VANCOUVER
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COURT OF APPEAL
REGISTRY

Court of Appeal File Nos. CA51536 / CA515355

IN THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, and KEVIN WESTELL

(Appellants / Plaintiffs)

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, and LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA

(Respondents / Defendants)

BOOK OF AUTHORITIES OF APPLICANT PARTY FOR APPLICANT PARTY'S FORM 8 AND APPLICATION BOOK

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TABLE OF CONTENTS

#	Authority	Page
1.	*2122157 Ontario Inc. v. Tarion Warranty Corporation*, 2016 ONSC 851	7
2.	*Albas (Re)*, 2016 LSBC 18	15
3.	*Arvanitis v. Slater Vecchio LLP*, 2022 BCCA 326	37
4.	*Baker et al. v. Board of Education of District No. 7 - Burin*, 1999 CanLII 19822 (NL SC)	58
5.	*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, 1976 CanLII 164 (SCC)	96
6.	*Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66	106
7.	*Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342	117
8.	*British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2018 BCCA 282	145
9.	*British Columbia v. Friends of Beacon Hill Park*, 2022 BCCA 383	162
10.	*C.R.F. Holdings Ltd. et al. v. Fundy Chemical International Ltd. et al.*, 1980 CanLII 586 (BC SC), aff'd 1981 CanLII 488 (BCCA)	179
11.	*Canada Permanent Mortgage Corporation v. The City of Toronto*, 1951 CanLII 121 (ON CA)	223
12.	*Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33	235
13.	*Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA)	296
14.	*Champoux v. Jefremova*, 2021 ONCA 92	318
15.	*Chandler v. Alberta Association of Architects*, 1989 CanLII 41	334
16.	*Chippewas of Sarnia Band v. Canada (Attorney General)*, (2000), 51 O.R. (3d) 641 (ON CA)	365
17.	*Chuang v. Toyota Canada Inc.*, 2016 ONCA 852	492
18.	*Cock v. British Columbia (Labour Relations Board)*, 1960 CanLII 293 (BCCA)	497

19.	*DeFehr v. DeFehr*, 2002 BCCA 139	501
20.	*First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5	506
21.	*Friedmann v. MacGarvie*, 2012 BCCA 109	521
22.	*Glover v. Leakey*, 2016 BCSC 1624	532
23.	*Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191	555
24.	*Haldorson v. Coquitlam (City)*, 2000 BCCA 672	569
25.	*Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2012 BCCA 414	578
26.	*Henry v. A.B.*, 2026 BCCA 207	599
27.	*Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011	610
28.	*Housen v. Nikolaisen*, 2002 SCC 33	656
29.	*Jensen v. Ross*, 2014 BCCA 173	758
30.	*Jones v. Tsige*, 2012 ONCA 32	775
31.	*Landreville v. Town of Boucherville*, [1978] 2 S.C.R. 801	799
32.	*Law Society of British Columbia v. British Columbia*, 2024 BCSC 1292	817
33.	*Law Society of British Columbia v. British Columbia*, 2026 BCSC 779	848
34.	*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29	912
35.	*Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA)	995
36.	*Menzies v. Harlos,* 1989 CanLII 2760 (BC CA)	1068
37.	*McLean v. Bradley*, 1878 CanLII 22 (SCC)	1094

38.	*McLean v. Law Society of British Columbia*, 2015 BCSC 661	1105
39.	*McLean v. Law Society of British Columbia,* 2015 BCSC 1431	1113
40.	*McLean v. Law Society of British Columbia*, 2017 BCSC 987	1146
41.	*McLean v. Law Society of British Columbia*, 2017 BCSC 1713	1180
42.	*McLean v. British Columbia*, 2019 BCCA 133	1188
43.	*McNeil v. Elizabeth Fry Society of Greater Vancouver*, 2023 BCCA 231	1197
44.	*Miller v. The Queen*, [1985] 2 S.C.R. 613	1214
45.	*Moore v. Cheung*, 2026 BCCA 259	1245
46.	*Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480	1263
47.	*NHK Spring Co., Ltd. v. Cheung*, 2023 BCCA 243	1289
48.	*Nisga'a Nation v. Malii*, 2024 BCCA 206	1301
49.	*Ontex Resources Ltd. v. Metalore Resources Ltd.*, 1990 CanLII 6952 (ON SC), aff'd in part 1993 CanLII 8673 (ON CA)	1310
50.	*Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247	1376
51.	*Pong v. Quong,* 1927 CanLII 2	1386
52.	*R. v. Bernard*, [1988] 2 S.C.R. 833	1392
53.	*R. v. Dineley*, 2012 SCC 58	1453
54.	*R. v. Poulin*, 2019 SCC 47	1492
55.	*R. v. Spencer*, 2014 SCC 43	1567
56.	*R. v. Vu*, 2013 SCC 60	1607
57.	*R.R. v. Vancouver Aboriginal Child and Family Services Society*, 2024 BCCA 342	1645
58.	*Snaw-Naw-As First Nation v. Canada (Attorney General)*, 2021 BCCA 89	1666

59.	*Sellars v. The Queen*, 1980 CanLII 166 (SCC)	1678
60.	*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32	1688
61.	*Thomas v. Rio Tinto Alcan Inc.*, 2022 BCCA 415	1752
62.	*Toronto (City) v. Lee-Tucker*, 2025 ONCJ 323	1772
63.	*Wildman v. The Queen*, [1984] 2 S.C.R. 311	1781
64.	*Wu v. Murray*, 2023 BCCA 270	1804
65.	*Yang v. Shi*, 2022 BCCA 317	1813
66.	*Young v. Bristol Aeroplane Co. Ltd.*, [1944] K.B. 718 (affirmed [1946] A.C. 163)	1823

Tab 1

CITATION: 2122157 Ontario Inc. v. Tarion Warranty Corporation, 2016 ONSC 851
DIVISIONAL COURT FILE NO.: 260/15
DATE: 20160203

2016 ONSC 851 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

AITKEN, SWINTON and C. HORKINS JJ.

BETWEEN:	
2122157 ONTARIO INC.	*Brian M. Campbell*, for the Applicant
Applicant	
– and –	
TARION WARRANTY CORPORATION, TORONTO STANDARD CONDOMINIUM CORPORATION N0. 2251 and OWENS WRIGHT LLP	*David Outerbridge*, for the Respondent Tarion Warranty Corporation *Kate Genest*, for the Respondent Condominium Corporation
Respondents	*M. Scott Martin*, for the Respondent Owens Wright LLP
	HEARD at Toronto: January 15, 2016

<u>Swinton J.:</u>

Overview

[1] The applicant 2122157 Ontario Inc. ("212") brought an application for judicial review to set aside a decision of Tarion Warranty Corporation ("Tarion") on the grounds of procedural unfairness. After oral argument, the Court dismissed the application without hearing the merits of the application with reasons to follow. These are the reasons for that decision.

2016 ONSC 851 (CanLII)

Factual Background

[2] 212 built a townhouse and condominium complex in the west end of Toronto ("the Project"). 212 was initially registered as a builder and vendor with Tarion, a corporation appointed by the Ontario government to administer the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 ("the Act"). As a condition of registration, 212 agreed to provide $560,000 in security to Tarion. That security was provided by means of a Deposit Trust Agreement between Tarion, 212 and the respondent Owens Wright LLP as trustee.

[3] 212 lost its registration with Tarion in January 2012 because of its poor credit rating and its failure to execute and deliver the annual terms and conditions letter for the 2011-2012 renewal year. As 212 had not sold all the units at the Project, Tarion agreed to re-register 212 from August 2012 to August 2014 for the limited purpose of the sale of the units. Tarion cancelled 212's registration as a vendor again on August 22, 2014.

[4] The Act and Regulation 892 prescribe three time periods during which a vendor has an opportunity to repair defects that are warrantable under the Act or otherwise resolve a vendor's claims voluntarily:

1. after a homeowner submits a warranty claim to Tarion;

2. after a homeowner requests that Tarion conduct a conciliation inspection to determine whether a warrantable defect exists, but before the inspection occurs; and

3. after Tarion determines, as a result of the inspection, that claim items are warranted.

[5] Section 5.10 of Regulation 892 confers a discretion on Tarion to abridge the vendor repair periods if Tarion determines that the vendor is "unable or unwilling" to resolve the claim items covered by a warranty. When Tarion decides to abridge a vendor repair period, the vendor is not excluded from the warranty claim process and continues to receive written notice of warranty claims and conciliation inspections. However, Tarion can begin repairs or pay compensation sooner to homeowners.

[6] Tarion first found 212 to be unwilling or unable to resolve the warranty claims at the Project on September 4, 2013, following a process undertaken by its Unwilling/Unable Committee. The reasons for the decision included the number of warranty claims, the failure of 212 to carry out proper repairs of warrantable defects, and 212's lack of attendance at conciliation inspections. After submissions from 212, the Chair of the Committee decided to give 212 a second chance, and the decision was reversed on September 20, 2013.

[7] Tarion reinstated the unwilling/unable determination in March 2014 because it concluded that 212 had failed to address significant warranty claims involving major defects, such as water penetration and lack of adequate insulation. In a letter dated March 5, 2014, Tarion informed 212 that Tarion would proceed to resolve all claims directly with homeowners without giving 212 an opportunity to do so. Homeowners would not be required to wait for 212 to resolve a warranty claim and could request a conciliation immediately. Tarion has since been resolving the homeowners' claims directly and at considerable expense.

[8] On March 17, 2014, 212 sent Tarion an incomplete application package meant to commence Builders' Arbitration Forum ("BAF") proceedings. It followed up with an updated Request to Arbitrate and an arbitration agreement on April 9, 2014. Tarion refused the request to arbitrate, as 212 did not meet the eligibility requirements laid out in the BAF Procedural Rules. The main reason for the refusal was the fact that 212 was not a member in good standing under the warranty regime.

[9] In August 2014, 212 commenced a civil action against Tarion and the respondent Toronto Standard Condominium Corporation No. 2251 ("TSCC"). On May 22, 2015, 212 commenced this application for judicial review, claiming that it had been denied procedural fairness when Tarion made its decision finding 212 unwilling or unable to make warrantable repairs.

Should this Court exercise its discretion to grant judicial review?

[10] Tarion argued that the Court should exercise its discretion to dismiss the application for judicial review on a number of grounds: unreasonable delay, mootness, the availability of alternative remedies, and 212's lack of clean hands.

Analysis

[11] Judicial review is a discretionary remedy, and courts will refuse a remedy where the public interest does not require judicial intervention (*Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.) at para. 258; Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, Carswell, para. 3:1200 (September 2009)). Whether on an application for judicial review or in another type of proceeding, courts will generally refuse to decide a case where the remedy sought would serve no useful purpose, because there is no live controversy or dispute between the parties (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 357). Courts have also refused to deal with an application for judicial review where there has been unreasonable delay by the applicant in pursuing judicial review, or the applicant has an adequate alternative remedy (*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 587, *Brown v. Waterloo (Region) Commissioners of Police* (1985), 7 O.A.C. 51 (Div. Ct.) at paras. 10, 46-48).

[12] In the present case, the applicant does not challenge the merits of the determination that it was unwilling/unable to effect warranty repairs. Rather, it argues that the determination was made without procedural fairness. Were a court to find that there was a denial of procedural

2016 ONSC 851 (CanLII)

fairness, the remedy would be to set aside the determination. That would not prevent Tarion from proceeding to make the determination again, provided it acted fairly.

[13] In my view, there is no useful purpose in considering the application on the merits, given the time that has passed since the unwilling/unable determination was made in March 2014. That determination allowed Tarion to abridge the times for 212 to make warranty repairs. The vendor repair periods that 212 notionally seeks to revive have long since expired, and Tarion has either completed the repairs or the work is well underway. The evidence clearly establishes that 212 did not seek to repair the warrantable defects within those repair periods or after their expiry.

[14] 212 argues that this proceeding is not moot, as the effect of a decision setting aside the unwilling/unable determination would be to allow it to proceed to arbitration under the BAF process. This argument is based on a misunderstanding of the BAF process. The BAF process is an arbitration process that requires the consent of both the vendor/builder and Tarion. Consent from Tarion requires compliance with a number of conditions set out in Builder Bulletin 41R, including the requirement that the vendor be a registrant in good standing throughout the arbitration process. As set out in the Bulletin, the vendor must be in compliance with requirements under the statutory scheme other than with respect to the disputed warranty claim that is the subject of the BAF proceeding.

[15] As of August 2014, 212 is no longer registered with Tarion, so it is not eligible to participate in the BAF process. Moreover, around the time of the unwilling/unable determination, 212 was not compliant with the statutory scheme in a number of ways - in particular, it was regularly failing to attend conciliation inspections, it was regularly failing to repair warrantable defects, and it was not up to date in paying all invoices issued by Tarion for reimbursement for warranty breaches. As Tarion stated in a letter to 212's counsel dated April 21, 2014:

> Your client's continued lack of participation in the warranty process is a breach of the Act, Builder Bulletin 42 and as a result, a breach of the Vendor Agreement. As such, your client is not considered to be in Good Standing with Tarion as defined by BAF Rules (2013).

Accordingly, 212 had no right of access to the arbitration process in the spring of 2014, nor would it have such a right today. Thus, the outcome of this judicial proceeding would have no effect on its access to the arbitration process.

[16] While 212 might prefer the arbitration route, it has an alternative route in the civil proceedings, where it can seek damages against Tarion. The civil action also provides an alternative remedy to this application for judicial review and, indeed, a preferable route, as this court cannot order monetary compensation if Tarion has carried out repairs that are not warrantable.

2016 ONSC 851 (CanLII)

[17] There has also been undue delay in commencing and advancing the application for judicial review, which is another reason for the court refusing to exercise its discretion to grant judicial review (*P.P.G. Industries Canada Ltd. v. Canada (Attorney General)*, [1976] 2 S.C.R. 739). The unwilling/unable determination was made in March 2014, yet the application for judicial review was not launched until May 2015. The application was not argued until January 2016. No satisfactory explanation has been provided for the delay. 212 was objecting to the repairs done by Tarion from the outset, as demonstrated by the request to proceed to the BAF process and the commencement of a civil action claiming damages in August 2014.

[18] A court may refuse judicial review because of undue delay where there will be prejudice to a third party or the public interest if the decision under review is now reversed. As I have stated above, Tarion has undertaken repairs or has contracted for the repairs that 212 was obligated to carry out under the statutory scheme. I am satisfied that there will be prejudice to homeowners, TSCC and the public interest if the determination is now reversed, as there will likely be further delay in carrying out necessary repairs.

[19] Given the mootness of the issue before this Court, the unreasonable delay, and the availability of other remedies, the application for judicial review is dismissed.

Costs

[20] Costs to Tarion are fixed on a partial indemnity basis at $25,000.00, an amount that is fair and reasonable having regard to the size of the record, the need for cross-examinations, and the complexity of the issues.

[21] Neither TSCC nor Owens Wright should have been added as parties to this application for judicial review, as 212 sought private law relief against them in the nature of injunctive relief and interpretation of the trust agreement. Such relief is not properly raised in an application for judicial review. Costs to TSCC are fixed at $10,000 and to Owens Wright at $7,500.

Swinton J.

Aitken J.

C. Horkins J.

2016 ONSC 851 (CanLII)

Released: February 3, 2016

2016 ONSC 851 (CanLII)

CITATION: 2122157 Ontario Inc. v. Tarion Warranty Corporation, 2016 ONSC 851
DIVISIONAL COURT FILE NO.: 260/15
DATE: 20160203

2016 ONSC 851 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

AITKEN, SWINTON and C. HORKINS JJ.

BETWEEN:

2122157 ONTARIO INC.

Applicant

– and –

TARION WARRANTY CORPORATION, TORONTO STANDARD CONDOMINIUM CORPORATION N0. 2251 and OWENS WRIGHT LLP

Respondents

Reasons for Decision

Swinton J.

Released: February 3, 2016

Tab 2

2016 LSBC 18
Decision issued: May 30, 2016
Citation issued: June 24, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

CHARLES LOUIS ALBAS

RESPONDENT

2016 LSBC 18 (CanLII)

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date: February 17, 2016

Panel: Martin Finch, QC, Chair
Dan Goodleaf, Public representative
Bruce LeRose, QC, Lawyer

Discipline Counsel: Kieron G. Grady
No-one appearing on behalf of the Respondent

BACKGROUND

[1] This hearing concerns three aspects of alleged lawyer misconduct. The first relates to borrowing of monies from clients and the provision of legal services where the lawyer is alleged to have a direct or indirect financial interest in the subject matter of the legal services. The second relates to candour with the court and opposing counsel. The third relates to the duty to notify the Law Society of unsatisfied judgments.

[2] On February 17, 2016, the Panel heard from counsel for the Law Society, but Mr. Albas did not attend the hearing that day. As a result of his non-attendance, a preliminary issue fell to be determined on whether the citation had been served on Mr. Albas in accordance with Rule 4-19 or if service had been waived by him.

[3] The Panel addressed the issue of service and then considered whether the hearing should proceed in the absence of the Respondent.

[4] The Panel determined service had been lawfully effected and decided to proceed with the hearing in the absence of the Respondent. The Panel found that the Respondent knew of the hearing and had indicated he did not intend to attend the hearing.

[5] Following the aforementioned determinations, the Panel addressed the citation on the issue of facts and determination of professional misconduct.

[6] The Panel found that the Respondent was guilty of professional misconduct with respect to all eight allegations of the citation.

[7] The following are reasons for those decisions and findings.

SERVICE OF NOTICE OF HEARING AND POSITION OF THE RESPONDENT REGARDING ATTENDANCE AT THE HEARING

Service of citation

[8] Rule 4-41 of the Law Society Rules requires the Hearing Panel to determine whether the citation has been served in accordance with Rule 4-19 or if service has been waived by the Respondent.

[9] Rule 4-19 states that a citation must be served on the Respondent:

(a) in accordance with Rule 10-1; and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the Chair of the Committee otherwise directs.

[10] Rule 10-1(1) reads as follows:

Service and notice

10-1(1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally, by leaving it at his or her place of business or by sending it by

(a) registered mail, ordinary mail or courier to his or her last known business or residential address,

(b) electronic facsimile to his or her last known electronic facsimile number,

2016 LSBC 18 (CanLII)

(c) electronic mail to his or her last known electronic mail address, or

(d) any of the means referred to in paragraphs (a) to (c) to the place of business of his or her counsel or personal representative or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation.

[11] Rule 10-1(5) states that a document sent by ordinary mail is deemed to be served seven days after it is sent.

[12] Rule 10-1(6) states that a document sent by registered mail or courier is deemed to be served on the next business day after it is left or delivered.

[13] Rule 10-1(7) states that a document sent by electronic facsimile or electronic mail is deemed to be served on the next business day after it is sent.

[14] Rule 10-1(8) states that any person may be notified of any matter by ordinary mail, electronic facsimile or electronic mail to the person's last known address.

[15] The Law Society filed as Exhibit 1 the affidavit of Chrysta Gejdos sworn on February 12, 2016. According to the affidavit, the citation, along with a covering letter dated June 24, 2015, was served on the Respondent's counsel, Mr. Ihas, by courier on June 25, 2015.

[16] The Respondent's counsel acknowledged receipt of the citation on June 25, 2015. By virtue of this acknowledgement, the Panel finds there is a preponderance of evidence to establish service of the citation on Mr. Albas.

Proceeding in the absence of the Respondent

[17] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.

[18] In *Law Society of BC v. Tak*, 2014 LSBC 27, *Law Society of BC v. Gellert*, 2013 LSBC 22, *Law Society of BC v. Power*, 2009 LSBC 23, *Law Society of BC v. Basi*, 2005 LSBC 41, *Law Society of BC v. McLean*, 2015 LSBC 06 and *Law Society of BC v. Jessacher*, 2015 LSBC 43 (among others), hearing panels proceeded in the absence of the respondent.

[19] In applying section 42(2) of the *Legal Profession Act*, hearing panels have considered the following factors:

2016 LSBC 18 (CanLII)

(a) whether the respondent has been provided with notice of the hearing date;

(b) whether the respondent has been cautioned that the hearing may proceed in his or her absence;

(c) whether the panel adjourned for 15 minutes in case the respondent was merely delayed;

(d) whether the respondent has provided any explanation for his or her non-attendance;

(e) whether the respondent is a former member of the Law Society; and

(f) whether the respondent has admitted the underlying misconduct.

It is submitted that (a), (b) and (d) should be given the most weight.

Whether the respondent has been provided with notice of the hearing date

[20] On September 3, 2015, Michelle Robertson, the Hearing Administrator, caused a letter, with enclosure, dated September 3, 2015 to be sent to the Respondent's counsel by courier. The enclosure was the Notice of Hearing dated September 3, 2015 (affidavit of Chrysta Gejdos – paragraphs 6).

[21] It was the position of the Law Society that the Respondent had been provided with notice of the time, place and date of the hearing and was deemed to have been served with the notice pursuant to, and in accordance with, Rule 10-1(1)(d).

[22] Mr. Ihas subsequently (on or about October 9, 2015) stopped acting as counsel for the Respondent in this matter (affidavit of Chrysta Gejdos – paragraph 8).

Whether the respondent has been cautioned that the hearing may proceed in his or her absence

[23] The Respondent had been cautioned that the hearing may proceed in his absence. The cautions were set out in:

(a) the citation issued June 24, 2015; and

(b) the Notice of Hearing dated September 3, 2015.

2016 LSBC 18 (CanLII)

Whether the panel adjourned for 15 minutes in case the respondent was merely delayed

[24] The Panel adjourned briefly to consider delay and then proceeded.

Whether the respondent has provided any explanation for his or her non-attendance

[25] In an email to Mr. Grady dated February 3, 2016 (Exhibit 2), the Respondent provided an explanation for his non-attendance. He said he was in Florida and did not want to attend the hearing if at all possible (affidavit of Chrysta Gejdos – paragraph 10).

[26] In an email sent to the Respondent on February 12, 2016 (Exhibit 3), Mr. Grady advised him correctly that there was no rule that compelled a respondent to attend a disciplinary hearing. He was also advised, however, that the Panel could continue in his absence if satisfied that the Respondent was served with the Notice of Hearing. There is no evidence that the Respondent replied to Mr. Grady's email of February 12, 2016. On February 16, 2016, Mr. Grady again sent an email to the Respondent advising him of the location of the hearing scheduled for February 17, 2016.

[27] Both Exhibits 2 and 3 were sent to an email address from which the Respondent had previously replied.

Whether the respondent is a former member of the Law Society

[28] The Respondent is a former member of the Law Society as of January 1, 2016. In an email dated January 18, 2016 (which contained the hearing date in the "Re" line), he stated that he chose to not renew his licence because of the citation (affidavit of Chrysta Gejdos – paragraph 9).

Whether the respondent has admitted the underlying misconduct

[29] The Respondent has admitted in his email of February 3, 2016 to Mr. Grady that his conduct as alleged in the citation constitutes professional misconduct (affidavit of Chrysta Gejdos – paragraph 10). He has further admitted all facts set out in the Law Society's Notice to Admit.

2016 LSBC 18 (CanLII)

Conclusion

[30] Having regard to all the circumstances, including evidence that the Respondent had been properly served with the citation and the Notice of Hearing, the Panel decided to proceed with the hearing of the citation, despite the Respondent's absence. The Panel relied on Section 42(2) of the *Legal Profession Act* and was satisfied that the Respondent had been served with the Notice of Hearing.

2016 LSBC 18 (CanLII)

FINDINGS REGARDING ALLEGATIONS OF PROFESSIONAL MISCONDUCT

[31] The citation was authorized on June 11, 2015 and issued on June 24, 2015 (the "Citation").

[32] The Citation contains eight allegations that the Respondent:

(a) Borrowed money from clients (two allegations);

(b) Provided legal services to clients when he had a direct or indirect financial interest in the subject matter of the legal services (two allegations);

(c) Failed to disclose material facts in a notice of motion and supporting affidavit;

(d) Failed to disclose material facts and correct the record concerning an application in foreclosure proceedings;

(e) Misled opposing counsel; and

(f) Failed to notify the Law Society of three unsatisfied judgements.

Onus and standard of proof

[33] The onus of proof is well established. It is on the Law Society.

[34] The standard of proof has been articulated by the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193 and has been adopted by Law Society hearing panels in numerous cases, including *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Seifert*, 2009 LSBC 17 at paragraph 13.

[35] In *Schauble* at paragraph 43 the panel quoted directly from *McDougall*:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But ... there is no objective standard to measure sufficiency.

[36] The burden of proof was also articulated by the hearing panel in *Seifert* at paragraph 13:

> ... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. In considering its findings in this matter, the Panel has applied that test.

Review of evidence

[37] Entered into evidence as Exhibit 5 was a Notice to Admit tendered by the Law Society dated November 20, 2015. That Notice to Admit sought 51 admissions of fact and the authenticity of 19 documents.

[38] Entered into evidence as Exhibit 6 was the Response of Charles Louis Albas dated November 25, 2015 to the Notice to Admit. In that Response, Mr. Albas admits the authenticity of the documents at tabs numbered 2 to 19 of the Notice to Admit, and admits the truth of the facts set out in paragraphs 1 through 51 of the Notice to Admit.

[39] MT was employed for over 30 years by the BC Assessment Office in Penticton. For investment, he made private loans to individuals or companies, secured by a mortgage. He began doing so in the late 1960s. Over the years, he made one or more loans a year, usually on a one-year basis. The amounts loaned gradually increased.

[40] MT eventually incorporated T Ltd., which he owns with his wife.

[41] At all material times, the Respondent was the owner and directing mind of a numbered company.

[42] MT retired from his employment with the BC Assessment Office in about 2005.

[43] MT met the Respondent in about 1980, when they became neighbours.

2016 LSBC 18 (CanLII)

[44] MT generally used the Respondent as his lawyer when making loans to borrowers, unless a borrower wanted to use a different lawyer. MT also retained the Respondent to act on his personal legal affairs, for the preparation of the mortgages to secure loans made, and on the occasional foreclosure.

[45] From time to time, the Respondent would call MT and ask if he had any money to lend. If MT said he was interested, once the terms were settled, the Respondent prepared and registered the mortgage.

[46] On October 6, 2005, the Respondent contacted MT and said he was going to do a subdivision on some property in Langley, BC and wanted to borrow $485,000 from T Ltd. through the Respondent's numbered company. MT discussed terms with the Respondent: interest at 7 per cent, a one-year term, and the monthly payment amount on interest only. MT believed that the Respondent had already bought the property through his numbered company. MT asked for a personal guarantee, to which the Respondent agreed. MT has no notes in relation to the transaction and says the conversation was between the two of them only. MT and the Respondent met on one occasion only in relation to this transaction.

[47] The Respondent showed MT an appraisal that showed that the property that he wished to develop was purchased in August 2005 for $485,000 and that its current value as of October 2005 was $635,000.

[48] MT agreed to make the loan of $485,000 to the numbered company. He had to borrow to do so.

[49] The documents were prepared and the funds were advanced. The Respondent used the funds to purchase the property. On October 14, 2005, the Respondent applied for registration of the property with his numbered company as registered owner in fee simple. The application for registration was entered on October 24, 2005.

[50] The Respondent reported to MT on the registration on November 9, 2005.

[51] The Respondent told MT that the loan was to fund the subdivision costs, and MT would not have loaned the full purchase price had he known the loan was for the purpose of buying the property.

[52] On October 24, 2005, the Respondent, through his numbered company, entered into a contract with E Investments and NA for the installation of the services required to complete the subdivision for a price of $200,000.

[53] In 2006, the Respondent needed further funds to complete the subdivision. He obtained a loan for his numbered company from AV and JV. The Respondent

2016 LSBC 18 (CanLII)

acted for AV and JV on a number of other occasions, both before and after this loan. The loan was for $300,000, secured by a mortgage upon which the Respondent was the covenanter. The Respondent's firm, Albas Wahl, drew the mortgage and registered it. The mortgage indicates the officer was "KM" who was a lawyer employed by Albas Wahl. The applicant was Albas Wahl. The mortgage was registered May 1, 2006.

[54] Payments were made by the Respondent to T Ltd. during the one year term of the mortgage. However, the subdivision did not complete. Payments by the Respondent to T Ltd. continued for a period of time, but then stopped.

[55] The Respondent made attempts to sell the property, but these were unsuccessful.

[56] In June 2008, T Ltd. filed a petition in foreclosure against the numbered company, the Respondent, AV and JV and two other respondents in the Penticton Registry of the BC Supreme Court. T Ltd.'s counsel was CS.

[57] On August 28, 2008, an order nisi of foreclosure was granted in the T Ltd. foreclosure, including an amount required to redeem and judgment in favour of T Ltd. against the numbered company and the Respondent for $506,373.93, with a six-month redemption period.

[58] On March 19, 2009, conduct of sale was granted to AV and JV as second mortgagee.

[59] On about August 7, 2009, through their counsel, JJ, AV and JV filed an application for an order approving a sale at a price of $495,000, returnable August 27, 2009.

[60] The Respondent said that, when he received AV and JV's application, he contacted NA and told him that, unless he brought forward a purchaser and at a better price, the property was likely to be sold at a loss. The Respondent says he called NA because NA had been involved in earlier attempts to sell the property.

[61] NA faxed an offer dated August 20, 2009 at a price of $950,000 from a RS. The Respondent noted that the offer was not in a form that could be approved by the court, so he made some notations and faxed it back to NA.

[62] On August 21, 2009, the Respondent filed a response opposing AV and JV's application for an order approving sale.

[63] Early in the morning of August 27, 2009, the date set for the hearing of AV and JV's application, the Respondent received an offer by fax for the sale of the property at $950,000 to "RS through his nominee corporation, a Division of M

2016 LSBC 18 (CanLII)

Ltd." to complete November 4, 2009. The offer required a deposit of $20,000 to be paid to the Respondent in trust within 72 hours of acceptance.

[64] The Respondent prepared an application for an order approving the RS offer, and swore an affidavit in support. He described the offer submitted by AV and JV as prepared by a "vulture" and attached the offer from RS. On August 27, 2009, the Respondent took the application and affidavit to the courthouse, filed them, and gave copies to the parties attending. On August 27, 2009, the court approved the RS offer.

[65] The Respondent ordered a company search on M Ltd. at about 8:00 am on August 27th, 2009. The Respondent did so because he had been unable to reach RS and he wanted to make sure the offer was real. The Respondent at no time spoke with RS, and all information he received about RS came through NA. The search showed that the corporate purchaser, M Ltd., had been dissolved on April 9, 2007 for failure to make required filings. The Respondent reviewed the corporate search sometime on August 27, 2009.

[66] The Respondent did not disclose the result of the M Ltd. corporate search to any other parties in the T Ltd. foreclosure and took no steps to return the matter to court.

[67] The RS offer that had been approved by the court required a deposit of $20,000 within 72 hours of acceptance to be paid to the Respondent in trust. The deposit was not paid within that time frame and was never paid.

[68] By letter dated August 31, 2009, JJ sent a draft form of the order approving the offer to the Respondent, which the Respondent received on September 2, 2009. By that date, the Respondent knew that M Ltd. had been dissolved and that the deposit had not been received.

[69] The Respondent's file contains no record of any communication regarding the sale of the property between September 2, 2009 and November 4, 2009, the date the sale was supposed to complete.

[70] Under the terms of the order approving the sale to RS, JJ was to handle the closing. The other parties, and in particular, T Ltd. and AV and JV, assumed that the sale would indeed complete. The day before the scheduled closing date, T Ltd.'s lawyer sent a bill of costs to the Respondent.

[71] On November 3, 2009, JJ spoke with the Respondent, who gave him an explanation for RS's absence and indicated that the sale would complete. No mention was

2016 LSBC 18 (CanLII)

made of the deposit. On November 4, 2009, JJ contacted the Respondent and asked about the deposit, and the Respondent told him that he would have to check with his office. By the closing date of November 4, 2009, the Respondent was aware that he had not received the deposit. Telling JJ he had to check with his office regarding the deposit was misleading.

[72] On November 4, 2009, JJ wrote to the Respondent indicating he had not heard from the purchasers or been able to contact them and seeking confirmation that the deposit was in the Respondent's trust account.

[73] On November 9, 2009, JJ telephoned the Respondent who told him that he had not received the deposit. The Respondent told JJ he was advised that morning that the RS purchase was still supposed to be going ahead.

[74] In November, 2009, the Respondent gave JJ and CS the names of two different law firms said to be acting for the purchaser. When contacted, each lawyer denied any knowledge of the transaction. The Respondent states that the names of RS's purported lawyers were given to him by NA.

[75] On November 20, 2009, CS wrote to the Respondent and asked whether the transaction would close. In handwriting, the Respondent faxed back a note on CS's letter, copied to JJ, that stated: "I have been pushing the purchaser (enforcement proceeding) and they have advised me that they will complete the purchase." As the Respondent had never spoken with RS or any lawyer on his behalf or on behalf of M Ltd, the statement by the Respondent in his faxed handwritten notes to CS of November 20, 2009 was on its face untrue.

[76] On December 18, 2009, AV and JV initiated foreclosure proceedings against the numbered company and the Respondent in the Penticton Registry of the Supreme Court. On January 28, 2010, order nisi was pronounced, including judgment against the numbered company and the Respondent in the amount of $402,698.92 with a one-day redemption period.

[77] On January 6, 2010, the Respondent told JJ "he was still in touch with RS" and the sale would complete. On January 28, 2010, conduct of sale was granted to T Ltd. in the T Ltd. foreclosure.

[78] On September 2, 2010, the Respondent and AV and JV entered into a forbearance agreement whereby the Respondent was to pay $2,000 per month and, so long as he continued to do so, the amount owed in excess of $300,000 would be forgiven.

2016 LSBC 18 (CanLII)

[79] On April 19, 2012, on the application of T Ltd., the sale of the property at a price of $585,000 was approved by the court. The sale completed. This left a shortfall of over $100,000 on the T Ltd. debt.

[80] On November 15, 2012, a certificate of costs was entered in the T Ltd. foreclosure against the Respondent and his numbered company for $16,739.15.

[81] T Ltd. has continued to pursue its judgment through garnishment and examination in aid of execution, without success.

[82] The Respondent failed to satisfy the judgment ordered against him in the amount of $506,373.93 pursuant to the order nisi of foreclosure dated August 28, 2008 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

[83] The Respondent also failed to satisfy the judgment ordered against him in the amount of $402,698.92 pursuant to the order nisi of foreclosure dated January 28, 2010 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

[84] The Respondent further failed to satisfy the Certificate of Costs in the amount of $16,739.15 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

Applicable law

[85] The *Legal Profession Act*, the *Code of Professional Conduct for British Columbia* and the Law Society Rules do not offer a singular definition of professional misconduct. Rather, the ambits of professional misconduct have developed in the same fashion as the common law, through decisions of Law Society hearing panels following assessment of impugned conduct of lawyers as considered through the cases. In *Law Society of BC v. Martin*, 2005 LSBC16, the panel articulated a now much-followed test. It said at paragraph 170: "The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[86] In *Martin* the panel found concern in the degree of fault that a lawyer might display that could constitute gross culpable neglect. The panel said, "The real question to

2016 LSBC 18 (CanLII)

be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer." This may be expanded by reference to the preface of the Canons of Legal Ethics stated in Chapter 2.1 of the *Code of Professional Conduct for British Columbia*: "A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession." It is to these various roles and their implied standards that professional conduct must be measured. Ultimately, our concern is to determine if the conduct of the Respondent is a marked departure from these standards.

2016 LSBC 18 (CanLII)

Allegations of borrowing from client (allegations 1 and 3)

[87] The preamble to Chapter 7 of the *Professional Conduct Handbook*, the forerunner of the *Code of Professional Conduct*, which was in effect at the time of the incidents in question, stated:

> The purpose of this Chapter is to state the general principles that should guide a lawyer's conduct when the lawyer is invited to act both as legal advisor and business associate.
>
> Generally speaking, a lawyer may act as legal advisor or as business associate, but not both.
>
> These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyer's Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies.

[88] Rule 4 of Chapter 7 stated:

> **CLIENT LOAN, CREDIT OR GUARANTEE**
>
> **4.** Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client.

[89] The evidence establishes and the Respondent has admitted that, on two occasions, he borrowed money from his clients. These admissions are made in paragraphs 6,

9, 11-14 (in relation to MT) and 18-19 (in relation to AV and JV) of the Notice to Admit. The amounts of money involved were not insignificant sums.

[90] These were extraordinary transactions for the benefit of the Respondent alone.

[91] Neither loan was of a routine nature, and neither client loaned money in the ordinary course of their business. Even in relation to MT, T Ltd.'s loans were a "side-venture" for MT and made in a limited way (paragraph 4 of the Notice to Admit).

[92] On the basis of the evidence and admissions, the Panel finds the allegations contained in paragraphs 1 and 3 of the Citation have been proven and the conduct of Mr. Albas amounts to professional misconduct. It constitutes clear violation of the prohibited conduct described in Rule 4, Chapter 7 and is a marked departure from the conduct expected of lawyers.

Providing legal services when the lawyer has a direct or indirect financial interest in the subject of the legal services (allegations 2 and 4)

[93] Rule 1 of Chapter 7 stated:

> **DIRECT OR INDIRECT FINANCIAL INTEREST**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>
> (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>
> (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.

[94] Again, the evidence is clear and the Respondent has admitted that, on two occasions, he provided legal services when he had a direct or indirect financial interest in the subject matter of the legal services. The legal services relate to the preparation and registration of the mortgages that accompanied the loans. These admissions are made in paragraphs 13-15 (in relation to MT) and 18 (in relation to AV and JV) of the Notice to Admit and are reflected in the documents at tabs 4, 5 and 7 of the Notice to Admit.

2016 LSBC 18 (CanLII)

[95] Clients are entitled to expect undivided loyalty from their lawyers. When the lawyer has a financial interest in the subject of the legal work, an obvious potential conflict exists. A lawyer entering such an arrangement cannot necessarily fairly satisfy two masters.

[96] Past discipline cases support the proposition that borrowing from a client or acting for the client in placing security where the lawyer has a direct financial interest in the subject matter of the legal services amounts to professional misconduct.

[97] In *Law Society of BC v. Dent*, 2001 LSBC 36, the lawyer admitted that he had borrowed $50,000 from a friend of his wife, then acted for the friend in placing the security on the loan (a third mortgage). He admitted his conduct amounted to professional misconduct. His admission was accepted by the panel.

[98] In a more serious case, *Law Society of BC v. Pomeroy*, 1999 LSBC 37, the lawyer caused his client to loan money to a company in which he had an interest. There were, in addition, much more serious allegations, including misappropriation.

[99] In *Siefert*, the lawyer admitted that he committed professional misconduct when he performed legal services for a client in relation to the proposed acquisition of shares in a company in which the client had a financial interest by virtue of the lawyer holding shares in that company.

[100] More recently, in *Law Society of BC v. Singh*, 2013 LSBC 17, the lawyer faced eight allegations in a citation, three of which related to his conduct in borrowing $20,000 from a client, failing to advise a client that he was not representing the client's interests and improperly withdrawing the funds from the trust account rather than the general account to repay part of the loan. The lawyer admitted that he had committed the conduct and that the conduct constituted professional misconduct.

[101] In *Law Society of BC v. O'Neill*, 2013 LSBC 23, the lawyer admitted that he negotiated an amended and restated finder's agreement between his client and third parties when he had a direct financial interest in the agreement. The lawyer also admitted that that conduct was a conflict of interest that constituted professional misconduct. The hearing panel accepted the admission and concluded that the Respondent had been guilty of professional misconduct. We find, in light of the evidence and admissions, that the Respondent is has committed the professional misconduct alleged in paragraphs 2 and 4 of the Citation.

2016 LSBC 18 (CanLII)

Failing to disclose materials facts to the court and failing to correct the record (allegations 5 and 6)

[102] Counsel for the Law Society submits that the evidence related to these allegations is contained in paragraphs 25-33 of the Notice to Admit (with the exception of the particularized allegation in paragraph 5(a)).

[103] A lawyer's duty of candour and integrity includes the obligation to disclose all material facts in an application before the court. The failure to do so has the potential to mislead the court and other interested parties.

[104] This duty is often discussed in the context of an *ex parte* application, where no opposing party can test the facts or submissions of counsel. In the present case, the Respondent's application was not *ex parte* but was brought without prior notice, and so, while the other parties were present, they had had minimal opportunity to evaluate or independently verify the Respondent's affidavit or submissions.

[105] In *Law Society of BC v. Vlug*, 2014 LSBC 09, the panel considered an allegation that the respondent misrepresented to the court the contents of a telephone call with another counsel. The disposition of *Vlug* was partly reversed on review, but the initial hearing panel's decision contains a convenient summary of the principles and authorities:

> [29] It is of fundamental importance that lawyers ensure that any representations that are made to a court or regulator are made so that the court or regulator need not have to make further inquiry. In *Law Society of BC v. Galambos*, 2007 LSBC 31, the hearing panel made a finding of professional misconduct in respect of a misrepresentation the respondent made to the court.
>
> [30] In *Law Society of BC v. Samuels*, [1999] LSBC 36, the hearing panel considered misleading statements a lawyer made to the court and found professional misconduct in respect of those statements. The panel commented at paragraph 12:
>
>> It is an essential cornerstone of our system of justice that counsel's submissions reflect the actuality. Any departure is an assault on the integrity of that system.
>
> [31] The law does not require us to find intentional misconduct. A determination of professional misconduct may be made even if the misrepresentation is not intentional. In *Law Society of BC v.*

2016 LSBC 18 (CanLII)

Botting, 2000 LSBC 30, the citation before the hearing panel alleged misrepresentations to the court and to the Law Society. The panel held at paragraph 60:

> While there is no specific prohibition in the Canons or the *Handbook* this Hearing Panel has no doubt that a lawyer has an obligation not to make misrepresentations to the court or the Law Society. Clearly, the justice system would fall into dispute and the ability to properly regulate the members of the profession would be seriously compromised if members did not have an unequivocal obligation to take care to be truthful in all written and oral representations to the Courts and the Law Society.

[32] With respect to the issue of filing affidavits with false or misleading statements, the hearing panel in *Law Society of BC v. Foo*, [1997] LSDD No. 197, commented on the importance for lawyers to ensure accuracy in documents that will be relied on by the courts or other litigants:

> This matter of members of the Law Society causing documents which would be relied upon by other litigants and Courts, to be filed, is a very serious matter where the member permits this to be done knowing that the documents filed either contain errors or contain falsehoods. Next to defalcation of trust funds by a lawyer, knowingly taking a false affidavit is about as serious a breach of professional conduct as can occur.

[106] In *Galambos*, the lawyer advised the court that an application had been served on the opposing party. On leaving the courtroom, the lawyer's junior advised that it had not been served. The lawyer did not return to the courtroom to correct the misapprehension he had created. In suspending the lawyer for one month, the panel wrote:

> The court must be able to accept statements of counsel without having to make inquiry. And indeed, when counsel, having discovered that he or she has made a misrepresentation (and there is no alternative) must inform the court of the incorrect statement that had been made. That seems to us to be an aggravating factor here.

2016 LSBC 18 (CanLII)

[107] In *Law Society of BC v. Nejat*, 2014 LSBC 51, Mr. Nejat admitted professional misconduct for failing to disclose that he no longer held any funds in trust for his client when, during an application, the court ordered those funds frozen. Mr. Nejat did not, while in court, know the funds had been paid out. He also admitted professional misconduct for failing to correct the misapprehension he had created with the court and opposing counsel.

[108] The Respondent had an obligation to advise the court on August 27, 2009 that he had not been able to contact the buyer's representatives despite making attempts to reach them and, furthermore, he was concerned enough about the veracity of the offer to conduct a company search, the results of which he did not yet have. Had this information been disclosed to the court, the offer may not have been accepted over the other, lesser offer.

[109] This misconduct was compounded when the Respondent discovered, later the same day, that the corporate search of M Ltd. revealed that the company had been dissolved more than two years earlier and did not disclose this important information to the court or the other parties.

[110] Further, when the deposit was not paid within 72 hours as required by the offer, this important information was also not immediately disclosed to the court or any other parties.

[111] The Respondent's failure to advise the court that he had been unable to contact the buyer and had conducted a company search, the results of which he did not have, and his subsequent failure to advise the court and opposing counsel of the results of the company search and the non-receipt of the deposit are all breaches of his duty of candour and good faith to the court and opposing counsel and constitute professional misconduct. The information withheld had the potential for either the court to reach a different decision or for other counsel to change their positions. The Respondent deliberately left the court and other counsel with only part of the complete picture.

Misleading other counsel (allegation 7)

[112] The evidence in support of this allegation is contained in paragraphs 37-42 of the Notice to Admit.

[113] In *Nejat* at paragraph 37, the hearing panel makes it clear that the duty of candour and honesty extends to a lawyer's dealings with opposing counsel.

2016 LSBC 18 (CanLII)

[114] Not only did the Respondent not advise other counsel in a timely manner that the deposit had not been received and that M Ltd. was not in good standing (and had not been for more than two years), he made statements that misled or were intended to mislead opposing counsel into believing that the sale approved by the order of the court would complete (paragraphs 38, 40, 41 and 42).

[115] The Respondent knew by the end of August 27, 2009 that M Ltd. was not in good standing, and he never advised opposing counsel of this information. The Respondent knew by August 31, 2009 that the deposit had not been received, but he did not advise opposing counsel of this information until November 9, 2009. Not only did he not disclose material information, he made statements that would have the effect of creating an impression (that the sale would complete) when he had to have known there was no basis for those statements.

[116] Counsel should be able to rely on assertions of other counsel without the need for suspicious reassessments. The duty of candour advances a common professional interest in fair and even dealings. Such conduct of the Respondent constitutes professional misconduct and is admitted as such by the Respondent. It reveals a deliberate failure to candidly inform the other counsel involved of matters of fact that could affect their decisions, deliberations and conduct.

Failing to report judgments (allegation 8)

[117] The evidence in support of this allegation is contained in paragraphs 47 and 49-51 and tabs 8, 17 and 19 of the Notice to Admit.

[118] Rule 3-44 at the time (now Rule 3-50) states:

> **Failure to satisfy judgment**
>
> **3-44**(1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of
>
> (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and
>
> (b) his or her proposal for satisfying the judgment.
>
> (2) Monetary judgments referred to in subrule (1) include
>
> (a) an order nisi of foreclosure,
>
> (b) any certificate, final order or other requirement under a statute that requires payment of money to any party,

2016 LSBC 18 (CanLII)

(c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor, and

(d) a judgment of any kind against an MDP in which the lawyer has an ownership interest.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

(4) If a lawyer fails to deliver a proposal under subrule (1)(b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee or the Chair of the Discipline Committee.

[119] The Respondent admits that he failed to comply with Rule 3-44. He has offered no explanation for his lack of compliance. He does not state that he was unaware of the rule.

[120] Failing to comply with Law Society Rules can result in an adverse determination of either professional misconduct or a breach of the Act or rules under section 38(4) of the *Legal Profession Act*. In this case, the Law Society submits that the appropriate adverse determination is professional misconduct.

[121] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the distinction between a breach of the rules that constituted a breach of the Act or rules under section 38(4)(b)(iii) of the *Legal Profession Act* and one that constituted professional misconduct under s. 38(4)(b)(i). The panel found at paragraphs 32 and 35:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> ...
>
> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

2016 LSBC 18 (CanLII)

[122] There are decisions where the lawyer has professed to be unaware of the rule in question, and in those circumstances, panels have sometimes in the past declined to make a finding of professional misconduct (*Law Society of BC v. Lessing*, 2012 LSBC 19) or have, alternatively, made a finding of a rules breach (*Law Society of BC v. Boles*, 2016 LSBC 02).

[123] However, in *Law Society of BC v. Tungohan*, 2015 LSBC 02, the panel found the lawyer had committed professional misconduct in relation to his failure to report a monetary judgment against him, stating at paragraph 141 that "Mr. Tungohan never provided an explanation to the Law Society or to the Panel during the course of the hearing as to why he failed to report the monetary judgment."

[124] In *Law Society of BC v. Derksen*, 2015 LSBC 24, the hearing panel accepted the lawyer's admission that he committed professional misconduct by not reporting judgments (along with other accounting breaches).

[125] In the absence of any explanation from the Respondent as to why he did not report the judgments as he was required to do, the Panel finds Mr. Albas' conduct constituted professional misconduct as alleged in allegation 8 of the Citation.

CONCLUSION

[126] The Panel finds the Respondent is guilty of professional misconduct with respect to allegations 1, 2, 3, 4, 5, 6, 7 and 8 of the Citation.

[127] A hearing respecting disciplinary action in this matter will take place at a date to be fixed.

2016 LSBC 18 (CanLII)

Tab 3

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Arvanitis v. Slater Vecchio LLP,*
2022 BCCA 326

Date: 20220926
Dockets: CA46372; CA46373; CA46375
CA47677; CA48269; CA48270

2022 BCCA 326 (CanLII)

Between:

Vicky Arvanitis

Appellant
(Defendant)

And

Slater Vecchio LLP

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On an application to vary: Orders of the Court of Appeal for British Columbia, dated November 3, 2021, June 30, 2022 August 12, 2022 (*Arvanitis v. Slater Vecchio LLP*, 2021 BCCA 415, 2022 BCCA 253, 2022 BCCA 290, Vancouver Dockets CA46372, CA46373, CA46375, CA47677, CA48269, CA48270), and January 31, 2022 (*Arvanitis v. Slater Vecchio LLP*, Vancouver Docket CA47677).

The Appellant, appearing in person:	V. Arvanitis
Counsel for the Respondent:	D.K. Georgetti
Place and Date of Hearing:	Vancouver, British Columbia September 6, 2022
Place and Date of Judgment:	Vancouver, British Columbia September 26, 2022

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

Summary:

The appellant has filed three applications to vary or cancel four orders made by justices of this Court that either refused an extension of time or required the appellant to post security for costs. The respondent applied for an order prohibiting the appellant from bringing or continuing an appeal or application for leave to appeal without leave of the Court or a justice on the ground that she is a vexatious litigant.

Held: The appellant's applications to vary or cancel are dismissed. The appellant failed to establish any error in the orders under review. The respondent's application to find the appellant a vexatious litigant is also dismissed. The extraordinary remedy of a vexatious litigant order is not justified at this stage of the proceedings.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] The appellant, Vicky Arvanitis, has initiated six appeal proceedings in this Court arising out of protracted litigation between her and the respondent Slater Vecchio LLP ("Slater Vecchio"). The present hearing concerns four applications:

(1) Court of Appeal File Nos. CA48269 and CA48270: Ms. Arvanitis applies to vary or cancel the June 30, 2022 order of Justice Griffin dismissing Ms. Arvanitis' application to extend the time to appeal two orders of the Supreme Court of British Columbia;

(2) Court of Appeal File No. CA47677: Ms. Arvanitis seeks an extension of time to apply to vary or cancel the November 3, 2021 order of Justice DeWitt-Van Oosten requiring Ms. Arvanitis to post security for costs, and the January 31, 2022 order of Justice Marchand dismissing her appeal as abandoned;

(3) Court of Appeal File Nos. CA46372, CA46373 and CA46375: Ms. Arvanitis applies to vary or cancel the August 12, 2022 order of Justice Grauer, dismissing her application for an extension of time to apply to vary the October 29, 2019 order of Justice Dickson; and

2022 BCCA 326 (CanLII)

(4) Slater Vecchio applies for orders pursuant to s. 22 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Court of Appeal Act*], dismissing Ms. Arvanitis' outstanding applications and prohibiting Ms. Arvanitis from bringing or continuing an appeal or application for leave to appeal in the court without leave of the court or a justice (the "Vexatious Litigant Application").

[2] The present hearing date was originally set to address only the first of these applications, Ms. Arvanitis' application to vary or cancel the June 30, 2022 order of Justice Griffin. In his judgment of August 12, 2022, Justice Grauer granted Slater Vecchio leave to amend and re-set its Vexatious Litigant Application—which was first filed in 2019—for hearing on September 6, 2022, at the same time as the application to vary or discharge Justice Griffin's order. Justice Grauer further ordered that it was for the division hearing those applications to determine whether Slater Vecchio's application to dismiss Ms. Arvanitis' application to vary or cancel the orders of Justices DeWitt-Van Oosten and Marchand should also be heard on September 6, 2022. That review application is otherwise scheduled to be heard on October 31, 2022. Ms. Arvanitis subsequently filed an application to vary or cancel the order of Justice Grauer. This application was also set for hearing on September 6, 2022.

[3] In its Vexatious Litigant Application, Slater Vecchio seeks a finding that Ms. Arvanitis is a vexatious litigant, as well as orders pursuant to s. 22(3) of the *Court of Appeal Act* dismissing Ms. Arvanitis' outstanding applications to vary or cancel the orders of Justices Griffin, DeWitt-Van Oosten, Marchand, and Grauer. Due to the interrelated nature of the issues, Slater Vecchio argues that all four applications should be addressed at the same time. Slater Vecchio says that Ms. Arvanitis has habitually, persistently and without reasonable cause commenced or continued vexatious proceedings in the courts of British Columbia. Slater Vecchio says there is no merit to any of the outstanding applications, and that Ms. Arvanitis' pattern of litigation conduct constitutes an abuse of the court process.

2022 BCCA 326 (CanLII)

[4] At the outset of the hearing, Ms. Arvanitis stated her opposition to the four applications being heard at the same time. She expressed concern about her ability to meaningfully address all of the applications. She instead proposed that only her application to vary or cancel the order of Justice Griffin should be heard, with the remaining applications adjourned to a later date. After receiving submissions from both parties on this procedural point, the Court ruled that the parties should address all four applications at the hearing, but reserved to final judgment the decision on the adjournment application.

[5] The applications are interrelated, and it is in the interests of efficiency, consistency, and judicial economy that they be addressed at the same time. In my view, the appeal hearing provided Ms. Arvanitis a full opportunity to address each of the applications. I conclude that the evidentiary record and submissions before the Court permit the fair resolution of all four applications. For the reasons that follow, I would dismiss Ms. Arvanitis' applications to vary or cancel the orders of Justices Griffin, DeWitt-Van Oosten, Marchand, and Grauer. I would also dismiss Slater Vecchio's Vexatious Litigant Application.

Background

[6] The four applications before the Court arise out of a common litigation history. This history is reviewed in detail in the judgments of Justice Grauer (indexed at 2022 BCCA 290), Justice Griffin (indexed at 2022 BCCA 253), Justice DeWitt-Van Oosten (indexed at 2021 BCCA 415), and Justice Dickson (indexed at 2019 BCCA 481). For the purpose of the present applications, the following summary is sufficient.

[7] Slater Vecchio represented Ms. Arvanitis in a personal injury claim. Ms. Arvanitis is dissatisfied with Slater Vecchio's representation of her. This dissatisfaction has led to prolonged litigation between the parties. Ms. Arvanitis sued Slater Vecchio for negligence. This action was dismissed (reasons indexed at 2016 BCSC 1612). Slater Vecchio was awarded costs in the lump sum amount of $8,000 (reasons indexed at 2017 BCSC 155). Ms. Arvanitis did not appeal these judgments. Instead, she began to post negative comments about Slater Vecchio on various

2022 BCCA 326 (CanLII)

online review and social media platforms, including the personal accounts of Slater Vecchio employees and the accounts of children of a partner of the firm. In May 2019, Slater Vecchio filed a defamation action against Ms. Arvanitis. Ms. Arvanitis filed a response and counterclaim.

[8] The proceedings in this Court arise from orders made by the Supreme Court of British Columbia in the defamation action and in a proceeding brought by Slater Vecchio to enforce a costs settlement. The relevant chronology is as follows:

a) On June 20, 2019, Justice Duncan granted Slater Vecchio's application in the defamation action for an interim injunction prohibiting Ms. Arvanitis from posting online negative commentary about the firm pending trial;

b) On July 12, 2019, Justice Dillon issued a bench warrant for Ms. Arvanitis' arrest after she failed to attend a contempt hearing relating to her non-compliance with Justice Duncan's order;

c) On July 22, 2019, Justice Groves found Ms. Arvanitis guilty of contempt, and ordered her to make best efforts to remove previously-posted online content;

d) On August 15, 2019, Justice Sharma granted Slater Vecchio's application in the defamation action for an order that the interim injunction issued by Justice Duncan continue as a permanent injunction, as well as an order dismissing Ms. Arvanitis' counterclaim pursuant to Rule 9-5 of the *Supreme Court Civil Rules*, an order for summary judgment pursuant to Rule 9-6, and an order that Ms. Arvanitis be declared a vexatious litigant pursuant to s. 18 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443;

e) On November 21, 2019, Justice Sharma expanded the vexatious litigant order to prohibit Ms. Arvanitis from starting any proceedings against Slater Vecchio's counsel, Mr. Georgetti, or the partners or employees of his law firm, without leave of the court;

2022 BCCA 326 (CanLII)

f) On September 17 and 18, 2019, Ms. Arvanitis filed notices of appeal in relation to the interim injunction order of Justice Duncan, the bench warrant issued by Justice Dillon and the August 15, 2019 order of Justice Sharma, and she applied for an extension of time to appeal these orders;

g) On October 29, 2019 (in reasons indexed at 2019 BCCA 481), Justice Dickson dismissed Ms. Arvanitis' application for an extension of time to appeal the three orders because, in her view, all three of the proposed appeals were bound to fail;

h) On February 22, 2021 (in reasons indexed at 2021 BCSC 428), Justice Giaschi found Ms. Arvanitis guilty of contempt of court for having continued to post negative online commentary about Slater Vecchio in contravention of the permanent injunction order issued by Justice Sharma;

i) On May 27, 2021, Ms. Arvanitis offered to pay Slater Vecchio $7,000 in full and final settlement of all costs awards made against her and an agreement consistent with this offer was subsequently drawn up and signed by both parties;

j) On July 14, 2021 (in reasons indexed at 2021 BCSC 1710), Justice Gomery granted Slater Vecchio's application for a declaration that the costs settlement was valid, binding, and subsisting between the parties;

k) On August 9, 2021, Ms. Arvanitis filed a notice of appeal of Justice Gomery's decision, and also applied for an order relieving her of the obligation to pay filing fees on the appeal (a "no fee" order);

l) On September 10, 2021, Slater Vecchio filed a cross-application seeking security for costs;

m) On November 3, 2021 (in reasons indexed at 2021 BCCA 415), Justice DeWitt-Van Oosten: (1) dismissed Ms. Arvanitis' application for a no fee order, and (2) ordered Ms. Arvanitis to pay security for costs in the amount

2022 BCCA 326 (CanLII)

of $12,000 within 30 days, failing which her appeal would be dismissed as abandoned;

n) On December 20, 2021, Slater Vecchio applied to have Ms. Arvanitis' appeal of Justice Gomery's order dismissed as abandoned, as she had not posted security for costs within 30 days of Justice DeWitt-Van Oosten's order;

o) On January 31, 2022, Justice Marchand dismissed Ms. Arvanitis' appeal of Justice Gomery's order as abandoned;

p) On April 27, 2022, Ms. Arvanitis filed an application for an extension of time to vary or cancel the orders of Justices DeWitt-Van Oosten and Marchand;

q) On May 4, 2022, Ms. Arvanitis filed an application for an extension of time to appeal the August 15, 2019 and November 21, 2019 orders of Justice Sharma, the former of which had already been the subject of the extension application heard by Justice Dickson in 2019;

r) On June 30, 2022 (in reasons indexed at 2022 BCCA 253), Justice Griffin: (1) quashed Ms. Arvanitis' second attempt to appeal Justice Sharma's August 15, 2019 order as a nullity, and (2) dismissed Ms. Arvanitis' application for an extension of time to appeal Justice Sharma's November 19, 2019 order;

s) On July 5, 2022, Ms. Arvanitis filed an application for an extension of time to vary or cancel Justice Griffin's order;

t) On July 8, 2022, Ms. Arvanitis filed an application for an extension of time to vary or cancel Justice Dickson's October 29, 2019 order, specifically in relation to Justice Dickson's refusal of an extension of time to appeal Justice Sharma's August 15, 2019 order;

2022 BCCA 326 (CanLII)

u) On August 12, 2022 (in reasons indexed at 2022 BCCA 290), Justice Grauer dismissed this application;

v) On August 17, 2022, Ms. Arvanitis filed an application to vary or cancel Justice Grauer's order.

[9] In summary, Ms. Arvanitis has initiated six proceedings in this Court arising out of her dispute with Slater Vecchio. Justices of this Court have consistently either refused to grant Ms. Arvanitis extensions of time to appeal or have ordered her to pay security for costs. All of Ms. Arvanitis' appeals currently stand as dismissed.

[10] There have been further recent proceedings in the Supreme Court. Ms. Arvanitis did not pay Slater Vecchio the amounts required by the costs settlement, and the firm initiated enforcement proceedings. On March 25, 2022 Master Bilawach ordered Ms. Arvanitis to produce documents in advance of an examination in aid of execution. Ms. Arvanitis appealed the production order and, in the meantime, failed to comply with the order. She did not attend the scheduled examination in aid of execution. Ms. Arvanitis took the position that she need not comply with the enforcement process while her proposed appeal of Justice Gomery's order was outstanding. These events are reviewed in greater detail in the recent judgment of Justice Blok striking Ms. Arvanitis' appeal of Master Bilawach's order: *Slater Vecchio LLP v. Arvanitis*, 2022 BCSC 1139.

[11] In addition, in March 2022 Slater Vecchio filed a second contempt application against Ms. Arvanitis in relation to her continued online posts about the firm. On June 14, 2022 (in reasons indexed at 2022 BCSC 1197), Justice Brongers found that Ms. Arvanitis had breached the terms of the Court's injunction, but he exercised his discretion to decline to make a contempt finding.

Issues

[12] The applications before the Court raise the following issues:

2022 BCCA 326 (CanLII)

a) Did any of Justices DeWitt-Van Oosten, Marchand, Griffin or Grauer err in their orders?

b) Should an order be made pursuant to s. 22 of the *Court of Appeal Act* preventing Ms. Arvanitis from initiating further proceedings in this Court without leave of the Court or a justice?

2022 BCCA 326 (CanLII)

Analysis

Issue a): Did any of the justices err?

[13] In her three applications, Ms. Arvanitis seeks to vary or cancel four orders of justices of this Court, sitting in chambers, pursuant to s. 29 of the *Court of Appeal Act*, formerly s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [*Former Court of Appeal Act*]. Such an application must ordinarily be brought no more than seven days after the order sought to be reviewed was made: *Court of Appeal Rules*, B.C. Reg 120/2022, Rule 62(2) [formerly Rule 34 of the *Court of Appeal Rules*, B.C. Reg. 297/2001].

[14] The standard of review on an application for an order varying or cancelling an order of a justice is “highly deferential”. A review is not a re-hearing. For a review division to interfere with the order of a justice, the appellant must demonstrate that the chambers justice was wrong in law, wrong in principle, or misconceived the facts. If such errors are not demonstrated, the application must be dismissed: *Seattle Environmental Consulting Ltd. v. Workers’ Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7.

[15] I will address the alleged errors Ms. Arvanitis identifies in respect of each of the orders under review.

Order of Justice DeWitt-Van Oosten: 2021 BCCA 415

[16] Justice DeWitt-Van Oosten’s order dismissed Ms. Arvanitis’ application for a no fee order on the appeal from Justice Gomery, and granted Slater Vecchio’s application for an order for security for costs and judgment in the amount of $12,000, comprised of the $7,000 Ms. Arvanitis owed Slater Vecchio under the costs

settlement and $5,000 for the costs of the appeal. She further ordered that Ms. Arvanitis had 30 days to post the security, failing which Slater Vecchio was free to apply to have the appeal dismissed as abandoned: at para. 42.

[17] Ms. Arvanitis says that Justice DeWitt-Van Oosten erred by overlooking the principle that a party should not be prevented from pursuing a meritorious appeal due to a lack of financial resources. In my view, Ms. Arvanitis' position overlooks the test for a no fee order, which was correctly set out by Justice DeWitt-Van Oosten.

[18] Justice DeWitt-Van Oosten reviewed the two steps to the test for a no fee order: (1) the applicant cannot afford to pay mandated fees without undue hardship, and (2) the proposed appeal is not bound to fail. Justice DeWitt-Van Oosten noted that even where financial hardship is established by the applicant, a no fee order may be refused if the appeal lacks merit, is scandalous, frivolous or vexatious, or otherwise constitutes an abuse of court process: at paras. 17–22.

[19] Justice DeWitt-Van Oosten accepted that Ms. Arvanitis met the first part of the test, but found there was no merit to the appeal. She stated:

> [27] However, the bulk of the matters raised by Ms. Arvanitis in support of her application have been litigated and resolved against her on the merits. The appeal before this Court is limited to Justice Gomery's order upholding the enforceability of the settlement agreement. Specific to that order, Ms. Arvanitis has not identified any legal error or palpable and overriding error of fact.
>
> [28] It is apparent from Justice Gomery's reasons that he was alive to the issues raised by Ms. Arvanitis in challenging the validity of the settlement agreement. He addressed each of them. There is nothing on the face of his reasons that suggests he misdirected himself on the governing legal principles or that he misapprehended the record in concluding that the agreement was neither inappropriate nor unfair.
>
> [29] I also note that Ms. Arvanitis was represented by a lawyer when the settlement agreement was entered into. Moreover, she was the one who made the offer that led to a settlement. The agreement was substantially consistent with the offer and it was signed by both parties.
>
> [30] In the circumstances, I see no realistic possibility of Ms. Arvanitis persuading a division of this Court that Justice Gomery was wrong to reject her submission on the invalidity of the agreement.

2022 BCCA 326 (CanLII)

[20] Justice DeWitt-Van Oosten identified the primary question on a security for costs application as whether such an order is in the interests of justice. She acknowledged that such an order could prevent Ms. Arvanitis from pursuing the appeal, but was persuaded that, in light of the history of the proceedings, the interests of justice weighed in favour of an order for security for appeal costs as well as security for judgment: at paras. 35–40.

[21] Accordingly, this is not a case in which a no fee order impedes a meritorious appeal, but rather a case in which a no fee order was refused on the basis that the appeal is lacking in merit. While Ms. Arvanitis disagrees with Justice DeWitt-Van Oosten's assessment of the merits of her appeal, she does not identify any error of law or principle or misconception of facts in her analysis.

[22] For these reasons, I would dismiss Ms. Arvanitis' application to vary or cancel the order of Justice DeWitt-Van Oosten.

Order of Justice Marchand

[23] Justice Marchand did not issue reasons for decision in relation to his January 31, 2022 order. Reasons were, in the circumstances, unnecessary. Ms. Arvanitis did not post security within 30 days of Justice DeWitt-Van Oosten's order, and therefore Slater Vecchio was free to apply to dismiss the appeal as abandoned. Justice Marchand granted the application.

[24] Ms. Arvanitis says that Justice Marchand erred in allowing Slater Vecchio's application to dismiss the appeal due to her failure to post security, rather than adjourning the application so that she could seek a review of Justice DeWitt-Van Oosten's order. However, Justice Marchand's order was simply a consequence of Ms. Arvanitis' failure to post security within the time required by the order of Justice DeWitt-Van Oosten. Ms. Arvanitis did not apply either for a stay of the order or for an extension of time to post the security. I cannot see how Justice Marchand could be said to have erred in failing to grant a remedy to Ms. Arvanitis that she did not seek.

2022 BCCA 326 (CanLII)

[25] For these reasons, I would dismiss Ms. Arvanitis' application to vary or cancel the order of Justice Marchand.

Order of Justice Griffin: 2022 BCCA 253

[26] Justice Griffin's order quashed Ms. Arvanitis' application for an extension of time to appeal the August 15, 2019 order as a nullity. It was a nullity because Ms. Arvanitis had previously filed an appeal of that same order, which was dismissed on October 29, 2019 by Justice Dickson. Justice Griffin also dismissed Ms. Arvanitis' application for an extension of time to appeal the November 21, 2019 order of Justice Sharma. In declining to grant an extension of time, Justice Griffin applied the well-known criteria from this Court's decision in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.), which govern an application for an extension of time to bring an appeal.

[27] Ms. Arvanitis alleges that Justice Griffin made three errors.

[28] First, she says Justice Griffin erred in quashing Ms. Arvanitis' appeal of the August 15, 2019 vexatious litigant order of Justice Sharma because Justice Dickson, in turn, erred in interpreting Ms. Arvanitis' September 17, 2019 notice of appeal to include an appeal of the vexatious litigant order. Ms. Arvanitis says that her September 17, 2019 notice of appeal of the August 15, 2019 order only related to Justice Sharma's dismissal of her counterclaim, and that she intended to file a separate notice of appeal to address the vexatious litigant order. She says that Justice Dickson's judgment thus reflects an error.

[29] Ms. Arvanitis' submission implies that it is open to an appellant to file multiple separate (and late) appeals arising out of a single judgment. I need not address this proposition because the fact is that Ms. Arvanitis' September 17, 2019 notice of appeal was not, on its face, limited to Justice Sharma's dismissal of her counterclaim. In her September 17, 2019 notice of appeal, Ms. Arvanitis asserts that she is not a vexatious litigant and that she should not be barred from pursuing justice. She thereby directly raised the vexatious litigant order in her appeal. Justice

2022 BCCA 326 (CanLII)

Dickson refused to grant Ms. Arvanitis an extension of time to appeal, and the appeal was dismissed.

[30] In my view, given these circumstances, Justice Griffin was correct to conclude that Ms. Arvanitis' second attempt to appeal the August 15, 2019 order is a nullity.

[31] Second, Ms. Arvanitis alleges that Justice Griffin erred in ignoring the merits of her appeal. Justice Griffin did not, in fact, ignore the merits of Ms. Arvanitis' appeal. Rather, she found it unnecessary to review the merits in light of the lengthy delay and resulting prejudice to Slater Vecchio. Ms. Arvanitis' application for an extension of time was brought over 30 months after the expiry of her deadline to appeal. Justice Griffin concluded that in light of the *Davies* criteria, and this lengthy unexplained delay, it was not in the interests of justice to grant the extension. In light of this conclusion, it was unnecessary for Justice Griffin to engage in any detailed review of the merits.

[32] Third, Ms. Arvanitis alleges that Justice Griffin failed to account for Ms. Arvanitis' health problems and self-represented status as justifications for the delay. However, Justice Griffin did not fail to account for these factors, she simply did not place the weight on them that Ms. Arvanitis believes they deserved. Justice Griffin stated:

> [29] Ms. Arvanitis submits that the reason for the delay is that she is disabled, self-represented and has suffered from extreme stress due to the underlying dispute she has with Slater Vecchio. While I of course have sympathy for anyone suffering stress and health problems, I note that many litigants face these problems and nevertheless meet the time periods. I also appreciate the significance of the order that she seeks to appeal. However, I am not persuaded that she has established good reason for the inordinate delay in this case.

[33] Ms. Arvanitis' arguments on this point invite this Court to engage in a re-hearing of Justice Griffin's order, which is not the role of the review division. Justice Griffin acknowledged Ms. Arvanitis' health issues and self-represented status, but was not persuaded that these issues established good reason for her 30-month delay in bringing her appeal of the November 21, 2019 order. I see no reviewable error in her analysis.

2022 BCCA 326 (CanLII)

[34] In my view, Ms. Arvanitis has not demonstrated any error in Justice Griffin's judgment, and therefore the review application must be dismissed.

Order of Justice Grauer: 2022 BCCA 290

[35] Justice Grauer's order dismissed Ms. Arvanitis' application for an extension of time to apply to vary or cancel the October 29, 2019 order of Justice Dickson.

[36] Ms. Arvanitis alleges that Justice Grauer's order reflects an error in the form of an irregular application of the law. She argues that Justice Grauer applied the law irregularly by depriving Ms. Arvanitis of the chance to appeal Justice Sharma's vexatious litigant order at the same time as he permitted Slater Vecchio to set down its Vexatious Litigant Application in this Court. In my view, Justice Grauer did not err or apply the law irregularly in the manner alleged by Ms. Arvanitis.

[37] The application before Justice Grauer was to extend the time for Ms. Arvanitis to apply to vary or cancel the order of Justice Dickson. Justice Grauer cited and applied the criteria from *Davies*. He noted the lengthy nature of the delay, the application having been brought some 33 months after Justice Dickson's order. He explained that Ms. Arvanitis' application focussed on the alleged merits of her appeal, which she argued outweighed the length of the delay and any prejudice to Slater Vecchio. Justice Grauer disagreed with Ms. Arvanitis' assessment of the strength of her appeal. Justice Grauer concluded it was not in the interests of justice to grant the extension given the inordinate delay and resulting prejudice to Slater Vecchio. Ms. Arvanitis has not identified any error of law or principle in Justice Grauer's analysis, nor has she shown that he misconceived the facts.

[38] The procedural orders granted by Justice Grauer—including granting Slater Vecchio leave to set down its Vexatious Litigation Application for hearing on September 6—were within his jurisdiction to make under s. 30 of the *Court of Appeal Act*. The orders were a principled exercise of this jurisdiction given the history of the proceeding and the interrelated nature of the issues raised on the various applications. Ms. Arvanitis does not identify any reviewable error in Justice Grauer's procedural orders.

2022 BCCA 326 (CanLII)

[39] For these reasons, I would also dismiss the application to vary or cancel the order of Justice Grauer.

Summary on Ms. Arvanitis' applications to vary or cancel orders

[40] For the forgoing reasons, I would dismiss Ms. Arvanitis' applications to vary or cancel the orders of Justices DeWitt-Van Oosten, Marchand, Griffin and Grauer. Ms. Arvanitis has not demonstrated any basis for interference with any of these orders by a review division.

Issue b): Should a vexatious litigant order be made?

Legal framework

[41] Slater Vecchio's Vexatious Litigant Application is brought pursuant to s. 22 of the *Court of Appeal Act*, which provides:

> **Vexatious proceedings**
>
> **22** (1) If the court or a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced or continued vexatious proceedings in any of the courts of British Columbia, the court or justice may order that the person *must* not bring or continue an appeal or application for leave to appeal in the court without leave of the court or a justice.
>
> (2) The court or a justice may make an order under subsection (1)
>
> (a) on application by any person or on the court or justice's own initiative, and
>
> (b) only if the person referred to in subsection (1) has been given an opportunity to make written submissions or otherwise be heard.
>
> (3) In making an order under subsection (1), the court may dismiss an appeal or application for leave to appeal previously brought to the court by the person.
>
> (4) If a justice makes an order under subsection (1),
>
> (a) the justice may refer the matter to the court, and
>
> (b) the court may, without receiving further written submissions or holding a further hearing, dismiss an appeal or application for leave to appeal previously brought to the court by the person.
>
> (5) In dismissing an appeal or application for leave to appeal under subsection (3) or (4), the court may impose terms and conditions, including the payment of costs.

2022 BCCA 326 (CanLII)

[42] Section 29 of the *Former Court of Appeal Act* states the Court's power to make a vexatious litigant declaration in somewhat different terms:

> **Vexatious appeals**
>
> **29** If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

[43] An order declaring that a person is a vexatious litigant is not to be made lightly. It is an extraordinary form of order that alters a person's right of access to the courts: *Hokhold v. Gerbrandt*, 2017 BCCA 216 at para. 21 (Newbury J.A. in Chambers). The purpose of such an order is to allow the Court to control its own process and prevent an abuse of that process by repetitive unmeritorious proceedings that needlessly expend judicial resources and cause unnecessary expense to other parties: *Gonzales v. British Columbia (Attorney General)*, 2018 BCCA 421 at para. 21 (Savage J.A. in Chambers).

[44] In *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594 at para. 25, citing *Lang Michener Lash Johnston v. Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.) (Ont. H.C.J., per Henry J. at para. 19), this Court set out a non-exhaustive list of factors to be considered on an application for a vexatious litigant declaration:

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

2022 BCCA 326 (CanLII)

> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals form judicial decisions can be considered vexatious conduct of legal proceedings.

[45] In cases decided under s. 29 of the *Former Court of Appeal Act* this Court has held that evidence of a party's conduct in the lower courts may inform a vexatious litigant finding in the Court of Appeal, although it is not in itself sufficient to ground such an order. In general, the existence of multiple proceedings in the Court of Appeal was considered necessary to warrant an order under s. 29: *Carten v. Carten*, 2015 BCCA 201 at para. 31 (Bennett J.A. in Chambers); *Extra Gift Exchange Inc. v. The Owners, Strata Plan LMS 3259*, 2014 BCCA 228 at para. 34 (Garson J.A. in Chambers).

Discussion

[46] Ms. Arvanitis argues that she cannot conceivably be a vexatious litigant in the Court of Appeal given that she has, to date, been unsuccessful in initiating even a single appeal. She denies that her applications to extend time to appeal, or to vary orders denying her extensions of time, demonstrate a pattern of vexatious conduct, as they are not repetitive and they relate to different orders of the Supreme Court. Ms. Arvanitis says she has simply been attempting to exercise her rights of appeal as best she can, bearing in mind the difficulties she faces as a result of her health issues and lack of legal representation. She denies that her attempts to initiate appeals are motivated by any purpose other than to pursue a remedy for what she perceives as the serious injustice she has suffered as a result of the Supreme Court orders.

[47] Slater Vecchio argues that many of the factors cited in *Lindsay* are present here, including Ms. Arvanitis' two attempts to appeal the August 15, 2019 order of Justice Sharma, her pursuit of moot appeals, and her filing of non-compliant and

2022 BCCA 326 (CanLII)

duplicative material in this Court. Slater Vecchio also argues that the amendment to the vexatious litigant power in the *Court of Appeal Act* results in substantive change to the test for a vexatious litigant finding in this Court, creating a "new threshold" for considering vexatious conduct in lower courts. Whereas s. 29 of the *Former Court of Appeal Act* referenced vexatious proceedings "in the court", s. 22(1) of the *Court of Appeal Act* replaces this language with "in any of the courts of British Columbia" (emphasis added). Slater Vecchio argues that the amendment reflects a legislative intent to capture situations where an appellant "was inevitably going to transition from a vexatious litigant into a vexatious appellant". Slater Vecchio does not suggest that the statutory amendment undermines the prior jurisprudence of this Court to the extent that it states the general objectives of a vexatious litigant finding.

[48] In my view, the change in statutory language does not have the significance that Slater Vecchio seeks to place on it. The wording in s. 29 of the *Former Court of Appeal Act* did not prevent this Court from considering a pattern of vexatious conduct by a litigant in the courts below. Such a pattern of conduct could inform the Court's conclusion on a vexatious litigant application, although the focus remained on the litigant's conduct in the Court of Appeal. Rather than establishing a "new threshold", as Slater Vecchio contends, the language of s. 22(1) gives the Court broader and more explicit discretion to rely on vexatious conduct by a litigant in the courts below in determining whether an abuse of this Court's process has occurred. However, a vexatious litigant declaration in the Court of Appeal does not automatically follow on a declaration that a party is a vexatious litigant in another court. The objective of a vexatious litigant declaration under s. 22(1) of the *Court of Appeal Act* must still be to prevent an abuse of *this Court's* process. This requires an analysis of the litigant's actual conduct before the Court.

[49] In this case, Ms. Arvanitis' conduct does share some features with the type of conduct described in *Lindsay*. Ms. Arvanitis twice attempted to appeal Justice Sharma's August 15, 2019 order, although she justifies this by explaining her belief that the two appeals related to different aspects of the order. Ms. Arvanitis initially attempted to pursue moot appeals—that is, appeals from Justice Duncan's interim

2022 BCCA 326 (CanLII)

injunction order and Justice Dillon's arrest warrant—although she abandoned those aspects of her appeal in the hearing before Justice Grauer. Ms. Arvanitis has persistently been unsuccessful in her attempts to appeal various Supreme Court orders, and has pursued unmeritorious applications to vary. She has been found to be a vexatious litigant in the Supreme Court.

[50] However, I am not persuaded at this stage of the proceeding that the extraordinary remedy of a vexatious litigant order is necessary to prevent an abuse of this Court's process. With limited exception, Ms. Arvanitis' applications in this Court have not been duplicative or abusive. The appeal proceedings have not been brought for an improper purpose. I accept that Ms. Arvanitis was genuinely motivated to secure the appellate remedies to which she believes she is entitled. While Ms. Arvanitis has been unsuccessful in her attempts to appeal, that in itself is not a basis for a vexatious litigant finding. Furthermore, with Ms. Arvanitis' three applications to vary dismissed, there are no outstanding proceedings in this Court, and, given the status of the Supreme Court proceedings, no new appeals are imminent. I accept Ms. Arvanitis' submission that she shares Slater Vecchio's desire for closure.

[51] In these circumstances, it does not appear to me that a vexatious litigant order is necessary at this time to prevent the abuse of this Court's process. It is, of course, open to Slater Vecchio to renew their application if circumstances change.

Conclusion

[52] I would dismiss Ms. Arvanitis' three applications to vary or cancel the orders of Justices DeWitt-Van Oosten, Marchand, Griffin and Grauer. I would also dismiss Slater Vecchio's application for a vexatious litigant order.

[53] In the course of the hearing, counsel for Slater Vecchio raised a collateral concern as to the jurisdictional basis for paragraph 4(c) of Justice Sharma's August 15, 2019 order. He invited the Court to direct an amendment to the wording of this paragraph. I would not make any such direction, which appears to me to be beyond the scope of any issue properly before the Court in this hearing.

2022 BCCA 326 (CanLII)

[54] Given the divided success on the applications, in my view it is appropriate to order that each party bear their own costs.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Abrioux"

2022 BCCA 326 (CanLII)

Tab 4

Newfoundland Supreme Court
Trial Division

Citation: Baker et al. v. Board of Education of District No. 7 - Burin
Date: 1999-11-22
Docket: 1999 St. J. No. 2270

Between:
Christina Baker, Jane Elms, et al. [Other Applicants Omitted]
and
School Board for District #7 - Burin

Dunn, J.

Counsel:
Lynn Verge, Q.C., for the applicants;
Michael F. Harrington, Q.C., for the respondent;
Douglas Moores, Q.C., for the proposed interveners.

1999 CanLII 19822 (NL SC)

Introduction

[1] Dunn, J.: This is an application by parents of Jacques Fontaine All Grade School children and/or interested parties for an order in the nature of certiorari and prohibition pursuant to rule 54 of the *Rules of the Supreme Court, 1986* quashing and prohibiting the implementation of the respondent's decision of August 31, 1999 to close Jacques Fontaine All Grade School on the following grounds:

> (a) The respondent contravened s. 76(2) of the *Schools Act,* 1997 by failing to give parents of students affected by the closure of Jacques Fontaine All Grade School the required opportunity to make representations to the respondent.
>
> (b) The respondent violated its own School Closure Policy by, among other things, failing to distribute to some trustees and the public the document dated January 20, 1999 by staff program specialists, a copy of which is attached to the application as exhibit "D", and failing to give the community ample opportunity to provide input based on all relevant

information. The respondent was obligated to follow the School Closure Policy that was adopted in 1998, a copy of which is attached to this application as exhibit "C". The so-called "new procedure for motions intended to be brought on August 31st", a copy of which is attached as exhibit "E", was nothing more than a strategy to circumvent the court judgment of August 13, 1999.

(c) The respondent breached its common law duty of procedural fairness to persons affected by the proposed closure of Jacques Fontaine All Grade School.

(d) By making the decision to close Jacques Fontaine All Grade School by a secret-ballot vote the respondent breached the *Schools Act,* 1997, which requires fully-elected, representative school boards.

(e) In the alternative, if the *Schools Act,* 1997 permits the respondent to make a decision to close a school by a secret-ballot vote, that part of the *Act* is in violation of the Constitution of Canada, in particular, s. 3 of the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1867.*

1999 CanLII 19822 (NL SC)

Preliminary Matters

[2] On the first day of the hearing parents of children attending St. Bernard's All Grade School at St. Bernard's, Newfoundland, requested intervenor status on the basis that the applicants' success in their application would result in direct and substantial consequences to their children. After argument I granted intervenor status to these individuals pursuant to rule 7.05(1) (a) of the *Rules of the Supreme Court, 1986.*

[3] As well, the applicant requested leave to expand the application to include a determination as to whether or not three of the trustees had contravened s. 68 of the *Schools Act,* pursuant to s. 71(1) on the basis that new information had become available, the result of which the applicant was of the view a contravention of the relevant section had occurred. I ordered the application be amended to include this additional ground.

[4] The application does involve a *Charter* argument. The Attorneys

General of both Newfoundland and Canada have been served with notice of the application. The Attorney General for Canada did not respond. The Attorney General for Newfoundland confirmed the province did not wish to intervene in the matter.

Facts

[5] Jacques Fontaine School has been the subject matter of a number of similar applications, although on different facts, since 1997. In 1997 the applicants, or other representatives of Jacques Fontaine School, obtained an order to have a decision of the respondent to close Jacques Fontaine School quashed. This decision was upheld on appeal. In March of 1999 the respondent voted, by a majority of one, once again, to close Jacques Fontaine All Grade School. Concerned parties, most of whom were parents of children attending the School, applied to this court sitting in Grand Bank to quash this decision. The applicants' request was granted by Justice Dymond who filed written reasons in the matter on August 13, 1999.

1999 CanLII 19822 (NL SC)

[6] The facts leading to this application are briefly summarized hereafter. On February 17, 1998 school board elections were held throughout Newfoundland in accordance with s. 53 of the *Schools Act,* 1997. Members of this Board were elected at that time. Pursuant to s. 74(1) of the *Act* bylaws were adopted by the respondent. The Board incorporated the procedural guidelines set out in *Robert's Rules of Order (Rev. Ed.)* into its bylaws.

[7] In early 1998 the respondent formulated a school-closure policy. This policy recognized the need for adequate notice to allow opinions to be considered and constructive dialogue to ensue between the community and the Board where a school is proposed to be closed. As part of the procedure adopted, a sixty-day notice provision was included. The respondent believed that the notice period was intended to run from the time of an introduction of notice of motion by the School Board for closure to the meeting at which the motion would be made. The applicants said in earlier proceedings they were of the view the notice period was intended to run from the date a background report and information package was provided to parents to the final Board meeting considering the closure motion. They also believed the sixty-day period was intended to allow for input from the parents and community pertaining to the Board's decision.

[8] In 1998/1999 the respondent operated three schools in the Northern Zone. They are Christ the King, Rushoon (K - 12), 251 students; Jacques Fontaine All Grade School (K - 12), 177 students; and St. Bernard's All Grade School (K-12), 117 students. In 1998 the respondent hired Central Consulting Services Inc. (the "Consultants") to review the School Board's delivery system of education and to make recommendations. A Report was produced November 3, 1998 recommending, among other things, consolidation of St. Bernard's and Jacques Fontaine schools due to their close proximity. The Report stated:

> "Jacques Fontaine All Grade shows the greatest potential in terms of facility issues."

At page 70 the consultants recommended closure of St. Bernard's All Grade School at the end of the 1998/1999 school year. It also envisaged and recommended that Jacques Fontaine All Grade School be considered the instructional centre for the Northern Zone to ensure quality educational offerings on par with the district. It appears the Board did not view this latter recommendation as an objective it intended to follow. The Report was presented to the Board on November 3, 1998 at a public meeting. A further public meeting was held December 1st at Marystown and presentations and comments from people in attendance were received by the Board and/or its representatives.

[9] On January 25, 1999 the respondent's trustees prepared school-closure motions to be made at a meeting scheduled for March 30, 1999, including a motion to accept the consultant's recommendations, as well as motions to close Jacques Fontaine All Grade School and St. Bernard's All Grade School, it being anticipated only one motion would pass to close one of these two schools. On March 2, 1999 the respondent distributed to representatives of school councils in the Northern Zone a document entitled "Restructuring - Northern Zone - Draft". This document referenced the fact that program specialists staff were requested by the administration of the Board to assess the programs for the re-alignment of the two schools in the Jacques Fontaine - St. Bernard's region using the 1993 *draft* school planning guide. On February 25, 1999 the same specialists were asked to redo the assessment using the school planning manual, 1978. The document indicated the program team had great difficulty using twenty-one-year-old

1999 CanLII 19822 (NL SC)

construction and program guidelines to determine the present and future curriculum needs of these schools. Further meetings ensued, and on March 30, 1999, at an open but limited number meeting, the respondent voted to close Jacques Fontaine All Grade School. The vote was carried six to five. It was done by secret ballot. Two trustees, Elliott and Allen, were disqualified from participating as they were parents of children in Jacques Fontaine All Grade School and it was believed they would be in a conflict of interest should they vote on the school-closure motions.

[10] The motion to close Jacques Fontaine School on March 30, 1999 became the subject matter of an application by representatives of children attending the school, which application was heard by Mr. Justice Dymond in July of 1999. On August 13th, Justice Dymond filed his judgment in the matter and accepted the applicants' position in three primary areas. Firstly, that Allen and Elliott had been improperly disqualified from voting. Secondly, that the Board had failed to provide a copy of the Program Specialists Report based on the 1993 Draft Guidelines to all of the trustees of the Board. Thirdly, that in providing the documentation to parents on March 2, 1999 the Board had breached procedural fairness and failed to adhere to its own Guidelines for a sixty-day notice period.

[11] After the court hearing concluded on July 23, 1999 the Board determined that in the event its earlier decision might be quashed it would proceed with a further notice of a special meeting to deal with the closure issues once again. As stated by Margaret Witherell, Chairperson of the respondent, in an affidavit filed with the within application at para. 10, the reasoning of the Board was as follows:

> "Because of the urgent need to bring certainty to the students and parents in the four zones that had been subject to school-closure decisions including Jacques Fontaine School, the respondent felt that a contingency plan should be put into effect leading to new votes on the four school closures. The respondent upon the advice of legal counsel realized that there was an opportunity to cure the alleged defects in the procedure followed by the Board and make a final determination on the status of these schools prior to school opening on September 7, 1999."

And, at para. 11:

1999 CanLII 19822 (NL SC)

> "The respondent also realized that if Judge Dymond agreed with the applicants' submission that Messrs. Earl Elliott and Clifford Allen should have been allowed to vote on the school closure decision affecting Jacques Fontaine, these two trustees could then be permitted to vote at a new vote to be conducted at a public meeting to take place on August 31, 1999."

Ms. Witherell goes on to state that she gave notice on July 23, 1999 of a special meeting of the respondent to be held Thursday, July 29, 1999. This notice included a motion to adopt a new procedure for motions intended to be brought on August 31, 1999. In essence, the notice reduced any time frames from sixty to thirty days to allow for documentation to be provided to parents and then to receive input and comment from them pertaining to items under consideration by the Board in making its decision. The same notice included notices of motion to be brought at a Board meeting on August 31, 1999 including a motion to rescind the decision to close Jacques Fontaine All Grade School. It further added "in the event that the Supreme Court of Newfoundland quashes the decision of the Board to close Jacques Fontaine, the motion will instead be to close one of Jacques Fontaine All Grade School or St. Bernard's All Grade School. Finally, the said notice included a motion to rescind motion to preclude voting by secret ballot. On July 29, 1998 the respondent's trustees held the special meeting. The motion to adopt a new procedure for the August 31st meeting was made and a majority voted by open, show of hands to adopt the motion.

[12] On Friday, August 27, 1999 counsel for the applicants advised the respondent that as a result of Mr. Justice Dymond's decision on August 13th, they were of the view the Board ought not to proceed to its vote on the 31st as the decision would likely be challenged in yet another court application. It viewed the Board's ongoing failure to provide the Program Specialists Report of January 20th prepared in accordance with the Draft 1993 Guidelines to be a breach of procedural fairness and to be contrary to the spirit and intent of Mr. Justice Dymond's decision of August 13th. It pointed out that this document had yet to be provided to all of the trustees of the Board. An open meeting was held August 28, 1999 to receive input and comments from parents pertaining to the information package provided, as well as other submissions on the motions to be made at the August 31st meeting. After this open meeting concluded six trustees, who had not received the January

1999 CanLII 19822 (NL SC)

20th Program Specialists Report, were provided with same.

[13] Although this Report was not promptly provided to the trustees subsequent to the filing of Mr. Justice Dymond's decision, it had been the subject matter of discussion at a School Board meeting held April 20th and 22nd of 1999 during which one of the trustees brought to the attention of other trustees attending the meeting that the Report had been prepared but not provided to them. Discussion ensued pertaining to the role of the School Board administrators in this regard. The Report was included as part of the package provided to Mr. Justice Dymond in the application before him. The applicant, Christina Baker, is acknowledged in affidavits filed by Allen and Elliott to have been the leader of the parents' court challenge before Judge Dymond.

1999 CanLII 19822 (NL SC)

[14] The information package provided to parents in advance of the August 31, 1999 Board meeting did not contain Program Specialists Report referred to above. It was comprised of similar information as had been provided to the parents and interested parties by the Board for the March 30th meeting. However, Ms. Witherell, in her affidavit, states in respect of this document at para. 26, p. 10:

> "... At the same time, it is important to understand that at no time throughout the process was the respondent relying on this program specialists report as a document to make its decision. The CCSI consulting group report, the northern zone trustees report and the northern zone report contained favourable comments about superior space available at Jacques Fontaine School as opposed to St. Bernard's School."

[15] At the hearing before me, counsel addressed considerations of the trustees in preferring St. Bernard's All Grade School over that of Jacques Fontaine. These include that St. Bernard's All Grade School was a newer facility; with declining enrollments St. Bernard's All Grade School would be the more fiscally viable of the two schools and the additional space of Jacques Fontaine All Grade School redundant for future educational purposes; and an apparent rejection of Jacques Fontaine All Grade School as the instructional centre for the Northern Zone.

[16] The trustees making up the composition of the Board are elected by

Zone. There are three representatives of the Northern Zone, two of whom have children in Jacques Fontaine All Grade School. The remaining trustees on the Board represent other Zones on the Burin Peninsula and do not have children attending either Jacques Fontaine All Grade School or St. Bernard's All Grade School.

[17] On August 31, 1999 the respondents held a meeting with limited public access and voted firstly to vote by secret ballot on the school-closure motions and secondly, moved, by secret ballot, to close Jacques Fontaine All Grade School by a count of seven to six. Northern Zone trustee Picco was not in attendance at this meeting.

1999 CanLII 19822 (NL SC)

Issues

[18] The three primary issues are:

1. Did the respondent breach its duty of procedural fairness in its handling of the matter, particularly:

(i) By contravening s. 76(2) of the *Schools Act,* 1997, in that it failed to provide parents of students affected by the closure of Jacques Fontaine All Grade School with the requisite opportunity to make representations to the respondent?

(ii) By violating its own school-closure policy in that it failed to distribute to some trustees and the public the Program Specialists Report dated January 20, 1999, based on the 1993 Draft School Board Guidelines?

(iii) By also violating its own school-closure policy in that it adopted a new procedure for closure motions at the July 28th meeting and implemented it in respect of the August 31, 1999 meeting?

2. Did the respondent breach the *Schools Act,* 1997, by allowing the vote for closure to proceed by secret ballot. In the alternative, if the *Schools Act,* 1997, permits the respondent to make such a decision by secret ballot, is secret-ballot voting a violation of the *Constitution of Canada,* in particular, s. 3, of the *Canadian Charter of Rights and*

Freedoms and the *Constitution Act,* 1867?

3. Were three of the trustees in a conflict-of-interest position by virtue of the fact that they voted in favour of holding a secret ballot in respect of the school closure on the basis that they feared financial repercussions, in the case of two, in respect of the operation of their businesses; and in the case of one in respect of the operation of his spouse's business?

1999 CanLII 19822 (NL SC)

Analysis:

Issue 1 - Did the Respondent Breach its Duty of Procedural Fairness in its Handling of the Matter, Particularly:

(i) By contravening s. 76(2) of the *Schools Act,* 1997, in that it failed to provide parents of students affected by the closure of Jacques Fontaine All Grade School with the requisite opportunity to make representations to the respondent?

(ii) By violating its own school-closure policy in that it failed to distribute to some trustees and the public the Program Specialists Report dated January 20, 1999, based on the 1993 Draft School Board Guidelines?

(iii) By also violating its own school-closure policy in that it adopted a new procedure for closure motions at the July 23rd meeting and implemented it in respect of the August 31, 1999 meeting?

[19] The applicants submit procedural fairness has been breached by virtue of the Board's failure to comply with the *Schools Act;* its own policy and the common law.

[20] Section 76(2) of the *Schools Act,* 1997, S-12.2 states:

"76(2) Notwithstanding s. 75 or subsection (1) of this section, a board may close a school only after parents of students affected have been given an opportunity to make representations to the board."

[21] The school policy prior to the August 31, 1999 decision, being the subject matter of this hearing, is described in brief at p. 7 of the School

Closure Policy document of the Burin Peninsula School Board adopted by the Board January 9, 1998 and amended March 19, 1998. It states:

"PROCEDURE IN BRIEF

Identification of the school to be considered for closure.

STEP 2

Introduction of Notice of Motion by School Board to close a school.

STEP 3

Communication of the nature of the motion in writing to School Council and parents.

STEP 4

Preparation of Background Report.

Meeting with community to discuss the report. Solicit community response and discuss the procedure for the response.

STEP 5

Provision of a minimum of at least sixty (60) days to receive and discuss a community response.

STEP 6

The Board will debate the notice of motion and make a final decision.

STEP 7

Written communication of the final decision to parents. Notice of an implementation date should be at least thirty (30) days prior to the closing of the school in June of that school year."

1999 CanLII 19822 (NL SC)

[22] The Board says it was of the view that the 60 days referenced in Step 5 related to the amount of time required from Step 1, being the identification of the school to be considered for closure to the ultimate meeting wherein the decision was to be made as outlined in Step 6.

[23] The intent of the Board at the end of July, as stated in the Witherell affidavit at paras. 14 and 15, was to amend the respondent's School-Closure Policy to make it consistent with the court decision in *Tracey et al. v. Board of Education of Avalon East,* (1998), 164 Nfld. & P.E.I.R. 181; 507 A.P.R. 181 (Nfld. T.D., Orsborn, J.), particularly as it related to the rights of the respondent to manage the school system throughout the entire year including summer months, and in setting its own procedures for school-closure decisions subject to the requirements of the *Schools Act.* Mr. Justice Green, writing for the Court of Appeal in *Elliott et al. v. Board of Education of Burin Peninsula* (1998), 166 Nfld. & P.E.I.R. 73; 511 A.P.R. 73 (Nfld. C.A.), stated in respect of procedural fairness at paras. 43 and 47 as follows:

1999 CanLII 19822 (NL SC)

> "[43] ... I am satisfied, as was the applications judge, that the issue of school closure is sufficiently qualitatively important that the board must act in a way that takes account of the concerns and interests of affected children, and the parents who act on their behalf, by allowing them in a meaningful way, to have input into the decision-making process with a view to potentially influencing the ultimate decision that is made.
>
> . . . . .
>
> "[47] ... The content of the duty must therefore be flexible to meet the exigencies of the case. Although, as noted in *Knight,* this must be a balance between fairness and efficiency, what must not be compromised in any case is the necessity that the notice, consultation and input elements, however structured, not be perfunctory and formalistic. They must be meaningful and realistic, designed to ensure that there is a real opportunity for persons affected to take reasonable steps to try to influence the decision. While that may not necessarily require full disclosure of all background material and every scrap of relevant paper (in the traditional natural justice sense of knowing the full case one has to meet), sufficient of such information and material would generally have to be made available, at least in summary form, so that

the persons affected will have a context in which to make their input, so that their representations can be directed to the real issues under active consideration by the board. This might be especially the case where it would be important for those having input to know how, if at all, the particular proposed closure fits into any broader scheme that is contemplated for reorganization or rationalization of the system generally."

[24] Similarly, Mr. Justice Orsborn of this court made several comments in *Tracey* pertaining to compliance with s. 76(2) at para. 106:

"106. In the context of the 1997 *Act,* and considering the principles outlined in *Jacques Fontaine* and the tenor of the various proposals or policies of the governing bodies, my interpretation of s. 76(2) is that parental opportunity to make representations means that:

1. The opportunity given must allow time for meaningful representations on the issues that are under active consideration by the board, and must allow the parents to raise in good faith the issues for the consideration of the board.

2. Meaningful representations require time for preparation and presentation, and require information on the issues considered relevant by the board. The parents are entitled to be advised of the particular considerations that are persuading the board to consider closure. They are entitled to sufficient information supporting those considerations so that a reasonably informed person would be able to make submissions on the validity, reliability or relevance of that information and the considerations it supports. The board is not obliged to provide information it does not have, nor is it obliged to acquire information for the parents' use, but it is obliged to take reasonable steps, if requested, to assemble in meaningful form relevant information in its possession. The board may, but is not required to provide information that may be requested by parents but which is not related to the factors said by the board to be influencing the closure decision.

3. Once the parents have been provided with sufficient reliable information on the factors under consideration by the board, they must

1999 CanLII 19822 (NL SC)

be given sufficient time to consider the information, take any necessary advice, acquire additional relevant information and prepare any representations. What time is sufficient will vary from case to case, depending on the circumstances. It is not appropriate for the court to set a fixed time limit - that should be done by each board either as a matter of policy or on a case by case determination. However, I would think it highly unlikely that in any circumstance less than 30 days would be sufficient.

4. Individual parents should have the opportunity to make oral representations to the board in a public forum. The *Act* prescribes that public meetings are to be the rule rather than the exception; school closure decisions are singled out as being worth of specific parental input - these factors, together with the nature of an elected board and its public accountability, and the references in the policy documents to representations in public, lead me to the conclusion that parents are entitled to make their arguments to the Board in a public forum.

5. Absent bad faith or other circumstances analogous to an attempt to obstruct the legitimate processes of the board, the board cannot require that individual parents make their representations on a group or representative basis. The fact that a large number of parents may wish to exercise their right is, in and of itself, no reason to limit or preclude the exercise of that right. The parents of children in a large school enjoy the same opportunity as do parents of children in a smaller school. The Board may limit presentations to a reasonable length of time.

6. It will be for the board to determine how information is communicated to parents. The opportunity to make individual representations does not, in my view, oblige the board to communicate individually with each parent and to provide each parent, without request, with whatever information may have been prepared by the board. The opportunity to make representations requires the board to take reasonable steps to ensure that the general body of parents is aware of the potential closure, of the rationale for such closure and of the availability of additional information. The steps to be taken are for the determination of the board but could, for example, include press releases and other media coverage, communication to school councils and parent-teacher

1999 CanLII 19822 (NL SC)

associations and public meetings."

[25] At para. 107 Justice Orsborn notes:

> "Counsel invited me to set specific guidelines for the use of other boards faced with potential school closures. I do not think it is appropriate to go beyond the views I have expressed on the content of the s. 76(2) duty. It will be for each board to determine how it will meet the procedural requirements of the *Act.* The reasons of Green, J.A., in *Jacques Fontaine* support the view that complying with the statute may necessitate a different response in different circumstances. School boards must be free to exercise their governance role as they think best; beyond interpreting the essential parameters of s.76(2), it is not for the court to interfere in that governance."

1999 CanLII 19822 (NL SC)

[26] What can be extracted from the two foregoing decisions is both judges agree it will be for each Board to determine how it will meet the procedural requirements of the Act. Insofar as these comments relate to the facts before me, I particularly note Mr. Justice Orsborn at para. 2 indicates a board may, but is not required, to provide information requested by parents but which is not related to the factors said by the board to be influencing the closure decision. The January 20th Program Specialists Report falls into this category. The Consultant's Report, which formed part of the information package provided to parents, was based on the 1978 School Board Manual, presumably upon the basis that the Draft 1993 Guidelines had yet to be approved for usage. The latter document referenced the existence of the January Program Specialists Report and, in part, contained similar viewpoints as expressed in that Report, particularly the seeming preference for Jacques Fontaine All Grade School over St. Bernard's All Grade School as the facility that ought to continue in operation in the Northern Zone.

[27] The January 20th Report was in the public domain to some extent. Ms. Witherell, at para. 23 of her affidavit, states that she has determined the vice-chair, Mr. Lambert, had received a copy of it prior to the Board meeting on March 30, 1999. Marcus Evans, Harvey Tulk and Wayne Collins, also trustees, obtained copies of the Report in April, 1999. Prior to the August 28, 1999 Town Hall meeting, trustee, Brian Walsh, sought and obtained a copy of the Report from the Board office. Clifford Allen and Earle Elliott state they had copies of the Report since January, 1999. All of the trustees had this

Report when they voted on August 31, 1999. In addition, applicant Baker had a copy of the Report and indicates she had distributed or shown it to a number of parents. It was subject to debate at the Board meeting April 20 and 22, 1999 and apparently, although not set forth in the affidavit evidence, was discussed on talk shows in the Burin Peninsula area, as well as being attached to the application documentation before Mr. Justice Dymond. It cannot be said that as of March 31, 1999, the trustees were unaware of the existence of the document. As to the extent of their review, remains in the realm of pure speculation, but as stated by counsel for the intervenor, it is not for the courts to extend the doctrine of procedural fairness to this degree.

1999 CanLII 19822 (NL SC)

[28] The issue of the January Program Specialists Report was argued before Mr. Justice Dymond. He concluded at para. 36 that as this document related to programs provided by the Board, it would have been an important document for *trustees* to review. I do not conclude that the Program Specialists Report of January 20, 1999 related to programs presently provided by the Board. The fact that it is in draft form suggests otherwise. When counsel for the respondent was asked this question by me, he confirmed the programs contained in the Draft Guidelines are not necessarily in place. The respondent took the position before Mr. Justice Dymond it was instructed by the Department of Education to use the 1978 Manual as the 1993 Guidelines had yet to be approved. It is apparent from the Consultants' Report the program specialists did not favour this approach.

[29] At para. 47 of his decision, Dymond, J., states:

> "The point to be made here is that the Program Specialist Report was never released. It may or may not have made a difference to the vote. However, it was a Report that was prepared for the January 21st Board meeting that actually took place on January 25th, 1999. If both the Program Specialists Report and the Northern Zone Restructure Draft had both been given to the trustees on March 2nd, 1999 instead of just the Northern Zone Restructuring Draft this may have had an impact on the way the vote went on March 30th."

[30] Justice Dymond recognizes at para. 49:

> "The Consultants Report recommended the Jacques Fontaine school over the St. Bernard's school on a number of other areas. This report

> really complimented the Specialists Report which the trustees never did see."

[31] He then concludes at para. 50:

> "At the February 25th meeting two trustees had indicated an intention to bring a notice of motion to close Jacques Fontaine school. We do not know how these individuals voted in the final analysis or whether they would have been influenced by the Specialists Report because it was never made available to them as the vote was done by secret ballot."

[32] At this point in the decision Mr. Justice Dymond moves on to another issue. On p. 45 he summarizes his findings and as it relates to the Specialists Report at para. 3 says as follows:

> "3. The fact that the Specialist Report completed by January 18th, 1999 was never presented to the Board violated the School Board Closure Policy on Reports and also violates the principles of procedural fairness at common law."

I am satisfied that the decision requires the Report be distributed only to the School trustees. There is no mention of the public, nor is there any suggestion of a thirty or sixty-day or other notice requirement. A problem with regard to notice periods did arise in respect of the Northern Zone Restructuring Report as reflected in paras. 42, 43, and 44 of the decision where this document was provided twenty-eight days prior to the March 30th Board meeting at which the closure decision was made. A summary of his findings on these points can be found at paras. 1 and 2, p. 45:

> "1. The Board by voting on the Northern Restructure Draft in less than 60 days from the introduction of the Report on March 2nd, 1999 violated its own School-Closure Guidelines.
>
> "2. The Meeting on March 30th where the vote was taken only 28 days after being first tabled violated the Doctrine of Procedural Fairness."

I conclude the failure to provide the Program Specialists Report of January 20, 1998 to the trustees in advance, does not amount to a breach of procedural fairness, nor does it offend the decision of Dymond, J., rendered

1999 CanLII 19822 (NL SC)

August 13, 1999. Likewise, the failure of the Board to provide it readily to all the parents, although perhaps not the most sensitive of decisions, did not breach procedural fairness in that the document was not being relied upon by the Board in making its decision.

[33] On July 29, 1998 the trustees, at a special Board meeting, by motion adopted a new procedure for the August 31st meeting respecting school closures. In so doing they reduced the time frame for notice to, and receipt of parental submissions, from sixty to thirty days, basically, in conformity with the minimal guidelines set forth by Mr. Justice Orsborn in *Tracey.* The same package of information as provided for the earlier hearings was once again provided to parents. This contained the Consultants Report outlined earlier. It did not contain the Program Specialists Report. Open meetings were held August 28, 1999 to receive parent representations on the proposed motions. The parents took the position that the procedure adopted by the Board was incorrect and the majority opted to protest the Board's decision to hold this further meeting rather than make presentations to the trustees.

1999 CanLII 19822 (NL SC)

[34] In support of its position to make such a procedural change/the respondent tendered the case of *Fisher Park Residents Association Inc. v. Board of Education of Ottawa* (1986), 57 O.R.(2d) 468 (H.C.). In that case the Board adopted a change of its policy for purposes of the closures under consideration by replacing a community-study committee called for in the original policy with a series of public meetings. The court concluded the real issue was not whether the amendment operated to reduce the quantity or quality of the public input, but rather whether or not the amendment operated to treat the public unfairly in terms of their rights to make their views known to the Board. At p. 483, Eberle, J., states:

> "... I think we must not lose sight of the fundamental principles in this case. We are dealing here not with a body affecting anyone's legal rights but a body carrying out an administrative or management function. In my view the decision of such a body should not be quashed unless real and substantial prejudices have been shown by the way in which matters have been conducted or for some other substantial reason. I do not think those exist in this case."

[35] In arriving at this conclusion the Judge in *Fisher* referenced at p. 481 a quote of Chief Justice Friedman in *Tweed et al. v. Assiniboine South*

School Division No. 3 (1982), 18 Man. R.(2d) 403 (C.A.), at p. 407:

> "... I quote in this regard the words of Professor S.A. de Smith in his text *Judicial Review of Administrative Action,* [2nd ed.] 1968, London, Stevens & Sons Limited, at p. 126:
>
> > 'Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the *Act* is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the Court is for any reason disinclined to interfere with the act or decision that is impugned.'"

1999 CanLII 19822 (NL SC)

[36] Further support for the respondent's argument is found in *Tracey* at page 196:

> "... The Board's policies and procedures are surely matters for the Board - subject to compliance with the *Act* - and the Board would not be in error to adopt an overall process to deal with the problem facing it. I do not place much weight on the fact that the policies of the previous Boards were not formally rescinded; by formally adopting a process for the closure at hand the Board was, as the proper decision- making authority, deciding that the former policies would not be applied. This was not unreasonable given that the former policies presented two distinct approaches. Neither is there anything in the Board's decision-making on process to suggest bad faith. While concern was expressed that the previous Avalon Consolidated policy required a year's notice, the fact that the Board wished to shorten this length of notice is not equivalent to acting in bad faith, nor is it, of itself, indicative of a lack of procedural fairness."

[37] Having considered the *Fisher Park, Elliott, Tracey,* and *Baker* decisions, I am satisfied the Board was within its rights in amending its closure policy. The Board, in adopting the new time frame, complied with the minimal standard suggested by Mr. Justice Orsborn in *Tracey.* This matter had been ongoing since January of 1999 and all of the significant information

utilized by the respondent in proposing its closure motions had been made available to the applicants. The integrity of the process was maintained in that the parents were afforded an opportunity on August 28, 1999 to bring forward whatever submissions they deemed appropriate.

[38] The dynamics of the situation were such that the Board wished to move on the closure issues as expeditiously as possible and before the opening of the school year, while the parents were adamant that the matter proceed in a procedurally fair manner. In some respects, perhaps to their own detriment, the applicants became so caught up in the procedure they failed to avail themselves of the opportunity afforded them to make presentations to the Board on August 28th. It cannot be said, however, that they were not given the opportunity to do so as required by s. 76(2) of the *Schools Act.*

1999 CanLII 19822 (NL SC)

[39] In summary, on the procedural fairness arguments, I find the respondent did not contravene s. 76(2) of the *Schools Act* as parents were permitted to make representations prior to the August 31, 1999 School Board meeting. The respondent did not violate its own School Closure Policy, but simply revised it to conform with the time frame reflected in *Tracey* and for use at the August 31, 1999 meeting. I would also add there is simply no evidence to suggest the respondent acted, at any time, without good faith and indeed, it appears the Board relied heavily on their counsel's advice in these matters. Finally, I conclude there was no breach of procedural fairness in respect of the Program Specialists Report dated January 20, 1999, although it would have been better had this Report been immediately distributed to all the trustees upon issuance of Dymond, J.'s, decision. In any event, it was assuredly in the hands of all trustees in advance of the August 31, 1999 meeting.

Issue 2 - Did the Respondent Breach the Schools Act by Allowing a Vote by Secret Ballot or. in the Alternative, Offend the Constitution of Canada, Particularly s. 3 of the Canadian Charter of Rights and Freedoms, in Adopting this Procedure?

[40] This issue was argued before Mr. Justice Dymond. In his decision of August 13th he ruled s. 3 of the *Charter* did not apply to secret-ballot voting. As to whether or not such a vote breached the *Schools Act,* 1997, Dymond,

J., noted there was nothing in the legislation to prohibit secret-ballot voting and found at p. 45, para. 4 of his decision:

> "The issue of the secret ballot violated the Guidelines of four days notice as set out in the Bylaws. The shortness of the notice of motion violated the common law principle of procedural fairness."

The applicants' argue no definitive decision was made in respect of whether or not the respondent actually breached the *Schools Act,* 1997 by allowing this type of vote. Certainly the tenor of his decision is that secret-ballot voting is permissible under the legislation but not desirable in the context of any democratic process.

[41] Section 3 of the *Canadian Charter of Rights and Freedoms* states:

> "Democratic Rights
>
> "3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

[42] The Supreme Court of Canada in *Reference Re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158; 127 N.R. 1; 94 Sask.R. 161; [1991] 5 W.W.R. 1; 81 D.L.R.(4th) 16; 5 C.R.R.(2d) 1, states s. 3 is to be determined in a broad and purposive way, having regard to historical and social context. In adopting this approach the Court must be guided by the ideal of the "free and democratic society, upon which the *Charter* is founded". However, the case focuses on the purpose of this section as being designed to ensure "effective representation" while at the same time recognizing that equality of voting may not always be achieved where factors such as geography, community history, community interests, and minority representation require consideration to ensure that legislative assemblies effectively represent their constituents. The case does not stand for the premise that effective representation must be accountable representation but rather must be representative of the constituent population.

[43] Applicants' counsel eloquently argued that even if s. 3 of the *Charter* cannot be so broadly interpreted so as to preclude secret-ballot voting, it nonetheless enshrines the *Charter* value ideal of a "free and democratic

1999 CanLII 19822 (NL SC)

society" inherently recognizing the necessity for both open voting and ultimate accountability to the electorate.

[44] I agree with much of the analysis found in Mr. Justice Dymond's decisions, [*Baker et al. v. Board of Education of District No. 7 - Burin* (1999), 180 Nfld. & P.E.I.R. 347; 548 A.P.R. 347 (Nfld. T.D.)] on this point, as well as comments made by other judges of this court in pre-Charter cases. Section 3 of the *Charter,* on the face of it, is restricted to legislative assemblies. This interpretation was favoured by the Ontario Courts in *Jones (R.) v. Ontario (Attorney General) et al.* (1992), 54 O.A.C. 211; 7 O.R.(3d) 22 (C.A.):

> "I agree with the Attorney General that prima facie s. 3 does not apply to the case at bar and that the delegation of powers does not make the delegatee into a delegator. The words legislative assembly are contained in other sections of the *Charter* where they could not be interpreted as including municipal councils. There is not constitutional impediment to a province abolishing municipal councils. If the applicant succeeded on its s. 3 argument, the results would be that a province could not abolish its municipalities. Municipalities are creatures of the province."

This case was appealed to both the Ontario Court of Appeal and the Supreme Court of Canada. Leave to appeal to the Supreme Court of Canada was refused and as noted by Mr. Justice Dymond at para. 74, that court, in refusing, made the following comment:

> "We also agree that s. 3 of the *Charter,* the right of a citizen inter alia to vote or to be qualified for membership in the House of Commons or in the legislative assembly, does not apply to municipal councils."

[45] If one extends the logic set forth in the foregoing case, particularly the first quote, it becomes apparent that school boards, as creatures of the province, in a like way as municipalities, cannot be clothed with the rights granted under s. 3 of the *Charter of Rights and Freedoms.* Therefore, this argument by the applicants is rejected.

[46] The applicants further submit the secret-ballot vote violated the *Schools Act,* 1997. In both pre and post-*Charter* cases judges of this court have found consistently, although this type of voting is not necessarily

1999 CanLII 19822 (NL SC)

desirable, particularly where sensitive issues such as school closures are being determined, it is not precluded by the *Schools Act.*

[47] In *pre-Charter* cases both Mr. Justice Roberts in *Gillingham et al. v. Board of Education of District No. 3 - Corner Brook/Deer Lake/St. Barbe* (1998), 169 Nfld. & P.E.I.R. 1; 521 A.P.R. 1 (Nfld. T.D.) and Mr. Justice Woolridge in *Wall et al. v. Board of Education of District No. 3 - Corner Brook/Deer Lake/St. Barbe* (1998), 169 Nfld. & P.E.I.R. 16; 521 A.P.R. 16 (Nfld. T.D.), adopted the reasoning of Mr. Justice Dixon in *Houde v. Quebec Catholic School Commission,* [1978] 1 S.C.R. 937; 17 N.R. 451, at p. 940 [S.C.R.].

> "First, public bodies, such as municipal councils and school commissions have broad discretion in the regulation of their procedures. It is not for the Courts to dictate the manner in which such bodies shall manage their internal affairs. If a council or a commission fails to observe the formalities which the Legislature has prescribed in plain language for the calling and conduct of meetings, then the Court may, in a proper case, intervene; if questions of natural justice, or fraudulent, inequitable, or oppressive use of power arise, the Courts may act; but in the absence of statutory obligation, or misconduct, the internal regulation of their affairs by municipal bodies is a matter for such bodies and for them alone ..."

And at p. 944 [S.C.R.]:

> "Public meetings and secret balloting are not incompatible. No authority has been cited which holds that a public body, whose meetings and deliberations are in public, is precluded as a matter of broad policy from voting by secret ballot. Such a proposition runs directly counter to the broad discretion all public bodies have, absent statutory direction otherwise, to regulate their internal procedures."

[48] The *Schools Act* is silent on the manner of voting. The bylaws adopted by the respondent incorporate *Robert's Rules of Order* (Rev. Ed.) as a procedural reference. These rules allow for vote by secret ballot. This suggests an intent on the part of the respondent to permit such voting.

[49] The only remaining question then is whether or not the *Houde*

1999 CanLII 19822 (NL SC)

decision ought to be departed from on the basis it does not adhere to the *Charter* value which the applicants submit emanates from s. 3 requiring open voting on the part of the elected representatives at the School Board level. I do not believe it appropriate, or legally correct, to depart from Houde at this time and on that basis. I cannot conclude that one can extract from s. 3 a presumptive *Charter* value that the respondent must vote openly on all occasions. Although accountability directly on the issue of who voted for school closure is thereby foreclosed, certainly the electorate can hold the Board accountable for passing a motion to permit secret ballot where, as is the case here, the motion was passed by show of hands after a debate by the trustees.

1999 CanLII 19822 (NL SC)

[50] The applicants' submission, therefore, that there has been a breach of the *Schools Act,* 1997, by virtue of the respondent having allowed secret-ballot voting in respect of the closure of Jacques Fontaine All Grade School at the August 31, 1999 meeting, is rejected.

Issue 3 - Were three of the trustees in a conflict-of-interest position by virtue of the fact they voted in favour of holding a secret ballot in respect of school closure of Jacques Fontaine All Grade School on the basis they feared financial repercussions, in the case of two of them in respect of the operation of their own businesses and in the case of the third individual, in respect of the operation of his spouse's business ?

[51] The facts relied upon are contained in the minutes of a special Board meeting held Tuesday, August 31, 1999 and attached as exhibit "E" to the affidavit of Margaret Witherell filed herein. Shortly before the hearing, counsel for the applicant became aware of the contents of these minutes the result of which this issue was raised for my consideration.

[52] Motion No. 1, in the meeting in question, reads as follows:

> "It was moved by Wayne Collins and seconded by Thomas LeGrow that the motion made by the Board on May 18th, 1999, prohibiting the use of voting by secret ballot, be rescinded."

[53] Discussion on this motion ensued and is recorded. Relevant portions are:

"Mr. Collins indicated that maybe there is a lot of people around who don't like the idea; he heard through different reports and on radio. However, different people are not in positions like other people on this board. First, when he submitted his name to the board, it didn't seem like it would be like it is right now. He runs a public business and a public business certainly don't coincide with things. To him, this has drastically affected different parts of his personal life....

"Tom LeGrow said he would go the other direction and supported Wayne Collins. He is in a similar position. He works in every community on the peninsula and it has the potential to affect his employment. He depends on a good rapport in the community to help him get his work done. He knows Wayne and several other trustees in the same position; where this can seriously affect personal lives. As a volunteer activity, he thinks that trustees should have the option to decide how we want to vote. ...

"Harvey Tulk indicated he supports a secret vote by ballot. The reason he can understand anyone when they speak of personal business is because his wife has a business, too. It is not fair for a decision of his to negatively affect his wife's business. He has been through that. He dealt with that when he got into this and he is aware of controversial situations that he was sure could arise. They decided that for the children he would represent, he would go ahead and do that anyway. Not jeopardizing the whole business, necessarily, but he guesses jeopardizing to a certain extent. He believes that board members can vote with a clearer conscience when they vote in secret because (and he's not afraid to stand up to any decision he makes) if everybody can make a clear conscientious decision by not having to worry about negative ramifications - that's what we have to think about. The negative ramifications of our children; not what Joe Blow is going to say, but if we were negatively impacted by some 'baby blue eyes' that would try to sway how we vote. Harvey thinks we will vote with a clear conscience if we vote by secret ballot." (See exhibit "E" attached to affidavit of Margaret Witherell)

1999 CanLII 19822 (NL SC)

[54] The opposite viewpoint was expressed at the same meeting by Mr. Marcus Evans:

> "Marcus Evans said he didn't believe the Board should vote by way of secret ballot. He understands the sentiments behind someone wanting them. He has a large amount of sympathy for anyone who feels that the stand they take in volunteer capacity on education, they take it for reasons that are high-minded and it is sad if their business is impacted. He works for a living and the business he works for does business all over the Burin Peninsula. He probably stands to lose as much, by publicly saying how he voted, as anyone else does, but he still doesn't think it's right to vote by way of secret ballot. He said when he ran for the school board, he knew he might have to make controversial decisions. Even though, he had no idea of the scale of the controversy that was going to develop in the last year or so, he still knew that it wouldn't all be roses. He believes that this is all part and parcel of doing something when you're elected by the public. This is not the House of Commons, but at the same time, we have a duty to the people who voted for us to say why and how we think things should work. For these reasons, he disagrees with voting by way of secret ballot and doesn't think we should rescind the motion not to." (See exhibit "E" attached to affidavit of Margaret Witherell)

1999 CanLII 19822 (NL SC)

[55] The motion to rescind was carried and a further motion to proceed by way of secret ballot was also carried.

[56] The relevant sections of the *Schools Act,* 1997 relied upon by the applicants are:

> "68(1) A trustee has a conflict of interest and shall not vote or speak on a matter before the board or a committee of the board where
>
> (a) the trustee or a relative of the trustee has a direct or indirect monetary or other interest in the matter; or
>
> (b) the trustee is an officer, employee or agent of an incorporated or unincorporated company, or other association of persons, that has a direct or indirect monetary or other interest in that matter.

. . . . .

> "(3) For the purpose of subsection (1) a relative of a trustee means a father, mother, spouse, sister, brother, child, stepchild, ward, mother-in-law, father- in-law, sister-in-law or brother-in-law of the trustee.
>
> "(4) In order for an interest to be considered as one falling within the prohibition set out in subsection (1) it shall be an interest distinct from an interest held in common with the electors generally in the district of the board."

1999 CanLII 19822 (NL SC)

[57] The foregoing provision has generally been interpreted and, in my view, reasonably so, to mean that a person in public office should not personally *benefit* by virtue of his/her position of trust. See: *Stewart v. Yorkton* (City) (1982), 16 Sask.R. 258; 18 M.P.L.R. 57 (Q.B.) at p. 59 (Sask. Q.B.). Adams, J., of this court in *Elliott et al. v. Board of Education of Burin Peninsula et al.* (1997), 157 Nfld. & P.E.I.R. 193; 486 A.P.R. 193 (Nfld. T.D.), commented at para. 21 as follows:

> "Therefore, 'other interest' as referred to in s. 68(1) (a) while it does not have to be pecuniary in nature, requires that the interest have some tangible or particular benefit for the trustee who is accused of the conflict or some member of his family as defined in the act."

[58] In *Elliott* the court distinguished other cases because they involved either a direct or indirect pecuniary interest *in favour of the person alleged to be in a conflict of interest.* At para. 24, in so distinguishing, Adams, J., reaffirmed those interpretations suggesting conflict may only arise in situations where a benefit has been bestowed upon the individual alleged to be in conflict as defined by subsection 3 of s. 68.

[59] Mr. Justice Orsborn considered an issue other than financial benefit or gain in *Tracey et al. v. Board of Education of Avalon East* (1998), 164 Nfld. & P.E.I.R. 181; 507 A.P.R. 181 (Nfld. T.D.), in relation to a trustee voting on school closure where the trustee had a child or children attending another school which might have been affected by the outcome on the first vote. Orsborn, J., concluded a conflict of interest would arise if the outcome would have the effect of securing a personal advantage for the trustee's child, namely, the ability to continue attending her own school.

[60] This issue was reviewed in *Moll v. Fisher et al.* (1979), 96 D.L.R.(3d) 506 (Ont. Div. Ct.). In this case two members of a Board of Education were disqualified from participating in deliberations relating to collective agreements with secondary school teachers on the basis their spouses were elementary school teachers also employed by the same board and there existed historical and practical parallels between the contracts negotiated by both secondary and elementary teachers. The court found voting in respect of one contract would be to secure a financial advantage to the spouses by way of increased salary in respect of the second contract.

[61] The three trustees involved in the present fact situation are not from the Northern Zone, that is the Zone in which Jacques Fontaine and St. Bernard Schools are located. They are from the communities of Lawn, Fortune and Marystown. The businesses referenced are located in these areas.

[62] I am satisfied the legislation was principally designed to ensure trustees do not secure a personal advantage, be it monetary or otherwise, by virtue of holding a position on the School Board. The Act is silent on the issue of personal disadvantage or negative consequence that might arise as in the facts before me. If an individual becomes fettered in his or her ability to make an objective and fair decision by virtue of potential negative consequences, he or she ought to abstain from any part in the voting process.

[63] Section 68(1) (a) of the *Act* mandates that a trustee not vote or speak on a matter before the Board where the trustee or a relative has an interest in the matter. In my view to hold that the fact situation before me amounts to a conflict of interest as envisaged by this part of the section, would be to cast upon it an interpretation not borne out by the wording of the legislation. The conflict herein did not arise due to an interest in the matter but rather a fear of repercussions arising out of any decision made.

[64] The trustees believed vote by secret ballot would negate any reprisals to their business thereby enabling them to vote, as stated by Harvey Tulk "with a clear conscience". In this way it would appear they believed vote by secret ballot eliminated the concern of any negative impact to them personally.

1999 CanLII 19822 (NL SC)

[65] On this first point, I conclude fear of negative consequences to business interests held directly or indirectly by the trustees cannot be considered as a "interest in the matter". Accordingly, the applicants' submission on this basis fails. Even if successful, the test for finding conflict of interest does not end there.

[66] It must also be established as set forth in s. 68(4) an interest to be considered as one falling within the prohibition set out in subsection (1) must be an interest distinct from interests held in common with electors generally in the Board district. The respondent submits even in circumstances where tangible benefit ensues to a trustee, or his or her family, the trustee will not be disqualified if that benefit is enjoyed by the electors in the district generally. While acknowledging juris prudence holds conflict of interest provisions must be given a broad and liberal interpretation, the respondent argues it must, nevertheless, remain workable. It notes Mr. Justice Dymond's reasoning in *Baker* on this point wherein he concluded to deny Allen and Elliott to vote would be to frustrate the intention of the Legislature to encourage people to seek election on various boards. Had the conflict of interest provisions been held applicable, Dymond, J., concludes at p. 39, para. 92:

> "In the present case the legislation, if interpreted to allow for interest to include trustees with children attending school up for closing would also include all the other people listed in the definition in sub-section (3) of s. 68. In smaller communities this would pretty well exclude everybody who was interested in serving on the School Board."

He then adopts the approach utilized by Adams, J., in *Elliott* in looking at the intent of the legislation on "other interests" and equating it to something akin to pecuniary interests.

[67] More comparable to the present situation is *Stewart v. Yorkton (City)* (1982), 16 Sask.R. 258; 18 M.P.L.R. 57 (Q.B.), where a mayor (and manager of T. Eaton and Co.), and a councillor, and shareholder, and officer of a local shoe store, were not considered to be in a conflict of interest when they voted on a bylaw regulating the hours of opening of shops in the city. The court stated at pp. 60-61:

> "The interest which Mayor Wytrykush and Councillor Hodgson

1999 CanLII 19822 (NL SC)

possessed in the bylaw is one they had in common with all other managers and owners of businesses in Yorkton governed by the bylaw. It was the same kind of interest although it might have differed in degree.

"The question, therefore, arises: did an interest held in common of the same kind but different in degree, with a segment of the residents of a municipality as opposed to all residents of the municipality, entitle the mayor and the councillor to vote on the bylaw?

"The answer to the question is 'yes'. In *Elliott v. St. Catherines* (1908), 18 O.L.R. 57 (C.A.) Meredith, C.J., said at p. 61:

> 'The community of interest spoken of I understand to be a community in the kind, not in the degree, of the interest.
>
> . . . . .
>
> 'I see no reason for differing from the view taken in the *McLean* case. As I view it, the principle upon which the rule is founded is the same whether the bylaw is one affecting all the rate payers of the municipality or only those within a section of it.'"

[68] A trustee's interest may differ in degree but so long as the interest is the same in kind as other electors in the district, the trustee will not be in a conflict of interest. I conclude individuals owning businesses, doing business, or having a spouse doing business in the Board district, hold an interest in common, generally, with all similar business people in the area. Having so concluded I find the interest of these trustees not sufficiently distinct from the interest of like individuals in the district of the Board so as to permit it to fall within the prohibition found in subsection 1 of s. 68 of the *Schools Act.*

[69] I would note the applicant in mounting this argument did not ask that the individuals be removed from the Board pointing out there was no mala fide on their part.

[70] In summary, I find firstly, the interest of the three trustees in their family businesses does not represent "interest in the matter" as set forth in s.

1999 CanLII 19822 (NL SC)

68(1)(a). Secondly, the interest of the three trustees is sufficiently broad that it may be viewed as one held in common with electors generally and the test required by s. 68(4) has not been met.

Remedies

[71] At my request, counsel provided authority pertaining to the court's discretion in granting extraordinary remedies such as that requested here. Although I am satisfied the grounds have not been made out on the application, I feel it appropriate to address the issue of the remedy requested should I be in error in my decision.

[72] Counsel for the applicant pointed to three possible situations where judicial discretion may be refused in granting an order for certiorari. First, where an appeal would be a more appropriate and effective remedy. Second, where the conduct or motivation of the applicant provides a basis for the discretionary denial of relief. Third, where to quash the decision will serve no useful purpose, or where there has been a procedural technical defect which overall is not significant enough to have likely altered the outcome of the proceeding. Two other areas appear to enter into the discussion on the discretion permitted in respect of extraordinary remedies, one being whether or not a real and substantial prejudice has been shown by virtue of the manner in which the matter has been conducted, the other considerations of the general public interest.

[73] Counsel advise the School Board has appealed the August 13th decision of Mr. Justice Dymond and the parents have filed a cross-appeal in the matter. This appeal has yet to be heard. The applicant argues there is no certainty that the appeal will proceed to hearing. S.A. de Smith in *Judicial Review of Administrative Action* (3rd Ed. 1973), at pp. 375 and 376 discusses the effect of appeal on judicial discretion to quash a tribunal decision as follows:

> "An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy[90] or to have

[90] *R. v. Postmaster-General, ex p. Carmichael* [1928] 1 K.B. 291; *R. v. Spalding* [1955] 5 D.L.R. 374; *R. v. Paddington Valuation Officer, ex p. Peachey Property Corpn. Ltd.* [1966] 1 Q.B. 380. See also pp. 131, 133, ante.

1999 CanLII 19822 (NL SC)

exercised any right of appeal to a court of law[91]; but it is not the practice of the court to exercise its discretion in favour of an applicant if he has already lodged an appeal to a court against the decision and the appeal is pending.[92] If an order is subject to appeal within a specified period, the court has a discretion to adjourn an application for certiorari to quash it until the appeal has been determined or the time for appealing has expired.[93]

"On the principles that ought to regulate the exercise of judicial discretion when alternative remedies are available there is not a great deal of English authority, but it is thought that the following propositions are acceptable:

(i) The court must be prepared to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and the conduct of the applicant.

(ii) If an applicant claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, the fact that he has not taken advantage of a statutory right of appeal should normally be regarded as irrelevant.[94]

(iii) If an applicant claims to be aggrieved by a decision exhibiting an

1999 CanLII 19822 (NL SC)

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[91] *R. v. Wandsworth Jj., ex p. Read* [1942] 1 K.B. 281. In *R. v. Jones (Gwyn)* [1969] 2 Q.B. 33 the Court of Appeal (Criminal Division) actually dismissed an appeal against sentence on the ground that the sentence was a nullity and that the only appropriate remedies were prohibition or certiorari. But an appeal against a void decision is not a contradiction in terms (see p. 133, ante). For cases where courts have treated an appeal as an application for certiorari, the latter being the more appropriate remedy, see p. 357, note 57, ante.

[92] *R. v. Pereira* [1949] W.N. 96; *R. v. Thomas* (1901) 18 T.L.R. 71; *R. v. Barnes, ex p. Vernon* (1910) 102 L.T. 860; see also *R. v. Hackney B.C., ex p. Teepee Estates (1956) Ltd.* (1968) 19 P. & C.R. 87; but see *McCarthy v. Grant* [1959] N.Z.L.R. 1014.

[93] R.S.C., Ord. 53, r. 2 (2).

[94] See notes 90, 91, ante. In the *Paddington* case (one of alleged quasi-jurisdictional error), the Court of Appeal held that certiorari to quash a valuation list was more appropriate than the prescribed machinery for appeal (to a local valuation court and thence to the Lands Tribunal) because the applicants were attacking the basic validity of the whole valuation list whereas appeals were concerned only with the Tightness or validity of individual assessments).

error of law (not going to jurisdiction) and has a statutory right of appeal to a court, recourse to appeal is the appropriate remedy and he may be refused certiorari for this reason.[95] However, the court retains jurisdiction to award certiorari to quash; and the refusal of certiorari is not the only way of encouraging resort to appeal.

. . . . .

(v) If the application for certiorari is made while an appeal is pending, an award of certiorari may still be justified if the questions to be raised on appeal go to the merits of the case and the application for certiorari is based on jurisdictional grounds or breach of natural justice not going to the merits.[98]

(vi) The court ought not to refuse certiorari because of alternative remedies other than appeal unless it is clearly satisfied that those other remedies are more appropriate.[99]

1999 CanLII 19822 (NL SC)

[74] The foregoing discussion anticipates an appeal in respect of the order for which certiorari is sought. In the present case the applicants seek a quashing of a decision of the School Board not under appeal. However, clearly, issues under appeal pertaining to Mr. Justice Dymond's decision must be decided before the respondent can proceed further in the closure process. The most notable of these issues is whether or not Elliot and Allen

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[95] As in *Re Wilfong* (1962) 32 D.L.R.(2d) 477. See also p. 355, ante.

[98] *McCarthy v. Grant* [1959] N.Z.L.R. 1014; *R. v. Alberta Law Society, ex p. Demco* (1967) 64 D.L.R.(2d) 140 (both turning on unusual facts). Contrast *R. v. Hackney B.C., ex p. Teepee Estates (1956) Ltd.* (1968) 19 P. & C.R. 87 (certiorari refused. Questions could have been raised on appeal).

[99] Recent cases in which certiorari was granted because it was more convenient and beneficial than alternative remedies include *R. v. Patents Appeal Tribunal, ex p. Geigy (J.R.) S.A.* [1963] 2 Q.B. 728 (possibility of action for damages if patent subsequently infringed; contrast *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C.663, 696, per Lord Denning) ; *Re Northern Ontario Natural Gas Co. And La Rocque* (1959) 18 D.L.R.(2d) 73 (compensation for invalid expropriation); *R. v. Town Planning Committee, ex p. Skye Estate Ltd.* [1958] S.A.S.R. 1 (provision for parliamentary review; see also the *Electricity Commissioners* case). In *R. v. Brighton Jj., ex p. Robinson* [1973] 1 W.L.R. 69, certiorari to quash a conviction was granted but the court warned that in future cases where defendants had not been notified of criminal proceedings they might be refused certiorari because of the more effective remedy provided by the *Criminal Justice Act 1967, s. 24(3)."*

were in conflict-of-interest positions, the result of which they should have abstained from voting. There are now two lines of thinking in this court that as reflected in Mr. Justice Dymond's decision, and the contrary position referenced by Mr. Justice Orsborn in *Tracey.* Until this issue is resolved at the appeal level, no decisions can be made upon which reliance can be placed.

[75] The second area identified by the applicants allowing for exercise of some discretion in the awarding of the remedy requested herein is where the applicants' conduct has disentitled them to relief. In *Administrative Law* (3rd Ed. 1996), Mullan, at p. 528, Topic 683, states:

> "The conduct or the motivation of the applicant for judicial review provides a basis for the discretionary denial of relief if, for example, the applicant's only motivation is to frustrate or obstruct the administrative process, he or she has not dealt in good faith with the decision-maker or the other side[1] or the applicant's claim to judicial review is technically impeccable but is established only by acting in such a way as to circumvent the spirit and intention of the relevant legislation.[2] It is, however, questionable whether the applicant's flouting of a decision by operating a business[3] or erecting a building[4] after a wrongful denial of a licence or permit amounts to misconduct sufficient to justify a denial of relief.

[76] It cannot be said that the applicants herein intentionally tried to frustrate or obstruct the administrative process, or in any way acted in bad faith. They did, by choice, not make submissions at the August 28th public meeting, but I do not believe such actions would have allowed for a denial of the remedy requested by them. Rather, they go to the issue of whether the applicants have been treated with procedural fairness in the circumstances.

[77] The third area of consideration in denial of remedy is where a quashing of the School Board's decision will serve no useful purpose, or

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[1] *Homex Realty & Development Co. v. Wyoming (Village),* (1980) 2S.C.R. 1011; *Cock v. British Columbia (Labour Relations Board)* (1960), 26 D.L.R.(2d) 127 (B.C.C.A.)
[2] *Homex Realty & Development Co. v. Wyoming (Village),* ante.
[3] *Tomaro v. Vanier (City)* (1978), 89 D.L.R.(3d) 265 (Ont. C.A.).
[4] *Slau Ltd. v. Ottawa (City),* (1976), 74 D.L.R.(3d) 181 (Ont. Div. Ct.)"

1999 CanLII 19822 (NL SC)

where there has been a procedural technical defect which over all is not significant enough to have likely altered the outcome of the proceeding. As stated by Jones and de Villars in *Principles of Administrative Law* (2nd Ed. 1994), p. 491, subparagraph (d):

> "... Minor procedural irregularities which in fact or which in all likelihood had no effect on the ultimate decision had been ignored by the courts.[114]

[78] There are two areas that one might find, although I have not, are of technical irregularity. They are:

> 1. First, the School Board changed its procedure by reducing the time frame for submission from sixty to thirty days; and
>
> 2. Second, the failure to provide the January Program Specialists Report to the parents amounted to a procedural irregularity and was, if not directly required, at least in spirit required by the decision of Dymond, J., and/or this document ought to have been provided to the trustees thirty days prior to any Board meeting on closure of Jacques Fontaine All Grade School.

As to the former, I am of the view that no evidence was provided whereby I could conclude that the shortened time frame prejudiced the parents in any real or substantial way. As to the latter, I am of the view that such technical defect would not have likely resulted in any change of the Board's decision. All of the trustees had this information available to them on or before the August 31st meeting. Armed with this information the Board arrived at its decision. Many, if not all, of the trustees were aware, at the time of the meeting, that this particular document was of concern to the parents and that it was felt that all trustees should have it on or before the vote.

[79] The legal effect of a failure to provide a report favourable to the

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[114] *Pringle v. Victoria*. (1951) 3 W.W.R. (N.S.) 570 (B.C.S.C.); *Invictus Ltd. V. Man. Lab. Bd.,* (1967) 62 W.W.R. 150 (Man. Q.B.); *R. v. Bd. Of Broadcast Gov.; Ex parte Swift Current Telecasting Co.,* [1962] O.R. 657 (C.A.) See also *Fort McMurray v. Duperron,* (1989) 68 Alta. L.R.(2d) 427;74 Alta. L.R.(2d) 420 (C.A.) Where the court held there was no substantial miscarriage of justice and denied the relief. See rule 753.07."

1999 CanLII 19822 (NL SC)

parents was considered by Halley, J., in *Benoit et al. v. School Board for District # 5 Baie Verte, Central, Connaigre* (August 18, 1999), 1999 G.F. 72 - Unreported (Nfld. S.C.T.D.) at paras. 43 and 44:

> "Failure to act in a procedurally fair manner does not always result in an order in the nature of Certiorari. Such a remedy is discretionary. In *P.P.G. Industries Canada Limited v. Attorney General of Canada* (1975), [1976] 2 S.C.R. 739 the Supreme Court of Canada exercised its discretion to deny Certiorari to an applicant that was entitled in law to such an order.
>
> "One of the grounds upon which a judge may decline to exercise that discretion is where there is a 'lack of utility' in the grant of the remedy (see *Administrative Law* (3rd ed.) by Evans at page 1053). In this case the Consultant's report was favourable to the position of the applicants. I find that the applicants were not negatively affected by the Board's consideration of the report. In these circumstances I find that there would be a 'lack of utility' in the grant of an order in the nature of Certiorari."

1999 CanLII 19822 (NL SC)

[80] It must be remembered in the present case that the January Program Specialists Report is referred to in the later Consultant's Report and further, that the Consultant's Report, like the former Report, and considered by the Board in arriving at its final conclusion, preferred Jacques Fontaine All Grade School over St. Bernard's School. The issue was squarely on the table before the Board and highlighted through the decision of Dymond, J., on August 31, 1999.

[81] Finally, I note in Mullan, *Administrative Law* (Third Edition) at p. 529, Topic 685, entitled Balance of Convenience and Public Interest considerations that I consider to be very relevant to the facts before me:

> "Despite the applicant making a case for relief on the merits, the courts may deny a remedy due to considerations of the general public interest.[1] The limits of the courts' jurisdiction to refuse relief on this

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[1] *Central Canada Potash Co. v. Minister of Mineral Resources (Saskatchewan)* (1972), 32 D.L.R.(3d) 107 (Sask. C.A.); affirmed (1973), 38 D.L.R.(3d) 317 (S.C.C.) (disruption of potash industry from illegal refusal of licence); *Berg v. British Columbia (Attorney General)*

basis are both unclear and controversial. Significantly, the court may invoke a provision entitling it to refuse relief for a defect in form or a technical irregularity which does not cause a substantial wrong or miscarriage of justice.[2] Provisions of that type are found in several reformed remedial regimes[3] and probably reflect the common law rather than legislative innovation. The court generally evaluates the impact of the error on the applicant's rights and interests and the presence of any other discretionary considerations, such as the motivations of the applicant and the utility of granting relief.[4] Arguments directed simply to cost and administrative expediency do not govern, especially if the error impinges upon important individual rights and interests[5], though considerations of administrative chaos resulting from the grant of relief are relevant if duties owed to the public at large are in issue.[6]

1999 CanLII 19822 (NL SC)

[82] The respondent proceeded with a further meeting in anticipation of Mr. Justice Dymond's decision. Having obtained counsel's advice, it was of the view that it could proceed and was doing so in a procedurally fair manner. The Board had focused on the primary issues raised before Mr. Justice Dymond and presumably embarked on its course of action with a view to finalizing the matter as expeditiously as possible and with financial considerations designed to benefit all students in the region and the Northern

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(1991), 48 Admin. L.R. 82 (B.C.S.C.) (grave danger of beetle infestation; proper notice of pesticide programme not given); *Mossman v. Nova Scotia (Attorney General)* (1995), 32 Admin. L.R. 109 (N.S.S.C.) (designation of beach by order-in-council made in violation of procedural fairness; declaration of invalidity stayed because of public interest in preserving beaches).

[2] *British Columbia Judicial Review Procedure Act, s. 9 ; Berg v. British Columbia (Attorney General)*, ante.

[3] *Alberta Rules of Court*, R. 753.07 [en. Alta. Reg. 457/87, s. 3]; *Ontario Judicial Review Procedure Act, s. 3; Prince Edward Island Judicial Review Act, s. 6; Federal Court Act*, s. 18.1(5) [en. 1990, c.8, s.5].

[4] *Berg v. British Columbia (Attorney General)*, ante (impact on plaintiffs' interests minimal; plaintiffs in fact heard); *Smythe v. Anderson* (1970), 11 D.L.R (3d) 503 (Sask. C.A.) (doubts on applicants' motivations, cost of holding legally-required meeting and apparent lack of urgency).

[5] *Padda v. Canada (Minister of Employment & Immigration)* (1988), 20 F.T.R. 180 (refusing to dismiss action; hundreds of other convention refugees in same position as applicant).

[6] *Apotex Inc. v. Canada (Attorney General)* (1993), 18 Admin. L.R.(2d) 122 (Fed. C.A.); affirmed (1995), 29 Admin L.R.(2d) 1 (S.C.C.) (Court of Appeal judgment containing comprehensive review of authorities)."

Zone in the future. There is, as I have said, no evidence of mala fide on the Board's part. The most that can be said is that it may have acted with some haste in the matter.

[83] I reject the applicants' argument that little inconvenience would be caused, at this stage, were I to quash the Board's decision. This decision does not simply affect the students of Jacques Fontaine All Grade School. As argued by counsel for the intervenors, it will have a serious affect on children and parents of St. Bernard's All Grade School, as well as children in the Rushoon area. The public interest served by decisions of the Board is not confined solely to the Northern Zone, but to all of the schools and children, and programming provided to them, under the authority of the respondent.

[84] I have concluded that if defects existed in the present case, they were merely technical in nature and not substantive enough to have likely caused a change in the decision of the Board as rendered August 31, 1999. I believe were I to quash the Board's decision, it would result in serious public inconvenience and impact negatively, most particularly on the children in the Northern Zone, but also indirectly on children in other areas.

[85] Having reflected on the evolution of this matter, and where it is at today's date, I do not believe it would have been appropriate to quash the Board's decision of August 31, 1999.

Disposition

[86] For all of the foregoing reasons, the application is hereby denied. Application dismissed.

1999 CanLII 19822 (NL SC)

Tab 5

1975 CanLII 164 (SCC)

Baxter Student Housing Ltd. and R. C. Baxter Ltd. (*Defendants*) *Appellants*;

and

College Housing Co-operative Limited and College Housing Holdings Incorporated (*Plaintiffs*) *Respondents*.

1975: May 12; 1975: June 26.

Present: Martland, Judson, Spence, Pigeon and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mechanics' liens—Appointment of receiver to draw upon and borrow undrawn balance of proceeds under a mortgage—Whether judge exceeded jurisdiction in ordering that mortgagee, in respect of any moneys advanced by mortgagee to receiver, should have priority over any other registered or unregistered charges or encumbrances—The Mechanics' Liens Act, R.S.M. 1970, c. M80, s. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, s. 59.

The respondent housing co-operative and the respondent holding company (both non-profit corporations, without funds) entered into a contractual relationship with the appellants whereby, *inter alia*, the first appellant was to construct a student housing project. Title to the project was in the name of the holding company; the housing co-operative was to be the head tenant; the second appellant was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/73 a moisture problem developed in the building, which recurred during the winter of 1973/74, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building sought advice of experts who recommended remedial measures, the estimated cost of which amounted to $135,000. The contractor refused to authorize that the work be done at its expense. Proceedings subsequently commenced between the parties but little progress was made.

The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation first mortgage in the principal amount of $1,988,831, all of which had been advanced except for a holdback of $228,897, and from a second mortage in the amount of $220,959, all of which had been advanced. On June 22, 1973, the contractor caused a mechanics' lien to be filed against the

Baxter Student Housing Ltd. et R. C. Baxter Ltd. (*Défenderesses*) *Appelantes*;

et

College Housing Co-operative Limited et College Housing Holdings Incorporated (*Demanderesses*) *Intimées*.

1975: le 12 mai; 1975: le 26 juin.

Présents: Les juges Martland, Judson, Spence, Pigeon et Dickson.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Privilège de constructeur—Nomination d'un séquestre pour effectuer des retraits et emprunts sur le solde non versé d'une hypothèque—Le juge a-t-il outrepassé ses pouvoirs en ordonnant que, pour toutes les avances faites par le créancier hypothécaire au séquestre, le créancier hypothécaire ait priorité sur toutes les autres charges, enregistrée ou non—The Mechanic's Liens Act. R.S.M. 1970, c. M80, art. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, art. 59.

La coopérative intimée et la société de portefeuille intimée (toutes deux des sociétés sans but lucratif et sans actif) ont conclu un contrat par lequel, entre autres choses, la première appelante devait construire un immeuble destiné à loger des étudiants. La société de portefeuille en était propriétaire, la coopérative en était locataire principal et la seconde appelante devait en être le gérant. Vers la fin de l'été 1972, la construction étant presque achevée, les premiers locataires s'installent dans l'immeuble. Au cours de l'hiver 1972-73, des problèmes d'humidité surviennent; ils se reproduisent pendant l'hiver 1973-74 avec accumulation d'eau, de glace et de moisissure dans certains appartements. La propriétaire consulte des experts qui recommandent, pour remédier aux difficultés, des travaux dont le coût est évalué à $135,000. L'entrepreneur a refusé de consentir que les travaux soient effectués à ses frais. Des procédures ont par la suite été instituées entre les parties mais elles ne sont guère avancées.

Le coût de construction de l'immeuble, soit $2,209,-790, devait être payé avec une première hypothèque de $1,988,831 consentie par la Société centrale d'hypothèques et de logement (SCHL), dont $228,897 n'avaient pas encore été versés, et une seconde hypothèque de $220,959, dont le montant avait été versé en entier. Le 22 juin 1973, l'entrepreneur a fait enregistrer sur les

1975 CanLII 164 (SCC)

property in the amount of $310,440, claimed to be due to it under the contract.

In the summer of 1974, the owner of the property applied to a Queen's Bench judge in chambers for an order appointing a receiver of the balance of the proceeds of the C.M.H.C. mortgage. The order was granted and contained a provision that any moneys paid by the mortgagee "shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands." An appeal was dismissed by the Court of Appeal, and the appellants, with leave, then appealed to this Court. The question to be decided was whether the judge exceeded his jurisdiction in making the said order.

Held: The appeal should be allowed and the application for the order dismissed.

The appointment of the receiver was wrong in law because the provision ordering that any moneys paid by C.M.H.C. to the receiver would have priority over any other registered or unregistered charges or encumbrances ran contrary to s. 11(1) of *The Mechanics' Liens Act*, R.S.M. 1970, c. M80. Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. The inherent jurisdiction of the Court of Queen's Bench, under s. 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of this order was to alter the statutory priorities which a court simply cannot do.

Boake v. Guild, [1932] O.R. 617, aff'd. [1934] S.C.R. 10, *sub nom. Carrel v. Hart*; *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*, [1958] S.C.R. 361; *Montreal Trust Co. et al. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1972] 1 W.W.R. 651, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from an order of Nitikman J. appointing a receiver. Appeal allowed.

[1] [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.

biens-fonds un privilège de constructeur pour un montant de $310,440, dû, selon lui, en vertu du contrat.

A l'été 1974, la propriétaire a adressé une requête à un juge en chambre de la Cour du Banc de la Reine demandant que soit nommé un séquestre du solde du prêt hypothécaire consenti par la SCHL. Il a été fait droit à la requête. L'ordonnance contenait une disposition portant que tous les fonds avancés par le créancier hypothécaire [TRADUCTION] «dès leur versement au séquestre, auront priorité sur toutes les autres charges, enregistrées ou non, grevant lesdits biens-fonds.» Un appel interjeté devant la Cour d'appel a été rejeté par celle-ci, et les appelantes, autorisées à cet effet, ont ensuite interjeté un pourvoi devant cette Cour. Il s'agit de décider si le juge a outrepassé ses pouvoirs en rendant ladite ordonnance.

Arrêt: Le pourvoi doit être accueilli et la requête visant à faire nommer un séquestre rejetée.

Le juge a commis une erreur de droit en nommant un séquestre parce que la disposition portant que les sommes versées au séquestre par la SCHL auraient priorité sur toutes les autres charges, enregistrées ou non, va à l'encontre du par. (1) de l'art. 11 du *Mechanics' Liens Act* du Manitoba, R.S.M. 1970, c. M80. Le paragraphe (1) de l'art. 11 va très loin pour assurer qu'une fois que le créancier a protégé ses droits en enregistrant un privilège conformément aux dispositions de la Loi, celui-ci devienne une charge prioritaire qui ne saurait être supplantée ou entamée d'aucune façon. La compétence inhérente de la Cour du Banc de la Reine, en vertu de l'art. 59 du *Queen's Bench Act*, R.S.M. 1970, c. C280, n'autorise pas ses juges à rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée du législateur. L'ordonnance rendue en l'espèce vise à modifier l'ordre des privilèges fixé par la Loi, ce qu'un tribunal ne peut simplement pas faire.

Arrêts mentionnés: *Boake v. Guild*, [1932] O.R. 617, confirmé à [1934] R.C.S. 10, *sub nom. Carrel c. Hart*; *Earl F. Wakefield Co. c. Oil City Petroleums (Leduc) Ltd. et autre*, [1958] R.C.S. 361; *Montreal Trust Co. et al. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1972] 1 W.W.R. 651.

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1], rejetant un appel interjeté d'une ordonnance du juge Nitikman nommant un séquestre. Pourvoi accueilli.

[1] [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.

1975 CanLII 164 (SCC)

K. B. Foster and *C. R. MacArthur*, for the defendants, appellants.

K. G. Houston, for the plaintiffs, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is an appeal from a judgment of the Court of Appeal for Manitoba affirming an order of Nitikman J. appointing a receiver to draw upon and borrow the undrawn balance of proceeds under a mortgage. The question to be decided is whether the judge exceeded his jurisdiction in ordering that the mortgagee, in respect of any moneys advanced by the mortgagee to the receiver, should have priority over other charges or encumbrances registered or unregistered affecting the lands.

The facts are unusual. In late 1971 College Housing Co-operative Limited (the Housing Co-operative) and College Housing Holdings Incorporated (the Holding Company) entered into contractual relationship whereby *inter alia* Baxter Student Housing Ltd. (Baxter Housing) was to construct on a "turnkey" basis a four-storey, 192-suite apartment building, known as "Dalhousie Drive Project", to provide housing for students at the University of Manitoba. Title to the project was in the name of the Holding Company; the Housing Co-operative, a students' co-operative, was to be the head tenant; R.C. Baxter Ltd. (R. C. Baxter) was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/1973 a moisture problem developed in the building, which recurred during the winter of 1973/1974, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building, the Housing Co-operative, sought advice of experts who recommended certain remedial measures, the estimated cost of which amounted to $135,000. Baxter Housing refused to authorize that the work be done at its expense. Two questions therefore became crucial (i) who would pay for the remedial work and (ii) where would the money come from. On point (i) I should say that in September 1973 the Housing Co-operative and the Holding Com-

K. B. Foster et *C. R. MacArthur*, pour les défenderesses, appelantes.

K. G. Houston, pour les demanderesses, intimées.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Le pourvoi est à l'encontre d'un arrêt de la Cour d'appel du Manitoba, qui confirme une ordonnance du juge Nitikman nommant un séquestre pour effectuer des retraits et emprunts sur le solde non versé d'une hypothèque. Il faut décider si le juge a outrepasssé ses pouvoirs en ordonnant que, pour toutes les avances faites au séquestre, le créancier hypothécaire ait priorité sur les autres charges, enregistrées ou non, qui grèvent les biens-fonds hypothéqués.

Les faits sortent de l'ordinaire. A la fin de 1971, College Housing Co-operative Limited (la coopérative) conclut avec College Holdings Incorporated (la société de portefeuille) un contrat par lequel, entre autres choses, Baxter Student Housing Ltd. (Baxter Housing) doit construire, et livrer prêt à habiter, un immeuble de quatre étages, désigné sous le nom de *Dalhousie Drive Project*. L'édifice comprend 192 appartements destinés à loger des étudiants de l'université du Manitoba. La société de portefeuille en est propriétaire, la coopérative formée d'étudiants est locataire principale et R.C. Baxter Ltd. (R.C. Baxter), gérant. Vers la fin de l'été 1972, la construction étant presque achevée, les premiers locataires s'installent dans l'immeuble. Au cours de l'hiver 1972-1973, des problèmes d'humidité surviennent; ils se reproduisent pendant l'hiver 1973-1974 avec accumulation d'eau, de glace et de moisissure dans certains appartements. La propriétaire et la coopérative consultent des experts qui recommandent pour remédier aux difficultés, des travaux dont le coût est évalué à $135,000. Baxter Housing refuse de consentir que les travaux soient effectués à ses frais. Deux questions cruciales se sont alors posées: 1) qui paiera le coût des travaux? 2) où prendra-t-on l'argent? Quant à la première question, je dois signaler qu'en septembre 1973 la coopérative et la société de portefeuille ont intenté une action contre Baxter Housing et R.C. Baxter: elles y réclament des

1975 CanLII 164 (SCC)

pany issued a statement of claim against Baxter Housing and R. C. Baxter seeking damages and other relief to which the defendants responded with a counterclaim for $310,440 for balance of construction cost and the defence, in brief, that the project had been completed in accordance with the plans and specifications in a good and workmanlike manner. Those proceedings have not yet been litigated and little progress has been made. The facts material on point (ii) I take to be the following. The Housing Co-operative and the Holding Company are non-profit corporations, without funds. The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation (C.M.H.C.) first mortgage in the principal amount of $1,988,831, all of which has been advanced except for a holdback of $228,897, and from a second mortgage in the principal amount of $220,959, all of which has been advanced. On June 22, 1973, Baxter Housing caused a mechanics' lien to be filed against the property in the amount of $310,440 claimed to be due to it under the contract.

In the summer of 1974, almost a year ago, the plaintiff owner of the property moved before Nitikman J. for an order appointing W. E. Shields or some other fit and proper person as receiver of the balance of the proceeds of the C.M.H.C. mortgage. The notice of motion referred to (i) the dispute between the parties as to the adequacy of the design and construction of the student housing project, (ii) the recommendations of the experts, (iii) the likelihood that if the repairs were not carried out forthwith there was every probability they would not be able to be done before freeze-up, with the result the project would suffer another winter with the moisture problem in the suites with an anticipated loss of goodwill and an increased vacancy rate, (iv) the filing by the defendants of the mechanics' lien and (v) the refusal by C.M.H.C., by reason of the lien, to advance further moneys under the mortgage. Affidavits were filed in support of the motion and the affiants cross-examined, following which Nitikman J. made the order called into question in these proceedings. That order contained the following provision, inserted no doubt in the hope that C.M.H.C.,

dommages-intérêts et d'autres redressements. Les défenderesses ont répondu par une demande reconventionnelle de $310,440 pour le solde à payer sur le coût de la construction et invoqué comme moyen de défense, en résumé, que le projet avait été réalisé conformément aux plans et devis et selon les règles de l'article. Ces procédures n'ont pas encore été entendues par les tribunaux et elles ne sont guère avancées. A l'égard de la deuxième question les faits pertinents sont, à ce qu'il me semble, les suivants. La coopérative et la société de portefeuille sont des sociétés sans but lucratif et sans actif. Le coût de construction de l'immeuble, soit $2,209,790, devrait être payé avec une première hypothèque de $1,988,831 consentie par la Société centrale d'hypothèques et de logement (SCHL), dont $228,897 n'ont pas encore été versés, et une seconde hypothèque de $220,959 dont le montant a été versé en entier. Le 22 juin 1973, Baxter Housing a fait enregistrer sur les biens-fonds un privilège de constructeur pour un montant de $310,440 dû, selon elle, en vertu du contrat.

A l'été 1974, soit il y a environ un an, la propriétaire demanderesse adressa une requête au juge Nitikman demandant que W. E. Shields ou une autre personne habilitée soit nommé séquestre du solde du prêt hypothécaire consenti par la SCHL. L'avis de requête relate: 1) le litige entre les parties sur la suffisance des plans et de la construction de l'immeuble destiné aux étudiants; 2) les recommandations des experts; 3) le fait que si les réparations ne sont pas effectuées sur le champ, elles ne pourront pas l'être avant le gel et, en conséquence, les appartements subiront de nouveau à l'hiver la même humidité, ce qui entraînera une perte de clientèle et un taux d'inoccupation accru; 4) l'enregistrement du privilège de constructeur par les défenderesses; 5) le refus de la SCHL d'avancer d'autres fonds sur l'hypothèque à cause du privilège. Des déclarations sous serment furent présentées à l'appui de la requête et les déclarants furent contre-interrogés; après quoi, le juge Nitikman rendit l'ordonnance qui fait l'objet du présent litige. Cette ordonnance contient la disposition suivante, introduite sans aucun doute avec l'espoir que la SCHL, ainsi rassurée, versera le montant

1975 CanLII 164 (SCC)

relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:

2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage & Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.

Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of *The Mechanics' Liens Act* of Manitoba, R.S.M. 1970, c. M80, reading:

11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.

Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See *Boake v. Guild*[2], and Rand J. in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*[3], at p. 364. Section 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of *The Mechanics' Liens*

[2] [1932] O.R. 617, aff'd, [1934] S.C.R. *sub nom. Carrel v. Hart.*

[3] [1958] S.C.R. 361.

retenu en garantie nonobstant l'enregistrement du privilège de constructeur:

[TRADUCTION] 2. ET IL EST DE PLUS STATUÉ que tous les fonds avancés par ladite Société centrale d'hypothèques et de logement, dès leur versement au séquestre, auront priorité sur toutes les autres charges, enregistrées ou non, grevant lesdits biens-fonds.

Le savant juge en chambre a-t-il outrepassé ses pouvoirs en rendant cette ordonnance? Pour opportune et souhaitable que soit la désignation d'un séquestre comme moyen de puiser à la seule source de financement disponible et d'éviter l'impasse, je suis d'avis que le juge n'avait pas en droit de bons motifs de faire cette nomination. Il a commis une erreur de droit, parce que la clause 2 précitée va à l'encontre du par. (1) de l'art. 11 du *Mechanics' Liens Act* du Manitoba, R.S.M. 1970, c. M80, qui prévoit:

[TRADUCTION] 11(1) Le privilège créé par cette loi a priorité sur tous jugements, exécutions, cessions, saisies, saisies-arrêts et ordonnances de mise sous séquestre postérieurs à sa naissance, et sur tous versements ou avances de fonds à valoir sur un montant payable en vertu d'un transfert ou d'une hypothèque, après qu'avis écrit du privilège a été donné à la personne effectuant ces versements ou avances ou que le privilège a été enregistré selon les modalités prévues ci-après.

Le paragraphe (1) de l'art. 11 va très loin pour assurer qu'une fois que le créancier a protégé ses droits en enregistrant un privilège conformément aux dispositions de la Loi, celui-ci devienne une charge prioritaire qui ne saurait être supplantée ou entamée d'aucune façon. Voir *Boake v. Guild*[2] et le juge Rand dans *Earl F. Wakefield Co. c. Oil City Petroleums (Leduc) Ltd. et al.*[3], à la p. 364. Il convient de noter que l'art. 59 du *Queen's Bench Act*, R.S.M. 1970, c. C280, donne à la Cour le pouvoir de nommer un séquestre [TRADUCTION] «dans tous les cas où la Cour estime juste et utile de le faire» et prévoit en outre que [TRADUCTION] «une telle ordonnance peut être rendue soit inconditionnellement soit selon les modalités que la Cour juge appropriées». Cela ne peut toutefois être

[2] [1932] O.R. 617, confirmé [1934] R.C.S. 10 sous le nom *Carrel c. Hart.*

[3] [1958] R.C.S. 361.

1975 CanLII 164 (SCC)

Act, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.

In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas J.A. *per curiam* said:

> In any event, I am of the opinion that sec. 11(1), *supra*, cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited*, [1971] 4 W.W.R. 542 at p. 546 *et seq.*) In my view, the order appealed from is not in conflict with *The Mechanics' Liens Act, supra*, and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

utile au propriétaire, parce que l'art. 11 du *Mechanics' Liens Act*, donne, explicitement, priorité à un privilège établi en vertu de la Loi sur toutes ordonnances de séquestre émises après sa création. La question de savoir si l'ordonnance de séquestre en l'espèce en est une de même nature que celle visée au par. (1) de l'art. 11 est sans intérêt parce que, même si la réponse favorisait la validité de la nomination, les derniers mots de l'alinéa donnent, sans équivoque, priorité au privilège de constructeur sur tous versements ou avances à valoir sur un montant payable en vertu d'une hypothèque. On ne peut se soustraite à la première partie de l'alinéa sans se faire enfourcher par la seconde, Me Houston, l'avocat de la propriétaire, en convient.

A mon avis, la compétence inhérente de la Cour du Banc de la Reine n'autorise pas ses juges à rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée du législateur. L'ordonnance rendue en l'occurrence vise à modifier l'ordre des privilèges fixé par la loi, ce qu'un tribunal ne peut simplement pas faire.

Le juge Matas de la Cour d'appel a dit pour elle:

> [TRADUCTION] De toute façon, je suis d'avis que le par. (1) de l'art. 11 ci-dessus ne saurait être interprété, dans les circonstances présentes, de façon à détruire la compétence de la Cour du Banc de la Reine de nommer un séquestre nanti des pouvoirs nécessaires à l'exécution de son mandat. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited* [1971] 4 W.W.R. 542 aux pp. 546 et suiv.) Selon moi, l'ordonnance qui fait l'objet de l'appel ne vient pas en conflit avec le *Mechanics' Liens Act* ci-dessus et est conforme à son objectif.

L'arrêt *Montreal Trust Company et al v. Churchill Forest Industries (Manitoba) Limited* peut fort bien être cité comme illustration du pouvoir discrétionnaire, mais le juge en chef Freedman, parlant au nom de tous ses collègues, y a pris la précaution de dire à la p. 547:

> [TRADUCTION] La compétence inhérente ne peut évidemment pas être exercée de façon à venir en conflit avec une loi ou un règlement. De plus, comme il s'agit d'un pouvoir spécial et extraordinaire, il ne doit s'exercer qu'avec circonspection et dans des cas bien clairs.

1975 CanLII 164 (SCC)

The case does not stand for the proposition that the Court has a discretion in the application of a statutory imperative, such as that residing in s. 11(1) of *The Mechanics' Liens Act*, in circumstances of the nature of those upon which Matas J.A. lays emphasis in the following extracts from his judgment:

> In the case at bar the receiver has been given control of the only money available as a means of breaking the stalemate which has been created by filing of the lien. The objective in having a receiver appointed was not to prevent dissipation of the fund, but to utilize the fund as a sensible and practical way of getting the necessary work done.
>
> . . .
>
> There is ample evidence to support a finding that if plaintiffs are prevented from using the only available funds, and are thus prevented from doing the work, there will be an adverse effect on the building and the financial viability of the project will be in jeopardy. It would be fruitless to require plaintiffs to await the result of mechanics' lien or other court action, which would take place some time in the future while the property deteriorated and the financial viability of the project was being seriously affected.

These would be compelling reasons for the appointment of a receiver in the absence of s. 11(1) but, given that subsection, it would seem to me they are considerations which the Court is not entitled to bring into account. Parenthetically, events have proven, as so often appears to be the case, that peripheral skirmishing is wasteful of time and money and justice is better served by getting ahead with trial of substantial issue in the proceedings. Reference was made by Matas J.A. to the case of *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*[4] In that case the Court of Appeal for Manitoba held that, on an appeal from a judgment at trial in a mechanics' liens action, where a subcontractor's steel shoring supports for a building were essential to hold the building in place and to avoid serious damage, the cost of continuing supply of the supports and of removal would rank in priority to lien claimants. The priority given to the expenditure for an urgent and necessary purpose for the benefit of others was recognized in that case.

[4] [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

Cet arrêt n'appuie pas la prétention que le tribunal peut à sa discrétion écarter une obligation statutaire comme celle contenue au par. (1) de l'art. 11 du *Mechanics' Liens Act* dans des circonstances du genre de celles sur lesquelles le juge Matas met l'accent dans les passages suivants de son jugement:

> [TRADUCTION] Dans le cas en l'espèce, le séquestre a reçu l'administration des seuls fonds disponibles qui pouvaient permettre de sortir de l'impasse découlant de l'enregistrement du privilège. La nomination d'un séquestre n'avait pas pour but de prévenir la dissipation des fonds mais de les utiliser comme moyen raisonnable et pratique de faire exécuter les travaux nécessaires.
>
> . . .
>
> Il ne manque pas de preuves pour démontrer que si les demanderesses ne peuvent utiliser les seuls fonds disponibles, et pour cette raison ne peuvent exécuter les travaux, cela aura des effets préjudiciables sur l'immeuble et la viabilité financière du projet sera menacée. Il serait vain d'exiger des demanderesses qu'elles attendent le résultat d'une action sur privilège ou d'une autre action, qui sera entendue plus tard, pendant que la propriété se détériore et que la viabilité financière du projet est sérieusement compromise.

Ces raisons commanderaient la nomination d'un séquestre si ce n'était du par. (1) de l'art. 11 dont l'existence empêche, à mon avis, le tribunal de tenir compte de ces facteurs. Entre parenthèses, les événements ont prouvé, comme il arrive souvent, que les débats sur des incidents sont une perte de temps et d'argent et la justice est mieux servie lorsque les tribunaux vont tout de suite au fond du litige. Le juge Matas cite *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*[4] Il s'agissait d'un privilège de constructeur. Les étais d'acier d'un sous-entrepreneur étaient indispensables pour soutenir le bâtiment et éviter de sérieux dommages. La Cour d'appel du Manitoba a statué, en appel que le coût de la fourniture ininterrompue des étais et de leur enlèvement aurait priorité sur les autres privilèges. La priorité accordée aux dépenses effectuées dans un but urgent et nécessaire, à l'avantage des autres créanciers a été admise.

[4] [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

1975 CanLII 164 (SCC)

It is commonplace to appoint a receiver at the instance of a creditor in order to preserve property pending litigation. We have here the novel situation of an owner of property applying for the appointment of a receiver. The *res* is not the property but a sum of money to which the owner wishes to have recourse for the purpose of effecting improvements to the property. Until the main litigation has been concluded, it will not be known whether the cost of such improvements will fall upon the owner or upon the contractor and in the meantime the effect of the order of Nitikman J. would be to subordinate the lien of the contractor to any advances under the mortgage made by C.M.H.C. to the receiver. The appointment would permit the receiver to borrow and expend moneys which, in the absence of the moisture difficulties and the litigation ensuing by reason thereof, would be payable to the contractor. None of the authorities to which we have been referred touches upon the appointment of a receiver in such circumstances and with such powers.

On nomme couramment un séquestre à la demande d'un créancier pour protéger un bien-fonds durant un litige. Nous sommes ici en face d'une situation différente où la chose visée par la demande de nomination de séquestre n'est pas le bien-fonds mais une somme d'argent dont le propriétaire veut se servir pour effectuer des améliorations au bien-fonds. Tant que le litige principal n'aura pas été réglé, on ne saura pas si le coût de ces améliorations doit être à la charge du propriétaire ou de l'entrepreneur et, dans l'intervalle, l'effet de l'ordonnance du juge Nitikman serait de subordonner le privilège de l'entrepreneur à toutes les avances faites par la SCHL au séquestre sur le montant de l'hypothèque. La nomination du séquestre permettrait d'emprunter et de dépenser des sommes qui, abstraction faite des problèmes d'humidité et du différend qui en découle, devraient être versées à l'entrepreneur. Rien dans la jurisprudence citée ne touche une nomination de séquestre dans de telles circonstances et avec de tels pouvoirs.

Mr. Houston advanced an argument based upon s. 4(1) of *The Mechanics' Liens Act* which reads in part:

> 4.(1) Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, . . . a lien for the price of that work, service, . . . upon the . . . building, . . . and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, . . . *limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner*; but no such lien exists under this Act for any claim for less than twenty dollars.

(The italics are mine.)

Me Houston avance un argument fondé sur le par. (1) de l'art. 4 du *Mechanics' Liens Act* qui se lit ainsi:

> [TRADUCTION] 4.(1) A moins de convention expresse à l'effet contraire, toute personne qui exécute des travaux ou rend des services sur ou à l'égard, . . . un privilège pour le prix de ces travaux, de ces services . . . sur . . . le bâtiment et les fonds de terre sur lesquels ils sont situés ou qui s'y rattachent, ou sur lesquels ou à l'égard desquels les travaux ont été exécutés et les services rendus, . . . *jusqu'à concurrence, toutefois, de la somme véritablement due au détenteur du privilège et de la somme due (sauf disposition contraire) par le propriétaire*; mais il n'existe pas, en vertu de la présente Loi, de privilège pour une réclamation inférieure à vingt dollars.

(J'ai mis des mots en italiques.)

It was contended that the lien of the contractor cannot go beyond the fair value of the work done, and that although the Manitoba Courts have not made an ultimate finding they have implicitly found that no amount is justly due to the lien claimant. I do not think the record before us bears this out. Explicit in the order of Nitikman J. was a finding of a moisture problem affecting the student housing project but there was no finding,

On a soutenu que le privilège de l'entrepreneur ne peut aller au-delà de la juste valeur du travail effectué et que, même si les tribunaux manitobains ne se sont pas prononcés définitivement, ils ont conclu implicitement qu'aucune somme n'est due à celui qui revendique le privilège. Je ne pense pas que le dossier devant nous justifie cette conclusion. L'ordonnance du juge Nitikman conclut à l'existence d'un problème d'humidité dans la résidence

1975 CanLII 164 (SCC)

express or implicit, in either of the lower Courts as to responsibility for the problem. An order directing payment to a receiver at this time of the holdback fund with C.M.H.C. would be tantamount to a finding in favour of the owner on the major issue not yet litigated. Mr. Houston contends that s. 4(1) limits the right to lien. In my opinion its only effect is to limit the amount which the lienholder can recover. Unless and until the main action has been tried, the amount, if any, justly due to the contractor will not be known. The interlocutory proceeding taken for the appointment of the receiver was not intended to have, and did not have, the effect of making any determination of this outstanding issue.

The appellant contractor submitted that the order of Nitikman J. was by its nature hypothetical and unenforceable in that C.M.H.C. did not appear in the proceedings and was known not to release funds except on assurance of priority and furthermore was not bound or directed by the order to advance funds to the receiver appointed. The effect which I would give to the express statutory provision, namely, s. 11(1) of *The Mechanics' Liens Act* makes it unnecessary to consider this additional ground of attack upon the validity of the order.

I would allow the appeal, reverse the decision of the Court of Appeal for Manitoba affirming the order of Nitikman J. and direct that the motion be dismissed with costs in this Court and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitors for the plaintiffs, respondents: Arpin & Co., Winnipeg.

d'étudiants, mais il n'y a pas de conclusion, explicite ou implicite, dans aucune des cours d'instance inférieure, sur la responsabilité de cet état de choses. Une ordonnance de paiement à un séquestre, en ce moment, des sommes retenues par la SCHL équivaut à une conclusion en faveur du propriétaire sur la question principale toujours en litige. Me Houston soutient que le par. (1) de l'art. 4 limite le droit au privilège. A mon avis, son seul effet est de limiter le montant que peut recouvrer le détenteur du privilège. Tant que l'action principale ne sera pas jugée, et jusqu'à ce qu'elle le soit, le montant véritablement dû, s'il en est, à l'entrepreneur ne sera pas connu. La procédure interlocutoire pour la nomination du séquestre n'avait pas pour but de trancher cette question en suspens, et elle n'a d'ailleurs pas eu cet effet.

L'entrepreneur appelant a fait valoir que l'ordonnance du juge Nitikman était, de par sa nature, hypothétique et non applicable, parce que la SCHL n'avait pas été mise en cause dans les procédures et qu'on savait qu'elle n'avance pas de fonds sans avoir l'assurance qu'elle a priorité; de plus elle n'est pas tenue ou obligée par l'ordonnance d'avancer des fonds au séquestre désigné. L'effet que j'accorde à la disposition législative expresse, le par. (1) de l'art. 11 du *Mechanics' Liens Act*, me dispense d'examiner cet argument additionnel avancé pour contester la validité de l'ordonnance.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel du Manitoba qui confirme l'ordonnance du juge Nitikman, et d'ordonner le rejet de la requête avec dépens dans cette Cour et dans les cours d'instance inférieure.

Pourvoi accueilli avec dépens.

Procureurs des défenderesses, appelantes: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs des demanderesses, intimées: Arpin & Co., Winnipeg.

Tab 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 66

Date: 20220211
Docket: CA47363

2022 BCCA 66 (CanLII)

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C.

Appellants
(Petitioners)

And

The Attorney General of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Marchand
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 18, 2021 (*Beaudoin v. British Columbia*, 2021 BCSC 512, Vancouver Docket S210209).

Oral Reasons for Judgment

Counsel for the Appellants (via videoconference):	M. Moore
Counsel for the Respondents (via videoconference):	E.C. Lapper S.A. Davis
Counsel for the Proposed Intervenor, The Association for Reformed Political Action (ARPA) Canada (via videoconference):	G. Trotter

Place and Date of Hearing:	Vancouver, British Columbia February 4, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 11, 2022

2022 BCCA 66 (CanLII)

Summary:

The applicant seeks intervenor status in an appeal from a judgment dismissing the appellants' Charter challenge to certain public health orders made by the Provincial Health Officer to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings. Held: Application allowed in part and with conditions. The applicant has a broad representative base and the case legitimately engages its interests in the public law issues raised on appeal. Though the applicant shares a common theological conviction and mission with a number of the appellants, certain of its proposed arguments provide a unique and different perspective that will assist the Court without seeking to expand the scope of the appeal beyond the issues raised by the parties.

2022 BCCA 66 (CanLII)

MARCHAND J.A.:

Introduction

[1] This is an application for intervenor status in an appeal from a judgment of Chief Justice Hinkson indexed at 2021 BCSC 512.

[2] The appellants are churches and their pastors. Two of the three churches identify as Reformed Churches. They appeal the dismissal of their *Charter* challenge to certain public health orders made by the Provincial Health Officer ("PHO") to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings.

[3] The Chief Justice concluded that the appellants had not exhausted an available statutory reconsideration process and so were not entitled to pursue relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The Chief Justice went on to find that the orders infringed s. 2 of the *Charter* but were justified under s. 1. In view of these findings and the fact that the appellants addressed their ss. 7 and 15 *Charter* issues in a summary way, the Chief Justice considered it was unnecessary to expand the jurisprudence relating to ss. 7 and 15. He therefore made no finding with respect to those sections.

[4] The applicant, the Association for Reformed Political Action (ARPA) Canada ("ARPA Canada"), seeks leave to intervene on public interest grounds. Although

ARPA Canada and a number of the appellants belong to the same faith group, ARPA Canada says they bring a different and useful perspective to the issues raised on appeal that will be of assistance to the Court.

[5] The Chief Justice granted ARPA Canada leave to intervene on specified issues in the proceedings before him. Trial courts in Ontario and Manitoba have also granted ARPA Canada leave to intervene in similar proceedings in those jurisdictions.

[6] The respondents oppose ARPA Canada's application. They argue ARPA Canada's perspective is "entirely aligned with, and duplicative of, that of the appellants." They characterize ARPA Canada's proposed intervention as a prohibited form of "me too" intervention.

[7] The appellants take no position on ARPA Canada's application, but, if ARPA Canada is granted leave to intervene, the appellants seek an extension of time so that their reply factum can address the issues raised by ARPA Canada.

Legal Framework

[8] The legal principles on ARPA Canada's application are not in dispute.

[9] Rule 36 of the *Court of Appeal Rules* governs applications for intervenor status. It provides, in part, as follows:

> 36(1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.
>
> ...
>
> (3) In any order granting leave to intervene, the justice
>
> (a) is to specify the date by which the factum of the intervenor must be filed, and
>
> (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.
>
> ...
>
> (5) Unless a justice otherwise orders, an intervenor
>
> (a) must not file a factum that exceeds 20 pages,

2022 BCCA 66 (CanLII)

(b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and

(c) is not to present oral argument.

[10] There are two routes to intervenor status: (1) the applicant has a direct interest in the matter; or (2) the applicant has a public interest in the public law issue in question and brings a different and useful perspective to the issue that will be of assistance to the Court: *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3 (Chambers); *Carter v. Canada*, 2012 BCCA 502 at paras. 12–13 (Chambers). ARPA Canada seeks leave only on the public interest ground.

[11] In *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers), Justice Garson summarized the factors to consider when an applicant seeks intervenor status on the public interest ground:

a) Does the proposed intervenor have a broad representative base?

b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?

c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[12] When hearing an application to intervene on the public interest ground, courts are not concerned with the fairness to or the interests of the intervenor, but rather with ensuring important points are not overlooked: *A.B. v. C.D.*, 2019 BCCA 297 at para. 33 (Chambers); *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 8 (Chambers). Intervenors must therefore show that it is in the public interest (or the Court's interest) that they be heard: *Equustek* at para. 8.

[13] When *Charter* issues are raised for the first time, the courts are permitted to take a more generous approach in order to gain "the assistance of argument from all segments of the community": *Canadian Labour Congress v. Bhindi and London*

2022 BCCA 66 (CanLII)

(1985), 61 B.C.L.R. 85 at 97, 1985 CanLII 384 (C.A.); *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 3 at para. 10 (Chambers).

[14] However, an intervenor in a *Charter* application is prohibited from raising entirely new issues, including making submissions on *Charter* grounds not raised by the parties: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270 at para. 83, aff'd 2013 BCCA 147, rev'd in part on other grounds 2015 SCC 7.

[15] The role of intervenors is not to support the position of a party, but rather to make principled submissions on pertinent points of law. Although an intervenor's submissions may ultimately support one party's position, that is not their purpose: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28 (Chambers).

[16] An intervenor whose interests appear to align with one of the parties may still be granted intervenor status where the intervenor provides a unique perspective that might assist the court in resolving the appeal: *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402 at para. 18 (Chambers). In such cases, the concern for partiality may be mitigated by a clear order limiting the scope of the intervenor's participation on appeal: *Araya* at para. 18.

[17] Typically, a court grants the right to intervene on discrete issues only: *Janzen v. British Columbia (Attorney General)* (1993), 38 B.C.A.C. 268 at 272, 1993 CanLII 1332 (Chambers), aff'd (1994), 45 B.C.A.C. 242, 1994 CanLII 2662, leave to appeal to SCC ref'd, 24213 (3 November 1994).

[18] Finally, an intervenor before the Supreme Court of British Columbia does not automatically gain intervenor status before this Court. Rather, the test must be met at each level: *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 at paras. 11–12, leave to appeal to SCC ref'd, 35236 (19 September 2013); *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2021 BCCA 138 at para. 4 (Chambers).

2022 BCCA 66 (CanLII)

2022 BCCA 66 (CanLII)

Who is ARPA Canada?

[19] ARPA Canada is a federally incorporated not-for-profit organization that advocates for Reformed Christians in legal and political spheres. It has been active in Canada since the 1970s. None of its members are appellants and none of the appellants has any power to direct ARPA Canada in this or any other legal proceeding.

[20] ARPA Canada says it has two missions: (a) educating, equipping, and assisting members of Canada's Reformed churches and the broader Christian community as they seek to winsomely participate in politics and public life; and (b) bringing a Reformed Christian perspective to civil authorities in Canada, including the courts.

[21] ARPA Canada is an experienced intervenor. They have been granted intervenor status in 18 previous cases, including cases involving constitutional issues relating to religious matters: see, for example, *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423; *A.B. v. C.D.*, 2020 BCCA 11.

Proposed Submissions

[22] Broadly, ARPA Canada proposes to submit that:

1. Institutional pluralism is a foundational *Charter* principle that corresponds with the Reformed Christian concept of sphere sovereignty. Under both concepts, government authority is limited by other sources of authority in a citizen's life. State justification for limits on fundamental freedoms under s. 1 therefore requires consideration of the importance of, and deference to, non-state institutions.

2. Although the respondents have admitted infringements of s. 2 of the *Charter*, a full appraisal of the nature and severity of those infringements is necessary to ground the s. 1 analysis. The prohibitions of the public health orders strike at the core of the intersection of freedom of religion, freedom of expression and freedom of assembly. The s. 1 analysis must give due

weight to the impact of each infringement as well as the intersectional impact of the infringements collectively.

3. Section 15 of the *Charter* protects religious equality. Under s. 15, the correct comparison is between particular activities performed for a religious purpose that were prohibited and activities of a similar functional nature performed for a non-religious purpose that were not. Contrary to s. 15, the prohibitions at issue discriminated against all religious believers as compared to non-believers on the basis of religion. If this Court finds the Chief Justice erred in failing to find the orders breached s. 15, ARPA Canada will restrict its submissions to the legal implications of the breach.

4. The orders cannot be saved under s. 1 of the *Charter* because they were neither minimally impairing nor proportionate. In particular, the orders prohibited constitutionally protected activities instead of restricting them as was done for non-constitutionally protected activities with a similar risk profile. Particularly in view of the broad principle of respect for institutional pluralism, the prohibition against constitutionally protected activities was overbroad and disproportionate to the risk of transmission.

Discussion

[23] The respondents accept, and I agree, that ARPA Canada has a broad representative base and the case legitimately engages ARPA Canada's interests in the public law issues raised on appeal. I must decide only whether ARPA Canada has a unique and different perspective that will assist the Court and whether they seek to expand the scope of the appeal beyond the issues raised by the parties.

[24] I have reviewed the appellants' factum. It is focused on the specifics of the orders, the record before the PHO, the impact of the orders on the appellants and the findings of the Chief Justice. In my respectful view, certain aspects of ARPA Canada's proposed submissions rise well above these specific details of the case at hand and consider broader and important constitutional issues not addressed by the appellants.

2022 BCCA 66 (CanLII)

[25] Though ARPA Canada shares a common theological conviction and mission with certain of the appellants, there is no hint that ARPA Canada is strategizing with them to skirt page limits on factums and make arguments that the appellants should make for themselves.

[26] I am satisfied that certain of ARPA Canada's proposed arguments are in the "Goldilocks" zone of providing a distinct and helpful perspective on the issues raised by the parties without introducing entirely new issues or hijacking the proceedings to serve their own ends.

[27] So, which of ARPA Canada's arguments lie within the "Goldilocks" zone? In my view, the Court stands to benefit from ARPA Canada's arguments regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 *Charter* breaches. Respectfully, the balance of ARPA Canada's arguments (on s. 15, minimal impairment and proportionality) are duplicative of the arguments in the appellants' factum or represent arguments the appellants are well-placed to make during oral submissions.

Disposition

[28] I grant ARPA Canada's application for leave to intervene. ARPA Canada may only make submissions regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 *Charter* breaches as summarized at subparas. 23(a) and (b) of its written submission filed on December 22, 2021. Its factum must not exceed ten pages and must be filed and served on the parties on or before March 1, 2022.

[29] ARPA Canada may not duplicate arguments made by the appellants and may not adduce new evidence or otherwise supplement the appeal record.

[30] I grant the respondents leave to file a factum in response to ARPA Canada's factum. The respondents' response factum must not exceed ten pages and must be filed and served on the appellants and intervenor by March 11, 2022.

2022 BCCA 66 (CanLII)

[31] Given the obvious alignment of interests, I do not grant the appellants' request for an extension of time to file their reply factum. To be clear, the appellants' reply factum is due in accordance with the usual timelines and must be confined to matters raised in the respondents' factum.

[32] I leave the question of whether ARPA Canada may make oral submissions to the division hearing the appeal.

"The Honourable Mr. Justice Marchand"

2022 BCCA 66 (CanLII)

TAB 7

Joseph Borowski *Appellant*

v.

The Attorney General of Canada *Respondent*

and

Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada and Women's Legal Education and Action Fund (LEAF) *Interveners*

INDEXED AS: BOROWSKI *v.* CANADA (ATTORNEY GENERAL)

File No.: 20411.

1988: October 3, 4; 1989: March 9.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal — Mootness — Abortion provisions of Criminal Code — Provisions under challenge already found invalid — Ancillary questions relating to Charter rights of the foetus — Whether or not issue moot — Whether or not Court should exercise discretion to hear case — Criminal Code, R.S.C. 1970, c. C-34, s. 251 — Canadian Charter of Rights and Freedoms, ss. 7, 15.

Criminal law — Abortion — Provisions under challenge already found invalid — Ancillary questions relating to Charter rights of the foetus — Whether or not issue moot — Whether or not Court should exercise discretion to hear case.

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Right to equality before and under the law — Whether or not Charter rights extending to foetus — Charter issues ancillary to question of validity of abortion provisions of Criminal Code — Provisions under challenge already found invalid — Whether or not issue moot — Whether or not Court should exercise discretion to hear case.

Civil procedure — Standing — Standing originally found because action seeking declaration as to legislation's validity — Provisions under challenge already found invalid — Whether or not standing as originally

Joseph Borowski *Appelant*

c.

Le procureur général du Canada *Intimé*

et

Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada et Fonds d'action et d'éducation juridiques pour les femmes (FAEJ) *Intervenants*

RÉPERTORIÉ: BOROWSKI *c.* CANADA (PROCUREUR GÉNÉRAL)

N° du greffe: 20411.

1988: 3, 4 octobre; 1989: 9 mars.

Présents: Le juge en chef Dickson et les juges McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Pourvoi — Caractère théorique — Dispositions du Code criminel relatives à l'avortement — Dispositions contestées déjà déclarées inopérantes — Questions accessoires relatives aux droits du fœtus en vertu de la Charte — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire? — Code criminel, S.R.C. 1970, chap. C-34, art. 251 — Charte canadienne des droits et libertés, art. 7, 15.

Droit criminel — Avortement — Dispositions contestées déjà déclarées inopérantes — Questions accessoires sur les droits du fœtus en vertu de la Charte — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire?

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Droit à l'égalité devant et dans la loi — Les droits garantis par la Charte s'appliquent-ils au fœtus? — Questions relatives à la Charte accessoires à la question de la validité des dispositions du Code criminel sur l'avortement — Dispositions contestées déjà déclarées inopérantes — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire?

Procédure civile — Qualité pour agir — Qualité pour agir reconnue initialement parce que l'action visait un jugement déclarant l'invalidité de dispositions législatives — Dispositions contestées déjà déclarées inopéran-

1989 CanLII 123 (SCC)

determined — Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.

Appellant attacked the validity of s. 251(4), (5) and (6) of the *Criminal Code* relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a foetus was not protected by either s. 7 or s. 15 of the *Charter* and also held that s. 1 of the *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the *Charter* applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the *Charter*; (2) if so, whether s. 251(4), (5) and (6) of the *Code* violated the principles of fundamental justice contrary to s. 7 of the *Charter*; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the *Charter*; (4) if so, whether s. 251(4), (5) and (6) of the *Code* violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the *Code* were justified by s. 1 of the *Charter*. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler (No. 2)*.

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

tes — La qualité pour agir reconnue initialement subsiste-t-elle? — L'article 24(1) de la Charte et l'art. 52(1) de la Loi constitutionnelle de 1982 peuvent-ils fonder la qualité pour agir?

L'appelant conteste la validité des par. 251(4), (5) et (6) du *Code criminel* relatives à l'avortement pour le motif qu'ils enfreignent les droits à la vie, à la sécurité et à l'égalité garantis au fœtus, en tant que personne, par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. La qualité pour agir avait été reconnue à l'appelant parce qu'il demandait un jugement déclarant une loi invalide, parce que la question de la validité de la loi se posait sérieusement, parce qu'il avait, à titre de citoyen, un intérêt véritable quant à la validité de la loi et parce qu'il n'y avait pas d'autre manière raisonnable et efficace de soumettre la question à la Cour.

La Cour du Banc de la Reine a conclu que les par. 251(4), (5) et (6) ne violent pas la *Charte* puisque le fœtus n'est protégé ni par son art. 7 ni par son art. 15 et, en outre, que l'article premier de la *Déclaration canadienne des droits* ne permet pas aux tribunaux de juger de la teneur ou de la sagesse des lois. La Cour d'appel a conclu que ni l'art. 7, ni l'art. 15 de la *Charte* ne s'appliquent au fœtus. Les questions constitutionnelles en cette Cour visent à déterminer: (1) si le fœtus a le droit à la vie que garantit l'art. 7 de la *Charte*; (2) dans l'affirmative, si les par. 251(4), (5) et (6) du *Code* violent les principes de justice fondamentale contrairement à l'art. 7 de la *Charte*; (3) si le fœtus a le droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination en raison de l'âge ou de déficiences mentales ou physiques, selon l'art. 15 de la *Charte*; (4) dans l'affirmative, si les par. 251(4), (5), (6) du *Code* violent l'art. 15; et (5) dans le cas d'une réponse affirmative aux questions (2) et (4), si les par. 251(4), (5) et (6) du *Code* sont justifiés par l'article premier de la *Charte*. Toutefois, après l'arrêt de la Cour d'appel mais avant l'audition du pourvoi en cette Cour, l'ensemble de l'art. 251 a été déclaré inopérant par l'arrêt *R. c. Morgentaler (n° 2)*.

Dès le début du pourvoi, la question du caractère théorique du pourvoi se posait sérieusement. En outre, il paraissait douteux que le demandeur ait encore qualité pour agir et même que la question puisse être réglée par voie de justice. Ces points ont été débattus à titre de questions préliminaires et ont été mis en délibéré. La Cour a alors entendu le pourvoi au fond, de manière à être en mesure de statuer sur la totalité du pourvoi sans devoir rappeler les parties pour plaider si, malgré les questions préliminaires, elle décidait que le pourvoi devait suivre son cours.

1989 CanLII 123 (SCC)

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal—the challenge to the constitutionality of s. 251(4), (5) and (6) of the *Code*—disappeared when s. 251 was struck down in *R. v. Morgentaler (No. 2)*. None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the *Charter* and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of

Arrêt: Le pourvoi est rejeté.

Le pourvoi est théorique et la Cour ne devrait pas exercer son pouvoir discrétionnaire pour le trancher au fond. De plus, l'appelant n'a plus qualité pour continuer le pourvoi puisque les circonstances qui fondaient initialement la qualité pour agir ont disparu.

La doctrine relative au caractère théorique relève du principe général en vertu duquel un tribunal peut refuser de trancher une affaire qui ne soulève qu'une question hypothétique ou abstraite. Un appel est théorique lorsque la décision du tribunal n'aura pas pour effet de résoudre un litige qui a, ou peut avoir, des conséquences sur les droits des parties. Un litige actuel doit exister non seulement quand l'action ou les procédures sont engagées, mais aussi au moment où le tribunal doit rendre une décision. Le principe général s'applique aux litiges devenus théoriques à moins que le tribunal n'exerce son pouvoir discrétionnaire de ne pas l'appliquer.

La démarche à suivre pour déterminer si le litige est théorique comporte une analyse en deux temps. En premier, il faut se demander si le différend concret et tangible a disparu et si la question est devenue purement théorique. Si c'est le cas, le tribunal décide alors s'il doit exercer son pouvoir discrétionnaire et entendre l'affaire. (Pour être précis, une affaire est «théorique» si elle ne présente pas de litige concret même si le tribunal choisit de trancher la question théorique.)

Le présent pourvoi est théorique puisqu'il n'y a plus de différend juridique concret. Le litige qui fondait le présent pourvoi—la contestation de la constitutionnalité des par. 251(4), (5) et (6) du *Code*—a disparu quand la Cour a déclaré cet article inopérant dans *R. c. Morgentaler (n° 2)*. Aucun des redressements demandés dans la déclaration n'est pertinent. Trois des cinq questions constitutionnelles énoncées visent expressément l'art. 251 et n'ont plus d'objet. Les deux autres ont trait à la portée des droits garantis par les art. 7 et 15 de la *Charte* et ne peuvent être traitées séparément de la contestation initiale de l'art. 251.

Une question constitutionnelle ne lie pas la Cour et ne peut pas servir non plus à transformer un pourvoi en renvoi. Les questions constitutionnelles visent à définir avec précision les points litigieux dans une affaire constitutionnelle et non à introduire de nouvelles questions. Les questions ne peuvent donc servir de fondement distinct à un pourvoi qui est par ailleurs théorique.

La deuxième partie de l'analyse consiste pour le tribunal à déterminer s'il devrait exercer son pouvoir discrétionnaire pour trancher l'affaire au fond, même en l'absence de litige actuel. Dans l'exercice de ce pouvoir

1989 CanLII 123 (SCC)

their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought before the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the *Charter* protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not

discrétionnaire, les tribunaux peuvent être guidés par l'étude des assises mêmes de la doctrine du caractère théorique.

La première raison d'être de la politique en matière de causes théoriques tient à ce que la capacité des tribunaux de trancher des litiges a sa source dans le système contradictoire. Le contexte réellement contradictoire, dans lequel les deux parties ont un intérêt dans l'issue du litige, est un élément fondamental de notre système juridique. La deuxième raison tient à l'économie des ressources judiciaires qui oblige les tribunaux à se demander si, compte tenu des circonstances d'une affaire, il y a lieu de consacrer des ressources judiciaires limitées à la solution d'un litige devenu théorique. La troisième raison d'être de la doctrine tient à la nécessité pour les tribunaux d'être sensibles à l'efficacité et à l'efficience de l'intervention judiciaire et d'être conscients de leur fonction juridictionnelle dans notre structure politique. En exerçant son pouvoir discrétionnaire à l'égard d'un pourvoi théorique, la Cour doit tenir compte de chacune de ces trois principales raisons d'être. Il ne s'agit pas d'un processus mécanique. Il se peut que les principes ne tendent pas tous vers la même conclusion. L'absence d'un facteur peut prévaloir malgré la présence de l'un ou des deux autres, ou inversement.

La Cour devrait refuser d'exercer son pouvoir discrétionnaire de trancher le pourvoi au fond par souci d'économie des ressources judiciaires et en raison de sa fonction véritable dans l'élaboration du droit. L'absence de rapport contradictoire ne fait pas problème: le pourvoi a été plaidé aussi pleinement que s'il n'avait pas été théorique.

Aucun des facteurs qui justifieraient l'utilisation de ressources judiciaires ne s'applique. La décision n'aurait pas d'effets accessoires pratiques sur les droits des parties. Il ne s'agit pas d'une situation susceptible à la fois de se répéter et de ne jamais être soumise aux tribunaux. Il est en effet très probable que la question sera soumise à cette Cour à propos d'une loi précise ou peut-être à propos d'un acte gouvernemental précis. Une décision dans l'abstrait sur les droits du fœtus n'éliminerait pas nécessairement des litiges répétés à l'avenir. Malgré la grande importance de la question, il n'est pas dans l'intérêt public de statuer sur le fond pour déterminer l'état du droit. Une décision sur la question de savoir si les art. 7 et 15 de la *Charte* protègent les droits du fœtus n'est pas dans l'intérêt public vu l'état d'incertitude qui pourrait résulter d'une telle décision en dehors de tout contexte législatif.

La considération de la fonction véritable de la Cour dans l'élaboration du droit est une autre raison de refuser d'exercer son pouvoir discrétionnaire pour tran-

1989 CanLII 123 (SCC)

the question raised in the original action. Indeed, what was sought—a *Charter* interpretation in the absence of legislation or other governmental action bringing it into play—would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the *Charter*. Secondly, the legislative context of original claim disappeared when s. 251 of the *Code* was struck down. Standing could not be based on s. 24(1) of the *Charter* for an infringement or denial of a person's own *Charter*-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the *Constitution Act, 1982* as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

Cases Cited

Referred to: *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Morgentaler v. The Queen (No. 1)*, [1976] 1 S.C.R. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Re Maltby and Attorney-*

cher le pourvoi au fond. La question soumise à cette Cour n'est plus celle qui était l'objet de l'action initiale. En réalité, ce qu'on demande—une interprétation de la *Charte* en l'absence de texte législatif ou d'acte gouvernemental la faisant entrer en jeu—transformerait le pourvoi en renvoi d'initiative privée. Si elle exerçait son pouvoir discrétionnaire dans un tel cas, la Cour empiéterait sur le droit du pouvoir exécutif d'ordonner un renvoi et pourrait empêcher la législateur de prendre une décision, en lui dictant les termes des dispositions législatives à adopter. Ce serait une dérogation marquée au rôle traditionnel de la Cour.

De plus, l'appelant n'a plus qualité pour continuer le pourvoi puisque le fondement initial de sa qualité pour agir n'existe plus. Il s'est produit deux changements importants dans la nature de l'action en l'espèce depuis que la Cour a reconnu à l'appelant qualité pour agir, en 1981. Premièrement, la demande actuelle se fonde principalement sur l'allégation que le droit du fœtus à la vie et à l'égalité est garanti par les art. 7 et 15 de la *Charte*. Deuxièmement, en déclarant l'art. 251 du *Code* inopérant, la Cour a fait disparaître le contexte législatif de la demande. Il n'est pas possible d'invoquer en l'espèce le par. 24(1) comme fondement de la qualité pour agir puisqu'il faut qu'il y ait violation ou négation d'un droit garanti par la *Charte* à la personne qui l'invoque. En l'espèce, les droits qui auraient été violés sont ceux du fœtus. La qualité pour agir ne peut être accordée en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* parce qu'une action fondée sur le par. 52(1) doit se limiter à la contestation d'une loi ou d'un acte gouvernemental pris en vertu d'un pouvoir conféré par la loi.

Jurisprudence

Arrêts suivis: *R. c. Morgentaler (nº 2)*, [1988] 1 R.C.S. 30; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Morgentaler c. La Reine (nº 1)*, [1976] 1 R.C.S. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), autorisation de pourvoi refusée [1981] 1 R.C.S. viii; *The King ex rel. Tolfree v. Clark*, [1944] R.C.S. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 R.C.S. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] R.C.S. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] R.C.S. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] R.C.S. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. c. Mercure*, [1988] 1 R.C.S. 234; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357; *Re Maltby*

1989 CanLII 123 (SCC)

General of Saskatchewan (1984), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncœur v. Landry*, [1977] 2 S.C.R. 179; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713; *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756; *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470; *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).
Constitution Act, 1982, s. 52(1).
Constitution of the United States of America, Art. III, s. 2(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).
Supreme Court Rules, SOR/83-74, s. 32.

Authors Cited

Kates, Don B., Jr. and William T. Barker. "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 *Calif. L.R.* 1385.
Macklem, Patrick and Eric Gertner. "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369.
Sharpe, Robert J. "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide." In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987.
"The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R.* 373.
Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R.

and Attorney-General of Saskatchewan (1984), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncœur c. Landry*, [1977] 2 R.C.S. 179; *Bisaillon c. Keable*, [1983] 2 R.C.S. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal c. Procureur général du Québec*, [1970] R.C.S. 713; *Wood, Wire and Metal Lathers' Int. Union c. United Brotherhood of Carpenters and Joiners of America*, [1973] R.C.S. 756; *Ministre de la Main-d'œuvre et de l'Immigration c. Hardayal*, [1978] 1 R.C.S. 470; *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90; *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 15, 24(1).
Code criminel, S.R.C. 1970, chap. C-34, art. 251(4), (5), (6).
Constitution des États-Unis d'Amérique, article III, art. 2(1).
Déclaration canadienne des droits, S.R.C. 1970, app. III, art. 1.
Loi constitutionnelle de 1982, art. 52(1).
Règles de la Cour suprême, DORS/83-74, art. 32.

Doctrine citée

Kates, Don B., Jr. and William T. Barker. «Mootness in Judicial Proceedings: Toward a Coherent Theory» (1974), 62 *Calif. L.R.* 1385.
Macklem, Patrick and Eric Gertner. «Re Skapinker and Mootness Doctrine» (1984), 6 *Sup. Ct. L. Rev.* 369.
Sharpe, Robert J. «Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide.» In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987.
«The Mootness Doctrine in the Supreme Court» (1974), 88 *Harvard L.R.* 373.
Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, qui a rejeté un appel contre un jugement du juge Matheson (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984]

1989 CanLII 123 (SCC)

15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and *R. Bradley Hunter*, for the appellant.

Claude R. Thomson, Q.C., and *Robert W. Staley*, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.

Angela M. Costigan and *Karla Gower*, for the intervener R.E.A.L. Women of Canada.

Edward Sojonky, Q.C., for the respondent.

Mary Eberts and *Helena Orton*, for the intervener Women's Legal Education and Action Fund (LEAF).

The judgment of the Court was delivered by

SOPINKA J.—This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (hereinafter *R. v. Morgentaler (No. 2)*).

From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the

1 W.W.R. 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Pourvoi rejeté.

Morris C. Shumiatcher, c.r., et *R. Bradley Hunter*, pour l'appelant.

Claude R. Thomson, c.r., et *Robert W. Staley*, pour l'intervenante Interfaith Coalition on the Rights and Wellbeing of Women and Children.

Angela M. Costigan et *Karla Gower*, pour l'intervenante R.E.A.L. Women of Canada.

Edward Sojonky, c.r., pour l'intimé.

Mary Eberts et *Helena Orton*, pour l'intervenant Fonds d'action et d'éducation juridiques pour les femmes (FAEJ).

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA—Le présent pourvoi, sur autorisation de cette Cour, attaque un arrêt de la Cour d'appel de la Saskatchewan, [1987] 4 W.W.R. 385, confirmant le jugement du juge Matheson de la Cour du Banc de la Reine de la Saskatchewan, [1984] 1 W.W.R. 15, qui avait rejeté l'action du demandeur (l'appelant en cette Cour). Devant les cours d'instance inférieure, le demandeur a contesté la validité des par. 251(4), (5) et (6) du *Code criminel*, S.R.C. 1970, chap. C-34, relatifs à l'avortement pour le motif qu'ils enfreignent des droits garantis au fœtus. Après l'arrêt de la Cour d'appel de la Saskatchewan et avant l'audition du présent pourvoi en cette Cour, l'art. 251, et donc les paragraphes contestés en l'espèce, a été déclaré inopérant par l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30 (ci-après *R. c. Morgentaler (n° 2)*).

Vu l'évolution de la procédure, il était évident dès le début du pourvoi que la question de son caractère théorique se posait sérieusement. En outre, il paraissait douteux que le demandeur ait encore qualité pour agir et même que la question puisse être réglée par voie de justice. La Cour a donc demandé aux avocats de débattre ces points à titre de questions préliminaires. Après leurs plaidoiries, nous avons mis ces questions en délibéré et nous avons entendu le pourvoi au fond, de manière

1989 CanLII 123 (SCC)

appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

(a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;
(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;
(c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
(d) The costs of this action; and
(e) Such further and other relief as to this Honourable Court seems just and expedient.

Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, was that Mr. Borowski had standing to attack the provisions of the *Code* referred to in his statement of claim.

à être en mesure de statuer sur la totalité du pourvoi sans devoir rappeler les parties pour plaider si, malgré les questions préliminaires, nous décidions que le pourvoi devait suivre son cours.

Compte tenu de la conclusion à laquelle je suis arrivé, il suffit de traiter des questions du caractère théorique et de la qualité pour agir. Puisque celles-ci résultent d'un changement dans la nature des procédures, il faut faire l'historique de l'action.

Historique de l'action

Monsieur Borowski a intenté une action devant la Cour du Banc de la Reine de la Saskatchewan en produisant, le 5 septembre 1978, une déclaration pour demander les redressements suivants:

[TRADUCTION]

a) Une ordonnance de la Cour déclarant que les par. 251(4), (5) et (6) du *Code criminel* sont nuls et inopérants;
b) Une ordonnance de la Cour déclarant que toutes les dispositions des lois du Parlement du Canada et tous les textes juridiques qui visent à autoriser l'utilisation de fonds publics pour les objets mentionnés aux par. 251(4), (5) et (6) sont nuls et inopérants et que le versement de ces sommes est *ultra vires* et illégal;
c) Une injonction permanente interdisant au ministre des Finances, ses agents et ses préposés, d'attribuer, de débourser ou de rendre autrement disponible quelque somme que ce soit sur le Fonds du revenu consolidé pour l'établissement ou le maintien de comités d'avortement thérapeutique, pour la pratique d'avortements ou pour tout acte ou objet afférent à l'avortement et à la destruction de fœtus humains;
d) Les dépens de la présente action;
e) Tout autre redressement que la Cour estime juste et approprié.

Avant l'audition de l'affaire, les intimés ont contesté par requête la compétence de la Cour du Banc de la Reine. Cette requête a abouti à un pourvoi en cette Cour qui portait principalement sur la qualité pour agir de M. Borowski. Selon la décision de cette Cour à la majorité, publiée sous l'intitulé *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575, M. Borowski avait qualité pour contester les dispositions du *Code*

1989 CanLII 123 (SCC)

Martland J., speaking for the majority, stated, at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, were repeated. Allegations based upon the *Canadian Charter of Rights and Freedoms*, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

> (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* to be *ultra vires*, unconstitutional, invalid, inoperative and of no force or effect;
>
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* are *ultra vires*, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:
>
> (c) The costs of this action; and
>
> (d) Such further and other relief as to this Honourable Court seems just.

The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the *Canadian Bill of Rights*.

mentionnées dans sa déclaration. Le juge Martland dit au nom de la majorité, à la p. 598:

> Selon mon interprétation, ces arrêts décident que pour établir l'intérêt pour agir à titre de demandeur dans une poursuite visant à déclarer qu'une loi est invalide, si cette question se pose sérieusement, il suffit qu'une personne démontre qu'elle est directement touchée ou qu'elle a, à titre de citoyen, un intérêt véritable quant à la validité de la loi, et qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour. À mon avis, l'intimé répond à ce critère et devrait être autorisé à poursuivre son action.

Le juge en chef Laskin, avec l'appui du juge Lamer, aurait statué que M. Borowski n'avait pas qualité pour agir parce qu'il n'était pas touché par la loi alors que d'autres, comme les médecins et les hôpitaux, pouvaient l'être. Le Juge en chef a conclu qu'en conséquence M. Borowski n'avait pas un intérêt judiciaire suffisant dans la question et que la Cour devrait exercer son pouvoir discrétionnaire pour lui nier la qualité pour agir.

Le 18 avril 1983, le demandeur a produit une déclaration amendée par laquelle il renouvelait les allégations de violation de la *Déclaration canadienne des droits*, S.R.C. 1970, app. III. Il ajoutait des allégations de violation de la *Charte canadienne des droits et libertés*, qui était entrée en vigueur le 17 avril 1982. Il demandait les redressements suivants:

> [TRADUCTION]
>
> a) Une ordonnance de la Cour déclarant que les par. 251(4), (5) et (6) du *Code criminel* sont *ultra vires*, inconstitutionnels, nuls et inopérants;
>
> b) Une ordonnance de la Cour déclarant que toutes les dispositions des lois du Parlement du Canada et tous les textes juridiques qui visent à autoriser l'utilisation de fonds publics pour les objets mentionnés aux par. 251(4), (5) et (6) du *Code criminel* sont *ultra vires*, inconstitutionnels, nuls et inopérants et que le versement de ces sommes est illégal;
>
> c) Les dépens de la présente action;
>
> d) Tout autre redressement que la Cour estime juste et approprié.

La Cour du Banc de la Reine de la Saskatchewan a rejeté les arguments de M. Borowski fondés sur l'article premier de la *Déclaration canadienne*

1989 CanLII 123 (SCC)

Matheson J. held that both *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (hereinafter *Morgentaler v. The Queen (No. 1)*) and *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal refused [1981] 1 S.C.R. viii) concluded that the *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation.

Matheson J. noted that Mr. Borowski's principal argument under the *Charter* was that the foetus is a person and therefore should be afforded the protection of s. 7 of the *Charter*. It was held, however, that s. 251(4), (5), and (6) did not violate the *Charter* as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the *Charter*. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the *Supreme Court Rules*, SOR/83-74, stated the following constitutional questions:

1. Does a child *en ventre sa mère* have the right to life as guaranteed by Section 7 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the principles of fundamental justice, contrary to Section 7 of the *Canadian Charter of Rights and Freedoms*?

des droits. Le juge Matheson a décidé que les arrêts *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616 (ci-après *Morgentaler c. La Reine (n° 1)*), et *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), (autorisation de pourvoi refusée, [1981] 1 R.C.S. viii), concluaient que la *Déclaration canadienne des droits* ne permettait pas aux tribunaux de juger de la teneur ou de la sagesse des lois.

Le juge Matheson souligne que M. Borowski soutient essentiellement, en vertu de la *Charte*, que le fœtus est une personne et devrait donc être protégé par l'art. 7 de la *Charte*. La Cour conclut toutefois que les par. 251(4), (5) et (6) ne violent pas la *Charte* puisque le fœtus n'est pas visé par le mot «chacun» et ne bénéficie donc pas de l'application de l'art. 7.

En appel, M. Borowski n'a plus soutenu que la contribution du gouvernement au financement des avortements était illégale. La Cour d'appel de la Saskatchewan a rejeté l'appel de M. Borowski en statuant que ni l'art. 7 ni l'art. 15 (qui était entré en vigueur le 17 avril 1985, avant l'audition de l'appel) ne s'appliquent au fœtus. Au nom de la cour, le juge Gerwing a examiné l'histoire du droit relatif au fœtus ainsi que la formulation de l'art. 7 et sa genèse législative, et il a conclu que les garanties de l'art. 7 ne s'appliquent pas à l'enfant à naître. De même, la cour a conclu que le fœtus n'est pas visé par les mots «personne» et «tous» aux fins de l'art. 15.

Cette Cour a accordé l'autorisation de pourvoi le 3 septembre 1987. Les moyens invoqués par l'appelant dans sa requête en autorisation visent principalement les art. 7 et 15 de la *Charte*. Le 7 octobre 1987, le juge McIntyre formulait ainsi les questions constitutionnelles, conformément à l'art. 32 des *Règles de la Cour suprême*, DORS/83-74:

1. Un enfant conçu a-t-il le droit à la vie que garantit l'art. 7 de la *Charte canadienne des droits et libertés*?

2. Si la réponse à la question 1 est affirmative, les par. 251(4), (5), (6) du *Code criminel* violent-ils ou nient-ils les principes de justice fondamentale contrairement à l'art. 7 de la *Charte canadienne des droits et libertés*?

1989 CanLII 123 (SCC)

3. Does a child *en ventre sa mère* have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the *Canadian Charter of Rights and Freedoms*?

4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the rights guaranteed by Section 15?

5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the *Criminal Code* justified by Section 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

On January 28, 1988, after leave to appeal was granted, this Court decided *R. v. Morgentaler (No. 2), supra*, in which all of s. 251 was found to violate s. 7 of the *Charter*. Accordingly, s. 251 in its entirety was struck down.

In July of 1988 in light of this Court's judgment in *R. v. Morgentaler (No. 2), supra*, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the *Criminal Code* had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child *en ventre sa mère* is entitled to the protection of ss. 7 and 15 of the *Charter* respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

3. L'enfant conçu a-t-il le droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination en raison de l'âge ou de déficiences mentales ou physiques, que garantit l'art. 15 de la *Charte canadienne des droits et libertés*?

4. Si la réponse à la question 3 est affirmative, les par. 251(4), (5), (6) du *Code criminel* violent-ils ou nient-ils les droits garantis par l'art. 15?

5. Si la réponse à la question 2 est affirmative et si la réponse à la question 4 est affirmative, les par. 251(4), (5), (6) du *Code criminel* sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Le 28 janvier 1988, après avoir autorisé le pourvoi en l'espèce, la Cour a rendu l'arrêt *R. c. Morgentaler (N° 2)*, précité, dans lequel elle a jugé que l'art. 251 viole l'art. 7 de la *Charte*. En conséquence, elle a déclaré inopérant l'ensemble de l'art. 251.

En juillet 1988, en raison de l'arrêt *R. c. Morgentaler (n° 2)* de cette Cour, le procureur général du Canada a demandé l'ajournement de l'audition du pourvoi. L'intimé soutenait que le litige concernant l'art. 251 du *Code criminel* était maintenant sans objet puisque cet article avait été déclaré inopérant et que les deux autres questions constitutionnelles (les questions 1 et 3), concernant le droit de l'enfant à naître à la protection des art. 7 et 15 de la *Charte*, ne pouvaient être séparées des questions constitutionnelles qui étaient devenues théoriques. Bien que l'intimé ait soutenu que la cause était théorique, il n'a pas demandé l'annulation du pourvoi. Le juge en chef Dickson a rejeté la demande d'ajournement le 19 juillet 1988. La Cour doit donc traiter de la question du caractère théorique du litige.

Je suis d'avis de rejeter le pourvoi pour les motifs suivants: (1) la cause de M. Borowski est devenue théorique et (2) il a perdu la qualité nécessaire pour agir. L'annulation de l'art. 251 a fait disparaître sa cause d'action. La demande initiale de redressement n'a plus d'objet. Le fondement même de la qualité pour agir reconnue par cette Cour dans sa décision antérieure a lui aussi disparu.

1989 CanLII 123 (SCC)

Mootness

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Le caractère théorique

La doctrine relative au caractère théorique est un des aspects du principe ou de la pratique générale voulant qu'un tribunal peut refuser de juger une affaire qui ne soulève qu'une question hypothétique ou abstraite. Le principe général s'applique quand la décision du tribunal n'aura pas pour effet de résoudre un litige qui a, ou peut avoir, des conséquences sur les droits des parties. Si la décision du tribunal ne doit avoir aucun effet pratique sur ces droits, le tribunal refuse de juger l'affaire. Cet élément essentiel doit être présent non seulement quand l'action ou les procédures sont engagées, mais aussi au moment où le tribunal doit rendre une décision. En conséquence, si, après l'introduction de l'action ou des procédures, surviennent des événements qui modifient les rapports des parties entre elles de sorte qu'il ne reste plus de litige actuel qui puisse modifier les droits des parties, la cause est considérée comme théorique. Le principe ou la pratique général s'applique aux litiges devenus théoriques à moins que le tribunal n'exerce son pouvoir discrétionnaire de ne pas l'appliquer. J'examinerai plus loin les facteurs dont le tribunal tient compte pour décider d'exercer ou non ce pouvoir discrétionnaire.

La démarche suivie dans des affaires récentes comporte une analyse en deux temps. En premier, il faut se demander si le différend concret et tangible a disparu et si la question est devenue purement théorique. En deuxième lieu, si la réponse à la première question est affirmative, le tribunal décide s'il doit exercer son pouvoir discrétionnaire et entendre l'affaire. La jurisprudence n'indique pas toujours très clairement si le mot «théorique» (*moot*) s'applique aux affaires qui ne comportent pas de litige concret ou s'il s'applique seulement à celles de ces affaires que le tribunal refuse d'entendre. Pour être précis, je considère qu'une affaire est «théorique» si elle ne répond pas au critère du «litige actuel». Un tribunal peut de toute façon choisir de juger une question théorique s'il estime que les circonstances le justifient.

1989 CanLII 123 (SCC)

When is an Appeal Moot?—The Authorities

The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

In *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.)

Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385, and *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. In *Coca-Cola v. Mathews*, Rinfret C.J. held the result of the undertaking was to eliminate any further *lis* between the parties such

Quand un pourvoi est-il théorique?—La jurisprudence

La première étape de l'analyse exige qu'on se demande s'il reste un litige actuel. Diverses circonstances, dont je vais donner des exemples, peuvent faire disparaître un litige et rendre la question théorique.

Dans l'arrêt *The King ex rel. Tolfree v. Clark*, [1944] R.C.S. 69, cette Cour a refusé d'accorder une autorisation de pourvoi à des requérants qui demandaient un jugement interdisant aux intimés d'exercer leurs fonctions de députés de l'assemblée législative de l'Ontario et de participer à ses délibérations. L'assemblée législative avait été dissoute avant l'audition de l'affaire par cette Cour. Le juge en chef Duff, au nom de la Cour, dit à la p. 72:

> [TRADUCTION] Il s'agit d'une de ces affaires où les circonstances auxquelles les procédures des tribunaux d'instance inférieure se rapportent et sur lesquelles elles sont fondées n'existent plus, le substratum du litige a disparu. Selon les principes reconnus, il n'est plus possible de connaître du pourvoi. [Je souligne.]

Dans l'affaire *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 R.C.S. 363, l'abrogation du règlement municipal contesté avant l'audition du pourvoi a entraîné la conclusion que l'appelant n'avait pas d'intérêt réel et qu'une décision n'aurait pas de conséquence pour les parties, sauf pour les dépens. De même, dans une situation analogue à l'espèce, le Conseil privé a refusé de se prononcer sur la constitutionnalité de dispositions législatives contestées parce que les lois en cause avaient été abrogées avant l'audition: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (C.P.)

Certains pourvois n'ont pas été entendus dans des cas où l'appelant avait pris l'engagement de verser à l'intimé les dommages-intérêts accordés par les cours d'instance inférieure et les dépens, quelle que soit l'issue du pourvoi: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] R.C.S. 385, et *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. Dans l'affaire *Coca-Cola v. Mathews*, le juge en chef Rinfret a statué que l'engagement avait comme conséquence

1989 CanLII 123 (SCC)

that the Court would have been forced to decide an abstract proposition of law.

As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (*Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (*R. v. Mercure*, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Re Maltby and Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (Sask. C.A.)

The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

d'éliminer tout litige entre les parties de sorte que la Cour aurait été forcée de se prononcer sur une question juridique abstraite.

Dans un autre cas, la vente d'un restaurant pour lequel on cherchait à obtenir un renouvellement du permis exigé par le règlement municipal contesté avait rendu la question théorique: *Vic Restaurant Inc. v. City of Montreal*, [1959] R.C.S. 58. Pour certains problèmes de courte durée, le litige n'existe plus quand l'affaire est portée en appel. C'est ce qui est arrivé dans l'affaire *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] R.C.S. 628, quand la fin de la grève qui opposait les parties a mis fin au litige concernant la validité de l'injonction qui interdisait certains actes de grève à l'une de ces parties.

Un changement dans la situation des parties à une action peut aussi éliminer l'aspect tangible du litige. Le décès d'une partie qui contestait la validité d'une audition sur la révocation de sa libération conditionnelle (*Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.)) et, dans un autre cas, le décès d'une partie qui contestait une contravention pour excès de vitesse (*R. c. Mercure*, [1988] 1 R.C.S. 234) ont mis fin à des litiges concrets.

De même, l'inapplicabilité d'une loi à celui qui en conteste la validité rend le litige théorique: *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357. Une situation semblable se présente quand l'appel d'une déclaration de culpabilité est considéré comme théorique parce que l'accusé a purgé la peine avant l'audition de l'appel: *Re Maltby and Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (C.A. Sask.)

La question du caractère théorique a été étudiée plus fréquemment aux États-Unis, dans la jurisprudence et la doctrine, et l'analyse du principe y est plus développée. Cela tient vraisemblablement au par. 2(1) de l'article III de la Constitution américaine qui exige qu'il y ait «une cause ou un différend»:

2. (1) Le pouvoir judiciaire s'étendra à toutes les causes, en droit (*Law*) et en équité (*Equity*), survenues sous l'empire de la présente constitution, des lois des

1989 CanLII 123 (SCC)

or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité; à toute les causes concernant les ambassadeurs, les autres ministres et les consuls; à toutes les causes d'amirauté et de juridiction maritime; aux différends dans lesquels les États-Unis seront partie; aux différends entre deux ou plusieurs États; entre un État et les citoyens d'un autre État; entre citoyens de différents États; entre citoyens d'un même État réclamant des terres en vertu de concessions d'autres États; entre un État ou ses citoyens et des États, citoyens ou sujets étrangers.

(Traduction de S. Rials, Presses Universitaires de France.)

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R.* 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

Cependant, en dépit de la consécration du principe dans la Constitution, la doctrine du caractère théorique a ses sources dans des principes de *common law* semblables à ceux qui prévalent au Canada: voir «The Mootness Doctrine in the Supreme Court» (1974), 88 *Harvard L.R.* 373, à la p. 374. Les cas où l'on a conclu au caractère théorique de l'action sont semblables à ceux du Canada. Par exemple, dans *Hall v. Beals*, 396 U.S. 45 (1969), la contestation par un électeur du Colorado de la condition de résidence de six mois a été déclarée théorique parce qu'une modification de la loi avait soustrait le demandeur à l'application de cette loi. La question a été soulevée dans l'affaire *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), parce que le défendeur avait volontairement mis fin à la conduite illégale alléguée. De même, dans *Sibron v. New York*, 392 U.S. 40 (1968), le caractère théorique a été invoqué parce que l'accusé avait fini de purger sa peine avant l'appel de sa déclaration de culpabilité.

The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 *Calif. L.R.* 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

La jurisprudence américaine manifeste le même souci de juger une action au fond dans certaines circonstances même si le litige n'est plus ni concret ni tangible. La règle selon laquelle les tribunaux ne se prononcent pas sur des questions abstraites, hypothétiques ou contingentes n'est pas absolue (voir: Tribe, *American Constitutional Law* (2e éd. 1988), à la p. 84; Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory» (1974), 62 *Calif. L.R.* 1385). L'analyse en deux temps permet à une cour d'entendre un appel au fond même si la question est théorique.

1989 CanLII 123 (SCC)

Is this Appeal Moot?

In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the *Criminal Code* having been struck down in *R. v. Morgentaler (No. 2)*, *supra*, the *raison d'être* of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 *Charter* rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the *Criminal Code*. They were a mere step in the process of measuring the impugned provision against the *Charter*.

In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: *Vadeboncœur v. Landry*, [1977] 2 S.C.R. 179, at pp. 187-88, and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the *Supreme Court Rules* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

32. (1) When a party to an appeal

(a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,

(b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court

Le présent pourvoi est-il théorique?

À mon avis, il n'y a plus de litige actuel ni de différend concret puisque le substratum du pourvoi de M. Borowski a disparu. Son action était fondée sur une contestation de la constitutionnalité des par. 251(4), (5) et (6) du *Code criminel*. Cet article ayant été déclaré inopérant par l'arrêt *R. c. Morgentaler (n° 2)*, précité, la raison d'être de l'action a disparu. Aucun des redressements demandés dans la déclaration n'est pertinent. Trois des cinq questions constitutionnelles énoncées visent expressément l'art. 251 et n'ont plus d'objet. Les deux autres ont trait à la portée des droits garantis par les art. 7 et 15 de la *Charte* et ne peuvent être traitées séparément de la contestation de l'art. 251. Ces questions étaient accessoires à la question principale de l'inconstitutionnalité des dispositions du *Code criminel* relatives à l'avortement. Elles n'étaient qu'une étape du processus d'examen des dispositions contestées en vertu de la *Charte*.

De toute façon, cette Cour n'est pas liée par la formulation d'une question constitutionnelle. La question ne peut servir non plus à transformer un pourvoi en renvoi: *Vadeboncœur c. Landry*, [1977] 2 R.C.S. 179, aux pp. 187 et 188, et *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, à la p. 71. La procédure établie par l'art. 32 des *Règles de la Cour suprême* ne vise pas à introduire de nouvelles questions, mais à définir avec précision les questions constitutionnelles litigieuses qui ressortent du dossier. L'article 32 dit:

32. (1) Lorsque, dans le cas d'un pourvoi autorisé par la Cour, par la cour de dernier ressort d'une province, par la Cour d'appel fédérale ou d'un pourvoi de plein droit, une partie

a) entend contester la validité ou l'applicabilité constitutionnelle d'une loi du Parlement du Canada ou d'une loi, de la législature d'une province, ou de l'un de leurs règlements d'application,

b) entend plaider le caractère inopérant d'une loi du Parlement du Canada ou d'une loi de la législature d'une province ou de leurs règlements d'application,

elle doit, après avoir donné un avis aux autres parties et dans les 30 jours de l'autorisation de pourvoi ou de

1989 CanLII 123 (SCC)

of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully

l'inscription de l'avis de pourvoi, s'adresser au Juge en chef ou à un juge pour que soit formulée la question.

Les questions ne peuvent donc pas servir de fondement distinct à un pourvoi qui est par ailleurs théorique.

Compte tenu de ce qui précède, je conclus que le pourvoi est théorique. Il est donc nécessaire d'aborder la seconde étape de l'analyse et d'examiner les éléments sur lesquels la Cour devrait se fonder pour décider d'exercer son pouvoir discrétionnaire pour entendre ou refuser d'entendre le pourvoi.

L'exercice du pouvoir discrétionnaire: les critères applicables

Puisque le pouvoir discrétionnaire à exercer concerne l'application d'une politique ou d'une pratique de la Cour, il n'est pas surprenant de ne pas pouvoir dégager de la jurisprudence un ensemble précis de critères. Aux États-Unis, le même problème a amené des commentateurs à dire que [TRADUCTION] «le droit est un fatras de théories incohérentes et disparates, ce qui rend indispensable une généralisation judiciaire convaincante.» (Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory», précité, à la p. 1387). J'ajouterais qu'il n'est pas souhaitable d'aller au-delà d'une généralisation convaincante parce qu'une liste exhaustive aurait comme conséquence d'entraver indûment, pour l'avenir, le pouvoir discrétionnaire de la Cour. Il s'agit néanmoins d'un pouvoir discrétionnaire à exercer de façon judiciaire selon les principes établis.

Pour formuler des lignes directrices applicables à l'exercice du pouvoir discrétionnaire visant à écarter une pratique habituelle, il est utile d'en étudier les assises. Dans la mesure où une assise donnée de cette pratique est faible ou inexistante, les raisons de l'appliquer diminuent ou disparaissent.

La première raison d'être de la politique ou de la pratique en question tient à ce que la capacité des tribunaux de trancher des litiges a sa source dans le système contradictoire. L'exigence du débat contradictoire est l'un des principes fondamentaux de notre système juridique et elle tend à garantir

1989 CanLII 123 (SCC)

argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal, supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in *Sibron v. New York, supra*. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

> . . . most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

que les parties ayant un intérêt dans l'issue du litige en débattent complètement tous les aspects. Il semble que cette exigence puisse être remplie si, malgré la disparition du litige actuel, le débat contradictoire demeure. Par exemple, même si la partie qui a engagé des procédures en justice n'a plus d'intérêt direct dans l'issue, il peut subsister des conséquences accessoires à la solution du litige qui fournissent le contexte contradictoire nécessaire. C'est un des facteurs qui a joué dans la décision de cette Cour d'exercer son pouvoir discrétionnaire dans l'affaire *Vic Restaurant Inc. v. City of Montreal*, précitée. Après la vente du restaurant pour lequel on demandait le renouvellement du permis d'exploitation et de vente de boissons alcooliques, il n'était plus possible de délivrer le *mandamus* relatif au permis. Néanmoins, subsistaient des poursuites contre l'appelante pour infraction au règlement municipal que visait l'action en justice. La détermination de la validité du règlement avait des conséquences accessoires pour l'appelante et lui donnait l'intérêt requis pour agir qu'autrement elle n'aurait pas eu.

Aux États-Unis, les conséquences accessoires ont un rôle reconnu dans la décision d'exercer le pouvoir discrétionnaire d'entendre une affaire. Dans *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), on avait demandé à la Cour suprême des États-Unis de se prononcer sur une ordonnance de l'Interstate Commerce Commission qui imposait un plafond sur certains prix de transport. Malgré la caducité de l'ordonnance, la Cour a conclu, entre autres choses, que la responsabilité éventuelle de la société de chemins de fer envers les expéditeurs constituait une conséquence accessoire qui justifiait une décision sur le fond. L'arrêt *Sibron v. New York*, précité, consacre le principe d'après lequel les conséquences accessoires d'une cause d'action terminée justifient un appel. Dans cette affaire, l'appelant avait interjeté appel de sa déclaration de culpabilité après avoir déjà purgé sa peine. Le juge en chef Warren dit, à la p. 55:

> [TRADUCTION] . . . la plupart des déclarations de culpabilité comportent des conséquences juridiques accessoires défavorables. Cette seule «possibilité» suffit pour empêcher qu'une affaire pénale se termine «ignominieusement dans les limbes des affaires théoriques».

1989 CanLII 123 (SCC)

In Canada, the cases of *Law Society of Upper Canada v. Skapinker*, *supra*, and *R. v. Mercure*, *supra*, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal*, *supra*.

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case

Au Canada, les arrêts *Law Society of Upper Canada c. Skapinker* et *R. c. Mercure*, précités, illustrent le mécanisme de ce principe. Dans ces affaires, l'intérêt des intervenants dans l'issue du pourvoi fournissait le contexte contradictoire nécessaire pour permettre à la Cour d'entendre ces causes.

La deuxième grande raison d'être de la doctrine du caractère théorique tient à l'économie des ressources judiciaires. (Voir: Sharpe, «Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide», *Charter Litigation*.) La triste réalité est qu'il nous faut rationner et répartir entre les justiciables des ressources judiciaires limitées. Le fait que les litiges actifs qui reçoivent une autorisation de pourvoi en cette Cour représentent une faible proportion du nombre total des demandes présentées, témoigne de cette réalité. La saine économie des ressources judiciaires n'empêche pas l'utilisation de ces ressources, si limitées soient-elles, à la solution d'un litige théorique, lorsque les circonstances particulières de l'affaire le justifient.

L'économie des ressources judiciaires n'empêche pas non plus d'entendre des affaires devenues théoriques dans les cas où la décision de la cour aura des effets concrets sur les droits des parties même si elle ne résout pas le litige qui a donné naissance à l'action. L'influence de ce facteur, combiné au premier facteur mentionné plus haut, est évidente dans l'affaire *Vic Restaurant Inc. v. City of Montreal*, précitée.

De même, il peut être justifié de consacrer des ressources judiciaires à des causes théoriques qui sont de nature répétitive et de courte durée. Pour garantir que sera soumise aux tribunaux une question importante qui, prise isolément, pourrait échapper à l'examen judiciaire, on peut décider de ne pas appliquer strictement la doctrine du caractère théorique. Ce fut le cas dans l'arrêt *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, précité. L'affaire portait sur la validité d'une injonction interlocutoire qui interdisait certains actes de grève. Quand l'affaire a été soumise à cette Cour, la grève avait déjà fait l'objet d'un règlement. C'est le résultat habituel d'une injonction provi-

1989 CanLII 123 (SCC)

that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and Kates and Barker, *supra*, at pp. 1429-31. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

This was the basis for the exercise of this Court's discretion in the *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court.

soire dans les conflits du travail. Si la question devait être tranchée un jour, il était presque inévitable qu'elle le soit dans un cas devenu théorique. La Cour a donc exercé son pouvoir discrétionnaire pour entendre l'affaire. D'autres exemples sont: *Le Syndicat des Employés du Transport de Montréal c. Procureur général du Québec*, [1970] R.C.S. 713, et *Wood, Wire and Metal Lathers' Int. Union c. United Brotherhood of Carpenters and Joiners of America*, [1973] R.C.S. 756. Le simple fait, cependant, que la même question puisse se présenter de nouveau, et même fréquemment, ne justifie pas à lui seul l'audition de l'appel s'il est devenu théorique. Il est préférable d'attendre et de trancher la question dans un véritable contexte contradictoire, à moins qu'il ressorte des circonstances que le différend aura toujours disparu avant d'être résolu.

On justifie également de façon assez imprécise, l'utilisation de ressources judiciaires dans des cas où se pose une question d'importance publique qu'il est dans l'intérêt public de trancher. Il faut mettre en balance la dépense de ressources judiciaires et le coût social de l'incertitude du droit. Voir *Ministre de la Main-d'œuvre et de l'Immigration c. Hardayal*, [1978] 1 R.C.S. 470, et Kates et Barker, dans l'ouvrage précité, aux pp. 1429 à 1431. Le juge Locke a fait allusion à cela dans l'arrêt *Vic Restaurant Inc. v. City of Montreal*, précité, à la p. 91: [TRADUCTION] «La question a, je l'ai dit, de l'importance pour toutes les institutions municipales du Canada.»

C'est le motif pour lequel cette Cour a décidé d'exercer son pouvoir discrétionnaire dans le *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793. La question de la constitutionnalité du rapatriement de la Constitution était devenue théorique après le rapatriement. La Cour dit à la p. 806:

> Tout en conservant son pouvoir discrétionnaire d'entendre ou non un pourvoi de plein droit lorsque la question est devenue théorique, la Cour peut, dans l'exercice de ce pouvoir, tenir compte de l'importance de la question constitutionnelle tranchée par une cour d'appel dont la décision serait soustraite à l'examen ultérieur de cette Cour.

1989 CanLII 123 (SCC)

In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law*, *supra* at p. 67.)

In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369, at p. 373:

The latter function of the mootness doctrine—political flexibility—can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it

Dans les présentes circonstances, il appert souhaitable de répondre à la question constitutionnelle afin de dissiper tous les doutes qu'elle suscite; voilà pourquoi il y sera répondu.

Manifestement, la présence d'une question d'importance nationale dans un pourvoi, qui est par ailleurs théorique, ne suffit pas. Tous les pourvois en cette Cour doivent avoir une importance nationale, à l'exception des pourvois de plein droit considérés assez importants par le législateur pour être soumis à cette Cour. Il faut aussi l'élément additionnel que constitue le coût social de laisser une question sans réponse. Ce facteur paraît avoir largement influencé la décision de la majorité dans l'arrêt de cette Cour *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90.

La troisième raison d'être de la doctrine du caractère théorique tient à ce que la Cour doit prendre en considération sa fonction véritable dans l'élaboration du droit. La Cour doit se montrer sensible à sa fonction juridictionnelle dans notre structure politique. On pourrait penser que prononcer des jugements sans qu'il y ait de litige pouvant affecter les droits des parties est un empiétement sur la fonction législative. La nécessité de garder une certaine souplesse à cet égard a été plus clairement reconnue aux États-Unis où la notion de caractère théorique est un aspect du concept plus large de justiciabilité. (Voir: Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory», précité, et Tribe, *American Constitutional Law*, précité, à la p. 67.)

À mon avis, c'est aussi l'un des trois objets fondamentaux de la doctrine canadienne du caractère théorique et un facteur très important en l'espèce. Je suis essentiellement d'accord avec ce que disent P. Macklem et E. Gertner dans «Re Skapinker and Mootness Doctrine» (1984), 6 *Sup. Ct. L. Rev.* 369, à la p. 373:

[TRADUCTION] Cette dernière fonction de la doctrine du caractère théorique—la souplesse politique—peut être considérée comme le degré supplémentaire de souplesse, à l'égard d'un différend tenu pour théorique, dans le rôle que joue la Cour dans l'élaboration du droit. La doctrine du caractère théorique permet à la Cour de ne pas entendre une affaire parce qu'il n'existe plus de

1989 CanLII 123 (SCC)

is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Exercise of Discretion: Application of Criteria

Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical

litige entre les parties, même si la Cour estime que la question a une importance nationale. Même si elle a des liens avec le facteur d'économie des ressources judiciaires, parce qu'il s'agit de déterminer si la décision de l'affaire aura comme conséquence de créer une jurisprudence inutile, la souplesse politique permet à la Cour de tenir compte de son rôle dans le cadre constitutionnel canadien et traduit en même temps la mesure dans laquelle la Cour peut diriger l'évolution du droit.

Je préfère toutefois ne pas utiliser l'expression «souplesse politique», afin d'éviter toute confusion possible avec la doctrine des questions politiques. Au moment de décider d'exercer le pouvoir discrétionnaire d'entendre une affaire théorique, la Cour doit être consciente de la mesure dans laquelle elle pourrait s'écarter de son rôle traditionnel.

En exerçant son pouvoir discrétionnaire à l'égard d'un pourvoi théorique, la Cour doit tenir compte de chacune des trois raisons d'être de la doctrine du caractère théorique. Cela ne signifie pas qu'il s'agit d'un processus mécanique. Il se peut que les principes examinés ici ne tendent pas tous vers la même conclusion. L'absence d'un facteur peut prévaloir malgré la présence de l'un ou des deux autres, ou inversement.

L'exercice du pouvoir discrétionnaire: application des critères

Pour l'application de ces critères au présent pourvoi, je ne crains pas vraiment l'absence de débat contradictoire. Le pourvoi a été plaidé avec autant de zèle et de ferveur de la part des deux parties que si la question n'avait pas été théorique.

Le second facteur à considérer est l'économie des ressources judiciaires. L'avocat de l'appelant soutient qu'un dossier imposant a été constitué devant les tribunaux d'instance inférieure et que ce dossier deviendrait inutile si l'affaire n'était pas jugée au fond. Quoique cet argument ait du mérite, on peut dire la même chose de presque tous les pourvois soumis à cette Cour. Faire droit à cet argument aurait comme conséquence d'affaiblir la doctrine du caractère théorique qui par définition s'applique si, à quelque étape que ce soit, le fondement de l'action disparaît. Il n'est pas possible non plus de faire jouer en faveur de l'appelant le fait que la Cour a mis les questions préliminaires en délibéré et a entendu le pourvoi. À défaut de

1989 CanLII 123 (SCC)

course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler (No. 2)*, *supra*, *per* Dickson C.J., at p. 75; *per* Beetz J. at pp. 122-23; *per* Wilson J. at pp. 181-82. A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the

requête en annulation, c'était la seule solution pratique pour éviter la division du pourvoi. Il serait anormal qu'en mettant en délibéré la question de la nature théorique et en entendant le pourvoi au fond, la Cour compromette son pouvoir discrétionnaire de le décider.

Aucun des autres facteurs dont j'ai parlé et qui justifieraient de consacrer des ressources judiciaires à l'affaire ne s'applique. L'affaire n'aura pas d'effets accessoires pratiques sur les droits des parties. Il ne s'agit pas d'une situation susceptible à la fois de se répéter et de ne jamais être soumise aux tribunaux. Il sera probablement possible de soumettre la question à la Cour à propos d'une loi précise ou peut-être à propos de l'examen d'un acte gouvernemental précis. De plus en l'espèce, une décision dans l'abstrait sur les droits du fœtus ne favoriserait pas nécessairement l'économie des ressources judiciaires puisqu'il est probable que, de toute façon, les tribunaux soient appelés à se prononcer sur des textes législatifs ou des actes gouvernementaux précis. Quoique je n'exprime pas d'opinion sur les droits du fœtus, je ne suis pas certain du tout qu'une décision sur le fond éliminerait la nécessité de litiges répétés.

De plus, même s'il soulève une question de grande importance pour le public, il ne s'agit pas d'un cas où il serait dans l'intérêt du public de statuer sur le fond de la question pour déterminer l'état du droit. L'appelant demande une interprétation générale des art. 7 et 15 de la *Charte canadienne des droits et libertés*. Dans le contexte d'une loi, les droits du fœtus pourraient être examinés ou, du moins, considérés par rapport aux droits garantis à la femme par l'art. 7: voir *R. c. Morgentaler (nº 2)*, précité, le juge en chef Dickson, à la p. 75, le juge Beetz, aux pp. 122 et 123, et le juge Wilson, aux pp. 181 et 182. Un jugement en faveur de la thèse de l'appelant, suivant laquelle le fœtus jouit des droits garantis par l'art. 7 dès sa conception, reviendrait à trancher la question hors de son contexte. Les médecins et les hôpitaux seraient alors obligés de se demander comment appliquer une telle décision et respecter les droits garantis aux femmes par l'art. 7. Pendant les plaidoiries, on a demandé à l'avocate de R.E.A.L. Women ce que les médecins feraient, si l'appelant

1989 CanLII 123 (SCC)

appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the *Criminal Code*. He now wishes to ask a question that relates to the *Canadian Charter of Rights and Freedoms* alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the *Criminal Code*

avait gain de cause, dans le cas d'une femme enceinte dont la vie ne pourrait être sauvée que par un avortement. Il a répondu que les médecins et les législateurs passeraient quelques nuits blanches à chercher une solution. Un tel état d'incertitude n'est certainement pas dans l'intérêt public. Au lieu de clarifier le droit, une décision en faveur de l'appelant aurait l'effet contraire.

Même si j'étais enclin à me prononcer en faveur de l'appelant pour les deux premiers facteurs, je refuserais d'exercer le pouvoir discrétionnaire de rendre une décision sur le fond du pourvoi à cause du troisième facteur. Un des éléments de ce troisième facteur est la nécessité d'être sensible à l'efficacité et à l'efficience de l'intervention judiciaire. La nécessité pour les tribunaux de faire preuve d'une certaine souplesse dans l'application de la doctrine du caractère théorique exige plus que la simple considération de l'importance de la question. L'appelant demande une opinion juridique sur l'interprétation de la *Charte canadienne des droits et libertés* en l'absence de loi ou d'acte gouvernemental qui donnerait lieu à l'application de la *Charte*. Seul le gouvernement peut le faire. L'appelant cherche en réalité à transformer le pourvoi en renvoi d'initiative privée. En fait, il ne cherche même pas à faire trancher la question qui était l'objet de l'action, c'est-à-dire la validité de l'art. 251 du *Code criminel*. Il veut maintenant poser une question qui a trait à la *Charte canadienne des droits et libertés* uniquement. On ne demande pas une réponse à une question théorique, mais une réponse à une question différente, à une question abstraite. Faire droit à cette demande empiéterait sur le droit du pouvoir exécutif d'ordonner un renvoi et pourrait empêcher le législateur de prendre une décision, en lui dictant les termes des dispositions législatives à adopter. Ce serait une dérogation marquée au rôle traditionnel de la Cour.

Ayant décidé que le pourvoi est théorique, je suis d'avis de refuser d'exercer le pouvoir discrétionnaire de la Cour pour le trancher au fond.

La qualité pour agir

Dans son action initiale, M. Borowski soutenait que les par. 251(4), (5) et (6) du *Code criminel*

1989 CanLII 123 (SCC)

violated the s. 1 right to life of the *Canadian Bill of Rights*: *Minister of Justice of Canada v. Borowski*, *supra*. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, and *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

The Court relied heavily upon the decision in *Thorson*, *supra*, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised . . . . [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Secondly, by holding s. 251 to be of no force and effect in *R. v. Morgentaler (No. 2)*, *supra*, the legislative context of this claim has disappeared.

By virtue of s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, there are two possi-

enfreignaient le droit à la vie garanti par l'article premier de la *Déclaration canadienne des droits*: *Ministre de la Justice du Canada c. Borowski*, précité. Cette Cour a statué que M. Borowski avait qualité pour agir parce qu'il pouvait faire la preuve d'«un intérêt véritable» quant à la validité de la loi.

La qualité pour agir a été reconnue à M. Borowski parce que celui-ci voulait contester une loi précise. Le juge Martland a examiné les arrêts antérieurs de cette Cour relatifs à la qualité pour agir, *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, et *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, et il a conclu que l'appelant avait qualité pour agir parce que «à titre de citoyen, [il avait] un intérêt véritable quant à la validité de la loi» contestée (à la p. 598).

La Cour s'est essentiellement appuyée sur l'arrêt *Thorson*, précité, dans lequel le juge Laskin (plus tard Juge en chef) a dit, au nom de la majorité, à la p. 161:

> À mon avis, la qualité pour agir d'un contribuable fédéral qui cherche à contester la constitutionnalité d'une loi fédérale est une matière qui relève particulièrement de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours. La question de savoir si la question qu'on cherche à soulever peut être réglée par les tribunaux est au cœur de ce pouvoir discrétionnaire . . . [Je souligne.]

Je crois que ces arrêts ont clairement élargi le fondement de la qualité pour agir quand une loi précise fait l'objet d'une contestation fondée sur des moyens constitutionnels.

Il s'est produit deux changements importants dans la nature de l'action en l'espèce depuis que la Cour a reconnu à M. Borowski la qualité pour agir en 1981. D'abord la demande actuelle se fonde principalement sur l'allégation que le droit du fœtus à la vie et à l'égalité est garanti par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. Deuxièmement, en déclarant l'art. 251 inopérant, l'arrêt *R. c. Morgentaler (n° 2)*, précité, a fait disparaître le contexte législatif de la demande.

Par application du par. 24(1) de la *Charte* et du par. 52(1) de la *Loi constitutionnelle de 1982*, il y

1989 CanLII 123 (SCC)

ble means of gaining standing under the *Charter*. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a *Charter*-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

Nor can s. 52(1) of the *Constitution Act, 1982* be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the *Thorson, McNeil, Borowski* trilogy expansion of the doctrine.

Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in

a deux moyens d'avoir qualité pour agir en vertu de la *Charte*. Le paragraphe 24(1) dit:

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

À mon avis, il n'est pas possible d'invoquer en l'espèce le par. 24(1) comme fondement de la qualité pour agir. Le paragraphe 24(1) exige expressément qu'il y ait violation ou négation d'un droit garanti par la *Charte*. La demande de l'appelant ne remplit pas cette condition puisqu'il allègue la violation des droits du fœtus, et non de ses propres droits.

On ne peut non plus se fonder sur le par. 52(1) de la *Loi constitutionnelle de 1982* pour reconnaître à M. Borowski qualité pour agir. Le paragraphe 52(1) dit:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Ce paragraphe prévoit donc un autre moyen d'avoir qualité pour agir selon les trois arrêts qui ont étendu la doctrine relative à cette question, les arrêts *Thorson, McNeil* et *Borowski*.

Cependant ces trois arrêts portaient sur la contestation d'une loi précise et, de la même manière, une action fondée sur le par. 52(1) de la *Loi constitutionnelle de 1982* doit se limiter à la contestation d'une loi ou d'un acte gouvernemental pris en vertu d'un pouvoir conféré par la loi. Ici, l'appelant ne conteste ni «une loi» ni un acte gouvernemental qui fait jouer les dispositions de la *Charte*. L'appelant demande une interprétation pure et simple de deux dispositions de la *Charte*. Pour ce faire, la Cour devrait ainsi répondre à une question totalement abstraite et, par la même occasion, sanctionner un renvoi d'initiative privée. À mon avis, le fondement initial de la qualité pour agir a disparu et le demandeur n'a plus qualité pour continuer ce pourvoi.

En conséquence, le pourvoi est rejeté et pour le motif qu'il est théorique et pour le motif que l'appelant n'a plus qualité pour agir. À mon avis,

1989 CanLII 123 (SCC)

lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

Appeal dismissed.

Solicitors for the appellant: Shumiatcher-Fox, Regina.

Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.

Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.

Solicitor for the respondent: Frank Iacobucci, Ottawa.

Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

au lieu de demander l'ajournement du pourvoi, l'intimé aurait dû demander son annulation. Cette demande aurait certainement dû être présentée après le refus de la demande d'ajournement. En ne le faisant pas, on a occasionné des dépenses inutiles à l'appelant en l'obligeant à préparer et soutenir le présent pourvoi. Dans les circonstances, il convient que l'intimé paie à l'appelant les dépens du présent pourvoi depuis la décision rendue sur la demande d'ajournement le 19 juillet 1988.

Pourvoi rejeté.

Procureurs de l'appelant: Shumiatcher-Fox, Regina.

Procureurs de l'intervenante Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.

Procureur de l'intervenante R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.

Procureur de l'intimé: Frank Iacobucci, Ottawa.

Procureurs de l'intervenant Fonds d'action et d'éducation juridiques pour les femmes (FAEJ): Tory, Tory, DesLauriers & Binnington, Toronto.

1989 CanLII 123 (SCC)

TAB 8

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2018 BCCA 282

Date: 20180629
Docket: CA45092

Between:

British Columbia Civil Liberties Association and The John Howard Society of Canada

Respondents
(Plaintiffs)

And

Attorney General of Canada

Appellant
(Defendant)

Before: The Honourable Madam Justice Garson
(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated January 17, 2018 (*British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, Vancouver Registry No. S150415)

Oral Reasons for Judgment

Counsel for the Appellant:	M.R. Taylor, Q.C M. McEachern
Counsel for the Respondents:	A.M. Latimer
Counsel for the Intervenor Applicant, Criminal Defence Advocacy Society	T.M. Arbogast
Counsel for the Joint Intervenor Applicants, Native Women's Association of Canada and West Coast Legal Education and Action Fund	R. Mangat
Counsel for the Intervenor Applicant, Canadian Association of the Elizabeth Fry Societies	P.M. Barkaskas

2018 BCCA 282 (CanLII)

Counsel for the Intervenor Applicant, Canadian Human Rights Commission	F. Keith
Counsel for the Intervenor Applicant Canadian Prison Law Association	A. Nanda
Counsel for the Intervenor Applicant Attorney General of Ontario	M. Dunn
Place and Date of Hearing:	Vancouver, British Columbia June 22, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 29, 2018

2018 BCCA 282 (CanLII)

Summary:

Six public interest groups and the Attorney General of Ontario apply for intervenor status. The appeal is from an order striking down legislation on the administrative segregation of federally incarcerated inmates. Held: Applications of the public interest applicants granted; application of Ontario dismissed. The public interest applicants will bring unique and helpful perspectives to the issues on appeal. Ontario's proposed submissions, however, go beyond the proper role of an intervenor. In particular, Ontario seeks to duplicate the appellant's submissions, make arguments the appellant could have made but chose not to, and address issues outside the scope of the appeal and the evidentiary record.

2018 BCCA 282 (CanLII)

[1] **GARSON J.A.**: This is the application of six public interest advocacy groups, as well as the Attorney General for Ontario, for intervenor status in the within appeal. The Attorney General of Canada appeals from the order of Justice Leask declaring unconstitutional certain provisions governing the administrative segregation of inmates in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*]. The constitutional challenge was brought by the British Columbia Civil Liberties Association ("BCCLA") and the John Howard Society of Canada.

[2] The issues on the applications are whether any of the intervenors are proposing to impermissibly expand the scope of the appeal and whether they would bring a unique or helpful perspective to the appeal.

[3] The appeal is scheduled for two days on November 13 and 14, 2018.

Background

[4] The respondent BCCLA is a non-profit advocacy group whose aims include promoting and defending civil liberties in British Columbia and Canada. The respondent John Howard Society is a non-profit organization with a history of involvement in penal policy and corrections. At trial, Canada did not dispute that the BCCLA and John Howard Society had public interest standing to challenge the constitutional validity of federal administrative segregation legislation.

[5] In the underlying proceeding, the BCCLA and John Howard Society (collectively "respondents") challenged the constitutional validity of ss. 31–33 and

s. 37 of the *CCRA*. Section 31 of the *CCRA* says the purpose of administrative segregation is to maintain safety and security. Section 31 also provides for release of inmates from administrative segregation "at the earliest appropriate time". Under s. 31(3), a warden can order an inmate to be placed in administrative segregation if "satisfied that there is no reasonable alternative" and if he or she believes on reasonable grounds that (a) the inmate is a risk to security or safety, (b) segregation is necessary to prevent interference with an investigation, or (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety. The *CCRA* and the regulations provide for periodic internal review of an inmate's placement in administrative segregation.

2018 BCCA 282 (CanLII)

[6] At trial, the respondents said the impugned provisions constituted an unjustifiable infringement of ss. 7, 9, 10, 12 and 15 of the *Charter.* The respondents alleged that the impugned legislation authorizes indeterminate and prolonged solitary confinement, which causes significant adverse health effects for inmates. They also challenged the lack of independent oversight of segregation placements. Finally, they said the impugned provisions had a disproportionate impact on Aboriginal inmates and inmates with mental illness.

Trial Judge's Decision

[7] In its factum on appeal, Canada conveniently summarizes the trial judge's decision:

> After a 36-day trial, the trial judge made a s. 52(1) declaration that the administrative segregation provisions (ss. 31-33 and 37) are invalid pursuant to s. 7 of the *Charter* to the extent that they authorize and effect prolonged, indefinite, administrative segregation for anyone; authorize and effect the institutional head to be the judge and prosecutor of his own cause; authorize internal review; and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.
>
> The trial judge further declared that the administrative segregation provisions infringe s. 15 of the *Charter* to the extent that they authorize and effect any period of administrative segregation for the mentally ill or disabled, and authorize and effect a procedure that results in discrimination against Aboriginal inmates.
>
> The trial judge granted a 12-month suspension of this declaration from January 17, 2018, as an immediate declaration would pose a potential

danger to the public or threaten the rule of law. He did not address the request for s. 24(1) relief.

Issues on Appeal

[8] Canada submits that the trial judge erred in law by holding that:

a) the administrative segregation provisions infringe s. 7 of the *Charter* to the extent they authorize and effect the prolonged, indefinite segregation of inmates, authorize and effect the institutional head to be the judge and prosecutor of his own cause, authorize internal review, and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews;

b) the administrative segregation provisions infringe s. 15 of the *Charter* for inmates with mental illness or disability, and that compliance with s. 15 precludes any period of administrative segregation for inmates with mental illness or disability;

c) any *Charter* infringements are not justified under s. 1 of the *Charter,* and

d) the appropriate remedy was to grant a s. 52(1) declaration that the administrative segregation provisions are constitutionally invalid, save as regards internal review of segregation decisions.

[9] In other words, Canada says that the impugned provisions, properly interpreted, do not violate s. 7 or s. 15 of the *Charter*. Canada submits that any infringement of the *Charter* is the result of the improper application of the legislation. It says the appropriate remedy is not to strike down the legislation, but rather for an aggrieved individual to seek a remedy under s. 24(1) of the *Charter.*

[10] Canada is not challenging the trial judge's finding of discrimination against Aboriginal inmates. Canada only challenges the trial judge's finding that infirmities in the implementation of the administrative segregation provisions in the case of Aboriginal inmates entitle the respondents to the relief declared under s. 52(1).

[11] The respondents frame the issues somewhat differently on appeal as follows:

Leask J. was correct that:

a) the impugned laws infringe s. 7 of the *Charter* because they authorize and effect prolonged, indefinite administrative segregation of inmates, authorize and effect the institutional head to be the judge and prosecutor of his own cause, authorize internal review, and authorize and effect the deprivation of inmates' right to counsel at administrative segregation hearings and reviews;

b) the administrative segregation provisions infringe s. 15 of the *Charter* for

2018 BCCA 282 (CanLII)

> inmates with mental illness or disability, and that compliance with s. 15 precludes any period of administrative segregation for inmates with mental illness or disability;
>
> c) any *Charter* infringements are not justified under s. 1 of the *Charter,* and granting a s. 52(1) declaration that the administrative segregation provisions are constitutionally invalid for the above reasons, and because they infringe s. 15 of the Charter for Aboriginal inmates.

[12] In the alternative, if the Court accepts Canada's position that declaratory relief under s. 52(1) was inappropriate in this case, the respondents say relief under s. 24(1) of the *Charter* is available to them. They say there is no principled reason to deny a corporate party with public interest standing the ability to challenge state action rather than legislation.

Law on Applications to Intervene in an Appeal

[13] Rule 36 of the *Court of Appeal Rules* governs applications for intervenor status:

> 36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.
>
> …
>
> (3) In any order granting leave to intervene, the justice
>
> (a) is to specify the date by which the factum of the intervenor must be filed, and
>
> (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.
>
> …
>
> (5) Unless a justice otherwise orders, an intervenor
>
> (a) must not file a factum that exceeds 20 pages,
>
> (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
>
> (c) is not to present oral argument.

[14] There are generally two routes to intervenor status. First, an applicant can show a direct interest in the outcome of the proceeding. None of the proposed intervenors in this case have a direct interest. They must rely on the second route,

2018 BCCA 282 (CanLII)

which is available to applicants with a public interest in a public law issue. The legal criteria that apply to intervenor applications under this second route are well settled and may be summarized as follows:

a) Does the proposed intervenor have a broad representative base?
b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

See *Guadagni v. B.C. (W.C.B. of B.C.)* (1988), 30 B.C.L.R. (2d) 259 (Chambers); *R. v. Watson and Spratt,* 2006 BCCA 234 at para. 3 (Chambers); *Canada (Attorney General) v. Aluminum Company of Canada Ltd.* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.); *Carter v. Canada (Attorney General),* 2012 BCCA 502 at paras. 24, 68 (Chambers); and *Vincent v. Roche-Vincent,* 2013 BCCA 136 at para. 4 (Chambers).

[15] I would add to these established criteria that the court may, where appropriate, give consideration to factors relating to the orderly and efficient administration of justice. Clearly the number of intervenors ought not to overwhelm the appeal in a manner that may be overly burdensome for the parties or the court. I have given consideration to this factor in my assessment of the totality of the applications.

[16] None of the applicants or the parties dispute the applicable legal test. Rather, it is the application of that test that is controversial in relation to some of the applications.

<u>The Proposed Intervenors</u>

[17] The proposed intervenors are the Attorney General of Ontario, the Canadian Human Rights Commission, the Criminal Defence Advocacy Society, the Canadian Prison Law Association, the Canadian Association of Elizabeth Fry Societies, and

2018 BCCA 282 (CanLII)

the Native Women's Association of Canada together with the West Coast Legal Education and Action Fund.

[18] I shall briefly comment on the organizational goals of the public interest advocacy groups below in my consideration of their individual applications for intervenor status. The Attorney General of Ontario's interest in the appeal relates to its administration of Ontario's provincial prison system and its pending legislation concerning solitary confinement.

2018 BCCA 282 (CanLII)

Individual Applications

[19] I now turn to the individual applications.

Attorney General of Ontario

[20] I begin with the intervenor application of the Attorney General of Ontario.

[21] In oral submissions, Ontario agreed to limit its intervention to the ground of appeal based on s. 7 of the *Charter.* On the basis of that revised submission, Canada withdrew its objection to Ontario being granted intervenor status. However, the respondents maintain their objection to Ontario's application.

[22] The pertinent remaining portions of Ontario's submissions in which it explains the anticipated intervention in this appeal are as follows:

> 15. Ontario will also highlight how administrative segregation in the provincial and territorial correctional setting differs from the federal setting, and how conditions of administrative segregation may differ across different institutions. For example, the majority of Ontario's inmates have been remanded pending criminal charges, which means that there is significant and frequent movement among the inmate population. This contributes to increased security concerns and more limited opportunities for programming, which impacts how the province can house inmates who present unique challenges. This would provide valuable context for this Court's deliberations in this appeal. It does not appear that any other province or territory intends to seek intervention status in the appeal.
>
> 16. Ontario can also provide a different perspective from Canada, in particular in relation to the application of the *Charter* s. 7 test. Canada has not addressed the security of the person interest in its memorandum of argument on appeal. Ontario can make useful submissions as to the proper application of the second stage of the s. 7 test in light of this interest. Ontario will argue

> that the question of whether a deprivation of liberty is arbitrary or overbroad may be different than the question of whether a deprivation of security of the person also fails to accord with the principles of fundamental justice.
>
> 17. Given that Ontario has recently passed new legislation to reform the operation of correctional facilities in the province (*Correctional Services and Reintegration Act, 2018*), Ontario's new legislation may be placed before this Court. Ontario is best positioned to assist the Court in understanding the similarities and differences between the challenged federal legislation and Ontario's new legislation. Ontario's position would be that both the federal and the provincial legislation comply with the *Charter*, and reflect reasonable policy choices by different levels of government.
>
> 18. Finally, if granted leave to intervene, Ontario would support Canada's position that where a statute can be administered in a manner that complies with the *Charter*, any remedy lies under s. 24(1), rather than s. 52. Given the decision of the British Columbia Supreme Court in this case that there was no evidence to support a finding that the legislation breached s. 12 of the *Charter*, Ontario would submit that the same conclusion should have been drawn with respect to the s. 7 analysis and that the declarations of invalidity should not have been ordered. It is only where the statute cannot be administered in a fashion consistent with the *Charter* that a s. 52 declaration would be the appropriate remedy.

[23] The respondents' objection to Ontario's participation in the appeal is based on the following points:

a) Ontario's proposed submissions will expand the issues under appeal without any evidentiary basis to support those submissions. The respondents point to Ontario's proposed submissions regarding Ontario's provincial corrections system. Ontario says its perspective, based on its experiential role in administering a different correctional system, will be unique and valuable. The respondents submit that there is no evidence about Ontario's correctional system. They say Ontario's proposed intervention is an inappropriate attempt to supplement the record.

b) Ontario's proposed submissions on s. 7 of the *Charter* are either an expansion into issues that are not under appeal or a duplication of Canada's position. For example, Ontario proposes to address the security of the person interest because Canada has not addressed this point in its factum. The respondents say this is a misapprehension of the

2018 BCCA 282 (CanLII)

role of an intervenor, as it is for the parties to frame the issues on appeal.

c) Ontario proposes to support Canada's submissions on the appropriate constitutional remedy in this case. The respondents say Ontario does not identify any unique or different perspective that it might contribute on this point.

[24] I accept that the question of the constitutionality of the federal administrative segregation provisions legitimately engages Ontario's interests in the administration of its provincial corrections system. However, I am unable to discern any unique or helpful perspective that Ontario could bring to this appeal within the confines of the issues under appeal and the record, aside from replicating Canada's submissions.

[25] Ontario proposes to highlight how administrative segregation in the provincial and territorial correctional setting differs from the federal setting, particularly in light of the mobility of the provincial inmate population. Although this proposed submission avoids duplication of Canada's position, I was advised by counsel that there is nothing in the trial record concerning administrative segregation in the provincial system. Given that the record concerns only the federal corrections system, Ontario's submissions on this point appear to stray outside the scope of the issues on appeal and the record. I would, with great respect for Ontario's efforts to assist on this appeal, dismiss Ontario's application for leave to intervene.

Canadian Prison Law Association ("CPLA")

[26] CPLA is a national organization of Canadian lawyers and academics practicing and researching in the area of prison law. It was founded in 1985. CPLA engages in education and advocacy activities with the aim of promoting the constitutional rights of prisoners. Its activities include intervening in litigation, issuing publications, and making submissions to governments on prison law reform. CPLA's members have worked to reform the use of administrative segregation in federal institutions for decades. Its members also act for prisoners in matters arising from their placement in administrative segregation.

2018 BCCA 282 (CanLII)

[27] Canada objects to CPLA's application because CPLA seeks to make submissions on the availability of relief under s. 24(1), an issue Canada says is not engaged on this appeal. Canada asserts that the respondents did not cross-appeal the trial judge's omission to grant relief under s. 24(1) and, accordingly, issues concerning s. 24(1) will not be before the court on appeal.

[28] In my view, the question of whether s. 24(1) might be engaged as an issue on appeal is not a question that could or should be decided on this application. Accordingly, I would not refuse intervenor status to a party proposing to make submissions about s. 24(1) on the grounds that it may not be an issue on the appeal. Such a determination would be premature. The question of whether s. 24(1) is engaged on this appeal is a question for the division hearing the appeal.

[29] If s. 24(1) ultimately becomes an issue, this proposed intervenor has a unique perspective from which to make submissions on this issue. CPLA does not take any position in respect to the availability of declaratory relief under s. 52(1). However, it does dispute Canada's position that relief under s. 24(1) is unavailable to public interest standing litigants. CPLA proposes to submit that seeking relief under s. 24(1) is impractical and unrealistic for the population it represents, namely inmates, because segregation status changes so quickly that an individual claim is generally moot before it reaches a hearing. This unique perspective is directly relevant to Canada's position that any remedy for *Charter* breaches should be sought by individual prisoners when their individual *Charter* rights are infringed.

[30] I would therefore grant CPLA intervenor status.

Canadian Human Rights Commission ("Commission") and Canadian Association of Elizabeth Fry Societies ("CAEFS")

[31] Neither Canada nor the respondents object to the intervenor applications of the Commission or CAEFS. However, Canada contends that these two public interest organizations should be granted status as a joint intervenor. Canada says both organizations seek leave to submit that the legislative provisions dealing with administrative segregation discriminate against female, Aboriginal and mentally

2018 BCCA 282 (CanLII)

disabled inmates. The trial judge held that the impugned provisions do not have a disproportionate effect on women (RFJ at para. 463) and that finding is not under appeal.

[32] The Commission says that, if granted leave to intervene, it will expand on the question of whether solitary confinement discriminates against vulnerable prisoners with mental disabilities, including female prisoners. It also proposes to make submissions on the failure of the impugned provisions to prevent discrimination and the need to interpret “mental disability” broadly and liberally.

[33] CAEFS proposes to make submissions along similar lines. It says its submissions will assert that segregation has disparate discriminatory impacts on vulnerable prisoners, particularly women prisoners who are Indigenous, classified as maximum security, or suffering from disabling mental health issues.

[34] These two organizations have quite different mandates.

[35] I agree with Canada that these two organizations propose to make similar submissions, but each will do so from their own different and unique perspective.

[36] I conclude that both groups should be granted intervenor status but they should not be compelled to do so jointly. I grant both applications.

Criminal Defence Advocacy Society (“CDAS”)

[37] CDAS intervened at trial. No party objects to its application. Canada voices some concerns about the intended scope of its planned submissions.

[38] CDAS is a British Columbia non-profit society engaged in advocacy, law reform, and education. It was formed in 2015 to fill a perceived need for an organization focused on criminal justice issues impacting defence counsel and their clients. Its membership is made up of over 300 lawyers and law students in British Columbia. CDAS says its members have significant experience with the *Charter*, including protecting the *Charter* rights of imprisoned clients and addressing Parliamentary committees on the constitutionality of proposed legislation.

2018 BCCA 282 (CanLII)

[39] CDAS submits that its members collectively represent thousands of incarcerated individuals who may face administrative segregation. CDAS says the appeal raises public law issues that engage its interests in the rule of law and the constitutional rights of accused persons. It also says the criminal defence bar has an interest in the development of the law surrounding the rights under ss. 7, 9, 10, and 12 of the *Charter*, since those rights are often engaged in the criminal justice process.

[40] CDAS says it will bring a unique and useful perspective to the appeal because its members have expertise in the protection of the *Charter* rights of accused and incarcerated persons and on the constitutionality of legislation. Its members also have insights on the interaction between defence counsel and inmates in administrative segregation.

[41] In its intervention at trial, CDAS' submissions primarily addressed the lack of access to counsel during the segregation review process. On appeal, CDAS seeks to make submissions on the review process and the right to counsel for segregated inmates. In particular, CDAS proposes to make submissions on:

a) The informational and implementational duties that may arise upon administrative segregation under ss. 7 and 10(b) of the *Charter*;

b) The impacts of administrative segregation on rehabilitation and other sentencing principles; and

c) An analysis of how administrative segregation affects the fitness and proportionality of an offender's sentence.

[42] I accept that CDAS has a broad representative base, as demonstrated by its membership and activities. I am also satisfied that CDAS can bring a unique perspective to this case due to the expertise and experience of its members.

[43] I would grant CDAS leave to intervene provided its submissions do not expand upon the issues as framed by the parties.

2018 BCCA 282 (CanLII)

Native Women's Association of Canada ("NWAC") and West Coast Legal Education and Action Fund ("West Coast LEAF")

[44] NWAC and West Coast LEAF apply jointly for intervenor status. The parties do not object to this joint application. Canada opposes the application insofar as the proposed intervenors seek to make submissions on constitutional remedies under s. 24(1).

[45] West Coast LEAF intervened at the trial before Leask J. Its submissions focused on the disproportionate impact of administrative segregation on individuals with intersecting markers of historic disadvantage, particularly Aboriginal women with mental illness. West Coast LEAF has intervened in numerous other cases at all levels of court with a focus on principles of substantive equality.

[46] NWAC is a national non-profit organization incorporated in 1974. It is an aggregate of provincial and territorial member associations. Its goal is to empower Indigenous women and further substantive equality for Indigenous women. It has a long-standing commitment to addressing the disproportionate criminalization and incarceration of Indigenous women.

[47] West Coast LEAF has experience in prison and sentencing reform. It says it has expertise on the ways that sex inequality intersects with other forms of disadvantage to contribute to the criminalization and over-incarceration of certain groups.

[48] If granted leave to intervene, West Coast LEAF and NWAC propose to bring an "intersectional" lens to the constitutionality of administrative segregation under s. 15 of the *Charter.* They seek to make submissions on the following issues: (a) how Indigenous women and women with disabling mental health issues experience segregation; (b) the disproportionate harms that arise from the use of ostensibly neutral classification or assessment tools in prisons; (c) the significance of the distinction between substantive and formal equality in the context of indirect discriminatory impacts of legislation; (d) the importance of less drastic alternatives to segregation for imprisoned women who are Indigenous and/or have disabling mental

2018 BCCA 282 (CanLII)

health issues; and (e) constitutional remedies, particularly the importance of making those remedies responsive to the needs of disadvantaged members of society.

[49] I am satisfied that both organizations have a broad representative base, as demonstrated by their membership, activities, and objectives. Further, I am satisfied that they have an interest in the public law issues on appeal. In particular, the appeal engages the constitutional rights of imprisoned Indigenous women, a group at the core of NWAC's work.

[50] For the reasons already given, I decline to make any order limiting submissions under s. 24(1).

[51] I would grant joint intervenor status to West Coast LEAF and NWAC.

[52] Finally, I recognize that in totality I have granted a large number of intervenor applications. However, their proposed submissions are quite narrowly focussed. I propose to make ancillary orders that will hopefully result in an appeal that does not overwhelm the parties or the court. It is my view that these intervenors do have unique and important perspectives from which they propose to address the legal issues.

Terms

[53] I make the following ancillary orders:

- Each intervenor is permitted to file and serve a factum not exceeding 10 pages in length on or before a date to be specified by this court. For clarity, NWAC and West Coast LEAF are permitted to file one joint factum not exceeding 10 pages in length.

- Each intervenor shall confine their submissions to issues that are raised by one or more of the parties. The intervenors are not permitted to adduce further evidence or otherwise supplement the record of the parties. They are not entitled to raise new issues or duplicate the arguments of the appellant or respondents.

2018 BCCA 282 (CanLII)

- The appellant and the respondents are each entitled to file and serve one factum not exceeding 12 pages in response to all the factums of the intervenors who take a position adverse to that party's position, such factum to be filed and served on or before a date to be specified by the court.

- The requests by the intervenors to present oral argument are deferred to the division hearing the appeal.

- There shall be no costs or disbursements awarded to or against an intervenor in this appeal.

[54] In a separate case management order I shall set out the filing schedule for the intervenor factums and consolidated books.

"The Honourable Madam Justice Garson"

2018 BCCA 282 (CanLII)

TAB 9

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Friends of Beacon Hill Park,* 2022 BCCA 383

Date: 20221101
Docket: CA48187

2022 BCCA 383 (CanLII)

In the matter of s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464
Re: Beacon Hill Park Trust

Between:

His Majesty the King in right of the Province of British Columbia and the Attorney General of British Columbia

Appellants

And

Friends of Beacon Hill Park, Corporation of the City of Victoria, Together Against Poverty Society, Shea Smith, and Dennis Davies

Respondents

Before: The Honourable Mr. Justice Fitch
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated February 24, 2022 (*Beacon Hill Park Trust (Re)*, 2022 BCSC 284, Victoria Docket S210676).

Oral Reasons for Judgment

Counsel for the Appellants (via videoconference):	S.M.L. Kirkpatrick
Counsel for the Respondent, Friends of Beacon Hill Park (via videoconference):	L.J. Alexander L.R. LeBlanc
Counsel for the Respondent, Corporation of the City of Victoria (via videoconference):	T.M. Zworski C. Moffat
Counsel for the Respondent, Shea Smith (via videoconference):	J. Riddle

Counsel for the Proposed Interveners, Songhees Nation and Esquimalt Nation (via videoconference):	K. Rose
Place and Date of Hearing:	Vancouver, British Columbia October 31, 2022
Place and Date of Judgment:	Vancouver, British Columbia November 1, 2022

2022 BCCA 383 (CanLII)

Summary:

The Applicants seek an extension of time to apply for leave to intervene and an order granting them intervener status on an appeal from an opinion given under s. 86(1) of the Trustee Act as to whether Beacon Hill Park can be used by the homeless for temporary sheltering. Held: The applications for an extension of time and for leave to intervene are granted. The Applicants did not form a bona fide intention to intervene within the 14-day period following the filing of the appellant's factum, but it is in the interests of justice to grant the orders sought. Any prejudice caused by the late application can be remedied by constraining the scope of the intervention and requiring expeditious filing of the interveners' factum. The applicants have met the test for public interest intervention. They have a unique perspective that will assist the Court, as no parties to the appeal address how a restrictive interpretation of the Trust terms may affect future Indigenous cultural activity in the Park.

2022 BCCA 383 (CanLII)

FITCH J.A.:

I. Nature of the Application

[1] The Songhees and Esquimalt Nations, collectively known as the Lekwungen people (the "Lekwungen"), seek leave to intervene on an appeal launched by the Province from a judicial opinion given by Justice Punnett on a question referred by the City of Victoria to the Supreme Court of British Columbia pursuant to s. 86(1) of the *Trustee Act*, R.S.B.C. 1996, c. 464 [*Trustee Act*].

[2] The question that was referred to the Court by the City is this: "Can the land known as Beacon Hill Park, held in trust by the City of Victoria, be used by persons experiencing homelessness for temporary sheltering?"

[3] In reasons for judgment indexed as 2022 BCSC 284, Punnett J. answered the question in the negative. He held that use of the Park for temporary sheltering by the homeless is contrary to the express purpose of the Trust: preservation of the Park for the use, recreation and enjoyment of the public.

[4] As the application for leave to intervene was filed out of time, the Lekwungen also require an extension of time.

[5] The application for leave to intervene is brought pursuant to Rule 61 of the *Court of Appeal Rules*, B.C. Reg 120/2022 [*Rules*] and s. 30(a) of the *Court of*

Appeal Act, S.B.C. 2021, c. 6 [*Act*]. The application for an extension of time to file the intervener application is brought pursuant to Rule 41 and s. 32 of the *Act*.

[6] The Province consents to the application to extend time and to the application to intervene. The City of Victoria also consents to the applications, provided that granting intervener status to the Lekwungen does not delay the hearing of the appeal. Mr. Shea Smith takes the same position as the City. The Province, the City and Mr. Smith all submit that the applicants have an interest in the public law issue raised on appeal and a unique perspective of which the Court should be informed before interpreting the terms of the Trust.

[7] The application to extend time and the application to intervene are opposed by the Friends of Beacon Hill Park ("FBHP"), who argue, among other things, that the applicants are seeking to raise a new issue at the eleventh hour that would effectively "hijack" the appeal.

[8] The appeal is set to be heard on November 14 and 15, 2022.

[9] For the reasons that follow, I grant the extension of time to file the application to intervene. I also grant the application to intervene on the conditions set out in these reasons.

II. Brief Overview

[10] On February 20, 1882, the Lieutenant Governor in Council granted the Park to the City of Victoria (the "City") pursuant to the *Public Parks Act, 1876* by Crown Grant on Trust terms that the Park be "…for the use recreation and enjoyment of the public…".

[11] The Park is the primary park in Victoria and it has, over the years, been used for a variety of purposes.

[12] With the onset of COVID-19, homeless shelters in the Victoria area reduced capacity, which led to an increase in sheltering in the Park. To permit self-isolation,

2022 BCCA 383 (CanLII)

the City stopped enforcement of its prohibition on daytime sheltering, and amended its bylaw to permit daytime sheltering, provided certain conditions were met.

[13] The proceeding in the court below was formally commenced by the City on March 30, 2021. Section 86(1) of the *Trustee Act* provides that a trustee may, by petition, apply to the court for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property. Section 86(2) of the *Trustee Act* contemplates the participation of interested persons in the proceeding.

[14] On March 22, 2021, the City provided informal notice of the petition to the Songhees and Esquimalt Nations.

[15] On April 13, 2021, a judge of the Supreme Court made an order requiring the giving of notice to all persons who may be interested in the question raised by the petition, and desirous of participating in the proceeding.

[16] The applicants did not respond to the City, nor did they seek to be added as respondents and heard on the question raised by the petition.

[17] The City did not take a position on how the question it referred to the Court should be answered, but submitted that the Crown Grant is a contractual document rather than a statutory enactment, and must be interpreted in accordance with the approach set out in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.

[18] The Province argued that the Trust is a statutory instrument to be interpreted in accordance with constitutional obligations and in recognition of the fact that s. 7 of the *Charter* may be infringed by laws that prohibit homeless people from sheltering overnight in parks: see *Victoria (City) v. Adams*, 2009 BCCA 563. The Province also submitted that the question posed did not lend itself to a simple ‘yes’ or ‘no’ answer. The Province argued that temporary sheltering is a use by the public of the Park that is permitted by the terms of the Trust, but, nevertheless, a use that must be limited so as to preserve and maintain the Park as a nature park. The Province also submitted that the Court’s answer to the question should provide guidance to the

2022 BCCA 383 (CanLII)

City as to how it could balance the public interest in the Park with the s. 7 interests of those experiencing homelessness.

[19] Mr. Smith (a person who had sheltered in the Park), along with the Together Against Poverty Society, argued that there is nothing in the terms of the Trust that prohibits use of the Park by persons experiencing homelessness for shelter. Further, they argued that the Trust must be read in a manner consistent with *Charter* values.

[20] Like the City, FBHP argued that the Crown Grant is a contractual document. FBHP submitted that when interpreted through this lens, the Trust terms do not allow temporary sheltering.

[21] Justice Punnett concluded that the Trust is a contractual document rather than an enactment. He held that on a plain reading of the phrase “use, recreation and enjoyment”, sheltering is not a permitted use of the Park because it is not done for the purposes of recreation and enjoyment.

[22] The Province filed its notice of appeal on March 23, 2022. A timetable for the exchange of factums was fixed by Justice Groberman on June 13, 2022. The Province filed its factum on July 8, 2022.

[23] A person interested in an appeal must apply for leave to intervene 14 days after the appellant files its factum. The applicants were required to seek leave to intervene by no later than July 22, 2022.

[24] On September 1, 2022, counsel for the proposed intervener advised the parties who had participated in the petition proceeding that the Lekwungen “will likely be seeking [intervener] status” on the appeal. She advised that:

> The two nations plan on advancing the argument that any interpretation of the trust should be limited so as not to preclude potential future use of the park by indigenous communities for cultural uses, including burials or the interment of remains. To be clear, we will not be arguing that the trust should be read at this time to *include* those uses; rather, that any decision on the interpretation of the trust in this case should not exclude the possibility of the park being used for those purposes in the future.
>
> [Italic emphasis in original.]

2022 BCCA 383 (CanLII)

[25] The applications before me were not filed until September 26, 2022. I was advised at the hearing of the application that scheduling difficulties prevented the applications from being set down for hearing before yesterday.

[26] Unfortunately, the applications come before the Court a mere two weeks before the dates upon which the appeal is scheduled to be argued.

III. The Applicants

[27] The Songhees and Esquimalt are the descendants of the Lekwungen, who have historically used and occupied the lands and waters in present day Greater Victoria. The Park is located within the traditional territory of the Lekwungen and, according to the applicants, the Park is “an important place for Lekwungen history and cultural practices”. Chief Ron Sam of the Songhees Nation deposes that, historically, there was a small village on the site now occupied by the Park, and the area was used as a defensive site, as well as for fishing, for agriculture, and for burials.

[28] The applicants point out that the Songhees and Esquimalt reserves consist of relatively small parcels of land that must accommodate both member and non-member residents, along with businesses and services. Chief Sam deposes that excavations in the Greater Victoria area associated with development projects sometimes uncover ancestral remains that are then returned to the Lekwungen. These remains must then be re-interred in a culturally appropriate way. Due to the limited burial space remaining on the Songhees and Esquimalt reserve lands, the Lekwungen desire a suitable place to bury the remains of their ancestors. One option that has been considered is the establishment of a Lekwungen cemetery in the Park. Chief Sam also deposes that the Lekwungen hope to one day “use the Park for burials, the interment of remains, or other cultural purposes including the building of a long house”.

[29] The applicants insist, as they did in their September 1, 2022 communication to the parties, that they do not “[seek] to expand the hearing to deal with whether the Trust permits Indigenous cultural uses”. Rather, the applicants seek leave to

2022 BCCA 383 (CanLII)

advance what I would characterize as a protective position. Specifically, they seek leave to intervene to caution the Court about bringing an unnecessary and unduly restrictive interpretation to the Trust terms that could, perhaps even inadvertently, preclude future Indigenous uses of the Park. They submit that this issue can only be resolved on a record that will not be before the Court on this appeal and is, in any event, one that may best be addressed through consultation and negotiation.

IV. Law and Analysis

1. The Test for an Extension of Time to File the Intervener Application

[30] The well-known criteria on an application to extend time to commence an appeal were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260, 1987 CanLII 2608 (C.A.) [*Davies*]:

> 1) Was there a *bona fide* intention to appeal?
> 2) When were the respondents informed of the intention?
> 3) Would the respondents be unduly prejudiced by an extension of time?
> 4) Is there merit in the appeal?
> 5) Is it in the interest of justice that an extension be granted?

[31] The “interests of justice” frame the overriding question and embrace the first four considerations; it is “the decisive question” on an application to extend time: *Davies* at 260–261.

[32] These factors can be modified to fit other circumstances, including when there has been a failure to take a timely step required in an appeal proceeding: *Salfinger v. Salfinger,* 2013 BCCA 217 at para. 16 (Chambers). I accept that the weight to be given to the *Davies* factors is a case-specific determination that must take account of the context in which an extension of time is being sought. I do not, however, accept the position of the applicants that the first and second factors have little or no application in this context.

2022 BCCA 383 (CanLII)

Was there a bona fide intention to intervene?

[33] The FBHP say that the applicants have failed to demonstrate a *bona fide* intention to intervene. They rely on *R. v. R.(L.G.),* 1994 BCCA 1 at para. 31, for the proposition that a *bona fide* intention must be formed within the prescribed time period, but "was frustrated by matters which adequately explain the delay". The FBHP assert that the applicants have not provided any explanation for the delay in seeking leave to intervene, nor have they explained why they did not seek to be added as an interested party in the underlying petition.

[34] I agree with FBHP that the applicants have provided no explanation for the delay in filing the leave application between July 22 and September 26. On the evidence before me, the applicants have not established they had a *bona fide* intention to seek leave to intervene within the 14-day period following the filing of the appellant's factum.

[35] While this factor, standing alone, weighs against the granting of an extension of time, it must be assessed in light of the other considerations and with regard to the overall interests of justice: *Irving v. Irving* (1982), 38 B.C.L.R. 318 (C.A.) at para. 22, *Chaube v. Campbell*, 2004 BCCA 85 at para. 9 (Chambers), *Rapton v. British Columbia (Motor Vehicles),* 2011 BCCA 71 at para. 21 (Chambers).

When were the respondents informed of the intention to intervene?

[36] As noted, the appellant and respondents to the appeal were informed that the applicants would likely apply to intervene by email sent on September 1, 2022. I have nothing before me to confirm that the applicants informed the other parties of their settled intention to apply for intervener status until the application was filed on September 26, 2022.

Would the respondents be unduly prejudiced by an extension of time?

[37] The Lekwungen contend that the parties to the appeal would not be unduly prejudiced by granting an extension of time.

2022 BCCA 383 (CanLII)

[38] The FBHP dispute this, pointing out that the Lekwungen applications have been brought shortly before the appeal hearing, and after factums and reply factums have already been exchanged. The FBHP emphasize that it is the only party on appeal to take the position that the judge was correct in his interpretation of the Trust. The FBHP argue that "any interpretation of the [Park] Trust to protect the [Lekwungen's] potential future cultural uses will require consideration of aboriginal rights in relation to [the Park]", which is a complex issue that cannot be assessed quickly or in the absence of a factual foundation. Citing *Apsassin v. British Columbia (Oil and Gas Commission),* 2004 BCCA 240 at para. 8, FBHP submit it would be unfair to impose upon them the burden of meeting these additional arguments.

[39] While I am sympathetic to FBHP's perspective, I am not convinced that granting the applications will, of necessity, broaden the scope of the appeal or require the resolution of Aboriginal rights in relation to the Park. As noted, the Lekwungen seek leave to intervene to ensure that, in resolving the appeal, an important point of view is not overlooked, and that the Court does not inadvertently speak to issues that implicate their interests and need not be resolved.

[40] Should the extension of time and leave to intervene be granted, it seems to me that the prejudice caused by the lateness of this application can be remedied by constraining the nature and scope of the intervention and requiring the applicant to expeditiously file its factum. On balance, I do not consider the prejudice caused to the parties, and FBHP in particular, to be fatal to the application.

Is there merit in the intervener's application?

[41] In my view, the Court would be assisted by having the submissions of the Lekwungen people on the potential implications to them of a restrictive interpretation of the terms of the Trust.

[42] Looking at the extension of time considerations collectively, and under the rubric of the interests of justice, I am satisfied that while many of the factors, viewed in isolation, militate against granting the order sought, the extension of time is nonetheless in the interests of justice. The application to extend time is granted. The

2022 BCCA 383 (CanLII)

time to apply for intervener status is extended to September 26, 2022, the date upon which the application was made.

2. The Test for Leave to Intervene in an Appeal

[43] There are generally two routes to intervener status: (1) the applicant demonstrates that they have a direct interest in a matter; or (2) the applicant has a public interest in the public law issue in question, and brings a different and useful perspective to the issue that will assist the court: *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers) [*BCCLA*].

[44] On this application, the Lekwungen seek to intervene under the second branch.

[45] As Justice Newbury confirmed in *Linkletter v. Proctorio, Incorporated,* 2022 BCCA 313 at para 14 (Chambers), despite the enactment of the new *Rules*, "the substantive considerations applicable to [intervener] applications remain the same as under the previous [*Rules*]".

[46] The criteria for public interest intervention were summarized in *BCCLA* at para. 14:

> a) Does the proposed [intervener] have a broad representative base?
>
> b) Does the case legitimately engage the proposed [intervener]'s interests in the public law issue raised on appeal?
>
> c) Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?
>
> d) Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

[47] In deciding whether to grant public interest intervener status, the Court is concerned with ensuring that important perspectives are not overlooked. Prospective interveners must therefore demonstrate that it is in the Court's interest or, more broadly, the public interest to grant leave to intervene: *Beaudoin v. British Columbia*

2022 BCCA 383 (CanLII)

(Attorney General), 2022 BCCA 66 at para. 12 (Chambers); *Equustek Solutions Inc. v. Google Inc.,* 2014 BCCA 448 at para. 8 (Chambers) [*Equustek*].

Does the proposed intervener have a broad representative base?

[48] The applicants submit that the Songhees and Esquimalt have a broad representative base in that they collectively represent over 800 Indigenous people in the Greater Victoria area and are the descendants of the original occupants of the Park.

[49] The FBHP argue that the Lekwungen "do not have a sufficiently broad representative base". On this point, they rely on *Snaw-Naw-As First Nation v. Canada (Attorney General)*, 2021 BCCA 89 at paras. 13, 32 (Chambers) [*Snaw-Naw-As*].

[50] In my view, *Snaw-Naw-As* is distinguishable on its facts. In that case, Justice Fisher found that the proposed intervener, Cowichan Tribes, did not have a broad representative base in part because it had initiated its own litigation that "[sought] the same relief against the same defendants respecting the same right of way": at para. 32. Its interests were found to prevail over the public interest. I would add that Justice Fisher also found that the perspective to be presented by the Cowichan Tribes duplicated the perspective presented by the Snaw-Naw-As First Nation: at para. 33.

[51] I accept that the Lekwungen have a broad representative base.

Does the case legitimately engage the proposed intervener's interests in the public law issue?

[52] The applicants say they have a legitimate interest in ensuring that, in addressing the question of whether the Trust permits sheltering in the Park, the Court does not reach an overly restrictive definition that would, without further argument, effectively forestall the Lekwungen's contemplated future uses of the Park.

2022 BCCA 383 (CanLII)

[53] The FBHP submit that the Lekwungen have not identified a “distinct public interest”, but instead focus upon their own intended cultural uses of the Park. The FBHP argue that the Lekwungen have not demonstrated that it is in the Court’s interest or the public interest for their intervention to be heard.

[54] Respectfully, I disagree. As the Province notes in its appeal factum, it “…has granted other parks on similar terms to those in the Trust to other municipalities…” and, accordingly, “…there may be other parks held in trust by municipalities on similar terms…”. I accept that interpretation of this Trust might have a bearing on the acceptable use of other parks. Against this background, I am of the view that it is in the Court’s interest to hear how a restrictive interpretation of the Trust terms might constrain Lekwungen cultural use of the Park, because this could have a bearing, more generally, on First Nations’ cultural use of other parks granted in Trust on similar terms. In my view, this constitutes a public interest.

Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?

[55] The applicants submit that, given their historical and cultural connection to the Park, it is only the Lekwungen who can speak to its cultural activities in the Park, and the way in which a narrow interpretation of the Trust could conceivably impact these activities.

[56] The FBHP argue that, while the Lekwungen have a unique perspective on Aboriginal or treaty rights, this perspective is not of assistance to the Court in deciding the narrow question before it: whether the Trust permits sheltering in the Park by those experiencing homelessness.

[57] In addition, FBHP argues that courts are aware that their decisions may, and often do, have consequences that go beyond the interests of the immediate parties. In support of this proposition, FBHP directed my attention to *Equustek* and to Justice Groberman’s adoption in that case of the reasoning of Justice Esson in *Hobbs v. Robertson*, 2002 BCCA 168 at paras. 9–10.

2022 BCCA 383 (CanLII)

[58] In my view, the Lekwungen do have a unique perspective that will assist the Court. At this point, each of the four parties to the appeal have filed a factum and a reply. As would be expected, none of the parties address how a restrictive interpretation of the Trust terms may affect future Indigenous cultural activity in the Park. I do not think that the Court can be taken to know the potential implications of its interpretation of the Trust terms on the Lekwungen peoples. I am satisfied that the Court will benefit from the perspective of the Lekwungen as an intervener in this appeal.

Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

[59] The applicants claim they are not seeking to expand the scope of the appeal. The FBHP say the Lekwungen seek to expand the scope of the appeal to address a new issue—potential future use of the Park for Indigenous cultural practices.

[60] To assist me in assessing this issue, and at my request, counsel for the applicants provided me with a draft copy of the intervener's factum after the applications had been argued and the matter taken under reserve.

[61] Having reviewed the draft, I am satisfied the applicants are seeking only to caution against a restrictive interpretation of the Trust; they are not seeking, nor could they seek, an order from this Court that the Trust permits Indigenous cultural practices, including burial practices, in the Park. I say this because the question referred for judicial opinion relates solely to the issue of whether the Park can be used by persons experiencing homelessness for temporary sheltering. By the order made on June 8, 2021, no respondent was permitted to seek any relief or remedy beyond the question posed by the trustee under s. 86(1) of the *Trustee Act*. Further, as Punnett J. observed in his reasons for judgment, "The Court is not being asked to answer questions of what particular uses are permitted under the Trust…The Court is only being asked to provide its advice, opinion or direction on the question posed.": at para. 11.

2022 BCCA 383 (CanLII)

[62] In my view, FBHP's concerns about expanding the scope of the appeal can be addressed by attaching conditions to the order granting intervener status.

[63] Ultimately, I am of the view that the applicants have established that the criteria for public interest intervention are met in this case.

V. Disposition

[64] The extension of time to file an application for leave to intervene is granted as is the application for leave to intervene.

[65] I consider it appropriate to attach the following conditions to the order permitting the Lekwungen to intervene:

a) The submissions of the interveners will be limited to cautioning the Court against adopting a restrictive interpretation of the Trust terms that could preclude Indigenous uses of the Park. For clarity, the interveners shall not advance an argument that the Trust terms permit use of the Park for Indigenous cultural purposes;

b) The interveners shall not advance an argument respecting the standard of review applicable to the order made below;

c) The Lekwungen shall not be permitted to adduce new evidence or otherwise seek to supplement the appeal record;

d) The Lekwungen will file one factum, not to exceed 8 pages in length; and

e) The Lekwungen will file their factum and deliver it to the parties on or before November 3, 2022.

[66] The parties have leave to file five-page factums in response to the interveners. Those factums shall be filed on or before November 9, 2022.

2022 BCCA 383 (CanLII)

[67] It will be for the division that hears the appeal to decide if the intervener should be given the opportunity to make oral submissions and, if so, the time that should be allotted for this purpose.

[68] The intervener will not be liable for or entitled to any costs on this motion or on the appeal.

"The Honourable Mr. Justice Fitch"

2022 BCCA 383 (CanLII)

TAB 10

CanLII

C. R. F. Holdings Ltd. v. Fundy Chemical International Limited, 1981 CanLII 488 (BC CA)

Source:	Court of Appeal for British Columbia
Date:	1981-12-29
File number:	CA800750
Other citations:	12 ACWS (2d) 265 — [1982] 2 WWR 385 — [1982] BCWLD 296 — 33 BCLR 291 — 19 CCLT 263 — [1981] CarswellBC 368 — [1981] BCJ No 1633 (QL)
Citation:	C. R. F. Holdings Ltd. v. Fundy Chemical International Limited, 1981 CanLII 488 (BC CA), <https://canlii.ca/t/23p0w>, retrieved on 2026-09-16

Court of Appeal for British Columbia
C. R. F. Holdings Ltd. v. Fundy Chemical International Limited
Date: 1981-12-29

R. Brock and P. G. Foy, for appellant Smerchanski.

D. B. Kirkham, for appellant Fundy Chemical International Limited.

J. Cram and J. Ince, for respondents.

(Vancouver No. CA800750)

[1] 29th December 1981. CRAIG J.A.:— The defendants appeal from the finding that a contract for the sale of property made on 6th December 1974, was induced by "deceit and fraudulent misrepresentation" and that the defendants are liable for the resulting damages. The facts and circumstances are set out in the report [1980 CanLII 586 (BC SC), 21 B.C.L.R. 345, 14 C.C.L.T. 87], and I will not reiterate them. The plaintiffs, alleging that C.R.F. Holdings Ltd. had been induced to enter into a contract to purchase the Anvil Way property by the fraud and deceit of Smerchanski, acting in his capacity as officer and agent for Fundy Chemical International Limited, claimed: (1) damages from both defendants for fraud and deceit: and (2) alternatively, damages from Smerchanski for breach of warranty of authority and for negligence. The plaintiffs contend that Smerchanski's statements regarding the slag, including a statement that it "makes excellent fill", were meant to convey the view that the slag was harmless and could remain on the property, or be removed from the property, at the will of the owner, and that this was fraudulent, because Smerchanski knew that the slag was radioactive and thus

not harmless and knew also that possession of and movement of the slag was subject to the direction and order of the Atomic Energy Control Board. In alleging, alternatively, that Smerchanski was negligent, the plaintiff said that Smerchanski was negligent in:

(a) not informing the plaintiff that the said slag material was radioactive;

(b) not informing the plaintiff that the Atomic Energy Control Board permits were required to possess the material and had to be renewed each year and that the material could not be disposed of without the permission of the Atomic Energy Control Board;

(c) not informing the plaintiff that some of the radioactive material had already been buried on the site, the said defendant failing to inform the plaintiff as to where it was buried, or that it was in fact buried under a building where personnel would be working; and

(d) failing to inform the plaintiff that the presence of the radioactive material resulted in restrictions upon the use or future use that could be made of the property.

In his factum, counsel for the plaintiffs submitted that, even if Faessler had not asked Smerchanski about the slag, Smerchanski had a duty to disclose all the circumstances pertaining to the slag, particularly the radioactive nature of it, and because: (1) the radioactivity of the slag was a latent defect; (2) the radioactive slag was a dangerous substance; and (3) the Atomic Energy Control Act, R.S.C. 1970, c. A-19, and the regulations imposed a duty to disclose fully the possible dangers to any person who might be interested in the property. Although counsel for Fundy dealt with these submissions in his factum in reply, he objected at the hearing of the appeal to the plaintiffs relying on them because they had not specifically relied on these points before the trial judge. The counsel for the plaintiffs then moved to amend the statement of claim to include these three allegations, contending that the breach of these duties amounted to: (a) fraud; or, alternatively, (b) negligence. Having examined the pleadings and considered the submissions of counsel. I think that para. 6 and para. 12 of the amended statement of claim permit the raising of these arguments on the issue of negligence and that the amendment is unnecessary with regard to these issues. In the same notice of motion, counsel for the plaintiffs contended also that these duties would support the proposition that "there was an implied term, or warranty in the contract to purchase that there was no radioactive material on the property. As I think the issue of liability in this case can be resolved on the basis of fraud, I do not propose to deal with this particular aspect of the motion other than to say that I would not be disposed to allow the amendment. As I think the issue of liability in this case can be resolved on the basis of fraud. I do not propose to deal with this particular aspect of the motion other than to say that I would not be disposed to allow the amendment.

[2] The appellants challenge the finding that Smerchanski was deceitful, contending that he was not deceitful and that, even if he had been, his deceit did not induce the contract, and challenge also the basis upon which the judge assessed the damages,

contending that he erred in principle. Concerning the claim in negligence, the appellants submit that Smerchanski did not owe a duty to the respondents to disclose the fact that the slag was radioactive and that, therefore, there could not be a finding of negligence. Counsel for the appellants rely on the statement in *Derry v. Peek* (1889), 14 App. Cas. 337 at 374 (H.L.), that in order to sustain an action of deceit there must be proof of fraud, and submit that a false statement which is made in the honest belief that it is true is not fraudulent. They contend: (1) that the statement that the slag would make "excellent fill" was true; and (2) that, in any event, Smerchanski honestly believed it to be true and therefore the statement was not deceitful. They submit that Smerchanski's belief was clearly justified by Welsh's letter of 21st December 1971, which authorized the appellant to use the slag material on the property as land-fill, providing the property would not be subsequently used for residential development. They submit that the trial judge did not give due weight to this letter and he thereby erred. They submit that, if there was any deception, it was caused by the initial silence on the question of radioactivity. They submit that the statement that the slag made "excellent fill" did not "increase" or "contribute" to the deception. Counsel for Fundy submitted also that:

> It is not the law that any statement automatically triggers the obligation of full disclosure. The vendor may maintain silence, with impunity, regardless of his fraudulent intent. He may also make statements, provided those statements with themselves are not misleading. If the purchaser is deceived by what is withheld there is no cause of action unless the statement actually made caused the deception.

[3] I think that anyone in Smerchanski's position would be entitled to infer from the letter of 21st December that he could use the slag as land-fill on his industrial property and that, to the extent that he actually used it for fill, he would not require a yearly licence to possess the slag. During argument, I inclined to the view that the trial judge had unduly discounted the effect of the letter on the mind of the reader, but, having analyzed the judgment, I have concluded that, while he may have attached less importance than he should have done, he based his conclusion on the evidence generally. Obviously, he did not regard Smerchanski as a completely credible witness, preferring the evidence of Faessler to that of Smerchanski where there was a conflict. The trial judge said that, although the letter was capable of the interpretation that the slag could be used as land-fill on the property, as Smerchanski contended, it did not amount to an exemption to Smerchanski from obtaining a yearly licence for the possession of the slag. He refused to accept Smerchanski's testimony on this issue, stating [p. 94] that:

> … Mr. Smerchanski was still well aware at the time of sale that most of the slag was in no way disposed of, but was stored in a stockpile and in drums.

[4] The trial judge pointed out that only some of the slag material had been used as fill and that most of the slag was stockpiled, either in bulk or in drums, and that until such time as Smerchanski used the slag as fill he had to have a licence to possess the slag on the property. The judge considered that when Faessler inquired about the slag

Smerchanski was bound to reveal that the slag was radioactive and was subject to the control of the Atomic Energy Control Board, and that his failure to do so in a statement that the slag made "excellent fill" was calculated to deceive Faessler and did deceive him. He referred to a passage in Spencer Bower and Turner on Actionable Misrepresentation, 3rd ed. (1974), at p. 94:

> To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representors, is to say the thing which is not. Such a statement is a "lie", and one of the most dangerous and insidious forms of lie.

[5] Counsel for the appellant submit that this is a finding of law. I think, however, that it is a finding of fact, and I proceed on the premise that an appellate court should not set aside findings of fact, particularly those based on credibility, nor substitute its interpretation of the evidence as a whole for that of the trial judge's, unless it is satisfied that his conclusion is "plainly wrong".

[6] I think that there is evidence upon which the trial judge could find, as he did find, that the statement was deceitful and was intended to be deceitful.

[7] Mr. Kirkham argues that, even if Smerchanski intended to deceive Faessler and did in fact deceive him, the plaintiffs cannot maintain an action for deceit because the statement did not induce the contract. He points out that on 28th November 1974 Faessler made, an offer to purchase the land for $243,000 to Smerchanski's real estate agent, and that the slag was not a material factor in that offer. He says that Faessler met Smerchanski only on or about 6th December, when Smerchanski made a counter-offer of $260,000, which Faessler agreed to pay. He submits that Faessler wanted the property primarily because it was in the right location and provided ample room for expanding his industrial activities. He says that the slag was not a marerial consideration in the purchase and that Faessler would have purchased the property regardless of the slag. He says that the radioactivity of the slag was not a matter of great public concern in 1974.

[8] I have found this to be a very difficult aspect of this case. What constitutes an inducement depends on the circumstances of each case. There may be only one thing which induces a transaction, or there may be several things collectively which induce it. Whether it be one thing or several things, it must be a material factor, not merely an incidental factor. In *Hinchey v. Gonda*, [1955] O.W.N. 125 (H.C.), Schroeder J. said at p. 126:

> In order that a misrepresentation, whether innocent or fraudulent, may support an action or a defence, it is essential that it should be material in its nature, that it should be intended to be acted upon and should be a determining ground of the transaction [citing among other cases, *Smith v. Chadwick* (1884), 9 App. Cas. 187 (H.L.)].

And at p. 127:

> A misrepresentation, to be material, must be one necessarily influencing and inducing the transaction and affecting and going to its very essence and substance. Misrepresentations which are of such a nature as, if true, to add substantially to the

> value of property, or are calculated to increase substantially its apparent value, are material.

[9] I agree with this statement, and, having regard to it, I have had some difficulty in accepting that the representation regarding the slag was a material factor in inducing this sale. On the other hand, the judge accepted Faessler's testimony that he would not have purchased the property had he known that the slag was radioactive, and concluded that the representation had been a material inducement. I think that the matter is borderline, but I am not prepared to say that the judge was plainly wrong in holding that this was a material misrepresentation that induced the contract.

[10] The question of damages poses many difficulties. Generally, the measure of damages in a fraud action involving the sale of land is the difference between the price paid and the actual value of the property purchased: *Hepting v. Schaaf*, 1963 CanLII 93 (SCC), [1964] S.C.R. 100, 46 W.W.R. 161, 43 D.L.R. (2d) 168. The object of an award of damages is to compensate the plaintiff for the loss which he has suffered insofar as he can be reasonably compensated by money. The relevant date for measuring the damages is, normally, the time of the deceit. In this case, the trial judge concluded that the total damages should include not only the normal loss but also consequential losses, and that the date for determining the loss was not the date of the deceit (6th December 1974), but rather the date of the discovery of the deceit (December 1976), and that, insofar as the damages included the cost of the repairs necessitated by the deceit, the costs of the repairs should be assessed as of the date of the trial (February 1980). The trial judge's reason for so concluding was that this was necessary to make the plaintiff "financially whole", stating at p. 108:

> While the Court must, I think, assess damages with a view to making the plaintiffs whole in the sense of being in the *financial position* they would have been in had the land been free from contamination at the end of 1976, when they discovered the fraud, that can in this case be done only by awarding the cost of placing the land in the *physical* condition which it ought to have been in had the representation been true.

[11] In summary, the trial judge awarded the plaintiffs a total of $458,700 damages — $415,000 relating to the Anvil Way property, the property which was the subject of the sale, and $43,700 relating to the 116th Avenue property, on the following basis:

Anvil Way property

[12] C.R.F Holding (including $315,000 for removing and disposing of fill) — $400.000; Comor Supplies Ltd — $15,000; showing a total of $415,000 (including $315,000 for the removal of the slag which was used as fill).

116th Avenue property

[13] Faessler (this is made up of $37,500 for the reduction in value of property plus $2,000 for the cost of relocating the slag on the property) — $39,500; Comor Supplies

Ltd. — $4,200; Total — $43,700. The $4,200 is apparently for storage costs. The trial judge awarded prejudgment interest of $6,200 of the total amount awarded.

Total — $428,700.

[14] Counsel for the appellants submit that the trial judge erred in principle in calculating damages in two respects: (1) he erred in considering that damages must be calculated on the basis that the representation was true, and (2) he erred in considering consequential loss. They submit that the measure of damages in the case of deceit relating to the sale of land is the price paid for the land less the actual value of it.

[15] The cases dealing with deceit state that generally the measure of damages is the price paid for the property less the actual value. The case usually cited as authority for this proposition is *McConnel v. Wright*, [1903] 1 Ch. 546, a decision of the English Court of Appeal, which was cited with approval by the Supreme Court of Canada in *Hepting v. Schaaf*, supra, and this court in *Zorzi v. Baker* (1957), 1957 CanLII 284 (BC CA), 8 D.L.R. (2d) 164. The statement that the normal measure of damages in a deceit action is the price paid for the property less the actual value might appear to preclude a consideration of consequential loss. I think that the *Hepting* case and the *Zorzi* case do not preclude us from holding that consequential loss may be a proper consideration in awarding damages for deceit relating to the sale of land and that, on principle, consequential loss may be a proper consideration in such a case. The most authoritative case on this subject is *Doyle v. Olbe (Ironmongers) Ltd*., [1969] 2 Q.B. 158, [1969] 2 All E.R. 119, a decision of the English Court of Appeal, a case dealing with deceit in the sale of a business. In the course of his judgment, Lord Denning M.R. referred to the judgment of Collins M.R. in *McConnel v. Wright*, supra, and referred to the comments of Lord Atkin in the case of *Clark v. Urquhart; Stracey v. Urquhart*, [1930] A.C. 28 at 67-68 (H.L.), where Lord Atkin said:

> I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership or in any other way alters his position to his detriment, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on the actual damage directly flowing from a fraudulent enducement. The formula in *McConnel v. Wright* [supra] may be correct or it may be expressed in too rigid terms.

Lord Denning M.R. (at p. 167) concluded that Collins M.R. had indeed expressed himself "in too rigid terms". He compared the damages assessable in contract and in fraud, and said:

> In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement …

> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.

[16] I query whether Lord Denning M.R. is right when he suggests, as he apparently does, that foreseeability can never be a factor in considering what damages are recoverable in a case of fraud. I think that in some cases, at least, foreseeability may be a factor in the assessment of damages, particularly on the issue of remoteness.

[17] Although the judge did not use the phrase "consequential damage", he obviously considered that consequential loss was a factor in the damage award. While I think that the judge was correct in concluding that consequential loss was a factor in the damage award, I think that he erred in proceeding on the premise that the plaintiffs should be put in the financial position in which they would have been had the representation been true. I think that the authorities support the view that in a deceit action the plaintff would be placed in the financial position in which he would have been had the representation not been made.

[18] Counsel for the defendant Smerchanski took the position at the trial that the basis for a damage award in the event that there is deceit was the difference between the price paid and the actual value of the property. He did not, however, lead any evidence at the trial regarding the actual value of the property at the time of the alleged fraud, namely, 6th December 1974. Counsel for the plaintiff did not adduce any evidence regarding this value. There is nothing in the evidence, so far as I can ascertain, from which the trial judge could infer the value of the land at the time of the misrepresentation. Although the judge did not make a finding regarding the actual value of the land at the time of the deception, he did conclude that the value of the land at the time of the discovery of the deception was approximately $150,000. I think that the judge initially should have attempted to ascertain the normal measure of damages, that is, the difference between the price paid and the actual value of the property. This would involve a consideration of to what extent the slag had reduced the value of the property. If, for example, the actual value of the property on 6th December 1974, was, say, $150,000, the normal measure of damages would be $110,000. Following this, the trial judge should have considered whether there was consequential loss and whether an award should be made for such loss. As I understand his reasons for judgment, he treated the cost of removal of the slag, namely, $315,000, as consequential loss. I think that he erred in including this whole amount as part of the consequential award, because this in effect would be awarding damages to the plaintiff on the basis of the value of the property had the representation been true. Whether any portion of this amount should be treated as consequential loss for the purpose of the damage award, or whether, indeed, there is any consequential loss, should be the subject of argument and, if necessary, evidence.

[19] I think that the trial judge was correct in treating the decrease in value of the 116th Avenue property in the sum of $37,500 as consequential loss and also in awarding a further sum of $2,000 with respect to the cost of relocating the barrelled slag on the 116th

Avenue property, but I do not see how an award of $4,200 for storage of the barrelled slag can be properly considered a consequential item, and I would not make any allowance for this aspect of the case.

[20] I think that the trial judge should have awarded prejudgment interest with regard to the damage to the Anvil Way property from 6th December 1974 and should have awarded prejudgment interest with regard to the diminution in value of the 116th Avenue property from the date that the slag was put on that property.

[21] Initially I was inclined to the view that we should hear further argument on consequential loss and attempt to assess the damages. On further consideration, I have come to the conclusion that this would be inappropriate and that the proper course would be to remit the matter to the trial judge for argument and evidence on the aspect of consequential loss. I regret that this is necessary, in view of the fact that this matter has been before the courts for some time, but I think that it is the most appropriate course in the circumstances. I would therefore dismiss the appeal from liability but allow the appeal from the assessment of damages and remit the matter to the trial judge for reassessment. As success has been divided, I would not make any order as to costs.

[22] MACDONALD J.A.:— I agree with my brother Craig in dismissing the appeal against the learned trial judge's finding of liability in damages for deceit [1980 CanLII 586 (BC SC), 21 B.C.L.R. 345, 14 C.C.L.T. 87]. With respect, I do not share his concern with regard to the element of inducement. The judge must have accepted Faessler's evidence that he would not have bought the property if he had known that the slag was radioactive. Certainly, in 1976 the public attitude with respect to disposal of radioactive waste became more severe. But it must have been a subject of considerable concern in December 1974. Otherwise Smerchanski would have given a truthful answer to Faessler's inquiry. He made a deceitful statement because he was afraid that telling the truth would have resulted in no sale. On the balance of probabilities, the transaction would not have proceeded as it did without the deceitful statement.

[23] The judge faced a particularly difficult problem in the assessment of damages. The defendants, citing *Sorenson v. Kaye Holdings Ltd.*, 1979 CanLII 621 (BC CA), [1979] 6 W.W.R. 193, 14 B.C.L.R. 204, submitted to him that the correct measure of damages was the difference between the price paid and the actual value of the property purchased. The judge's concern with that submission is apparent from this passage in his reasons [p. 355]:

> In the present case, it is therefore clear that were only the actual purchase of the land and chattels involved, the damages, assuming they had been proved, would be related to the $260,000 which Mr. Faessler's company actually paid. In this litigation, however, unlike the *Sorenson* case, the claim is based on much more than an improvident purchase. The plaintiffs here were led by the deceptive statement of the defendants into spreading radioactive material over the land and building on it, and into moving material in barrels to another site, so as to infect a second parcel which Mr. Faessler controlled.

[24] He stated the plaintiff's position in these words [p. 361]:

> The approach for which the plaintiffs in effect contend is that of simply taking present-day cost of excavation, removal and disposal of the radioactive waste, adding to it an allowance for business disruption and residual injurious affection, and using this as the measure of damages resulting from the misrepresentation of five and a half years ago.

[25] This was the judge's resolution of the problem [p. 362]:

> While the court must, I think, assess damages with a view to making the plaintiffs whole in the sense of being in the *financial* position they would have been in had the land been free from contamination at the end of 1976, when they discovered the fraud, that can in this case be done only by awarding the cost of placing the land in the *physical* condition which it ought to have been in had the representation been true.

[26] The learned judge proceeded to assess in accordance with this principle. I agree with the defendants that he erred in so doing.

[27] I endeavour now to state how the assessment of damages in this case ought to be undertaken. Firstly, the long-established measure of damages for the tort of deceit ought to be applied. That is that the damages are the difference between the price paid and the actual value of the property purchased: *Zorzi v. Barker* (1957), 1957 CanLII 284 (BC CA), 8 D.L.R. (2d) 164 (B.C.C.A.); *Hepting v. Schaaf*, 1963 CanLII 93 (SCC), [1964] S.C.R. 100, 46 W.W.R. 161, 43 D.L.R. (2d) 168; and *Sorenson v. Kaye Holdings Ltd*., supra. The price, of course, is $260,000. But there is no finding of actual value as at 6th December 1974, and this court cannot make that finding. So the calculation cannot yet be made.

[28] When that calculation is completed, one goes on to consider consequential loss. The right to recover for such loss did not have to be decided in the cases in which the established rule for the measure of damages in deceit was applied. The learned trial judge was of the opinion, in taking as authority the judgment of the English Court of Appeal in *Doyle v. Olby (Ironmongers) Ltd*., [1969] 2 Q.B. 158, [1969] 2 All E.R. 119, that damages for consequential loss could be awarded. I agree with that opinion. Now a claim for such damages has to be considered here with respect to the $318,400 spent on improvements to the contaminated property in 1975, before the plaintiffs were aware of the deception. It is an assessment which this court is not in a position to make. The plaintiffs carry the onus of proof. The mere expenditure of the money is not proof of loss. And it is clear that there has not been loss to the total amount spent. The expenditure created facilities which have been used to facilitate the business of the plaintiff Comor Supplies Ltd. for some five years up to date of trial. A number of factors have to be weighed in the assessment of the loss, if any. It is undesirable to discuss the matter further before the assessment takes place.

[29] The plaintiff Faessler claims consequential loss, arising out of the deceit, with respect to the 116th Avenue property. The trial judge allowed him $37,500 for diminution in value due to the presence of the radioactive material on that property, and $2,000,

being the cost of relocating the barrels on the land. In my opinion, that was a proper assessment of consequential loss, and I would not disturb those awards. In addition, he awarded the plaintiff Comor Supplies Ltd. $4,200 for storage of the barrels. In my opinion, that is too remote and cannot be considered a loss flowing from the deception. It should be disallowed.

[30] I would remit the matter to the trial judge to complete the assessment of damages. He will have to consider the application of prejudgment interest to amounts he awards. As success has been divided, the respondents succeeding upon the issue of liability and the appellants upon the issue of damages, I would allow no costs.

[31] ANDERSON J.A. (dissenting in part):— This is an appeal from the judgment of Taylor J. [1980 CanLII 586 (BC SC), 21 B.C.L.R. 345, 14 C.C.L.T. 87], awarding damages for fraud against both appellants.

[32] The reasons for judgment of the learned trial judge insofar as the issue of liability is concerned read as follows [pp. 346-53]:

> The defendant Mark Smerchanski, a consulting geologist, promotor of mining and metallurgical enterprises and former Member of Parliament, sold four acres of land in Surrey to the plaintiff Court Faessler, a wire rope dealer, in December 1974, after having told him that certain material piled there made "excellent fill" but without having mentioned it was radioactive waste.
>
> Relying on what Mr. Smerchanski had said, and in ignorance of that which he had not, Mr. Faessler thereafter spread this material over the property, put a warehouse addition and blacktopped cable storage area on top of it, and moved some of the material which had been put in drums to a piece of land he owned nearby. In December 1976, officials of the Atomic Energy Contol Board, alerted to certain dangers caused by such low-grade radioactive material, set out on a search for Mr. Smerchanski's waste, and found most of it beneath Mr. Faessler's warehouse and yard. The visit, which was well publicized, has been followed by three years of intensive investigation and paper work and expressions both of governmental disapproval and reassurance concerning the presence of radioactive waste in a populous Vancouver suburb.
>
> Governmental action to date has been restricted to such expressions of concern and has stopped short of any actual remedy. While a substantial amount of public money has been spent on departmental investigations and demonstrations of interest, actual removal of waste has proved politically impossible. The federal government position is that the material ought to have gone to an approved radioactive waste disposal site. The only such disposal site in Canada is at Chalk River, Ontario, and the Ontario government position is that it is not to be used as a dumping ground for nuclear waste from other provinces. The position of the government of British Columbia to date is that it will not authorize disposal of radioactive waste anywhere in this province. The position of the federal Atomic Energy Control Board, as explained at trial, is that it will take away the slag stored in drums if it can find somewhere to put it, but it has given no undertaking with respect to the material under Mr. Faessler's plant. The board has insisted that the latter material does not represent a health hazard. The board's efforts to discover and expose the material have suggested to some, however, that it does and there are those, too, who wonder why the board would undertake to remove the material stored in drums if it did not. The plaintiff says the principal result of governmental activity to date has

probably been to render his land the least desirable piece of industrial property in the Lower Mainland, and thus destroy most of its value.

It is against this background that Mr. Faessler and his companies seek to recover damages for fraud and negligent misrepresentation against Mr. Smerchanski and his company, and the latter counterclaim for defamation, alleging that the plaintiffs exceeded the bounds of truth and fair comment in the manner in which they chose to describe Mr. Smerchanski's conduct to the newspapers.

(1) *The Defendant's Justification*

Departing somewhat from his evidence on examination for discovery, Mr. Smerchanski conceded at trial that he did not tell Mr. Faessler that the slag contained radioactive material.

Mr. Smerchanski's reason for saying that it made good fill constitutes his defence and his justification for his silence on a subject which, had it been mentioned, must surely have had a marked impact on any potential purchaser. The material is waste remaining after the extraction of columbium, an agent used for hardening steel, from columbium concentrates containing thorium, which had been imported by the corporate defendant from the United States with permission of the Atomic Energy Control Board. The waste contains approximately two per cent thorium, which is a radioactive mineral and "prescribed substance" under the Atomic Energy Control Act, R.S.C. 1970, c. A-19. The regulations enacted pursuant to the Act provide that no person shall have possession of any thorium-bearing material except under licence from the board, unless the proportion of thorium contained is less that .05 per cent by weight. Both the concentrate imported by the corporate defendant and the resulting slag contained at least 20 times this maximum thorium content, so that a licence was required both for possession of the concentrate and for possession of the waste material after removal of the columbium.

During 1971 Mr. Smerchanski, then a Member of Parliament, had communications with the Radiation Protection Division of the Department of Health and Welfare, which was carrying out certain responsibilities of the Atomic Energy Control Board. These communications resulted in a letter of 21st December 1971 from that department in the following terms:

"21 December, 1971

"Dear Mr. Smerchanski:

"This Division has recently granted health approval for the issuance of a Permit to allow you to procure a quantity of columbium containing approximately 2% thorium. This Permit should be forthcoming from the Atomic Energy Control Board in the near future.

"On this Permit there is a condition covering the disposal of wastes containing thorium. The usual procedure for disposal of unwanted radioactive material is shipment to Atomic Energy of Canada Limited, Ottawa for burial at their Chalk River site; however this method of disposal becomes quite unrealistic for the volume of thorium-bearing wastes which you will be disposing of. As an alternative, since the wastes will only contain about 2% thorium, the slag material from your process could be used for land fill on your property in an area which will not be subsequently used for residential developments. This waste material could also be use for land fill off your property, railway and road bedding, etc,; however these latter methods of disposal would require prior approval of the Atomic Energy Contol Board.

"I trust that the above information will be of some assistance to you in disposing of your unwanted waste materials. Should you require any further information, please feel free to get in touch with us.

"Yours sincerely,

" 'W. J. Welsh'

"W. J. Welsh

Radioisotope Safety Officer."

The board received a copy of this letter and, by its subsequent silence, may be taken to have adopted it content. On 5th January 1972 the board issued the promised licence authorizing importation of 340,000 pounds of columbium concentrate containing 6,000 pounds of thorium. It was expressed to expire 31st December 1972, and was subject to the condition: "Wastes containing thorium shall not be disposed of without prior approval from the Atomic Energy Control Board".

Mr. Smerchanski took the position at trial that the letter constituted prior authority from the board to dispose of the slag as land-fill on his property. The letter is, of course, capable of that interpretation. The phrase "however *these latter* methods of disposal would require approval of the Atomic Energy Control Board" (the italics are mine) could refer either to *all* disposal as land-fill or to disposal as land-fill *off* the applicant's premises. Mr. Smerchanski asserted that he understood it in the latter sense, and felt he was entitled to use the waste material as land-fill *on* the property without obtaining any further approval from the board.

But Mr. Smerchanski had a copy of the regulations and knew very well what they said: he must have known, as well as any man could, that what he subsequently did was in breach of both the letter and spirit of the Act. He knew that even if he did use the waste as fill on his company's land, it would still remain in his company's possession so as to require continued authority under valid licence from the board. The regulations draw no distinction between possession for use, possession for storage and possession by way of disposal. In each case the person in possession must, and obviously for good reason, have a valid licence. He knew, too, that the slag had *not* been disposed of as fill; most was in a stockpile at the time of sale of the property; some was stored in drums. All of it remained in his possession, yet in December 1973 he let the licence lapse. Even if he believed that a licence was not needed after possession became possession as land-fill only — and I regret that I cannot accept that he did — Mr. Smerchanski was still well aware at the time of sale that most of the slag was in no way disposed of, but was stored in a stockpile and in drums. He was plainly in violation of the Atomic Energy Control Act and liable upon conviction to a fine or imprisonment.

It is clear that Mr. Smerchanski and his company well knew that a purchaser of the property would require a licence from the board, too, in order that possession of the property be lawful, whether as to the slag by then buried or that remaining in the stockpile and drums. He had reason to hope that no problem would in fact arise as a result of the unlawful presence of the material, but I have no doubt that he knew he was in breach of the law in having the material there without a licence from the board. He knew that a purchaser would be in breach of the Act, too, unless he obtained a licence from the board. Mr. Smerchanski gambled on a continuation of the board's somewhat complacent attitude towards low-grade radiation hazards.

(2) *The Claim in Deceit*

Mr. Brock has argued forcefully that a sale of land without express disclosure of the fact that it is being used unlawfully does not constitute fraud, relying particularly on the recent case of *Sorenson v. Kaye Holdings Ltd*., 1979 CanLII 621 (BC CA), [1979] 6 W.W.R. 193, 14 B.C.L.R. 204 (C.A.), and the statement of Lambert J.A. (at p. 235) that normally "it is not deceit for a vendor to fail to decry his own wares

unless he makes some positive assertion that becomes distorted by the failure" or there is a relationship of trust.

While the facts of the cases have some striking similarities, there are, I think, on closer examination, features which distinguish that case from the situation involved in the present litigation. In the *Sorenson* case the purchasers knew that the swimming pool on the land they bought might not conform with applicable regulations; they knew more than enough to alert them to the advisability of independent inspection and inquiry as to its status. To suggest in the present case that the purchaser knew there was slag material on the land and ought to have made inquiry to determine whether it might be radioactive, and whether or not it was lawfully there, would, of course, be absurd, and counsel did not suggest it. The majority of the Court of Appeal in *Sorenson* found there had been neither intent to deceive nor the making of any deceptively inadequate representation. While the swimming pool problem was not disclosed to the purchasers in all its detail, sufficient had been said to enable them to assess the legal position for themselves; and what was withheld had been withheld without fraudulent intent and without deceptive effect.

I find the situation here quite different. Mr. Faessler says he and Mr. Smerchanski had a discussion at the property on 6th December 1974, shortly before executing the interim agreement. Mr. Faessler says he disclosed his intention to build another warehouse on the land. He said he asked Mr. Smerchanski what he had been doing there and Mr. Smerchanski replied that he had been conducting a process which involved "something to make metal stronger". He asked what Mr. Smerchanski was going to do with the slag and Mr. Smerchanski said he hoped to take away the slag which was in barrels but was selling with the land the stockpiled material, which he had been using to fill soft spots on the property. Mr. Smerchanski said it "makes excellent fill".

No specific arrangement was made at that time as to when Mr. Smerchanski would remove the material which he had put into barrels. The parties proceeded to execute the interim agreement by amending Mr. Faessler's original offer of $243,000 to read $260,000 in accordance with Mr. Smerchanski's counterproposal, in which form the offer was accepted on behalf of the corporate defendant.

Mr. Smerchanski agreed in evidence that he said the material made excellent fill, and did so during a discussion with Mr. Faessler at the property. But he did not believe that he met Mr. Faessler on 6th December 1974, and asserted that this discussion must have taken place in mid-January, after the interim agreement had been entered into, but before completion and execution of a registrable agreement for sale. On examination for discovery Mr. Smerchanski had been entirely unsure when the discussion occurred. He thought at that time it could have been at a meeting in December. Mr. Faessler is certain the discussion occurred just before the interim agreement was executed on 6th December and the evidence of the real estate agent, Mr. O'Connor, is consistent with the meeting having occurred on that date. I accept Mr. Faessler's recollection as to the date of the meeting, and that it was in the context of an inquiry as to the nature of the material, and with knowledge that Mr. Faessler was considering erecting further improvements, that Mr. Smerchanski told him that the slag made "excellent fill".

The law with respect to deceit by half-truth has its foundation in the colourful dictum of Chambre J. in *Tapp v. Lee* (1803), 3 Bos. & P. 367, 127 E.R. 200 at 203:

"An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the Defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If

a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

In *Peek v. Gurney* (1873), L.R. 6 H.L. 377, Lord Chelmsford observes (at p. 391) that while mere concealment will not suffice to give rise to a right of action in deceit, so that there must be "something actively done to deceive [the other party] and draw him in to deal with the person withholding the truth from him", this may well be accomplished by a half-truth. He observes (at p. 392) that half a truth will sometimes amount to a "real falsehood", and may contain " a positive misrepresentation". The law is summarized in Spencer Bower on Actionable Misrepresentation, 3rd (Turner) ed. (1974), at p. 94, in this passage:

"To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a 'lie', and one of the most dangerous and insidious forms of lie."

While it is true that in Canada the concept of fraudulent concealment by silence alone has not gained the acceptance which it has found in the United States law governing sale of land, the concept of deceit by incomplete disclosure which is here recognized may impose very similar obligations on a vendor who answers a prospective purchaser's questions.

In the present case, the fact that unlicensed possession of the radioactive material on the land was, to the vendor's knowledge, unlawful, and the obvious difficulties of effecting a resale of the land if its presence there became publicly known, were matters of such moment to a purchaser that it is difficult to conceive of any sufficient statement Mr. Smerchanski might have made about the material which did not include disclosure of its radioactive character. How could he speak of it and keep that fact secret?

There was something unusual about the operation producing the slag, either in the appearance of the waste material or the manner in which it was piled and stored, which caused Mr. Faessler to make inquiry. The statement that the slag made "excellent fill" was calculated to bring that inquiry to an end. The statement was true only with the qualifications that possession of the material required a licence, certainly until it had been used as fill, and that if not used as fill on that property, it could only be disposed of in certain specified ways and with consent of the Atomic Energy Control Board, and that permitted disposal methods would not include use for fill on residential projects. To describe the material as *excellent* fill was in the circumstances deceptive and the statement as a whole was deliberately deceptive as a half-truth within each of the definitions cited above. It was a "positive assertion that becomes distorted" by failure to disclose other relevant facts, in the sense mentioned by Lambert J.A. in the *Sorenson* case, supra. I have no doubt that Mr. Smerchanski intended to lead Mr. Faessler by this half-truth into the belief that the slag need give him no concern. No doubt he hoped that it would be used as fill and forgotten. The board's lack of interest during the year since his licence lapsed would have given Mr. Smerchanski some reason to hope that Mr. Faessler would have no problems with it. But the risk was there and Mr. Smerchanski knew of it. If he told Mr. Faessler anything about the slag, and certainly if he told him what he did, he could not limit his disclosure so as to pass that risk on without making Mr. Faessler aware that there was, in fact, such a risk.

I find that the transactions of 6th December 1974 were induced by deceit and fraudulent misrepresentation as to the character of the slag material, made by the defendant Mark Gerald Smerchanski on behalf of the defendant Fundy Chemical International Ltd., for which both of the defendants are liable.

And at pp. 356-59:

On behalf of Mr. Smerchanski, the court was urged by Mr. Brock to resolve the problem by making the finding of fact that the thorium waste presents no danger whatever to persons using the property, a finding which, it was argued, would dispel any concern which users of the property or prospective purchasers might otherwise have had as a result of the public tumult which has lasted for 3½ years since its discovery.

The evidence at trial of Joseph Paul Didyk, a senior engineer on the staff of the Atomic Energy Control Board, would, I think, support such a finding. But I am certain that such a declaration as counsel seeks, made on the basis of expert evidence given on behalf of litigants in a private lawsuit, even if there were several such witnesses, would not serve to put to rest the concern which has been expressed about this material. The court's inquiry must be directed to the task of determining, not whether that concern is justified, but whether it is in fact entertained by reasonable people and, if it is, whether those likely to be interested in purchasing property of this sort would be influenced by that fact in deciding how much they would be willing to pay for it.

Mr. Didyk said that hazards to health created by the presence of thorium are similar to those associated with the presence of radium. It was the discovery of hazardous conditions created by construction of houses and schools above radium-bearing waste used as fill at Port Hope, Ontario, which led to the search for other radioactive slag material in 1976 and to the discovery of the Surrey wastes. The material at Port Hope, and some similar material in Ottawa, has been excavated and removed by truck to the Chalk River disposal site on the insistence of the board.

Mr. Didyk's evidence leads the layman, I think, to these conclusions. Radioactive waste materials of the type in question may create three possible dangers to human health: the danger of exposure to low-grade gamma radiation, the danger of inhalation of radon gas, which may be built up within a closed building above such material, and the danger that the actual waste material may be swallowed, Exposure to low-grade radiation over long periods of time is thought by some experts to carry the possibility of developing malignancies, but the level of radioactivity produced by the slag at Surrey is not remarkable in comparison with that produced by sunlight, some neon lighting and other sources to which people are continually exposed. The radon gas problem arises mainly in confined spaces, such as basements, and is principally considered a danger in residential premises, where inhalation may continue over long continuous periods. The possibility of ingestion of the waste material is fairly remote, probably having relevance only where children are likely to be present on the premises.

This witness said that with radiation there is no "safe" level, as there is with many toxic substances. But there is an "acceptable" level which can be justified in relation to other sources of radiation exposure which all people experience in their ordinary lives. Radiation produced by the slag buried on the property which Mr. Faessler purchased is classified as in the acceptable range; exposure over two or three years to radiation at this level is said to be less, for instance, than a single exposure to radiation created by certain types of X-ray examination. Tests for the presence of radon gas at the property produced negative results and the likelihood of the material being eaten clearly is not a serious danger, the site being in an area zoned for industrial purposes only.

The evidence presented, of course, by no means reflects the whole spectrum of expert opinion on the subject. It suggests that according to the board's standards, and those of other knowledgeable and responsible public health bodies, there is no

> significant health hazard created by the thorium slag which has given rise to this action. But that is not because the material is harmless. The evidence is clear that it emits radiation and that all radiation is potentially harmful, and ought to be avoided. The reason why the material cannot, on the evidence, be classed as hazardous is that the radiation exposure to be derived from it, considered in relation to the exposure to which most of mankind is inevitably exposed, cannot be regarded as exceptional. From a health point of view it is clear that it would have been better that the material had not been put there. But so long as the property is used as at present, there is nothing to suggest that the presence of the slag there will result in those using it necessarily receiving greater exposure to radiation than they would otherwise have experienced in their daily lives. This seems to be the implication of Mr. Didyk's evidence.
>
> Unfortunately, the board's public position is not quite so clear. The board regards the present resting places of both buried and barrelled slag as temporary only; its official position is that all the material ought to be moved to a proper disposal site. Mr. Didyk said the view of the board's chairman is that each province should make proper provision for disposal of radioactive waste resulting from operations within its own boundaries. While the federal authority claims constitutional jurisdiction over importation and possession of radioactive substances, and appears to have made no inquiry of the province before authorizing Mr. Smerchanski to bring radioactive material to Surrey to process it there, yet provision of a site for disposal of resulting wastes is said to be a provincial responsibility. The province has not to date been prepared to accept that responsibility so far as the Surrey waste is concerned, with the inevitable result that the plaintiffs are left with the problem. In recognition of this reality the board mailed Mr. Faessler an unsolicited licence authorizing his continued possession of the material.
>
> It is hardly surprising in the circumstances that there have been local public demonstrations of concern, including the formation of a Surrey Organization for Nuclear Awareness, angry observations by members of the municipal council, a threatened strike by employees at the adjoining Canadian National Railway yard, attempts by residents to establish a roadblock nearby, and extensive coverage on television and in the metropolitan and local weekly newspapers.
>
> The fact that similar material in Ontario has been removed to a proper disposal site at the board's direction, and under its supervision, makes it difficult for people to accept that failure to remove the Surrey slag is due to the fact that it presents no health hazard, rather than to the fact that no government is willing to take responsibility for it. The board's reaction and response here and in Ontario is not wholly consistent with the suggestion that the material need give no concern. It is quite apparent that many people continue to place greater weight on the conduct of the governmental agencies involved rather than on what they say. I conclude that the concern expressed in evidence by employees of the plaintiff, real estate agents and appraisers, the local citizens' organizations and others, whether justifiable or not in fact, cannot be dismissed as unreasonable, and would undoubtedly be reflected in the price which a prudent purchaser would be willing to pay for the property.
>
> I conclude that loss of value due to public reluctance to be exposed to radiation, no matter how small that risk may be, is something for which the plaintiffs are entitled to be compensated in damages; I deal first with such damages in relation to the Anvil Way property, the land on which the slag was used as fill, and thereafter with damages in relation to the property on 116th Avenue, to which the barrelled slag was taken for storage, and the buried slag generally.

And, finally, at pp. 367-68:

The radioactive "half-life" of thorium — the time which it takes for the level of radiation emission to decline by one-half — is said to be 80,000 years. The conduct of the defendant in passing off such material to the plaintiff's as "excellent fill" can only be regarded in the circumstances as a shameless act of deception.

The increased vigour with which the Atomic Energy Control Act has been enforced following discovery in 1976 of new hazards associated with low-grade radiation could not, of course, have been expected at the time of the sale to the plaintiffs. Much was then, and still remains, unknown about radiation; hence, no doubt, the Atomic Energy Control Board's broad regulatory authority over radioactive material. Mr. Smerchanski and his company were well aware, however, of the political implications of radioactive waste disposal, and the dangers which the board's powers held for a person in possession of such material in the event of discovery of new hazards or a change in public attitudes towards those hitherto known. The manner in which the problem of the Surrey wastes has been dealt with by government agencies, influenced in part by the desire to achieve political, rather than practical, objectives, could well have been foreseen by Mr. Smerchanski and his company, and the loss which has been suffered by the plaintiffs as a consequence is plainly a proximate result of his deception.

[33] In addition to the findings of fact and the inferences drawn by the learned trial judge from the facts, the following evidence may be of assistance in dealing with the issues raised on this appeal:

1. The Atomic Energy Control Board issued a licence to Fundy Chemical Corporation Limited (hereinafter referred to as "Fundy") on 5th January 1971. This licence (Ex. 9) reads as follows:

ATOMIC ENERGY CONTROL BOARD
P.O. BOX 1046
OTTAWA, CANADA
K1P 5S9

Permit No. 90/11/72
Date January 5, 1972
A.E.C.B. Files 15-3-F8

PERMIT FOR PRESCRIBED SUBSTANCES

To: Fundy Chemical Corporation Limited
7900 Anvil Way
Surrey, B.C.

Reference: your letter dated 22 November 1971.

You are hereby authorized to obtain from:

Mercer Alloys Corporation
Greenville, Pennsylvania
USA.

the following … approx. 340,000 lbs. of columbium ……

… concentrates containing some 6,000 lbs ……

… of thorium …….

for conversion to ferro-columbium

Subject to the following conditions

1. The actual quantity of columbium concentrates imported under this order together with the average thorim ovide [sic] content and quantity of contained thorium shall be reported to the Board within fourteen days after such importation.

2. Wastes containing thorium shall not be disposed of without prior approval from the Atomic Energy Control Board.

3. Authority under this permit shall expire 31 December 1972.

and otherwise subject to the provisions

of the Atomic Energy Control Regulations.

ATOMIC ENERGY CONTROL BOARD

BY_____

2. Smerchanski renewed Fundy's licence for the year 1973.

3. Smerchanski failed to renew Fundy's licence for the year 1974.

[34] It will also be necessary to consider the Atomic Energy Control Regulations, C.R.C. 1978, c. 365, made pursuant to the Atomic Energy Control Act, R.S.C. 1970, c. A-19, relating to the possession and disposal of "prescribed substances" such as thorium waste. Certain of the regulations are reproduced as follows:

3. Subject to section 6, no person shall, unless exempted in writing by the Board, produce, mine, prospect for, refine, use, sell or possess for any purpose any prescribed substance except in accordance with a licence issued pursuant to section 7 …

7.(1) The Board or a designated officer may issue a licence for any purpose referred to in section 3 or in respect of any device or equipment referred to in section 4 upon receipt of a written application from the person requiring such licence.

(2) An application for a licence for any purpose referred to in section 3 or in respect of any device or equipment referred to in section 4 shall set out such of the following information as the Board may require:

(*a*) the nature and quantity of the prescribed substance and the purpose for which it is required;

(*b*) the maximum quantity of the prescribed substance likely to be required at any one time for the purpose set out in the application;

(*c*) a description of the premises in which the prescribed substance is to be located and of any equipment in connection with which it is to be used;

(*d*) a description of the measures to be taken to prevent theft, loss or any unauthorized use of the prescribed substance;

(*e*) a description of the measures to be taken, including any plan in case of accident, to prevent the receipt by any person of a dose of ionizing radiation in excess of any dose specified in respect of such person in Schedule II;

(*f*) a description of the method of disposing of the radioactive prescribed substance;

(*g*) a description of the qualifications, training and experience of any person who is to use the prescribed substance; and

(*h*) any other information necessary to evaluate the application.

(3) A licence issued by the Board pursuant to subsection (1) may contain such conditions as the Board deems necessary in the interests of health, safety and

security and, without limiting the generality of the foregoing, may include conditions respecting

(*a*) the measures to be taken to prevent the receipt by any person of a dose of ionizing radiation in excess of any dose specified in respect of such person in Schedule II;

(*b*) the monitoring devices and other methods for measuring the dose of ionizing radiation received by any person;

(*c*) instructions to be given to atomic radiation workers respecting the hazards of ionizing radiation and the procedures to be followed to limit exposure to ionizing radiation;

(*d*) the maximum quantity and concentration of radioactive or other hazardous material that may be discharged into the air and water as a result of the use of the prescribed substance;

(*e*) the method of disposing of radioactive prescribed substance;

(*f*) the measures to be taken to prevent theft, loss or any unauthorized use of the prescribed substance; and

(*g*) the qualifications, training and experience of any person who is to use or supervise the use of the prescribed substance or any device or equipment to which the licence applies …

11. (1) Every person to whom a licence has been issued shall

(*a*) where the licence has been issued pursuant to section 7, keep all necessary records in respect of the prescribed substance that is the subject matter of the licence to show

(i) the nature, form and quantity in which the licence under which such substance was obtained.

(ii) the location thereof.

(iii) the names of all persons involved in the use and handling thereof, and

(iv) where such substance has been disposed of, full particulars of such disposal, whether by sale or otherwise, and the licence, if any, under which such disposal was made;

(*b*) where the licence has been issued pursuant to section 9,

(i) keep all records required by paragraph (*a*) in respect of any prescribed substance at the nuclear facility, and

(ii) keep all necessary records to show the maintenance and operation of the nuclear facility; and

(*c*) keep all necessary records to show the dose of ionizing radiation received by any person as a result of the use of the prescribed substance or the operation of the nuclear facility, as the case may be;

(*d*) keep all reports of medical examinations that are required pursuant to subsection 17(1); and

(*e*) keep such other records as the Board may require in the interests of health, safety and security.

(2) The Board may require any person to whom a licence has been issued to deposit the records required to be kept under paragraph (1)(*c*) or a copy thereof with any person or agency specified in writing by the Board.

(3) No person shall destroy or otherwise dispose of any records required to be kept under subsection (1) except in accordance with the written authority of the Board …

20.(1) Every person in possession of a prescribed substance or operating a nuclear facility in which a prescribed substance is located shall, in the event of any loss or theft of such prescribed substance in a quantity exceeding ten times the scheduled quantity, make a report of such loss or theft within 24 hours to the inspector appointed for the place or area in which the loss or theft occurred and shall as soon as possible thereafter send a complete report of such loss or theft to the Board, such inspector and the person, if any, appointed pursuant to section 16 as radiation safety adviser for the place or area in which the loss or theft occurred …

22.(1) No person shall use a container to store or otherwise hold radioactive prescribed substances, except where such container forms part of the machinery attached to the manufacturing or processing equipment of a nuclear facility, unless there appears on such container

(*a*) the radiation warning symbol set out in Schedule III and the words "RADIATION-DANGER-RAYONNEMENT", clearly and prominently displayed on the outside thereof; and

(*b*) information with respect to the nature, form, quantity and date of measurement of the radioactive isotopes in the container …

23. (1) No person shall ship any radioactive prescribed substances unless the shipment thereof complies with the requirement respecting packaging and labelling and any other requirements prescribed

(*a*) by any body having jurisdiction by statute over the proposed mode of transport; or

(*b*) by the Canadian Transport Commission, if no requirements have been prescribed by any body described in paragraph (*a*) …

24.(1) Every person operating a nuclear facility or carrying on a business or undertaking involving the use of a prescribed substance shall, in addition to any other requirements of these Regulations,

(*a*) take all reasonable precautions in relation to the nuclear facility or the prescribed substance to protect persons and property from injury or damage; …

25. No person shall abandon or dispose of any prescribed substance except

(*a*) in accordance with the conditions in any licence that is applicable to the prescribed substance and that is in force; or

(*b*) in accordance with the written instructions of the Board …

27.(1) Subject to subsections (2) and (3), the Board or a designated officer may, by notice in writing to the holder of any licence, revoke or suspend the licence or amend the terms and conditions thereof,

[35] It will be noted, as well, that Pt. VI of the regulations is entitled "Health and Safety". The regulations make reference to "medical advisers" and "radiation safety advisers".

[36] The submissions of the appellant as to liability may be summarized as follows:

(1) that Fundy was exempted from the licensing requirements of the regulations pursuant to a letter written by one Welsh, a safety officer of the Radiation Protection Division of the Department of Health and Welfare, to Fundy on 21st December 1971;

(2) that the representation made by Smerchanski that the thorium waste stored on the property made "excellent fill" was true and, in the circumstances, could not be construed as a "half-truth" or a positive fraudulent misrepresentation;

(3) that the thorium waste was not dangerous or hazardous to health, at least in respect of persons using the Anvil Way property, and therefore the disclosure of the existence of the thorium waste on the property would not be of any concern to the plaintiffs or to any prospective purchasers of the property;

(4) that the learned trial judge erred in holding that the letter of Mr. Welsh to Smerchanski could be interpreted as requiring further approval of the board to dispose of the thorium waste on the Anvil Way property and, as a result, his finding of fraud, being based partly on an erroneous determination as to fact, cannot stand;

(5) that the cause of the problems encountered by the respondents and the diminution in values of the Anvil Way property were caused by political and media events which took place in 1976 and were not foreseeable at the time of the sale in 1974; and

(6) that, even if the representation made by Smerchanski was fraudulent, it did not induce the respondents to purchase the Anvil Way property.

[37] Upon reviewing the findings of the learned trial judge in dealing with the Welsh letter (21st December 1971), I have reached the conclusion that this letter was not fairly open to the interpretation placed upon it by him. In my view, the letter authorizes Fundy to use the thorium waste as fill on the Anvil Way property without further approval of the board. The thorium waste could not, however, be removed from the Anvil Way property, even for use as fill in other locations, without prior approval of the board.

[38] The Welsh letter does not, however, constitute an exemption from the mandatory language of s. 3 of the regulations, which required Fundy to "possess" the thorium waste in accordance with the terms of the licence issued by the board. All exemptions from the licensing requirements of the regulations are required to be in writing. Even if the Welsh letter could be construed as being an exemption granted by the board, the only exemption set out in the Welsh letter is that the thorium waste could be used as fill on the Anvil Way property. The licence issued by the board on 5th January 1972 (about two weeks after the date of the Welsh letter) contains the following language:

> 2. Wastes containing thorium shall not be disposed of without prior approval from the Atomic Energy Control Board.
>
> 3. Authority under this permit shall expire 31 December 1972.

[39] To argue that the Welsh letter amounted to an exemption from the board's licensing requirements in the light of the limited approval contained in the Welsh letter and the express and specific language of the licence is to fly in the face of the facts and the regulations.

[40] It should also be noted that the licence issued by the board was subject to amendment by the board at any time: see reg. 27(1).

[41] Smerchanski was conversant with the regulations and knew that the Welsh letter was not an exemption. He renewed Fundy's licence in 1973. He admitted that he should have obtained a licence in 1974.

[42] It is in the above context that I come to review the submissions made on behalf of the appellants.

[43] Firstly, after reviewing the reasons for judgment of the learned trial judge in the light of his erroneous interpretation of the Welsh letter, I am quite unable to reach the conclusion that he committed any palpable or overriding error. The error made by the trial judge was inconsequential and was not central to his determination that the purchaser was induced by the fraudulent representations of Smerchanski to buy the property, I cannot interfere: see *Taylor v. Jaegli Enterprises Ltd.* (1981), 1981 CanLII 26 (SCC), 124 D.L.R. (3d) 415 (S.C.C.); and *Lewis v. Todd* (1980), 1980 CanLII 20 (SCC), 14 C.C.L.T. 294, 115 D.L.R. (3d) 257 at 260-61, 34 N.R. 1 (S.C.C.).

[44] Secondly, I am convinced that the learned trial judge reached the correct conclusion. The facts as found demonstrate clearly that the comment by Smerchanski that the slag would make "excellent fill" was a false and misleading statement. The words "excellent fill" surely must be taken to mean, at the very least, that the use of the slag as fill was unrestricted. The slag could not be used as fill in any other location without the consent of the board. The slag used as fill on the Anvil Way property was subject to licensing conditions fixed by the board from time to time. Even if the slag used as fill on the Anvil Way property was not subject to the regulations, the remaining slag (not used as fill) was subject to such licensing conditions as might be fixed by the board. Possession of the remaining slag in the absence of a licence was unlawful. The slag could not be abandoned or disposed of without the permission of the board. The board could prescribe conditions as to how the slag was to be dealt with on or off the Anvil Way property. In short, the possession and/or the disposal of the slag was subject to the dictates of the board. Quite apart from licensing requirements, the slag, because of its inherently dangerous propensities, would not make "excellent fill" except in very limited circumstances. The slag could not be used as fill in any residential environment. The slag could not be used as fill in schoolyards, parks or in any places frequented by children. It could not be safely used under conditions which might give rise to a danger from the formation of radon gas. If the slag was used as fill on the Anvil Way property, it could not be removed therefrom without the consent of the board. It follows that, if it became necessary at some future date as part of an industrial or commercial development of the property to excavate and remove the fill to another site, such excavation and removal would require the board's approval.

[45] The fill was not in any sense "excellent fill", but was fill that no reasonable owner would desire to use.

[46] The case for the appellants is that, insofar as the slag could be disposed of on the Anvil Way property, as the slag so disposed of was not hazardous to health, the words "excellent fill" properly described the thorium waste. The appellants point out as well that, as a board licence was not required, except perhaps in a technical sense, the failure to disclose that the respondents would have to obtain a licence from the board was not material. To so view the words "excellent fill" is to take too narrow an approach, and is to treat these words as though they are to be construed in a vacuum, without regard to the background in which the words were uttered. The words "excellent fill" cannot be read as meaning "excellent fill if used on this property".

[47] At the risk of repetition, the words used were fraudulent, in that they emphasized only the favourable qualities of the slag, thus leading the respondents to believe that the use of the fill was not subject to any restrictions or qualifications, when Smerchanski well knew that the slag not disposed of as fill on the Anvil Way property was subject to the regulations and could, in certain circumstances, create an immediate hazard to health. Quite apart from the above matters, it appears to me that in the marketplace one of the most important considerations was that it consisted of radioactive waste. As the learned trial judge found, all the expert advice in the world will not convince the average citizen that radioactive waste makes "excellent fill". This was so in 1974 as it was in 1976. The fact that the views of the average citizen may be "irrational' ' is of little consequence. The fact is that the market for real property is determined by the views of average citizens, be they rational or irrational. I pause here to state that, in my view, it is not "irrational" to fear that proximity to radioactive waste may create a dangerous environment. The average citizen is aware, for example, that radioactive waste can be disposed of only at specific sites designated by the government. He can rationally conclude only that such measures are necessary for reasons of health and safety.

[48] I think it is also important that the representations made by Smerchanski were made after inquiry by R. Faessler as to what the slag was. The evidence of R. Faessler relating to this matter reads as follows:

> So then we walked out to the back of the building and there was railway tracks there. And he — he explained to me about the railway tracks and — you know — access of the railway tracks and so on, and from there we walked around the end of the building, the end of what we called the "old building", which is 40 by 60, and we walked right up on an area that he had levelled out of slag, and there was quite a pile of slag, as I indicated yesterday on the map, and *I asked him what it was, what the material was*, and what he was going to do with the — with it.
>
> Mainly, I said — you know — "What are you going to do with this?" And he said, "Well, I — "He said. "Over there you have some fairly soft spots in the property. We have been levelling it out as we go. We just bulldoze it once a month or so to keep it down."

> We were standing there, and he demonstrated it, and he said that you can see that there is nothing better for fill. He said that it makes a really good hardbed and he said that your low spots there to fill in, level it out and use it for fill.
>
> I said, "Well, are you sure it's good for fill?" and he said, "Yes, it makes excellent fill. See for yourself." (The italics are mine.)

[49] The answers given by Smerchanski as to "what the slag was" were such as to dispel any further desire to inquire into the nature of the slag on the part of Faessler.

[50] As to the law, the appellants rely on the judgment of this court in *Sorenson v. Kaye Holdings Ltd.*, 1979 CanLII 621 (BC CA), [1979] 6 W.W.R. 193, 14 B.C.L.R, 204 (C.A.). The [B.C.L.R.] headnote in that case reads in part as follows:

> The appellants operated a seaside resort with a "fill-and-draw" swimming pool. The operation of such pools was contrary to health regulations, and the male appellant had in fact been convicted of violating those regulations. In order to make the pool conform to the regulations, expenditure in the area of $30,000 would have been necessary. In 1974 the appellants sold the resort to the respondents without fully informing them of the problems they had had with health authorities. The appellants simply advised the respondents that there "could" be a problem in that regard, and that the health board "may" require a permit. The appellants allayed the respondents' fears by showing them a newspaper story reporting that a similar pool in Vancouver had been allowed to remain open. The respondents discovered the facts after taking possession of the property but before the sale was completed. In this action they sought damages for fraud. At trial, $30,000 damages were awarded against the appellants, and this appeal was brought on the issue of liability …
>
> PER MCFARLANE J.A.: This was not an action for damages for breach of contract. It was an action in deceit, and for the action to succeed nothing short of proof of fraudulent intention to deceive in the strict sense would suffice. Accordingly, this action could not succeed because the evidence showed that the respondents were well aware of the true state of affairs at the relevant time. In any case, the measure of damages in an action like this is the difference between the price paid and the actual value of the property purchased, and the respondents had failed to adduce any evidence as to actual value. Accordingly, an essential element of the cause of action had not been proved …
>
> PER LAMBERT J.A.: The issue was whether the appellants had intentionally deceived the respondents by fraudulent misrepresentation and so induced them to buy the property. Because this was not a contract of "utmost good faith" and there was no fiduciary relationship between the parties, silence could not constitute a misrepresentation. Therefore, for this claim to succeed it would have to be proved that there was a positive assertion which amounted to a misrepresentation. There was no such assertion here. Moreover, the tort of deceit involves intent, and the appellants here had not intended to deceive the respondents.

[51] That case may be distinguished on the following bases:

(a) the plaintiffs in *Sorenson* were well aware of the relevant facts at all material times;

(b) there was no evidence that any positive assertion amounting to a misrepresentation had been made;

(c) the plaintiffs were put on inquiry (they were told that the board of health might require a permit to operate the pool); and

(d) Lambert J.A. held, on the facts, that there was no intent to deceive.

[52] In the case on appeal, there is no evidence that the respondents were aware of the existence of radioactive waste or that they were put on inquiry. The learned trial judge made a finding of fact that Smerchanski intended to deceive the respondents and that a positive misrepresentation had been made by Smerchanski.

[53] Furthermore, in my view, the judgment of Lambert J.A. supports the case for the respondents. His judgment reads, in part, at p. 235, as follows:

> The first question is whether silence constituted a misrepresentation. This is not a contract of utmost good faith, nor was there a fiduciary relationship between the parties. In the absence of such a special contract or relationship, it is not deceit for a vendor to fail to decry his own wares unless he makes some positive assertion that becomes distorted by failure.

[54] In the case on appeal, the positive assertion of the vendor (the slag makes "excellent fill") becomes distorted by the vendor's failure to disclose that the right to use the slag as fill was qualified and restricted and that the slag was an inherently dangerous substance.

[55] In addition to the authorities referred to by the trial judge, I would make reference to several cases where it has been held that to knowingly represent only favourable aspects without disclosing the fact that those favourable aspects are substantially qualified by restrictions and unfavourable aspects known to the person making the representation, amounts to fraud.

[56] Firstly, I make reference to the judgment of Denning L.J. in *Curtis v. Chemical Cleaning & Dyeing Co.*, [1951] 1 K.B. 805, [1951] 1 All E.R. 631 at 634 (C.A.), as follows:

> In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption. In R. *v. Lord Kylsant*, [1932] 1 K.B. 442, 23 Cr. App. R. 83, it was held that a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied.

See also the judgment of Avory J. in R. *v Lord Kylsant*, supra. In that case the following comments were made:

(a) "Sometimes a half truth is no better than a downright falsehood." (p. 446)

(b) "There must in my opinion be some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated, makes that which is stated absolutely false." (p. 447)

(c) "I do not care by what means it is conveyed — by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction." (p. 448); and

(d) "There was ample evidence on which the jury could come to the conclusion that this prospectus was false in a material particular in that it conveyed false impression." (p. 448).

[57] If the representations made by Smerchanski are tested in any of the ways suggested in *Kylsant*, one cannot reach any conclusion but that the representations were clearly fraudulent.

[58] Even if the learned trial judge was wrong in holding that the use of the words "excellent fill" constituted a positive fraudulent misrepresentation, the case for the respondents may be upheld on another ground. In the circumstances of this case, the failure to disclose the inherently dangerous nature of the thorium waste was fraudulent: see the judgment of Ritchie J. in *Rivtow Marine Ltd. v. Washington Iron Works Ltd.*, 1973 CanLII 6 (SCC), [1974] S.C.R. 1189 [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530 at 538, as follows:

> It is no novelty to state that prior to the case of *George v. Skivington* (1869), L.R. 5 Ex. 1, it was generally accepted in the law of England that the breach of a contract requiring the use of skill and care in the manufacture of an article did not of itself give any cause of action to a stranger to that contract who was injured by reason of the article proving to be defective. Even from the earliest times articles dangerous in themselves as well as articles which were made dangerous by reason of some defect *known to the manufacturer* were excepted from this general rule, but the ground for excepting the latter class of articles was first based on the fact that the vendor of the article who knew it to be defective was guilty of fraud or deceit and for this reason liable to anyone who suffered as a result of an injury: see *Langridge v. Levy* (1837), 2 M. & W. 519, 150 E.R. 863.

[59] There can be no doubt that the thorium waste is an inherently dangerous substance. The fact that it does not create any danger to health, when properly buried beneath the ground on the Anvil Way property, is not of importance. There are at least three reasons why the thorium waste should be classified as inherently dangerous, as follows:

1. The only rational explanation for the making of the regulations is that they were created in the public interest for health and safety purposes. The regulations refer specifically to "health and safety".

2. The requirement in the regulations that radioactive wastes shall not be abandoned or disposed of without the consent of the board must be regarded as a declaration that such wastes, unless properly dealt with in accordance with board orders, constitute a danger to health and safety.

3. Thorium waste constitutes a danger to health when deposited in residential areas or any public places frequented by children.

[60] In my view, the principle enunciated by Ritchie J. in *Rivtow*, supra, while not literally applicable to the facts of the case on appeal, may be reasonably extended to cover cases of this kind. The rule may be stated as follows:

> The vendor of land on which is situate an inherently dangerous substance is guilty of fraud if he sells such land to a purchaser without warning the purchaser that, if the dangerous substance is not used or disposed of in a specified manner or in the manner prescribed by statute, the purchaser and/or strangers to the contract may suffer a serious risk of injury.

[61] The law with respect to the sale of dangerous chattels is summarized in Clerk and Lindsell on Torts, 14th ed. (1975), p. 927, para. 1623, as follows:

> *Sale of chattel known to be dangerous*. It seems that a person who sells a gun to another for use impliedly represents thereby that so far as he • knows the gun is a safe one. So, too, one who sells animals which he knows to be suffering from an infectious disease and which he also knows the purchaser is likely to place with his own uninfected animals, is presumably liable to an action of deceit if by reason of the non-disclosure of the disease the purchaser's other animals are injured. Thus, when the defendant was alleged to have knowingly sold a diseased cow at a market without disclosing the fact of the disease, and the purchaser put the cow in a field with other cattle which caught the disease and died. Blackburn, J, said, "I entertain no doubt that the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind." In *Mullen v. Mason* (1866), L.R. 1 C.P. 559 at 563, a similar case in which the first count was on warranty, Willes, J. said, "I agree with my Lord that it is not necessary to say what the plaintiff would be entitled to recover if he rested his case only on the warranty … was it not necessarily within the contemplation of the parties that it might be placed with other cows?"

[62] There would seem to be no good reason why the law relating to the sale of dangerous chattels should not be applied to the sale of land, where it is reasonably foreseeable that the dangerous substance, situate on the land in question, may be used or disposed of in a manner causing a risk of injury to health. I would add that the language used by Blackburn J. in *Badger v. Nichols* (1873), 28 L.T. 441 (Q.B.), may be paraphrased in relation to the case on appeal as follows:

> I entertain no doubt that Smerchanski, by selling the land on which was situate the dangerous thorium waste, furnished evidence of a representation that, as far as his knowledge went, the land was free of any dangerous substances. *To say otherwise would be contrary to the common sense of mankind*. (The italics are mine.)

[63] I come next to the submission that, as the damages suffered by the respondent could not be foreseen, the issue of liability must be resolved in favour of the appellants. This submission appears in the factum of counsel for Smerchanski as follows:

> The discovery in 1976 of low level radioactive landfill in Ontario, the change in the aproach to administration of the Regulations by A.E.C.B.: its activities in relation to the material at Surrey and the public reaction were subsequent, supervening circumstances which could not have been contemplated in 1974 when the land was sold.

[64] This submission must fail, for the reasons given by the learned trial judge as follows [pp. 367-68]:

> The increased vigour with which the Atomic Energy Control Act has been enforced following disovery in 1976 of new hazards associated with low-grade radiation could not, of course, have been expected at the time of the sale to the plaintiffs. Much was then, and still remains, unknown about radiation; hence no doubt, the Atomic Energy Control Board's broad regulatory authority over radioactive material. Mr. Smerchanski and his company were well aware, however, of the political implications of radioactive waste disposal, and the dangers which the board's powers held for a person in possession of such material in the event of discovery of new hazards or a change in public attitudes towards those hitherto known. The manner in which the problem of the Surrey wastes has been dealt with by the government agencies, influenced in part by the desire to achieve political, rather than practical, objectives, could well have been foreseen by Mr. Smerchanski and his company, and the loss which has been suffered by the plaintiffs as a consequence is plainly a proximate result of his deception.

[65] In relation to this submission, I would make reference to the judgement of Lord Denning MR. in *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158, [1969] 2 All E.R. 119 at 122 (C.A.), as follows:

> The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages." *All such damages can be recovered; and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.* (The italics are mine.)

[66] In conclusion, it should be noted that, while it could be argued that the full extent of the injury to the respondents was not foreseeable, it was foreseeable that as of the date of the completion of the sale of the Anvil Way property the respondents would suffer substantial injury of the type actually suffered.

[67] It was also contended by counsel for Smerchanski that, by mixing the thorium waste with other materials, the thorium content would be so minimal as not to constitute a "prescribed substance" within the meaning of the regulations. There is no evidence to support this contention. The mere mixing of thorium with other materials does not diminish the quantity of thorium waste on the Anvil Way property. In any event, expert evidence would be required to show that the mixing of the thorium waste with other materials was carried out in such a way as to show that all the thorium waste had been so diluted with other materials so as not to constitute a "prescribed substance".

[68] The appellants also submit that, even if the representations made by Smerchanski were fraudulent, C.R.F. was not induced to purchase the Anvil Way property by those representations. They contend that, as C.R.F. made an offer of $234,000 to purchase the property prior to the making of any representations, it could not have been induced to purchase by the representations made by Smerchanski. The fact is that on the date the fraudulent representations were made this offer had expired. The trial judge accepted R. Faessler's evidence that C.R.F. would not have purchased the property for $260,000 if it

had not been for the fraudulent representations made by Smerchanski. The authorities are clear that it is not open to us to reverse this finding of fact.

[69] I come now to deal with the argument of the appellant that the learned trial judge applied wrong principles in assessing damages for fraudulent misrepresentation.

[70] The facts relating to the issue of damages may be summarized as follows [excerpts are from the trial decision]:

> 1.
>
> The transactions of 6th December 1974 involved both the sale of real estate in the form of land (including buried slag) and improvements, and the sale of chattels including the slag piled behind one of the buildings: shortly after the original sale transactions, but as part of the same bargain, there was an agreement by the purchaser to take possession and care of the vendor's slag material stored in drums for eight months without charge.
>
> After they had taken possession, but long before discovery of the radioactive nature of the slag, the plaintiffs, in reliance on the deceptive representation made by the defendants, used the piled slag material as fill, and placed a warehouse addition and blacktopped wire-rope storage yard on top of it, and removed the material stored in drums to another site with the knowledge and approval of the defendants. Thus the consequences of the deceit of the defendants went a good deal further than merely inducing the sale of the real estate and chattels of 6th December 1974. It was in reliance on the same deception that the plaintiffs took possession of the piled radioactive material, moved that in barrels, and spread the material over the land and built on it. [pp. 353-54].
>
> 2.
>
> The cost (as of the date of trial) of removing the thorium waste from the Anvil Way property to an approved disposal site is approximately $315,000.
>
> 3.
>
> As of the date of trial, no approved disposal site had been designated by the federal or provincial governments.
>
> 4.
>
> Had the clean-up been done in January 1977, when the contamination was discovered, it would have cost less to do the job, but the value of the land in an uncontaminated state would, I think, have been lower by a greater proportion. This evidence suggests a residual value of the property immediately after discovery of the fraud, with means of disposal, would have been in the neighbourhood of $450,000.
>
> But the uncontradicted appraisal evidence is that lack of an assurance of some alternative disposal site greatly reduces the actual market value below this residual value derived by deducting clean-up cost from the uncontaminated value. Without such an assurance the land is said today to be worth less than $200,000, and presumably would have been worth no more than $150,000 at time of discovery of the fraud. Much turns on whether in fact the province will permit disposal of the radioactive material at any other site. If. the material is *not* in fact hazardous, governments could hardly object to it being put somewhere else. If the material *is* hazardous, governments could hardly refuse to permit it to be taken away from the centre of population to a site properly engineered for radioactive waste disposal, rather than left in an unprepared site located within the metropolitan area. One

would prefer to assume, in assessing damages, that governments would act reasonably in the matter, and that governmental permission to put the material elsewhere will soon be forthcoming. But appraisal evidence suggests that this is not the view of the market. The appraised value today in contaminated condition, without assurance of an alternative disposal site, is less than half what the evidence indicates the value would be on the assumption that such a site had been provided. In matters of value the court must, of course, be concerned with the view which the market is thought to hold.

The cost of the property to the plaintiff C. R. F. Holdings Ltd. at date of discovery of the fraud consisted of the $260,000 purchase price paid to the corporate defendant, $248,000 spent on the warehouse addition, $65,700 spent on paving and $4,700 spent on fencing, for a total of $578,000. If the damages were computed by deducting value at that date, say $150,000, from cost to that date, the damages of the plaintiff C. R. F. Holdings Limited in respect of this property would thus amount to approximately $425,000. To this would be added prejudgment interest at least for the period from discovery of the fraud to date of judgment, [p. 360].

5.

Clearly the problem of assessing damages in this, as in so many cases today, is compounded by inflation, Evidence shows that property in which the plaintiff owner invested $575,000 would, but for the fraudulent misrepresentation, be worth $825,000 today, 44 per cent more than cost. It seems, at first impression, that the benefit of some $250,000 in enhanced value should be credited to the defendants in determining the extent of their liability for misleading the plaintiff into what is alleged to be an improvident transaction. But the increase in value is an illusion — in terms of purchasing power the plaintiff has made no real gain. It would have enjoyed the same 30 per cent "gain" had it purchased a piece of property free from contamination, in any event, [p. 361].

6.

I assess the damages of the plaintiff C. R. F. Holdings Ltd., as owner of the Anvil Way property, at $400,000, inclusive of some compensation for the contingency that governmental action may prevent any clean-up, and those of Comor Supplies Ltd. as operator of the wire rope business, at $15,000, being partial compensation for business interruption in the event governmental action permits clean-up to occur.

By virtue of s. 2(*a*) of the Prejudgment Interest Act, 1974 (B.C.), c. 65, [now the Court Order Interest Act, R.S.B.C. 1979, c. 76], there will be no prejudgment interest on either award.

The effect of the award is that should immediate clean-up take place the plaintiff C. R. F. Holdings Ltd. would be over-compensated for loss of value of the land and the plaintiff Comor Supplies Ltd. undercompensated for business interruption. Should clean-up never take place, so that the damages were to stand in place of loss of what would have been the value of the land in uncontaminated condition, then the plaintiff owner would, on today's values, be approximately $225,000 short of proper compensation, and the plaintiff operating company would be compensated for a loss which never in fact occurred, but would no doubt be exposed to other business losses. Thus the award, as is so often the case, falls short of perfect compensation; its adequacy depends essentially on the willingness of the governments to discharge their responsibility in the matter by providing an alternative disposal site at reasonable cost as a final resting place for the radioactive material which, as is now conceded, ought never to have been there. [p. 363].

7.

The damages suffered at the 116th Avenue property are of a different nature; they result from the transfer of some 280 drums containing slag material there from the Anvil Way property for storage purposes prior to discovery of its radioactivity, a move which is alleged to have rendered part of the property temporarily unusable and to have reduced the value of the remainder of the land when sold in 1979.

At the meeting of 6th December 1974, Mr. Smerchanski indicated he wished to remove the barrelled material from the Anvil Way property at some future date and there was subsequent agreement, before completion of the sale, at which a deadline of 15th August 1975 was set for its removal. Mr. Faessler agreed to keep the barrels until that date without charge. During June, however, he decided he would have to move the barrels so that the property could be paved, and Mr. Smerchanski's office agreed to them being removed to the 116th Avenue property which Mr. Faessler controlled. The move took place during July and the moving bill sent to the defendant company during August was eventually paid by it. In late August, Mr. Faessler was in touch with Mr. Smerchanski's office again to point out that the free storage period was over. He was then advised to dump the material and sell the drums. Mr. Faessler found the stuff would not come out and the drums were too rusted to be saleable; he told the defendants he would have to charge rent if they were not removed. Later he sent bills for storage of the drums but none of these bills appears to ever have been paid.

When the Atomic Energy Control Board representatives arrived in December 1976, they checked the Anvil Way and 116th Avenue sites and found radioactivity at both which was above that found in the surrounding area. They told Mr. Faessler to put the barrels and loose rock together on part of the 116th Avenue property, rope it off, and erect radioactivity warning signs. Later he was told by the board to put a fence around the barrels. There were no offers from the defendants to pay any of these costs. In March 1979, Mr. Faessler moved the barrels to another corner of the property in accordance with an agreement he had made with a company willing to purchase the property. He put the drums into large steel containers piled two high on a pad of gravel and hog fuel which he had prepared, and set up a fence around the area, all in accordance with Atomic Energy Control Board directions. The board paid for some of the materials used but did not pay for the steel boxes, nor for the labour and equipment employed. The defendants contributed nothing.

In order to make a sale possible, the board gave its assurance that it would remove the barrelled material from the site. This did not, of course, prove to be possible, but the board has indicated that, one way or, another, it hopes to move the material before the end of 1980. The appraisal evidence is that as a consequence of the presence of this material the property sold for 19 per cent, or $37,500, less than the price it would have commanded had it not been contaminated. From this evidence it is argued that there will be continuing loss of value resulting from the previous radioactive contamination if and when the slag is removed. I find it more probable that the diminution in value is due to continuing uncertainty that governments will in fact permit removal of the material. The claim for diminution in value is made by Mr. Faessler personally, as equitable owner of the property; in addition he claims the cost of relocating the barrels on the land, which is stated at $2,200, and the plaintiff Comor Supplies Ltd. claims $8,864 for storage of the barrels from August 1975 to January 1979.

Mr. Faessler's claim for diminution in value is, I think, the proper measure of loss in respect of this aspect of the damages flowing from the fraudulent misrepresentation. Since the defendants authorized removal of the drums to the 116th Avenue property, remaining silent about the character of the content, the consequences in loss of value of that land are not too remote. The damages ought, perhaps, to be assessed

as at the date of the move, in 1976, and to bear prejudgment interest from that date, and I would permit further evidence to be adduced for that purpose if either party desires. Failing any application to adduce further evidence, I would assess Mr. Faessler's damages at the appraised figure of $37,500 for loss of value plus $2,000 for labour, equipment and materials employed in relocating the barrels, that is to say $39,500 in all, upon $2,000 on which there will be prejudgment interest at the appropriate rates prevailing for each period since 31st March 1979, as set by the registrar.

The claim of the plaintiff Comor Supplies Ltd. for storage of the barrelled material gives rise to considerable difficulty. The position of the defence is that the $8,864 claimed is unconscionable. At $100 per month for the 3½ years the claim would come to $4,200 plus prejudgment interest at the appropriate rate for each applicable period on each monthly payment 30 days after billing date. Subject to further submissions. I would make that award [pp. 364-65].

[71] The learned trial judge fixed the damages in respect of the Anvil Way property in the sum of $400,000, made up as follows:

(a) estimated removal or "clean-up" costs — $315,000; and

(b) compensation for the contingency that "clean-up" may be impossible because of continued governmental opposition or inaction.

[72] The submission of the appellants in respect of this issue is set out in the factum of Smerchanski as follows:

1. IN THE ALTERNATIVE, THE LEARNED TRIAL JUDGE ERRED IN THE PRINCIPLES TO BE APPLIED IN ASSESSING DAMAGES FOR FRAUDULENT MISREPRESENTATION.

2. The learned trial judge erred in both damage assessments in holding that these damages flowed from the representation made by Mr. Smerchanski. The fact is that any diminution in value of these properties was caused by the change in attitude towards disposal of radioactive waste, a change which, according to the trial judge, "could not have been expected at the time of the sale to the Plaintiffs".

3. Such damages were not causally related to any representation by Mr. Smerchanski.

4. In arriving at his assessment of damages, the learned trial judge attempted to put the Plaintiffs in the position they would have been in if the representation had been true. In so doing, he erred in principle. In cases of fraudulent misrepresentation, the correct measure is to put the Plaintiff in the position he would have been in if the representation had not been made to him, and not, as with breach of condition or warranty in contract, into the position he would have been in if the representation had been true.

See McGregor on Damages, 14th ed. (1980), para. 1459.

5. The well-established rule in cases of representations inducing the sale of property is to award damages in the amount of the price paid for the property less the actual value as of the date of acquisition.

See Sorenson v. Kaye Holdings Ltd. [supra].

6. The learned trial judge erred in law in not applying this principle in assessing damages in so far as the Anvil Way property is concerned.

> 7. The learned trial judge erred in assessing damages on the basis of the diminution in value as of the date of the sale of this property and not as of the date the representation was made, in this case, the date Mr. Smerchanski represented the material could be moved from Anvil Way to 116th Avenue. The presence of the material in containers at 116th Avenue being temporary gave rise to no damage except possibly such costs as storing and fencing.
>
> 8. The learned trial judge erred in taking into account removal of all of the landfill when such was not necessary. In his approach to damages, he endeavoured to give complete or perfect compensation. This was an error.
>
> *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 230, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 8 A.R. 182, 19 N.R. 50.
>
> 9. Apart from the lack of a causative link between the representation, the damage alleged was too remote. Public reaction to the landfill when it posed no significant hazard was not a foreseeable or direct consequence of any representation made by Mr. Smerchanski.

[73] The rule enunciated in *Sorenson*, supra, that damages for fraud are to be measured by deducting from the price paid the actual value of the land at the date of the sale is inapplicable to the facts of the case on appeal insofar as consequential damages are concerned. To endeavour to apply that rule here would be to overlook the fact that the fraudulent representations of merchandise induced C.R.F. to bury the thorium waste on its land and to construct the improvements detailed by the learned trial judge. It was not until after this work had been done that the fraud was discovered. The representations made by Smerchanski induced C.R.F, to worsen its position. To apply the *Sorenson* rule would be to disregard the facts, and would result in a clearly inadequate award. It should also be noted that, if the *Sorenson* rule was applied here, the damages recoverable for fraud would be considerably less than if the claim were based on negligent misstatement, and there would be no award for consequential damages. Such an anomalous situation cannot be permitted to exist.

[74] How are the consequential damages in the case on appeal to be assessed? In my view, where by reason of the fraud of the defendants the plaintiff has made substantial improvements to his property prior to the discovery of the fraud, the most practical approach is to adopt the reasoning of Lord Denning M.R. in *Doyle*, supra, at p. 122 as follows:

> I think that Sir Richard Henn Collins, M.R., did express himself in too rigid terms. He seems to have overlooked consequential damages. On principle the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: "I would not have entered into this bargain at all but for

> your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages." All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

[75] In the *Doyle* case, the court also recognized that the plaintiff's position before the fraudulent inducement should be compared with his position at the end of the transaction (in the case on appeal, the plaintiff's position at the time the fraud was discovered). In this respect, reference may be made to the judgment of Sachs L.J. in the *Doyle* case at p. 126 as follows:

> In cases such as the present the wrong done is tricking a plaintiff into a contract, and the plaintiff is entitled by way of damages to whatever sum he has lost by being thus tricked. The question as to what a purchaser has lost must naturally depend on the subject-matter of the contract. If the contract is simply one such as the purchase of shares, normally the maximum loss will be the money out of which the purchaser has been tricked, a sum which, however, may well include brokerage or stamp duty: the value of benefits received will be taken into account. If the purchase is one of a business which the plaintiff but for the fraud would not have acquired at all, the objective of the court is to put the plaintiff, so far as it is possible, into the same position financially as if he had not entered into the contract at all; in other words, one must look at the end result of his having entered into the transaction and find out what was his loss over all. In this behalf, I entirely agree with what has fallen from my Lords. The acquiring of a business normally entails the expenses of moving into fresh premises, keeping the business going, and at any rate continuing to keep it going until such time as it can be disposed of; and then one looks also at the expenses of selling. The computation of the loss may in many cases not be easy. Thus, the court must obviously take care not to include sums for consequences which may be due to the plaintiff's own unreasonable actions, and also not to include results which are too remote — matters which often involve difficult questions of fact and degree. But such difficulties do not alter the duty of the court, which should approach the matter on a broad basis.

[76] In *Dodd Properties Ltd. v. Canterbury*, [1980] 1 W.L.R. 433, [1980] 1 All E.R, 928 (C.A.), Megaw L.J. pointed out that the general rule that damages are to be assessed as of the date of the breach is subject to many exceptions and qualifications. His judgment reads, in part, at pp. 933-34, as follows:

> The general principle, referred to in many authorities, has recently been recognized by Lord Wilberforce in *Miliangos v. George Frank (Textiles) Ltd*., [1976] A.C. 443 at 468, [1975] 3 All E.R. 801 (C.A.), namely, that "… as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach".
>
> But in the very passage in which this "general rule" is there stated, it is stressed that it is not a universal rule. That it is subject to many exceptions and qualifications is

> clear. Cantley J. in the present case rightly recognized that that was so, in the passage from his judgment which I have recently read.
>
> Indeed, where, as in the present case, there is serious structural damage to a building, it would be patently absurd, and contrary to the general principle on which damages fall to be assessed, that a plaintiff, in a time of rising prices, should be limited to recovery on the basis of the prices of repair at the time of the wrongdoing, on the facts here being two years, at least, before the time when, acting with all reasonable speed, he could first have been able to put the repairs in hand. Once this is accepted, as it must be, little of practical reality remains in postulating that, in a tort such as this, the "general rule" is applicable. The damages are not required by English law to be assessed as at the date of breach.
>
> The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages. That rule conforms with the broad and fundamental principle as to damages, as stated in Lord Blackburn's speech in *Livingstone v. Rawyards Coal Co*. (1880), 5 App. Cas. 25 at 39 (H.L.), where he said that the measure of damages is —
>
> "… that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[77] Unfortunately, in my opinion, while the learned trial judge correctly stated the law as to how damages should be ascertained, he did not apply that law to the facts of the case on appeal.

[78] The learned trial judge did not apply the *Sorenson* rule to the loss which occurred at the time of the sale, as he should have done.

[79] He did not, moreover, attempt to ascertain the consequential damages caused by the fact that C.R.F. was induced to construct the improvements on the Anvil Way property in the belief that the property was uncontaminated. In his reasons for judgment he did endeavour to utilize the principles enunciated in *Sorenson* in dealing with the loss to C.R.F. by deducting from the combined cost of the land and improvements the presumed market value of the lands and improvements as of 1976, thus fixing the damages at the sum of $425,000. To be more precise I quote from his reasons for judgment as follows [p. 360]:

> Had the clean-up been done in January 1977, when the contamination was discovered, it would have cost less to do the job, but the value of the land in an uncontaminated state would, I think, have been lower by a greater proportion. This evidence suggests a residual value of the property immediately after discovery of the fraud, with means of disposal, would have been in the neighbourhood of $450,000.
>
> But the uncontradicted appraisal evidence is that lack of an assurance of some alternative disposal site greatly reduces the actual market value below this residual value derived by deducting clean-up from the uncontaminated value. Without such an assurance the land is said today to be worth less than $200,000, and presumably would have been worth no more than $150,000 at time of discovery of the fraud. Much turns on whether in fact the province will permit disposal of the radioactive

> material at any other site. If the material is *not* in fact hazardous, governments could hardly object to it being put somewhere else. If the material is hazardous, governments could hardly refuse to permit it to be taken away from the centre of population to a site properly engineered for radioactive waste disposal, rather than left in an unprepared site located within the metropolitan area. One would prefer to assume, in assessing damages, that governments would act reasonably in the matter, and that governmental permission to put the material elsewhere will soon be forthcoming. But appraisal evidence suggests that this is not the view of the market. The appraised value today in contaminated condition, without assurance of an alternative disposal site, is less than half what the evidence indicates the value would be on the assumption that such a site had been provided. In matters of value the court must, of course, be concerned with the view which the market is thought to hold.
>
> The cost of the property to the plaintiff C.R.F. Holdings Ltd. at date of discovery of the fraud consisted of the $260,000 purchase price paid to the corporate defendant, $248,000 spent on the warehouse addition, $65,700 spent on paving and $4,700 spent on fencing, for a total of $578,000. If the damages were computed by deducting value at that date, say $150,000, from cost to that date, the damages of the plaintiff C.R.F. Holdings Ltd. in respect of this property would thus amount to approximately $425,000. To this would be added prejudgment interest at least for the period from discovery of the fraud to date of judgment.

[80] Having reached this conclusion, he immediately discarded this approach, and thereby failed to ascertain the loss incurred in 1974. In addition, he failed to make any estimate of the consequential losses resulting from the construction of the improvements in 1975. Instead, he proceeded to assess the damages in the amount of $400,000 by awarding the amount required to remove the thorium waste ($315,000) together with the sum of $85,000 to cover residual damages and by allowing for the contingency that government permission to move the waste might be delayed.

[81] In so doing, he made the following statement [p. 362]:

> While the court must, I think, assess damages with a view to making the plaintiffs whole in the sense of being in the *financial* position they would have been in had the land been free from contamination at the end of 1976, when they discovered the fraud, that can in this case be done only by awarding the cost of placing the land in the *physical* condition which it ought to have been in had the representation been true. (The italics are Taylor J.'s.)

[82] The courts have consistently held that it is not proper to ascertain damages by awarding the amount required to place the land in the physical condition which it ought to have been in had the representation been true.

[83] The proper method of ascertaining damages was, in my opinion, as follows:

Loss in 1974 — Cost of land	$260,000
Market value	150,000
	110,000
Consequential losses	
Cost of land and improvements	$578,400
(assuming that the value of the	

land as improved uncontaminated would increase by at least the cost of the improvements)		
Market value of land as of date of completion of improvements in 1975	X	
Consequential loss		X

The sum of $110,000 would bear prejudgment interest from December 1974. The amount ascertained for consequential losses would bear prejudgment interest from the date of completion in 1975.

[84] As the damage award could not exceed the amount required to decontaminate the property (together with residual damages, etc.) if the amount of the 1974 loss and the consequential losses exceeded the removal costs, the removal costs would constitute the award of damages, in this case, $400,000.

[85] The reason why the award for damages cannot exceed the removal costs (together with residual damages, etc.) is that the plaintiff is required to mitigate his damages.

[86] The difficulty with applying the above formula to the facts in the case on appeal is that the only valuation to the property is the appraisal of the property made in 1980 by one A. R. Nesbitt. A summary of his appraisal is contained in a letter which he wrote on 5th February 1980, reading, in part, as follows:

> Thus, I have concluded that, without the availability of an alternative permanent radio-active [sic] disposal site at this time, there would be a very small probability and possibility of locating a potential purchaser who would accept title to the site, without some guarantee of decontamination and that if such a purchaser were found, he would, in all probability, be willing to pay only something less than *$200,000* for the property in its present condition.

[87] We do not have valuations for the years 1974, 1975 or 1976.

[88] The usual course in cases of this kind where the trial judge has utilized a wrong formula in ascertaining damages is to remit the case to the trial judge so that he may hear further evidence and argument and re-assess the damages. I would pursue that course here, except for the following circumstances:

(a) The learned trial judge made a finding of fact that the land today is said to be worth less than $200,000 and presumably would not have been worth more than $150,000 at the time of discovery of the fraud. The presumption made by the learned trial judge was, no doubt, based on the sensible and common sense basis that, if the land, as improved, was worth $200,000 in 1980, it would be worth less in 1975. Thus the total damages could not in any case be less than $378,400.

(b) While no appraisals were made for the years 1974, 1975 and 1976, the findings of the learned trial judge were not attacked by counsel for C.R.F. or the appellants.

(c) Even if different appraisals were given for the years 1974, 1975 and 1976, it is highly unlikely that the losses computed in accordance with the formula suggested by me would be significantly different than the sum awarded by the learned trial judge.

(d) Even if the damages were reduced very substantially, the award would bear prejudgment interest, and thus C.R.F. would recover an amount in excess of that awarded by the learned trial judge.

(e) C.R.F. did not cross-appeal.

(f) Counsel for C.R.F. did not deal with consequential damages, except to assert that the approach taken by the learned trial judge was correct.

(g) Counsel for the appellants did not deal with consequential damages at all, except to argue that the only measure of damages was to apply the *Sorenson* rule as of December 1974.

[89] In the above circumstances, I would not take any step which would further protract this litigation and cause great expense to the parties and which might have the effect of giving C.R.F. a benefit which it did not seek, here or below. I would not, therefore, disturb the award made by the learned trial judge in respect of the Anvil Way property, or in any respect whatsoever.

[90] While I think the award of $4,200 in respect of storage costs to Comor Supplies Ltd. is too remote, as this part of the award was not attacked in argument, as I have already said, I would not disturb the award made by the learned trial judge in this regard.

[91] I must, of course, deal with the other issues raised by counsel for the respondents.

[92] On the issue of damages, the appellants again raise the issue of foreseeability. I held in dealing with this matter on the issue of liability that there was no doubt that the respondents had suffered some injury which was clearly foreseeable. The appellants submit, however, that after 1974 events occurred which were not foreseeable, and that they should not be held responsible for the damages flowing from these unforeseen events. They contend that several of the factors contributing substantially to the damages claimed were not, as found by the learned trial judge, foreseeable at the time of the sale in 1974. These unforeseen factors were:

(a) the increased concern of the Atomic Energy Control Board over the long term effects of low-level radiation, including the prospect that the board might require that the thorium waste be removed and transported to a waste disposal site; and

(b) the public outcry which arose after the 1976 investigations made by the board, which investigations were the subject of extensive comment by the media.

[93] Before dealing with the legal aspects of this matter, the issue of foreseeability should be considered in relation to the findings of fact made by the learned trial judge. I repeat what the trial judge said on this issue as follows [pp. 367-68]:

> The increased vigour with which the Atomic Energy Control Act has been enforced following discovery in 1976 of new hazards associated with low-grade radiation could not, of course, have been expected at the time of the sale to the plaintiffs. Much was then, and still remains, unknown about radiation; hence no doubt, the Atomic Energy Control Board's broad regulatory authority oyer radioactive material, Mr. Smerchanski and his company were well aware, however, of the political implications of radioactive waste for a person in possession of such material in the event of discovery of new hazards, or a change in public attitudes towards those hitherto known. The manner in which the problem of the Surrey wastes has been dealt with by government agencies, influenced in part by the desire to achieve political, rather than practical, objectives, could well have been foreseen by Mr. Smerchanski and his company, and the loss which has been suffered by the plaintiffs as a consequence is plainly a proximate result of his deception.

[94] It is implicit in the finding of fraud that the appellants deliberately undertook the risk that their fraudulent conduct might be discovered. They undertook the risk that damages would result to the respondents as a result of the fraud. The arguments put forward by the appellants are similar to the arguments which used to be made in the "thin-skull" cases. Such arguments have long been rejected in our courts. See the article by Professor A. M. Linden, "Foreseeability in Negligence Law" (1973), L. Soc. of Upper Can. Special Lectures, 55 at 69:

> The recurring situation that is the most settled and therefore the easiest to handle is the thin-skull problem. Since the turn of the century, it has been crystal-clear that a negligent defendant must take his victim as he finds him. The thin-skull rule, as this principle is often identified, was first enunciated before *Polemis [Re Polemis and Furness, Withy & Co*., [1921] 3 K.B. 560 (C.A.)] was decided by Lord Justice Kennedy in *Dulieu v. White & Sons*, [1901] 2 K.B. 669 at 679 (D.C.), in these words:
>
> "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damage that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."
>
> Some years after the *Polemis* decision, this principle was repeated by Lord Just MacKinnon in *Owens v. Liverpool*, [1939] 1 K.B. 394 at 400, [1938] 4 All E.R. 727 (C.A.), as follows:
>
> "One who is guilty of negligence to another must put up with idiosyncracies of his victim that increase the likelihood or extent of damage to him — it is no answer to a claim for a fractured skull that its owner had an unusually fragile one."
>
> His lordship did not feel it necessary to cite the *Polemis* case, which had been decided in the interim, nor did he give any reasons for the decision. He merely asserted that, if the defendant's negligence "in fact caused" the damage, he should have to pay.

[95] The risk of harm was assumed by the appellants. That harm was more extensive than they could foresee. That is no reason to relieve them from liability. The type of injury here was reasonably foreseeable, given the premise that the thorium waste was a dangerous, regulated material.

[96] In *Vacwell Enrg. v. B.D.H. Chemicals*, [1971] 1 Q.B. 88, [1969] 3 All E.R. 1681, varied [1971] 1 Q.B. 111, [1970] 3 All E.R. 553n (C.A.) (a negligence case), Rees J. said at pp. 1698-99:

The duty which Vacwell allege rested upon B.D.H. was to take reasonable care to ascertain major industrial hazards of chemicals marketed by them and to give warning of such hazards to their customers. It was not argued before me that there was an absolute duty upon B.D.H. to give warning of industrial hazards of dangerous chemicals, whether they could have discovered them by the exercise of reasonable care or not. I find that the duty to take reasonable care as stated above is the duty which rested upon B.D.H. in the circumstances of this case. I have already reviewed the evidence in relation to this aspect of the matter and I need not repeat it. I am satisfied that B.D.H. failed to comply with their duty in two respects: first, they failed to provide and maintain a system for carrying out an adequate research into scientific literature to ascertain known hazards; secondly, by Mr. Hill and Dr. Muir, they failed to carry out an adequate research into the scientific literature available to them in order to discover the industrial hazards of a new, or little-known, chemical, If that duty had been complied with, I have no doubt that the explosion hazard noted by GAUTIER and others would have come to light and a suitable warning been given, which would have prevented Vacwell dealing with the ampoules of boron tribromide as they did. The greater part of the observations I have made earlier in this judgment in relation to causation and remoteness of damage apply in the present context also. But in tort, foreseeability of damage is the paramount test. It will be sufficient if I refer briefly to the judgment of Lord Parker C.J. in *Smith v. Leech Brain & Co. Ltd*., [1962] 2 Q.B. 405, [1961] 3 All E.R. 1159. In that case a workman received a burn from molten metal in foreseeable circumstances, for which the employer was responsible in law. The burn caused cancer, from which the plaintiff died, which was not a reasonably foreseeable consequence of the burn. His widow brought a claim for damages, Lord Parker C.J. … said, at p. 415:

"The Judicial Committee were, I think, disagreeing with the decision in *Re Polemis* [supra] that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated. That view is really supported by the way in which cases of this sort have been dealt with in Scotland. Scotland has never, so far as I know, adopted the principle laid down in *Re Polemis*, and yet I am quite satisfied that they have throughout proceeded on the basis that the tortfeasor takes the victim as he finds him. In those circumstances, it seems to me that this is plainly a case which comes within the old principle. The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim."

Here it was a foreseeable consequence of the supply of boron tribromide without a warning — and a fortiori with an irrelevant warning about harmful vapour — that in the ordinary course of industrial use it could come into contact with water and cause a violent reaction and possibly an explosion. It would also be foreseeable that some damage to property would or might result. In my judgment the explosion and the type of damage being foreseeable, it matters not in the law that the magnitude of the former and the extent of the latter were not.

[97] As long as a chain of causation can be traced from the tort to the damage and that damage is "foreseeable as possible" damages are recoverable: see the judgment of Dickson J.A. (as he then was) in *Assinaboine South S.D. v. Greater Winnipeg Gas Co*.,

1971 CanLII 959 (MB CA), [1971] 4 W.W.R. 746 at 751, 21 D.L.R. (3d) 608, affirmed 1973 CanLII 1313 (SCC), [1973] 6 W.W.R. 765 (sub nom. *Hoffer v. Assiniboine South S.D.*), 40 D.L.R. (3d) 480n, 1 N.R. 32 (S.C.C.), as follows:

> The force of *The Wagon Mound (No. 1) [Overseas Tankship U.K. Ltd. v. Morts Dock and Enrg. Co*., [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.)] was somewhat dissipated by *Hughes v. Lord Advocate*, [1963] A.C. 837, [1963] 1 All E.R. 705 (P.C.) (per Lord Jenkins at p. 710:
>
> "It is true that the duty of care expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against."
>
> One need not envisage "the precise concatenation of circumstances which led up to the accident", p 712 [per Lord Morris of Borth-y-Gest quoting from *Harvey v. Singer Mfg. Co. Ltd*., [1960] S.C. 155 at 172].
>
> In *Overseas Tankship (U.K.) Ltd. v. Miller SS. Co. Proprietary Ltd. (The Wagon Mound* (No. 2)), [1967] 1 A.C. 617, [1966] 2 All E.R. 709, the Privy Council, on different findings of fact, reached a conclusion different from that in *The Wagon Mound* (No. 1). Lord Reid said at p. 717:
>
> "The vital parts of the findings of fact which have already been set out in full are (i) that the officers of the Wagon Mound 'would regard furnace oil as very difficult to ignite on water' — not that they would regard this as impossible; (ii) that their experience would probably have been 'that this had very rarely happened' — not that they would never have heard of a case where it had happened; and (iii) that they would have regarded it as a 'possibility, but one which could become an actuality only in very exceptional circumstances' — not, as in *The Wagon Mound* (No. 1), that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water."
>
> These words would suggest that recovery may be had, provided the event giving rise to the damage is not regarded as "impossible", and even though it "very rarely happened", "only in very exceptional circumstances". The test of foreseeability of damage becomes a question of what is possible rather than what is probable.

[98] The rules as to remoteness are more favourable to the plaintiff in actions of deceit than they are in actions for breach of contract; see Treitel, Law of Contracts, 4th ed. (1975), p. 236.

[99] I refer again to the statement of Lord Denning M.R. in *Doyle*, supra, at p. 122, where he said: "… it does not lie in the mouth of the fraudulent person to say that the damages could not be reasonably foreseen."

[100] In *Hoffer*, supra, it was "foreseeable as possible" that a negligently operated snowmobile might escape control, crash into a school and' knock off a negligently constructed gas main, leading to an explosion which destroyed the school.

[101] In *Smith v. Leech Brain*, supra, some molten metal spattered on to a worker's lip, leading to development of cancer, and death. This type of injury and damage was held to be reasonably foreseeable.

[102] In *Vacwell*, supra, it was foreseeable that a minor explosion would result and lead to some damage, and the defendants were held liable for all damages from the large explosion which actually occurred.

[103] All of the above situations seem much more unlikely to occur and much more difficult to foresee than the matters referred to by the appellants in the case on appeal.

[104] Counsel for the appellants also argues that the public outcry and the increased concern of the Atomic Energy Control Board constitute a novus actus interveniens. This argument is without merit. The harm inflicted by the appellants was the same throughout, and the suggested "intervening forces" were merely a recognition of existing damage.

[105] In conclusion, I point out that the time of sale (1974) is not an appropriate date for testing foreseeability in this case. While the major fraudulent misrepresentations were made in 1974, the fraud was a continuing one. Further wrongs were committed later by permitting the drummed materials to be stored at the 116th Avenue property and abandoning this material to the respondents.

[106] The final submission of counsel for the appellants on the subject of damages was that the learned trial judge erred in refusing to include in his order a provision for relief or reimbursement in the event of a contribution to the cost of "clean-up" by government agencies.

[107] I agree with the determination made by the learned trial judge in respect of this contention, as follows:

> After reflection I have concluded that it would be inconsistent with the finality which the law requires of judgments that any provision be made in the present judgment for relief or reimbursement of the defendants in the event that a government contribution should be made towards the solution of the problem.

[108] I would also point out that ex gratia payments made prior to judgment by a government to a plaintiff are not taken into account in the calculation of awards for damages: see the judgment of Denning J. (as he then was) in *Dennis v. London Passenger Tpt. Bd*., [1948] 1 All E.R. 779 at 779 (K.B.), as follows:

> The cardinal point to remember is that it is the defendants who are responsible for what has occurred. In my opinion, a wrongdoer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages, like the London County Council and the Ministry of Pensions in this case. The plaintiff has lost his wages. In point of law, therefore, *prima facie* he should have them paid by the wrongdoer.

[109] It would seem to follow that ex gratia payments made after judgment should not be considered by the court.

[110] I would think it extremely unlikely that any government agency would make any payment to the respondents in respect of "clean-up" costs when, as in this case, the respondents have already received compensation from the appellants. It is more likely that any compensation paid by a government agency would go to the appellants. If the

respondents were compensated by a government agency in respect of "clean-up" costs, it might well be that the appellants would have a claim against the respondents for "unjust enrichment". Whether such a claim would succeed is not for us to decide.

[111] For the above reasons, I would dismiss the appeals.

Appeal from liability dismissed; appeal from assessment of damages allowed; case remitted to trial judge for reassessment of damages.

TAB 11

1951 CanLII 121 (ON CA)

Canada Permanent Mortgage Corporation v. The City of Toronto

[1951] O.R. 726-735

ONTARIO
[COURT OF APPEAL]
ROBERTSON C.J.O. and HOPE and BOWLBY JJ.A.
4th OCTOBER 1951.

Pleadings -- Amendment -- General Rule as to Permitting Amendments -- Exceptions to General Rule -- Withdrawal of Admission -- Prejudice -- Rules 183, 184.

An admission made in pleadings or otherwise for the purpose of trial is a judicial admission, and the vital feature of a judicial admission is its conclusiveness upon the party making it. Although an admission may, in some circumstances and upon proper terms, be withdrawn by leave of the Court, this should never be permitted unless it is proved by satisfactory evidence that the fact admitted was not true. The withdrawal of an admission of fact in a pleading is not something for which the other side can be compensated in costs, and is therefore not within the general rule stated in Williams v. Leonard et al. (1895), 16 P.R. 544 at 549. Delap v. Canadian Pacific R.W. Co. (1915), 8 O.W.N. 293; Wright v. Way (1880), 8 P.R. 326; Gesman v. The City of Regina et al. (1907), 1 Sask. L.R. 39; Wampler v. British Empire Underwriters Agency (1920), 48 O.L.R. 428, quoted and applied.

Judgment of Kelly J., [1951] O.W.N. 574, reversed.

AN APPEAL, by leave of Spence J., from the order of Kelly J. allowing an appeal from an order of Conant, Senior Master. The

reasons of Kelly J. and Spence J. are set out in [1951] O.W.N. 574.

19th September 1951. The appeal was heard by ROBERTSON C.J.O. and HOPE and BOWLBY JJ.A.

R.N. Starr, K.C., for the plaintiff, appellant: Not only was the writing of the letter admitted in the statement of defence, but it was again set out in the defendant's affidavit on production. We obtained leave to amend our statement of claim to plead laches, estoppel, ratification and other equitable principles after we had obtained partial production from the City. The order permitted amendment of the statement of defence, but my submission is that the purpose of this leave was merely to enable the defendant to reply as might be necessary to our amendments. The amended statement of defence not only did this, but went further and withdrew the prior admission that the letter had been written.

I can find no Ontario case as to how a party should plead to an amended pleading of his opponent, but it seems obvious that he should go no further than is necessary to reply to the amendment.

The affidavit filed by the defendant does not say that the letter was not written, and that the original admission was not true. Our position is prejudiced by the withdrawal of the admission, because without it we shall have to prove the letter at the trial, which may be a matter of some difficulty.

[BOWLBY J.A.: What right has the Court to interfere with the Master's discretion?] I submit there is none, and I so argued before Kelly J., but he did not give effect to my submission. [BOWLBY J.A.: The City, by its counter-motion, invoked the discretion, and it is difficult to see how it can now complain of the way in which that discretion was exercised.]

The general principle is that an admission, once made, cannot be withdrawn unless it is proved by satisfactory evidence that

1951 CanLII 121 (ON CA)

the fact admitted was not true. This is both good law and good sense, and if the rule did not exist there would be little finality to pleadings. The rule is so well established that Wigmore on Evidence, 3rd ed. 1940, s. 2590 (vol. 9), states that admissions of fact are judicial admissions. I rely also on Greenwood v. Atkinson (1830), 4 Sim. 54, 58 E.R. 22; Livesey v. Wilson (1812), 1 Ves. & B. 149, 35 E.R. 58; Wright v. Way (1880), 8 P.R. 326; Chechik v. Bronfman et al., 18 Sask. L.R. 512 at 519, [1924] 2 W.W.R. 1165, [1924] 3 D.L.R. 1065; Guinn v. Cully et al., [1941] O.W.N. 189. There is nothing here to prove that these admissions were not correct; on the contrary, there is actual evidence that they were true.

The whole defence is a technical one; substantially the defendant says, as to each of our allegations of fact, that what was done was done without authority. There is in general no objection to a technical defence, but in the circumstances of this case the defence, in view of the City's conduct over 40 years, is intellectually dishonest.

The power of amendment under Rule 183 is not to be exercised to enable a defendant to put technical difficulties in the plaintiff's way, when they do not go to the merits of the action, or to assist a litigant to obtain a dishonest advantage: Wampler v. British Empire Underwriters Agency (1920), 48 O.L.R. 428, 57 D.L.R. 88; Witherspoon v. Township of East Williams (1918), 44 O.L.R. 584, 47 D.L.R. 370.

The disadvantage to us cannot be compensated in costs. If worst comes to worst it may be necessary for us to call the city treasurer, and he would be a hostile witness. We have also lost a year's time that might have been given to a further attempt to find the letter.

J. Johnston, for the defendant, respondent: I admit that this letter is important. If it was written it should not have been. It was nine years before the decision in John Mackay and Company v. The City of Toronto, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253, which finally decided that municipalities could act only by by-law, and lawyers were then

1951 CanLII 121 (ON CA)

not so sure as to the powers of municipalities. The only by-law in this connection was that providing for the original debentures, which specified that they were to be payable in sterling. When the affidavit on production was made the question of this letter had not come to the fore; doubt arose later as to whether it was written or, if written, delivered.

The affidavit on production was drafted in a solicitor's office, and the deponent might easily overlook this item. Mr. Lascelles could hardly know what was sent 40 years before, and no one else in his department would have knowledge of this matter. He probably simply accepted the affidavit as drawn by the solicitor. It was not until the plaintiff's examination for discovery that we discovered that the original letter was not available. The plaintiff may be able to prove this letter at the trial, but it should not escape the necessity for proving its case merely because of a slip on our part.

Before the Master the plaintiff based its argument on a firm rule that an admission, once made, cannot be withdrawn unless there is evidence that the admission was not in accordance with the facts. It is impossible to prove that in this case. This being the case, however, it follows that the Master's order was not made in the exercise of any discretion, but was made because there was no evidence to show that the admission was not true.

The order of Kelly J. was based on the proposition that the Court has a discretion to amend pleadings so that the trial of an action will not be governed by a solicitor's slip. There is no reason why this order should be interfered with. There is no injustice in the solicitor attempting to rectify his mistake or to rely on a weak point in his opponent's case, and put his case in proper shape, so that it can be tried on the proper facts. [BOWLBY J.A.: You originally admitted the letter but said that the person who wrote it had no authority to do so. You have copy on file. Is the admission not therefore in accordance with the obvious facts?] The copy may have been merely a draft. We want this feature of the case passed on by the trial judge, and do not want to be governed by the

1951 CanLII 121 (ON CA)

solicitor's hastily-made admissions. I rely on Roe v. Davies (1876), 2 Ch. D. 729 at 733.

Pleadings are often amended in the course of an action to fit the evidence; pleadings are only the frame of the action. If an admission like this could not be withdrawn except on positive proof of its incorrectness, no admission would ever be made. Such a ridiculous result should be avoided by the practice: Smith v. Smith (1884), 5 O.R. 690; Northern Sulphite v. Occidental Syndicate (1911), 2 O.W.N. 1015, 19 O.W.R. 69; McQuade & Clark v. Moncrieff et al., [1929] 1 D.L.R. 984; Peterkin v. MacFarlane et al. (1878), 4 O.A.R. 25 at 46; Tildesley v. Harper (1878), 10 Ch. D. 393; Steward v. North Metropolitan Tramways Company (1886), 16 Q.B.D. 556; Weldon v. Neal (1887), 19 Q.B.D. 394; McLeod v. Crawford (1905), 6 O.W.R. 797 at 799; Ormsby v. Township of Mulmur (1916), 36 O.L.R. 566, 31 D.L.R. 76.

The order of the Master re-opened the pleadings and we took it that we could plead at large because the statement of claim was so completely changed. Our defence is not technical but the reverse, and goes to the substance of the whole action.

R.N. Starr, K.C., in reply: I refer to the following authorities as to pleading to an amendment: Bowes v. Chaleyer (1921), 32 C.L.R. 159; Hawthorne v. Siegel (1891), 88 Cal. 159, 22 Am. St. Rep. 291 at 296. Greenwood v. Atkinson (1830), 4 Sim. 54 at 634, 58 E.R. 22, is, I submit, still the law to-day. Rex et al. v. Meilicke et al., [1937] 3 W.W.R. at 257, should not be followed, being based on a misinterpretation of the English Annual Practice.

Cur adv. vult.

4th October 1951. The judgment of the Court was delivered by

HOPE J.A.:-- This is an appeal by the plaintiff by virtue of leave of Spence J., dated 5th June 1951, pursuant to Rule 493

1951 CanLII 121 (ON CA)

from an order of Kelly J. dated 22nd May 1951, reversing an order of the Senior Master dated 9th April 1951, striking out paras. 4 and 6 of the amended statement of defence filed herein and restoring in place thereof paras. 4 and 6 appearing in the original statement of defence filed. The original statement of defence contained, as paras. 4 and 6, statements which were an admission by the defendant that a certain letter dated 18th November 1911 had been written by the then City Treasurer of the defendant corporation to Messrs. G.A. Stimson and Company. The paragraphs in question read as follows:

"4. The defendant further admits that R.T. Coady who was the treasurer of The Corporation of the City of Toronto at the time in question wrote a letter date November 18, 1911 to Messrs. G.A. Stimson and Company, stock brokers, Toronto, advising that the Corporation in order to suit the convenience of their client would make payment of principal and interest either at the Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto instead of at London, England, at the par of exchange (9 1/2%) in regard to the debentures referred to in paragraph 3 hereof and the letter purported to have the corporate seal attached. This letter was not the act of the defendant and the said Coady had no authority to alter the terms of the debentures or to affix the seal of the corporation to the said letter, his powers in the latter regard being limited to those set out in section 20 by By-law No. 4295 of the defendant corporation. Accordingly the said letter had no binding effect on the defendant. Furthermore the letter could not be considered as part of the debentures because it did not comply with section 334 of the Municipal Act, chapter 266, Revised Statutes of Ontario 1937 and antecedent statutes. The defendant says that its Deputy City Treasurer Henry Reburn did write a letter dated June 1, 1936 to Mr. E. Reburn of Canada Permanent Mortgage Corporation enclosing a copy of the letter from Coady to G.A. Stimson and Company referred to above but the said letter was not the act of the defendant and had no binding effect on the defendant."

"6. In the alternative if it should be found that the letter of Coady was binding on the defendant, it did not bind the defendant to pay the principal and interest on the debentures

1951 CanLII 121 (ON CA)

when they became due in United States Dollars at the par of exchange for the pound as the plaintiff claims."

Subsequent to the delivery and filing of the original statement of defence, the plaintiff moved to amend its statement of claim. Leave to do so was granted by the Senior Master on the 3rd January 1951. This order provided, inter alia, as follows:

"2. IT IS FURTHER ORDERED that the pleadings be and they are hereby re-opened and that the Plaintiff shall amend the Statement of Claim as aforesaid and serve an amended copy thereof upon the Defendant within 10 days from the date hereof, and the Defendant shall have 10 days from the date of service to file an amended Statement of Defence, and the Plaintiff shall have 10 days from the service of the said amended Statement of Defence, if any, to reply thereto."

The amended statement of claim, dated the 11th January 1951, was delivered and filed. The amendment effected thereby in no way related to the letter above mentioned. In the amended statement of defence, dated 30th January 1951, the defendant corporation amended paras. 4 and 6 of its original defence by withdrawing its admission that the letter referred to was written. The amended paragraphs read as follows:

"4. The defendant does not admit that its Treasurer wrote letters as set out in paragraph 5 of the said statement of claim and paragraph 9 of the amended statement of claim or that the seal of the Corporation was affixed. However if it should be proved that such letters were written and received by Stimson and Company such acts were not the acts of the defendant and the said treasurer had no authority to alter the terms of the debentures or to affix the seal of the Corporation to the said letter, his powers in the latter regard being limited to those set out in section 20 of By-law No. 4295 of the defendant corporation. Accordingly the said letters had no binding effect on the defendant. Furthermore the letters could not be considered as part of the debentures because they did not comply with section 333 of The Municipal Act, chapter 243, Revised Statutes of Ontario 1950 and antecedent statutes."

1951 CanLII 121 (ON CA)

"6. In the alternative if it should be found that the said Treasurer wrote the said letters and that such letters are binding on the defendant, it did not commit the defendant to pay the principal and interest on the debentures when they became due in United States Dollars at the par of exchange for the pound, as the plaintiff claims."

Then followed the motion to the Senior Master by notice dated 31st January 1951 to strike out, inter alia, these paragraphs from the amended statement of defence and to restore the paragraphs of corresponding numbers from the original pleading. The defendant, by notice dated 1st February 1951, launched a counter-motion asking the Master to exercise his discretion and allow the amended defence to stand in the place of the original defence. The order of the Senior Master dated 9th April 1951 makes no specific reference to the counter-motion and no separate order in respect thereof appears in the appeal book. The order was, however, granted as requested, striking out the paragraphs numbered 4 and 6 from the amended pleading and restoring the paragraphs of the same numbers from the original pleading. Thereupon, on an appeal heard by Kelly J., the last-named order of the Master was set aside.

The question on this appeal can be reduced to a very simple point, namely: May a litigant, having made an admission of fact in his pleading, be permitted to withdraw such admission from the record, and, if so, in what circumstances? The rule which still prevails was well stated by Street J. in Williams v. Leonard et al. (1895), 16 P.R. 544, affirmed 17 P.R. 73; 26 S.C.R. 406. Although somewhat lengthy, I quote as follows: Street J. who delivered the judgment of a Divisional Court composed of himself and Falconbridge J., said at p. 549:

"... a rule has been enunciated in England which has been expressly approved by the Court of Appeal there in Steward v. North Metropolitan Tramways Co., 16 Q.B.D. 556, which I think we are bound to follow, and which has the merit of placing the obligation to allow amendments upon a more solid basis than that afforded by a balancing of the respective merits of the parties in each case in which an application to amend is made.

1951 CanLII 121 (ON CA)

"The rule to which I refer is thus stated by Lord Esher, M.R.: 'The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made;' and Lord Justice Lindley says, at p. 559: 'I entirely agree with the terms in which the rule as to amendments has been laid down in the cases cited by the Master of the Rolls. I think an amendment ought always to be allowed, except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs.'

"I have not failed to observe the difference between the English Rule (309 of the year 1883), under which the cases to which I have referred were decided, and our own Rule 444. The former requires that 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' Our Rule is that 'all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case.' A reference, however, to the cases decided upon the English rule will shew that they have practically construed it as if it contained the language used in ours. Notwithstanding its imperative language, they have in many cases refused leave where they deemed the amendments not conducive to the advancement of justice, or of a technical character and therefore not best calculated to secure the giving of judgment according to the very right and justice of the case."

Admissions made in pleadings or otherwise for the purpose of trial are judicial admissions. The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i.e., the prohibition of any further

1951 CanLII 121 (ON CA)

dispute of the effect by him and by any use of evidence to dispute or contradict it.

An admission may, in certain circumstances and upon proper terms, be withdrawn on leave of the Court. Nevertheless it is well established that facts admitted cannot be withdrawn unless it is proved by satisfactory evidence that the fact so admitted was not true. Decisions both in our Courts and in other Provinces sustain this statement and it is cited by the respondent's counsel in his memorandum of fact and law in the words found in 25 Halsbury's Laws of England, 2nd ed. 1937, pp. 256 et seq., particularly in s. 425, which reads in part as follows:

"If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side. There is no injustice if the other side can be compensated by an order as to costs; but if, owing to the way in which the pleading has been framed, the other party has been put into such a position that an injury would be done to him by an amendment, the Court will not give leave."

In Delap v. Canadian Pacific R.W. Co. (1915), 8 O.W.N. 293, Middleton dealing with a motion to amend by withdrawing an admission said: "This amendment was sought as of right, without any evidence shewing why that which was once stated and admitted should now be withdrawn. It was not to be supposed that such a statement, deliberately made, could be without foundation; and the defendants were justified in asking that it should remain of record, so that they might have whatever advantage it might give them."

In Wright v. Way (1880), 8 P.R. 326, Blake V.C. said: "... I think the Court should not allow a defendant to vary his answer unless a mistake or misapprehension is clearly made out, and some reason assigned for this existing."

In Gesman v. The City of Regina et al. (1907), 1 Sask. L.R. 39, 7 W.L.R. 307, a single judge (Newlands J.) stated the rule thus: "Before an admission made on the pleadings can be

1951 CanLII 121 (ON CA)

withdrawn, there should be evidence produced that it was inadvertently made, and that the admission is not correct."

In Wampler v. British Empire Underwriters Agency (1920), 48 O.L.R. 428, 57 D.L.R. 88, Masten J.A. at pp. 433-4, delivering the judgment of the Court of Appeal, concurred in by Mulock C.J.O. and Magee and Riddell JJ.A., said: "Our Rule 183 is not quite the same as the English Rule; but, even under our Rule it has been held by my brother Riddell, in a judgment concurred in by my brother Sutherland -- Witherspoon v. Township of East Williams (1918), 44 O.L.R. 584, at p. 602, 47 D.L.R. 370, at p. 387 -- that 'Rule 183 does not compel us to amend proprio motu: amendments under that Rule are "to secure the advancement of justice," not to enable a litigant to obtain a dishonest advantage.' "

After considering these authorities and those others to which counsel referred, and in the light of the circumstances in this case, I am of the opinion that the appeal must be allowed. Counsel for the respondent made some effort to argue that the admission in the original statement of defence had been a slip of a solicitor in the rush of preparing the pleading, but it is quite clear that subsequent thereto a copy of the same letter was set out in the affidavit on production filed on behalf of the defendant. Moreover, counsel for the respondent produced no evidence or argument whatsoever that the admission contained in the original pleading was not, in fact, correct. I do not consider that this is a case where the amended pleadings should be allowed on the grounds that the appellant can be compensated in costs. The appeal is therefore allowed and the order of the Senior Master is restored. Costs both here and below to the appellant.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.

Solicitor for the defendant, respondent: W.G. Angus, Toronto.

1951 CanLII 121 (ON CA)

Tab 12

Canadian Broadcasting Corporation *Appellant*

v.

Her Majesty The Queen, Stanley Frank Ostrowski, B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Centre for Free Expression, Canadian Association of Journalists, News Media Canada, Communications Workers of America/Canada and Ad Idem/Canadian Media Lawyers Association *Interveners*

Société Radio-Canada *Appelante*

c.

Sa Majesté la Reine, Stanley Frank Ostrowski, B.B., conjointe de feu M.D., et J.D., en sa qualité d'exécuteur de la succession de feu M.D. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Centre for Free Expression, Association canadienne des journalistes, Médias d'Info Canada, Guilde canadienne des médias/Syndicat des communications d'Amérique/Canada et Ad Idem/Canadian Media Lawyers Association *Intervenants*

INDEXED AS: CANADIAN BROADCASTING CORP. *v.* MANITOBA

2021 SCC 33

File No.: 38992.

2021: March 17; 2021: September 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

RÉPERTORIÉ : SOCIÉTÉ RADIO-CANADA *c.* MANITOBA

2021 CSC 33

N° du greffe : 38992.

2021 : 17 mars; 2021 : 24 septembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Courts — Jurisdiction — Publication bans — Variation — Criminal proceedings — Court of Appeal ordering indefinite publication ban on affidavit filed in criminal proceedings before it — Motion brought by media representative after judgment on merits of proceedings rendered asking Court of Appeal to set aside publication ban — Court of Appeal declining to hear motion on basis that jurisdiction exhausted — Whether court retains jurisdiction

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Tribunaux — Compétence — Interdictions de publication — Modification — Procédures criminelles — Interdiction de publication d'une durée indéterminée prononcée par la cour d'appel à l'égard d'un affidavit déposé dans une instance criminelle se déroulant devant elle — Motion présentée par un représentant des médias après qu'un jugement eut été rendu sur le fond de l'instance pour demander à la cour d'appel d'annuler l'interdiction de

2021 SCC 33 (CanLII)

to reconsider publication ban orders and other such ancillary orders after merits of criminal proceedings decided.

publication — Refus de la Cour d'appel d'entendre la motion au motif qu'elle a épuisé sa compétence — Un tribunal demeure-t-il compétent pour réexaminer des ordonnances de non-publication et d'autres ordonnances accessoires de cette nature après qu'il a été statué sur le fond d'une instance criminelle?

An affidavit filed in a criminal matter before the Court of Appeal had been subject to a publication ban pending a decision as to its admissibility as new evidence. In its November 2018 reasons allowing the appeal on the merits, the Court of Appeal dismissed the motion for new evidence but ordered that the publication ban remain in effect indefinitely. In May 2019, the CBC brought a motion before the Court of Appeal to have the publication ban set aside, arguing that having access to the affidavit would shed light on the criminal matter before the Court of Appeal and the court's conclusion on the merits that a miscarriage of justice had occurred at trial.

Un affidavit déposé dans une affaire criminelle dont était saisie la Cour d'appel avait fait l'objet d'une interdiction de publication en attendant qu'il soit statué sur son admissibilité en tant que nouvel élément de preuve. Dans ses motifs de novembre 2018 accueillant l'appel sur le fond, la Cour d'appel a rejeté la motion pour présentation d'éléments de preuve nouveaux, mais elle a ordonné que l'interdiction de publication reste en vigueur indéfiniment. En mai 2019, la SRC a présenté une motion à la Cour d'appel sollicitant l'annulation de l'interdiction de publication, soutenant que l'accès à l'affidavit permettrait de faire la lumière sur l'affaire criminelle dont la Cour d'appel était saisie et sur la conclusion de cette dernière sur le fond selon laquelle une erreur judiciaire s'était produite au procès.

The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion. The CBC applied for and was granted leave to appeal to the Court from both the Court of Appeal's 2019 decision refusing to reconsider the publication ban ("2019 Jurisdiction Judgment") and the Court of Appeal's 2018 decision ordering the indefinite publication ban ("2018 Publication Ban Judgment").

La Cour d'appel a refusé d'examiner la motion de la SRC, invoquant la règle du *functus officio* et sa règle de pratique qui interdit les nouvelles audiences. La cour estimait avoir épuisé sa compétence dès qu'elle s'était prononcée sur le fond de l'affaire et avait inscrit son jugement formel tranchant l'appel. Elle a conclu qu'elle n'avait pas compétence pour entendre la motion. La SRC a demandé et obtenu l'autorisation d'interjeter appel à la Cour à la fois de la décision, rendue par la Cour d'appel en 2019, portant refus de réexaminer l'interdiction de publication (« jugement de 2019 sur la compétence ») et de la décision, rendue par la Cour d'appel en 2018, d'imposer l'interdiction de publication d'une durée indéterminée (« jugement de 2018 sur l'interdiction de publication »).

Held (Abella J. dissenting): The appeal from the 2019 Jurisdiction Judgment should be allowed and the matter remanded to the Court of Appeal. The appeal from the 2018 Publication Ban Judgment should be adjourned *sine die*.

Arrêt (la juge Abella est dissidente) : Le pourvoi contre le jugement de 2019 sur la compétence est accueilli et l'affaire est renvoyée à la Cour d'appel. Le pourvoi contre le jugement de 2018 sur l'interdiction de publication est ajourné *sine die*.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.: The Court of Appeal had jurisdiction to consider the CBC's motion to set aside the publication ban. While the court could not rehear the appeal on the merits and while the doctrine of *functus officio* precluded it from reconsidering the substance of the appeal, the court retained the authority to supervise access to the record of its own proceeding, which allowed it to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. The matter

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer : La Cour d'appel avait compétence pour examiner la motion de la SRC visant à faire annuler l'interdiction de publication. Même si la cour ne pouvait pas entendre de nouveau l'appel sur le fond et bien que la règle du *functus officio* l'empêche de se prononcer encore une fois sur le mérite de l'appel, elle a conservé le pouvoir de superviser l'accès au dossier de sa propre instance, ce qui lui permettait d'assurer la conformité au principe constitutionnel de la publicité des débats judiciaires et la protection d'autres

2021 SCC 33 (CanLII)

should be remanded to the Court of Appeal, as it is best placed to decide the CBC's motion and the discretionary and fact-specific issues raised. It would be inappropriate for the Court to decide the CBC's appeal from the 2018 Publication Ban Judgment before the Court of Appeal has had a chance to consider the CBC's motion to have the publication ban set aside.

intérêts publics importants par rapport auxquels il doit être soupesé. Il y a lieu de renvoyer l'affaire à la Cour d'appel, car elle est la mieux placée pour trancher la motion de la SRC ainsi que les questions discrétionnaires et tributaires des faits qui sont soulevées. Il serait inopportun que la Cour décide du pourvoi formé par la SRC contre le jugement de 2018 sur l'interdiction de publication avant que la Cour d'appel ait eu une occasion d'examiner la motion déposée par la SRC en vue de faire annuler l'interdiction de publication.

According to the rule of *functus officio*, a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction once the formal judgment has been entered. This rule serves goals of finality and of an orderly appellate procedure. If lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court.

Selon la règle du *functus officio*, la décision définitive d'un tribunal qui est susceptible d'appel ne peut pas, en règle générale, être examinée de nouveau par le tribunal qui a rendu cette décision. Un tribunal perd sa compétence une fois le jugement officiel rendu. Cette règle favorise la reconnaissance du caractère définitif des procédures et une procédure d'appel ordonnée. Si les juridictions inférieures pouvaient réexaminer continuellement leurs propres décisions, les justiciables seraient privés d'une assise fiable à partir de laquelle interjeter appel à une juridiction supérieure.

That said, it is important to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. Even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter. This power is part of a court's authority to control its own process and arises by necessary implication from the legislative grant of a court's adjudicative authority. It is anchored in the vital public policy favouring public access to the workings of the courts. Important decisions about the openness of the court record, such as rendering, varying or vacating publication bans and sealing orders, may need to be taken after the proceeding on the merits is over. Recognizing that a court's jurisdiction to control its record survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments as the doctrine of *functus officio* was never intended to restrict the ability of lower courts to control their own files.

Cela dit, il importe de faire la distinction entre le pouvoir de connaître du fond, perdu par l'application de la règle du *functus officio*, et la compétence qui existe pour superviser le dossier judiciaire. Même lorsqu'un tribunal a perdu le pouvoir de connaître du fond d'une affaire pour avoir inscrit son jugement formel, il demeure compétent pour contrôler son propre dossier à l'égard d'une instance généralement considérée comme étant une affaire accessoire, mais indépendante. Ce pouvoir fait partie de la maîtrise par le tribunal de sa propre procédure et découle, par déduction nécessaire, de l'octroi par voie législative du pouvoir juridictionnel d'un tribunal. Il est ancré dans la politique publique essentielle favorisant l'accès aux rouages des tribunaux. D'importantes décisions au sujet de la publicité du dossier judiciaire, comme prononcer, modifier ou annuler des interdictions de publication et ordonnances de mise sous scellés, peuvent devoir être prises après la fin de l'instance sur le fond. Reconnaître que cette compétence subsiste après la fin de l'instance sous-jacente n'est pas incompatible avec les objectifs du caractère définitif des procédures et de la stabilité des jugements, car la règle du *functus officio* n'a jamais eu pour but de restreindre la capacité des tribunaux d'instance inférieure d'être maîtres de leurs propres dossiers.

That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. A publication ban or sealing order is susceptible of reconsideration by

Le fait que les tribunaux conservent un pouvoir de surveillance à l'égard de leurs dossiers judiciaires ne veut pas dire que les décisions portant sur la publicité des débats judiciaires, une fois prises, sont susceptibles d'être réexaminées n'importe quand ou pour n'importe quelle

2021 SCC 33 (CanLII)

the issuing court on two narrow grounds and regardless of whether formalized in an order or not.

raison. Une interdiction de publication ou une ordonnance de mise sous scellés est susceptible d'être réexaminée par le tribunal qui l'a prononcée pour deux motifs restreints et peu importe qu'elle soit consacrée dans une ordonnance ou non.

First, a court may vary or set aside a publication ban or sealing order it has made on timely motion by an affected person, such as the media, who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose. Regarding publication bans in criminal matters, standing should be thought of as a matter of a court's discretion. The media should generally have standing to challenge an order that threatens the open court principle where they are able to show they will make submissions that were not considered and that could have affected the result. A court does retain residual discretion to deny standing where hearing the motion would not be in the interests of justice, such as where it would unduly harm the parties or duplicate argument already before the court. As to delay, a moving party is expected to take prompt action to challenge such an order once it has become aware it exists. In the absence of legislative direction, a court must be guided by the purpose of the rule and the circumstances of each case. The task is a contextual balancing of finality and timely justice against the importance of the matter being heard on the merits. This determination is inherently tied to the facts of each particular case and the nature of the issue raised.

Premièrement, un tribunal peut modifier ou annuler une interdiction de publication ou une ordonnance de mise sous scellés qu'il a rendue sur motion déposée en temps opportun par une personne touchée, tels les médias, qui n'a pas été avisée du prononcé de cette ordonnance et à qui il y a lieu d'accorder la qualité pour agir à cette fin. Pour ce qui est des interdictions de publication dans les affaires criminelles, la qualité pour agir devrait relever du pouvoir discrétionnaire d'un tribunal. Les médias devraient généralement avoir qualité pour contester une ordonnance qui menace le principe de la publicité des débats judiciaires s'ils sont à même de démontrer qu'ils présenteront des observations qui n'ont pas été prises en compte et qui auraient pu influer sur le résultat. Le tribunal conserve effectivement le pouvoir discrétionnaire de refuser la qualité pour agir lorsque l'audition de la motion ne serait pas dans l'intérêt de la justice, comme dans le cas où la motion serait indûment préjudiciable aux parties, ou ne ferait que répéter des arguments dont le tribunal a déjà connaissance. Quant au délai, on s'attend à ce que la partie requérante agisse avec célérité pour contester pareille ordonnance dès qu'elle en apprend l'existence. Faute d'une directive législative, les tribunaux doivent être guidés par l'objet de la règle et les circonstances de chaque cas. Leur tâche consiste à mettre en balance dans le contexte le caractère définitif d'une décision et la justice rendue en temps utile par rapport à l'importance que l'affaire soit instruite sur le fond. Cette détermination est intrinsèquement fonction des faits de chaque affaire et de la nature de la question soulevée.

Second, a court may vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed. The moving party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms. The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances.

Deuxièmement, le tribunal peut modifier ou annuler une interdiction de publication ou une ordonnance de mise sous scellés lorsqu'il y a eu changement important des circonstances relatives au prononcé de l'ordonnance. La partie requérante doit établir à la fois qu'il y a eu changement de circonstances et que le changement, s'il avait été connu à l'époque de l'ordonnance initiale, se serait vraisemblablement traduit par une ordonnance aux conditions différentes. La justesse de l'ordonnance initiale est présumée et n'est pas pertinente quant à l'existence d'un changement important de circonstances.

Instances in which a court may reconsider a publication ban or sealing order are distinct from an appeal or application for *certiorari* made to a higher court from such decisions, as the original court is not being asked

Les situations dans lesquelles un tribunal peut réexaminer une interdiction de publication ou une ordonnance de mise sous scellés se distinguent de l'appel ou d'une demande de *certiorari* faits à une juridiction supérieure de

2021 SCC 33 (CanLII)

to reconsider its decision because it is wrongly decided. Finally, the general principles underlying the two grounds for reconsideration can be displaced by legislation, such as applicable rules of court.

In the present case, the Court of Appeal erred in concluding that applicable legislation, such as its rules of court procedure, or the doctrine of *functus officio* deprived it of jurisdiction to consider the CBC's motion to set aside the publication ban. The Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered. That the Court of Appeal had jurisdiction to consider the CBC's motion does not mean, however, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts, a determination that should be made by the Court of Appeal. Since the CBC has not established a material change of circumstances, it will therefore have to rely on the Court of Appeal's power to reconsider an order on the basis that it was made without notice to an affected party. The impugned order was made of the Court of Appeal's own accord at the oral hearing and then continued indefinitely. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The Court of Appeal will have to determine whether the CBC has standing to challenge the relevant order and whether CBC's motion was timely. Furthermore, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test for discretionary limits on court openness: a court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects.

Per Abella J. (dissenting): The appeals should be dismissed. The CBC is not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay.

The media is a crucial voice in protecting and promoting the openness of courts, and their right to challenge publication bans is undisputed. But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot

ces décisions, car on ne demande pas au tribunal d'origine de réexaminer sa décision parce qu'elle était erronée. Enfin, les principes généraux qui sous-tendent les deux motifs de réexamen peuvent être écartés par une mesure législative, par exemple les règles de procédure applicables.

En l'espèce, la Cour d'appel a eu tort de conclure que les textes législatifs applicables, comme ses règles de procédure, ou la règle du *functus officio* lui enlevait compétence pour examiner la motion de la SRC visant à faire annuler l'interdiction de publication. La Cour d'appel est demeurée compétente pour surveiller son dossier, même après que le certificat de décision dans l'instance sous-jacente sur le fond a été inscrit. Ce n'est toutefois pas parce que la Cour d'appel avait compétence pour examiner la motion de la SRC que cette dernière a droit à la mesure de redressement qu'elle a demandée. La possibilité d'obtenir cette mesure de redressement dépend d'une bonne application du droit aux faits, une décision qui devrait être rendue par la Cour d'appel. Puisque la SRC n'a pas établi un changement important de circonstances, elle devra s'appuyer sur le pouvoir de la Cour d'appel de réexaminer une ordonnance au motif qu'elle a été rendue sans avis à une partie touchée. L'ordonnance attaquée a été prononcée du propre chef de la Cour d'appel à l'audience, puis maintenue pour une durée indéterminée. La cour n'a entendu aucune observation sur le point, et n'a donné de préavis à qui que ce soit, dont les médias, notamment la SRC qui a eu vent de l'interdiction attaquée peu après le prononcé des motifs. La Cour d'appel devra se demander si la SRC a qualité pour contester l'ordonnance en question et si la SRC a déposé sa motion en temps opportun. De plus, toute limite discrétionnaire à l'accès au dossier judiciaire et à la publication de son contenu doit être comprise à l'aune du test concernant les limites discrétionnaires à la publicité des débats judiciaires : un tribunal ne peut imposer de limites discrétionnaires portant sur la publicité des débats que si les conditions suivantes sont remplies : (1) la publicité des débats pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque; (3) les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La juge Abella (dissidente) : Il y a lieu de rejeter les pourvois. La SRC n'a pas droit au réexamen de l'interdiction de publication en raison de son retard indu et injustifié à présenter sa motion.

Les médias jouent un rôle crucial dans la protection et la promotion de la publicité des débats judiciaires, et leur droit d'attaquer des interdictions de publication n'est pas contesté. Cependant, au terme de l'instance sous-jacente, la règle du *functus officio* fait en sorte qu'une

2021 SCC 33 (CanLII)

be reconsidered by the court that rendered the decision. Although the application of *functus officio* is less formalistic and more flexible in respect of ancillary orders and publication bans, and circumscribed avenues must be maintained through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over, the rationales underlying this doctrine show that it has a role to play in respect of publication ban orders.

Finality matters. The parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over. A reconsideration of a publication ban must therefore be sought in a timely manner, and a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests of finality and the interests in support of the open court principle. Courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions, and there is no reason to assume that did not happen in this case.

In the present case, the CBC is unable to establish a material change in circumstances. The only bases under which it could move for reconsideration of the publication ban are by showing that the ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met.

First, the publication ban was not issued without notice. If the media is present in the courtroom when a publication ban is issued, as was the CBC, it follows that it knows of its existence. Second, the CBC has not discharged its burden of showing that its proposed submissions could make a material, or even any difference in the outcome.

décision définitive ne peut pas, en général, être réexaminée par le tribunal qui l'a rendue. Bien que l'application de la règle du *functus officio* soit moins formaliste et plus souple en ce qui concerne les ordonnances accessoires et les interdictions de publication, et qu'il faille maintenir des voies circonscrites par lesquelles les médias peuvent demander à un tribunal de réexaminer une interdiction de publication après la fin de l'instance sous-jacente, les considérations qui sous-tendent cette règle montrent qu'elle a un rôle à jouer relativement aux ordonnances de non-publication.

Le caractère définitif d'une décision est important. Il faut que les parties puissent tourner la page et être à l'abri des préjudices psychologiques et financiers associés au fait d'être entraînées de nouveau malgré elles dans le système de justice lorsqu'une affaire est close. Voilà pourquoi il faut demander le réexamen d'une interdiction de publication en temps opportun et pourquoi les tribunaux ne devraient généralement pas réexaminer une interdiction de publication après la fin de l'instance principale, sauf s'il existe une raison valable de croire que la demande formulée par un représentant des médias sert l'intérêt public et qu'elle pourrait raisonnablement amener le tribunal à rendre une décision différente. Il s'agit d'un exercice de pondération, sans barème préétabli, entre les intérêts qui sous-tendent le caractère définitif d'une décision et les intérêts liés au principe de la publicité des débats judiciaires. Les tribunaux qui prononcent des interdictions de publication sont censés tenir compte de l'importance du principe de la publicité des débats judiciaires, même lorsqu'aucun représentant des médias ne présente d'arguments à ce sujet, et il n'y a aucune raison de supposer que cela ne s'est pas produit en l'espèce.

Dans la présente affaire, la SRC ne peut établir qu'un changement important de circonstances s'est produit. Elle ne peut demander un réexamen de l'interdiction de publication que si elle démontre que l'interdiction de publication a été prononcée sans avis, que ses observations peuvent avoir une incidence importante sur le résultat, et qu'elle a déposé la motion en réexamen en temps opportun. Aucune de ces conditions n'a été remplie.

Premièrement, l'interdiction de publication n'a pas été prononcée sans avis. Si les médias sont présents dans la salle d'audience lorsqu'une interdiction de publication est prononcée, comme l'était la SRC, il s'ensuit qu'ils en connaissent l'existence. Deuxièmement, la SRC ne s'est pas acquittée de son fardeau de démontrer que ses observations envisagées pourraient avoir une incidence importante, ou quelque incidence que ce soit, sur le résultat.

2021 SCC 33 (CanLII)

Third, and more significantly, the CBC's failure to act in a timely manner is determinative. An unexplained six-month delay for filing a motion to have a publication ban reconsidered is inordinately long. Under no definition of "due dispatch" can this delay be justified, particularly since the CBC was fully aware of the ban from the outset of the proceedings. The delay in this case causes acute harm to the parties, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings.

Troisièmement, fait plus important encore, la tardiveté de la SRC à agir est déterminant. Un délai non expliqué de six mois pour déposer une motion en réexamen d'une interdiction de publication est excessif. Peu importe la définition que l'on donne au concept d'agir « avec célérité », le délai ne saurait être justifié, en particulier parce que la SRC était parfaitement au courant du prononcé de l'interdiction dès le début de l'instance. Le délai en l'espèce cause un préjudice grave aux parties, qui s'attendaient raisonnablement à ce que leur droit au respect de la vie privée et à la dignité soit protégé par le caractère définitif de l'instance.

Cases Cited

By Kasirer J.

Referred to: *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521; *R. v. Ostrowski and Correia* (1989), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, [1990] 2 S.C.R. 82; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Reekie v. Messervey*, [1990] 1 S.C.R. 219; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Adams*, [1995] 4 S.C.R. 707; *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75; *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 33 O.R. (3d) 202; *The Queen v. Jacobs*, [1971] S.C.R. 92; *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257; *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103; *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Dickie v. Woodworth* (1883), 8 S.C.R. 192; *Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Ivandaeva Total Image Salon*

Jurisprudence

Citée par le juge Kasirer

Arrêts mentionnés : *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] 2 R.C.S. 521; *R. c. Ostrowski and Correia* (1989), 57 Man. R. (2d) 255, conf. par *R. c. Ostrowski*, [1990] 2 R.C.S. 82; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848; *Reekie c. Messervey*, [1990] 1 R.C.S. 219; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *R. c. Adams*, [1995] 4 R.C.S. 707; *R. c. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75; *Paper Machinery Ltd. c. J.O. Ross Engineering Corp.*, [1934] R.C.S. 186; *R. c. H. (E.)* (1997), 33 O.R. (3d) 202; *The Queen c. Jacobs*, [1971] R.C.S. 92; *R. c. Burke*, 2002 CSC 55, [2002] 2 R.C.S. 857; *Tsaoussis (Litigation Guardian of) c. Baetz* (1998), 41 O.R. (3d) 257; *Ayangma c. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103; *GEA Refrigeration Canada Inc. c. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *Société Radio-Canada c. La Reine*, 2011 CSC 3, [2011] 1 R.C.S. 65; *CTV Television Inc. c. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *R. c. Wagner*, 2017 ONSC 6603; *R. c. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *Dickie c. Woodworth* (1883), 8 R.C.S. 192; *Hollinger Inc. c. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; *R. c. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, conf. par *Toronto Star Newspaper Ltd. c. Canada*, 2010 CSC 21, [2010] 1 R.C.S. 721; *Société Radio-Canada c. Canada (Procureur général)*, 2011 CSC 2, [2011] 1 R.C.S. 19;

2021 SCC 33 (CanLII)

Inc. v. Hlembizky (2003), 63 O.R. (3d) 769; *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 184 N.S.R. (2d) 159; *9095-7267 Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878; *Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67; *Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306; *1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361; *585430 Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191; *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374; *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *Morin v. R.* (1997), 32 O.R. (3d) 265; *R. v. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1; *R. v. Baltovitch* (2000), 47 O.R. (3d) 761; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673; *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209; *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65; *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135; *Aleong v. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44; *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740.

Ivandaeva Total Image Salon Inc. c. Hlembizky (2003), 63 O.R. (3d) 769; *Canadian Transportation Accident Investigation and Safety Board c. Canadian Press* (2000), 184 N.S.R. (2d) 159; *9095-7267 Québec inc. c. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878; *Attorney General of Ontario c. 15 Johnswood Crescent*, 2009 CanLII 50751; *Marché D'Alimentation Denis Thériault Ltée c. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660; *1196158 Ontario Inc. c. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67; *Toronto Standard Condominium Corporation No. 2058 c. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306; *1202600 Ontario Inc. c. Jacob*, 2012 ONSC 361; *585430 Alberta Ltd. c. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191; *Jane Doe c. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309; *M. (A.) c. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382; *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477; *R. c. Média Vice Canada Inc.*, 2018 CSC 53, [2018] 3 R.C.S. 374; *British Columbia c. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *Morin c. R.* (1997), 32 O.R. (3d) 265; *R. c. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206; *R. c. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82; *L.M.P. c. L.S.*, 2011 CSC 64, [2011] 3 R.C.S. 775; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1; *R. c. Baltovitch* (2000), 47 O.R. (3d) 761; *R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331; *Lochner c. Ontario Civilian Police Commission*, 2020 ONCA 720; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Canadian Broadcasting Corp. c. R.*, 2010 ONCA 726, 102 O.R. (3d) 673; *Aboriginal Peoples Television Network c. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247; *Saadati c. Moorhead*, 2017 CSC 28, [2017] 1 R.C.S. 543; *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199; *Secure 2013 Group Inc. c. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209; *Canadian Planning and Design Consultants Inc. c. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98; *Gray c. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65; *MK Engineering Inc. c. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135; *Aleong c. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44; *Canadian Cablesystems (Ontario) Ltd. c. Consumers' Association of Canada*, [1977] 2 R.C.S. 740.

2021 SCC 33 (CanLII)

By Abella J. (dissenting)

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; *R. v. Adams*, [1995] 4 S.C.R. 707; *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 85, 246 N.S.R. (2d) 104; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *R. v. Khela*, [1995] 4 S.C.R. 201; *Hollinger Inc. v. Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521; *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 9.15.
Canadian Charter of Rights and Freedoms, s. 2(b).
Code of Civil Procedure, CQLR, c. C-25.01, art. 349.
Court of Appeal Rules, Man. Reg. 555/88R, r. 21(4), 33(4), 46.2(1), (2), (4), (12).
Court of Queen's Bench Rules, Man. Reg. 553/88R, r. 37.11.
Criminal Code, R.S.C. 1985, c. C-46, ss. 696.1, 696.3(3)(a)(ii).
Manitoba Criminal Appeal Rules, SI/92-106, r. 45.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 37.14.
Supreme Court Act, R.S.C. 1985, c. S-26, ss. 40(1), 46.1.

Authors Cited

Barbeau, François-Olivier. "Rétractation du jugement", dans *JurisClasseur Québec — Collection droit civil — Procédure civile I*, par Pierre-Claude Lafond, dir. Montréal: Lexis Nexis, 2015, fascicule 31 (feuilles mobiles mises à jour novembre 2020, envoi nº 11).
Mayrand, Albert. *Dictionnaire de maximes et locutions latines utilisées en droit*, 4e éd. Montréal: Yvon Blais, 2007.
Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*. Toronto: Thomson Reuters, 2006 (loose-leaf updated 2020, release 2).
Wong, Anna S. P. "Doctrine of *Functus Officio*: The Changing Face of Finality's Old Guard" (2020), 98 *Can. Bar Rev.* 543.

Citée par la juge Abella (dissidente)

Dagenais c. Société Radio-Canada, [1994] 3 R.C.S. 835; *R. c. Adams*, [1995] 4 R.C.S. 707; *Nova Scotia Government and General Employees Union c. Capital District Health Authority*, 2006 NSCA 85, 246 N.S.R. (2d) 104; *Tsaoussis (Litigation Guardian of) c. Baetz* (1998), 41 O.R. (3d) 257; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *R. c. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *British Columbia c. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *R. c. Khela*, [1995] 4 R.C.S. 201; *Hollinger Inc. c. Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] 2 R.C.S. 521; *Canadian Cablesystems (Ontario) Ltd. c. Association des consommateurs du Canada*, [1977] 2 R.C.S. 740.

Lois et règlements cités

Alberta Rules of Court, Alta. Reg. 124/2010, règle 9.15.
Charte canadienne des droits et libertés, art. 2b).
Code criminel, L.R.C. 1985, c. C-46, art. 696.1, 696.3(3)(a)(ii).
Code de procédure civile, RLRQ, c. C-25.01, art. 349.
Loi sur la Cour suprême, L.R.C. 1985, c. S-26, art. 40(1), 46.1.
Règles de la Cour d'appel, Règl. du Man. 555/88R, règles 21(4), 33(4) 46.2(1), (2), (4), (12).
Règles de la Cour du Banc de la Reine, Règl. du Man. 553/88R, règle 37.11.
Règles de procédure de la cour d'appel du Manitoba en matière criminelle, TR/92-106, règle 45.
Règles de procédure civile, R.R.O. 1990, règl. 194, règle 37.14.

Doctrine et autres documents cités

Barbeau, François-Olivier. « Rétractation du jugement », dans *JurisClasseur Québec — Collection droit civil — Procédure civile I*, par Pierre-Claude Lafond, dir., Montréal, Lexis Nexis, 2015, fascicule 31 (feuilles mobiles mises à jour novembre 2020, envoi nº 11).
Mayrand, Albert. *Dictionnaire de maximes et locutions latines utilisées en droit*, 4e éd., Montréal, Yvon Blais, 2007.
Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*, Toronto, Thomson Reuters, 2006 (loose-leaf updated 2020, release 2).
Wong, Anna S. P. « Doctrine of *Functus Officio* : The Changing Face of Finality's Old Guard » (2020), 98 *R. du B. can.* 543.

2021 SCC 33 (CanLII)

APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), 2019 MBCA 122 (*sub nom. R. v. Ostrowski*), [2019] M.J. No. 334 (QL), 2019 CarswellMan 923 (WL Can.), dismissing a motion to set aside a publication ban. Appeal allowed, Abella J. dissenting.

POURVOI contre un arrêt de la Cour d'appel du Manitoba (les juges Beard, Burnett et Pfuetzner), 2019 MBCA 122 (*sub nom. R. c. Ostrowski)*, [2019] M.J. No. 334 (QL), 2019 CarswellMan 923 (WL Can.), qui a rejeté une motion en annulation d'une interdiction de publication. Pourvoi accueilli, la juge Abella est dissidente.

APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), 2018 MBCA 125, 369 C.C.C. (3d) 139 (*sub nom. R. v. Ostrowski*), [2018] M.J. No. 306 (QL), 2018 CarswellMan 550 (WL Can.), ordering *inter alia* that a publication ban remain in effect. Appeal adjourned *sine die*, Abella J. dissenting.

POURVOI contre un arrêt de la Cour d'appel du Manitoba (les juges Beard, Burnett et Pfuetzner), 2018 MBCA 125, 369 C.C.C. (3d) 139 (*sub nom. R. c. Ostrowski*), [2018] M.J. No. 306 (QL), 2018 CarswellMan 550 (WL Can.), qui a ordonné, entre autres, qu'une interdiction de publication demeure en vigueur. Pourvoi ajourné *sine die*, la juge Abella est dissidente.

Jonathan B. Kroft and *Sean A. Moreman*, for the appellant.

Jonathan B. Kroft et *Sean A. Moreman*, pour l'appelante.

Michael Bodner and *Denis Guénette*, for the respondent Her Majesty The Queen.

Michael Bodner et *Denis Guénette*, pour l'intimée Sa Majesté la Reine.

Harvey T. Strosberg, *Q.C.*, and *James Lockyer*, for the respondent Stanley Frank Ostrowski.

Harvey T. Strosberg, *c.r.*, et *James Lockyer*, pour l'intimé Stanley Frank Ostrowski.

Robert Gosman, for the respondents B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.

Robert Gosman, pour les intimés B.B., conjointe de feu M.D., et J.D., en sa qualité d'exécuteur de la succession de feu M.D.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Michael Bernstein, pour l'intervenant le procureur général de l'Ontario.

Lesley A. Ruzicka, for the intervener the Attorney General of British Columbia.

Lesley A. Ruzicka, pour l'intervenant le procureur général de la Colombie-Britannique.

Fredrick Schumann, for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and Communications Workers of America/Canada.

Fredrick Schumann, pour les intervenants Centre for Free Expression, l'Association canadienne des journalistes, Médias d'Info Canada et Guilde canadienne des médias/Syndicat des communications d'Amérique/Canada.

Tess Layton, for the intervener Ad Idem/Canadian Media Lawyers Association.

Tess Layton, pour l'intervenante Ad Idem/Canadian Media Lawyers Association.

2021 SCC 33 (CanLII)

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. was delivered by

KASIRER J. —

I. Overview

[1] The principal issue in these appeals concerns a court's jurisdiction to render, vary or vacate orders — sealing orders, publication bans and the like — that limit the open court principle. The question is whether a court retains jurisdiction over these ancillary matters after it has decided the merits of the case and has entered its formal judgment. Does the doctrine of *functus officio* — the notion that once a court has performed its function, it has exhausted its authority — preclude that court from revisiting a publication ban that it had ordered or a sealing order put in place in the course of criminal proceedings?

[2] An affidavit filed in a criminal matter before the Court of Appeal of Manitoba had been held under seal and subject to a publication ban pending a decision as to its admissibility as new evidence. In its reasons allowing the appeal on the merits, the court dismissed the motion for new evidence because it was not relevant to the issue at hand. It nevertheless ordered that the publication ban remain in place indefinitely.

[3] Relying on the open court principle and the constitutionally-protected right of freedom of the press with which it is bound up, the appellant Canadian Broadcasting Corporation ("CBC") brought a motion in which it sought access to the affidavit and asked to have the publication ban set aside. It had been covering the proceedings as a representative of the media. Lifting the publication ban, said the CBC, would shed light on the principal matter before the Court of Appeal and its conclusion on

Version française du jugement du juge en chef Wagner et des juges Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer rendu par

LE JUGE KASIRER —

I. Vue d'ensemble

[1] La question principale en litige dans les présents pourvois concerne le pouvoir d'un tribunal de rendre, de modifier ou d'annuler des ordonnances — ordonnances de mise sous scellés, interdictions de publication et ainsi de suite — qui limitent le principe de la publicité des débats judiciaires. La question est de savoir si un tribunal demeure compétent à l'égard de ces matières accessoires après qu'il se soit prononcé sur le fond de l'affaire et ait inscrit son jugement formel. La règle du *functus officio* — l'idée selon laquelle dès qu'un tribunal a exercé sa fonction, il a épuisé sa compétence — interdit-elle à ce tribunal de se pencher de nouveau sur une interdiction de publication qu'il a prononcée ou sur une ordonnance de mise sous scellés mise en place lors d'une instance criminelle?

[2] Un affidavit déposé dans une affaire criminelle dont était saisie la Cour d'appel du Manitoba avait été gardé sous scellés et était visé par une interdiction de publication en attendant qu'il soit statué sur son admissibilité en tant que nouvel élément de preuve. Dans ses motifs accueillant l'appel sur le fond, le tribunal a rejeté la motion pour présentation d'éléments de preuve nouveaux, jugeant que ceux-ci n'étaient pas pertinents quant à la question en litige. Il a néanmoins ordonné que l'interdiction de publication reste en vigueur indéfiniment.

[3] Invoquant le principe de la publicité des débats judiciaires et le droit constitutionnel à la liberté de la presse avec lequel il est intimement lié, la Société Radio-Canada appelante (« SRC ») a présenté une motion dans laquelle elle sollicitait l'accès à l'affidavit et demandait l'annulation de l'interdiction de publication. Elle avait assuré la couverture de l'instance en tant que représentante des médias. Aux dires de la SRC, la levée de l'interdiction de publication ferait la lumière sur la principale question dont était

2021 SCC 33 (CanLII)

the merits that a miscarriage of justice had occurred at trial. The Crown opposed the motion to disturb the ban, however, arguing that the affidavit was not relevant and the Court of Appeal had no continuing authority over the matter. Family members of a deceased person mentioned in the affidavit under seal also opposed lifting the ban since, they said, doing so would result in an unjustifiable violation of their privacy.

[4] The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion and said the CBC should turn to this Court, on appeal, to seek redress.

[5] In point of fact, this Court is seized of two appeals. In the first, leave was granted from the Court of Appeal's refusal to hear the motion in which it was asked to reconsider its own publication ban and, in addition, to grant the CBC access to the affidavit. This first appeal raises preliminary issues about the Court of Appeal's powers to reconsider such decisions after it had entered the formal order on the merits of the miscarriage of justice case, including consideration of the doctrine of *functus officio*. In the second appeal for which leave was also granted, the CBC challenges the publication ban directly. This second appeal is taken directly from the publication ban itself, and unlike the first appeal, it does not concern the order granting access to the affidavit also sought in the CBC's motion. It raises the sole issue of whether the Court of Appeal was correct to order the final, indefinite publication ban made in the judgment which disposed of the merits of the appeal.

saisie la Cour d'appel et sa conclusion sur le fond selon laquelle une erreur judiciaire s'était produite au procès. Cependant, la Couronne s'est opposée à la motion en modification de l'interdiction, plaidant que l'affidavit n'était pas pertinent et que la Cour d'appel n'avait plus compétence sur la matière. Des membres de la famille d'une personne décédée mentionnée dans l'affidavit sous scellés se sont eux aussi opposés à la levée de l'interdiction, car, disaient-ils, pareille mesure entraînerait une violation injustifiable de leur vie privée.

[4] La Cour d'appel a refusé d'examiner la motion de la SRC, invoquant sa règle de pratique interdisant les nouvelles audiences et la règle du *functus officio*. La cour estimait avoir épuisé sa compétence dès lors qu'elle s'était prononcée sur le fond de l'affaire et inscrit son jugement formel tranchant l'appel. Elle a conclu qu'elle n'avait pas compétence pour entendre la motion et a affirmé que la SRC devait s'adresser à notre Cour, dans un pourvoi, pour obtenir réparation.

[5] En fait, notre Cour est saisie de deux pourvois. Dans le premier, elle a accordé l'autorisation de pourvoi à l'encontre du refus de la Cour d'appel d'entendre la motion dans laquelle il lui était demandé de réexaminer sa propre interdiction de publication et, en outre, de donner à la SRC accès à l'affidavit. Ce premier pourvoi soulève des questions préliminaires relatives aux pouvoirs de la Cour d'appel de réexaminer les décisions de cette nature après qu'elle eut rendu l'ordonnance formelle sur le bien-fondé de l'allégation d'erreur judiciaire, notamment l'examen de la règle du *functus officio*. Dans le second pourvoi, autorisé lui aussi, la SRC conteste directement l'interdiction de publication. Ce deuxième pourvoi prend sa source directement dans l'interdiction de publication elle-même, et contrairement au premier pourvoi, il ne concerne pas l'ordonnance donnant accès à l'affidavit sollicité lui aussi dans la motion de la SRC. Il soulève l'unique question de savoir si la Cour d'appel a eu raison d'imposer l'interdiction de publication définitive de durée indéterminée décrétée dans le jugement qui tranchait l'appel sur le fond.

2021 SCC 33 (CanLII)

[6] As to the first appeal, and so said with great respect, I do not share the Court of Appeal's view that it was without jurisdiction to consider the motion brought by the CBC. It is true that, in the exercise of its appellate authority, the Court of Appeal could not rehear the appeal on the merits and that the doctrine of *functus officio* precludes it from reconsidering the substance of the appeal. But after a court loses jurisdiction over the merits, it generally retains the authority to supervise access to the record of its own proceedings. Even after the formal judgment on the merits is filed, this ongoing authority allows the court to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. Indeed, it is critical to upholding the responsibility all courts have to manage their records in accordance with the *Canadian Charter of Rights and Freedoms* and the proper administration of justice. As ancillary court openness issues have no bearing on the judgments on the merits, there was no reason for the Court of Appeal to tie its own hands in service of the finality of the underlying judgment that was not at risk.

[6] En ce qui concerne le premier pourvoi, et soit dit en tout respect, je ne partage pas l'opinion de la Cour d'appel selon laquelle elle n'avait pas compétence pour examiner la motion présentée par la SRC. Il est vrai que, dans l'exercice de sa compétence en tant que juridiction d'appel, la Cour d'appel ne pouvait pas entendre de nouveau l'appel sur le fond et que la règle du *functus officio* l'empêche de se prononcer encore une fois sur le mérite de l'appel. Toutefois, après qu'un tribunal perde compétence sur le fond, il conserve généralement le pouvoir de superviser l'accès au dossier de sa propre instance. Même après le dépôt du jugement formel sur le fond, ce pouvoir continu permet au tribunal d'assurer la conformité au principe constitutionnel de la publicité des débats judiciaires et la protection d'autres intérêts publics importants par rapport auxquels il doit être soupesé. En effet, il est essentiel au maintien de la responsabilité de tous les tribunaux d'administrer leurs dossiers conformément à la *Charte canadienne des droits et libertés* et à la bonne administration de la justice. Puisque ces questions accessoires liées à la publicité des débats judiciaires n'ont aucune incidence sur les jugements au fond, la Cour d'appel n'avait aucune raison de se lier les mains au service du caractère définitif du jugement sous-jacent, lequel n'était pas menacé.

[7] Moreover, the Court of Appeal had ordered the continuing publication ban in its judgment on the merits without a hearing to determine whether the open court principle should be limited in the circumstances. The Court of Appeal ought to have considered whether it was appropriate to set aside its publication ban on motion by the CBC in these circumstances.

[7] Qui plus est, la Cour d'appel avait prononcé l'interdiction de publication continue dans son jugement sur le fond sans tenir d'audience en vue de décider s'il y avait lieu de limiter le principe de la publicité des débats judiciaires dans les circonstances. La Cour d'appel aurait dû se demander s'il convenait d'annuler son interdiction de publication sur motion de la SRC dans ces circonstances.

[8] For the reasons that follow, to dispose of the first appeal I propose that the matter should be remanded to the Court of Appeal to decide the CBC's motion. That court is best placed to decide the discretionary and fact-specific issues raised, including whether the CBC should be granted standing to challenge the publication ban, whether the motion was unreasonably delayed such that it is not in the interests of justice to hear it and whether the lifting

[8] Pour les motifs qui suivent, en vue de statuer sur le premier pourvoi, je propose que l'affaire soit renvoyée à la Cour d'appel pour qu'elle tranche la motion de la SRC. Ce tribunal est le mieux placé pour trancher les questions discrétionnaires et tributaires des faits qui sont soulevées, dont celle de savoir s'il y a lieu d'accorder à la SRC qualité pour contester l'interdiction de publication, celle de savoir si la motion a été déraisonnablement tardive

2021 SCC 33 (CanLII)

of the publication ban is justified here taking into account this Court's decision in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521.

si bien qu'il n'est pas dans l'intérêt de la justice de l'entendre, et celle de savoir si la levée de l'interdiction de publication est justifiée en l'espèce compte tenu de la décision rendue par notre Cour dans *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] 2 R.C.S. 521.

[9] Given that I propose to dispose of the first appeal by returning the matter to the Court of Appeal to decide the CBC's motion, in my respectful view it would be inappropriate for this Court to decide the second appeal challenging the ban directly now, before the Court of Appeal has had a chance to reconsider the matter. Accordingly, I would adjourn the second appeal *sine die*.

[9] Comme je propose de statuer sur le premier pourvoi en renvoyant l'affaire à la Cour d'appel pour qu'elle se prononce sur la motion de la SRC, je suis respectueusement d'avis qu'il serait inopportun que notre Cour décide du second pourvoi contestant l'interdiction de publication elle-même, avant que la Cour d'appel ait eu une occasion de réexaminer l'affaire. Par conséquent, j'ajournerais le second pourvoi *sine die*.

II. Background and Proceedings Below

II. Contexte et instances devant les juridictions inférieures

A. *The Miscarriage of Justice Reference*

A. *Le renvoi sur l'erreur judiciaire*

[10] Following a jury trial in 1987, Stanley Ostrowski was convicted of first degree murder. He appealed the conviction unsuccessfully to the Court of Appeal and later this Court (*R. v. Ostrowski and Correia* (1989), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, [1990] 2 S.C.R. 82).

[10] Au terme d'un procès devant jury en 1987, Stanley Ostrowski a été déclaré coupable de meurtre au premier degré. Il a interjeté appel sans succès de la déclaration de culpabilité à la Cour d'appel et, plus tard, à notre Cour (*R. c. Ostrowski and Correia* (1989), 57 Man. R. (2d) 255, conf. par *R. c. Ostrowski*, [1990] 2 R.C.S. 82).

[11] In 2014, the Minister of Justice referred the matter to the Court of Appeal pursuant to ss. 696.1 and 696.3(3)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. These provisions allow matters to be referred back to the Court of Appeal in circumstances where, in the Minister's view, there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

[11] En 2014, le ministre de la Justice a renvoyé l'affaire à la Cour d'appel en application de l'art. 696.1 et du sous-al. 696.3(3)a)(ii) du *Code criminel*, L.R.C. 1985, c. C-46. Ces dispositions permettent de renvoyer des causes à la Cour d'appel dans des situations où, de l'avis du ministre, il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite.

[12] Certain new evidence relating to the conviction at trial in 1987 was proposed for consideration by the Court of Appeal upon joint motion of the Crown and Mr. Ostrowski. Unusually, this included the live testimony of 12 witnesses heard before a panel of appellate justices. The Crown conceded this evidence was admissible, that it proved a miscarriage

[12] Certains éléments de preuve nouveaux liés à la déclaration de culpabilité au procès en 1987 ont été proposés pour examen par la Cour d'appel sur motion conjointe de la Couronne et de M. Ostrowski. Fait inusité, ceci comprenait le témoignage de vive voix de 12 témoins entendus devant une formation de juges de la Cour d'appel.

2021 SCC 33 (CanLII)

of justice had occurred and, accordingly, that the 1987 conviction should be set aside. The concession was based on evidence pointing to the existence of a deal made between prosecutors and a witness whose testimony had linked Mr. Ostrowski to the murder. The evidence had not been disclosed to Mr. Ostrowski at trial, violating his right to make full answer and defence.

La Couronne a concédé que ces éléments de preuve étaient admissibles, qu'ils prouvaient une erreur judiciaire et, par conséquent, qu'il y avait lieu d'annuler la déclaration de culpabilité de 1987. La concession était fondée sur des éléments de preuve qui indiquaient l'existence d'un marché conclu entre les poursuivants et un témoin dont le témoignage au procès avait lié M. Ostrowski au meurtre. Ces éléments n'avaient pas été communiqués à M. Ostrowski au procès, ce qui violait son droit de présenter une défense pleine et entière.

[13] The parties did not agree on the appropriate remedy for the miscarriage of justice. The Crown sought a new trial order and a judicial stay of those proceedings, while Mr. Ostrowski asked that an acquittal be entered by the Court of Appeal.

[13] Les parties ne s'entendaient pas sur la réparation qu'il convenait d'accorder pour l'erreur judiciaire. La Couronne a demandé à la Cour d'appel d'ordonner la tenue d'un nouveau procès et l'arrêt de ces procédures, alors que M. Ostrowski lui a demandé d'inscrire un acquittement.

[14] Mr. Ostrowski also sought to introduce further new evidence, specifically an affidavit sworn by his lawyer, Richard Posner ("Posner affidavit"). The affidavit contained details of certain events that had occurred after one of the 12 witnesses, M.D., had testified before the Court of Appeal in this matter. Unlike the material relating to the other motion for new evidence, the Crown did not consent to the Posner affidavit being admitted into evidence.

[14] Monsieur Ostrowski a également cherché à produire un autre nouvel élément de preuve, à savoir un affidavit souscrit par son avocat, Richard Posner (« affidavit de Me Posner »). L'affidavit renfermait des détails de certains événements qui s'étaient produits après qu'un des 12 témoins, M.D., eut témoigné devant la Cour d'appel dans cette affaire. Contrairement aux documents liés à l'autre motion en présentation d'éléments de preuve nouveaux, la Couronne n'a pas consenti à ce que l'affidavit de Me Posner soit admis en preuve.

[15] The Court of Appeal heard oral argument from the parties on May 28, 2018, including submissions regarding the admissibility of the Posner affidavit. The affidavit was sealed, pursuant to the *Court of Appeal Rules*, Man. Reg. 555/88R, relating to motions for new evidence, but the Court of Appeal nevertheless reviewed it on the consent of the parties (r. 21(4)). It also ordered a publication ban respecting this material at the outset of the May 28 hearing:

[15] Le 28 mai 2018, la Cour d'appel a entendu les plaidoiries des parties, notamment leurs observations sur l'admissibilité de l'affidavit de Me Posner. L'affidavit était mis sous scellés, en application des *Règles de la Cour d'appel*, Règl. Man. 555/88R, relatives aux motions en présentation d'éléments de preuve nouveaux, mais la Cour d'appel l'a néanmoins examiné avec le consentement des parties (par. 21(4)). Elle a également prononcé une interdiction de publication de ce document à l'ouverture de l'audience du 28 mai :

THE COURT: . . . [I]n our view, unless counsel feel otherwise, there must be a publication ban. There's no point in having the sealed material to the extent that it's referred to in argument without a publication ban. So there will be

[TRADUCTION] LA COUR : . . . [À] notre avis, à moins que les avocats soient d'avis contraire, il doit y avoir interdiction de publication. Il ne sert à rien de mettre les documents sous scellés dans la mesure où il en est question

2021 SCC 33 (CanLII)

a publication ban as well unless counsel wish to address that?

Ban on Publication

(R.R. (Crown), at p. 137)

[16] As it would later concede before the Court of Appeal, the CBC was reporting on the proceedings, and its journalists could have attended any of the hearings, including the May 28 hearing.

B. *The 2018 Publication Ban Judgment (2018 MBCA 125, 369 C.C.C. (3d) 139 — Beard, Burnett and Pfuetzner JJ.A.)*

[17] The Court of Appeal found a miscarriage of justice as a result of the non-disclosure based on material revealed by the first motion for new evidence, accepting the concession of the Crown noted above. This was sufficient to conclude the conviction should be set aside. The Court of Appeal ultimately quashed the conviction, ordered a new trial and entered a stay of any further proceedings, and continued the publication ban indefinitely ("2018 Publication Ban Judgment").

[18] The court declined to admit the Posner affidavit as further new evidence, because it concluded that it was not relevant to the determination of the only live issue of the appropriate remedy for Mr. Ostrowski. Instead, the evidence went to "the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice" (para. 82). Beard J.A. wrote the following in concluding: "I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect" (*ibid.*).

[19] For our purposes, it bears emphasizing that the publication ban that the Court of Appeal had ordered

dans les plaidoiries sans interdiction de publication. Il y aura donc en outre une interdiction de publication, à moins que les avocats veuillent se prononcer sur cette question?

Interdiction de publication

(d.i. (Couronne), p. 137)

[16] Comme elle l'admettra plus tard devant la Cour d'appel, la SRC assurait la couverture médiatique de l'instance, et ses journalistes auraient pu assister à n'importe laquelle des audiences, y compris celle du 28 mai.

B. *Le jugement de 2018 sur l'interdiction de publication (2018 MBCA 125, 369 C.C.C. (3d) 139 — les juges Beard, Burnett et Pfuetzner)*

[17] La Cour d'appel a conclu à une erreur judiciaire en raison de la non-communication sur la foi de documents révélés par la première motion en présentation d'éléments de preuve nouveaux, prenant acte de la concession susmentionnée de la Couronne. Ceci était suffisant pour conclure que la déclaration de culpabilité devrait être annulée. La Cour d'appel a fini par annuler la déclaration de culpabilité, ordonner la tenue d'un nouveau procès, inscrire l'arrêt de toute autre procédure et reconduire indéfiniment l'interdiction de publication (« jugement de 2018 sur l'interdiction de publication »).

[18] La cour a refusé d'admettre l'affidavit de Me Posner en tant qu'autre élément de preuve nouveau, car elle a conclu qu'il n'était pas pertinent pour trancher la seule question en litige de la réparation qu'il convenait d'accorder à M. Ostrowski. La preuve concernait plutôt [TRADUCTION] « la question de savoir si la Couronne s'était mal conduite, un enjeu pertinent pour décider s'il y avait eu erreur judiciaire » (par. 82). La juge Beard a conclu en ces termes : « Je suis d'avis que l'élément de preuve n'est pas pertinent quant aux questions à trancher et qu'il y a lieu de rejeter la motion. J'ordonnerais que l'interdiction de publication portant sur cet élément de preuve demeure en vigueur » (*ibid.*).

[19] Pour nos besoins, il convient de souligner que l'interdiction de publication que la Cour d'appel

2021 SCC 33 (CanLII)

at the hearing was, in para. 82 of the court's reasons on the merits, ordered to "remain in effect." This was done without either a motion to that end or particularized pleadings on the appropriateness of the continuing order in light of the open court principle. The Posner affidavit had been sealed pursuant to a rule of court during the proceedings on appeal (*Court of Appeal Rules*, r. 21(4)). That sealing order is not mentioned in the 2018 Publication Ban Judgment.

avait prononcée à l'audience devait, comme il est dit au par. 82 des motifs de la cour sur le fond, [TRADUCTION] « demeurer en vigueur ». Cette décision a été rendue sans qu'il y ait eu de motion en ce sens et en l'absence de plaidoiries précises sur la justesse du maintien de l'interdiction de publication à la lumière du principe de la publicité des débats judiciaires. L'affidavit de Me Posner avait été mis sous scellés en application d'une règle de procédure pendant l'instance en appel (*Règles de la Cour d'appel*, par. 21(4)). Cette ordonnance de mise sous scellés n'est pas mentionnée dans le jugement de 2018 sur l'interdiction de publication.

[20] A formal certificate of decision of this judgment was entered in January 2019, recording the orders on the appeal and the two new evidence motions. The certificate made no reference to a sealing order or a publication ban.

[20] En janvier 2019, un certificat de décision officiel de ce jugement a été inscrit, consignant les ordonnances sur l'appel et les deux motions en présentation d'éléments de preuve nouveaux. Le certificat ne fait aucune mention d'une ordonnance de mise sous scellés ou d'une interdiction de publication.

C. *The 2019 Jurisdiction Judgment (2019 MBCA 122 — Beard, Burnett and Pfuetzner JJ.A.)*

C. *Le jugement de 2019 sur la compétence (2019 MBCA 122 — les juges Beard, Burnett et Pfuetzner)*

[21] Following the disposition of the appeal on the miscarriage of justice, the CBC petitioned the Court of Appeal to obtain access to the Posner affidavit and to ask the court to set aside the publication ban referred to in the 2018 Publication Ban Judgment. The CBC's motion was brought in May 2019, following the release of reasons on the merits of Mr. Ostrowski's appeal and the filing of the formal judgment in that matter.

[21] À la suite de la décision sur l'appel concernant l'erreur judiciaire, la SRC a demandé à la Cour d'appel l'accès à l'affidavit de Me Posner et l'annulation de l'interdiction de publication mentionnée dans le jugement de 2018 sur l'interdiction de publication. La motion de la SRC a été présentée en mai 2019, après le prononcé des motifs sur le bien-fondé de l'appel de M. Ostrowski et le dépôt du jugement formel dans cette affaire.

[22] The CBC had contacted the Registrar at the Court of Appeal seeking access to the Posner affidavit. Evidence suggests the CBC received word from the Court of Appeal's media relations officer alerting it to the existence of the publication ban in the days following the release of the 2018 reasons on the merits of Mr. Ostrowski's appeal. However, it was over five months later that the CBC filed the above-mentioned motion.

[22] La SRC avait communiqué avec le greffier de la Cour d'appel pour demander accès à l'affidavit de Me Posner. Il appert de la preuve que la SRC avait été informée par l'agent des relations avec les médias de la Cour d'appel de l'existence de l'interdiction de publication dans les jours qui ont suivi le prononcé des motifs de 2018 sur le bien-fondé de l'appel de M. Ostrowski. Toutefois, c'est plus de cinq mois plus tard que la SRC a déposé la motion susmentionnée.

[23] The CBC relied on s. 2(b) of the *Charter* and alleged that the evidence did not support "any continued restriction on the right of the media and the

[23] La SRC s'est fondée sur l'al. 2b) de la *Charte* et a allégué que la preuve ne justifiait [TRADUCTION] « aucune restriction continue au droit des médias et

2021 SCC 33 (CanLII)

public to access and report upon the full record of these [p]roceedings" (A.R., at p. 75). In its motion brief, the CBC emphasized its purpose to render transparent the circumstances that led to the miscarriage of justice, arguing that it was of the utmost importance that material in the Posner affidavit concerning M.D., one of the 12 witnesses at the miscarriage of justice proceeding, be open to public scrutiny. In an affidavit filed in support of the motion, the CBC's Director of Investigative Journalism: Regions observed that there had been no formal motion filed requesting a publication ban of the material and there was no notice to the public or the media that a ban was being sought.

du public d'avoir accès au dossier intégral de cette instance et de réaliser un reportage sur celui-ci » (d.a., p. 75). Dans son mémoire relatif à la motion, la SRC a souligné son objectif de rendre transparentes les circonstances qui ont mené à l'erreur judiciaire, plaidant qu'il était de la plus haute importance que des éléments dans l'affidavit de Me Posner relatifs à M.D., un des 12 témoins à l'instance en matière d'erreur judiciaire, puissent être ouverts à l'examen du public. Dans un affidavit déposé au soutien de la motion, le directeur du journalisme d'enquête (régions) de la SRC a fait remarquer qu'aucune motion officielle n'avait été déposée pour solliciter une interdiction de publication des éléments et qu'il n'y avait eu aucun avis au public ou aux médias qu'une interdiction était demandée.

[24] M.D.'s spouse, B.B., and the executor of his estate, J.D. (collectively, "interested parties") opposed the CBC's motion on jurisdictional grounds, as did the Crown. Noting that the certificate of decision had already been entered, the interested parties and the Crown argued that the Court of Appeal had no authority to decide the motion by reason of the rule against rehearing in the *Court of Appeal Rules*.

[24] La conjointe de M.D., B.B., et l'exécuteur de sa succession, J.D. (collectivement, les « parties intéressées »), se sont opposés à la motion de la SRC pour des motifs de compétence, comme l'a fait la Couronne. Signalant que le certificat de décision avait déjà été inscrit, les parties intéressées et la Couronne ont plaidé que la Cour d'appel n'avait pas compétence pour trancher la motion en raison de la règle interdisant les nouvelles audiences, prévue dans les *Règles de la Cour d'appel*.

[25] The Court of Appeal dismissed the motion, citing a lack of jurisdiction ("2019 Jurisdiction Judgment"). It explained that the CBC was seeking a rehearing of a publication ban order made as part of the final disposition of Mr. Ostrowski's appeal. "[N]o rehearing of an appeal, or any issue dealt with on an appeal, can occur once the certificate of decision has been entered", wrote Pfuetzner J.A. for the court, relying on r. 46.2 of the *Court of Appeal Rules* and the common law doctrine of *functus officio* (para. 17 (CanLII)). The certificate had been entered well before the motion was brought. The fact that the certificate did not mention the publication ban was held not to be determinative because it was "subsidiary" to the ruling on the new evidence motion and the final disposition of the appeal. It was further barred by r. 46.2(12), which provides a motion cannot be reheard. The Court of Appeal concluded that the "proper route for a third party . . . to challenge a publication ban issued by a superior court (including

[25] La Cour d'appel a rejeté la motion, invoquant l'absence de compétence (« jugement de 2019 sur la compétence »). Elle a expliqué que la SRC sollicitait une nouvelle audience portant sur une interdiction de publication prononcée dans le cadre du jugement définitif sur l'appel de M. Ostrowski. [TRADUCTION] « [I]l ne peut y avoir nouvelle audition d'un appel, ni d'aucune question traitée en appel, dès lors que le certificat de décision a été inscrit », a écrit la juge Pfuetzner au nom de la cour, s'appuyant sur la règle 46.2 des *Règles de la Cour d'appel* et la règle de common law du *functus officio* (par. 17 (CanLII)). Le certificat avait été inscrit bien avant la présentation de la motion. Le fait que le certificat ne mentionnait pas l'interdiction de publication a été jugé non déterminant, parce que celle-ci était « accessoire » au jugement portant sur la motion en présentation d'éléments de preuve nouveaux et au jugement tranchant définitivement l'appel. La motion était en outre irrecevable du fait du par. 46.2(12), lequel prévoit

2021 SCC 33 (CanLII)

one issued by an appellate court) is to seek leave to appeal to the Supreme Court of Canada" (para. 21). It dismissed the motion on this jurisdictional basis alone.

qu'une motion ne peut faire l'objet d'une nouvelle audience. La Cour d'appel a conclu que « la marche à suivre pour un tiers [. . .] qui entend contester une interdiction de publication prononcée par une cour supérieure (y compris une interdiction prononcée par une cour d'appel) consiste à solliciter l'autorisation de se pourvoir en appel devant la Cour suprême du Canada » (par. 21). La Cour d'appel a rejeté la motion pour ce motif de compétence uniquement.

III. Issues

III. Questions en litige

[26] As is plain from the CBC's two applications seeking leave, the terms of the leave judgment and the arguments of the parties before us, this matter raises two distinct appeals. The CBC is appealing both from the 2019 Jurisdiction Judgment dismissing the motion for reconsideration, and from the 2018 Publication Ban Judgment, which made the indefinite publication ban at issue in this case.

[26] Tel qu'il ressort des deux demandes d'autorisation de la SRC, des dispositions du jugement sur autorisation et de l'argumentation présentée devant nous par les parties, la présente affaire met en jeu deux pourvois distincts. La SRC interjette appel à la fois du jugement de 2019 sur la compétence rejetant la motion en réexamen et du jugement de 2018 sur l'interdiction de publication qui a imposé l'interdiction de publication d'une durée indéterminée litigieuse en l'espèce.

[27] In these two appeals, the CBC seeks three orders from this Court. First, the CBC asks for an order setting aside the 2019 Jurisdiction Judgment. It argues the Court of Appeal erred in concluding it had no jurisdiction to hear its motion and should have addressed the issues of whether to reconsider the publication ban and of whether the public and the press have the right to access the Posner affidavit. Notably, the CBC argues that neither the rule against rehearings in the *Court of Appeal Rules* nor the doctrine of *functus officio* deprived the Court of Appeal of jurisdiction to consider the motion based in constitutional principles of court openness. It says that the publication ban could be reconsidered on the basis of a change in circumstances or because, as an affected party, it did not have notice of the making of this order.

[27] Dans les deux présents pourvois, la SRC sollicite trois ordonnances de notre Cour. En premier lieu, la SRC demande une ordonnance annulant le jugement de 2019 sur la compétence. Elle soutient que la Cour d'appel a eu tort de conclure qu'elle n'avait pas compétence pour entendre sa motion, et qu'elle aurait dû aborder les questions de savoir s'il y a lieu de réexaminer l'interdiction de publication et si le public et la presse ont le droit d'avoir accès à l'affidavit de Me Posner. Signalons que, d'après la SRC, ni la règle interdisant les nouvelles audiences, prévue dans les *Règles de la Cour d'appel*, ni la règle du *functus officio* ne privait la Cour d'appel du pouvoir d'examiner la motion eu égard aux principes constitutionnels de la publicité des débats judiciaires. Selon elle, l'interdiction de publication pourrait être réexaminée en raison d'un changement de circonstances ou parce que, à titre de partie touchée, elle n'avait pas été avisée du prononcé de cette ordonnance.

[28] The CBC also asks this Court for a second order setting aside the continuing publication ban in the 2018 Publication Ban Judgment and a third giving it access to the Posner affidavit as part of

[28] La SRC demande aussi à notre Cour une deuxième ordonnance annulant le maintien de l'interdiction de publication décrétée dans le jugement de 2018 sur l'interdiction de publication, et une

2021 SCC 33 (CanLII)

the court record. It argues the open court principle applies to material that is tendered as new evidence even if, at the end of the day, it is not admitted. In this instance, it says the publication ban fails the test for discretionary limits on this principle set forth in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. It contends further that the public is legally entitled to access the Posner affidavit because the applicable rules do not provide for continued sealing of this material. Mr. Ostrowski adopts the CBC's position and adds that the orders of the Court of Appeal preclude the proper accountability of public officials whose actions he alleges contributed to his wrongful conviction.

troisième lui donnant accès à l'affidavit de Me Posner en tant qu'élément du dossier judiciaire. Elle soutient que le principe de la publicité des débats judiciaires s'applique aux documents qui sont présentés comme éléments de preuve nouveaux même si, au bout du compte, ils n'ont pas été admis. Dans le cas présent, elle affirme que l'interdiction de publication ne satisfait pas au critère des limites discrétionnaires à ce principe établies dans les arrêts *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, et *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442. Elle prétend en outre que le public a légalement le droit d'avoir accès à l'affidavit de Me Posner parce que les règles applicables ne prévoient pas le maintien sous scellés de ce document. Monsieur Ostrowski fait sienne la thèse de la SRC et ajoute que les ordonnances de la Cour d'appel excluent une transparence adéquate de la part des titulaires de charge publique dont les gestes, allègue-t-il, ont contribué à sa condamnation injustifiée.

[29] The Crown takes the position that the Court of Appeal was right to conclude that it had no jurisdiction to consider the CBC's motion. The Crown says, however, that if the Court of Appeal had authority to consider these issues, this Court does not have jurisdiction with respect to the publication ban and, if it does, it should decline to exercise its authority. Should this Court proceed to consider the merits, the Crown's position is that the Court of Appeal's decision to impose a continuing publication ban was correct, even if it might have given more fulsome reasons. The material in the Posner affidavit is deeply personal and speaks to intimate details about M.D. that would re-traumatize the family, such that a discretionary limit on court openness was justified here. Similarly, the interested parties argue that the limits on court openness are necessary to protect the privacy of M.D.'s family and that the limit is justified given the inadmissible, irrelevant and unreliable nature of the proposed new evidence.

[29] La Couronne soutient que la Cour d'appel a eu raison de conclure qu'elle n'avait pas compétence pour examiner la motion de la SRC. Cependant, la Couronne affirme que, si la Cour d'appel avait le pouvoir d'examiner ces questions, notre Cour n'a pas compétence à l'égard de l'interdiction de publication et que, si elle a cette compétence, elle devrait refuser de l'exercer. Si notre Cour procède sur le fond, la Couronne est d'avis que la décision de la Cour d'appel d'imposer le maintien de l'interdiction de publication était fondée, et ce, même si elle aurait pu donner des motifs plus étoffés. Les éléments qui se trouvent dans l'affidavit de Me Posner sont très personnels et traitent de détails intimes concernant M.D. qui feraient vivre à la famille une nouvelle épreuve, si bien que la limite discrétionnaire à la publicité des débats judiciaires était justifiée en l'espèce. Pareillement, les parties intéressées soutiennent que les limites à la publicité des débats judiciaires sont nécessaires pour protéger la vie privée de la famille de M.D. et que la limite est justifiée compte tenu du caractère inadmissible, non pertinent et non fiable des nouveaux éléments de preuve proposés.

[30] The parties raise a broad series of questions before this Court bearing on jurisdiction over and the appropriateness of a publication ban or sealing

[30] Les parties soulèvent devant notre Cour un vaste éventail de questions qui portent sur la compétence à l'égard d'une interdiction de publication ou

2021 SCC 33 (CanLII)

order in the circumstances. It is sufficient to answer the following questions to dispose of this matter:

1. Did the Court of Appeal err in concluding it had no jurisdiction to consider the CBC's motion to reconsider the publication ban and gain access to the Posner affidavit?

2. Should the matter be remanded to the Court of Appeal to hear the merits of that motion?

[31] For the reasons that follow I am respectfully of the view, in the first appeal from the 2019 Jurisdiction Judgment, that the Court of Appeal did err on the issue of jurisdiction and that as a result the matter should be remanded to that court. This ends the analysis. The second appeal from the 2018 Publication Ban Judgment would best not proceed until the Court of Appeal decides the CBC's motion.

IV. Analysis

A. *Jurisdiction to Make, Vary and Set Aside Orders Concerning Court Openness*

(1) Supervisory Jurisdiction Over the Court Record Survives Entering a Judgment on the Merits

[32] In concluding that it lacked jurisdiction to vary or set aside the relevant orders concerning court openness, the Court of Appeal relied, in part, on the doctrine of *functus officio*. The term *functus officio* — often rendered as "having performed his or her office" — has traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision (A. S. P. Wong, "Doctrine of *Functus Officio*: The Changing Face of Finality's Old Guard" (2020), 98 *Can. Bar Rev.* 543, at pp. 546-47; see A. Mayrand, *Dictionnaire*

d'une ordonnance de mise sous scellés de même que sur l'opportunité de ces mesures dans les circonstances. Il suffit de répondre aux questions suivantes pour trancher la présente affaire :

1. La Cour d'appel a-t-elle eu tort de conclure qu'elle n'avait pas compétence pour examiner la motion de la SRC pour le réexamen de l'interdiction de publication et pour avoir accès à l'affidavit de Me Posner?

2. L'affaire devrait-elle être renvoyée à la Cour d'appel pour qu'elle se prononce sur le bien-fondé de cette motion?

[31] Pour les motifs qui suivent, je suis respectueusement d'avis, à l'égard du premier appel formé contre le jugement de 2019 sur la compétence, que la Cour d'appel a fait erreur au sujet de la compétence et qu'en conséquence, l'affaire devrait être renvoyée à cette cour. Cela met un terme à l'analyse. Il vaut mieux que le second appel du jugement de 2018 sur l'interdiction de publication n'aille pas de l'avant jusqu'à ce que la Cour d'appel tranche la motion de la SRC.

IV. Analyse

A. *Compétence pour rendre, modifier ou annuler des ordonnances portant sur la publicité des débats judiciaires*

(1) Le pouvoir de surveillance du dossier judiciaire subsiste après l'inscription du jugement sur le fond

[32] En concluant qu'elle n'avait pas compétence pour modifier ou annuler les ordonnances en cause concernant la publicité des débats judiciaires, la Cour d'appel s'est appuyée, en partie, sur la règle du *functus officio*. Dans son acception traditionnelle, le terme *functus officio* — souvent rendu par l'expression [TRADUCTION] « ayant rempli sa fonction » — signifie que lorsqu'un juge a tranché une question, il s'est acquitté de sa fonction et n'a plus la faculté de revenir sur sa décision pour la corriger (A. S. P. Wong, « Doctrine of *Functus Officio* : The Changing Face of Finality's Old Guard » (2020), 98 *R. du B.*

2021 SCC 33 (CanLII)

de maximes et locutions latines utilisées en droit (4th ed. 2007), at p. 193, who also uses the term *functa officio*).

[33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860; *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 77-79). A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered (*R. v. Adams*, [1995] 4 S.C.R. 707, at para. 29; *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75, at paras. 33-34). After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits (*Chandler*, at p. 861, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 (C.A.), at pp. 214-15, citing *The Queen v. Jacobs*, [1971] S.C.R. 92; see also *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 54).

[34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (*Chandler*, at p. 861; *H. (E.)*, at p. 214). As Doherty J.A. wrote in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court (*Doucet-Boudreau*, at para. 79; see also *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103, at paras. 11-12). The appeal

can. 543, p. 546-547; voir A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4e éd. 2007), p. 193, qui emploie également le terme *functa officio*).

[33] Suivant son acception actuelle, la règle du *functus officio* indique que la décision définitive d'un tribunal qui est susceptible d'appel ne peut pas, en règle générale, être examinée de nouveau par le tribunal qui a rendu cette décision (voir *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848, p. 860; *Reekie c. Messervey*, [1990] 1 R.C.S. 219, p. 222-223; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 77-79). Un tribunal perd sa compétence, auquel cas on dit qu'il est *functus officio*, une fois le jugement officiel rendu (*R. c. Adams*, [1995] 4 R.C.S. 707, par. 29; *R. c. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75, par. 33-34). À partir de ce moment, il est entendu que le tribunal ne peut modifier le jugement que dans des circonstances très limitées, par exemple s'il existe une assise législative pour ce faire, s'il faut corriger une erreur dans l'expression de son intention manifeste ou lorsque l'affaire n'a pas été entendue sur le fond (*Chandler*, p. 861, citant *Paper Machinery Ltd. c. J.O. Ross Engineering Corp.*, [1934] R.C.S. 186; *R. c. H. (E.)* (1997), 33 O.R. (3d) 202 (C.A.), p. 214-215, citant *The Queen c. Jacobs*, [1971] R.C.S. 92; voir également *R. c. Burke*, 2002 CSC 55, [2002] 2 R.C.S. 857, par. 54).

[34] Cette règle favorise la reconnaissance du caractère définitif des procédures et, en stabilisant les jugements susceptibles de révision, une procédure d'appel ordonnée (*Chandler*, p. 861; *H. (E.)*, p. 214). Comme l'a écrit le juge Doherty dans *Tsaoussis (Litigation Guardian of) c. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), pour les parties à un litige, le caractère définitif répond à un besoin à la fois économique et psychologique, en plus de satisfaire une nécessité pratique pour le système de justice dans son ensemble (p. 264-265). Plus précisément, si les juridictions inférieures pouvaient réexaminer continuellement leurs propres décisions, les justiciables seraient privés d'une assise fiable à partir de laquelle interjeter appel à une juridiction supérieure

2021 SCC 33 (CanLII)

record would be written on "shifting sand", ultimately inhibiting effective review (Wong, at p. 548).

(*Doucet-Boudreau*, par. 79; voir aussi *Ayangma c. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103, par. 11-12). Le dossier d'appel serait rédigé sur du [TRADUCTION] « sable mouvant », ce qui finirait par faire obstacle à un contrôle efficace (Wong, p. 548).

[35] That said, *functus officio* is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of *functus officio* as narrow in scope (*Reekie*, at pp. 222-23; see also Wong, at pp. 555-56). So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality.

[35] Cela dit, *functus officio* n'est qu'un de plusieurs principes de droit conçus pour favoriser le caractère définitif d'une décision. En effet, vu qu'il est intrinsèquement lié à l'inscription du jugement formel et que ses exceptions sont relativement restreintes, notre Cour a décrit la règle du *functus officio* comme ayant une portée étroite (*Reekie*, p. 222-223; voir aussi Wong, p. 555-556). Donc, bien que notre jurisprudence reconnaisse que cette norme importante serve cet objet nécessaire, aucune règle n'a le monopole du caractère définitif.

[36] It is useful to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. As I will endeavour to explain, even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter (see, e.g., *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330, at paras. 185-86).

[36] Il est utile de faire la distinction entre le pouvoir de connaître du fond, perdu par application de la règle du *functus officio*, et la compétence qui existe pour superviser le dossier judiciaire. Comme je m'efforcerai de l'expliquer plus loin, même lorsqu'un tribunal a perdu le pouvoir de connaître du fond d'une affaire pour avoir inscrit son jugement formel, il demeure compétent pour contrôler son propre dossier à l'égard d'une instance généralement considérée comme étant une affaire accessoire, mais indépendante (voir, p. ex., *GEA Refrigeration Canada Inc. c. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330, par. 185-186).

[37] Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189; see also *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 12). As Goudge J.A. observed in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.), "it is important to remember that the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts" (para. 13). Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive

[37] Le pouvoir de surveillance à l'égard du dossier judiciaire est reconnu depuis longtemps comme une caractéristique de la compétence de tous les tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 189; voir aussi *Société Radio-Canada c. La Reine*, 2011 CSC 3, [2011] 1 R.C.S. 65, par. 12). Comme l'a fait remarquer le juge Goudge dans *CTV Television Inc. c. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.), [TRADUCTION] « il est important de se rappeler que la compétence du tribunal à l'égard de ses propres dossiers est ancrée dans la politique publique essentielle favorisant l'accès aux rouages des tribunaux » (par. 13). En particulier, les tribunaux doivent assurer le respect

2021 SCC 33 (CanLII)

to "competing important public interests" that may be put at risk by that openness (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 26 and 28).

du solide principe, protégé par la Constitution, de la publicité des débats judiciaires, tout en demeurant sensibles aux « importants intérêts publics divergents » que cette publicité des débats peut mettre en péril (*Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 26 et 28).

[38] The need to attend to the appropriate balance between these fundamental public interests does not disappear merely because the order on the merits is final and could have been appealed. Court records may be accessed even when proceedings have come to an end. Indeed, important decisions about the openness of the court record may need to be taken after the proceeding on the merits is over (see, e.g., *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190). If jurisdiction over court openness ceased when the formal order on the merits were entered, courts would lose control over their own record without good reason. Consider, for example, a case where no order limiting court openness is made before the formal judgment on the merits is entered, and a need to protect an important public interest is later discovered. In my respectful view, to conclude that this power is wholly lost once the formal order on the merits is entered would risk undermining the proper administration of justice in service of a reading of the doctrine of *functus officio* unconnected with its purpose.

[38] Le besoin d'établir un juste équilibre entre ces intérêts publics fondamentaux ne disparaît pas du seul fait que l'ordonnance sur le fond est définitive et aurait pu être portée en appel. On peut avoir accès aux dossiers judiciaires même lorsque l'instance est arrivée à terme. De fait, d'importantes décisions au sujet de la publicité du dossier judiciaire peuvent devoir être prises après la fin de l'instance sur le fond (voir, p. ex., *R. c. Wagner*, 2017 ONSC 6603; *R. c. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190). Si la compétence à l'égard de la publicité des débats judiciaires cessait lorsque l'ordonnance officielle sur le fond était inscrite, les tribunaux perdraient la maîtrise de leur propre dossier sans raison valable. Prenez par exemple le cas où aucune ordonnance limitant la publicité des débats judiciaires n'est rendue avant l'inscription du jugement formel sur le fond et où l'on constate par la suite qu'il faut protéger un intérêt public important. À mon humble avis, conclure que ce pouvoir est entièrement perdu une fois l'ordonnance formelle sur le fond inscrite risque de mettre à mal la bonne administration de la justice au service d'une interprétation de la règle du *functus officio* qui est étrangère à son objectif.

[39] Recognizing that this jurisdiction survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments associated with the doctrine of *functus officio*. Relief granted pursuant to this power leaves the substance of the underlying proceeding and the reasons that support it undisturbed. While some interlocutory motions, such as motions relating to the admissibility of evidence, may have an impact on the final decision on the merits, deciding public access to the court record has no bearing on the underlying proceeding or its appeal. The doctrine of *functus officio* reflects the transfer of the decision-making authority in respect of final judgments from the court of first instance to the appellate court (*Chandler*, at p. 860, citing *In re St. Nazaire Co.* (1879), 12 Ch.

[39] Reconnaître que cette compétence subsiste après la fin de l'instance sous-jacente n'est pas incompatible avec les objectifs du caractère définitif des procédures et de la stabilité des jugements liés à la règle du *functus officio*. La réparation accordée en vertu de ce pouvoir laisse intacts le fond de l'instance sous-jacente et les motifs qui l'appuient. Bien que certaines requêtes interlocutoires, par exemple les requêtes portant sur l'admissibilité d'éléments de preuve, puissent avoir un impact sur la décision définitive au fond, la décision concernant l'accès au dossier judiciaire n'a aucune incidence sur l'instance sous-jacente ou sur l'appel dont elle peut faire l'objet. La règle du *functus officio* témoigne du transfert du pouvoir décisionnel à l'égard des jugements définitifs de la cour de première instance à la cour

2021 SCC 33 (CanLII)

D. 88). It was never intended to restrict the ability of those lower courts to control their own files in respect of these decisions.

d'appel (*Chandler*, p. 860, citant *In re St. Nazaire Co.* (1879), 12 Ch. D. 88). Cette règle n'a jamais eu pour but de restreindre la capacité de ces tribunaux d'instance inférieure d'être maîtres de leurs propres dossiers en ce qui concerne ces décisions.

[40] To be clear, this does not mean that *functus officio* never applies to publication bans or sealing orders. The point is simply that a court is not precluded from deciding a motion concerning court openness merely because it is *functus officio* with respect to the merits of the underlying proceeding.

[40] Soyons clairs, cela ne veut pas dire que la règle du *functus officio* ne s'applique jamais aux interdictions de publication ou aux ordonnances de mise sous scellés. Je tiens simplement à préciser que rien n'empêche un tribunal de trancher une requête qui concerne la publicité des débats judiciaires simplement parce qu'il est *functus officio* à l'égard du fond de l'instance sous-jacente.

(2) Decisions Regarding Court Openness May Be Reconsidered in Limited Circumstances

(2) Les décisions portant sur la publicité des débats judiciaires peuvent être réexaminées dans des circonstances limitées

[41] That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. Where a decision concerning court openness is formalized in an order, *functus officio* may apply, regardless of whether or not it is ancillary to some other proceeding. Even where, as here, a decision concerning court openness is not formalized in an order, finality remains an important value in the making of publication bans and sealing orders. Indeed, in this case the CBC has in fact appealed an ancillary publication ban that has never been formalized in an order. The need to provide litigants with a stable basis from which to launch an appeal — a central rationale underpinning *functus officio* (see *Doucet-Boudreau*, at para. 79) — can apply, even where *functus officio* technically does not.

[41] Le fait que les tribunaux conservent un pouvoir de surveillance à l'égard de leurs dossiers judiciaires ne veut pas dire que les décisions portant sur la publicité des débats judiciaires, une fois prises, sont susceptibles d'être réexaminées n'importe quand ou pour n'importe quelle raison. Lorsqu'une décision sur la publicité des débats judiciaires est officialisée sous la forme d'une ordonnance, la règle du *functus officio* peut opérer, peu importe si la décision est accessoire ou non à une autre procédure. Même dans les cas où, comme en l'espèce, une décision en matière de publicité des débats judiciaires n'est pas officialisée sous la forme d'une ordonnance, le caractère définitif d'une décision reste une valeur importante du prononcé d'interdictions de publication et d'ordonnances de mise sous scellés. D'ailleurs, en l'espèce, la SRC a effectivement interjeté appel d'une interdiction de publication accessoire qui n'a jamais été consacrée dans une ordonnance. Le besoin de fournir aux parties une base stable à partir de laquelle elles peuvent former un appel — la raison d'être de la règle du *functus officio* (voir *Doucet-Boudreau*, par. 79) — peut se présenter, même lorsque ce n'est, techniquement parlant, pas le cas de la règle du *functus officio*.

[42] Therefore, regardless of whether a court is deprived of jurisdiction by the doctrine of *functus officio*, the importance of finality will mean courts

[42] En conséquence, peu importe qu'un tribunal soit privé ou non de compétence par la règle du *functus officio*, l'importance du règlement définitif

2021 SCC 33 (CanLII)

will be rightly reluctant to reconsider questions of court openness. A publication ban or sealing order is, however, susceptible to reconsideration by the issuing court, albeit on narrow grounds. This will include cases where an affected party not given notice proposes to make novel submissions that could affect the result, or on the basis of a material change in circumstances. This applies to both publication bans and sealing orders that are formalized in an order and those that are not.

signifie que les tribunaux hésiteront, à juste titre, à réexaminer des questions relatives à la publicité des débats judiciaires. Une interdiction de publication ou une ordonnance de mise sous scellés est toutefois susceptible d'être réexaminée par le tribunal qui l'a prononcée, quoique pour des motifs restreints. Ce sera notamment le cas lorsqu'une partie touchée et non avisée propose de présenter de nouveaux arguments qui peuvent influer sur le résultat, ou en raison d'un changement important de circonstances. Cela vaut tant pour les interdictions de publication et les ordonnances de mise sous scellés consacrées dans une ordonnance que pour celles qui ne le sont pas.

[43] Central to the CBC's claim that the Court of Appeal had jurisdiction to vary the 2018 publication ban is that it was made without proper notice to the press as an affected party.

[43] Au cœur de la thèse de la SRC selon laquelle la Cour d'appel avait compétence pour modifier l'interdiction de publication de 2018 est que cette mesure avait été prise sans que la presse, en tant que partie touchée, en ait été dûment avisée.

[44] One basis for revisiting a publication ban or sealing order may indeed arise when an affected person who was not given notice of the making of the order later seeks to vary it or have it set aside. Natural justice is understood to require that whenever a person is affected by a decision, they generally have the right to appropriate notice of that decision and an opportunity to be heard (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at pp. 233-34). When an order is made without the submissions of an affected person because that person was not given proper notice, such as an *ex parte* order, the law recognizes that the court that made that order generally has authority to review it on motion of that affected person (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 607, citing *Dickie v. Woodworth* (1883), 8 S.C.R. 192). This ensures that affected persons are not unfairly subjected to orders made without the benefit of their submissions (see, generally, F.-O. Barbeau, "Rétractation du jugement", in *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2nd ed. (loose-leaf)), by P.-C. Lafond, ed., fasc. 31, at No. 39). This principle also finds expression in various rules of court procedure (see, e.g., *Court of Queen's Bench Rules*, Man. Reg. 553/88R, r. 37.11 ("*Queen's Bench Rules*")). Similar principles apply to orders concerning court openness: I note for example that courts in Ontario

[44] Il peut effectivement y avoir lieu de réexaminer une interdiction de publication ou une ordonnance de mise sous scellés lorsque la personne touchée qui n'a pas été avisée du prononcé de l'ordonnance cherche ultérieurement à la faire modifier ou annuler. La justice naturelle veut que lorsqu'une personne est touchée par une décision, celle-ci ait généralement le droit d'en être dûment avisée et d'avoir l'occasion d'être entendue (*Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219, p. 233-234). Lorsqu'une ordonnance est rendue sans qu'une personne touchée n'ait présenté d'observations parce qu'elle n'en a pas été dûment avisée, comme dans le cas d'une ordonnance *ex parte*, le droit reconnaît que le tribunal qui a rendu cette ordonnance a généralement le pouvoir de l'examiner sur requête de la personne touchée (*Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 607, citant *Dickie c. Woodworth* (1883), 8 R.C.S. 192). Ceci fait en sorte que les personnes touchées ne sont pas injustement soumises à des ordonnances rendues sans que l'on ait pris connaissance de leurs arguments (voir, en général, F.-O. Barbeau, « Rétractation du jugement », dans *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2e éd. (feuilles mobiles)), par P.-C. Lafond, dir., fasc. 31, nº 39). Ce principe trouve en outre son expression dans diverses règles de procédure (voir, p. ex., *Règles de la Cour du Banc de la*

2021 SCC 33 (CanLII)

have relied on the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to decide challenges to sealing orders brought by media representatives who were not given proper notice of the hearing at which the order was made (*Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721, at para. 43, per Juriansz J.A., dissenting in part but not on this point).

Reine, Règl. du Man. 553/88R, r. 37.11 (« *Règles du Banc de la Reine* »)). Des principes analogues s'appliquent aux ordonnances portant sur la publicité des débats judiciaires : je note par exemple que les tribunaux de l'Ontario se sont appuyés sur les *Règles de procédure civile*, R.R.O. 1990, règl. 194, pour trancher des contestations d'ordonnances de mise sous scellés présentées par des représentants des médias qui n'avaient pas été dûment avisés de l'audience à laquelle l'ordonnance a été rendue (*Hollinger Inc. c. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721, par. 43, le juge Juriansz, dissident en partie, mais non sur ce point).

[45] To challenge an existing order concerning court openness, the moving party must qualify as an affected person to whom standing should be granted. Further, where so required, that party must have acted with due dispatch in seeking to set aside the impugned order. Both of these points merit brief comment in view of arguments made here.

[45] Pour contester une ordonnance existante en matière de publicité des débats judiciaires, la partie requérante doit être une personne touchée à qui il convient de reconnaître la qualité pour agir. De plus, s'il y a lieu, la partie doit avoir agi avec célérité dans sa demande d'annulation de l'ordonnance contestée. Compte tenu des arguments présentés en l'espèce, de brèves remarques s'imposent en ce qui concerne ces deux points.

[46] First, it is important to recognize that applying this principle to publication bans or sealing orders requires some consideration of standing, because of the broad effects of such an order. Insofar as a publication ban or a sealing order impinges on the open court principle, such orders can, for example, affect the public's right to freedom of expression and freedom of the press under s. 2(b) of the *Charter* (*Vancouver Sun*, at para. 26). Court openness is understood as a public good, not an interest that belongs to a particular individual or entity. Further, the risks to competing important interests which justify limits on court openness must also reflect public values, even if they might be aimed at protecting particular persons (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 55). Yet, in the interest of the orderly administration of justice, it cannot be that every member of the public or media entity has standing to bring an individual motion to set publication bans aside in the absence of such notice. This would make the number of parties entitled to reconsideration potentially endless. Instead, as this Court held in *Dagenais*, with regard to publication bans in criminal matters,

[46] En premier lieu, il importe de reconnaître que l'application du principe susmentionné aux interdictions de publication ou aux ordonnances de mise sous scellés nécessite la prise en compte de la qualité pour agir, en raison des répercussions générales d'une telle ordonnance. Dans la mesure où une interdiction de publication ou une ordonnance de mise sous scellés fait entorse au principe de la publicité des débats judiciaires, les ordonnances de ce genre peuvent, par exemple, porter atteinte au droit du public à la liberté d'expression et à la liberté de la presse que confère l'al. 2b) de la *Charte* (*Vancouver Sun*, par. 26). La publicité des débats judiciaires se conçoit comme un bien public, et non un intérêt qui appartient à une personne ou à une entité en particulier. En outre, les risques pour les intérêts importants et divergents qui justifient des limites à la publicité des débats judiciaires doivent eux aussi refléter des valeurs publiques, même s'ils visent à protéger certaines personnes (*Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522, par. 55). En revanche, dans l'intérêt d'une administration ordonnée de la justice, on ne peut pas donner à chaque membre du

2021 SCC 33 (CanLII)

standing in these cases should be thought of as a matter of the court's discretion (pp. 869 and 872; see also *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, at para. 12, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721).

public ou entité médiatique qualité pour présenter une motion visant à faire annuler des interdictions de publication en l'absence d'un tel préavis. Le nombre de parties ayant droit à un réexamen risquerait d'être infini. Ainsi que notre Cour l'a mentionné dans l'arrêt *Dagenais*, pour ce qui est des interdictions de publication dans les affaires criminelles, la qualité pour agir dans ces affaires devrait plutôt relever du pouvoir discrétionnaire du tribunal (p. 869 et 872; voir aussi *R. c. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, par. 12, conf. par *Toronto Star Newspaper Ltd. c. Canada*, 2010 CSC 21, [2010] 1 R.C.S. 721).

[47] In respect of standing, an order limiting court openness engages the constitutionally-protected right of a free press to report on judicial proceedings (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 2; *Vancouver Sun*, at para. 26). When that order has been made in the absence of notice to the media, a representative of the media should generally have standing to challenge an order that threatens the open court principle where they are able to show that they will make submissions that were not considered in its making that could affect the result (see, generally, *Hollinger*, at paras. 36-39). In practice, and properly in my view, standing is seldom refused to the media to participate in open court proceedings where it is sought (J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 8.1.10). Equally, a person directly affected by an order concerning court openness because it might harm their individual interests should, as a matter of course, have standing to challenge that order (see, generally, *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769 (C.A.), at para. 27). Courts should nevertheless retain some residual discretion to deny standing where hearing the motion would not be in the interests of justice, as in the case, for example, that it would unduly harm the parties or merely duplicate argument that is already before the court (*Dagenais*, at p. 869; *White*, at para. 12; see, e.g., *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 184 N.S.R. (2d) 159 (S.C.), at paras. 18-21). The requirement of standing, therefore, by limiting who may challenge a publication ban or sealing order, serves the goals

[47] Au chapitre de la qualité pour agir, une ordonnance limitant la publicité des débats judiciaires fait entrer en jeu le droit constitutionnel de la liberté de la presse de relater des procédures judiciaires (*Société Radio-Canada c. Canada (Procureur général)*, 2011 CSC 2, [2011] 1 R.C.S. 19, par. 2; *Vancouver Sun*, par. 26). Lorsque cette ordonnance a été rendue sans avis aux médias, un représentant des médias devrait généralement avoir qualité pour contester une ordonnance qui menace le principe de la publicité des débats judiciaires s'il est à même de démontrer qu'il présentera des observations qui n'ont pas été prises en compte au moment du prononcé de l'ordonnance et qui peuvent influer sur le résultat (voir, en général, *Hollinger*, par. 36-39). En pratique, et à juste titre selon moi, la qualité pour participer aux instances portant sur la publicité des débats judiciaires est rarement refusée aux médias quand ils la demandent (J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 8.1.10). De même, une personne directement touchée par une ordonnance portant sur la publicité des débats judiciaires parce que l'ordonnance est susceptible de porter atteinte à ses droits individuels devrait, dans le cours normal des choses, avoir qualité pour contester cette ordonnance (voir, en général, *Ivandaeva Total Image Salon Inc. c. Hlembizky* (2003), 63 O.R. (3d) 769 (C.A.), par. 27). Les tribunaux devraient néanmoins conserver un certain pouvoir discrétionnaire de refuser la qualité pour agir lorsque l'audition de la requête ne serait pas dans l'intérêt de la justice, comme dans le cas, par exemple, où la requête serait indûment préjudiciable aux parties, ou ne ferait que répéter

2021 SCC 33 (CanLII)

of finality and mirrors the discretionary approach to standing that this Court has previously endorsed.

des arguments dont le tribunal a déjà connaissance (*Dagenais*, p. 869; *White*, par. 12; voir, p. ex., *Canadian Transportation Accident Investigation and Safety Board c. Canadian Press* (2000), 184 N.S.R. (2d) 159 (C.S.), par. 18-21). Par conséquent, l'exigence de faire valoir la qualité pour agir, en limitant ceux et celles qui peuvent contester une interdiction de publication ou une ordonnance de mise sous scellés, favorise la réalisation des objectifs du caractère définitif d'une décision et reflète la démarche discrétionnaire que notre Cour a déjà adoptée à l'égard de la qualité pour agir.

[48] Second, as to delay, courts may decline to hear a motion to vary or set aside an order dealing with court openness made without notice if the moving party was unreasonably slow in bringing that motion after becoming aware of the order, such that it is no longer in the interests of justice to hear it. Once the moving party has become aware the order exists, they are then expected to take prompt action to challenge the order or otherwise acquiesce to its existence (see, e.g., *9095-7267 Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878 (Que. C.A.), at para. 46; see also *Rules of Civil Procedure*, r. 37.14 (Ontario); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 349 (Quebec); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.15; *Queen's Bench Rules*, r. 37.11 (Manitoba)). Strathy J., as he then was, explained that a timeliness requirement reflects the common sense presumption that "a party who sits on his or her rights in the face of a court order has accepted the legitimacy of the order" (*Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751 (Ont. S.C.), at para. 43).

[48] En deuxième lieu, quant au délai, un tribunal peut refuser d'entendre une motion en modification ou en annulation d'une ordonnance portant sur la publicité des débats judiciaires rendue sans préavis si la partie requérante a déraisonnablement tardé à présenter cette motion après avoir eu connaissance de l'ordonnance, si bien qu'il n'est plus dans l'intérêt de la justice de l'entendre. Dès que la partie requérante apprend que l'ordonnance existe, on s'attend alors à ce qu'elle agisse avec célérité pour contester l'ordonnance ou acquiescer autrement à son existence (voir, p. ex., *9095-7267 Québec inc. c. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878 (C.A. Qc), par. 46; voir aussi *Règles de procédure civile*, r. 37.14 (Ontario); *Code de procédure civile*, RLRQ, c. C-25.01, art. 349 (Québec); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.15; *Règles de la Cour du Banc de la Reine*, r. 37.11 (Manitoba)). Le juge Strathy, maintenant juge en chef de l'Ontario, a expliqué que l'obligation d'agir en temps opportun reflète la présomption sensée selon laquelle [TRADUCTION] « la partie qui ne fait pas valoir ses droits à l'encontre d'une ordonnance judiciaire se trouve à accepter la légitimité de l'ordonnance » (*Attorney General of Ontario c. 15 Johnswood Crescent*, 2009 CanLII 50751 (C.S. Ont.), par. 43).

[49] In some instances, the legislature will provide indications of the appropriate period of delay. In the absence of legislative direction, courts must be guided by the purpose of the rule and the circumstances of each case (see, generally, *Johnswood*, at para. 45). As in other cases where courts are asked not to hear proceedings by reason of an unacceptable delay, the task is not a mechanical calculation,

[49] Le législateur donne parfois des indications du délai convenable. Faute d'une directive législative, les tribunaux doivent être guidés par l'objet de la règle et les circonstances de chaque cas (voir, de façon générale, *Johnswood*, par. 45). Comme dans les autres cas où l'on demande aux tribunaux de ne pas instruire des instances à cause d'un délai inacceptable, leur tâche consiste non pas à effectuer un calcul

2021 SCC 33 (CanLII)

but rather a contextual balancing of finality and timely justice against the importance of the matter being heard on its merits (*Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, at para. 34; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 19). By way of example, under the *Rules of Civil Procedure*, a period of three months to bring a motion to set aside an order dismissing the action for delay was held to be reasonable in the context of one dispute (*Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306, at para. 36), but a largely unexplained ten-month delay meant in another case that the applicant had not moved forthwith (*1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361, at paras. 102 and 121 (CanLII)). In one Manitoba case, a delay of five months in moving to set aside a judgment was found not to be unreasonable in the circumstances (*585430 Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191, at para. 56). I stress, however, that this determination is inherently tied to the facts of each particular case and the nature of the issue raised. Especially where this delay has caused meaningful prejudice to the responding parties, courts may conclude it is not in the interests of justice to hear a motion. This requirement safeguards finality by circumscribing reconsideration in the temporal dimension.

[50] On the basis of these principles, then, and in the absence of explicit legislation to the contrary, a court may vary or set aside an order concerning court openness it has made on timely motion by an affected person who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose.

[51] To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the

mécanique, mais plutôt à mettre en balance dans le contexte le caractère définitif d'une décision et la justice rendue en temps utile par rapport à l'importance que l'affaire soit instruite sur le fond (*Marché D'Alimentation Denis Thériault Ltée c. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, par. 34; *1196158 Ontario Inc. c. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, par. 19). À titre d'exemple, en vertu des *Règles de procédure civile*, un délai de trois mois pour présenter une motion en vue de faire annuler une ordonnance rejetant l'action pour cause de retard a été jugée raisonnable dans le contexte d'un différend (*Toronto Standard Condominium Corporation No. 2058 c. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306, par. 36), mais un délai de dix mois en grande partie inexpliqué a été vu dans une autre affaire comme signifiant que la demanderesse n'avait pas procédé sans délai (*1202600 Ontario Inc. c. Jacob*, 2012 ONSC 361, par. 102 et 121 (CanLII)). Dans une affaire manitobaine, un délai de cinq mois pour solliciter l'annulation d'un jugement a été jugé non déraisonnable dans les circonstances (*585430 Alberta Ltd. c. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191, par. 56). Je souligne toutefois que cette détermination est intrinsèquement fonction des faits de chaque affaire et de la nature de la question soulevée. Surtout si ce retard a causé un préjudice réel aux parties intimées, les tribunaux peuvent conclure qu'il n'est pas dans l'intérêt de la justice d'entendre une motion. Cette exigence préserve le caractère définitif d'une décision en circonscrivant le réexamen dans la dimension temporelle.

[50] Sur le fondement de ces principes, donc, et faute de disposition contraire explicite, un tribunal peut modifier ou annuler une ordonnance concernant la publicité des débats judiciaires qu'il a rendue sur motion déposée en temps opportun par une personne touchée qui n'a pas été avisée du prononcé de cette ordonnance et à qui il y a lieu d'accorder la qualité pour agir à cette fin.

[51] Soyons clairs, il est possible d'imposer des limites à la publicité des débats judiciaires, par exemple une interdiction de publication, sans avis préalable aux médias. Vu l'importance du principe

2021 SCC 33 (CanLII)

public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

[52] Indeed this Court has explicitly recognized the discretion of courts to decide when notice to the media is required in the case of search warrants and production orders. In *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, this Court held that granting a search warrant in the absence of the affected media organization was not a jurisdictional error; the issuing judge had discretion regarding the timing and modality of notice to the media (paras. 83-84). Similarly, in *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374, Moldaver J. considered a media organization's argument that notice of an application for a production order affecting it was required (para. 59). He rejected that submission because the *Criminal Code* explicitly provided for *ex parte* proceedings and the negative impact on the media was mitigated by the statutory right to apply to have the order varied or revoked at a later stage (paras. 61-62). It follows from these authorities that giving notice is not a pre-requisite to the issuance of a valid order in these circumstances. At the same time, this jurisprudence does not exclude the possibility of providing notice after an order has been granted or entertaining a motion to vary or set aside

de la publicité des débats judiciaires et le rôle qu'ont les médias d'informer le public au sujet des activités des tribunaux, il sera généralement opportun de donner avis aux médias, en plus des personnes qui seraient directement touchées par l'interdiction de publication ou l'ordonnance de mise sous scellés, lorsqu'on cherche à limiter la publicité des débats judiciaires (voir *Jane Doe c. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, par. 24; *M. (A.) c. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (C. div.), par. 6). Toutefois, la question de savoir si et quand cet avis doit être donné relève en dernier ressort du pouvoir discrétionnaire du tribunal compétent (*Dagenais*, p. 869; *M. (A.)*, par. 5). Je suis d'accord avec les observations des procureurs généraux de la Colombie-Britannique et de l'Ontario selon lesquelles les circonstances dans lesquelles les ordonnances limitant la publicité des débats judiciaires sont prononcées varient et que les tribunaux doivent avoir le pouvoir discrétionnaire nécessaire pour veiller à ce que justice soit rendue dans chaque cas.

[52] En effet, notre Cour a explicitement reconnu le pouvoir discrétionnaire des tribunaux de décider quand il faut donner un avis aux médias dans le cas des mandats de perquisition et des ordonnances de communication. Dans l'arrêt *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, notre Cour a conclu que délivrer un mandat de perquisition en l'absence du média touché n'était pas une erreur de compétence; le juge qui a décerné le mandat avait le pouvoir discrétionnaire de décider du moment où il convenait de donner l'avis aux médias ainsi que de ses modalités (par. 83-84). De même, dans *R. c. Média Vice Canada Inc.*, 2018 CSC 53, [2018] 3 R.C.S. 374, le juge Moldaver a étudié l'argument d'un média suivant lequel il devait être informé d'une demande d'ordonnance de communication qui le concernait (par. 59). Mon collègue a rejeté cet argument parce que le *Code criminel* prévoyait expressément la tenue d'instances *ex parte* et que les répercussions négatives sur le média étaient atténuées par le droit légal de demander la modification ou la révocation de l'ordonnance à un stade ultérieur (par. 61-62). Il découle de ces sources que la signification d'un avis n'est pas une condition préalable

2021 SCC 33 (CanLII)

an order by an affected person who was not given prior notice.

au prononcé d'une ordonnance valide dans ces circonstances. En revanche, cette jurisprudence n'exclut pas la possibilité de donner avis après qu'une ordonnance eut été rendue, ou d'entendre une motion présentée par une personne touchée en vue de faire modifier ou annuler une ordonnance dont elle n'a pas été avisée préalablement.

[53] I also agree with the CBC that courts may exercise discretion to vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed in accordance with the principle set out by this Court in *Adams*. As Sopinka J. observed in that case, "[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed" (para. 30). This rule applies to orders involving court openness (see, e.g., *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257, at paras. 15-22; *Morin v. R.* (1997), 32 O.R. (3d) 265 (C.A.), at pp. 272-73).

[53] Je suis également d'accord avec la SRC pour dire que les tribunaux peuvent exercer le pouvoir discrétionnaire de modifier ou d'annuler une interdiction de publication ou une ordonnance de mise sous scellés lorsqu'il y a eu changement important des circonstances relatives au prononcé de l'ordonnance, conformément au principe énoncé par notre Cour dans l'arrêt *Adams*. Comme l'a fait remarquer le juge Sopinka dans cet arrêt, « [e]n règle générale, toute ordonnance relative au déroulement d'un procès peut être modifiée ou annulée s'il y a eu changement important des circonstances qui existaient au moment où elle a été rendue » (par. 30). Cette règle s'applique aux ordonnances portant sur la publicité des débats judiciaires (voir, p. ex., *British Columbia c. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257, par. 15-22; *Morin c. R.* (1997), 32 O.R. (3d) 265 (C.A.), p. 272-273).

[54] I hasten to say, however, that I do not read *Adams* to bear the meaning the CBC attributes to it in their factum. The CBC says the case was about "whether the doctrine of *functus officio* prevented a trial judge from rescinding a publication ban it had previously issued" and suggests that it is a case about how the doctrine of *functus officio* applies to ancillary orders (A.F., at paras. 82-83). On my understanding, *Adams* dealt simply with the question as to when a judge could reconsider a previous order made in the course of trial. The impugned order, which purported to lift a publication ban previously made, was decided as the trial judge dismissed the charges against the accused (*Adams*, at para. 5). This Court concluded that the trial judge did not have the power to revoke the order because the circumstance that made the order mandatory had not changed (para. 31). Subsequent appellate jurisprudence has interpreted the judgment to provide a general rule about varying such orders, rather than a rule about *functus officio* (see, e.g., *BCTF*, at para. 22; *R. v.*

[54] Je m'empresse toutefois de mentionner qu'à mon avis, l'arrêt *Adams* n'a pas la signification que lui attribue la SRC dans son mémoire. La SRC dit que l'affaire concernait [TRADUCTION] « la question de savoir si la règle du *functus officio* empêchait un juge de première instance d'annuler une interdiction de publication qu'il avait prononcée auparavant », et elle postule qu'il y est question de la manière dont la règle du *functus officio* s'applique aux ordonnances accessoires (m.a., par. 82-83). D'après moi, l'arrêt *Adams* traitait simplement des circonstances où un juge peut réexaminer une ordonnance rendue plus tôt au cours du procès. Le sort de l'ordonnance attaquée, qui visait à lever une interdiction de publication en vigueur, a été décidé au moment où le juge du procès rejetait les accusations portées contre l'accusé (*Adams*, par. 5). Notre Cour a conclu que le juge du procès n'avait pas le pouvoir de révoquer l'ordonnance parce que les circonstances qui ont exigé le prononcé de l'ordonnance n'avaient pas changé (par. 31). Dans des décisions subséquentes, les cours

2021 SCC 33 (CanLII)

B. (H.), 2016 ONCA 953, 345 C.C.C. (3d) 206, at para. 51; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123). The principles in *Adams* balance finality and flexibility even when the court is not *functus officio*, by permitting the reconsideration of such orders where there has been a material change of circumstances.

d'appel ont considéré que le jugement établissait une règle générale à propos de la modification de ces ordonnances plutôt qu'une règle au sujet du *functus officio* (voir, p. ex., *BCTF*, par. 22; *R. c. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206, par. 51; *R. c. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, par. 123). Les principes établis dans *Adams* concilient le caractère définitif d'une décision et la souplesse même lorsque le tribunal n'est pas *functus officio*, en autorisant le réexamen de ces ordonnances lorsqu'il y a eu changement important de circonstances.

[55] In deciding whether this rule from *Adams* applies, I do agree that a first question for the court will be whether there has been a material change in circumstances since the making of the initial order (para. 30). The burden of establishing this change falls to the party seeking a variation in the order (see, by analogy, *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 31). That party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms (*L.M.P.*, at para. 32; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, at paras. 75-76; *R. v. Baltovitch* (2000), 47 O.R. (3d) 761 (C.A.), at para. 6). The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances (*L.M.P.*, at para. 33; *Droit de la famille — 132380*, at para. 78).

[55] Lorsqu'il s'agit de décider si cette règle tirée de l'arrêt *Adams* s'applique, je conviens que la première question à laquelle le tribunal doit répondre est de savoir s'il y a eu changement important des circonstances depuis que l'ordonnance initiale a été rendue (par. 30). Le fardeau d'établir ce changement incombe à la partie qui sollicite une modification de l'ordonnance (voir, par analogie, *L.M.P. c. L.S.*, 2011 CSC 64, [2011] 3 R.C.S. 775, par. 31). Cette partie doit établir à la fois qu'il y a eu changement de circonstances et que le changement, s'il avait été connu à l'époque de l'ordonnance initiale, se serait vraisemblablement traduit par une ordonnance aux conditions différentes (*L.M.P.*, par. 32; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, par. 75-76; *R. c. Baltovitch* (2000), 47 O.R. (3d) 761 (C.A.), par. 6). La justesse de l'ordonnance initiale est présumée et n'est pas pertinente quant à l'existence d'un changement important de circonstances (*L.M.P.*, par. 33; *Droit de la famille — 132380*, par. 78).

[56] Instances in which a court may reconsider a decision respecting its court record are distinct from an appeal or application for *certiorari* made to a higher court from such decisions (see, generally, *Dagenais*, at pp. 870-72). In a motion to reconsider on both grounds described above, the original court is not being asked to reconsider its decision because it is wrongly decided, but rather because it was made without relevant submissions from an affected party or on the basis of a material change in the circumstances that justified the initial decision.

[56] Les situations dans lesquelles un tribunal peut réexaminer une décision portant sur son dossier judiciaire se distinguent de l'appel ou d'une demande de *certiorari* faits à une juridiction supérieure de ces décisions (voir, en général, *Dagenais*, p. 870-872). Dans une motion en réexamen fondée sur les deux motifs décrits ci-dessus, on ne demande pas au tribunal d'origine de réexaminer sa décision parce qu'elle était erronée, mais plutôt parce qu'elle a été rendue en l'absence d'observations utiles de la part d'une partie touchée ou en raison d'un changement important des circonstances qui justifiaient la décision initiale.

2021 SCC 33 (CanLII)

[57] Finally, I note that the general principles considered here can, of course, be displaced by legislation, such as the applicable rules of court, designed to determine more exactly when it is appropriate to reconsider orders concerning court openness.

[57] Enfin, je souligne que les principes généraux examinés ici peuvent, bien entendu, être écartés par une mesure législative, par exemple les règles de procédure applicables, conçue pour décider plus exactement dans quelles circonstances il y a lieu de réexaminer des ordonnances portant sur la publicité des débats judiciaires.

B. *Application to the Facts of This Case*

(1) The Court of Appeal Erred in Concluding It Had No Jurisdiction to Consider the CBC's Motion

[58] In answer to the preliminary question raised by the first appeal from the 2019 Jurisdiction Judgment, I turn now to whether the Court of Appeal erred in concluding it did not have jurisdiction to hear the CBC's motion to gain access to the Posner affidavit and set aside the publication ban.

[59] The CBC submits that the Court of Appeal was mistaken when it declined jurisdiction on the basis of the doctrine of *functus officio*. For the CBC, the flexible approach to *functus officio* spoken to in *Adams* requires ancillary orders, such as the publication ban here, to be treated separately from the merits of the main proceeding. Moreover, the circumstances in which the ban was ordered had changed. It was made without notice to the affected parties and no mention in a certificate of decision of the publication ban had been entered. The CBC maintains that it was not asking for a "rehearing" of the appeal or of the motion which, it recognizes, is prohibited by the *Court of Appeal Rules*. In the alternative, even if the prohibition against rehearings does apply, it must be interpreted flexibly as is the case with the doctrine of *functus officio*.

[60] The Crown answers that the Court of Appeal rightly held it was without jurisdiction given that the formal judgment had been entered. In its view, the only exception to the doctrine of *functus officio* that might conceivably apply here is that the CBC's

B. *Application aux faits de l'espèce*

(1) La Cour d'appel a eu tort de conclure qu'elle n'avait pas compétence pour examiner la motion de la SRC

[58] En réponse à la question préliminaire qu'a soulevée le premier appel du jugement de 2019 sur la compétence, j'en viens maintenant à la question de savoir si la Cour d'appel a eu tort de conclure qu'elle n'avait pas compétence pour entendre la motion de la SRC sollicitant l'accès à l'affidavit de Me Posner et l'annulation de l'interdiction de publication.

[59] La SRC prétend que la Cour d'appel a fait erreur lorsqu'elle a décliné compétence sur le fondement de la règle du *functus officio*. Selon la SRC, l'approche souple à l'égard du *functus officio* dont il est question dans *Adams* exige que les ordonnances accessoires, par exemple l'interdiction de publication en l'espèce, soient traitées séparément du fond de l'instance principale. Qui plus est, les circonstances dans lesquelles l'interdiction de publication a été prononcée avaient changé. L'interdiction a été prononcée sans avis aux parties touchées, et aucune mention de l'interdiction de publication n'avait été inscrite dans un certificat de décision. La SRC soutient qu'elle n'avait pas demandé que l'appel ou la motion fasse l'objet d'une « nouvelle audience » ce qui, elle le reconnaît, est interdit par les *Règles de la Cour d'appel*. Subsidiairement, même si l'interdiction des nouvelles audiences s'applique, elle doit être interprétée avec souplesse, à l'instar de la règle du *functus officio*.

[60] La Couronne répond que la Cour d'appel a statué à bon droit qu'elle n'avait pas compétence, vu que le jugement formel avait été inscrit. À son avis, la seule exception à la règle du *functus officio* qui pourrait théoriquement s'appliquer en l'espèce est

2021 SCC 33 (CanLII)

arguments were never heard on their merits. That exception, says the Crown, does not apply here. While the CBC did not make submissions, it was covering the case and could have challenged the ban anytime between when the initial publication ban was made in May 2018 and when the certificate of decision was entered in January 2019. The CBC provides no proper explanation for its delay in taking action to set aside the publication ban. Even if a material change of circumstances would allow the Court of Appeal to reconsider its order, there was no such change in this case. The Court of Appeal's jurisdiction over the matter was exhausted.

que les arguments de la SRC n'ont jamais été entendus sur le fond. Selon la Couronne, cette exception ne s'applique pas en l'espèce. Bien que la SRC n'ait pas présenté d'observations, elle couvrait l'affaire et aurait pu contester l'interdiction en tout temps entre le prononcé de l'interdiction de publication initiale en mai 2018 et l'inscription du certificat de décision en janvier 2019. La SRC n'explique pas correctement pourquoi elle a tardé à agir pour faire annuler l'interdiction de publication. Même si un changement important de circonstances permettrait à la Cour d'appel de réexaminer son ordonnance, il n'y a pas eu un tel changement en l'espèce. La compétence de la Cour d'appel sur l'affaire était épuisée.

[61] I agree with the CBC that the Court of Appeal did have the authority to uphold, vary or vacate the 2018 publication ban and grant or withhold access to the court record.

[61] Je suis d'accord avec la SRC pour dire que la Cour d'appel avait le pouvoir de confirmer, de modifier ou d'annuler l'interdiction de publication de 2018 et de donner ou de refuser accès au dossier judiciaire.

[62] It is best to note at the outset that appellate jurisdiction, such as that being exercised by the Court of Appeal in the proceeding below, must be grounded in legislation (*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 21). In addition to any explicit grant, statutory and appellate courts should be understood to have the implicit power to control their own process and exercise other powers that are practically necessary to accomplish the role the law assigns them (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720, at para. 27 (CanLII)). I agree with the Attorney General of British Columbia that it may be unhelpful to describe this implicit authority as "inherent jurisdiction" given that appellate powers are, ultimately, rooted in statute (transcript, at pp. 100-1).

[62] Il vaut mieux souligner d'entrée de jeu que la compétence en matière d'appel, comme celle qu'exerce la Cour d'appel dans l'instance inférieure, doit reposer sur la loi (*R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385, par. 21). Outre les pouvoirs qui leur sont explicitement conférés, les tribunaux d'origine législative et les cours d'appel ont la maîtrise implicite de leur propre procédure et d'autres pouvoirs qui sont de fait nécessaires à l'exercice du rôle que la loi leur confie (*R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 19; *Lochner c. Ontario Civilian Police Commission*, 2020 ONCA 720, par. 27 (CanLII)). Je suis d'accord avec le procureur général de la Colombie-Britannique pour dire qu'il est peut-être inutile de qualifier ce pouvoir implicite de [TRADUCTION] « compétence inhérente », vu que les pouvoirs en matière d'appel prennent leur source, en définitive, dans la loi (transcription, p. 100-101).

[63] The legislative foundation for the Court of Appeal's jurisdiction over the motion on court openness is plain here. As I have said, the supervisory jurisdiction over the court record is a feature of all courts (*MacIntyre*, at p. 189) and this is no less true of an appellate court. As part of the court's authority to control its own process, the power over the openness

[63] Le fondement législatif de la compétence de la Cour d'appel à l'égard de la motion portant sur la publicité des débats judiciaires est manifeste en l'espèce. Comme je l'ai évoqué précédemment, le pouvoir de surveillance à l'égard du dossier judiciaire est une caractéristique de tous les tribunaux (*MacIntyre*, p. 189) et ceci vaut autant pour une cour

2021 SCC 33 (CanLII)

of proceedings and over the court record arises here by necessary implication from the legislative grant of the appellate court's adjudicative authority (see, generally, *Cunningham*, at para. 19). As a matter of procedural necessity — a publication ban or a sealing order may remain in place long after the substance of the appeal has been decided — this jurisdiction continues even after the formal judgment on the merits of a given appeal has been entered unless ousted by legislation. The Court of Appeal therefore had continuing, ancillary jurisdiction to consider the CBC's motion regarding sealing orders and publication bans. This included implied jurisdiction to vary or vacate its orders limiting court openness in accordance with the common law principles considered above. The only remaining question is whether any applicable legislation limits this jurisdiction for the Court of Appeal in this case.

d'appel. Dans le cadre de la maîtrise par le tribunal de sa propre procédure, le pouvoir à l'égard de la transparence de l'instance et du dossier judiciaire découle en l'espèce, par déduction nécessaire, de l'octroi par voie législative du pouvoir juridictionnel de la cour d'appel (voir, en général, *Cunningham*, par. 19). Par la force des choses sur le plan de la procédure — une interdiction de publication ou une ordonnance de mise sous scellés peut demeurer en place longtemps après qu'il a été statué sur le fond de l'appel — cette compétence subsiste même après que le jugement formel sur le bien-fondé d'un appel donné a été inscrit, à moins qu'elle n'ait été écartée par un texte législatif. En conséquence, la Cour d'appel avait encore le pouvoir accessoire d'examiner la motion de la SRC visant les ordonnances de mise sous scellés et les interdictions de publication. Ceci comprenait la compétence implicite pour modifier ou annuler ses ordonnances limitant la publicité des débats judiciaires conformément aux principes de common law examinés ci-dessus. La seule question qui demeure est celle de savoir si des textes législatifs applicables limitent cette compétence de la Cour d'appel en l'espèce.

[64] The *Court of Appeal Rules* do prohibit a "rehearing of an appeal" (in French, "*appel . . . entendu de nouveau*") after the certificate of decision has been entered, a rule on which the Court of Appeal relied in this case (r. 46.2(1) and (2), applicable by virtue of r. 45 of the *Manitoba Criminal Appeal Rules*, SI/92-106). This rule also prohibits the "rehearing" of motions (in French, "*faire l'objet d'une nouvelle audience*") (r. 46.2(12)). Relevant portions of r. 46.2 are as follows:

[64] Les *Règles de la Cour d'appel* interdisent effectivement qu'un « appel [soit] entendu de nouveau » (en anglais, « *[the] rehearing of an appeal* ») après que le certificat de décision ait été inscrit, une règle sur laquelle la Cour d'appel s'est appuyée en l'espèce (par. 46.2(1) et (2), applicables en raison de la règle 45 des *Règles de procédure de la cour d'appel du Manitoba en matière criminelle*, TR/92-106). Cette règle interdit également que les motions « fa[ssent] l'objet d'une nouvelle audience » (en anglais, « *[the] rehearing of* [. . .] *a motion* ») (par. 46.2(12)). Les extraits pertinents de la règle 46.2 prévoient ce qui suit :

46.2(1) There shall be no rehearing of an appeal except by order of the court or at the instance of the court.

46.2(1) Aucun appel ne peut être entendu de nouveau, sauf sur ordonnance du tribunal ou à son initiative.

46.2(2) A rehearing of an appeal may be ordered before the certificate of decision has been entered.

46.2(2) Une nouvelle audition d'un appel peut être ordonnée avant que le certificat de décision n'ait été inscrit.

46.2(12) There shall be no rehearing on an application for leave or a motion.

46.2(12) Aucune requête en autorisation ni aucune motion ne peuvent faire l'objet d'une nouvelle audience.

2021 SCC 33 (CanLII)

[65] It is true that the certificate of decision referred to in r. 46.2(2) has been entered here in respect of the appeal bearing on the miscarriage of justice. Accordingly, a rehearing of Mr. Ostrowski's appeal on the merits is precluded in accordance with r. 46.2. Similarly, any motion that had been heard in the course of the proceeding cannot now be reheard, as this is foreclosed by r. 46.2(12).

[66] But these rules did not deprive the Court of Appeal of the ability to hear the CBC's motion concerning court openness. This is certainly not a "rehearing of an appeal" as contemplated by r. 46.2(1) and (2). The CBC brought a motion concerning access to the court file and did not seek to reopen the miscarriage of justice proceeding itself. Interpreting the prohibition against rehearing an appeal as precluding the Court of Appeal from hearing a motion concerning court openness, distinct from the merits of the appeal, is not plain from the text. The appeal is not to be "*entendu de nouveau*", to advert to the French text of r. 46.2(1) and (2). Nor does it accord with the purpose of rules prohibiting rehearings of the appeal that reflect the same core objectives of finality and stability of judgments associated with the doctrine of *functus officio* (see *Doucet-Boudreau*, at para. 79). There is nothing in r. 46.2 that prevents the CBC from seeking ancillary orders related to court openness after the certificate of decision has been entered on the merits.

[67] Similarly, the prohibition on the rehearing of motions in r. 46.2(12) cannot be interpreted to prohibit the CBC from moving to set aside the publication ban made without notice and which affects the open court principle. The impugned order was made of the Court of Appeal's own accord, with the consent of the parties, at the oral hearing and then continued indefinitely in para. 82 of the 2018 Publication Ban Judgment. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons

[65] Il est vrai que le certificat de décision mentionné au par. 46.2(2) a été inscrit en l'espèce à l'égard de l'appel portant sur l'erreur judiciaire. Par conséquent, une nouvelle audition de l'appel de M. Ostrowski sur le fond est exclue en application de la règle 46.2. Pareillement, une motion entendue au cours de l'instance ne peut pas maintenant faire l'objet d'une nouvelle audience, puisque le par. 46.2(12) l'en empêche.

[66] Toutefois, ces règles n'ont pas privé la Cour d'appel de la faculté d'entendre la motion de la SRC portant sur la publicité des débats judiciaires. Ceci n'est certainement pas un « appel [. . .] entendu de nouveau » ni une « nouvelle audition d'un appel » visé aux par. 46.2(1) et (2). La SRC a présenté une motion portant sur l'accès au dossier judiciaire et n'a pas tenté de rouvrir l'instance en matière d'erreur judiciaire elle-même. Considérer que l'interdiction d'une nouvelle audition d'un appel empêche la Cour d'appel d'entendre une motion portant sur la publicité des débats judiciaires, distincte du fond de l'appel, ne ressort pas manifestement du texte. Il n'y a pas de « *rehearing of an appeal* », pour reprendre le texte anglais des par. 46.2(1) et (2). Une telle interprétation ne s'accorde pas non plus avec l'objet des règles interdisant les nouvelles auditions de l'appel qui reflètent les mêmes objectifs fondamentaux du caractère définitif et de la stabilité des jugements que l'on associe à la règle du *functus officio* (voir *Doucet-Boudreau*, par. 79). La règle 46.2 n'empêche aucunement la SRC de solliciter des ordonnances accessoires liées à la publicité des débats judiciaires après que le certificat de décision ait été inscrit sur le fond.

[67] Pareillement, on ne saurait considérer que l'interdiction de la nouvelle audition d'une motion, prévue au par. 46.2(12), a pour effet d'interdire à la SRC de demander par motion l'annulation de l'interdiction de publication prononcée sans avis et qui a une incidence sur le principe de la publicité des débats judiciaires. L'ordonnance attaquée a été prononcée du propre chef de la Cour d'appel, avec le consentement des parties, et à l'audience, puis maintenue pour une durée indéterminée au par. 82 du jugement de 2018 sur l'interdiction de publication. Le tribunal n'a entendu aucune observation sur le

2021 SCC 33 (CanLII)

were released. The CBC was not asking the Court of Appeal for a "rehearing" of a motion. The idea of a "rehearing" spoken to in r. 46.2 necessarily implies there was an original hearing and that the court would be hearing the same motion again, as the French ("*nouvelle audience*") in r. 46.2 makes plain.

point, et n'a donné de préavis à qui que ce soit, dont les médias, notamment la SRC qui a eu vent de l'interdiction attaquée peu après le prononcé des motifs. La SRC ne demandait pas à la Cour d'appel qu'une motion fasse l'objet d'une « nouvelle audience ». L'idée d'un « *rehearing* » dont il est question à la règle 46.2 implique nécessairement qu'il y a eu une première audience et que le tribunal entendrait la même motion de nouveau, comme l'indique clairement l'expression française « nouvelle audience » à la règle 46.2.

[68] Instead, the CBC brought an altogether new motion to set aside the 2018 publication ban made in its absence. This may engage, as the CBC suggests, a fundamental principle of the administration of justice that parties affected by orders be given the opportunity to be heard. There is nothing in the text of r. 46(12) that modifies the generally applicable rule allowing the Court of Appeal to vary or rescind its publication ban or sealing order on motion from an affected person not given notice of the making of the order.

[68] La SRC a plutôt déposé une motion entièrement nouvelle pour faire annuler l'interdiction de publication de 2018 prononcée en son absence. Cela peut faire entrer en jeu, comme le prétend la SRC, un principe fondamental de l'administration de la justice voulant que les parties touchées par des ordonnances se voient accorder l'occasion d'être entendues. Rien dans le libellé du par. 46(12) n'a pour effet de modifier la règle généralement applicable qui permet à la Cour d'appel de modifier ou d'annuler son interdiction de publication ou ordonnance de mise sous scellés sur motion d'une personne touchée qui n'a pas été avisée du prononcé de l'ordonnance.

[69] The CBC also argued that the Court of Appeal should have taken up its rightful jurisdiction to vary the publication ban covering the Posner affidavit because there had been a material change of circumstances.

[69] La SRC ajoute que la Cour d'appel aurait dû assumer sa compétence légitime pour modifier l'interdiction de publication portant sur l'affidavit de Me Posner parce qu'il y avait eu un changement important de circonstances.

[70] I disagree. I think it should be recorded that the CBC did not, in the proceedings below, establish a material change of circumstances.

[70] Je ne suis pas de cet avis. Selon moi, il faut souligner que la SRC n'a pas, devant les juridictions inférieures, établi de changement important de circonstances.

[71] While it may be the case that the finding of a miscarriage of justice by the Court of Appeal increased the public interest in the materials, that conclusion was made in the 2018 Publication Ban Judgment in which the continuation of the publication ban was ordered. It cannot, therefore, be a change of circumstances that has occurred *since* the impugned order was made, as is required (*Adams*, at para. 30; *L.M.P.*, at para. 31).

[71] Bien que la conclusion d'erreur judiciaire à laquelle est arrivée la Cour d'appel ait pu accroître l'intérêt du public à l'égard des documents, la Cour d'appel a conclu à l'existence de cette erreur dans le jugement de 2018 sur l'interdiction de publication, où elle a ordonné le maintien de l'interdiction de publication. Il ne peut donc s'agir d'un changement de circonstances qui s'est produit *depuis* le prononcé de l'ordonnance contestée, comme le veut la règle (*Adams*, par. 30; *L.M.P.*, par. 31).

2021 SCC 33 (CanLII)

[72] Equally, the subsequent appearance of the CBC in the proceedings as a party did not constitute, in itself, a material change in circumstances. Assuming the initial order was correctly made, as one must at this stage (*L.M.P.*, at para. 33), and recognizing that the CBC did not make submissions on the initial order, in my view the CBC's mere presence would not likely have resulted in a different outcome for the purposes of the applicable test. This is not to exclude the possibility that, had the CBC made submissions, the result might have been different. But acknowledging this possibility requires one to consider whether the Court of Appeal may have erred in applying the relevant test without the benefit of the CBC's argument. This is contrary to the well-established principle that one must not consider the possibility that the original court erred when determining whether a material change has occurred (*L.M.P.*, at para. 33). The Court of Appeal is therefore presumed at this stage to have balanced the interest of the media in open court proceedings with competing public interests even in the absence of a representative of the press, as is required (*Mentuck*, at para. 38). The CBC's absence at the making of the initial order is more properly considered in reference to the principles relating to orders made without notice to an affected party, since it is a lost opportunity to make submissions, and not in reference to a change in the circumstances relied on by the Court of Appeal.

[73] In sum, the Court of Appeal erred in concluding that r. 46.2 or the doctrine of *functus officio* deprived it of jurisdiction to hear the CBC's motion. Said respectfully, the Court of Appeal's interpretation of these principles was unnecessary to protect the values of finality and orderly appellate review. It had an adverse impact on the opportunity of the media to make representations in respect of this order limiting the open court principle. The better view is that the Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered.

[72] De même, la comparution subséquente de la SRC dans l'instance en qualité de partie ne constituait pas, en soi, un changement important de circonstances. En présumant que l'ordonnance initiale était bien fondée, comme on doit le faire à ce stade (*L.M.P.*, par. 33), et en reconnaissant que la SRC n'avait pas présenté d'observations portant sur l'ordonnance initiale, j'estime que la simple présence de la SRC n'aurait vraisemblablement pas donné lieu à un résultat différent pour les besoins du test applicable. Cela n'exclut pas la possibilité que le résultat eût été différent si la SRC avait présenté des observations. Mais en reconnaissant cette possibilité, on doit se demander si la Cour d'appel a peut-être fait erreur dans l'application du test en question sans avoir pris connaissance de l'argument de la SRC. Cela va à l'encontre du principe bien établi voulant qu'on ne doive pas envisager la possibilité que le tribunal d'origine ait commis une erreur au moment de décider s'il y a eu un changement important (*L.M.P.*, par. 33). On présume donc à ce stade que la Cour d'appel a mis en balance, comme elle doit le faire, l'intérêt des médias dans la publicité des débats judiciaires et les intérêts publics opposés, même en l'absence d'un représentant de la presse (*Mentuck*, par. 38). Il vaut mieux examiner l'absence de la SRC lors du prononcé de l'ordonnance initiale en fonction des principes applicables aux ordonnances rendues sans qu'une partie touchée en ait été avisée, car il s'agit d'une occasion perdue de présenter des observations, et non au regard d'un changement de circonstances invoqué par la Cour d'appel.

[73] En somme, la Cour d'appel a eu tort de conclure que la règle 46.2 ou la règle du *functus officio* lui enlevait compétence pour entendre la motion de la SRC. Soit dit respectueusement, l'interprétation que donne la Cour d'appel de ces principes n'était pas nécessaire afin de protéger les valeurs du caractère définitif des procédures et du déroulement ordonné de l'examen en appel. Elle a eu des effets préjudiciables sur l'occasion des médias de présenter des observations à l'égard de cette ordonnance limitant le principe de la publicité des débats judiciaires. De fait, la Cour d'appel est demeurée compétente pour surveiller son dossier, même après que le certificat de décision dans l'instance sous-jacente sur le fond ait été inscrit.

2021 SCC 33 (CanLII)

(2) The Matter Should Be Remanded to the Court of Appeal

[74] That the Court of Appeal had jurisdiction to consider the CBC's motion and its request for access to the Posner affidavit, does not mean, of course, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts here, a determination that would be best made at first instance by the Court of Appeal.

[75] In respect of the publication ban, the CBC will rely on the Court of Appeal's power to rescind an order on the basis that it was made without notice to an affected party. As a preliminary matter, the Court of Appeal must determine, in keeping with the principles sketched above, whether the CBC has standing to challenge the relevant order. This initial hurdle, which the CBC must clear, serves to restrict the scope of those who are able to challenge an order made without notice to the media to those representatives who were deprived of the ability to make useful submissions that may have affected the result.

[76] The CBC will also be required to show that the delay from the time it became aware of the impugned order to the time it filed its motion in May 2019 was not unreasonable. I note that the Crown argues the CBC ought to have brought its motion earlier. In response to questions from my colleagues at the oral hearing, the CBC rightly conceded it knew of the publication ban shortly after the 2018 Publication Ban Judgment was released. Its delay in bringing the motion was in the order of six months. While the matter was not advanced by the Crown as a basis for dismissing the appeal, at the hearing before this Court the CBC did say the delay was justified in the circumstances, pointing to initial confusion as to the nature of the order, and asserted the public interest in deciding this open court issue that affects the rights of all Canadians.

(2) L'affaire doit être renvoyée à la Cour d'appel

[74] Bien entendu, ce n'est pas parce que la Cour d'appel avait compétence pour examiner la motion de la SRC et sa demande d'accès à l'affidavit de Me Posner que la SRC a droit à la mesure de redressement qu'elle a demandée. La possibilité d'obtenir cette mesure de redressement dépend d'une bonne application du droit aux faits de l'espèce, et c'est la Cour d'appel qui est la mieux à même d'en décider en première instance.

[75] Pour ce qui est de l'interdiction de publication, la SRC s'appuiera sur le pouvoir de la Cour d'appel d'annuler une ordonnance au motif qu'elle a été rendue sans avis à une partie touchée. À titre préliminaire, la Cour d'appel doit se demander, compte tenu des principes sommairement exposés ci-dessus, si la SRC a qualité pour contester l'ordonnance en question. Ce premier obstacle, que doit surmonter la SRC, fait en sorte que seuls les représentants qui sont privés de la possibilité de présenter des observations utiles et susceptibles d'avoir influé sur le résultat peuvent contester une ordonnance rendue sans que les médias en aient été avisés.

[76] La SRC aura également à démontrer que le délai qui s'est écoulé entre le moment où elle a pris connaissance de l'ordonnance contestée et le moment où elle a déposé sa motion en mai 2019 n'était pas déraisonnable. Je prends note que la Couronne prétend que la SRC aurait dû présenter sa motion plus tôt. En réponse aux questions posées par mes collègues à l'audience, la SRC a concédé à juste titre qu'elle avait eu connaissance de l'interdiction de publication peu de temps après le prononcé du jugement de 2018 sur l'interdiction de publication. Le délai qui s'est écoulé avant qu'elle présente la motion était de l'ordre de six mois. Bien que la question n'ait pas été invoquée par la Couronne en tant que motif du rejet du pourvoi, la SRC a mentionné à l'audience devant notre Cour que le délai était justifié dans les circonstances, soulignant la confusion au départ quant à la nature de l'ordonnance et faisant valoir l'intérêt public à trancher cette question de publicité des débats judiciaire qui touche les droits de tous les Canadiens et les Canadiennes.

2021 SCC 33 (CanLII)

[77] Turning to the substance of the CBC's motion, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test from *Sierra Club* as recently recast by this Court in *Sherman*. Court proceedings are presumptively open to the public (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11). A court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects (*Sherman*, at para. 38, citing *Sierra Club*, at para. 53).

[78] Before this Court, both the Crown and M.D.'s family invoke the privacy and dignity of the interested parties as an important public interest that would be threatened if the publication ban was lifted. The CBC answers that the interests raised are merely personal, without the public component required to displace the open court principle. Much like in *Sherman*, the parties' disagreement is rooted in the inherent tension between the open court principle and what Dickson J., as he then was, once described as competing "superordinate" values (*MacIntyre*, at pp. 186-87). Both privacy and court openness have been recognized in law as pillars of a free and democratic society (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25). If open courts are to remain the rule rather than the exception, some degree of privacy loss for those whose lives are the subject of litigation is inevitable. But circumstances do exist where openness poses a serious risk to an aspect of privacy that evinces an important public interest.

[79] The Court of Appeal did not have the advantage of considering the judgment of this Court in *Sherman* where it was held that there is an important public interest in a narrower dimension of privacy

[77] En ce qui a trait au fond de la motion de la SRC, toute limite discrétionnaire à l'accès au dossier judiciaire et à la publication de son contenu doit être comprise à l'aune du test de l'arrêt *Sierra Club* récemment reformulé par notre Cour dans *Sherman*. Les procédures judiciaires sont présumées accessibles au public (*A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11). Un tribunal ne peut imposer de limites discrétionnaires à la publicité des débats que si les conditions suivantes sont remplies : (1) la publicité des débats pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque; (3) les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sherman*, par. 38, citant *Sierra Club*, par. 53).

[78] Devant notre Cour, la Couronne et la famille de M.D. invoquent toutes les deux la vie privée et la dignité des parties intéressées comme un intérêt public important qui serait menacé si l'interdiction de publication était levée. La SRC répond que les intérêts invoqués ne sont que personnels, sans l'élément public qu'il faut pour écarter le principe de la publicité des débats judiciaires. Tout comme dans l'affaire *Sherman*, le désaccord des parties repose sur la tension inhérente entre le principe de la publicité des débats judiciaires et ce que le juge Dickson, plus tard juge en chef, a déjà qualifié de valeurs ayant « préséance » (*MacIntyre*, p. 186-187). La vie privée et la publicité des débats judiciaires ont toutes les deux été reconnues dans la jurisprudence comme étant des piliers d'une société libre et démocratique (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25). Si la publicité des débats judiciaires doit demeurer la règle plutôt que l'exception, il est inévitable que ceux dont la vie fait l'objet d'un litige subissent une certaine atteinte à leur vie privée. Toutefois, il existe effectivement des circonstances où la publicité des débats pose un risque sérieux pour un aspect de la vie privée qui fait état d'un intérêt public important.

[79] La Cour d'appel n'a pas pu prendre connaissance de l'arrêt *Sherman*, dans lequel notre Cour a statué qu'il existe un important intérêt public dans une dimension plus étroite de la vie privée qui concerne la

2021 SCC 33 (CanLII)

concerning the protection of individual dignity. In order to show a serious risk to this interest, an individual must establish that the information about them that would be disseminated as a result of court openness is sufficiently sensitive such that it strikes at their biographical core, revealing something "intimate and personal about the individual, their lifestyle or their experiences" (*Sherman*, at paras. 73-77, 79 and 85). If they succeed, the question becomes whether, in light of the totality of the circumstances, court openness poses a risk to individual dignity that strikes meaningfully at this important public interest. A serious risk need not be supported by direct evidence but may be reasonably inferred on the basis of available circumstantial facts (*Bragg*, at paras. 15-16). If the party succeeds in establishing this serious risk, they must then show that the order they seek is necessary to prevent the risk and that the benefits of the order outweigh its negative effects, including the effects on constitutionally-protected court openness (*Sierra Club*, at para. 53).

protection de la dignité individuelle. Afin de démontrer l'existence d'un risque sérieux pour cet intérêt, une personne doit établir que les renseignements à son sujet qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles, si bien qu'ils représentent des renseignements biographiques, révélant quelque chose « d'intime et de personnel au sujet de la personne, de son mode de vie ou de son vécu » (*Sherman*, par. 73-77, 79 et 85). Si elle réussit, il s'agit de se demander si, eu égard à l'ensemble des circonstances, la publicité des débats judiciaires pose un risque pour la dignité individuelle qui concerne concrètement cet important intérêt public. Il n'est pas nécessaire que le risque sérieux soit étayé par une preuve directe; il peut être raisonnablement inféré sur le fondement de faits circonstanciels connus (*Bragg*, par. 15-16). Si la partie réussit à établir ce risque sérieux, elle doit ensuite démontrer que l'ordonnance qu'elle sollicite est nécessaire pour écarter le risque et que les avantages de l'ordonnance l'emportent sur ses effets négatifs, y compris les effets sur la publicité des débats judiciaires, protégée par la Constitution (*Sierra Club*, par. 53).

[80] The parties disagree about the extent to which the test for discretionary limits on court openness applies to determine access to and publication of the Posner affidavit. The CBC argued that the sealing order that applied to the affidavit by operation of the *Court of Appeal Rules* ended once the new evidence motion was dismissed. The Crown took the position that the relevant rule is silent on what happens to material under seal after a new evidence motion is dismissed such that the Court of Appeal was entitled not to enter the proposed evidence into the public record. As for the publication ban covering the details of this evidence, the CBC argued that it fails the test for discretionary limits on court openness, which it says applies even though the Posner affidavit was ultimately not admitted into evidence. The Crown and the interested parties stressed instead the Posner affidavit's alleged irrelevance as a factor in this analysis.

[80] Les parties ne s'entendent pas sur la mesure dans laquelle le test concernant les limites discrétionnaires à la publicité des débats judiciaires s'applique lorsqu'il s'agit de trancher la question de l'accès à l'affidavit de Me Posner et de sa publication. La SRC a plaidé que l'ordonnance de mise sous scellés qui s'appliquait à l'affidavit en vertu des *Règles de la Cour d'appel* avait pris fin dès que la motion en présentation d'éléments de preuve nouveaux a été rejetée. La Couronne a fait valoir que la règle pertinente est silencieuse sur ce qui se passe avec les documents sous scellés après le rejet de la motion en présentation d'éléments de preuve nouveaux, si bien qu'il était loisible à la Cour d'appel de ne pas verser les éléments de preuve proposés au dossier public. Quant à l'interdiction de publication portant sur les détails de ces éléments de preuve, la SRC a soutenu qu'elle ne satisfait pas au critère concernant les limites discrétionnaires à la publicité des débats judiciaires, lequel, selon la SRC, s'applique même si l'affidavit de Me Posner a fini par ne pas être admis en preuve. La Couronne et les parties intéressées ont insisté plutôt sur la non-pertinence présumée de l'affidavit de Me Posner comme facteur dans cette analyse.

2021 SCC 33 (CanLII)

[81] For two reasons, I conclude that any limits on access to or publication of the Posner affidavit in this case must meet the generally applicable test for discretionary limits on court openness. First, I agree with the CBC that r. 21(4) of the *Court of Appeal Rules* does not provide for a permanent sealing order over the Posner affidavit. Rule 21(4), which specifies that the new evidence remains sealed "until the motion is decided", explicitly anticipates that the sealing prescribed by this rule will cease once there is a decision. This decision occurred when the new evidence motion was dismissed. There is nothing in the rule to indicate that the seal is to protect the information from public dissemination and that this is meant to extend indefinitely after the motion is decided. In my view, r. 21 does not continue to seal the Posner affidavit.

[81] Deux raisons m'amènent à conclure que toute limite à l'accès à l'affidavit de Me Posner ou à sa publication en l'espèce doit satisfaire au critère généralement applicable aux limites discrétionnaires sur la publicité des débats judiciaires. Premièrement, je suis d'accord avec la SRC pour dire que le par. 21(4) des *Règles de la Cour d'appel* ne prévoit pas d'ordonnance permanente de mise sous scellés à l'égard de l'affidavit de Me Posner. Le paragraphe 21(4), qui précise que les nouveaux éléments de preuve demeurent scellés « jusqu'à ce qu'il soit statué sur la motion », prévoit expressément que la mise sous scellés prescrite par cette règle cessera lorsqu'il y aura une décision. Cette décision a eu lieu lorsque la motion en présentation d'éléments de preuve nouveaux a été rejetée. Rien dans la règle n'indique que la mise sous scellés vise à protéger les renseignements contre une diffusion publique et que cette mesure est censée se poursuivre indéfiniment après qu'il a été statué sur la motion. À mon avis, la règle 21 ne maintient pas la mise sous scellés de l'affidavit de Me Posner.

[82] Second, the fact that the Posner affidavit was not admitted as new evidence for the purposes of the miscarriage of justice proceeding should not shield the publication ban from review. The Crown submits that the Court of Appeal's "practice" not to admit such evidence into the court registry fills the silence in r. 21(4). But an administrative practice cannot have the effect of taking this matter outside the scope of the test for discretionary limits on the open court principle. Court openness serves to maintain the legitimacy of the exercise of judicial power — including the decision to dismiss the motion for new evidence — by allowing the public to scrutinize this exercise in service of ensuring that justice is being dispensed fairly (*Vancouver Sun*, at para. 25). Public access to the court record facilitates this scrutiny (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339, per Cory J.).

[82] Deuxièmement, le fait que l'affidavit de Me Posner n'a pas été admis comme élément de preuve nouveau pour les besoins de l'instance portant sur l'erreur judiciaire ne doit pas mettre l'interdiction de publication à l'abri d'un contrôle. La Couronne soutient que la [TRADUCTION] « pratique » de la Cour d'appel qui consiste à ne pas admettre de tels éléments de preuve pour dépôt au greffe du tribunal comble le silence du par. 21(4). Toutefois, une pratique administrative ne saurait avoir pour effet de placer cette affaire en dehors de la portée du test concernant les limites discrétionnaires au principe de la publicité des débats judiciaires. Cette publicité sert à maintenir la légitimité de l'exercice du pouvoir judiciaire — y compris la décision de rejeter la motion en présentation d'éléments de preuve nouveaux — en permettant au public d'examiner attentivement cet exercice dans le but de s'assurer que la justice est dispensée équitablement (*Vancouver Sun*, par. 25). L'accès public au dossier judiciaire facilite cet examen attentif (*Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339, le juge Cory).

2021 SCC 33 (CanLII)

[83] Consistent with this purpose, all materials that are made available to the court for the purposes of deciding the case — in other words, for the purposes of exercising its judicial power — are subject to the open court principle (see *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 42-44; see also *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246, at para. 48). In this case, the Court of Appeal had before it a motion to admit the Posner affidavit as new evidence. With the consent of the parties, the court reviewed that affidavit in considering the motion. While the court ultimately declined to admit it, the affidavit was considered in deciding the new evidence motion. It follows that any discretionary limit on access to or publication of the Posner affidavit must meet the requirements affirmed in *Sierra Club* and *Sherman*.

[83] Dans le respect de cet objectif, tous les documents mis à la disposition du tribunal en vue de trancher l'affaire, autrement dit pour lui permettre d'exercer son pouvoir judiciaire, sont visés par le principe de la publicité des débats judiciaires (voir *Canadian Broadcasting Corp. c. R.*, 2010 ONCA 726, 102 O.R. (3d) 673, par. 42-44; voir également *Aboriginal Peoples Television Network c. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246, par. 48). En l'espèce, la Cour d'appel était saisie d'une motion en vue de faire admettre l'affidavit de Me Posner en tant que nouvel élément de preuve. Avec le consentement des parties, le tribunal a étudié cet affidavit lors de l'examen de la motion. Bien que le tribunal ait fini par refuser d'admettre l'affidavit, celui-ci a été examiné lorsqu'il a été statué sur la motion en présentation d'éléments de preuve nouveaux. Il s'ensuit que toute limite discrétionnaire à l'accès à l'affidavit de Me Posner ou à sa publication doit satisfaire aux exigences énoncées dans les arrêts *Sierra Club* et *Sherman*.

[84] In sum, to the extent the requested relief required it to reconsider its publication ban, the Court of Appeal should have asked whether it was appropriate to vary or set aside that decision on motion by the CBC given it was made without notice. On the substance of the motion, the Court of Appeal should have considered whether any discretionary limits it imposed on publication of the court record, which includes the Posner affidavit, complied with the test for discretionary limits on court openness.

[84] En somme, dès lors que la mesure de redressement sollicitée l'obligeait à réexaminer son interdiction de publication, la Cour d'appel aurait dû se demander s'il était opportun de modifier ou d'annuler cette décision sur motion de la SRC, vu qu'elle avait été prise sans avis. Sur le fond de la motion, la Cour d'appel aurait dû se demander si les limites discrétionnaires qu'elle avait imposées à la publication du dossier judiciaire, qui comprend l'affidavit de Me Posner, se conformaient au test concernant les limites discrétionnaires à la publicité des débats judiciaires.

[85] The remaining question is which court should decide these issues raised in the context of the first appeal from the 2019 Jurisdiction Judgment. I recall that the Crown suggests that if the Court of Appeal had jurisdiction to hear the motion for reconsideration, it follows that this Court does not. It argues that in this scenario the publication ban is not a "final or other judgment of . . . the highest court of final resort" for the purposes of s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, under which leave to appeal in this matter was granted.

[85] Il reste à se demander quel tribunal doit trancher ces questions soulevées dans le contexte du premier appel du jugement de 2019 sur la compétence. Tel qu'il est indiqué ci-dessus, la Couronne prétend que, si la Cour d'appel avait compétence pour entendre la motion en réexamen, il s'ensuit que notre Cour ne l'a pas. Elle plaide que dans ce scénario, l'interdiction de publication n'est pas un « jugement, définitif ou autre, rendu par [. . .] le plus haut tribunal de dernier ressort » pour l'application du par. 40(1) de la *Loi sur la Cour suprême*, L.R.C. 1985, c. S-26, en vertu duquel l'autorisation d'appel en l'espèce a été accordée.

2021 SCC 33 (CanLII)

[86] I disagree. The Court of Appeal's reconsideration of its publication ban is not, as we have seen, an appeal of the publication ban order. The only route of appeal from either the Court of Appeal's 2018 Publication Ban Judgment or the 2019 Jurisdiction Judgment was to this Court with leave pursuant to s. 40(1) of the *Supreme Court Act* (see, generally, *Dagenais*, at p. 872). Accordingly, I have no difficulty concluding that both were "final or other judgment[s] of . . . the highest court of final resort" from which this Court has jurisdiction to hear an appeal with leave (see, generally, *Mentuck*, at paras. 20-21).

[87] That said, I am of the view that fairness to all the parties requires that we remand the motion that resulted in the 2019 Jurisdiction Judgment to the Court of Appeal. The remaining issues raised are best decided by the Court of Appeal. The Court of Appeal ended its analysis after concluding it was *functus officio* and we do not have the benefit of any reasons below on these issues. As I have noted above, the motion required the Court of Appeal to make several discretionary decisions: whether to grant the CBC standing, whether to hear the motion given the delay, and ultimately whether to uphold a discretionary limit on the openness of its own record. These are decisions the Court of Appeal is best placed to make given they are intimately connected to the facts and procedural history of this case, in which that court effectively acted as a court of first instance.

[88] In my view, it is not in the interests of justice for this Court to step into the Court of Appeal's shoes and decide these matters at first instance. This is quite different from considering such issues on appeal through the deferential lens this Court would take in reviewing the exercise of discretion below (see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117). Other appellate courts have been rightly cautious to dictate to lower courts in this way (see, e.g., *GEA Refrigeration*, at para. 184).

[86] Je ne suis pas de cet avis. Le réexamen, par la Cour d'appel, de son interdiction de publication n'est pas, comme nous l'avons vu, un appel de l'ordonnance. La seule voie d'appel du jugement rendu en 2018 par la Cour d'appel sur l'interdiction de publication ou de son jugement de 2019 sur la compétence était l'appel à notre Cour, avec son autorisation, en application du par. 40(1) de la *Loi sur la Cour suprême* (voir, en général, *Dagenais*, p. 872). Par conséquent, je n'ai aucune difficulté à conclure que les deux étaient des « jugement[s], définitif[s] ou autre[s], rendu[s] par [. . .] le plus haut tribunal de dernier ressort » à l'égard desquels notre Cour a compétence pour entendre un appel avec autorisation (voir, en général, *Mentuck*, par. 20-21).

[87] Cela dit, je suis d'avis que, par souci d'équité envers toutes les parties, nous devons renvoyer à la Cour d'appel la motion qui a mené au jugement de 2019 sur la compétence. Il vaut mieux que ce soit la Cour d'appel qui tranche les autres questions soulevées. La Cour d'appel a mis fin à son analyse après avoir conclu qu'elle était *functus officio*, et nous ne disposons pas de motifs de la juridiction inférieure sur ces questions. Comme je l'ai déjà fait remarquer, la motion obligeait la Cour d'appel à rendre plusieurs décisions discrétionnaires : accorder ou non à la SRC qualité pour agir, accepter ou non d'entendre la motion compte tenu du délai et, en dernier lieu, confirmer ou non sa limite discrétionnaire à la transparence de son propre dossier. Ce sont des décisions que la Cour d'appel est la mieux placée à rendre vu qu'elles sont intimement liées aux faits et à l'historique procédural de la présente affaire, où cette cour a exercé dans les faits la fonction de tribunal de première instance.

[88] À mon avis, il n'est pas dans l'intérêt de la justice que notre Cour se mette à la place de la Cour d'appel et tranche ces questions en première instance. Cela est très différent du fait d'examiner ces questions en appel avec un regard empreint de déférence que notre Cour adopterait pour contrôler l'exercice du pouvoir discrétionnaire de la juridiction inférieure (voir *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117). D'autres cours d'appel ne se sont pas hasardées à bon droit à dicter ainsi aux juridictions inférieures leur conduite (voir, p. ex., *GEA Refrigeration*, par. 184).

2021 SCC 33 (CanLII)

[89] I note as well that the issue of delay was not fully argued before this Court and we are therefore not well placed to come to the appropriate balance in this case in any event. This Court has remanded matters to the Court of Appeal where a question was not addressed below and the record and arguments are "too sparse to . . . resolve the matter confidently" (see, e.g., *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 46). The CBC did not raise the issue in its factum because it considered the issue to have been resolved when we granted its motions for extensions of time to seek leave to appeal. While the Crown pointed to the delay in passing, it never argued the appeal bearing on the motion for reconsideration could be dismissed on that basis alone. This further militates towards remanding the matter.

[89] Je signale en outre que la question du délai n'a pas été pleinement débattue devant notre Cour et que nous sommes donc mal placés pour réaliser le juste équilibre en l'espèce de toute manière. Notre Cour a renvoyé à la Cour d'appel des affaires où une question n'avait pas été examinée par les tribunaux d'instance inférieure, et le dossier ainsi que les arguments ne sont « pas suffisamment étoffés pour [. . .] permettre de statuer sur cette question sans crainte de [s]e tromper » (voir, p. ex., *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 46). La SRC n'a pas soulevé la question dans son mémoire parce que, selon elle, la question avait été réglée lorsque nous avons accueilli ses requêtes en prorogation du délai pour solliciter l'autorisation d'appel. Bien que la Couronne ait fait allusion au délai en passant, elle n'a jamais plaidé que l'appel portant sur la motion en réexamen pouvait être rejeté pour ce seul motif. Cela milite encore davantage en faveur du renvoi de l'affaire.

[90] Even if this Court were to exercise its jurisdiction to decide these issues, it does not have the benefit of submissions from the parties on how the principles from *Sherman* outlined above apply to these facts. That decision was released only after this matter had been heard and, in my view, fairness would require further submissions from the parties with respect to its impact on the issue at hand. This Court had previously considered privacy in the context of this test in *Bragg*, but was clear that it was not a question of privacy without more but was combined with "the relentlessly intrusive humiliation of sexualized online bullying" (para. 14).

[90] Même si notre Cour exerçait sa compétence pour trancher ces questions, elle ne dispose pas d'observations des parties sur la manière dont les principes de l'arrêt *Sherman* énoncés ci-dessus s'appliquent aux faits de l'espèce. Cet arrêt n'a été prononcé qu'après l'instruction de la présente affaire, et j'estime que l'équité exigerait des observations supplémentaires de la part des parties en ce qui concerne l'incidence de l'arrêt *Sherman* sur la question à l'étude. Notre Cour s'est déjà penchée sur la protection de la vie privée dans le cadre de ce test dans l'arrêt *Bragg*, mais elle a clairement affirmé qu'il s'agissait non pas uniquement de protection de la vie privée, mais aussi de « l'humiliation constamment envahissante liée à l'intimidation à caractère sexuel en ligne » (par. 14).

[91] *Sherman* provided an opportunity for this Court to confront this issue directly from a distinct perspective. The Court of Appeal had identified privacy interests as mere personal concerns that could not "without more" justify a limit on court openness (*Sherman*, at para. 18). This Court concluded on appeal that it was "inappropriate . . . to dismiss the public interest in protecting privacy as merely a personal concern" (para. 52), and went on to recognize

[91] L'arrêt *Sherman* a donné à notre Cour l'occasion de s'attaquer à cet enjeu directement d'un autre point de vue. La Cour d'appel avait qualifié les droits à la vie privée de simples préoccupations personnelles qui ne pouvaient pas « à elles seules » justifier une limite à la publicité des débats judiciaires (*Sherman*, par. 18). Notre Cour a conclu en appel qu'il était « inapproprié [. . .] de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il

2021 SCC 33 (CanLII)

that "privacy understood in relation to dignity is an important public interest for the purposes of the test" (para. 86).

s'agit d'une simple préoccupation personnelle » (par. 52), et elle a ensuite reconnu que la « vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test » (par. 86).

[92] Of course, it is not uncommon that this Court clarifies the law in an appeal, or series of appeals heard together, and then applies that clarified law to those appeals. But the situation here is different because these parties were not heard in settling the approach taken in *Sherman*. That they would also not be heard on how this approach applies on the facts of their case would be fundamentally unfair to them, not to mention a disadvantage to this Court in deciding the matter. The need for these further submissions on *Sherman* attenuates any judicial economy that would be gained by deciding the matter here rather than remanding it below.

[92] Bien entendu, il n'est pas rare que notre Cour clarifie les règles de droit lors d'un appel, ou d'une série d'appels entendus ensemble, puis applique ces règles de droit clarifiées aux appels en question. Mais la situation en l'espèce est différente parce que ces parties n'ont pas été entendues lorsque l'approche retenue dans l'arrêt *Sherman* a été fixée. Il serait fondamentalement injuste envers les parties qu'elles ne soient pas entendues au sujet de l'application de cette approche aux faits de leur cause, sans parler du désavantage que cela ferait subir à notre Cour quand elle tranche l'affaire. La nécessité d'obtenir ces observations supplémentaires sur l'arrêt *Sherman* atténue toute économie des ressources judiciaires qui serait réalisée en tranchant l'affaire ici, plutôt que de la renvoyer à la juridiction inférieure.

[93] I recognize, as the Crown argued at the hearing, that remanding the matter will prolong the period of uncertainty for the interested parties as to whether the publication ban will ultimately be set aside. It is important to remember, however, that the interested parties will continue to benefit from the publication ban they say is necessary to protect their privacy in the interim.

[93] Je reconnais, tout comme la Couronne l'a plaidé à l'audience, que le renvoi de l'affaire prolongera l'incertitude pour les parties intéressées sur la question de savoir si l'interdiction de publication finira par être annulée. Il importe toutefois de se rappeler que les parties intéressées bénéficieront toujours de l'interdiction de publication qui, à leurs dires, est essentielle à la protection de leur vie privée dans l'intervalle.

[94] This is a completely different situation from cases such as *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, and *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, where it had been approximately a decade since the impugned conduct that was the subject of the litigation and this Court had the benefit of a reasonable decision supported by the record and made by the appropriate first instance decision-maker (*Saadati*, at para. 45; *Wells*, at para. 68). In this case, the publication ban that is the subject of these proceedings was made less than three years ago and we have no decision from a first instance decision-maker on the motion, let alone a reasonable one.

[94] Il s'agit d'une situation tout à fait différente de celle qui prévalait dans des affaires comme *Saadati c. Moorhead*, 2017 CSC 28, [2017] 1 R.C.S. 543, et *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199, où il s'était écoulé environ une décennie depuis la conduite reprochée qui faisait l'objet du litige, et notre Cour avait pris connaissance d'une décision raisonnable étayée par le dossier et rendue par le décideur compétent de première instance (*Saadati*, par. 45; *Wells*, par. 68). En l'espèce, l'interdiction de publication sur laquelle porte la présente instance a été imposée il y a moins de trois ans, et aucune décision n'a été rendue en première instance sur la motion, encore moins une décision raisonnable.

2021 SCC 33 (CanLII)

[95] In the circumstances, the value of shortening this period of uncertainty does not outweigh the importance of fairness to all parties, served by ensuring the matter is decided by the appropriate first instance decision-maker and with the benefit of appropriate submissions.

[96] I would therefore allow the appeal from the 2019 Jurisdiction Judgment and remand the matter to the Court of Appeal to decide the CBC's motion in accordance with these reasons (*Supreme Court Act*, s. 46.1).

[97] The second appeal from the 2018 Publication Ban Judgment itself presents a procedural complication. As I mentioned above, the CBC sought and was granted leave not only from the dismissal of its motion for reconsideration, but also directly from the publication ban. This is plain from the leave judgment and the parties specifically argued both appeals before this Court. That appeal raises a single remaining issue concerning the legality of the publication ban as an exception to the open court principle.

[98] In light of my conclusion that the Court of Appeal did have jurisdiction to hear the CBC's motion, I would not decide the issues raised in the appeal from the 2018 Publication Ban Judgment before the Court of Appeal has decided the motion for reconsideration. I note that appellate courts in similar circumstances have generally insisted that recourse be sought at the original court before hearing an appeal (see, e.g., *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209, at paras. 54-55; *GEA Refrigeration*, at para. 184). Similarly, in this case, it is not in the interests of justice to consider the appeal from the 2018 Publication Ban Judgment before the CBC's motion is decided, given this appeal could be rendered moot as a consequence of that proceeding. We are accordingly not in a useful or informed position to dismiss or allow the second appeal.

[95] Dans les circonstances, la valeur du raccourcissement de cette période d'incertitude ne l'emporte pas sur l'importance de l'équité envers toutes les parties, laquelle est servie en veillant à ce que l'affaire soit tranchée par le décideur compétent de première instance qui dispose des observations voulues.

[96] Je suis donc d'avis d'accueillir le pourvoi contre le jugement de 2019 sur la compétence et de renvoyer l'affaire à la Cour d'appel pour qu'elle tranche la motion de la SRC conformément aux présents motifs (*Loi sur la Cour suprême*, art. 46.1).

[97] Le second appel contre le jugement de 2018 sur l'interdiction de publication lui-même présente une complication procédurale. Comme je l'ai déjà mentionné, la SRC a sollicité et obtenu l'autorisation d'appel non seulement à l'encontre du rejet de sa motion en réexamen, mais aussi directement à l'encontre de l'interdiction de publication. Cela ressort du jugement sur autorisation d'appel, et les parties ont explicitement débattu des deux appels devant notre Cour. Cet appel soulève une seule question restante qui concerne la légalité de l'interdiction de publication en tant qu'exception au principe de la publicité des débats judiciaires.

[98] Vu ma conclusion que la Cour d'appel avait compétence pour entendre la motion de la SRC, je ne suis pas d'avis de trancher les questions soulevées dans l'appel du jugement de 2018 sur l'interdiction de publication avant que la Cour d'appel n'ait statué sur la motion en réexamen. Je signale que les tribunaux d'appel se trouvant dans des situations semblables ont généralement insisté pour que ce type de recours soit introduit au tribunal initial avant d'entendre un appel (voir, p. ex., *Secure 2013 Group Inc. c. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209, par. 54-55; *GEA Refrigeration*, par. 184). Pareillement, en l'espèce, il n'est pas dans l'intérêt de la justice de se pencher sur l'appel contre le jugement de 2018 sur l'interdiction de publication avant qu'il ne soit statué sur la motion de la SRC, vu que cet appel pourrait devenir théorique par suite de l'instance en question. En conséquence, nous ne sommes pas en position utile ou éclairée pour rejeter ou accueillir le second appel.

2021 SCC 33 (CanLII)

[99] Nor would it be appropriate to remand this appeal in whole to the Court of Appeal. Unlike remanding the 2019 Jurisdiction Judgment to the Court of Appeal to reconsider the publication ban following submissions from an affected party not given notice, which as I noted earlier is distinct from an appeal, returning the 2018 Publication Ban Judgment to the Court of Appeal would require it to sit in appeal of its own publication ban.

[100] It follows, in the unusual circumstances of this case, that the appeal from the 2018 Publication Ban Judgment should be adjourned *sine die* pending determination of the motion for reconsideration at the Court of Appeal (see, e.g., *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98, at para. 61). I note that if the Court of Appeal engages with the merits of the publication ban and the 2018 Publication Ban Judgment appeal is then reopened, then those reasons will be before this Court and it will benefit from them as it decides this appeal.

[101] This Court heard appeals thus both directly from a judgment and, simultaneously, from the denial of reconsideration of that same judgment. Leave was granted from both judgments here, a fact that has created the procedural difficulty, but this difficulty is not insurmountable. Appellate courts have used the *sine die* adjournment to deal with appeals identified as premature due to ongoing proceedings below which ought to be completed before the appeal is heard (*Libya*, at para. 83; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65, at para. 33; *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135, at para. 22; *Aleong v. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44, at para. 47). This is more than a procedural concern here: we cannot, in my respectful view, dismiss the second appeal now without conflating the issues at stake on reconsideration of the 2019 Jurisdiction Judgment and those at play in a direct appeal of the 2018 Publication Ban Judgment.

[99] Il ne serait pas approprié non plus de renvoyer cet appel en totalité à la Cour d'appel. Contrairement au fait de renvoyer le jugement de 2019 sur la compétence à la Cour d'appel pour qu'elle réexamine l'interdiction de publication à la suite des observations d'une partie touchée qui n'en a pas été avisée — ce qui, je le répète, se distingue d'un appel —, renvoyer le jugement de 2018 sur l'interdiction de publication à la Cour d'appel l'obligerait à siéger en appel de l'interdiction de publication qu'elle a elle-même décrétée.

[100] Il s'ensuit, dans les circonstances inhabituelles de la présente affaire, que le pourvoi contre le jugement de 2018 sur l'interdiction de publication doit être ajourné *sine die* en attendant qu'il soit statué sur la motion en réexamen en Cour d'appel (voir, p. ex., *Canadian Planning and Design Consultants Inc. c. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98, par. 61). Je signale que si la Cour d'appel se penche sur le bien-fondé de l'interdiction de publication et le pourvoi contre le jugement de 2018 sur cette interdiction est ensuite rouvert, notre Cour disposera alors de ces motifs, et elle en prendra connaissance au moment de statuer sur ce pourvoi.

[101] Notre Cour a donc entendu des pourvois à la fois directement à l'encontre d'un jugement et, parallèlement, contre le refus de réexaminer ce même jugement. L'autorisation d'appel a été accordée à l'égard des deux jugements en l'espèce, un fait à l'origine de la complication procédurale, mais cette complication n'est pas insurmontable. Les cours d'appel ont utilisé l'ajournement *sine die* pour traiter des appels jugés prématurés à la suite de l'instance en cours devant la juridiction inférieure qui devrait être menée à terme avant l'audition de l'appel (*Libya*, par. 83; *Gray c. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65, par. 33; *MK Engineering Inc. c. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135, par. 22; *Aleong c. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44, par. 47). C'est plus qu'une préoccupation d'ordre procédural en l'espèce : avec égards pour l'avis contraire, j'estime que nous ne pouvons rejeter le second pourvoi sans confondre les questions en jeu dans le réexamen du jugement de 2019 sur la compétence et celles en jeu dans un appel formé directement contre le jugement de 2018 sur l'interdiction de publication.

2021 SCC 33 (CanLII)

[102] Finally, even if it were appropriate for this Court to decide the reasonableness of the CBC's delay in bringing its motion, and even if its view was that the motion should have been dismissed on this basis, that conclusion alone would be insufficient to dismiss the appeal directly from the 2018 Publication Ban Judgment. This Court granted leave to appeal, and an extension of time to seek leave to appeal, directly from this separate judgment. I am of the respectful view that it would be inappropriate to effectively reverse these decisions or retroactively limit their scope. If this Court sought only to dispose of the reconsideration issues raised in the appeal from the 2019 Jurisdiction Judgment, it could have granted leave from that judgment alone. But it granted leave from both judgments.

[103] The CBC has not acquiesced in the 2018 Publication Ban Judgment from which it appeals directly to this Court and, with respect for other views, this second appeal has not "lost its *raison d'être*" (*Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740, at pp. 744 and 747). The question it raises is whether the publication ban should be set aside, which is an ongoing issue of live controversy between the parties, and which is distinct from the appropriateness of the reconsideration raised in the appeal from the 2019 Jurisdiction Judgment. There is no basis to say this second appeal has become moot.

[104] Unlike in the first appeal bearing on the reconsideration motion, in the direct appeal from the 2018 Publication Ban Judgment there is no preliminary issue about the delay in bringing the motion, a motion that was not even filed before this judgment was rendered. The only issue in this second appeal is the validity of the final and indefinite publication ban imposed in the 2018 Publication Ban Judgment, which requires the application of the test for discretionary limits on court openness. To resolve this issue now, this Court would have to advert to and apply this test, including, with proper submissions,

[102] Enfin, même s'il était indiqué pour notre Cour de décider du caractère raisonnable du temps qu'a pris la SRC à déposer sa motion, et même si elle estimait qu'il y avait lieu de rejeter la motion pour ce motif, cette conclusion ne suffirait pas à elle seule pour rejeter l'appel formé directement contre le jugement de 2018 sur l'interdiction de publication. Notre Cour a accordé l'autorisation d'appel, de même qu'une prorogation du délai pour solliciter l'autorisation d'appel, directement contre ce jugement distinct. Soit dit respectueusement, il serait inopportun d'infirmer dans les faits ces décisions ou d'en limiter rétroactivement la portée. Si notre Cour ne cherchait qu'à statuer sur les questions de réexamen soulevées dans l'appel du jugement de 2019 sur la compétence, j'estime qu'elle aurait accordé l'autorisation d'appel uniquement à l'encontre de ce jugement. Or, elle a accordé l'autorisation d'appel à l'égard des deux jugements.

[103] La SRC n'a pas acquiescé au jugement de 2018 sur l'interdiction de publication dont elle interjette appel directement à notre Cour et, malgré tout le respect que je dois à d'autres points de vue, ce second appel n'a pas « perdu sa raison d'être » (*Canadian Cablesystems (Ontario) Ltd. c. Association des consommateurs du Canada*, [1977] 2 R.C.S. 740, p. 744 et 747). La question que cet appel soulève est de savoir s'il y a lieu d'annuler l'interdiction de publication, un enjeu qui divise encore les parties et qui se distingue du caractère opportun du réexamen évoqué dans l'appel du jugement de 2019 sur la compétence. Il n'y a aucune raison d'affirmer que ce second appel est devenu théorique.

[104] Contrairement au premier appel portant sur la motion en réexamen, l'appel formé directement contre le jugement de 2018 sur l'interdiction de publication ne soulève pas de question préliminaire au sujet du temps pris pour présenter la motion, une motion qui n'a même pas été déposée avant que ce jugement n'ait été rendu. La seule question en litige dans ce second appel est la validité de la dernière interdiction de publication, de durée indéterminée, qui a été imposée dans le jugement de 2018 sur l'interdiction de publication, ce qui nécessite l'application du test concernant les limites discrétionnaires

2021 SCC 33 (CanLII)

the recent judgment of this Court in *Sherman*. In my respectful view, that task should not be undertaken until the motion for reconsideration is resolved by the Court of Appeal.

à la publicité des débats judiciaires. Pour résoudre cette question maintenant, notre Cour serait obligée de faire allusion à ce critère, ainsi qu'au récent jugement de notre Cour dans *Sherman* en disposant des observations voulues, et de les appliquer. Je suis respectueusement d'avis qu'il ne convient pas d'entreprendre cette tâche tant que la Cour d'appel n'a pas statué sur la motion en réexamen.

V. Conclusion

V. Conclusion

[105] I would allow the appeal from the 2019 Jurisdiction Judgment of the Court of Appeal, set aside that judgment, and remand the matter to that court to decide the CBC's motion in accordance with these reasons.

[105] Je suis d'avis d'accueillir le pourvoi contre le jugement sur la compétence rendu par la Cour d'appel en 2019, d'annuler ce jugement et de renvoyer l'affaire à ce tribunal pour qu'il tranche la motion de la SRC conformément aux présents motifs.

[106] I would adjourn the appeal from the 2018 Publication Ban Judgment of the Court of Appeal *sine die*. I would order that if no motion for directions is filed in this Court within 30 days after the date of the judgment of the Court of Appeal deciding the matter remanded to it in accordance with these reasons, the appeal will be dismissed as abandoned.

[106] Je suis d'avis d'ajourner *sine die* le pourvoi contre le jugement rendu par la Cour d'appel en 2018 sur l'interdiction de publication. J'ordonnerais que si aucune requête pour directives n'est déposée à notre Cour dans les 30 jours qui suivent la date du jugement de la Cour d'appel tranchant l'affaire qui lui est renvoyée conformément aux présents motifs, le pourvoi soit rejeté pour cause d'abandon.

[107] The CBC does not request costs of these appeals and I would make no order as to costs.

[107] La SRC ne demande pas l'adjudication de dépens dans les présents pourvois, et je ne rendrais aucune ordonnance concernant les dépens.

The following are the reasons delivered by

Version française des motifs rendus par

[108] Abella J. (dissenting) — These appeals involve a request by a member of the media to reconsider a publication ban after the underlying proceedings have ended. While I generally agree with Justice Kasirer's analysis of the "notice" issues, I do not share his view that the appeal should be remanded to the Manitoba Court of Appeal for disposition.

[108] La juge Abella (dissidente) — Les présents pourvois concernent une demande déposée par un représentant des médias en vue de faire réexaminer une interdiction de publication après la fin de l'instance sous-jacente. Je souscris dans l'ensemble à l'analyse du juge Kasirer concernant les points relatifs aux « avis », mais je ne suis pas d'accord avec lui pour dire que l'affaire devrait être renvoyée à la Cour d'appel du Manitoba pour décision.

[109] As this Court has repeatedly stressed, the media is a crucial voice in protecting and promoting the openness of courts. That is why the media's right to challenge orders like publication bans is undisputed and why the courts have the discretion to give them

[109] Comme notre Cour l'a souligné à maintes reprises, les médias jouent un rôle crucial dans la protection et la promotion de la publicité des débats judiciaires. C'est pour cette raison que le droit des médias d'attaquer des ordonnances comme les

2021 SCC 33 (CanLII)

notice of publication ban hearings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, this Court clearly stated that members of the media are "third parties" and that notice remains "in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law" (p. 869).

interdictions de publication n'est pas contesté et que les tribunaux ont le pouvoir discrétionnaire d'aviser les médias de la tenue d'audiences sur le sujet. Dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, notre Cour a affirmé sans équivoque que les représentants des médias sont des « tiers » et que la notification relève « du pouvoir discrétionnaire du juge, exercé conformément aux règles de procédure provinciales en matière criminelle et à la jurisprudence pertinente » (p. 869).

[110] But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. In *R. v. Adams*, [1995] 4 S.C.R. 707, Sopinka J. recognized that the application of *functus officio* is "less formalistic and more flexible" in respect of ancillary orders including publication bans (para. 29). It is therefore imperative to maintain circumscribed avenues through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over.

[110] Cependant, au terme de l'instance sous-jacente, la règle du *functus officio* fait en sorte qu'une décision définitive ne peut pas, en général, être réexaminée par le tribunal qui l'a rendue. Dans l'arrêt *R. c. Adams*, [1995] 4 R.C.S. 707, le juge Sopinka a reconnu que l'application de la règle du *functus officio* « est moins formaliste et plus souple » en ce qui concerne les ordonnances accessoires, y compris les interdictions de publication (par. 29). Il est donc impératif de maintenir des voies circonscrites par lesquelles les médias peuvent demander à un tribunal de réexaminer une interdiction de publication après la fin de l'instance sous-jacente.

[111] The rationales underlying the doctrine of *functus officio* show that it has a role to play in respect of publication ban orders, even when those orders are ancillary to the underlying proceedings. *Functus officio* is "commonly described as a 'rule about finality'" (A. S. P. Wong, "Doctrine of *Functus Officio*: The Changing Face of Finality's Old Guard" (2020), 98 *Can. Bar Rev.* 543, at p. 549, citing *Nova Scotia Government and General Employees Union v. Capital District Health Authority* (2006), 246 N.S.R. (2d) 104 (C.A.), at para. 36). As Doherty J.A. observed in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.):

[111] Les considérations qui sous-tendent la règle du *functus officio* montrent que la règle a un rôle à jouer relativement aux ordonnances de non-publication, même lorsque celles-ci sont accessoires à l'instance sous-jacente. La règle du *functus officio* est [TRADUCTION] « souvent décrite comme une "règle sur le caractère définitif d'une décision" » (A. S. P. Wong, « Doctrine of *Functus Officio* : The Changing Face of Finality's Old Guard » (2020), 98 *R. du B. can.* 543, p. 549, citant *Nova Scotia Government and General Employees Union c. Capital District Health Authority* (2006), 246 N.S.R. (2d) 104 (C.A.), par. 36). Comme l'a fait remarquer le juge Doherty dans l'arrêt *Tsaoussis (Litigation Guardian of) c. Baetz* (1998), 41 O.R. (3d) 257 (C.A.) :

Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which

[TRADUCTION] Le caractère définitif d'une décision est une caractéristique importante de notre système de justice, à la fois pour les parties au litige et, au chapitre institutionnel, pour la collectivité en général. Pour les parties, il est nécessaire sur le plan économique et psychologique. Pour la collectivité, il limite en quelque sorte le fardeau économique qu'impose chaque litige au système et confère

2021 SCC 33 (CanLII)

they could not hope to have if they were subject to constant reassessment and variation . . . .

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. [pp. 264-65]

[112] Finality is important, in part, because it provides a stable basis for an appeal (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 79). But finality is also important because it provides economic and psychological security to parties who are dragged into the justice system, including those impacted by publication ban decisions.

[113] It has been settled since *Adams* that publication ban orders, which are ancillary to the underlying proceedings, "can be varied or revoked if the circumstances that were present at the time the order was made have materially changed" (para. 30; *R. v. Henry* (2012), 327 B.C.A.C. 190, at para. 11; *British Columbia v. BCTF* (2015), 75 B.C.L.R. (5th) 257 (C.A.), at para. 22). The change must "relate to a matter that justified the making of the order in the first place" *and* the moving party must act "at the earliest opportunity" after the change in circumstances occurs (*Adams*, at para. 30, citing *R. v. Khela*, [1995] 4 S.C.R. 201, at pp. 210-11). I agree with the majority that a material change in circumstances cannot be established in this case.

[114] In the absence of a material change, trial and appellate courts have recognized that the media are "affected by" orders relating to court openness, meaning that they can generally apply for

aux décisions rendues par le système l'autorité qu'elles ne pourraient espérer détenir si elles étaient assujetties à une réévaluation et à une variation constantes. . .

Les parties et la collectivité ont besoin que les litiges aient un caractère définitif et discernable. Les parties doivent pouvoir, à un certain point, savoir que la question a été tranchée et que leurs droits et obligations respectifs ont fait l'objet d'une décision définitive. En l'absence d'une telle issue discernable, les parties ne peuvent pas avoir la certitude que la question a été tranchée définitivement; elles doivent supporter le fardeau économique et psychologique considérable d'instances de durée indéterminée où leurs droits et obligations respectifs sont réexaminés au fur et à mesure que les circonstances changent. [p. 264-265]

[112] Le caractère définitif d'une décision est important, d'une part, parce qu'il fournit une assise stable pour l'appel (*Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, [2003] 3 R.C.S. 3, par. 79). Il est aussi important, d'autre part, parce qu'il constitue une garantie économique et psychologique pour les parties qui sont entraînées malgré elles dans le système de justice, notamment pour celles qui sont touchées par des décisions en matière de non-publication.

[113] Il est établi depuis l'arrêt *Adams* que les ordonnances de non-publication, qui sont accessoires à l'instance sous-jacente, « peu[vent] être modifiée[s] ou annulée[s] s'il y a eu changement important des circonstances qui existaient au moment où elle[s] [ont] été rendue[s] » (par. 30; *R. c. Henry* (2012), 327 B.C.A.C. 190, par. 11; *British Columbia c. BCTF* (2015), 75 B.C.L.R. (5th) 257 (C.A.), par. 22). Le changement doit « se rapporter à une question qui a justifié, au départ, la délivrance de l'ordonnance » *et* le requérant doit agir « à la première occasion » après le changement de circonstances (*Adams*, par. 30, citant *R. c. Khela*, [1995] 4 R.C.S. 201, p. 210-211). Je suis d'accord avec les juges majoritaires pour dire qu'aucun changement important de circonstances ne peut être établi en l'espèce.

[114] En l'absence d'un changement important de circonstances, les cours de première instance et les cours d'appel ont reconnu que les médias sont « touchés » par les ordonnances qui ont trait à la

2021 SCC 33 (CanLII)

reconsideration when such an order is issued without notice (see e.g. *Hollinger Inc. v. The Ravelston Corp.* (2008), 89 O.R. (3d) 721 (C.A.), at para. 43, and cases cited therein). As Justice Kasirer confirms, this approach applies if the media can show that their submissions are made with "due dispatch" and "prompt action", could make a material difference to the outcome and that the nature of those submissions was not originally considered by the court that issued the ban. The courts have discretion to decide whether it is in the interests of justice to reopen a publication ban under such circumstances.

publicité des débats judiciaires, ce qui signifie qu'ils peuvent généralement demander le réexamen de ces ordonnances lorsqu'elles sont délivrées sans avis (voir, p. ex., *Hollinger Inc. c. The Ravelston Corp.* (2008), 89 O.R. (3d) 721 (C.A.), par. 43, et les décisions qui y sont citées). Comme le confirme le juge Kasirer, cette approche s'applique si les médias peuvent démontrer que leurs observations sont présentées « avec célérité », qu'elles pourraient avoir une incidence importante sur le résultat et que la nature de leurs observations n'a pas été examinée au départ par le tribunal qui a imposé l'interdiction de publication. Dans ces circonstances, les tribunaux ont le pouvoir discrétionnaire de décider s'il est dans l'intérêt de la justice de réexaminer une interdiction de publication.

[115] These two avenues for after-the-fact media challenges to publication bans reflect the fact that the media is indispensable to court openness. But the applicable tests also take the concept of finality seriously. At a certain point, the parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over.

[115] Les deux voies par lesquelles les médias peuvent contester une interdiction de publication après coup témoignent du fait que les médias sont indispensables à la publicité des débats judiciaires. Néanmoins, les critères applicables accordent aussi beaucoup d'importance au concept de caractère définitif d'une décision. À un moment donné, il faut que les parties puissent tourner la page et être à l'abri des préjudices psychologiques et financiers associés au fait d'être entraînées de nouveau malgré elles dans le système de justice lorsqu'une affaire est close.

[116] That is why reconsideration of a publication ban must be sought in a timely manner, and why a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests underlying finality and the interests in support of the open court principle.

[116] Voilà pourquoi il faut demander le réexamen d'une interdiction de publication en temps opportun et pourquoi les tribunaux ne devraient généralement pas réexaminer une interdiction de publication après la fin de l'instance principale, sauf s'il existe une raison valable de croire que la demande formulée par un représentant des médias sert l'intérêt public et qu'elle pourrait raisonnablement amener le tribunal à rendre une décision différente. Il s'agit d'un exercice de pondération, sans barème préétabli, entre les intérêts qui sous-tendent le caractère définitif d'une décision et les intérêts liés au principe de la publicité des débats judiciaires.

[117] In balancing these principles, and with great respect, I come to a different conclusion from the majority on whether to remand the matter to the Manitoba Court of Appeal.

[117] En soupesant les principes susmentionnés, et avec égards, j'arrive à une conclusion différente de celle des juges majoritaires quant au renvoi de l'affaire à la Cour d'appel du Manitoba.

2021 SCC 33 (CanLII)

[118] As noted, the CBC is unable to establish a material change in circumstances under *Adams*. As a result, the only basis on which it could move for reconsideration once the proceedings are over is by showing that the publication ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met in this case.

[118] Comme je l'ai souligné précédemment, la SRC ne peut établir en l'espèce qu'un changement important de circonstances s'est produit au sens de l'arrêt *Adams*. Par conséquent, la SRC ne peut demander un réexamen après la fin de l'instance que si elle démontre que l'interdiction de publication a été prononcée sans avis, que ses observations peuvent avoir une incidence importante sur le résultat et qu'elle a déposé la motion en réexamen en temps opportun. En l'espèce, aucune de ces conditions n'est remplie.

[119] To start, the CBC's argument that the publication ban was issued without notice is difficult to accept in the circumstances. At the hearing before the Manitoba Court of Appeal, counsel for the CBC candidly admitted that the CBC was reporting on the Ostrowski case throughout the course of the proceedings. And before this Court, counsel confirmed that the CBC had a representative in the courtroom when the publication ban was originally ordered on May 28, 2018. At no point in the intervening period between the original publication ban order and its continuation in the Court of Appeal's reasons of November 27, 2018 did the CBC attempt to assert its interests.

[119] Tout d'abord, l'argument de la SRC selon lequel la cour a prononcé l'interdiction de publication sans avis est difficile à accepter dans les circonstances. Lors de l'audience devant la Cour d'appel du Manitoba, les avocats de la SRC ont admis candidement que la SRC avait couvert l'affaire Ostrowski tout au long de l'instance. En outre, devant notre Cour, ils ont confirmé que la SRC avait un représentant dans la salle d'audience lors du prononcé de l'interdiction de publication le 28 mai 2018. La SRC n'a tenté de faire valoir ses intérêts à aucun moment depuis le prononcé de l'ordonnance de non-publication initiale jusqu'à la reconduction de l'ordonnance dans les motifs du jugement que la Cour d'appel a rendus le 27 novembre 2018.

[120] In any event, it is not clear to me what further "notice" would be required in such circumstances. Courts do not issue formal invitations to their hearings — the courtroom is, and should be, open to all, including and especially the media. If the media is present in the courtroom when a publication ban is issued, it follows that it knows of its existence. That is what notice is supposed to be for.

[120] Quoi qu'il en soit, je ne vois pas très bien quel autre « avis » aurait été requis dans les circonstances. Les tribunaux n'envoient pas d'invitations officielles à leurs audiences — les salles d'audience sont, et devraient être, accessibles à tous, y compris et surtout aux médias. Si les médias sont présents dans la salle d'audience lorsqu'une interdiction de publication est prononcée, il s'ensuit qu'ils en connaissent l'existence. Or, il s'agit là du résultat qu'on cherche à atteindre lorsqu'on transmet un avis.

[121] Nor has the CBC discharged its burden of showing that its proposed submissions could make a material difference in the outcome. It is well-established that courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions (*R. v. Mentuck*, [2001] 3 S.C.R. 442, at para. 38). There is no reason to assume that did not happen in this case. The CBC does

[121] La SRC ne s'est pas non plus acquittée de son fardeau de démontrer que ses observations envisagées pourraient avoir une incidence importante sur le résultat. Il est bien établi que les tribunaux qui prononcent des interdictions de publication sont censés tenir compte de l'importance du principe de la publicité des débats judiciaires, même lorsqu'aucun représentant des médias ne présente d'arguments à ce sujet (*R. c. Mentuck*, [2001] 3 R.C.S. 442, par. 38). Il

2021 SCC 33 (CanLII)

not propose to advance a new or unique position or to introduce evidence of which the Court of Appeal was unaware. It simply wishes to argue that the open court principle outweighs the interests supporting the ban, a foundational submission that the Court of Appeal is presumed to have already considered. Furthermore, having heard the CBC's complete argument on the propriety of the publication ban in this Court, I find it difficult to see how its submissions could make a difference in the result.

n'y a aucune raison de supposer que cela ne s'est pas produit en l'espèce. La SRC ne propose pas de faire valoir une position nouvelle ou unique ni de produire des éléments de preuve dont la Cour d'appel ignorait l'existence. Elle souhaite simplement plaider que le principe de la publicité des débats judiciaires l'emporte sur les intérêts qui appuient l'interdiction, une observation de base que la Cour d'appel est présumée avoir déjà examinée. De plus, ayant entendu l'exposé complet des arguments de la SRC sur le bien-fondé de l'interdiction de publication devant notre Cour, j'ai de la difficulté à voir comment ses observations pourraient mener à un résultat différent.

[122] More significantly, and relatedly, the CBC's failure to act in a timely manner is, in my respectful view, determinative. The publication ban was originally ordered on May 28, 2018 and was continued by the Court of Appeal in its reasons for judgment on November 27, 2018. But the CBC did not file its motion for reconsideration until May 10, 2019, over five months later. And it did not file its application to this Court for leave to appeal the original publication ban until January 27, 2020, nearly two years after the ban was first imposed and well over a year after it was continued in the November 2018 reasons for judgment.

[122] Qui plus est, et dans le même ordre d'idées, le fait que la SRC a tardé à agir me paraît déterminant. La Cour d'appel a prononcé l'interdiction de publication le 28 mai 2018 et l'a reconduite dans ses motifs de jugement rendus le 27 novembre 2018. Or, la SRC n'a pas déposé sa motion en réexamen avant le 10 mai 2019, soit plus de cinq mois plus tard. De surcroît, elle n'a pas déposé sa demande d'autorisation d'appel de l'interdiction de publication initiale devant notre Cour avant le 27 janvier 2020, soit près de deux ans après l'imposition de l'interdiction et bien plus d'un an après sa reconduction dans les motifs du jugement rendus en novembre 2018.

[123] The CBC has suggested that its delay can be explained in part by its confusion as to the nature and scope of the publication ban, resulting in communications with the Court of Appeal to determine precisely what was prohibited.

[123] La SRC a laissé entendre que le délai s'expliquait en partie par le fait qu'il régnait une certaine confusion quant à la nature et à la portée de l'interdiction de publication, qui a fait en sorte que la SRC a communiqué avec la Cour d'appel pour obtenir des précisions sur ce qui était interdit.

[124] The correspondence between the CBC and the Manitoba Court of Appeal following the November 27, 2018 reasons demonstrates clearly that this is hardly a robust explanation. On November 30, 2018, the Executive Assistant to the Chief Justices and the Chief Judge informed the CBC that the media was entitled to review the material "protected by the ban on publication", but that the actual fresh evidence affidavit was not available for review because the fresh evidence was not filed with the court after the motion was dismissed. After some further clarifying correspondence, by January 21, 2019, the Registrar had spelled out in unmistakeable terms

[124] Les communications entre la SRC et la Cour d'appel du Manitoba qui ont eu lieu après le prononcé des motifs du 27 novembre 2018 démontrent sans équivoque que cette explication est loin d'être solide. Le 30 novembre 2018, l'adjointe exécutive des juges en chef a avisé la SRC que les médias avaient le droit d'examiner les documents [TRADUCTION] « protégés par l'interdiction de publication », mais que la nouvelle preuve par affidavit ne pouvait être examinée étant donné qu'elle n'avait pas été déposée auprès de la cour après le rejet de la motion. Le 21 janvier 2019, à la suite d'autres communications visant à éclaircir davantage la question, le registraire

2021 SCC 33 (CanLII)

that "at the outset of proceedings on May 28, 2018, the [c]ourt imposed a publication ban preventing the publication of any of the details of the proposed fresh evidence. In paragraph 82 of the reasons, the [c]ourt ordered that the publication ban would remain in effect". Yet it took the CBC another four months to file a motion for reconsideration.

a énoncé en des termes sans équivoque que, [TRADUCTION] « au début de l'instance le 28 mai 2018, la [c]our a imposé une interdiction de publication pour empêcher la publication de tout renseignement relatif aux nouveaux éléments de preuve proposés. Au paragraphe 82 de ses motifs, la [c]our a ordonné que l'interdiction de publication demeure en vigueur. » Pourtant, il a fallu à la SRC encore quatre mois pour déposer une motion en réexamen.

[125] It is useful to put this delay in perspective by reference to some timelines provided for by Manitoba's *Court of Appeal Rules*, Man. Reg. 555/88R. If a party to an appeal before the court of appeal wants a rehearing before the certificate of decision has been entered, they presumptively have 30 days to file a motion after reasons for judgment are delivered (r. 46.2(4)). If the appellant fails to file its factum in accordance with the timelines set out in the rules, its appeal will be deemed to be abandoned 30 days after the appellant receives notice from the registrar (r. 33(4)). These timelines are a legislated acknowledgement of the importance of timeliness in the resolution of court cases.

[125] Pour mettre le temps écoulé en perspective, il est utile de se référer à certains délais prévus dans les *Règles de la Cour d'appel*, Règl. du Man. 555/88R, du Manitoba. Si une partie à un appel devant la Cour d'appel souhaite obtenir une nouvelle audience avant que le certificat de décision n'ait été inscrit, elle est présumée disposer de 30 jours après le prononcé des motifs de jugement pour présenter sa motion (par. 46.2(4)). Si l'appelant ne dépose pas son mémoire dans les délais prévus par les règles, son appel sera réputé abandonné 30 jours après l'avis que l'appelant reçoit du registraire (par. 33(4)). Les délais prévus constituent une reconnaissance législative de l'importance d'agir en temps opportun dans le règlement des affaires portées devant les tribunaux.

[126] An unexplained six month delay for filing a motion to have a publication ban reconsidered — even a four month delay, on a charitable interpretation of when the CBC had full and complete notice of the nature of the publication ban — is inordinate. Under no definition of "due dispatch" or "prompt action" can this delay be justified, particularly since the CBC was fully aware — and present — from the outset of the proceedings, the ban, and the ban's continuation. On the other hand, the delay in this case causes acute harm to the family, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings and that they would not be brought back to court. I see no reason to prolong their distress further.

[126] Un délai non expliqué de six mois pour déposer une motion en réexamen d'une interdiction de publication est excessif. Même un délai de quatre mois, calculé de façon indulgente à partir du moment où la SRC connaissait parfaitement et entièrement la nature de l'interdiction de publication, serait excessif. Peu importe la définition que l'on donne au concept d'agir « avec célérité », le délai ne saurait être justifié, en particulier parce que la SRC était parfaitement au courant du prononcé de l'interdiction et de sa reconduction — et qu'elle était présente — dès le début de l'instance. De plus, le délai en l'espèce cause un préjudice grave aux membres de la famille, qui s'attendaient raisonnablement à ce que leur droit au respect de la vie privée et à la dignité soit protégé par le caractère définitif de l'instance et à ce qu'ils n'aient pas à comparaître de nouveau devant le tribunal. Je ne vois aucune raison de prolonger leur détresse.

[127] While it is true that the CBC's appeal directly from the publication ban technically came to this

[127] Même s'il est vrai que le pourvoi formé par la SRC directement à l'encontre de l'interdiction de

2021 SCC 33 (CanLII)

Court on a separate application for leave to appeal from that of its appeal from the Court of Appeal's refusal to reconsider that ban, both appeals ultimately seek the same relief: that the publication ban be set aside. In the unique context of this case, it makes sense that leave was granted concurrently in both appeals since the ultimate relief sought in both was the same. Moreover, the legal question of when the media can reopen a publication ban order after the case is over raised an issue of "public importance" requiring this Court's guidance (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1)).

publication est arrivé techniquement devant notre Cour dans une demande d'autorisation d'appel distincte de celle concernant le refus de la Cour d'appel de réexaminer cette interdiction, les deux pourvois visent en fin de compte à obtenir la même réparation : la levée de l'interdiction de publication. Dans le contexte unique de l'espèce, il est logique que l'autorisation des deux pourvois ait été accordée simultanément puisque la réparation demandée en fin de compte était la même. De plus, la question juridique de savoir dans quels cas les médias peuvent faire réexaminer une ordonnance de non-publication après la conclusion d'une instance revêt une « importance [. . .] pour le public » qui nécessite des directives de la part de notre Cour (*Loi sur la Cour suprême*, L.R.C. 1985, c. S-26, par. 40(1)).

[128] Since, in my respectful view, the CBC was not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay, it would be incongruous to conclude that the impact of the CBC's delay is different for its appeal from the ban itself and for the appeal from the reconsideration motion. The reconsideration appeal is an appeal of that same ban. It would be the triumph of procedural formalism over substantive reality to pretend that these are two different and unrelated legal issues requiring separate conceptual consideration. An undue delay in one is an undue delay in the other.

[128] Étant donné qu'à mon humble avis, la SRC n'avait pas droit au réexamen de l'interdiction de publication en raison de son retard indu et injustifié à présenter sa motion, il serait incongru de conclure que l'incidence du retard de la SRC est différente dans le pourvoi qu'elle a formé contre l'interdiction en tant que telle que dans le pourvoi à l'encontre du rejet de la motion en réexamen. Le pourvoi en réexamen de l'interdiction porte sur cette même interdiction. Prétendre qu'il s'agit de deux questions juridiques distinctes qui requièrent un examen conceptuel distinct reviendrait à faire triompher le formalisme procédural sur la réalité pratique. Un retard indu dans un cas est un retard indu dans l'autre cas.

[129] As for how to deal with this Court's recently released decision in *Sherman Estate v. Donovan*, [2021] 2 S.C.R. 521, it was open to the majority to seek further submissions based on the *Sherman* reasons. This would have been more consistent with this Court's usual practice in dealing with appeals of publication bans, namely, deciding them in our Court rather than remanding them back to the issuing court. It would also have curtailed the prolongation of these proceedings. In any event, with respect, I do not see anything in the *Sherman* decision of such determinative relevance to the CBC's interests that it justified ignoring the unjustified delay.

[129] Quant au traitement qu'il convient de réserver à la récente décision de notre Cour dans l'affaire *Sherman (Succession) c. Donovan*, [2021] 2 R.C.S. 521, il était loisible aux juges majoritaires de chercher à obtenir des éclaircissements compte tenu des motifs énoncés dans cet arrêt. Cette façon de faire se serait mieux accordée avec la pratique habituelle de notre Cour lorsqu'elle entend des pourvois relatifs à une interdiction de publication, soit de statuer sur ceux-ci plutôt que de les renvoyer à la cour qui a imposé l'interdiction. Cela aurait aussi limité la prolongation de l'instance. De toute manière, avec égards, je ne vois rien dans l'arrêt *Sherman* qui soit pertinent pour les intérêts de la SRC au point de justifier que l'on passe outre au délai injustifié.

2021 SCC 33 (CanLII)

[130] This Court retains a narrow discretion to refuse to entertain the merits of an appeal even after leave has been granted. As Laskin C.J. wrote for the Court in *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740,

> Although it will be rarely that this Court, leave having been granted, will thereafter refuse to entertain the appeal on the merits, its power to do so is undoubted . . . . [p. 742]

This is one of those rare cases where the interests of justice warrant a refusal to entertain the appeal on the merits.

[131] I would dismiss the appeals.

Appeal from motion to set aside publication ban allowed. Appeal from publication ban adjourned sine die. ABELLA J. *dissenting.*

Solicitors for the appellant: MLT Aikins, Winnipeg; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent Her Majesty The Queen: Attorney General of Manitoba, Winnipeg.

Solicitors for the respondent Stanley Frank Ostrowski: Strosberg Sasso Sutts, Windsor; Lockyer Campbell Posner, Toronto.

Solicitors for the respondents B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.: Robert Gosman Law Corporation, Winnipeg.

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

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

[130] Notre Cour conserve un pouvoir discrétionnaire limité qui lui permet de refuser d'examiner le pourvoi au fond, même après que l'autorisation eut été accordée. Comme l'a écrit le juge en chef Laskin au nom de la Cour dans l'arrêt *Canadian Cablesystems (Ontario) Ltd. c. Association des consommateurs du Canada*, [1977] 2 R.C.S. 740 :

> Une fois l'autorisation accordée, cette Cour ne refusera que rarement d'examiner le pourvoi au fond, mais elle a indubitablement le pouvoir de le faire . . . [p. 742]

Il s'agit de l'un des rares cas où les intérêts de la justice justifient le refus d'examiner le pourvoi au fond.

[131] Je suis d'avis de rejeter les pourvois.

Pourvoi formé contre la motion en annulation de l'interdiction de publication accueilli. Pourvoi formé contre l'interdiction de publication ajourné sine die. La juge ABELLA *est dissidente.*

Procureurs de l'appelante : MLT Aikins, Winnipeg; Société Radio-Canada, Toronto.

Procureur de l'intimée Sa Majesté la Reine : Procureur général du Manitoba, Winnipeg.

Procureurs de l'intimé Stanley Frank Ostrowski : Strosberg Sasso Sutts, Windsor; Lockyer Campbell Posner, Toronto.

Procureurs des intimés B.B., conjointe de feu M.D., et J.D., en sa qualité d'exécuteur de la succession de feu M.D. : Robert Gosman Law Corporation, Winnipeg.

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

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

2021 SCC 33 (CanLII)

Solicitors for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and the Communications Workers of America/Canada: Stockwoods, Toronto.

Procureurs des intervenants Centre for Free Expression, l'Association canadienne des journalistes, Médias d'Info Canada et Guilde canadienne des médias/Syndicat des communications d'Amérique/Canada : Stockwoods, Toronto.

Solicitors for the intervener Ad Idem/Canadian Media Lawyers Association: Reynolds Mirth Richards & Farmer, Edmonton.

Procureurs de l'intervenante Ad Idem/Canadian Media Lawyers Association : Reynolds Mirth Richards & Farmer, Edmonton.

2021 SCC 33 (CanLII)

TAB 13

Canam Enterprises Inc. v. Coles; CB Commercial Real Estate Group Canada Inc., Leon and Senst, Third Parties; National Trust Company of Canada, Duncan and James Duncan Estate and Business Broker, Fourth Parties*

CB Commercial Real Estate Group Canada Inc. et al. v. Coles

[Indexed as: Canam Enterprises Inc. v. Coles]

51 O.R. (3d) 481
[2000] O.J. No. 4607
Docket No. C33982

Court of Appeal for Ontario
Finlayson, Weiler and Goudge JJ.A.
December 8, 2000

* An appeal from the following judgment to the Supreme Court of Canada (McLachlin C.J., Gonthier, Major, Binnie, Arbour, LeBel and Deschamps JJ.) was allowed on October 8, 2002. The full text of the appeal is available at [2002] S.C.J. No. 64 in the S.C.J. database.

Actions -- Bars -- Abuse of process -- Purchaser bringing action against vendor alleging that mortgage back void because of misrepresentation made by vendor's real estate agent about zoning of property -- Purchaser's action dismissed based on doctrine of merger -- Purchaser then bringing action against own solicitor for negligence in failing to investigate zoning -- Solicitor denying negligence and bringing third party proceedings against real estate agent -- Solicitor relying on Negligence Act and claiming contribution from real estate agent -- Lawyer alleging that agent having liability to purchaser -- Real estate agent moving to dismiss third party claim based on issue estoppel -- Issue estoppel not established but third

2000 CanLII 8514 (ON CA)

party claim dismissed based on doctrine of abuse of process -- Negligence Act, R.S.O. 1990, c. N.1.

In 1993, National Trust retained CB Inc. and L and S ("the Realtors") as its real estate agent to sell a property in Toronto. In marketing the property, the Realtors represented that the property was zoned C-1 Commercial. This representation was false because the property was subject to a site-specific zoning by-law that restricted its uses. Unaware that the representation about zoning was false, Canam Enterprises Inc. ("Canam") entered into an agreement to purchase it for a price of $1,420,000, to be paid, in part, by a mortgage back to National Trust for $1,130,000. Canam retained C as its lawyer, and the transaction closed without Canam being aware that the property was not zoned C-1 Commercial as represented. After the closing, Canam sued National Trust for a declaration that the mortgage was void because of the Realtors' misrepresentation about the zoning. National Trust counterclaimed to enforce its mortgage. In 1998, Day J. granted National Trust's motion for summary judgment dismissing Canam's claim and granting it judgment on the counterclaim. Although Day J. concluded that there had been a false representation, he held that the misrepresentation did not provide grounds to set aside the mortgage because of the doctrine of merger. Canam then sued C for professional negligence, which he denied, pleading that under his retainer Canam was responsible for investigating zoning matters. In addition to defending, C commenced third party proceedings against the Realtors. In the third party proceedings, C did not assert any claim of his own against the Realtors but relied on the provisions of the Negligence Act to plead that the Realtors were liable to Canam. The Realtors defended and also brought fourth party proceedings against National Trust alleging that if they provided false information, it had been obtained from National Trust. The Realtors then moved for a summary judgment dismissing C's third party claim based on the defences of res judicata, issue estoppel and abuse of process because of the judgment of Day J. National Trust also moved for a summary judgment dismissing both the third party claim against the Realtors and the fourth party claim against it on the same grounds. For the purpose of the motion, the parties agreed that the facts pleaded were true

2000 CanLII 8514 (ON CA)

and that they gave rise to a cause of action. Nordheimer J. granted both motions and dismissed the third and fourth party claims on the basis that they were barred by issue estoppel or, alternatively, that they constituted an abuse of process. C appealed and sought an order setting aside the dismissal of his third party claim against the Realtors.

Held, the appeal should be dismissed with costs.

Per Finlayson J.A. (Weiler J.A. concurring): The result below was correct, and the appeal should be dismissed based on the doctrine of abuse of process but not based upon the principle of res judicata, of which issue estoppel is one aspect. The requirements of issue estoppel are: (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. On this appeal, the key question about issue estoppel was whether the appropriate parties were privies to the proceedings between Canam and National Trust. Someone who is privy in interest to a party in an action is equally bound by the final judgment in those proceedings. Here C claimed contribution under the Negligence Act and sought to add the Realtors as joint tortfeasors for the misrepresentations they made to Canam. In the prior proceeding the parties were Canam and National Trust. The Realtors were privies of National Trust, but an issue estoppel did not arise in the immediate case because it was not necessary in the mortgage action for Day J. to deal with the present assertion that had the Realtors been parties then damages could have been awarded against them. The misrepresentation issue was not disposed of in a manner that was dispositive of a claim now being asserted against the Realtors. It could hardly be said that the parties to the mortgage action had an opportunity to raise the issue of the potential liability of an entity that was not a party to the action at all. However, the court could still utilize the broader doctrine of abuse of process, which is a discretionary principle not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public

2000 CanLII 8514 (ON CA)

policy. The Realtors could have been properly included in the mortgage proceedings. It did not lie in the mouth of a stranger to those proceedings to insist that there now be a trial as to the liability of the Realtors to Canam. To allow the defendant to retry the issue of misrepresentation would be a classic example of abuse of process and a waste of the time and resources of the litigants and the court.

Per Goudge J.A. (dissenting): The third party proceeding ought not to have been dismissed on the basis of either issue estoppel or the doctrine of abuse of process. The same issue requirement of issue estoppel was not met. The issue in the third party proceeding was whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. That duty was not a part of the proceedings before Day J., which dealt with whether the contractual rights of National Trust were voided by the misrepresentation made on its behalf. Given this finding, it was unnecessary to deal with the same parties requirement of issue estoppel, but if one were to address this requirement, having due regard to the subject matter of the dispute before Day J., it would not appear that one could find the privity of interest between C or Canam or between the Realtors and National Trust. As for the doctrine of abuse of process, it engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or that would in some other way bring the administration of justice into disrepute. One circumstance where the doctrine is applied is where the litigation before the court is found in essence to be an attempt to relitigate a claim that the court has already determined. There was, however, no relitigation in the immediate case. The third party proceeding was the first time that the Realtors would have to respond to the assertion that they breached their duty to Canam. The third party claim raised an issue not previously litigated. It was not manifestly unfair to allow C to bring the claim or to require the Realtors to defend it. There was no abuse of process.

Cases referred to

2000 CanLII 8514 (ON CA)

Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397; Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, 110 Sol. Jo. 425, [1967] R.P.C. 497 (H.L.); Fenerty v. Halifax (City) (1920), 53 N.S.R. 457, 50 D.L.R. 435 (S.C.); Gleeson v. J. Wippell & Co. Ltd., [1977] All E.R. 54, [1977] 1 W.L.R. 510, 121 Sol. Jo. 157 (Ch. D.); Heynen v. Frito Lay Canada Ltd. (1999), 45 O.R. (3d) 776, 46 C.C.E.L. (2d) 1, 179 D.L.R. (4th) 317, [2000] C.L.L.C. 210-003 (C.A.); House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347, [1990] 2 All E.R. 990 (C.A.); M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe), [1998] 4 All E.R. 675 (C.A.); Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 112 D.L.R. (4th) 683 (C.A.) [Leave to appeal to S.C.C. refused (1994), 19 O.R. (3d) xvi, 7 C.C.E.L. (2d) 40n, 178 N.R. 80n]; Solomon v. Smith (1987), [1988] 1 W.W.R. 410, 45 D.L.R. (4th) 266, 49 Man. R. (2d) 252, 22 C.P.C. (2d) 12 (C.A.)

Statutes referred to

Negligence Act, R.S.O. 1990, c. N.1

APPEAL from an order of Nordheimer J. (2000), 47 O.R. (3d) 446 (S.C.J.) dismissing a third party and a fourth party claim.

Christine Innes, for respondent.
V.A. Edwards and J. Sebastian Winny, for appellant.
Jeffrey S. Klein, for third parties respondents.
Mark Hartman, for fourth party respondent, National Trust Company of Canada.

[1] FINLAYSON J.A. (WEILER J. concurring): -- The defendant in the main action, Alan H. Coles ("Coles"), appeals from the summary judgment of The Honourable Mr. Justice Nordheimer dated March 2, 2000. The motions judge granted motions by the third parties, CB Commercial Real Estate Group Canada Inc., Kevin W. Leon and Peter D. Senst (the "Realtors") and the fourth party,

2000 CanLII 8514 (ON CA)

National Trust Company of Canada ("National Trust"), and dismissed both the third and fourth party claims on the basis that they were barred by issue estoppel or, alternatively, that they constituted an abuse of process. Coles seeks an order setting aside the dismissal of his third party claim against the Realtors. There is no appeal from the dismissal of the fourth party claim by either Coles or the plaintiff Canam.

Facts

The original real estate transaction

[2] Pursuant to an agreement of purchase and sale dated March 5, 1993, Canam Enterprises Inc. ("Canam") agreed to purchase 200 Finch Avenue West in Toronto ("the property") from National Trust pursuant to a power of sale. The purchase price of the property was $1,420,000. Canam provided a down payment of $290,000, and National Trust agreed to take back a mortgage of $1,130,000 to secure the balance of the purchase price.

[3] The Realtors acted as listing agents for National Trust. They prepared and circulated advertising material which represented the zoning of the property as C-1 Commercial. The advertisement specifically detailed potential retail uses of the property.

[4] The agreement of purchase and sale also stipulated that the zoning of the property was C-1 Commercial. It contained a requisition period that gave Canam the right to make requisitions as to title and other matters. Canam's solicitor on the transaction, Coles, requisitioned evidence that C-1 Commercial use could be lawfully continued. National Trust's solicitors responded with what has been described as "the usual satisfy yourself reply".

[5] When the transaction closed on June 29, 1993, the property was subject to a site-specific zoning by-law which restricted it to "professional office" use. Canam alleges that as a result of these use restrictions, it has suffered significant financial losses, including losses arising from defaulting on the vendor take-back mortgage to National Trust.

2000 CanLII 8514 (ON CA)

The prior proceeding (the "Mortgage Action")

[6] Following Canam's default under the mortgage, National Trust issued a Notice of Sale dated January 14, 1997. On August 22, 1997, Canam commenced a separate action against National Trust seeking a declaration that the mortgage was void and unenforceable because of the false representations made by the Realtors about the zoning. National Trust counter-claimed for the balance owing on its mortgage and for payment on a guarantee. In its defence to Canam's claim, National Trust took the position that the representation concerning zoning merged with the conveyance.

[7] National Trust successfully moved for summary judgment on its counterclaim and for dismissal of Canam's claim before Day J. on April 20, 1998. Summary judgment was granted on that date, with oral reasons released December 23, 1998 [reported 22 R.P.R. (3d) 129]. In his reasons for judgment, Day J. concluded that false representations were made concerning zoning on behalf of National Trust. He then examined the doctrine of merger in the context of the requisition period contained in the agreement of purchase and sale. He concluded [at p. 135]: "From the broad considerations it appears that the defence of Canam as to misrepresentation will not apply so as to set aside the contract."

Nature of the present action

[8] Following receipt of the Notice of Sale, Canam commenced this action against its former solicitor, Coles, by statement of claim issued June 17, 1997. Canam claimed damages for alleged negligence in relation to the zoning restrictions on the property that it purchased. Canam pleaded that Coles failed to warn it of the site-specific by-law restricting the use of the property.

[9] Coles denied any negligence or breach of contract. He pleaded that his retainer with Canam was expressly limited to exclude zoning inquiries, and that Canam was responsible for investigating zoning matters.

2000 CanLII 8514 (ON CA)

[10] Coles commenced a third party claim for contribution or indemnity against the Realtors who listed the property and represented it as being zoned C-1 Commercial. Coles alleged that the Realtors knew or ought to have known of the true zoning of the property, failed to take steps to verify the correct zoning, and breached their professional duty to Canam, including a fiduciary duty to Canam, in failing to ascertain and disclose the restricted zoning by-law. Coles pleads and relies on the provisions of the Negligence Act, R.S.O. 1990, c. N.1.

[11] The Realtors have defended both the main action and the third party claim, in part with a defence of res judicata based on the disposition of the Mortgage Action. The Realtors also commenced a fourth party claim for contribution or indemnity against National Trust, for whom they acted as a selling agent and broker. The fourth party claim against National Trust pleads that if the Realtors provided false information to Canam, they obtained it from National Trust, who should accordingly be liable to the Realtors in negligence. The Realtors' allegations against National Trust are not framed as a joint tortfeasor claim.

[12] National Trust has defended the main action, the third party claim and the fourth party claim, and has raised the plea of res judicata and abuse of process based on the disposition of the Mortgage Action. The remaining fourth parties have not defended the proceeding.

Motions before Nordheimer J.

[13] National Trust moved for summary judgment dismissing both the third party claim against the Realtors and the fourth party claim against National Trust based on the defences of issue estoppel and abuse of process. The Realtors also brought a motion for summary judgment dismissing the third party claim based on the defences of issue estoppel and abuse of process.

[14] On the motions for summary judgment before Nordheimer J., the parties agreed that for the purpose of the motions, the

2000 CanLII 8514 (ON CA)

facts set out in both the third party and fourth party claims were true and gave rise to a cause of action. The only issue to be determined on the motions was whether, by virtue of the judgment of Day J., the third and fourth party claims should be dismissed on the basis of issue estoppel, res judicata, or abuse of process.

Reasons of the motions judge

[15] Nordheimer J. granted the motions of the third and fourth parties in his reasons reported at 47 O.R. (3d) 446. He dismissed the third and fourth party claims, with costs of both claims payable by Coles.

[16] The motions judge referred to the relevant authorities on the issues of cause of action estoppel, issue estoppel and abuse of process. He found primarily that issue estoppel applied to the third party proceedings and in the alternative that they were an abuse of process.

[17] With respect to the false representations made about the zoning possibilities, the motions judge clarified that Coles was not asserting any independent liability claims. All of the liability alleged in the third and fourth party claims arising from the false representations involved liability to Canam alone. The motions judge went on to find that issue estoppel applied. He found that Day J.'s decision on the matter was final. He also found that the issue regarding the legal consequences of the false representations made to Canam was a fundamental part of Day J.'s decision. The motions judge then concluded at paras. 19 and 20 [p. 453 O.R.]:

> The fundamental issue determined by Mr. Justice Day is whether, in all of the circumstances, the transaction could be rescinded, or liability on the mortgage avoided, by Canam based on the false representations. The source of those representations was not the issue. The fact of the representations being false, and the fact that they were made by others on behalf of National Trust, was accepted by Mr. Justice Day. He concluded, regardless of those facts, that the transaction could not be avoided by Canam. In my view,

2000 CanLII 8514 (ON CA)

that is a complete answer to whether Canam could now claim any relief surrounding these representations -- it could not. Put another way, the decision of Mr. Justice Day clearly determined that there was no liability of National Trust to Canam arising from the false representations.

It follows from that conclusion that it is not open to Coles to indirectly advance such a claim on behalf of Canam because, in the end result, it would still involve a re-litigation of the same question -- a situation which the principle of res judicata is designed to prevent. . . .

[18] The motions judge proceeded to the privity of interest requirement for the application of issue estoppel. Here, the motions judge concluded that Coles, as a solicitor, was a privy of his client, Canam.

Analysis

Issue estoppel

[19] The principle of res judicata applies where a judgment rendered by a court of competent jurisdiction provides a conclusive disposition of the merits of the case and acts as an absolute bar to any subsequent proceedings involving the same claim, demand or cause of action. Issue estoppel is one aspect of res judicata. The oft-cited requirements of issue estoppel are attributed to Lord Guest in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, [1966] 2 All E.R. 536 (H.L.): (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[20] The key issue raised in this court is whether the appropriate parties were privy to the proceedings between Canam and National Trust so that the doctrine of issue estoppel applies to prevent the third party claim by Coles against the Realtors. I agree with the result arrived at by the motions

2000 CanLII 8514 (ON CA)

judge, but for different reasons.

[21] The issues of identity of subject matter and identity of parties had to be resolved by the motions judge. The latter issue, also referred to as privity, is treated identically under the doctrine of res judicata whether the claim is cause of action estoppel or issue estoppel. Someone who is privy in interest to a party in an action is equally bound by the final judgment in those proceedings. Thus, where a party to the prior proceeding is clearly and sufficiently identified with a non-party to the litigation, the doctrine of res judicata may be applied: Gleeson v. J. Wippell & Co. Ltd., [1977] 3 All E.R. 54 at p. 60, [1977] 1 W.L.R. 510 (Ch. D.).

Privity of interest

[22] Privity between an agent and a principal will be based on privity of interest. This matter was considered by Megarry V.-C. in Gleeson at p. 60: "it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. . . . It is in that sense that I would regard the phrase 'privity of interest'."

[23] In Carl-Zeiss-Stiftung at p. 566, Lord Guest had this to say of privies: "There is a dearth of authority in England on the question of privies. . . . 'Privies' have been described as those who are 'privy to the party in estate or interest'. . . . Before a person can be privy to a party there must be community or privity of interest between them." Lord Reid made a similar comment in that decision at p. 550: "It has always been said that there must be privity of blood, title or interest: here it would have to be privity of interest. That can arise in many ways, but it seems to me to be essential that [there be] some kind of interest in the previous litigation or its subject-matter." Thus, in the case of an agent and principal, their mutual interest in the outcome of the lawsuit will make the agent a privy to the principal -- a necessary element for the application of issue estoppel.

2000 CanLII 8514 (ON CA)

[24] The motions judge found that Cole was a privy of Canam in the prior proceeding between Canam and National Trust because he was Canam's solicitor. This finding seems to me to illustrate a misconception of the interaction between the various proceedings. Canam responded to the Notice of Sale of National Trust by instituting an action against National Trust for a declaration that the mortgage that authorized the Notice was void and unenforceable by virtue of false representations as to the nature of the zoning emanating from National Trust and conveyed to Canam by the Realtors. Canam did not sue the Realtors, who had acted as the agents of National Trust in conveying these alleged misrepresentations to it, and does not propose to sue them now.

[25] In the present action, Canam is suing Coles for negligence for not advising it of the true nature of the zoning. Coles, for his part, does not say he relied on the representations of National Trust (or the Realtors) in not advising Canam of the state of the zoning. Rather, he states that his retainer did not require him to give such advice. He is not attempting to excuse his tort of negligence by stating that he relied upon the representations of the Realtors. He seeks to add the Realtors as joint tortfeasors for their misrepresentations to Canam and claims contribution under the Negligence Act.

[26] The issue before the motions judge and this court became whether Coles was estopped, or barred by the doctrine of abuse of process, from raising as between Canam and the Realtors the issue of whether Canam was relieved of liability under the mortgage to National Trust because Canam relied on the zoning representations conveyed to it through National Trust's agents, the Realtors. If my assessment of the situation is correct, the issue is not whether Coles was a privy of Canam, but whether the Realtors were privies of National Trust. Instead of looking at the relationship between the solicitor Cole and his client, the plaintiff, Canam, we should look to the relationship between the third party Realtors and the defendant in the Mortgage Action, National Trust. The Realtors should take the position that Canam could have sued them in the Mortgage Action

2000 CanLII 8514 (ON CA)

as agents of National Trust for the same misrepresentations that it alleged against National Trust and did not do so. Since the Mortgage Action involving th ese allegations of misrepresentation was resolved adversely to Canam, it follows that the issue of the validity of the real estate transaction is res judicata between Canam and National Trust, and issue estoppel applies as between Canam and the Realtors as privies to National Trust.

[27] I am satisfied that the Realtors are privies of National Trust, but I am having some difficulty in applying issue estoppel in this case. The summary judgment judge in the Mortgage Action found that false representations had been made that were attributable to National Trust but that no remedy was available to Canam because the representations complained of had merged in the closing of the original real estate transaction. Because it was not required of him, he did not deal with the present assertion that had the Realtors been parties to the Mortgage Action, he could have awarded damages against them in favour of National Trust. Accordingly, I am concerned that the misrepresentation issue was disposed of in a manner that may not be dispositive if the action was against the Realtors as well as National Trust.

[28] In deciding the application of issue estoppel, it is necessary to consider the context and rationale behind the doctrine of res judicata. As was stated by Ritchie J. in Fenerty v. Halifax (City) (1920), 53 N.S.R. 457 at p. 463, 50 D.L.R. 435 (S.C.):

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. . . .

[29] Additional clarification for the application of "issue estoppel" was provided by Dickson J. in Angle v. Minister of

2000 CanLII 8514 (ON CA)

National Revenue (1974), [1975] 2 S.C.R. 248 at p. 255, 47 D.L.R. (3d) 544 at pp. 555-56: "It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings." (Emphasis added)

[30] It can hardly be said in this case that the parties to the Mortgage Action had an opportunity to raise the issue of the potential liability of an entity that was not a party to the action at all. Additionally, while the decision that the misrepresentation merged in the conveyance was fundamental to the decision that it could not affect the validity of the mortgage that was being enforced, I am not altogether sure that merger would be a defence to the agents of the National Trust in an action against them in damages. Certainly, the point was never raised because it was irrelevant to the proceedings as framed.

Abuse of process

[31] However, we are not limited in this case to the application of issue estoppel. The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. The doctrine can be relied upon by persons who were not parties to the previous litigation but who claim that if they were going to be sued they should have been sued in the previous litigation. This was the case in M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe), [1998] 4 All E.R. 675 (C.A.), where the second claim was against a wholly owned subsidiary of the defendant in the first claim. Similarly, in Solomon v. Smith (1987), [1988] 1 W.W.R. 410 at pp. 419-20, 45 D.L.R. (4th) 266 (Man. C.A.), the purchaser unsuccessfully sued the vendor and was seeking to sue the vendor's agent. The court found that a llowing the second action to proceed would amount to an abuse of process.

2000 CanLII 8514 (ON CA)

[32] Although there are no cases directly on point in this jurisdiction, the general principles of abuse of process dictate that the agent in this case should not be required to defend a cause of action previously litigated. The safest question to ask is whether the same evidence is needed to support the issues in both cases. It would seem that the evidence would be the same: the same evidence will be presented to show that a negligent representation was made and the same evidence will be used to show that the plaintiff relied upon the representations to his detriment.

[33] Unless there is new evidence, special circumstances or equitable reasons, then Coles should not be entitled to raise a second cause of action, identical in merit, against an agent who was a privy to the initial proceeding. The Realtors could have been properly included in the initial proceeding. There could be any number of reasons why Canam did not do so, but it hardly lies in the mouth of a stranger to those proceedings to insist constructively that there now be a trial as to the liability of the Realtors to Canam.

[34] Maintaining open and ready access to the courts by all legitimate suitors is fundamental to our system of justice. However, to achieve this worthy purpose, the courts must be vigilant to ensure that our system does not become clogged with unnecessary, repetitious litigation. To allow the defendant to retry the issue of misrepresentation would be a classic example of abuse of process and a waste of the time and resources of the litigants and the court. The retrying of the issues in this case would also erode the principle of finality that is crucial to the proper administration of justice. Thus, where agents as third parties must raise a defence to issues that are identical to those in a prior proceeding against their principal, the court is entitled to exercise its discretion and terminate the third party proceedings (and in this case the fourth party) as an abuse of process.

Disposition

[35] Accordingly, for the reasons set out above, I would dismiss the appeal with costs payable by the appellant to the

2000 CanLII 8514 (ON CA)

respondents on a party and party basis.

[36] GOUDGE J.A. (dissenting): -- I have had the benefit of reading the reasons for judgment of my colleague Finlayson J.A. I agree with him that Nordheimer J. ought not to have dismissed the third party claim on the basis of issue estoppel. However, I disagree that this conclusion was properly reached on the basis of the doctrine of abuse of process. For the reasons that follow I would allow the appeal and dismiss the motion for summary judgment seeking to dismiss the third party claim.

[37] The facts are well described in my colleague's reasons for judgment. For my purposes I need only highlight a few of them.

[38] The third party claim is brought by the defendant in the main action, Alan H. Coles ("Coles"). It seeks relief against CB Commercial Real Estate Group Canada Inc., Kevin W. Leon and Peter D. Senst (the "Realtors").

[39] Coles acted as the solicitor for the plaintiff Canam Enterprises Inc. ("Canam") when it purchased 200 Finch Avenue West in Toronto from National Trust Company of Canada ("National Trust"). The Realtors acted as real estate agents for National Trust on the transaction.

[40] In the main action, Canam sues Coles for professional negligence, pleading that Coles failed to warn it of the zoning restriction on the use of the property. Those restrictions, which prevented the property from being put to retail use, caused Canam significant harm.

[41] In the third party claim, Coles seeks contribution from the Realtors pursuant to the provisions of the Negligence Act, R.S.O. 1990, c. N.1. Coles pleads that the Realtors had a duty of care or even a fiduciary duty to Canam. The Realtors breached this duty by representing to Canam that the property could lawfully be put to retail use when they knew or ought to have known that this representation was false. Coles pleads that Canam relied on this representation in agreeing to purchase the property and that the Realtors are liable in

2000 CanLII 8514 (ON CA)

damages to Canam for the harm caused by this misrepresentation.

[42] On the motion for summary judgment to dismiss the third party claim, the parties agreed that for the purposes of the motion the facts pleaded were true and gave rise to a cause of action.

Issue Estoppel

[43] The doctrine of issue estoppel prevents a party from relitigating an issue already decided in an earlier proceeding. The three requirements of the doctrine are well settled. They are (a) that the prior proceeding must have decided the same question as is in issue in the subsequent proceeding; (b) that the decision said to create the estoppel be judicial and final; and (c) that the parties to the earlier decision be either the same as, or the privies of, the parties in the subsequent proceeding.

[44] The question is whether the prior decision of Day J. triggers the application of this doctrine to the third party claim. In the prior proceeding Canam sought a declaration that the mortgage taken back by National Trust when it sold the property to Canam was void because the purchaser was induced to enter the contract by the misrepresentation of the vendor as to the use of the property allowed by its zoning. National Trust counterclaimed for the balance owing on the mortgage.

[45] In his reasons for judgment, Day J. dismissed Canam's claim and allowed National Trust's counterclaim. He found that the representation about zoning was made on behalf of National Trust by the Realtors and that the representation was false. However, he concluded that the misrepresentation did not entitle Canam to set aside the mortgage contract because of the doctrine of merger.

[46] In these circumstances, there is no doubt that the decision of Day J. was judicial and final.

[47] However, like Finlayson J.A., I do not think that the "same issue" requirement of issue estoppel is met. As this

2000 CanLII 8514 (ON CA)

court said in Heynen & Frito Lay Canada Ltd. (1999), 45 O.R. (3d) 776, 179 D.L.R. (4th) 317, this determination depends on a careful analysis of both the factual context and the legal question addressed in the earlier proceeding. This allows the specific issue determined in the earlier proceeding to be identified and compared to the issue to be resolved in the subsequent proceeding. This reflects "the fastidious approach" that the courts have taken to the "same question" test that was described by Morden A.C.J.O. in Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 at p. 294, 112 D.L.R. (4th) 683 (C.A.).

[48] The issue in the third party claim is whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. This duty is separate from and not derived from the contractual relationship between Canam and National Trust. It depends on the nature of the direct relationship between Canam and the Realtors. This duty was not part of the proceedings before Day J., which dealt with whether the contractual rights of National Trust were voided by the misrepresentation made on its behalf.

[49] As Finlayson J.A. writes, it can hardly be said that the parties before Day J. had the opportunity to raise the issue of the potential liability of the Realtors, who were not a party to that action at all. While the legal consequence for National Trust of the false representation made to Canam was fundamental to the decision of Day J., the legal consequence for the Realtors of making that false representation was not before him. In the language of Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, quoted by my colleague, the question of whether the Realtors had an independent duty of care to Canam was not "fundamental to the decision arrived at" by Day J. The "same issue" requirement of issue estoppel is therefore not met.

[50] Given this finding, it is unnecessary to deal with "the same parties" requirement of issue estoppel. Indeed where, as here, the question is whether they are "privies", this inquiry may be impossible to answer if the two proceedings do not raise the same question. The measure of whether the parties are the

2000 CanLII 8514 (ON CA)

privies of those in the earlier proceeding would seem to require that the same question be involved in both proceedings, that is, that the subject matter of both disputes be the same. This is implicit in Gleeson v. J. Wippell & Co. Ltd., [1977] 3 All E.R. 54 at p. 60, [1977] 1 W.L.R. 510 (Ch. D.), where Vice-Chancellor Megarry said:

> I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'

(Emphasis added)

[51] Even if one were to address the "same parties" requirement having due regard only to the subject matter of the dispute before Day J., I do not think one could find the privity of interest between Coles and Canam or between the Realtors and National Trust.

[52] The subject matter of the dispute before Day J. was the contractual right of National Trust and the corresponding contractual obligation of Canam under the mortgage. Coles has no identification of interest with Canam having regard to this subject matter. He was simply its lawyer. Canam's contract with National Trust does not reach him.

[53] In the same way, having regard to this subject matter, the Realtors have no identification of interest with National Trust. The contract between Canam and National Trust does not affect them at all. In Solomon v. Smith (1987), 45 D.L.R. (4th) 266, [1988] 1 W.W.R. 410, the Manitoba Court of Appeal reached just such a conclusion. It found that where a purchaser had unsuccessfully sued a vendor seeking to avoid the transaction because of a misrepresentation, the purchaser's subsequent action in tort against the vendor's agent based on the same misrepresentation was not against the same party or its privy.

2000 CanLII 8514 (ON CA)

[54] In summary, therefore, it is my view that the first requirement of issue estoppel is not met in this case, and the third requirement is probably not met as well. I agree with my colleague that the third party claim ought not to have been dismissed on the basis of issue estoppel.

Abuse of Process

[55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[56] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See Solomon v. Smith, supra. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.

[57] I would disagree. As I have attempted to indicate, the issue in the third party claim is different from the issue already determined by Day J. The duty of care owed by the Realtors to Canam was simply not before Day J. This is not the relitigation of an issue already decided by the court. Hence, in my view, Nordheimer J. built his conclusion of an abuse of process on an erroneous foundation.

[58] This issue can be addressed by looking not just at the claim but also at the party bringing it. Here it cannot be said that the third party claim is an attempt by Coles to relitigate a claim which he has previously raised but lost. Coles has not raised this issue before in any legal proceeding. Nor could Coles have forced Canam to raise this issue and sue the Realtors in the action in contrast against National Trust before Day J. Coles has not had his day in court on this issue.

2000 CanLII 8514 (ON CA)

[59] Equally this issue can be examined from the perspective of the party required to defend the claim. Here, it cannot be said that the third party claim forces the Realtors to relitigate a claim which [they have] already successfully resisted. The Realtors have not previously been required to defend this or any other claim by either Canam or Coles.

[60] Although this is the first time that the Realtors have had to respond to the assertion that they breached their duty to Canam by making the negligent misrepresentation, they say it is manifestly unfair to require them to do so because of a prior proceeding in which it was found that on behalf of National Trust they knowingly made this false representation. I do not find this persuasive. The prior proceeding did not vindicate their conduct in the slightest, but rather found that the Realtors had made the false representation. This prior finding hardly makes it unfair that they now must defend the third party claim.

[61] In summary, the third party claim raises an issue not previously litigated. It is not manifestly unfair to allow Coles to bring the claim or to require the Realtors to defend it. In my view, it is not an abuse of process.

[62] I would therefore allow the appeal with costs payable by the third party. I would set aside the order below and order that the motion for summary judgment in the third party claim be dismissed with costs payable by the third party.

Appeal dismissed with costs.

2000 CanLII 8514 (ON CA)

TAB 14

COURT OF APPEAL FOR ONTARIO

CITATION: Champoux v. Jefremova, 2021 ONCA 92
DATE: 20210212
DOCKET: C67511

2021 ONCA 92 (CanLII)

van Rensburg, Hourigan and Brown JJ.A.

BETWEEN

Penny-Lee Champoux

Plaintiff (Appellant)

and

Ljudmilla Jefremova and Mohammed Khodabandehloo

Defendants (Respondent)

Geoffrey Adair and Peter Denton, for the appellant

Graham Ragan and Katie Ahn, for the respondent

Heard: November 19, 2020, by video conference

On appeal from the judgment of Justice James A. S. Wilcox of the Superior Court of Justice, dated September 4, 2019, with reasons reported at 2019 ONSC 5143.

Hourigan J.A.:

I. INTRODUCTION

[1] This is an appeal of the dismissal of a medical malpractice claim. The trial's focus was whether the respondent, Ljudmilla Jefremova, breached the standard of care of a reasonable and prudent doctor when she treated Penny-Lee Champoux.

The trial judge found that Dr. Jefremova met that standard of care and dismissed the claim in its entirety.

[2] Two issues are raised on the appeal: (i) whether the trial judge's reasons are insufficient to permit appellate review; and (ii) whether the trial judge erred in his consideration of a Response to Request to Admit filed by counsel for Dr. Jefremova.

[3] As will be explained below, I have concluded that the judgment must be set aside and a new trial ordered. I accept the argument advanced by Ms. Champoux that the trial judge failed in his reasons to analyze essential components of her theory of liability and explain why he found that Dr. Jefremova did not breach the standard of care. Consequently, the trial judge's reasons do not permit appellate review. Regarding the analysis of the Response to Request to Admit, the trial judge issued contradictory reasons about the central issue of whether it constituted an accurate admission. This resulted in an unfair trial for Ms. Champoux and also warrants a new trial.

II. FACTS

[4] Given that I would order a new trial, only a brief recitation of the facts is necessary to put the grounds of appeal in context.

[5] Ms. Champoux attended Kirkland Lake Hospital's emergency department on June 29, 2012, intending to seek treatment for an abscess on her buttocks area

2021 ONCA 92 (CanLII)

and hyperglycemia, as she could not get her high blood sugars under control. She has various underlying health problems, including diabetes, PTSD, and fibromyalgia. At the emergency department, a nurse triaged Ms. Champoux, took her vital signs and did a blood sugar reading.

[6] Dr. Jefremova then examined Ms. Champoux and noted that her heart rate was elevated and that her blood sugar level was 11.6. However, prior hospital records indicated that Ms. Champoux's heart rate was always elevated without cardiac issues and that her normal glucose level was between 8 and 12.5. Dr. Jefremova assessed the abscess, decided it was not yet ready to break, and sent Ms. Champoux home.

[7] Ms. Champoux returned to the emergency department on July 2, 2012, because her abscess had grown rapidly, and her blood sugar was higher. She was admitted for surgery to drain the abscess and discharged on July 13, 2012. Ms. Champoux was re-admitted to the hospital several times afterward to deal with abscess drainage.

[8] Ms. Champoux brought a medical malpractice action against Dr. Jefremova and Dr. Mohammed Khodabandehloo, who had given her a cortisone shot on June 19, 2012. However, the action against Dr. Khodabandehloo was dismissed before trial.

2021 ONCA 92 (CanLII)

[9] In his reasons for decision, the trial judge reviewed the evidence of Ms. Champoux, her mother-in-law, Dr. Jefremova, and two experts (Dr. Fernandes, who testified for Ms. Champoux, and Dr. McMurray, who testified for Dr. Jefremova), and documents related to the medical events. The evidence focused on whether Dr. Jefremova breached the standard of care of a reasonable and prudent doctor in her treatment of Ms. Champoux on June 29, 2012.

[10] The location of the abscess was an important issue because the standard of care differs based on whether the abscess was a simple buttocks abscess, as opposed to a perianal, ischiorectal, or anorectal abscess. On the issue of the location of the abscess, a Request to Admit served by Ms. Champoux's counsel became significant at trial. It was served on Dr. Jefremova's counsel on September 19, 2018. Among other things, Ms. Champoux requested that Dr. Jefremova admit that "[o]n June 29, 2012, Penny Lee Champoux had a perianal abscess."

[11] On October 9, 2018, a Response to Request to Admit was delivered by counsel for Dr. Jefremova. Among other refusals, Dr. Jefremova's counsel refused to admit that "[o]n June 29, 2012, Penny Lee Champoux had a perianal abscess". In the reason for this refusal, Dr. Jefremova's counsel stated that "[o]n June 29, 2012, Penny Lee Champoux presented with a buttock abscess/swollen nodule in the general perianal area."

2021 ONCA 92 (CanLII)

[12] At trial, Ms. Champoux's counsel closed his case on December 12, 2018, without referring to the Request to Admit. It was entered as exhibit 9 on December 14, 2018, as part of a package that included the Request to Admit, the Response to Request to Admit, and a document entitled "Admissions Made by the Defendant Jefromova" [*sic*].

[13] Dr. McMurray's evidence in chief was that Ms. Champoux suffered from a simple buttock abscess and that Dr. Jefremova had met the standard of care. In cross-examination, Ms. Champoux's counsel put to Dr. McMurray that Dr. Jefremova had formally admitted that "on June 29 the abscess was in the general perianal area or region". Dr. McMurray opined that if it was clearly a perianal abscess or in the perianal region, Ms. Champoux should not have been sent home and the abscess should have been incised and drained right away by the emergency room physician or a surgeon.

[14] On December 15, 2018, Dr. Jefremova's counsel wrote to Ms. Champoux's counsel to advise that the Response to Request to Admit had left her office through inadvertence and without Dr. Jefremova's instructions, and to request consent to withdrawal of the admission. By email dated December 16, 2018, Ms. Champoux's counsel advised that his client would not consent to the withdrawal of the admission.

2021 ONCA 92 (CanLII)

[15] Dr. Jefremova brought a motion seeking to clarify or, in the alternative, withdraw the admission contained in the Response to Request to Admit. In written reasons, the trial judge dismissed the motion to withdraw the admission. He also found that it was inappropriate at that point in the proceeding to rule on the interpretation to be given to the Response to Request to Admit. Instead, he held that the interpretation of the admission was best left for consideration after final submissions.

[16] In his reasons for decision, the trial judge considered all of the evidence and found that on June 29, 2012, Ms. Champoux had presented with an abscess located near the middle of the left buttock cheek. He concluded that Dr. Jefremova had met the standard of care based on the location of the abscess. The trial judge did not go on to consider the issues of causation or damages. The action was dismissed.

III. ANALYSIS

[17] As noted, Ms. Champoux makes two arguments on this appeal. The first is that the trial judge provided insufficient reasons. The second is that the trial judge erred in disregarding Dr. Jefremova's formal admission in determining the location of the abscess on June 29, 2012. These arguments will be considered in turn below.

2021 ONCA 92 (CanLII)

(a) Insufficient Reasons

[18] The law regarding insufficient reasons is well established. Reasons serve many functions, they: (i) justify and explain the result; (ii) tell the losing party why they lost; (iii) provide public accountability and satisfy the public that justice has been done and is seen to have been done; and (iv), permit effective appellate review: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 98. Meaningful appellate review is precluded if the decision of the court below does not provide some insight into how the legal conclusion was reached and what facts were relied on in reaching that conclusion: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 63.

[19] When reasons do not fulfill one or more of their functions, it may be necessary for the appellate court to send the matter back to the court below for a new hearing. This is hardly a desirable result, given the wasted costs of the first hearing and the delay in having the case determined on the merits. Yet sometimes, this rather drastic result is necessary to protect the judicial system's integrity.

[20] As this court observed in *Gendron v. Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293, 34 C.P.C. (8th) 144, at para. 93, leave to appeal refused, [2019] S.C.C.A. No. 228, the insufficient reasons ground of appeal appears with such frequency in this court that it is fast becoming a boilerplate ground of appeal. The court cautioned that the ground of appeal was being asserted in cases where

2021 ONCA 92 (CanLII)

there was no reasonable basis for arguing that the reasons for decision of the court below were anything other than straightforward. This is not such a case. Instead, this is a situation where the parties and the court are left to speculate on how the trial judge reached his conclusion on critical issues.

[21] The trial judge spent much of his reasons summarizing the evidence of the witnesses who testified at trial. This approach to writing reasons is often problematic. There is nothing impermissible in writing reasons this way, and it is important to capture the evidence adduced at trial. However, it is worth emphasizing that a detailed factual recitation is not a substitute for a considered analysis of the issues. What frequently happens when reasons begin with a very detailed recitation of the evidence is that when it comes time to grapple with the issues in the case, the analysis is largely conclusory. This was what happened in the case at bar.

[22] In his reasons, the trial judge concluded that the abscess was located near the middle of the plaintiff's left buttock cheek. He then went on to comment on the expert evidence at paras. 139-140:

> I was favourably impressed with Dr. McMurray's evidence and prefer it to Dr. Fernandes's. Meaning no disrespect to Dr. Fernandes who has impressive credentials, as noted above, I found Dr. McMurray's experience to be more closely related to the situation in this case. Also, I was impressed with the apparent practicality of his approach to scenarios such as the defendant was confronted with on June 29, 2012, as

2021 ONCA 92 (CanLII)

> compared to what I saw to be the more academic approach of Dr. Fernandes. Furthermore, I find that Dr. McMurray's initial opinion was based on the facts as found, specifically about the location of the abscess when the defendant, Dr. Jefremova, saw it on June 29, 2012.
>
> Consequently, I am not persuaded that the defendant Dr. Jefremova failed to meet the standard of care on June 29, 2012 and would dismiss the claim against her.

[23] As in most medical malpractice cases, the expert evidence was of significant importance. There were several areas where the experts disagreed. The trial judge was obliged to explain in some level of detail why he preferred the evidence of Dr. McMurray over Dr. Fernandes. Expressing a general preference based on a statement that he found "Dr. McMurray's experience to be more closely related to the situation in this case" does not suffice. Nor does a reference to Dr. McMurray's approach being more practical. The trial judge was obliged to weigh in on important issues, including, but not limited to:

- Was the standard of care breached when Ms. Champoux was sent home without Dr. Jefremova knowing why her heart rate was elevated and her blood sugars uncontrolled?
- Was Dr. Fernandes correct in his criticism of Dr. Jefremova when he said that she failed to undertake appropriate testing of Ms. Champoux?
- Was Dr. Fernandes correct when he opined that the standard for all abscesses is immediate incision or drainage once they are diagnosed?
- Was Dr. McMurray correct when he testified that there were two abscesses, one on the buttocks and an ischiorectal one that was discovered during surgery?

2021 ONCA 92 (CanLII)

- Why was Dr. McMurray's experience considered more applicable to the case at bar when he testified that he had never aspirated an abscess or seen it performed?
- Was the standard of care breached by Dr. Jefremova in delaying treatment?

[24] Given the failure to consider these and other key issues, the trial judge's reasons are not amenable to appellate review. Understandably, Ms. Champoux complains that the trial judge failed to engage with the crux of the case before him and, accordingly, she is unable to understand why her claim was dismissed. As an appellate court, we are also left in the dark about how the trial judge dealt with these critical issues. For this reason, I would order a new trial.

(b) Withdrawal of Admission

[25] I would also order a new trial as a result of the trial judge's treatment of the admission in the Response to Request to Admit. His analysis resulted in an unfair trial for Ms. Champoux.

[26] Before considering the trial judge's analysis, I would reject Dr. Jefremova's argument on appeal that the impugned admission in the Response to Request to Admit was not a formal admission because it was proffered in the context of a refusal. The purpose of request to admit procedures — to save time and costs by narrowing the facts in issue — would be undercut if litigants could deny a fact in a Request to Admit on the basis that an alternative set of facts is accurate, but then treat those proffered alternative facts as non-binding. That approach would

2021 ONCA 92 (CanLII)

obfuscate rather than clarify what facts are in issue. Further, Dr. Jefremova's counsel brought a motion to withdraw the admission after seeking Ms. Champoux's consent to the withdrawal, indicating that all parties viewed the response as a formal admission.

[27] Turning to the trial judge's analysis, in the written reasons on the motion to withdraw the admission, the trial judge stated at para. 26:

> I am not persuaded that it is appropriate at this point in the proceeding to rule on the interpretation to be given to the Response to Request to Admit. Rather, that evidence would be left for consideration after the trial submissions have been heard, if the admission still existed then. Consequently, it is necessary in the circumstances to consider the request to withdraw the admission. For this, I turn to the applicable test.

[28] The trial judge then went on to apply the test from *Antipas v. Coroneos* (1988), 26 C.P.C. (2d) 63 (Ont. H.C.), as recently endorsed in *Liu v. The Personal Insurance Company*, 2019 ONCA 104, 89 C.C.L.I. (5th) 195, at para. 13. That test directs courts to first consider whether the admission is one purely of fact, law, or mixed fact and law (since questions of law can be more easily withdrawn than questions of fact), and then apply a three-part conjunctive test regarding when an admission could be withdrawn, being:

(a) Does the proposed amendment raise a triable issue in respect to the truth of the admission?;

2021 ONCA 92 (CanLII)

(b) Is there a reasonable explanation for the withdrawal, such as inadvertence or wrong instructions?; and,

(c) Has the party wishing to withdraw the admission established that the withdrawal will not result in any prejudice that cannot be compensated for in costs?

[29] The trial judge found that the admission was one of pure fact. His analysis of the triable issue factor was as follows, at para. 29:

> On the second branch, this is a medical malpractice case. The result depends on the standard of care that applies in the circumstances. Insofar as an abscess is concerned, what the standard is depends on its location and its type. The interpretation of the Response to Request to Admit is integral to determining these. The defence submitted that the admission is not incorrect, but is being misinterpreted. As I stated above, the interpretation of the admission is to be left to follow trial submissions. Therefore, I find no triable issue with respect to the truth of the admission, as contrasted with its interpretation.

[30] The trial judge noted that the test for a withdrawal of an admission was conjunctive. Therefore, he found that Dr. Jefremova had not met her onus for the withdrawal of an admission. He dismissed the motion for leave to withdraw the admission.

[31] In his reasons for decision on the trial, the trial judge reviewed the evidence regarding the location of the abscess and concluded, at para. 125, “it is asking too much in seeking to have that imprecise expression [in the Response to Request

2021 ONCA 92 (CanLII)

to Admit] accepted as proof on the balance of probabilities that the plaintiff presented to the ER with anything more serious than an abscess on her buttocks."

[32] I note that nowhere in his reasons on the motion or reasons for judgment does the trial judge consider the document in exhibit 9 wherein the admissions made by Dr. Jefremova are listed. Among those admissions is the following: "On June 29, 2012, Penny Lee Champoux presented with a buttock abscess/swollen nodule in the general perianal area (response to fact 10)."

[33] The problem with the trial judge's analysis is that he dismissed the motion to withdraw the admission on the basis that it was an admission of pure fact and that there was no triable issue with regard to its truth. However, in his analysis of the admission's interpretation, he proceeded to effectively conduct an analysis of the truth of the admission. Thus, the reasons on the motion and the reasons on the trial were contradictory. In the first, he concluded that there was no triable issue regarding the truth of the admission and in the second, he undertook an analysis of whether the admission was true and found that it was not true.

[34] A trial judge has the freedom to interpret what an admission means: *Allto Construction Services Ltd. v. Toronto and Region Conservation Authority*, 2017 ONCA 488, at para. 11. But that interpretive exercise cannot morph into an analysis of the veracity of the admission. A formal admission is not like other pieces of evidence led at trial that a judge can weigh at their discretion. A formal admission

2021 ONCA 92 (CanLII)

is conclusive of the matter admitted. The court is bound to act on formal admissions before it, even if other evidence contradicts the admission: *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at para. 106.

[35] In the case at bar, the trial judge weighed the admission against the other evidence led at trial and proceeded to effectively permit the withdrawal of the admission on the basis that it was not accurate. He did so despite his earlier finding that there was no triable issue in respect of the truth of the admission and his dismissal of the motion to withdraw the admission. In so doing, he ignored the issue of non-compensable prejudice to Ms. Champoux, who clearly based her trial strategy on the fact that she had this admission. In my view, his reasons effectively bypassed the rigorous test for the withdrawal of an admission and resulted in an unfair trial for Ms. Champoux. This trial unfairness requires an order for a new trial.

IV. DISPOSITION

[36] For the foregoing reasons, I would set aside the trial judge's judgment and order a new trial.

[37] Regarding the costs of the first trial and the costs of the appeal, if no agreement can be reached, I would order that: Ms. Champoux serve and file her costs submissions, including a bill of costs, within 14 days of the issuance of these reasons, Dr. Jefremova serve and file her responding costs submissions, including a bill of costs, within 10 days of the receipt of Ms. Champoux's submissions, and

2021 ONCA 92 (CanLII)

any reply submissions be served and filed within 7 days of the receipt of the responding submissions.

Released: “K.M.v.R.” February 12, 2021

“C.W. Hourigan J.A.”

“I agree. K. van Rensburg J.A.”

“I agree. David Brown J.A.”

2021 ONCA 92 (CanLII)

TAB 15

IN THE MATTER of an application for an order for prohibition;

AND IN THE MATTER of the *Architects Act*, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;

AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects;

between

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd. *Appellants*

v.

Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh and Mary K. Green *Respondents*

INDEXED AS: CHANDLER *v.* ALBERTA ASSOCIATION OF ARCHITECTS

File No.: 19722.

1989: January 30; 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Jurisdiction — Continuation of original proceedings — Functus officio — Inquiry into the practices of a firm of architects — Board conducting a valid hearing but issuing ultra vires findings and orders — Board's findings and orders quashed — Board failing to consider whether it should make recommendations as required by legislation — Whether Board empowered to continue original proceedings — Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) — Alberta Regulation, 175/83, s. 11(1).

Pursuant to s. 39 of the *Architects Act*, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of

DANS L'AFFAIRE d'une demande d'ordonnance de prohibition;

ET DANS L'AFFAIRE de l'*Architects Act*, chapitre A-44.1 des Revised Statutes of Alberta, 1980, et modifications;

ET DANS L'AFFAIRE de la Practice Review Board de l'Alberta Association of Architects;

entre

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk et Peter J. Dandyk Architect Ltd. *Appelants*

c.

Alberta Association of Architects, la Practice Review Board de l'Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh et Mary K. Green *Intimés*

RÉPERTORIÉ: CHANDLER *c.* ALBERTA ASSOCIATION OF ARCHITECTS

N° du greffe: 19722.

1989: 30 janvier; 1989: 12 octobre.

Présents: Le juge en chef Dickson et les juges Wilson, La Forest, L'Heureux-Dubé et Sopinka.

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

Droit administratif — Commissions et tribunaux administratifs — Compétence — Continuation des procédures initiales — Functus officio — Enquête sur les pratiques d'un cabinet d'architectes — La Commission a tenu une audience valide mais a formulé des conclusions et des ordonnances ultra vires — Annulation des conclusions et ordonnances de la Commission — La Commission a omis de se demander si elle devait faire des recommandations comme l'exige la loi — La Commission a-t-elle le pouvoir de continuer les procédures initiales? — Architects Act, R.S.A. 1980, chap. A-44.1, art. 39(3) — Alberta Regulation, 175/83, art. 11(1).

Conformément à l'art. 39 de l'*Architects Act*, la Commission de révision des pratiques de l'Association des architectes de l'Alberta a tenu une audience en vue

1989 CanLII 41 (SCC)

architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for *certiorari* and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore *functus officio*. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not *functus officio*. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tri-

de réviser les pratiques d'un cabinet d'architectes en faillite et a présenté un rapport. Même si l'audience devait constituer une révision des pratiques, la Commission, dans son rapport, a tiré 21 conclusions de conduite contraire à la profession à l'encontre du cabinet et de six de ses architectes, imposé des amendes et des suspensions et leur a ordonné de payer les frais de l'audience. La Cour du Banc de la Reine a accueilli la demande de *certiorari* des appelants et a annulé les conclusions et ordonnances de la Commission. La Cour d'appel a confirmé la décision et a conclu que la Commission n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. En vertu du par. 39(3) de la Loi, la Commission est tenue simplement de rendre compte au Conseil de l'Association des architectes de l'Alberta et de faire les recommandations qui s'imposent.

La Commission a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin de décider s'il y aurait lieu de rédiger un nouveau rapport à l'intention du Conseil et de renvoyer toute l'affaire au Comité d'examen des plaintes. La Cour du Banc de la Reine a accueilli la demande des appelants visant à interdire à la Commission de poursuivre l'affaire. La cour a conclu que la Commission s'était acquittée de sa fonction et qu'elle était donc *functus officio*. La Cour d'appel a annulé l'ordonnance de prohibition. Elle a conclu que le par. 39(3) de la Loi et le par. 11(1) du Règlement imposent à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation au Conseil ou au Comité d'examen des plaintes. La Commission ne l'a pas fait et, par conséquent, elle n'a pas épuisé sa compétence.

Arrêt (les juges La Forest et L'Heureux-Dubé sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Wilson et Sopinka: La Commission n'est pas *functus officio*. En règle générale, lorsqu'un tribunal administratif a statué définitivement sur une question dont il est saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou si un lapsus a été commis en rédigeant la décision ou s'il y a eu une erreur dans l'expression de l'intention manifeste du tribunal. Le principe du *functus officio* s'applique dans cette mesure à un tribunal administratif. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel

1989 CanLII 41 (SCC)

bunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were *ultra vires*. The Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, after its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was *functus officio* when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio*.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore, once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters. Finally, as a general rule, a tribunal should not

en bonne et due forme. Son application doit donc être plus souple et moins formaliste dans le cas des tribunaux administratifs dont les décisions ne peuvent faire l'objet d'un appel que sur une question de droit.

En l'espèce, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par la Loi. La Commission a tenu une audience valide au sujet des pratiques des appelants, mais elle a formulé des conclusions et des ordonnances qui étaient *ultra vires*. Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire les recommandations requises par le Règlement et le par. 39(3) de la Loi. La Commission a voulu statuer sur la question de façon définitive, mais sa décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Dans ces circonstances, la Commission, qui a tenu une audience valide jusqu'au moment de statuer sur la question, devrait pouvoir continuer les procédures initiales afin d'examiner la possibilité de trancher la question d'une façon appropriée. Cependant, à la continuation des procédures initiales, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement.

Les juges La Forest et L'Heureux-Dubé (dissidents): Sans autorisation de la loi, un tribunal administratif ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission. En l'espèce, la Commission était *functus officio* lorsqu'elle a prononcé sa décision. Elle avait complété sa fonction quand elle a rendu son rapport final. Le fait que la décision initiale soit erronée ou que le tribunal ait agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio*.

Si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. La Loi n'autorise aucunement la Commission à changer d'avis de sa propre initiative. En outre, une fois qu'une commission excède sa compétence, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les

1989 CanLII 41 (SCC)

be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Lodger's International Ltd. v.*

pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire. Enfin, en règle générale, il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Si la Commission a omis de remplir une obligation qui lui incombait de faire des recommandations, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. Cependant, tout réexamen de l'affaire ne devrait pas être considéré comme «la continuation des procédures initiales par la Commission». Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, ce serait de nature à éroder la garantie d'équité et de justice naturelle dont on s'attend de la part des tribunaux administratifs. En l'espèce, il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

La Cour d'appel a commis une erreur en appliquant les principes du *mandamus* au présent cas.

Jurisprudence

Citée par le juge Sopinka

Arrêts mentionnés: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577.

Citée par le juge L'Heureux-Dubé (dissidente)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Lodger's International*

1989 CanLII 41 (SCC)

O'Brien (1983), 45 N.B.R. (2d) 342; *Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Cité de Jonquière v. Munger*, [1964] S.C.R. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.
Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].
Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).
National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly *National Transportation Act*], s. 66.
Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

Authors Cited

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "*functus officio*".
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "*functus officio*".
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench[1], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W. E. Code, Q.C., and *B. G. Kapusianyk*, for the appellants.

No one appearing for the respondents.

[1] Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)

Ltd. v. O'Brien (1983), 45 R.N.-B. (2e) 342; *Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), conf. [1989] 1 R.C.S. 1038; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577; *Cité de Jonquière v. Munger*, [1964] R.C.S. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Lois et règlements cités

Alberta Regulation, 175/83, art. 11.
Architects Act, R.S.A. 1980, chap. A-44.1, art. 9(1)j.1) [aj. 1981, chap. 5, art. 6], 39 [mod. 1981, chap. 5, art. 16].
Labour Relations Code, S.A. 1988, chap. L-1.2, art. 11(4).
Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), chap. N-20 [auparavant la *Loi nationale sur les transports*], art. 66.
Loi sur la Commission des affaires municipales de l'Ontario, L.R.O. 1980, chap. 347, art. 42.

Doctrine citée

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, «*functus officio*».
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, «*functus officio*».
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1985), 67 A.R. 255, qui a accueilli l'appel interjeté par les intimés à l'encontre d'une décision de la Cour du Banc de la Reine[1], qui avait accueilli la demande des appelants visant à obtenir une ordonnance de prohibition contre la Practice Review Board. Pourvoi rejeté, les juges La Forest et L'Heureux-Dubé sont dissidents.

W. E. Code, c.r., et *B. G. Kapusianyk*, pour les appelants.

Personne n'a comparu pour les intimés.

[1] B.R. Alb., n° 8501-19113, 8 octobre 1985 (le juge Brennan).

1989 CanLII 41 (SCC)

The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

SOPINKA J.—The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was *functus officio*.

Facts

As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the *Architects Act*, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55

Version française du jugement du juge en chef Dickson et des juges Wilson et Sopinka rendu par

LE JUGE SOPINKA—Dans ce pourvoi, il s'agit de déterminer si la Practice Review Board (la «Commission de révision des pratiques «) de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était *functus officio* après avoir établi un rapport sur les pratiques ayant entraîné la faillite du Chandler Kennedy Architectural Group. La Cour d'appel de l'Alberta a accueilli l'appel interjeté contre la décision de la Cour du Banc de la Reine de l'Alberta qui avait accordé l'ordonnance de prohibition, demandée par les appelants, visant à interdire à la Commission de poursuivre l'affaire, pour le motif que la Commission n'avait plus compétence et qu'elle était *functus officio*.

Les faits

En juin 1984, le Chandler Kennedy Architectural Group s'est déclaré insolvable. La Commission de révision des pratiques de l'Association des architectes de l'Alberta a alors décidé, de sa propre initiative, de procéder à une révision des pratiques du groupe et d'un certain nombre de ses membres, conformément à l'al. 39(1)b) de l'*Architects Act*, R.S.A. 1980, chap. A-44.1. Les audiences ont débuté le 14 août 1984 et se sont poursuivies pendant dix-huit jours. Les dernières plaidoiries ont été entendues le 17 décembre 1984 et la Commission a présenté son rapport le 6 mars 1985.

Le rapport de 71 pages comportait 21 conclusions précises de conduite contraire à la profession à l'encontre du cabinet et de plusieurs de ses membres. Des amendes s'élevant à 127 500 $ ont été imposées à six membres du cabinet. Ces mêmes six membres ont également été suspendus de l'exercice de la profession d'architecte pour des périodes de six mois à deux ans. De même, les appelants devaient payer les frais de l'audience, soit environ 200 000 $.

Les tribunaux d'instance inférieure

Les appelants ont déposé un avis d'intention d'interjeter appel contre la décision de la Commission auprès du Council of the Alberta Association

1989 CanLII 41 (SCC)

of the *Architects Act*. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of *certiorari* to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the *Architects Act* the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the *Architects Act* did not give to the Board the powers it purported to exercise.

A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

of Architects («Conseil de l'Association des architectes de l'Alberta»), conformément à l'art. 55 de l'*Architects Act*. Toutefois, avant même l'audition de l'appel, les appelants ont présenté à la Cour du Banc de la Reine de l'Alberta une requête visant à obtenir une ordonnance tenant d'un *certiorari* qui annulerait les conclusions et l'ordonnance de la Commission de révision des pratiques. Le juge Kryczka a accordé l'ordonnance demandée et conclu que l'omission d'aviser les appelants qu'ils faisaient l'objet d'accusations ou d'allégations de conduite contraire à la profession contrevenait aux principes de justice naturelle. Le juge Kryczka a statué que les commentaires du président de la Commission indiquaient clairement que les audiences devaient constituer une révision des pratiques plutôt qu'une enquête portant sur des allégations de conduite contraire à la profession.

L'Association des architectes de l'Alberta a interjeté appel de cette décision devant la Cour d'appel de l'Alberta. Dans l'arrêt de la Cour d'appel (1985), 39 Alta. L.R. (2d) 320, le juge Prowse a maintenu, au nom de la cour, la décision du juge Kryczka, en se fondant toutefois sur des motifs différents. Le juge Prowse a conclu que la Commission de révision des pratiques n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. Il a estimé que les pouvoirs disciplinaires étaient conférés à un autre organe de l'Association des architectes de l'Alberta, savoir le Comité d'examen des plaintes. En vertu du par. 39(3) de l'*Architects Act*, la Commission est tenue simplement de rendre compte au Conseil et de faire les recommandations qu'elle juge appropriées. Par conséquent, la Cour d'appel a rejeté l'appel pour le motif que l'*Architects Act* ne conférait pas à la Commission les pouvoirs qu'elle prétendait exercer.

Un mois après la décision de la Cour d'appel, la Commission de révision des pratiques a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin d'envisager la possibilité de rédiger un nouveau rapport à l'intention du Conseil de l'Association des architectes de l'Alberta et de renvoyer toute l'affaire au Comité d'examen des plaintes.

1989 CanLII 41 (SCC)

The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore *functus officio* and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the *Architects Act* and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. *Functus officio* was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 11(4); *Ontario Municipal Board Act*, R.S.O. 1980, c. 347, s. 42; and *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20, s. 66 (formerly the *National Transportation Act*). It is therefore necessary to consider (a) whether it had made a final decision, and (b) whether it was, therefore, *functus officio*.

Les appelants ont alors soumis une requête à la Cour du Banc de la Reine en vue d'interdire à la Commission de poursuivre l'affaire. Le juge Brennan a conclu que la Commission s'était acquittée de la fonction pour laquelle elle avait été constituée, qu'elle était donc *functus officio* et n'avait pas compétence pour poursuivre l'audience. Cette décision a également fait l'objet d'un appel à la Cour d'appel de l'Alberta.

La Cour d'appel (1985), 67 A.R. 255 a accueilli l'appel et annulé l'ordonnance de prohibition. Le juge Kerans a conclu, au nom de la cour, que le par. 39(3) de l'*Architects Act* et le par. 11(1) du règlement 175/83 imposaient à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation. Le juge a statué que la Commission n'avait pas envisagé de recommander le renvoi de l'affaire devant le Comité d'examen des plaintes et que, par conséquent, elle n'avait pas épuisé sa compétence. On a jugé que le principe du *functus officio* ne s'appliquait pas dans ce cas puisque la Commission avait omis d'examiner des questions qu'elle avait le devoir d'examiner en vertu de la loi. C'est cette décision qui fait l'objet du présent pourvoi.

Les pouvoirs conférés à la Commission par la Loi

Pour déterminer si la Commission avait le pouvoir de poursuivre les procédures engagées contre les appelants, il est nécessaire d'examiner le contexte légal dans lequel elle fonctionne. La Loi n'a pas pour objet de conférer à la Commission le pouvoir d'abroger, de réviser ou de modifier une décision définitive qu'elle a rendue, ni de revenir sur une telle décision. Une telle disposition est courante dans les lois habilitantes de nombreux tribunaux. Voir le *Labour Relations Code*, S.A. 1988, chap. L-1.2, par. 11(4), la *Loi sur la Commission des affaires municipales de l'Ontario*, L.R.O. 1980, chap. 347, art. 42, et la *Loi nationale sur les attributions en matière de télécommunications*, L.R.C. (1985), chap. N-20, art. 66 (auparavant la *Loi nationale sur les transports*). Il convient donc de décider a) si elle avait rendu une décision définitive et b) si elle était, par conséquent, *functus officio*.

1989 CanLII 41 (SCC)

The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,

(ii) the evaluation of desirable standards of competence of authorized entities generally,

(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and

(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

La Commission a entrepris, de sa propre initiative, une enquête sur les pratiques des appelants, conformément à l'art. 39 de la Loi dont voici le texte:

[TRADUCTION] 39(1) La Commission

a) doit, de sa propre initiative ou à la demande du Conseil, enquêter, faire rapport au Conseil et le conseiller au sujet de

(i) l'évaluation des normes actuelles et l'élaboration de nouvelles normes en matière de formation et d'expérience préalablement nécessaires à l'obtention et au maintien de l'enregistrement en vertu de la présente loi,

(ii) l'évaluation des normes de compétence souhaitables pour les entités autorisées en général,

(iii) toute autre question que le Conseil juge nécessaire ou appropriée en rapport avec l'exercice de ses pouvoirs et l'exécution de ses fonctions relativement à la compétence dans l'exercice de la profession d'architecte, en vertu de la présente loi et des règlements, et

(iv) l'exercice de l'architecture par des entités autorisées en général,

et

b) peut procéder à la révision des pratiques d'une entité autorisée, conformément à la présente loi et aux règlements.

(2) Toute personne citée à témoigner par la Commission, lors d'une enquête tenue en vertu du présent article, peut y être représentée par un avocat.

(3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

(4) Le Conseil peut ordonner qu'une enquête tenue par la Commission en vertu du présent article ait lieu à huis clos, en totalité ou en partie, s'il est dans l'intérêt public de le faire.

Il est évident que l'art. 39 porte non pas sur la discipline mais bien sur les pratiques ayant cours au sein de la profession et vise l'amélioration de celles-ci. Toutefois, si dans le cours d'une enquête sur les pratiques, la Commission estime qu'une question devrait être confiée au Comité d'examen des plaintes, la Loi prévoit le renvoi de cette question à ce comité. L'alinéa 9(1)j.1) de la Loi confère au Conseil le pouvoir d'adopter des règlements:

1989 CanLII 41 (SCC)

(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

[TRADUCTION] j.1) concernant les pouvoirs, obligations et fonctions de la Commission de révision des pratiques, dont le renvoi de questions par la Commission au Conseil ou au Comité d'examen des plaintes, et les appels interjetés à l'encontre de décisions rendues par la Commission;

Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer, the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the unco-operative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

L'article 11 du règlement 175/83 adopté en vertu de l'al. 9(1)j.1) prévoit que:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

a) faire une ou plusieurs recommandations à l'entité autorisée ou au dessinateur d'intérieurs agréé dont les pratiques font l'objet d'une révision, au sujet des améliorations qu'il est souhaitable d'apporter à la pratique qui fait l'objet d'une révision;

b) ordonner qu'un réviseur assure le suivi de la révision des pratiques afin de déterminer si les recommandations de la Commission ont été adoptées et si elles ont entraîné les améliorations souhaitées dans les pratiques de l'entité en cause;

c) si, à son avis, l'une des questions suivantes est assez grave pour que le Comité d'examen des plaintes fasse enquête, ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête:

(i) manque de collaboration d'une entité autorisée ou d'un dessinateur d'intérieurs agréé dans le cadre d'une révision des pratiques ou d'un suivi;

(ii) manquement à la Loi, au Règlement sur l'exercice de la profession, au Code de déontologie, au Règlement sur le dessin d'intérieurs ou aux règlements généraux;

(iii) défaut d'adopter et d'appliquer les recommandations relatives à l'amélioration souhaitée des pratiques de l'entité en cause;

(iv) toute apparence de fraude, négligence ou fausses déclarations, ou tout manquement aux normes généralement acceptées pour l'exercice de la profession d'architecte et de la profession de dessinateur d'intérieurs;

d) si, dans le cadre de sa révision des pratiques, la Commission estime que la conduite d'une entité autorisée ou d'un dessinateur d'intérieurs agréé constitue

(i) un manque de compétence dans l'exercice de la profession d'architecte ou une conduite contraire à la profession, ou les deux à la fois,

(ii) un manque de compétence dans l'exercice de la profession de dessinateur d'intérieurs ou une conduite contraire à la profession, ou les deux à la fois,

1989 CanLII 41 (SCC)

the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) make recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) after a notice under section 42 of the Act has been given, fails to attend the hearing or does not make representations.

The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.

As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.

. . .

Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand

la Commission procédera conformément aux articles 50 à 53 de la Loi;

e) indiquer qu'elle n'a aucune recommandation à faire ou que la pratique faisant l'objet d'une révision s'est avérée satisfaisante;

f) faire des commentaires sur le maintien d'un idéal élevé de pratique et, avec le consentement de l'entité autorisée ou du dessinateur d'intérieurs agréé en cause, faire connaître cet idéal élevé ainsi que le nom des personnes visées;

g) faire au Conseil des recommandations visant l'élaboration de nouvelles normes dans des domaines précis ou généraux de l'architecture.

(2) La Commission ne peut imposer de sanction en vertu de l'alinéa (1)d) que si l'entité autorisée ou le dessinateur d'intérieurs professionnel en cause

a) a présenté ses arguments à la Commission, ou

b) n'a pas assisté à l'audience ni présenté d'arguments, après avoir reçu un préavis donné en vertu de l'article 42 de la Loi.

La Commission a procédé à une enquête sur les pratiques conformément à la Loi. Au cours de l'enquête, le président a fait les observations suivantes qui décrivent bien la nature de l'enquête:

[TRADUCTION] J'aimerais tout d'abord établir très clairement, et je crois que vous y aviez fait allusion au début, qu'il s'agit non pas de l'examen d'une plainte mais bien d'une révision des pratiques et que, par conséquent, nous ne sommes pas saisis d'un cas précis d'actes répréhensibles, ce à quoi vous faites allusion, je crois, et pour lesquels vous avez beaucoup d'expérience devant les tribunaux. Il s'agit de la révision des pratiques des diverses entités autorisées et donc, d'une révision complète. Par conséquent, cette l'audience a uniquement pour but de réviser les pratiques dans leur ensemble. Il ne s'agit pas de réviser des points précis. La Commission a voulu comprendre entièrement et de façon aussi globale que possible, dans les circonstances, les pratiques de ces diverses entités.

À la suite de la révision de ces entités autorisées, il nous incombe de faire des recommandations et de tirer des conclusions, ce que nous allons faire ci-après.

. . .

Après chaque témoignage, nous avons permis que le témoin soit questionné. La Commission devra tenir compte de toute la preuve qui lui a été soumise et elle a consacré beaucoup de temps à s'assurer qu'elle écoutait et essayait de comprendre tout ce qui s'était passé. Mais

1989 CanLII 41 (SCC)

everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be *ultra vires*. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were *ultra vires* and have been quashed.

In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

Kerans J.A. based his conclusion that the Board was not *functus officio* on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly

encore une fois, comme je l'ai dit à votre avocat il y a quelques minutes, il ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession. [Je souligne.]

Néanmoins, lorsque vint le temps de donner des directives et de faire des recommandations, la Commission a procédé en vertu de l'al. 11(1)d) du Règlement, que la Cour d'appel a jugé *ultra vires* dans le premier appel, au lieu d'agir sous le régime du par. 39(3) de la Loi, précisé par les al. 11(1)a), b), c), e), f) ou g) du Règlement. La Cour d'appel a statué que les art. 50 à 53 portaient sur des questions disciplinaires qui outrepassent la compétence de la Commission. Cette décision de la Cour d'appel n'a pas été contestée. Par conséquent, il en résulte que la Commission a tenu une audience valide sur les pratiques des appelants, mais qu'elle a formulé des conclusions et des ordonnances qui étaient *ultra vires* et qui ont été annulées.

Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire des recommandations en vertu du par. 39(3) de la Loi ou des al. 11(1)a), b), c), e), f) ou g), et en particulier de l'al. c), du Règlement.

Le juge Kerans a conclu que la Commission n'était pas *functus officio* parce qu'elle avait l'obligation d'envisager la possibilité de faire une recommandation. Voici ce qu'il a affirmé à la p. 257:

> [TRADUCTION] Même si la commission a, en vertu du par. 39(3) et peut-être également du règlement, le pouvoir discrétionnaire de faire ou non une recommandation, nous estimons que cette disposition impose à la commission l'obligation d'envisager la possibilité de faire une recommandation. Le rapport n'indique pas que la commission l'a fait. Si la commission n'a pas envisagé cette possibilité alors, contrairement à ce que le juge de la Cour du Banc de la Reine a conclu, elle n'a pas épuisé sa compétence.

Étant donné l'emploi inexplicable de l'expression «peut/doit» au par. 11(1) du Règlement, il est difficile de préciser ce que la Commission était

1989 CanLII 41 (SCC)

it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the *Architects Act*.

I am, however, of the opinion that the application of the *functus officio* principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a number of *ultra vires* findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of *functus officio*?

Functus Officio

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

In *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal

tenue de faire. Il serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations, que ce soit aux parties ou au Conseil, ou d'envisager un renvoi au Comité d'examen des plaintes. Par conséquent, je souscris à l'opinion du juge Kerans selon laquelle la Commission était tenue d'envisager la possibilité de faire des recommandations, conformément au Règlement et au par. 39(3) de l'*Architects Act*.

J'estime cependant qu'il faut plutôt traiter de l'application du principe *functus officio* dans le contexte de la qualification suivante de l'état actuel des procédures devant la Commission. La Commission a tenu une audience valide au sujet de certaines pratiques des appelants. À la fin de l'audience, au lieu d'envisager de formuler des recommandations et des directives, elle a formulé un certain nombre de conclusions et d'ordonnances *ultra vires* qui étaient nulles et qui ont été annulées. Dans ces circonstances, la décision de la Commission est-elle définitive, ce qui justifierait l'application du principe du *functus officio*?

Functus officio

La règle générale portant qu'on ne saurait revenir sur une décision judiciaire définitive découle de la décision de la Court of Appeal d'Angleterre dans *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. La cour y avait conclu que le pouvoir d'entendre à nouveau une affaire avait été transféré à la division d'appel en vertu des *Judicature Acts*. La règle ne s'appliquait que si le jugement avait été rédigé, prononcé et inscrit, et elle souffrait deux exceptions:

1. lorsqu'il y avait eu lapsus en la rédigeant ou

2. lorsqu'il y avait une erreur dans l'expression de l'intention manifeste de la cour. Voir *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186.

Dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, le juge Martland s'exprimant en son propre nom et en celui du juge Laskin, s'est dit d'avis que le même

1989 CanLII 41 (SCC)

Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At page 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.*

raisonnement ne s'appliquait pas à la Commission d'appel de l'immigration dont les décisions ne pouvaient faire l'objet d'un appel que sur une question de droit. Même s'il s'agissait d'une opinion dissidente, seul le juge Pigeon, parmi les cinq juges ayant entendu l'affaire, n'y a pas souscrit. Le juge Martland affirme, à la p. 589:

> Le même raisonnement ne s'applique pas aux décisions de la Commission, dont il n'y a pas d'appel, sauf sur une question de droit. Il n'y a pas d'appel par voie de nouvelle audition.
>
> Dans *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, la Chambre d'appel de la Cour suprême de l'Alberta a exprimé l'avis que la législature albertaine reconnaissait l'application de la restriction énoncée dans l'affaire *St. Nazaire Company* aux commissions administratives puisque des dispositions expresses prévoyant une nouvelle audition avaient été insérées dans les lois établissant certaines commissions provinciales, tandis que, dans le cas du Development Appeal Board en question, il n'y en avait pas. La Cour a poursuivi en signalant que l'un des buts de la création de ces commissions était d'arriver rapidement au règlement de problèmes administratifs.

Il a ensuite conclu que le texte de la loi exprimait l'intention d'habiliter la Commission à entendre d'autres éléments de preuve, dans certains cas, même si une décision définitive avait été rendue.

Je ne crois pas que le juge Martland ait voulu affirmer que le principe *functus officio* ne s'applique aucunement aux tribunaux administratifs. Si l'on fait abstraction de la pratique suivie en Angleterre, selon laquelle on doit hésiter à modifier ou à rouvrir des jugements officiels, la reconnaissance du caractère définitif des procédures devant les tribunaux administratifs se justifie par une bonne raison de principe. En règle générale, lorsqu'un tel tribunal a statué définitivement sur une question dont il était saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou s'il y a eu un lapsus ou une erreur au sens des exceptions énoncées dans l'arrêt *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, précité.

1989 CanLII 41 (SCC)

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Le principe du *functus officio* s'applique dans cette mesure. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel en bonne et due forme. C'est pourquoi j'estime que son application doit être plus souple et moins formaliste dans le cas de décisions rendues par des tribunaux administratifs qui ne peuvent faire l'objet d'un appel que sur une question de droit. Il est possible que des procédures administratives doivent être rouvertes, dans l'intérêt de la justice, afin d'offrir un redressement qu'il aurait par ailleurs été possible d'obtenir par voie d'appel.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.

Par conséquent, il ne faudrait pas appliquer le principe de façon stricte lorsque la loi habilitante porte à croire qu'une décision peut être rouverte afin de permettre au tribunal d'exercer la fonction que lui confère sa loi habilitante. C'était le cas dans l'affaire *Grillas*, précitée.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

De plus, si le tribunal administratif a omis de trancher une question qui avait été soulevée à bon droit dans les procédures et qu'il a le pouvoir de trancher en vertu de sa loi habilitante, on devrait lui permettre de compléter la tâche que lui confie la loi. Cependant, si l'entité administrative est habilitée à trancher une question d'une ou de plusieurs façons précises ou par des modes subsidiaires de redressement, le fait d'avoir choisi une méthode particulière ne lui permet pas de rouvrir les procédures pour faire un autre choix. Le tribunal ne peut se réserver le droit de le faire afin de maintenir sa compétence pour l'avenir, à moins que la loi ne lui confère le pouvoir de rendre des décisions provisoires ou temporaires. Voir *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.)

In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd.*

Dans l'affaire qui nous intéresse, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par l'*Architects Act*. La Commission a voulu rendre une décision définitive, mais cette décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Traditionnellement, le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une déci-

1989 CanLII 41 (SCC)

and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.

In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and

sion valide. Dans la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), le juge McLachlin (maintenant de notre Cour) a résumé le droit applicable à ce sujet dans le passage suivant, à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40 à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide.
>
> Trizec Equities Ltd. n'a formulé aucune plainte à l'égard de l'audience du 19 mars. Par conséquent, même si la cour a outrepassé sa compétence en prétendant augmenter les cotisations le 17 mars 1982 au matin, sa décision subséquente, rendue le 19 mars 1982, demeure valide.

Si l'erreur qui a pour effet de rendre nulle la décision entache la totalité des procédures, le tribunal doit tout recommencer. Les arrêts *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), et *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330, se situent dans cette catégorie. Dans chaque cas, il s'agissait d'un déni de justice naturelle qui avait pour effet de vicier toute l'instance. Le tribunal était tenu de tout recommencer afin de remédier à ce vice.

En l'espèce, la Commission a tenu une audience valide jusqu'au moment de trancher la question. Elle a alors prononcé une décision qui est nulle de nullité absolue. Elle n'a pas envisagé de régler la

1989 CanLII 41 (SCC)

should be entitled to do so. The Court of Appeal so held.

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting)—I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

The issues which arise in this appeal are:

(1) Was the Practice Review Board ("Board") of the Alberta Association of Architects *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?

(2) If the Board was not *functus officio*, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?

(3) Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

The first two, closely related issues, turn on the construction of s. 39 of the *Architects Act*, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

question de façon appropriée, ce qu'elle devrait pouvoir faire maintenant. C'est ainsi qu'en a décidé la Cour d'appel.

Cependant, à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement. Cela permettra aux appelants d'aborder directement la question des recommandations que la Commission devrait faire, le cas échéant.

En définitive, le pourvoi est rejeté, mais sans dépens. Les intimés n'ont pas présenté de plaidoirie ni déposé de mémoire.

Les motifs des juges La Forest et L'Heureux-Dubé ont été rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—Avec égards, je ne puis souscrire à la conclusion à laquelle en arrive mon collègue le juge Sopinka.

Les questions en litige dans ce pourvoi sont les suivantes:

1) La Practice Review Board («la Commission») de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était-elle *functus officio* après avoir établi un rapport sur les pratiques qui ont entraîné la faillite du Chandler Kennedy Architectural Group?

2) Si la Commission n'était pas *functus officio*, a-t-elle compétence pour poursuivre l'audience initiale, à l'encontre des appelants, afin d'envisager la possibilité de faire des recommandations au Comité d'examen des plaintes?

3) La Cour d'appel a-t-elle commis une erreur en examinant et en appliquant les principes relatifs au *mandamus*?

Les deux premières questions sont étroitement liées et portent sur l'interprétation de l'art. 39 de l'*Architects Act*, R.S.A. 1980, chap. A-44.1, et du règlement 175/83 (adopté en vertu de la Loi), qui créent la Commission et en définissent les pouvoirs.

1989 CanLII 41 (SCC)

Section 39(3) of the *Architects Act* provides:

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

The disputed text is found in Regulation 175/83, s. 11(1):

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

. . .

(c) ... direct that the matter be referred to the Complaint Review Committee for investigation: ...

The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative, mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) *Functus Officio*

When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.

In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is *functus officio*. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not

Le paragraphe 39(3) de l'*Architects Act* dispose:

[TRADUCTION] (3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

Le texte contesté en l'espèce figure au par. 11(1) du règlement 175/83:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

. . .

c) ... ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête ...

La confusion tient à la juxtaposition des termes facultatif «peut» et impératif «doit», sans priorité apparente. Cependant, même si je me propose d'examiner les conséquences des deux interprétations, j'estime que le pourvoi devrait être accueilli de toute façon.

1) *Functus officio*

Lorsque la Commission a voulu rouvrir l'enquête pour la première fois, les appelants ont demandé une ordonnance de prohibition qui leur a été accordée par le juge Brennan, juge en chambre de la Cour du Banc de la Reine, qui a affirmé en rendant l'ordonnance:

[TRADUCTION] Malheureusement, la Commission de révision des pratiques a agi comme si elle avait des fonctions disciplinaires, en tirant des conclusions et en imposant des peines. Monsieur le juge Kryczka a jugé que ces conclusions et ordonnances étaient nulles, ce qui a été confirmé par la Cour d'appel de l'Alberta.

À mon avis, la Commission de révision des pratiques s'est acquittée des fonctions pour lesquelles elle a été constituée et elle est donc *functus officio*. Par conséquent, elle n'avait pas compétence pour poursuivre l'exercice de quelque fonction que ce soit. La demande d'ordonnance de prohibition interdisant à la Commission de poursuivre l'affaire contre les requérants est donc accueillie et il est notamment interdit à la Commission de tenir d'autres audiences sur cette question.

Cette décision a été infirmée par la Cour d'appel de l'Alberta: (1985), 67 A.R. 255. Selon le juge Kerans, s'exprimant au nom de la cour, la Com-

1989 CanLII 41 (SCC)

functus officio, and should be allowed to "voluntarily . . . do the right thing" (at p. 257):

> [T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

Jowitt's Dictionary of English Law (2nd ed. 1977) defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

Black's Law Dictionary (5th ed. 1979) defines *functus officio* as "a task performed":

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

mission n'était pas *functus officio* et il devrait lui être loisible de [TRADUCTION] «procéder de la bonne façon [. . .] volontairement» (à la p. 257):

> [TRADUCTION] [A]près avoir décidé erronément qu'elle avait le pouvoir de traiter directement et définitivement de questions disciplinaires, la Commission a rejeté trop hâtivement toute possibilité de faire des recommandations à d'autres organismes. Nous pensons que la Commission, convaincue erronément d'être investie de ces autres pouvoirs, a commis une erreur si énorme quant à la portée de ses pouvoirs de recommandation que l'on ne peut conclure qu'elle a exercé cette compétence.

L'expression *functus officio* est définie par [TRADUCTION] «qui s'est acquitté de sa fonction» dans le *Jowitt's Dictionary of English Law* (2e éd. 1977). Cette expression s'applique à un juge, magistrat ou arbitre qui a rendu une décision ou prononcé une ordonnance et a ainsi épuisé sa compétence. La conclusion à laquelle est arrivé le juge Morton, dans *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), est bien résumée dans le sommaire:

> [TRADUCTION] Lorsqu'un juge a décrété un sursis d'exécution qui a été prononcé et inscrit, il devient *functus officio* et ni lui ni aucun autre juge de même juridiction n'a le pouvoir d'en modifier les modalités. L'appel devant une instance supérieure est alors le seul moyen d'obtenir une modification de l'ordonnance.

La mention suivante a été ajoutée par l'arrêtiste:

> [TRADUCTION] C'est une question de pratique. Il est bien établi que la cour peut modifier une ordonnance avant de la prononcer et de l'inscrire. Une fois que l'ordonnance est prononcée et inscrite, la cour est *functus officio* et ne peut la modifier elle-même. Seule une juridiction d'appel peut procéder à la modification de l'ordonnance.

Dans le *Black's Law Dictionary* (5e éd. 1979), *functus officio* est défini ainsi: [TRADUCTION] «une fonction remplie»:

> [TRADUCTION] Ayant rempli sa fonction, s'étant acquitté de sa charge ou ayant réalisé son objectif et n'ayant donc plus aucun pouvoir ni compétence. S'applique à un fonctionnaire dont le mandat est expiré et qui n'a donc plus de pouvoir officiellement; également à un acte, à un pouvoir, à un organisme, etc., qui a atteint l'objectif visé lors de sa constitution et n'a donc plus aucun autre effet.

1989 CanLII 41 (SCC)

The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)) "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

In *Re Nelsons Laundries Ltd.*, Verchere J. cited *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it .... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file

En vertu du principe du *functus officio*, une instance décisionnelle, qu'il s'agisse d'un arbitre, d'un tribunal administratif ou d'une cour de justice ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (C.S.C.-B.)) [TRADUCTION] «Permettre à l'instance décisionnelle de se pencher encore sur la question de sa propre initiative, sans réentendre toute l'affaire est contraire à ce principe» (mémoire des appelants, à la p. 19).

Dans la décision *Re Nelsons Laundries Ltd.*, le juge Verchere cite l'arrêt *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (C.A.C.-B.), à la p. 154:

> [TRADUCTION] Il s'agit donc de déterminer à quel moment la décision a été rendue. À mon avis, c'est lorsque l'arbitre a tout fait ce qu'il pouvait faire, c'est-à-dire lorsqu'il a consigné sa décision par écrit et l'a publiée à ce titre.

Dans l'arrêt *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (C.A.T.-N.), le juge Morgan affirme (à la p. 163):

> [TRADUCTION] La question de savoir si le juge de première instance a commis une erreur au départ en déclarant que l'instance était nulle et en ordonnant la radiation du bref d'assignation et de la déclaration n'est pas pertinente en l'espèce. L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier. De toute évidence, le juge était dès lors functus officio et n'avait pas compétence pour entendre l'affaire.

Les auteurs de traités de droit administratif sont étonnamment parcimonieux lorsqu'ils parlent du principe du *functus officio*. L'ouvrage de Pépin et Ouellette, intitulé *Principes de contentieux administratif* (2e éd. 1982), contient peut-être l'énoncé le plus concis de ce principe, à la p. 221:

> Dans les cas des actes quasi judiciaires, la jurisprudence considère que les décisions régulièrement rendues sont irrévocables. On veut en quelque sorte que les droits accordés ou reconnus aux administrés par l'Administration ne puissent être remis en cause par le biais d'un pouvoir de reconsidération; les administrés ont droit à la sécurité juridique des décisions. Une fois la décision

1989 CanLII 41 (SCC)

is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not *functus officio* after handing down its decision, at what point does it become so? In this case an appeal was filed, though not heard because the original ruling was quashed. If the Board is not *functus officio* when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes *functus officio*, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretion-

rendue, le dossier est fermé et l'Administration est «functus officio». Souvent d'ailleurs, le législateur prendra la peine de préciser que la décision est «finale et sans appel». La règle de l'irrévocabilité des décisions à caractère quasi judiciaire semble s'appliquer également aux tribunaux domestiques. Cependant, la règle pourra souffrir des exceptions lorsque la décision initiale est entachée d'un vice de procédure grave comme l'inobservance d'un principe de justice naturelle.

Suivant ce principe, si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. Le caractère définitif de la décision de la Commission peut s'inférer du langage qu'elle emploie dans ses ordonnances. Le rapport de la Commission indique que les audiences ont pris fin le 17 décembre 1984. Les membres de la Commission ont signé le rapport sous la rubrique «Conclusions». De plus, vu que le Conseil de l'Association des architectes de l'Alberta avait déposé un avis d'appel contre la décision rendue par la Commission, lui aussi doit avoir considéré que l'audition était terminée. Dans sa décision, la Commission a imposé des suspensions exécutoires immédiatement. Le rapport est intitulé [TRADUCTION] «Rapport de la Commission de révision des pratiques». Il a été rendu dans l'exercice des fonctions de ce tribunal. Tous ces facteurs révèlent que la Commission avait complété sa fonction et rendu son rapport final.

Le raisonnement de la Cour d'appel de l'Alberta me semble entaché d'un vice fondamental. Si la Commission n'est pas *functus officio* après le prononcé de sa décision, quand le devient-elle? En l'espèce, un appel a été interjeté bien qu'il n'ait jamais été entendu puisque la décision initiale a été annulée. Si la Commission n'est pas *functus officio* lorsqu'elle prononce sa décision, elle doit certainement l'être au moment où cette dernière est portée en appel. Sinon, il faudrait logiquement conclure que la Commission pourrait siéger de nouveau pour réexaminer une affaire même après l'audition de l'appel. Aucun principe en effet ne permet d'affirmer que la Commission devient *functus officio* à un certain moment après le prononcé de sa décision, et il semble rationnellement impossible de faire une exception pour le rare cas

1989 CanLII 41 (SCC)

ary duty. In my view, this point should be fatal to the respondents.

If a tribunal has discretion, i.e., if it may consider making recommendations, and chooses not to, there is no authority in the *Architects Act* that permits it to change its mind on its own initiative. Furthermore, once a board acts *ultra vires*, it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes *functus officio* and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); *Re Nelsons Laundries Ltd.*, *supra*). However, the Board in the present case is

où la Commission fait défaut de considérer l'exercice d'un pouvoir discrétionnaire. À mon avis, ce point devrait être fatal aux intimés.

Si un tribunal détient un pouvoir discrétionnaire, c.-à-d. s'il peut envisager de faire des recommandations et s'il choisit de ne pas le faire, l'*Architects Act* ne l'autorise aucunement à changer d'avis de sa propre initiative. En outre, une fois qu'une commission agit de façon *ultra vires*, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire.

Dans la plupart des décisions administratives, le tribunal ne s'arrête pas à la question de savoir s'il a considéré tous les pouvoirs discrétionnaires dont il est investi, mais a choisi de n'en exercer que quelques-uns. Je suis d'accord avec l'arrêt *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.), portant qu'il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations au Conseil, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Il y a évidemment des exceptions à la règle générale portant qu'un arbitre ayant prononcé une décision définitive devient *functus officio* et ne peut modifier cette décision par la suite. Par exemple, une instance décisionnelle peut corriger des erreurs matérielles ou des fautes imputables à un lapsus ou à une omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 R.N.-B. (2e) 342 (C.A.N.-B.); *Re Nelsons Laundries Ltd.*, précité).

1989 CanLII 41 (SCC)

not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is *functus officio*: any further action would be entirely without authority (*Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of *functus officio* would be rendered nugatory.

In *Lodger's International Ltd.*, *supra*, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the *Human Rights Act* provided that the orders were "final". The court held that the second order was improper and that the Commission was *functus officio* after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

Unlike the enabling statute in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under

En l'espèce, toutefois, la Commission ne tente pas de corriger un lapsus ou une erreur matérielle. Si elle avait la possibilité d'envisager de faire des recommandations et a choisi de ne pas le faire, ce choix n'altère en rien le caractère définitif de la décision.

Lorsqu'une décision est rendue et qu'il ne reste rien à compléter, l'instance décisionnelle est incontestablement *functus officio*: toute mesure additionnelle serait prise en l'absence de toute compétence (*Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), confirmé par [1989] 1 R.C.S. 1038). Donc, si la Commission est perçue comme ayant discrétion pour décider de faire ou non des recommandations et si l'arrêt de la Cour d'appel de l'Alberta est maintenu, le principe du *functus officio* serait privé de tout effet.

Dans l'arrêt *Lodger's International Ltd.*, précité, la Cour d'appel du Nouveau-Brunswick était saisie d'une série d'ordonnances prononcées par la Commission des droits de l'homme du Nouveau-Brunswick. La Commission avait d'abord ordonné à un employeur d'indemniser deux employés. L'employeur ne s'étant pas exécuté, la Commission a renouvelé l'ordonnance en l'assortissant d'un délai de paiement. Le paragraphe 21(2) de la *Loi sur les droits de l'homme* prévoit que les ordonnances sont «définitive[s]». La cour a statué que la seconde ordonnance était irrégulière et que la Commission était *functus officio* après avoir rendu la première ordonnance, parce que l'art. 21 ne l'autorisait pas à rendre d'autres ordonnances. S'exprimant au nom de la cour, le juge La Forest (maintenant de notre Cour) a abordé la question de savoir si la Commission avait le pouvoir de prononcer une telle série d'ordonnances et a conclu ce qui suit (aux pp. 352 et 353):

> Il faudrait des arguments bien solides pour me convaincre que la Législature a jamais eu l'intention de conférer ce genre de pouvoir à un organisme administratif, si nobles que soient ses objectifs et si libérale que soit l'interprétation escomptée de la loi pour faciliter la réalisation de ces objectifs.

Contrairement à la loi habilitante en cause dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, où, en vertu de l'art. 15 sur la *Loi sur la Commission d'appel de*

1989 CanLII 41 (SCC)

s. 15 of the *Immigration Appeal Board Act*, there is no authority in the *Architects Act* for the Board to hold a rehearing. *Cité de Jonquière v. Munger*, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

Furthermore, I agree with the holding in *M. Hodge and Sons Ltd.*, *supra*, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio* (at p. 163):

> The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

The Alberta Court of Appeal interpreted the *Architects Act*, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations" (p. 860). Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 863), my colleague suggested that "[o]n the continuation of the Board's original proceedings ... either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter" (p. 864). Hence, while it would

l'immigration, la Commission d'appel de l'immigration avait compétence pour procéder à une nouvelle audition, l'*Architects Act* n'autorise aucunement la Commission à réentendre ainsi une affaire. L'arrêt *Cité de Jonquière v. Munger*, [1964] R.C.S. 45, confirme également que les décisions doivent être définitives à moins que la loi ne prévoie le contraire. En confirmant l'arrêt unanime de la Cour d'appel du Québec, le juge Cartwright statue au nom de la Cour (à la p. 48):

> [TRADUCTION] Je suis convaincu que le conseil avait le droit d'interpréter la décision mais non de la modifier. Cela ne signifie pas toutefois qu'il n'avait pas le droit de corriger une simple erreur d'écriture. Toute entité dotée de pouvoirs quasi judiciaires doit avoir ce droit, sinon la moindre petite erreur de rédaction pourrait avoir des conséquences désastreuses.

De plus, je souscris à la conclusion de la cour dans l'arrêt *M. Hodge and Sons Ltd.*, précité, selon laquelle le fait que la décision initiale était erronée ou que la cour a agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio* (à la p. 163):

> [TRADUCTION] L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier.

2) La compétence de la Commission pour réentendre une affaire

Dans son interprétation de l'*Architects Act* et du règlement 175/83, la Cour d'appel de l'Alberta a conclu que ces textes imposaient à la Commission l'obligation d'envisager si elle devait faire une recommandation au Conseil ou au Comité d'examen des plaintes.

Malgré le langage ambigu de ces textes législatifs, mon collègue le juge Sopinka conclut que la Loi impose une telle obligation parce qu'«[i]l serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations» (p. 860). Étant donné que «la Commission a tenu une audience valide jusqu'au moment de trancher la question» (p. 863), mon collègue postule qu'«à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments perti-

1989 CanLII 41 (SCC)

provide for the presentation of supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly *ultra vires*. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision" (p. 862) (emphasis added), relying on *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R.

nents aux fins de régler l'affaire» (p. 864). Par conséquent, même si la nouvelle audition permettait aux parties de présenter des éléments de preuve additionnels, cette audition ne constituerait pas un réexamen de la question dans son entier mais plutôt la «continuation des procédures initiales par la Commission».

Intuitivement, cette analyse offre un certain attrait: étant donné que la Commission de révision des pratiques existe et qu'elle a une certaine fonction à remplir, elle devrait être autorisée à exercer cette fonction ou plutôt y être tenue. En l'espèce, cependant, le litige porte précisément sur le fait que la Commission a bel et bien exercé cette fonction, même si elle l'a fait dans l'illégalité.

Il est admis que lorsqu'elle a prononcé ses ordonnances définitives, la Commission a clairement outrepassé sa compétence. Le président de la Commission a lui-même décrit les fonctions de la Commission et reconnu explicitement que:

> [TRADUCTION] [I]l ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession.

Après cette introduction, la Commission s'est engagée dans un processus décisionnel que les tribunaux ont ensuite jugé entièrement *ultra vires*. Si elle avait l'obligation d'envisager de faire des recommandations au Comité de révision des plaintes, elle ne l'a pas fait.

Même si la Commission a commis une erreur en prononçant sa décision initiale, il s'agit de déterminer si cela l'empêche de tenter cette fois d'exercer correctement sa fonction. Selon mon collègue, comme la décision de la Commission était nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision: «le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une décision valide» (pp. 862 et 863) (je souligne), s'appuyant sur la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), où le juge

1989 CanLII 41 (SCC)

(3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

Furthermore, *Re Trizec* dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

(1) the court in *Re Trizec* was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in *Chandler* allowed the Board to continue its original proceeding;

(2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in *Chandler* was not

McLachlin (maintenant de notre Cour) écrit à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40, à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide. [Je souligne.]

D'après cette jurisprudence, il est clair que lorsqu'en raison de circonstances particulières, un tribunal administratif est justifié de réexaminer une affaire, ce dernier doit procéder à un réexamen de la question dans son entier et non à la simple continuation du processus vicié que l'on tente maintenant de corriger.

En outre, dans la décision *Re Trizec*, il s'agissait d'une erreur de procédure commise par la Cour de révision. Tout en respectant les limites de sa compétence sur le plan du fond, la Cour de révision avait augmenté une cotisation établie à l'encontre d'un contribuable avant même d'entendre ce dernier. Deux jours plus tard, à la demande du contribuable, la cour a été convoquée de nouveau et a tenu une audition. Cette affaire doit être distinguée sur au moins trois aspects:

(1) dans *Re Trizec*, on a ordonné à la cour de réexaminer l'affaire et de procéder à une audience régulière; dans *Chandler*, la Cour d'appel de l'Alberta a permis à la Commission de continuer ses procédures initiales;

(2) la cour, agissant dans les limites de sa compétence, a commis une erreur de procédure qu'elle a ensuite corrigée; dans *Chandler*, la

1989 CanLII 41 (SCC)

empowered at the substantive level to make any of the findings it did; and

(3) the taxpayer itself requested a hearing, whereas the Board in *Chandler* reopened the proceedings on its own initiative.

The issues in *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in *Re Trizec*, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

The suggestion that the Board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position

Commission n'avait pas le pouvoir, sur le plan du fond, de formuler les conclusions en cause; et

(3) le contribuable a lui-même demandé une audience alors que dans *Chandler*, la Commission a rouvert l'instance de sa propre initiative.

Les questions en litige dans l'arrêt *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), invoqué dans *Re Trizec*, étaient presque identiques. Un professeur avait été congédié pour trois motifs d'inconduite mais n'avait pu témoigner qu'à l'égard de deux d'entre eux. Par la suite, il avait pu se faire entendre au sujet du troisième motif et le congédiement avait été confirmé.

La suggestion que les procédures initiales puissent être continuées est particulièrement inquiétante. Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, cela serait de nature à éroder la garantie d'équité et de justice naturelle à laquelle chaque citoyen de ce pays est en droit de s'attendre de la part des tribunaux administratifs. La Commission a tenu l'audience initiale en croyant à tort qu'elle pouvait prononcer certaines ordonnances, malgré les propos préliminaires tenus par le président. Les commentaires du président que j'ai déjà reproduits indiquent clairement que les audiences devaient constituer une révision des pratiques plutôt qu'un examen des plaintes portant sur la conduite non professionnelle.

En Cour du banc de la Reine de l'Alberta, le juge Kryczka a statué que, compte tenu de ce que les appelants n'ont pas été avisés qu'ils faisaient face à des accusations ou allégations de nature disciplinaire, [TRADUCTION] «il m'est difficile d'imaginer que le résultat éventuel puisse être considéré comme autre chose qu'un simulacre de justice». Les appelants auraient peut-être agi différemment ou présenté un autre genre de défense à l'audience s'ils avaient soupçonné qu'ils faisaient l'objet d'une enquête sur des questions excédant totalement la compétence de la Commission. Puisqu'ils n'étaient pas au courant ni informés des accusations de nature disciplinaire que la Commis-

1989 CanLII 41 (SCC)

to prepare a full defense to the allegations and orders ultimately made against them.

Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, cited with approval in *Grillas, supra*, at pp. 588-89. *Canadian Industries* dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be required to conduct a new hearing. *Re Trizec* and *Lange, supra*. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

I would like to briefly address the *prima facie* apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered *functus officio*. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity,

sion envisageait de porter, les appelants n'étaient pas légalement en mesure de préparer une défense pleine et entière à l'égard des allégations et des ordonnances dont ils ont finalement fait l'objet.

Les appelants ajoutent que s'il est confirmé, l'arrêt de la Cour d'appel de l'Alberta devra alors être considéré comme renversant l'arrêt de la même cour dans *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, qui a été cité avec approbation dans l'arrêt *Grillas*, précité, aux pp. 588 et 589. L'arrêt *Canadian Industries* portait sur une audience tenue par une commission sans avis préalable à l'appelant, qui avait droit à un tel préavis en tant que partie intéressée. Après avoir donné les avis appropriés, la Commission a procédé à une nouvelle audition de l'affaire et a décidé, après avoir entendu les arguments, de ne pas modifier son ordonnance antérieure. Le juge Johnson a statué, au nom de la Cour d'appel, que les deux ordonnances devaient être annulées. La première était nulle parce que l'appelant n'avait pas été avisé. La deuxième était tout aussi nulle, parce que la loi n'autorisait pas clairement la tenue d'une nouvelle audition.

Comme nous l'avons déjà mentionné, aucun texte de loi n'habilite clairement la Commission à tenir une nouvelle audition. Si la Commission a omis de remplir une obligation qui lui incombe, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. *Re Trizec* et *Lange*, précités. Cependant, si elle se propose de faire une chose et qu'en fin de compte elle fait quelque chose de tout à fait différent, tout réexamen de l'affaire ne devrait pas être considéré comme la «continuation des procédures initiales par la Commission».

J'aimerais aborder brièvement la question de la crainte *prima facie* que le fait d'ordonner à la Commission de tenir une nouvelle audition équivaille à une «double décision». Cette crainte pourrait être justifiée si l'on estimait que la Commission détient un pouvoir discrétionnaire. Elle prononcerait alors des ordonnances après être devenue *functus officio*. Cependant, si elle était dans l'obligation d'agir, la tenue d'une nouvelle

1989 CanLII 41 (SCC)

and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, *Lodger's International Ltd.*, *supra*, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

audition ne s'imposerait que si l'audience initiale était jugée nulle de nullité absolue et si les circonstances le justifiaient. Dans ce cas, il n'y aurait pas lieu de craindre de permettre au tribunal de prononcer une série d'ordonnances, *Lodger's International Ltd.*, précité. À mon avis, en l'espèce il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

(3) *Mandamus*

As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

3) *Mandamus*

Puisque la Cour d'appel s'est référée à deux reprises aux principes du *mandamus*, j'en traiterai également. Je conviens toutefois avec les appelants que ces principes n'ont rien à voir avec le présent pourvoi.

Laidlaw J.A. set out the requirements for mandamus in *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" . . . ; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief . . .»; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy . . . .

Dans l'arrêt *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (C.A. Ont.), le juge Laidlaw décrit les conditions applicables à l'obtention d'un *mandamus*, à la p. 297:

> [TRADUCTION] Pour être en mesure d'obtenir ce redressement, le requérant doit démontrer (1) «qu'il a le droit, clairement prescrit par la loi, d'obtenir que la chose qu'il demande soit faite et ce, de la façon demandée et par la personne en cause» . . . ; (2) «la fonction dont on demande l'exercice par voie de *mandamus* doit réellement incomber au fonctionnaire en cause, au moment où le redressement est demandé» . . . ; (3) cette fonction doit être de nature purement ministérielle et «incomber directement à un fonctionnaire en vertu de la loi ou de la nature de son poste; il ne doit jouir d'aucun pouvoir discrétionnaire à cet égard»; (4) il doit y avoir eu demande et refus d'accomplir l'acte que l'on veut faire accomplir par voie judiciaire . . .

Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here:

Il appert donc que le *mandamus* s'applique à l'encontre d'un tribunal ou d'une autorité et qu'il ne peut être invoqué par ceux-ci. Si la Commission avait refusé d'exercer sa compétence, il y aurait lieu de délivrer un *mandamus*. Toutefois ce n'est pas le cas ici. C'est plutôt le contraire: la Commission a pris sur elle d'exercer des pouvoirs plus étendus que ceux qui lui étaient conférés. Ce seul fait militerait à l'encontre de l'application du *mandamus* à l'espèce par la Cour d'appel. En outre, si nous respectons les conditions susmentionnées applicables à l'obtention d'un *mandamus* les faits de l'espèce ne semblent satisfaire à aucune de celles-ci:

1989 CanLII 41 (SCC)

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.

(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.

(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

(4) Conclusion

On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now *functus officio*. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

Appeal dismissed, LA FOREST *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitors for the appellants: Code Hunter, Calgary.

1) Aucun droit clairement prescrit par la loi n'est en cause.

2) La Commission pouvait avoir le pouvoir discrétionnaire de décider de faire ou non des recommandations.

3) La question de savoir si le règlement confère un pouvoir discrétionnaire à la Commission demeure ouverte; si la Commission a le devoir de considérer de faire des recommandations, elle a certainement le pouvoir discrétionnaire de décider de les faire ou non, et de choisir la recommandation appropriée, le cas échéant.

4) Les appelants n'ont pas demandé qu'un acte soit accompli et la Commission n'a pas refusé de le faire, comme le requiert le *mandamus*.

4) Conclusion

Peu importe la façon dont on interprète le langage ambigu du règlement, j'estime que le pourvoi doit être accueilli. Si la Commission avait le pouvoir discrétionnaire d'agir et a décidé d'agir d'une certaine façon, elle est maintenant *functus officio*. Si elle avait le devoir d'agir et qu'elle ne l'a pas fait, elle ne peut poursuivre une audience viciée. Pour les motifs qui précèdent, le *mandamus* n'est pas un facteur déterminant en l'espèce.

Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de la Cour d'appel et de rétablir le jugement du juge Brennan interdisant à la Commission de poursuivre l'affaire, le tout avec dépens dans toutes les cours.

Pourvoi rejeté, les juges LA FOREST *et* L'HEUREUX-DUBÉ *sont dissidents.*

Procureurs des appelants: Code Hunter, Calgary.

1989 CanLII 41 (SCC)

TAB 16

The Chippewas of Sarnia Band v. Attorney General of Canada et al.*

[Indexed as: Chippewas of Sarnia Band v. Canada (Attorney General)]

51 O.R. (3d) 641
[2000] O.J. No. 4804
Docket Nos. C32170, C32188 and C32202

Court of Appeal for Ontario
Osborne A.C.J.O., Finlayson, Doherty, Charron and Sharpe JJ.A.
December 21, 2000

* Application for motion for reconsideration of leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002 (L'Heureux-Dub, Arbour and LeBel JJ.). S.C.C. File No. 28365. S.C.C. Bulletin, 2002, p. 925.

Native law--Aboriginal title--Surrender--Indian reserve lands sold in 1827--Procedures for lawful surrender of lands not followed because of dysfunctional bureaucracy administering Indian lands--Crown patent issued although lands never lawfully surrendered--Innocent third party purchasers for value and without notice relying on validity of Crown patent--After 150-year delay, Indian band seeking declaratory relief and possession of lands--Claims not barred by statutory limitation period--Claims for declaration subject to discretionary and equitable principles--Aboriginal rights not absolute --Aboriginal rights must be considered in relation to rights of others--Equitable defences of laches, acquiescence, bona fide purchaser for value available--Claims dismissed--Royal Proclamation, 1763 (U.K.), R.S.C. 1985, App. II, No. 1 --Quebec Act, 1774 (U.K.), R.S.C. 1985, App. II, No. 2.

2000 CanLII 16991 (ON CA)

Real property--Crown patent-- Aboriginal title--Surrender --Indian reserve lands sold in 1827--Procedures for lawful surrender of lands not followed because of dysfunctional bureaucracy administering Indian lands--Crown patent issued although lands never lawfully surrendered--Innocent third party purchasers for value and without notice relying on validity of Crown patent--After 150-year delay, Indian band seeking declaratory relief and possession of lands--Claims not barred by statutory limitation period--Claims for declaration subject to discretionary and equitable principles--Aboriginal rights not absolute--Aboriginal rights must be considered in relation to rights of others--Equitable defences of laches, acquiescence, bona fide purchaser for value available--Claims dismissed--Royal Proclamation, 1763 (U.K.), R.S.C. 1985, App. II, No. 1--Quebec Act, 1774 (U.K.), R.S.C. 1985, App. II, No. 2.

In 1827, the ancestors of The Chippewas of Sarnia Band ("the Chippewas") lived on the Upper Reserve, an Indian reserve located near the St. Clair River. In November 1839, after negotiations with Head Chief Joshua Wawanosh and Chiefs Chibigun and Corning, Malcolm Cameron, a land speculator, purported to purchase 2,540 acres ("the disputed lands") located at the rear of the Upper Reserve. In 1840, Lieutenant Governor Arthur approved the sale in two orders-in-council of the Province of Upper Canada. The orders incorporated recommendations about the details of the sale made by Samuel P. Jarvis, the Acting Chief Superintendent of Indian Affairs. However, unlike other orders-in-council about land sales by the Chippewas, there was no reference to a surrender of the lands. Because of neglect and a dysfunctional bureaucracy administering Indian land, none of the normal procedures for a lawful surrender of the disputed lands was ever undertaken; however, in 1853, the disputed lands were conveyed to Cameron by Crown patent. The form of the letters patent was consistent with a surrender having been obtained. By 1861, Cameron was no longer on title.

In 1995, the Chippewas brought action, among other things, for a declaration that they retained their interest in the disputed lands because their ancestors had never formally

2000 CanLII 16991 (ON CA)

surrendered the lands. By this time, the disputed lands were occupied by more than 2,000 different individuals, organizations and businesses ("the landowners") in the City of Sarnia, who traced their title to the Cameron patent. Until the action was commenced, the landowners had no way of knowing of the Chippewas' claim, having acquired their properties in good faith for good value with no knowledge and no reason to believe that the Chippewas had a claim.

The federal and provincial governments were defendants to the Chippewas' action, as were individual landowners and a class of defendants certified under the Class Proceedings Act, 1992, S.O. 1992, c. 6. The parties brought motions and cross-motions for summary judgment, none of which touched the Chippewas' claim seeking damages against Canada and Ontario. On the motions, the motions judge, Campbell J., among other things, declared that the Cameron patent was void ab initio, but he dismissed the action against the landowners and declared that they held title free and clear of any aboriginal title or treaty right. Campbell J. held that the landowners were entitled to the defence of good faith purchaser for value without notice, but he held that the defence could only operate after the passage of a 60-year limitation period. The result was that he held that the Chippewas' aboriginal and treaty rights were extinguished on August 26, 1921, and they were left with a claim for damages against the Crown. Campbell J.'s decision gave rise to six appeals and cross-appeals.

Held, the appeals and cross-appeals by Canada, Ontario and the landowners should be allowed; the appeal of the Chippewas should be dismissed; the action against the landowners should be dismissed; and the Chippewas' motion for summary judgment in respect of the invalidity of the Cameron patent should be dismissed.

As preliminary issues, the Chippewas' motion to introduce fresh evidence should be dismissed, and Ontario's objection to Campbell J.'s exercise of jurisdiction under the summary judgment rule should be rejected. Given the nature of the record, a trial judge would be in no better position to deal with the issues than the motions judge. Pursuant to s. 134(1)

2000 CanLII 16991 (ON CA)

(c) of the Courts of Justice Act, R.S.O. 1990, c. C.43, it would not be just to accede to Ontario's objection, particularly when Ontario had not raised the issue below.

Despite the many difficult legal issues, this case was first and foremost a factual case, and, in the usual circumstances of the summary judgment proceedings, the motion judge's findings and inferences should be given the deference of findings made at a trial. That said, there were several significant inferences that were unreasonable or that misapprehended or overlooked evidence. The motions judge was correct in concluding that there had been no surrender; however, he was incorrect in characterizing the Cameron transaction as a private sale. The negotiations were conducted with the knowledge and authority of Crown officials. The terms of sale were reviewed and the ultimate terms were dictated by the Crown for the protection of the Chippewas. The motions judge missed the evidentiary significance of the absence of any complaint by the Chippewas to the Cameron transaction. The other chiefs were aware of the transaction, and it could reasonably be inferred that Chief Wawanosh acted with the authority of the affected bands or that they accepted his actions once they became known. The inference of approval or acceptance was strengthened by reference to events that occurred between 1840 and 1855. These events, which included the Chippewas' inaction in the face of a survey of the disputed lands and their insistence on compliance with the terms of the sale agreement, indicated a communal awareness of the transaction and acceptance of it, in part, as a means to advance other community goals.

The motions judge erred by concluding that the surrender provisions set out in the Royal Proclamation had the force of law at the relevant time. He was bound by the decision of Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 570, which held that the surrender provisions of the Royal Proclamation were revoked by the Quebec Act. However, little turned on this error because surrender was necessary as a result of the protocol between the Crown and First Nations peoples that aboriginal title could be lost only by surrender and that a surrender required a voluntary, informed, communal decision to give up the land. In the immediate case, there was

2000 CanLII 16991 (ON CA)

no surrender. The issues then were whether, in the absence of surrender, the Chippewas had a right to relief and whether their claims were barred by the application of a statutory limitation period or equitable doctrine.

The motions judge correctly concluded that the Chippewas' claim was not barred by any statutory limitation period. The applicability of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 and the Nullum Tempus Act, 1769 (U.K.), 9 Geo. III, c. 16 would presuppose that the Chippewas' claim was in effect a "proceeding by the Crown", but this was not the case. Insofar as the 1834 and 1859 pre-Confederation statutes were concerned, the motions judge was correct in his conclusion that neither statute evidenced the clear and plain intent necessary to extinguish aboriginal or treaty rights.

The issue then narrowed to whether the Chippewas were entitled to a declaration that the Cameron patent was void and that they were entitled to possession of the disputed lands. In particular, the issue was whether it was appropriate in deciding on a remedy for the court to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Crown patent. The issue of remedies had both a public and private law dimension. The sui generis nature of aboriginal title drew upon public law concepts but had to be understood in relation to traditional common law private property rights. Although it has fallen into disuse, the common law prerogative remedy to challenge the validity of a Crown patent, grant, charter or franchise was the writ of scire facias. Public law remedies are discretionary, and it was well established that public law remedies may be refused when there is delay in asserting a claim combined with reliance by innocen t third parties on the impugned act. The purported exercise of a statutory or prerogative power creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of an aggrieved party must be reconciled with the interests of third parties and the interests of orderly administration.

Aboriginal rights, while an integral aspect of the Canadian

2000 CanLII 16991 (ON CA)

legal landscape, did not exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights, which must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown and with the rest of Canadian society. It was a basic principle of the Canadian legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim an automatic entitlement without regard to the consequences to the rights of others that might flow by reason of the complaining party's delay in asserting the claim. In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the historically vulnerable position of aboriginal peoples. In exercising its discretion, the court should have regard to the nature of the disputed act, the nature of the illegality committed, and its consequences. In the immediate case, the transaction did not occur without Crown intervention to ensure that the Chippewas' interests were protected and the failure to obtain a formal surrender was not such an error that the interests of third parties should be ignored. There was every indication that the Crown officials intended to follow the usual practice to obtain a formal surrender. The courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that had been relied upon for 150 years by innocent parties. Further, there was no adequate explanation for the delay that would excuse its impact. For almost 150 years, third party purchasers relied on the validity of the Cameron patent. There were exceptional circumstances in the immediate case that justified withholding a remedy that would vindicate aboriginal title.

Approaching the matter from a private law perspective, the issue was whether the remedies claimed by the Chippewas were subject to the discretion traditionally associated with equity. Their submission that equitable principles could have no bearing was unacceptable; their claims for a declaration or for a vesting order were equitable in origin and discretionary in nature. Their submission that a claim to aboriginal title was strictly legal in nature and immune from equitable principles

2000 CanLII 16991 (ON CA)

was also unacceptable. The juridical nature of aboriginal title has been influenced and shaped by equitable principles. It was difficult to see why a right drawing so heavily on the principles of equity should from a remedial perspective be immune from the principles of equity. The modern conception of the private law that there has been a fusion of equitable and legal principles added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. As the Chippewas sought remedies that were discretionary in nature to vindicate a sui generis right that drew upon both common law and equitable sources, it was appropriate to consider the effect of their delay in asserting a remedy and the consequent impact upon third parties.

The Chippewas' reliance on the principle of nemo date quod non habet--no one gives what he does not have--did not preclude the consideration of discretionary factors. The principle did not automatically invalidate Crown patents. Where the validity of a patent was impugned, established legal principles required that the interests of third parties be considered. Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The facts in the immediate case brought the case within the principles governing laches and acquiescence. Equity's protection of the good faith purchaser for value also was relevant to the claim advanced by the Chippewas. On the findings of the motions judge, all purchasers from Cameron were good faith purchasers for value. The defence was available to them, and the motions judge erred by qualifying the defence with a 60-year "equitable limitation period".

Cases referred to

Alcock v. Cooke (1829), 130 E.R. 1092, 5 Bing. 340 (C.P.); Apsassin v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344, 102 F.T.R. 160n, 130 D.L.R. (4th) 193, 190 N.R. 89 (sub nom. Blueberry River Indian Band v. Canada); Bailey v. Du Cailland, [1905] 6 O.W.R. 506 (Div. Ct.); Boulton v. Jeffrey (1845), 1 E. & A. 111 (C.A.); Cadbury

2000 CanLII 16991 (ON CA)

Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, 59 B.C.L.R. (3d) 1, 167 D.L.R. (4th) 577, 235 N.R. 30, [1999] 5 W.W.R. 751, 42 B.L.R. (2d) 159, 83 C.P.R. (3d) 289; Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, 61 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201; Chippewas of Kettle and Stony Point v. Canada (Attorney General), [1998] 1 S.C.R. 756, 38 O.R. (3d) 640n, 163 D.L.R. (4th) 189, 226 N.R. 121, affg (1996), 31 O.R. (3d) 97, 141 D.L.R. (4th) 1, 6 R.P.R. (3d) 185 (C.A.); Chippewas of Sarnia Band v. Canada (Attorney General), [2000] O.J. No. 138 (C.A.); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285, 153 D.L.R. (4th) 193, 220 N.R. 161, [1999] 10 W.W.R. 34; Doe d. Malloch v. Principal Officers of Her Majesty's Ordinance (1847), 3 U.C.Q.B. 387; Dyson v. Attorney General, [1911] 1 K.B. 410, 81 L.J.K.B. 217, 105 L.T. 753, 27 T.L.R. 143, 55 Sol. Jo. 168 (C.A.); Fitzpatrick v. The King (1926), 59 O.L.R. 331 (C.A.); Friends of Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 48 F.T.R. 160n, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, [1992] 2 W.W.R. 193; Guerin v. R., [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 20 E.T.R. 6, 36 R.P.R. 1; Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, 26 N.R. 364, [1979] 3 W.W.R. 676; Holmsten v. Karson Kartage Konstruction Ltd. (1997), 33 O.R. (3d) 54 (Gen. Div.); Homex Realty and Development Co. v. Wyoming (Village), [1980] 2 S.C.R. 1011, 116 D.L.R. (3d) 1, 33 N.R. 475, 13 M.P.L.R. 234; Hong Kong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167, 6 Alta. L.R. (3d) 337, 100 D.L.R. (4th) 40, 148 N.R. 1, 29 R.P.R. (2d) 1 (sub nom. Canada Mortgage & Housing Corp. v. Hong Kong Bank of Canada); Immeubles Port Louis Lte v. Lafontaine (Village), [1991] 1 S.C.R. 326, 78 D.L.R. (4th) 175, 121 N.R. 323, 5 M.P.L.R. (2d) 1; LeMesurier v. Andrus (1986), 54 O.R. (2d) 1, 12 O.A.C. 299, 25 D.L.R. (4th) 424, 38 R.P.R. 183 (C.A.), revg (1984), 31 R.P.R. 143 (Ont. H.C.J.); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 142 N.R. 321, 14 C.C.L.T. (2d) 1; National Trust Co. v. Bouckhuyt (1987), 61 O.R. (2d) 640, 23 O.A.C. 40, 43 D.L.R. (4th) 543, 38 B.L.R. 77, 21 C.P.C. (2d) 226, 7 P.P.S.A.C. 273, 46 R.P.R. 221 (C.A.), revg (1987), 59 O.R. (2d) 556, 39 D.L.R. (4th) 60,

2000 CanLII 16991 (ON CA)

7 P.P.S.A.C. 113, 44 R.P.R. 264 (H.C.J.); Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 570, 4 O.R. (3d) 133n, 46 O.A.C. 396, 83 D.L.R. (4th) 381, 127 N.R. 147, 20 R.P.R. (2d) 50, supp. reasons (1995), 46 R.P.R. (2d) 91n (S.C.C.), affg (1989), 68 O.R. (2d) 394, 32 O.A.C. 66, 58 D.L.R. (4th) 117, 4 R.P.R. (2d) 252 (C.A.), affg (1984), 49 O.R. (2d) 353, 15 D.L.R. (4th) 321 (H.C.J.); Ontario Housing Corp. v. Ong (1988), 63 O.R. (2d) 799, 26 C.P.C. (2d) 139 (C.A.), affg (1987), 58 O.R. (2d) 125, 15 C.P.C. (2d) 279 (H.C.J.); Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1, 13 C.R.R. 287, 12 Admin. L.R. 16; Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 1 S.C.R. 44, 182 D.L.R. (4th) 561, 251 N.R. 1, 82 Alta. L.R. (3d) 211, [2000] 10 W.W.R. 187; R. v. Agawa (1988), 65 O.R. (2d) 505, 28 O.A.C. 201, 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266 (C.A.); R. v. Gladstone, [1996] 2 S.C.R. 723, 23 B.C.L.R. (3d) 155, 137 D.L.R. (4th) 648, 200 N.R. 189, [1996] 9 W.W.R. 149, 109 C.C.C. (3d) 193, 50 C.R. (4th) 111; R. v. Marshall, [1999] 3 S.C.R. 456, 178 N.S.R. (2d) 201, 177 D.L.R. (4th) 513, 246 N.R. 83, 549 A.P.R. 201, 138 C.C.C. (3d) 97; R. v. Marshall, [1999] 3 S.C.R. 533, 179 N.S.R. (2d) 1, 179 D.L.R. (4th) 193, 247 N.R. 306, 553 A.P.R. 1, 139 C.C.C. (3d) 391; R. v. Nikal, [1996] 1 S.C.R. 1013, 19 B.C.L.R. (3d) 201, 133 D.L.R. (4th) 658, 196 N.R. 1, [1996] 5 W.W.R. 305, 35 C.R.R. (2d) 189, 105 C.C.C. (3d) 481 (sub nom. Canada v. Nikal); R. v. Palmer, [1980] 1 S.C.R. 759, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22, 106 D.L.R. (3d) 212, 17 C.R. (3d) 34; R. v. Sioui, [1990] 1 S.C.R. 1025, 30 Q.A.C. 280, 70 D.L.R. (4th) 427, 109 N.R. 22, 56 C.C.C. (3d) 225; R. v. Van der Peet, [1996] 2 S.C.R. 507, 23 B.C.L.R. (3d) 1, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 9 W.W.R. 1, 109 C.C.C. (3d) 1, 50 C.R. (4th) 1; R. v. Wilkes (1770), 98 E.R. 327, 4 Burr. 2527, 19 State Tr. 1075, [1558-1774] All E.R. Rep. 570, 2 E.R. 244, 4 Bro. Parl. Cas. 360, Wilm. 322; Robertson v. Robertson (1875), 22 Gr. Ch. 449; Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438, [1921] All E.R. Rep. 329, 90 L.J.K.B. 1089, 126 L.T. 35, 37 T.L.R. 919, 65 Sol. Jo. 733 (H.L.) (subsequent proceedings sub nom. British Bank for Foreign Trade Ltd. v. Russian Commercial & Industrial Bank (1921), 38 T.L.R. 65); Scarborough Golf & Country Club Ltd. v. Scarborough

2000 CanLII 16991 (ON CA)

(City) (1988), 66 O.R. (2d) 257, 31 O.A.C. 260, 54 D.L.R. (4th) 1, 41 M.P.L.R. 1, 1 R.P.R. (2d) 225 (C.A.) [Leave to appeal to S.C.C. refused [1989] 2 S.C.R. vi]; Shaver Hospital for Chest Diseases v. Slesar (1979), 27 O.R. (2d) 383, 106 D.L.R. (3d) 377, 15 C.P.C. 97 (C.A.) [Leave to appeal to S.C.C. refused [1981] 1 S.C.R. xiii]; Skerryvore Ratepayers Assn. v. Shawanaga Indian Band (1993), 16 O.R. (3d) 390, 109 D.L.R. (4th) 449, 50 M.V.R. (2d) 9, 36 R.P.R. (2d) 23 (C.A.) [Leave to appeal to S.C.C. refused [1994] 2 S.C.R. v, 39 R.P.R. (2d) 311n, 174 N.R. 228n] (sub nom. Hopton v. Pamajewon); Smith v. R., [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237, 47 N.R. 132 (sub nom. Canada v. Smith); St. Mary's Indian Band v. Cranbrook (City), [1997] 2 S.C.R. 657, 35 B.C.L.R. (3d) 218, 147 D.L.R. (4th) 385, 213 N.R. 290, [1997] 8 W.W.R. 332, 40 M.P.L.R. (2d) 131; The Queen v. Hughes (1865), 1 L.R. 81 (P.C.); United Scientific Holdings Ltd. v. Burnley Borough Council, [1977] 2 All E.R. 62, [1978] A.C. 904, [1977] 2 W.L.R. 806, 121 Sol. Jo. 223, 75 L.G.R. 407, 33 P. & C.R. 220 (H.L.); Wewayakum Indian Band v. Canada (1999), 171 F.T.R. 320n, 247 N.R. 350 (C.A.), affg (1995), 99 F.T.R. 1

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 25
Class Proceedings Act, 1992, S.O. 1992, c. 6
Code of Civil Procedure, R.S.Q., c. C-25, art. 33
Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 129
Constitutional Act, 1791 (U.K.), R.S.C. 1985, App. II, No. 3
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 96(1), 100, 134(1)(c)
Crown Liability Act, S.C. 1952-53, c. 30
Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (as am. S.C. 1990, c. 8), ss. 22, 32
Federal Court Act, R.S.C. 1985, c. F-7, s. 39(1)
Indian Act, R.S.C. 1906, c. 81
Indian Act, R.S.C. 1985, c. I-5, s. 88
Law Respecting Real Property, and to Render the Proceedings for recovering possession thereof in certain cases, less difficult and expensive, An Act to Amend the, 1834 (U.C.), 4 Will. IV, c. 1
Limitation of Actions and Suits relating to Real Property, and the time of prescription in certain cases, An Act respecting

2000 CanLII 16991 (ON CA)

the, 1859, S.C. 1859, 22 Vict., c. 88, ss. 1, 16
Limitations Act, R.S.O. 1990, c. L.15, ss. 4, 15
Management of the Indian lands and property, An Act respecting the, S.C. 1860, 23 Vict., c. 151, s. 6
Municipal Act, R.S.O. 1980, c. 302 [now R.S.O. 1990, c. M.45, s. 261], s. 257
Nullum Tempus Act, 1769 (U.K.), 9 Geo. III, c. 16
Quebec Act, 1774 (U.K.), R.S.C. 1985, App. II, No. 2
Royal Proclamation, 1763 (U.K.), R.S.C. 1985, App. II, No. 1
Union Act, 1840 (U.K.), R.S.C. 1985, App. II, No. 4

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.04

Authorities referred to

Birks, "Rights, Wrongs and Remedies" (2000) 20 Oxford Journal of Legal Studies 1
Brown and Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998)
Evans, de Smith's Judicial Review of Administrative Action, 4th ed. (London: Stevens, 1980)
Halsbury's Laws of England, 4th ed., Vol. 1(1)
Hogg, Constitutional Law of Canada, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997)
Jones and de Villars, Principles of Administrative Law, 3d ed. (Scarborough, Ont.: Carswell, 1999)
McGhee, Snell's Equity, 30th ed. (London: Sweet and Maxwell, 2000)
Province of Canada, Journals of the Legislative Assembly of Canada, 1844-1845, Appendix eee, "Report on the Affairs of the Indians in Canada", 20 March 1845 (the "Bagot Report")
Sarna, The Law of Declaratory Judgments, 2d ed. (Toronto: Carswell, 1988)
Wade and Forsyth, Administrative Law, 7th ed. (Oxford: Clarendon Press, 1994)
Zamir, The Declaratory Judgment (London: Stevens, 1962)

2000 CanLII 16991 (ON CA)

APPEAL from a judgment given after motions and cross-motions for summary judgment in an action for a declaration with respect to aboriginal title and treaty rights.

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TABLE OF CONTENTS

I. OVERVIEW OF THE PROCEEDINGS 649

A. The Chippewas' Claim 649
B. The Motions for Summary Judgment 650
C. The Appeals and Cross-Appeals 653
D. Our Decision in a Nutshell 654

II. PRELIMINARY ISSUES 656

A. Chippewas' Motion to Introduce Fresh Evidence 656

2000 CanLII 16991 (ON CA)

B. The Summary Judgment Issue 657

III. THE FACTS 659

A. Introduction 659
B. The Occupants of the Disputed Lands: Then and Now 660
C. The Time Line 661
D. Crown-First Nations Relations 665
E. The Surrender of Chippewa Lands Before the Sale to Cameron 670
F. The Cameron Transaction 675
G. Post-Cameron Transaction Events 688
H. Summary of Findings 697

IV. NO SURRENDER OF THE DISPUTED LANDS 698

A. The Royal Proclamation, 1763 699
B. The Quebec Act, 1774 705

V. STATUTORY LIMITATION PERIODS 708

A. Issues on Appeal 708
B. The Crown Liability and Proceedings Act 711
C. The Nullum Tempus Act 712
D. The 1834 and 1859 Pre-Confederation Limitation Statutes 712

VI. REMEDIES AND EQUITABLE DEFENCES 714

A. Introduction 714
B. Public Law Remedies 715

1. The Prerogative Writ of Scire Facias 716
2. The Discretionary Nature of Public Law Remedies 718
3. Discretion and Aboriginal Rights 720
4. Application of Discretionary Factors 722

C. Private Law Remedies 725

1. Equitable Nature of Remedies Sought 726
2. Aboriginal Title and Equitable Principles 727

2000 CanLII 16991 (ON CA)

3. The Nemo Dat Principle 730
4. Nature of Discretion to be Exercised 731
5. Laches and Acquiescence 732
6. Good Faith Purchaser for Value 734

D. Conclusion on Remedies 736

VII. DISPOSITION 736

BY THE COURT: --

I. OVERVIEW OF THE PROCEEDINGS

A. The Chippewas' Claim

[1] The Chippewas of Sarnia Band ("the Chippewas") claim ownership of a parcel of land located in and around the City of Sarnia ("the disputed lands"). Prior to 1827, the disputed lands were part of a vast tract of land over which the Chippewa Nation [See Note 1 at end of document] had dominion. By 1827, the Chippewas had surrendered almost all of that territory to the Crown. They had, however, retained four reserves, including one referred to as the Upper Reserve, located on the St. Clair River near present-day Sarnia. The ancestors of the Chippewas of Sarnia lived on the Upper Reserve. The Upper Reserve originally occupied 10,280 acres. The disputed lands are the 2,540 acres located at the rear or back of the reserve furthest from the St. Clair River, and are presently occupied by over 2,000 different individuals, organizations and businesses.

[2] In November 1839, Malcolm Cameron, a politician and land speculator, purported to purchase the disputed lands from the Chippewas. The lands were eventually conveyed to him by Crown patent in 1853 ("the Cameron patent"). The present occupants of the disputed lands trace their title to the Cameron patent. The Chippewas claim that their ancestors never surrendered the disputed lands and that their interest in the land is the same now as it was in 1827.

[3] The Chippewas started this action in 1995. In essence, they seek declaratory relief recognizing their right to the

2000 CanLII 16991 (ON CA)

disputed lands and damages for trespass and breach of fiduciary duty. If the Chippewas obtain the declaratory relief claimed, they would be entitled to possession of the land, although they have made it clear that they are ready and willing to negotiate with the federal and provincial governments and do not seek the wholesale eviction of the present occupiers of the property.

[4] The individual defendants, other than the Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), occupy parts of the disputed land. They also represent the defendant class certified by Adams J. in 1996 under the Class Proceedings Act, 1992, S.O. 1992, c. 6. In this decision we refer to them collectively as the landowners.

B. The Motions for Summary Judgment

[5] Canada brought a motion for summary judgment asking that the parts of the Chippewas' claim seeking declaratory relief be dismissed. The landowners also brought a motion for summary judgment seeking the dismissal of the action against them on the grounds advanced by Canada in its motion and on other grounds applicable only to the individual defendants.

[6] Ontario supported both motions.

[7] The Chippewas responded with a cross-motion seeking summary judgment against all defendants on the parts of the claim seeking a declaration as to the Chippewas' rights to the disputed lands.

[8] None of the motions for summary judgment touched the parts of the claim seeking damages against Canada and Ontario. The trial of those claims awaits the result of these proceedings.

[9] The motions judge, Campbell J.:

-- dismissed Canada's motion for summary judgment;

-- allowed in part the landowners' motion for summary judgment, dismissed the action against them and declared that they

2000 CanLII 16991 (ON CA)

held title free and clear of any aboriginal title or treaty right; and

-- allowed the Chippewas' motion to the extent that it sought a declaration of invalidity with respect to the letters patent issued to Malcolm Cameron in 1853, but dismissed the Chippewas' motion for a declaration that they continued to enjoy "aboriginal, treaty and constitutional rights" in the disputed lands.

[10] The motions judge's main findings were:

-- There was no evidence that the Chippewas ever surrendered the disputed lands.

-- The sale of the disputed lands by three chiefs of the Chippewas to Malcolm Cameron in 1839 was a private sale without formal surrender and as such was prohibited by common law and by the Royal Proclamation, 1763 (U.K.), R.S.C. 1985, App. II, No. 1 ("Royal Proclamation").

-- There was no evidence that the Chippewas ever expressed a free, voluntary and fully informed collective intention to release their interest in the lands or to consent to the sale to Cameron.

-- The Governor General, Lord Elgin, had no authority to issue a patent for the disputed lands in 1853. Therefore, the patent issued to Cameron was void ab initio and of no force and effect.

-- The Chippewas' interest in the lands continued to this day, unless extinguished by some constitutionally applicable statute, rule of law or principle of equity.

-- None of the limitations statutes relied upon by the parties operated to extinguish the Chippewas' interests in the lands or to bar the Chippewas' action for recovery of the lands.

-- The doctrines of laches, acquiescence and estoppel by

2000 CanLII 16991 (ON CA)

election did not bar the Chippewas' action.

-- The defence of good faith purchaser for value without notice was a fundamental aspect of the applicable real property regime. This defence could, in appropriate cases, bar an aboriginal claim against an innocent third party purchaser.

-- Against ordinary property, the good faith purchaser for value without notice defence operated immediately upon purchase. Such an abrupt application, if applied to land subject to aboriginal title, would ignore the legal priority to be accorded to aboriginal rights and would result in the extinguishment of the Chippewas' title immediately in 1861.

-- The competing interests of the Chippewas and the innocent purchasers without notice would best be balanced by allowing the good faith purchaser without notice defence to operate only after 60 years. A 60-year equitable limitation period would protect aboriginal property interests against immediate extinguishment on sale to a good faith purchaser for value without notice.

-- The 60-year equitable limitation to the claim against the good faith purchaser began on August 26, 1861 and ended on August 26, 1921. As of August 26, 1921, no action had been commenced against any good faith purchaser. Therefore, the defence of good faith purchaser for value without notice operated to extinguish the Chippewas' aboriginal title and treaty rights in the lands on August 26, 1921.

-- The aboriginal rights which were extinguished as of August 26, 1921 have crystallized into a damage claim against the Crown.

[11] Based on his findings, the motions judge directed that the following order should issue:

(a) Canada's motion to dismiss the Chippewas' claim on the basis that the Cameron patent was valid was dismissed.

(b) The landowners' motion in respect of the validity of

2000 CanLII 16991 (ON CA)

the 1853 Cameron patent was also dismissed.

(c) The Chippewas' motion in respect of the invalidity of the Cameron patent was allowed. A declaration was issued to the effect that the patent issued to Malcolm Cameron on August 13, 1853 was void ab initio and of no force and effect because there was no lawful surrender. Neither the orders-in-council of March 19, 1840 and June 18, 1840, which approved the sale to Cameron, nor the subsequent letters patent, extinguished the Chippewas' unceded, unsurrendered, common law and aboriginal interests in the lands.

(d) The Chippewas' motion for a declaration that they enjoyed continuing and unextinguished common law, aboriginal, treaty and constitutional rights in the lands was dismissed.

(e) The Chippewas' action for damages against the Crown was permitted to continue.

(f) The motion by the landowners was allowed. The Chippewas' claim against the landowners was dismissed on the basis that the defence of good faith purchaser for value without notice protected the landowners' title and that the application of an equitable limitation period of 60 years worked to extinguish all right, title and interest of the Chippewas in the disputed lands as of August 26, 1921. A declaration was issued to the effect that the present landowners held their title free and clear from any aboriginal title claims.

C. The Appeals and Cross-Appeals

[12] The motions judge's decision gave rise to six appeals and cross-appeals, all of which were argued during the last two weeks of June 2000. In particular:

-- Canada appealed from the dismissal of its motion for summary judgment, the order dismissing in part the landowners'

2000 CanLII 16991 (ON CA)

motion for summary judgment, and the order allowing the Chippewas' motion. Canada sought an order dismissing that part of the Chippewas' claim in which the Chippewas asserted that the Crown had no authority, right or jurisdiction to issue the patent to Malcolm Cameron and a further order dismissing that part of the claim which alleged that the patent was void ab initio and unenforceable at law.

-- The Chippewas appealed from the orders allowing the landowners' motion for summary judgment and from the dismissal of the Chippewas' cross-motion for summary judgment. They sought an order declaring that they enjoyed continuing and unextinguished common law, statutory, aboriginal, treaty and constitutional rights in the disputed lands. Canada, Ontario and the landowners are respondents on the Chippewas' appeal.

-- The landowners cross-appealed in the Chippewas' appeal, seeking:

(a) an order declaring that the letters patent issued to Cameron were valid and created a valid interest in the lands in question;

(b) a declaration that the effect of the patent was to extinguish any aboriginal title or treaty rights in the lands; and

(c) a declaration that any right of action that the Chippewas may have had for recovery or enforcement of any interest in the land was barred by the operation of limitations statutes or by various equitable doctrines.

[13] Ontario cross-appealed in the Chippewas' appeal and sought an order granting the landowners' motion for summary judgment and an order dismissing the Chippewas' cross-motion. Ontario contended that the Cameron patent was valid and conveyed the lands to Cameron free of any interest of the Chippewas. Ontario also claimed that the doctrine of good faith purchaser for value without notice extinguished any claim that

2000 CanLII 16991 (ON CA)

the Chippewas had from the time of the purchase rather than 60 years after the purchase.

[14] On January 27, 2000, the Chippewas moved to quash Ontario's appeal from the dismissal of Canada's motion for summary judgment and Canada's cross-appeal in the Chippewas' appeal. These motions were dismissed. [See Note 2 at end of document]

[15] The following representatives of First Nations appeared as intervenors on the appeals: Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames, Chief Mary Jane Wardell on behalf of the Ojibways of Thessalon, Martin Bayer on behalf of the United Chiefs and Councils of Manitoulin and Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario.

[16] The appellate proceedings were case-managed by Goudge J.A. who, among other things, determined the order of, and time allocations for, oral argument after consulting with all counsel. It was agreed by all parties that, given the nature of the judgment appealed from, none of the appeals and cross-appeals related to interlocutory orders and that, consequently, the proceedings were properly before this court. We are grateful to Goudge J.A. for his assistance. We are also grateful to counsel, not only for the quality of their oral arguments, but also for their cooperation in adhering to the times allocated for hearing the appeals.

D. Our Decision in a Nutshell

[17] In our view, these appeals and cross-appeals give rise to two main issues. First, was there a surrender of the disputed lands by the Chippewas to the Crown? Second, if there was no surrender, what remedies, if any, are the Chippewas entitled to?

[18] Although the first issue gave rise to questions that were essentially factual, much of the argument was focussed on whether the surrender provisions in the Royal Proclamation had the force of law at the relevant time and, if so, what effect

2000 CanLII 16991 (ON CA)

any failure to comply with these provisions would have on the Cameron transaction. The motions judge held that the surrender procedures in the Royal Proclamation had the force of law at the relevant time, that these procedures were not followed and that the Chippewas never consented to or affirmed the Cameron transaction. Consequently, the following points were argued before us:

1. Did the surrender procedures set out in the Royal Proclamation have the force of law at the time of the sale to Cameron in 1839 and the subsequent letters patent in 1853?

2. Did the Chippewas surrender the disputed lands to the Crown?

3. If the lands were not surrendered, did the Chippewas nonetheless consent to or affirm the sale to Cameron?

[19] The first question has been authoritatively determined by this court in Ontario (Attorney General) v. Bear Island Foundation (1989), 68 O.R. (2d) 394, 32 O.A.C. 66 (C.A.), affd [1991] 2 S.C.R. 570, 4 O.R. (3d) 133n. This court held that the surrender provisions of the Royal Proclamation were revoked by the Quebec Act, 1774 (U.K.), R.S.C. 1985, App. II, No. 2. The motions judge was bound by this decision and, consequently, he erred in departing from its authority when he determined otherwise. However, we are of the view that, in this case, little turns on whether the surrender provisions of the Royal Proclamation had the force of law at the relevant time. Instead, we adopt the view that surrender was necessary as a result of the established protocol between the Crown and First Nations peoples that aboriginal title could be lost only by surrender to the Crown. The precise legal status of the Royal Proclamation at the time of the Cameron transaction is therefore of no consequence to our decision.

[20] On the second point, we accept the proposition that a surrender required a voluntary, informed, communal decision to give up the land and we agree with the motions judge that the Chippewas never surrendered the disputed lands to the Crown. However, we disagree with a number of the motions judge's

2000 CanLII 16991 (ON CA)

findings relating to the Chippewas' participation in the Cameron transaction. This brings us to the third point.

[21] In our view, the evidence leads to the inescapable conclusion that, notwithstanding the absence of a surrender, the Chippewas accepted the sale to Cameron. This finding becomes important in our determination of the appropriate remedies.

[22] The following points were argued with respect to the remedies sought by the Chippewas:

4. Is the Chippewas' claim barred by any statutory limitation periods?

5. In the absence of a surrender, is the Cameron patent void ab initio or is the remedy subject to the exercise of the court's discretion?

6. Do the equitable defences of laches and acquiescence apply to bar the Chippewas' claim to the disputed lands?

7. Does the equitable defence of good faith purchaser for value apply to defeat the Chippewas' claim? If so, was the motions judge correct in finding that the defence of good faith purchaser for value was subject to an equitable 60-year limitation period before it can operate to extinguish the Chippewas' claim to the land?

8. If the Chippewas enjoy continuing and unextinguished rights in the disputed lands, should this court order that the Crown has a duty to negotiate in good faith with the Chippewas?

[23] The motions judge held that the Chippewas' claim was not barred by any statutory limitation period. He held further that in the absence of surrender, the Cameron patent was void ab initio and that the defences of laches and acquiescence could not be relied upon. The motions judge concluded, however, that the present occupiers of the land could rely on the doctrine of good faith purchaser without notice subject to a 60-year

2000 CanLII 16991 (ON CA)

"equitable limitation period" which in effect postponed the application of the doctrine.

[24] We agree with the motions judge that the Chippewas' claim is not barred by any statutory limitation period. However, we do not agree that the Cameron patent was void ab initio. In our view, the patent was valid on its face and continues to have legal effect unless and until a court decides to exercise its discretion to set it aside. We are of the view that the principles governing the availability of the relevant public and private law remedies militate against a court exercising its discretion in this case. Finally, we are of the view that the imposition of a 60-year "equitable limitation period" is not supportable in law. In the result, we are of the view that the Chippewas have no entitlement to the remedies they seek for the return of the disputed lands and that they are left with their claim in damages against Canada and Ontario.

II. PRELIMINARY ISSUES

[25] Two preliminary issues were raised by the parties. First, the Chippewas sought to introduce fresh evidence on their appeal. Second, Ontario challenged the motions judge's authority to decide the case on motions for summary judgment.

A. Chippewas' Motion to Introduce Fresh Evidence

[26] The Chippewas sought to introduce fresh evidence which generally fell into two categories:

(a) new evidence relating to sales of property within the disputed lands that occurred after the decision below; and

(b) further evidence of the circumstances surrounding the sale of Indian lands which was already addressed in the existing record.

[27] It was agreed that we would deal with the fresh evidence issue on the basis of counsel's written material. No oral submissions were made.

2000 CanLII 16991 (ON CA)

[28] The test for the admission of fresh evidence on appeal is that set out by the Supreme Court of Canada in Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 1 S.C.R. 44, 182 D.L.R. (4th) 561. See also R. v. Palmer, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212. The requirements for the admission of fresh evidence are as follows:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the proceeding.

3. The evidence must be credible in the sense that it is reasonably capable of belief.

4. The evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

[29] In our view, the proposed fresh evidence does not meet these requirements. In particular, it is not evidence that if believed could reasonably, when taken with the other evidence, affect the result.

[30] The motion to admit fresh evidence is therefore dismissed.

B. The Summary Judgment Issue

[31] Ontario submits that the motions judge "significantly overstepped" the narrow role of a motions judge when he dealt with the motions that were brought before him. Ontario asserts that in his 241-page reasons for judgment, the motions judge assessed credibility, weighed evidence, made findings of fact on disputed evidence and generally dealt with the summary judgment motions in such a way as to conduct what was essentially a paper trial.

[32] Ontario accepts that, pursuant to rule 20.04 of the

2000 CanLII 16991 (ON CA)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the motions judge was entitled to determine questions of law and to ". . . grant judgment accordingly". In particular, Ontario accepts that the motions judge could grant judgment on discrete issues of law such as the application of the doctrine of good faith purchaser for value without notice. However, Ontario submits that where the resolution of discrete issues of law required the motions judge to make findings of fact on evidence that was in conflict, the motions judge exceeded the jurisdiction given to him by Rule 20.

[33] We are prepared to accept that in some instances, the motions judge made findings of fact and drew inferences from evidence which was to some degree conflicting. We are, nonetheless, not disposed to give effect to Ontario's submissions on the summary judgment issue for the following reasons.

[34] Ontario participated fully in the summary judgment proceedings. None of the parties, including Ontario, took the position that, having regard to the voluminous evidence placed before the motions judge and the issues of law raised by the material, it was not appropriate to deal with the matter under Rule 20. To the extent that the parties, including Ontario, participated in what Ontario asserts was a paper trial, they got precisely what they agreed to: a resolution of clearly identified issues of fact and law on the basis of a paper record. In addition, Ontario filed no material on the motion that would in any way suggest that this was not an appropriate matter to be decided under Rule 20.

[35] Apart from the expert witnesses, there are no living witnesses who could give relevant evidence. Thus, if the action were to proceed to trial, the trial judge would be in no better position to deal with the issues than the motions judge, unless one were to accept Ontario's late submission that the trial judge would have an advantage from seeing and hearing the expert witnesses testify. In our opinion, absolutely nothing would be gained by sending this matter to trial.

[36] We are authorized by s. 134(1)(c) of the Courts of

2000 CanLII 16991 (ON CA)

Justice Act, R.S.O. 1990, c. C.43, to make a decision on appeal that ". . . is considered just". It would not, in our view, be "just" to accede to Ontario's position on the summary judgment issue, particularly where Ontario did not see fit to raise the issue below: see National Trust Co. v. Bouckhuyt (1987), 61 O.R. (2d) 640, 23 O.A.C. 40 (C.A.); Scarborough Golf & Country Club v. Scarborough (City) (1988), 66 O.R. (2d) 257, 31 O.A.C. 260 (C.A.), leave to appeal to S.C.C. refused [1989] 2 S.C.R. vi; Shaver Hospital for Chest Diseases v. Slesar (1979), 27 O.R. (2d) 383, 106 D.L.R. (3d) 377 (C.A.), leave to appeal to S.C.C. refused [1981] 1 S.C.R. xiii.

[37] We would not give effect to this ground of appeal.

III. THE FACTS

A. Introduction

[38] The summary judgment motions raised complex legal issues, turning in part on the interpretation of old statutes and documents, the nature and scope of arcane remedies, and traditional property law concepts, some of which seem to have more relevance to 17th-century England than to present-day Ontario. Despite the many difficult legal issues raised, however, this case is first and foremost a factual one. The determination of the Chippewas' claim is necessarily site-specific and primarily fact-driven. As the motions judge noted:

> This decision affects these lands only. As noted below in response to the argument in terrorem, this decision turns on the unique story that unfolded around these four square miles and the specific terms of the instruments affecting it; above all, the site-specific provisions of Treaty 29.

[39] The events giving rise to these proceedings spread over more than 200 years and are found in the thousands of historical documents filed by the parties and analyzed in the affidavits and cross-examinations of various experts. There was no viva voce evidence presented on the motions. The motions judge undertook an exhaustive review of the massive record. He

2000 CanLII 16991 (ON CA)

told the story underlying this dispute with extraordinary clarity and vitality. We have borrowed liberally from his reasons (which unfortunately are not reported) in setting out the relevant facts.

[40] The motions judge made numerous findings of fact. Many were primary findings of fact based directly on information contained in the historical documents or found in the uncontested parts of the evidence of the various experts. Other findings were in the nature of inferences drawn from one or more of the primary findings of fact. The primary facts as found by the motions judge are not challenged. Some of the inferences he drew from those facts are, however, very much in dispute. In the unusual circumstances of these summary judgment proceedings, justice dictates that we approach the motions judge's findings of fact as though they were made at trial. We defer to the inferences he drew except where we conclude that they are based on a misapprehension of the evidence, a failure to consider material evidence, or where in light of the totality of the undisputed primary facts, we conclude that the inferences the motions judge drew were unreasonable. As will become evident, we do not accept some of the inferences drawn by the motions judge.

B. The Occupants of the Disputed Lands: Then and Now

[41] At the turn of the 18th century, the disputed lands were in Chippewa territory. The Chippewas were established over a vast expanse of land, including present-day southwestern Ontario. The Chippewa Nation consisted of three distinct groups who occupied different territories, but shared a common language and similar customs and traditions. The Mississauga Chippewas occupied southwestern Ontario. By 1760 they had established several seasonal villages in southwestern Ontario, including one on the St. Clair River near present-day Sarnia.

[42] The Chippewas lived in relatively small groups spread out over their vast territory. They survived by hunting, fishing, gathering, growing corn and harvesting maple sugar. To do so they moved from place to place within their lands on a seasonal basis. Groups of families, referred to as bands,

2000 CanLII 16991 (ON CA)

shared a territory which supplied them with the necessary food, shelter and clothing. Within these regional bands, there were a number of smaller traditional bands consisting of 30 to 60 people. In the late 1820s, after the Chippewas had given up most of their land and began to settle on reserves, traditional distinctions between various bands became somewhat blurred and those who lived on particular reserves were seen as having a communal interest in that reserve. The evidence indicates that as of 1839 there were approximately six regional bands of Chippewas in southwestern Ontario, each of which had 250 to 350 members. The St. Clair regional band, the ancestors of the Chippewas of Sarnia, included approximately eight to 10 traditional bands.

[43] Each traditional band had a chief. The chief was usually the eldest son of the former chief, however, the band could choose someone else if it decided that the eldest son was not up to the task. The chief acted with the concurrence of the band as expressed at meetings of the principal men in the band, and had little authority to act on his own. The actual power of any particular chief depended in large measure on his own leadership abilities. The regional Chippewa bands came to recognize one chief as the Head Chief. The Head Chief was the primary spokesman in dealings with the Crown, but within the Chippewa community had no more power than the other chiefs.

[44] The traditional bands managed their own local affairs at Local Councils attended by the principal men of the band. Matters of general importance to the region were resolved at General Councils attended by the chiefs and principal men of the traditional bands within the region. Traditional bands within a region would come together on occasion at a principal village within the region, like the one near present-day Sarnia, to engage in various social activities and decide matters of regional importance.

[45] Today, the Chippewas live on what is left of the Upper Reserve. Their reserve occupies some 3,000 acres adjacent to the disputed lands. The disputed lands themselves have been divided into 2,276 properties. The properties are zoned for various uses ranging from agricultural to industrial. There are

2000 CanLII 16991 (ON CA)

over 2,000 residences, five schools, five churches and a number of commercial and industrial properties located on the disputed lands. The Canadian National Railway Company's main line between Ontario and western Canada runs through the disputed lands.

[46] The individual defendants and the defendant class are the present occupants of the disputed lands. Until this action was commenced in 1995, they had no way of knowing or discovering the existence of the claim made by the Chippewas of Sarnia. They and their predecessors in title since 1861 are innocent of any illegality or prohibited act. They acquired the land in good faith for good value with no knowledge of and no reason to believe the Chippewas of Sarnia had any claim to the land. The individual defendants and their predecessors in title have developed the property at considerable expense. The motions judge described their investment in the property as being in the "hundreds of millions of dollars". He also observed that those who now live and work on the disputed lands have a "deep connection" with those lands.

C. The Time Line

[47] Before examining the relevant events in some detail, it is helpful to set out a chronology of the central events:

Date	Event
1756-1763	Southwestern Ontario, including the disputed lands, was under the dominion of the Chippewa Nation. Both the French and English, who were at war, claimed the area as part of their North American empires. The white men in the area were primarily involved in military operations or fur trading.
1763	The Treaty of Paris ended the seven-year war between France and England. The French Crown ceded New France to England and also relinquished any other claim to present-day Ontario. Southwestern Ontario, including the

2000 CanLII 16991 (ON CA)

disputed lands, became part of British North America and fell under the control of the English Crown.

October 7, 1763 George III, by order-in-council, issued a Royal Proclamation. The Proclamation created four new colonies, including Quebec, from the land ceded to the English Crown by France in the Treaty of Paris, established governments for those colonies, and addressed the status of Indian lands throughout British North America. Southwestern Ontario was not part of any of the established colonies and was instead part of what was referred to in the Proclamation as the "interior" Indian territory.

1764 William Johnson, the Superintendent of Indian Affairs for the northern district, convened a large meeting with the First Nations chiefs at Niagara. Many Chippewa chiefs were present. The English Crown and the chiefs entered into the Treaty of Niagara. William Johnson read the 1763 Proclamation as it related to Indian lands and the regulation of trade. The chiefs promised to keep the peace and deliver up any prisoners taken during the previous hostilities.

1774 The British Parliament passed the Quebec Act. The Act expanded the boundaries of the colony of Quebec to include southwestern Ontario, introduced French civil law into that colony, guaranteed religious freedom and altered the form of colonial government. The effect, if any, of the Quebec Act on the provisions relating to Indian lands in the Royal Proclamation is the subject of dispute in this litigation.

2000 CanLII 16991 (ON CA)

1791	By the Constitutional Act, 1791 (U.K.), R.S.C. 1985, App. II, No. 3, the British Parliament divided Quebec into the provinces of Upper and Lower Canada. Southwestern Ontario was part of Upper Canada.
1818 to 1825	The Chippewas and the Crown conducted a series of negotiations aimed at the surrender of a large part of the Chippewas' territory to the Crown for settlement purposes.
April 1825	The Chippewas and the Crown entered into Provisional Treaty 271/2 whereby the Chippewas gave up their rights to some 2.2 million acres of land referred to as the Huron tract. The Chippewas, however, maintained their rights to four specific areas (reserves), one of which, the Upper Reserve, included the disputed lands.
July 10, 1827	The land surrendered by the Chippewas to the British Crown in provisional Treaty 271/2 and the four reserves were surveyed, and the Chippewas and the British Crown entered into Treaty 29, which finalized the agreement reflected in the provisional Treaty.
August 12, 1839	Malcolm Cameron, a businessman, land speculator and politician, wrote to Lieutenant Governor Arthur proposing that part of Upper Reserve be purchased and opened for settlement.
October 1839	Cameron received permission from Samuel Jarvis, Chief Superintendent of Indian Affairs, to enter into negotiations with the Chippewas for a sale of part of a reserve "subject to the approval of the Lieutenant Governor and the Council".
November 9, 1839	Cameron met with Joshua Wawanash, the Head

2000 CanLII 16991 (ON CA)

Chief of the St. Clair Regional Chippewas, and two other chiefs. They reached an agreement whereby Cameron would purchase 2,540 acres at the rear of the Sarnia reserve (the Cameron transaction). These are the disputed lands.

November 9, 1839 — Cameron wrote to Lieutenant Governor Arthur and Jarvis, reporting that he had reached an agreement with "the Indians". He sought approval of the transaction.

November 9, 1839 — William Jones, the resident Superintendent of Indian Affairs at Sarnia, wrote to his superior Samuel Jarvis, telling him that the three chiefs had advised Jones of the agreement with Cameron and had asked that he "propose to the government the sale" of the part of the reserve referred to in the Cameron transaction.

November 16 to 18, 1839 — In correspondence, Jarvis took issue with the terms of payment proposed by Cameron and observed that where similar transactions had been approved, the Crown first took a surrender of the land from the Indians and then made a grant of the land to a stated party.

March 19 and June 18, 1840 — Two orders-in-council were passed, approving the Cameron transaction on terms as modified by the proposal of Jarvis. Neither order-in-council referred to a surrender to the Crown by the Chippewas.

1840 — By the Union Act, 1840 (U.K.), R.S.C. 1985, App. II, No. 4, the British Parliament unified Upper and Lower Canada to form the province of Canada. The Indian Department was reorganized to reflect the Union.

2000 CanLII 16991 (ON CA)

February 27, 1841	Cameron made the first payment against the purchase price to the Crown.
June 1841 to June 1842	Discussions were ongoing concerning the survey of the land referred to in the Cameron transaction. Jarvis favoured a survey of the entire reserve, however, the Chippewas refused to agree to a survey of any land other than the land encompassed in the Cameron transaction.
June 1842	John O'Mara surveyed the lands referred to in the Cameron transaction. He was on site for about 15 days.
December 1846	Cameron wrote to Resident Superintendent Clench stating that he had "just put sixteen settlers on 1600 acres".
January 1851 to May 1851	A dispute arose as to whether the Cameron transaction included certain road allowances. Eventually, the dispute was resolved in favour of the Chippewas and they surrendered a single road allowance through the reserve.
January to November 1851	Cameron sold off large parts of the disputed lands.
August 11, 1853	Cameron paid the rest of the purchase price. He had not made any payments since the first payment in 1841. [See Note 3 at end of document]
August 13, 1853	Letters patent for the disputed lands were granted by the Crown to Cameron. The letters patent were in the form used when the land referred to in the patent was surrendered land. The validity of this Cameron patent is in dispute.
September 1853	Cameron continued to sell parts of the disputed

2000 CanLII 16991 (ON CA)

to 1861	lands.
August 26, 1861	Cameron sold off all of the disputed lands and was no longer on title.
August 1979	William Plan, an amateur historian and researcher for the Chippewas, wrote to an official in the Indian Affairs Department in connection with an ongoing dispute over a road allowance claim. Mr. Plan contended that the disputed lands were never surrendered to the Crown by the Chippewas and that the Chippewas maintained their original interest in those lands. This was the first indication that the Chippewas asserted a continuing interest in the disputed lands.
October 19, 1995	The Chippewas commenced this action.

D. Crown-First Nations Relations

[48] In the first half of the 18th century, the English Crown showed little interest in the First Nations of North America. Unlike its Catholic counterparts in France and Spain, the English Crown did not pursue active efforts to "civilize" the First Nations peoples and convert them to Christianity. Relationships between the First Nations and English colonies in North America were left primarily to the individual colonies and developed on an ad hoc basis. By the 1750s, however, French imperialist ambitions, aided and abetted by First Nations allies, threatened the security of English interests in North America. Those who shaped imperial policy came to see the military need to develop better relations with First Nations peoples in North America.

[49] An Indian Department under the control of English ministers of the Crown was established in the 1750s. Sir William Johnson was appointed Superintendent of the Northern District. His district encompassed present-day southwestern Ontario. Johnson and members of his family played a key role in the administration of English-First Nations relations in the

2000 CanLII 16991 (ON CA)

latter part of the 18th and the early part of the 19th century. All were familiar with First Nation customs and appear to have been well regarded by the First Nations.

[50] At first, the Crown's policy was aimed at gaining the military support, or at least the neutrality, of First Nations in England's ongoing war with the French. When that war ended with an English victory in 1763, English control over the territories it had won from France depended in part on maintaining good relations with the First Nations. The English Crown continued its wartime Indian policy in the hope of forging new military alliances with First Nations who had supported the French (e.g. the Mississauga Chippewas) and avoiding further uprisings like that led by Chief Pontiac of the Odawa in 1763.

[51] The Indian Department underwent many changes between 1750 and 1860. The lines of responsibility and the titles of various officials changed repeatedly. As the bureaucracy grew, responsibility for different aspects of the policy fell to various Crown agencies. Despite these many bureaucratic changes, two fundamental tenets of the Crown's policy towards First Nations remained constant until 1860. [See Note 4 at end of document] First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative. Like all imperial policies, Indian policy was formulated in England and those responsible for the implementation of it in North America reported to Crown officials. Indian affairs were no concern of the colonial legislatures.

[52] Second, the English Crown, primarily for military reasons, actively pursued the support of the First Nations. In doing so, it sought to address First Nations' grievances. Those grievances had arisen out of incursions by white settlers onto Indian lands and the dishonest actions of some of those who traded with the First Nations. In an effort to gain First Nations support, the Crown sought to assure the First Nations

2000 CanLII 16991 (ON CA)

that they would not be deprived of their lands or cheated in their (trade) dealings with the white man. The Crown pursued these goals by recognizing First Nations' land rights, taking steps to protect those rights against white settlers, and regulating trade between the white man and First Nations.

[53] The Royal Proclamation was an important, albeit not the first, manifestation of Crown imperial policy as it applied to Indian lands. The Royal Proclamation:

-- recognized that First Nations had rights in their lands;

-- established imperial control over settlement on Indian lands whether those lands were within or beyond the boundaries of the established British colonies in North America;

-- prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands be by way of surrender to the Crown; and

-- established a process by which surrenders of Indian land would be made to the Crown. The surrender process accepted that Indian rights in their lands were collective and not individual.

[54] After setting out its policy in the Royal Proclamation, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the Royal Proclamation would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some 22 First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the Royal Proclamation respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the Royal Proclamation to the First Nations can be traced to this extraordinary assembly and the treaty it produced. [See Note

2000 CanLII 16991 (ON CA)

5 at end of document]

[55] The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown's promise to all of the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.

[56] The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.

[57] Between 1764 and 1774, the commanders of the British forces in North America who were responsible for Indian relations emphasized the applicability and the importance, not only of the specific terms of the Royal Proclamation, but also of the policies underlying it.

[58] In 1774, the English Parliament passed the Quebec Act. That Act radically changed the government of the province of Quebec and extended the boundaries of that province to include what is now southwestern Quebec. The effect of that Act on the terms of the Royal Proclamation relating to Indian lands will be addressed later in these reasons. It is safe to say, however, that those responsible for First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation. The historical record is replete with references to the Royal Proclamation and its policies. For example, in August 1791, Lord Dorchester, the Governor General of Canada, advised a delegation of First Nation chiefs, including Chippewa chiefs, that the King had no right to their lands save where it had been:

2000 CanLII 16991 (ON CA)

> fairly ceded by yourself with your consent by public convention and sale . . .
>
> and that further:
>
> . . . bargains with private individuals were forbidden and considered as void.

[59] Lord Dorchester's comments make it clear that the Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

[60] The Crown policy towards the First Nations was reflected not only in official documents like the Royal Proclamation, but also in the day-to-day conduct of those relations. People like Sir William Johnson had long-standing connections with First Nations peoples and long-standing associations with them. They were aware of and respected the manner in which First Nations peoples conducted business. Formal meetings between Crown officials and First Nations were held at public Council meetings attended by the chiefs and other members of the First Nations. Certain formalities became an accepted part of these meetings and served to emphasize the nation-to-nation nature of the dealings. Many of those formalities reflected aboriginal customs and usages. The First Nations peoples attached considerable importance to compliance with these formalities and the Crown representatives were aware of the importance of these formalities to the First Nations.

[61] By the turn of the 19th century, the procedures associated with the surrender of land by First Nations to the Crown were well established. Those procedures blended aboriginal and British customs and usages and came to be reflected in various orders issued by responsible Crown officials (e.g., the Dorchester Regulations of 1794). The surrender of First Nations land to the Crown involved the following:

2000 CanLII 16991 (ON CA)

-- All surrenders were made "in public council with great solemnity and ceremony, according to the ancient usages and customs of the Indians".

-- The Crown representatives at the meeting included the Governor or his designate, representatives from the Indian Department, and military officers.

-- An interpreter was present and explained the "nature and extent of the bargain" to the Indians in their language. The consideration for the sale was clearly stated.

-- If a surrender was agreed upon, a deed of conveyance surrendering the land to the Crown was prepared in triplicate and executed at the Council meeting by the Indian chiefs who would place their totems on the deed and by the Superintendent of the Indian Department or his designate.

-- A descriptive plan of the land to be surrendered was attached to the deed and signed and witnessed in the same manner as the deed.

-- The Head Chief received one of the copies of the deed.

[62] These formalities recognized the importance of the surrender of lands by First Nations and the collective nature of the First Nations' interest in the land. The procedures also reflected the common law concern that certainty attach to the transfer of land. Certainty was achieved by requiring that the conveyance of land be fully documented, that the documents be placed in the appropriate records and that they be preserved for future reference.

[63] Surrender was the first step toward making Indian land available for settlement. After the surrender deed was executed, it was submitted to the Governor in Council for approval. If approved, an order-in-council would issue and the surrender deed could be registered in the appropriate colonial land registry record. At this stage, the surrendered land could be granted by the Crown to third parties by way of letters

2000 CanLII 16991 (ON CA)

patent. Over time, the patents were standardized and made reference to the fact that the land had been acquired from a First Nations people. Where the First Nations were to be paid from the proceeds of the grant to the third party, the Crown held those proceeds for the benefit of the First Nations.

[64] Although a surrender could only be authorized by a General Council meeting of the First Nations people, Crown Indian policy also depended on the development of strong working relationships between Crown officials and influential chiefs of regional bands. Indian Department officials worked at obtaining the confidence and support of key chiefs. The relationship with these chiefs became even more important as the Indians surrendered much of their lands and took up residence on reserves.

[65] Indian Department officials would meet with key chiefs prior to Council meetings in an effort to gain their support on the matters that were to be considered at the Council meeting. If the Crown official and those chiefs could reach an agreement, the chiefs would become the spokesmen for the proposed agreement at the subsequent Council meeting.

E. The Surrender of Chippewa Lands Before the Sale to Cameron

[66] By 1815, the military importance to the English Crown of alliances with First Nations, including the Chippewas, had diminished significantly. The War of 1812 had ended and there was no real risk of continued hostilities in the British North American colonies with either the United States or any European power. Soldiers returning from the War of 1812 were looking for land and the pressure to open Indian land to settlement increased dramatically.

[67] As the military significance of alliances decreased and demands for settlement increased, the Crown became more receptive to those who petitioned for the opening of Indian land for settlement purposes. Imperial Indian policy also began to reflect objectives other than military ones. The "civilization" of those First Nations whose land stood in the path of white settlement became a priority. The Crown's

2000 CanLII 16991 (ON CA)

"civilization" policy encouraged First Nations to live, farm and worship like the white man, in and around permanent sites located on lands reserved for the First Nations.

[68] Despite the change in focus of the Crown's Indian policy, the Crown continued to control access by settlers to Indian lands by insisting that Indian land could not be sold directly to settlers but had to be surrendered to the Crown first. This policy reflected both the Crown's desire to control settlement and to protect aboriginal people as the harmful effects of contact with the white man became more obvious. [See Note 6 at end of document]

[69] The Crown's continued recognition of Indian rights to their lands, the prohibition against alienation of land to anyone except the Crown by way of surrender and the requirement that the surrender be accompanied by a public manifestation of the First Nations' agreement to surrender are all evident in the extensive land dealings between the Chippewas and the Crown between 1818 and 1827. Those dealings resulted in the surrender of some 2.2 million acres of Chippewa land and the retention by the Chippewas of four reserves within that tract of land.

[70] The possibility of acquiring a large part of the Chippewas' land in southwestern Ontario for settlement purposes was first raised by the Surveyor General of Upper Canada in 1815. In October 1818, an official of the Indian Department met with numerous Chippewa chiefs at Amherstburg to discuss the possibility of a surrender of Chippewa land. The Chippewas advised that they were not opposed to the surrender in return for an annuity but were anxious to retain enough land to permit them to continue to enjoy their traditional lifestyle and maintain their viability as a people. The Chippewas were concerned that they not suffer the fate of their American brothers who had failed to retain sufficient reserves when surrendering their land. In the initial discussion, the Chippewas referred to five possible reserves, including one on the St. Clair River which came to be known as the Upper Reserve, on which the disputed lands are located.

[71] Discussions between the Crown and the Chippewas went on

2000 CanLII 16991 (ON CA)

for several years. Progress was slow. The Chippewas' lifestyle was still quite transitory and it was sometimes difficult to arrange for the attendance of the necessary chiefs at Council meetings to discuss the proposed surrender. Various provisional agreements were made and in July 1822, the Crown and the Chippewas concluded their first confirmatory treaty whereby the Chippewas surrendered some 500,000 acres of land along and near the Thames River.

[72] This surrender did not satisfy the ever-increasing needs of the white settlers. In 1824 the Canada Company was formed and received a million-acre grant of land in Upper Canada for settlement purposes. Part of that land was to come from the Chippewas' land. In March 1825, an official of the Indian Department was directed to assemble the chiefs of the Chippewas in Council "with the least possible delay" to finalize the surrender of over 2,000,000 acres of Chippewa land. This land came to be known as the Huron Tract.

[73] A General Council of the Chippewas was held at which the Chippewas and the Indian officials observed the usual formalities. The Crown requested a surrender and the chiefs, "after consultation among themselves", said that they were prepared to make the surrender on behalf of the Chippewas. Provisional Treaty 271/2 was signed by James Givens, Superintendent of Indian Affairs, representing the Crown and 20 named "chiefs and principal men" of the Chippewas. These chiefs represented the various bands who lived on the affected lands.

[74] Under the terms of Provisional Treaty 271/2, the Chippewas agreed to "freely, fully and voluntarily . . . surrender and convey" to the Crown some 2.2 million acres of land in consideration for a perpetual annuity of GBP 1,100. The treaty identified 440 Chippewas who were affected by this surrender and provided for a reduction in the annuity if the population decreased.

[75] Under the terms of the Provisional Treaty, the Chippewas did not surrender all of their lands. They retained four reserves, including the Upper Reserve, for themselves and future Chippewa generations. The Provisional Treaty provided

2000 CanLII 16991 (ON CA)

that the reserves were retained by the Chippewas for their "exclusive use and enjoyment".

[76] Upon receipt of the agreement the Lieutenant Governor forwarded it to the Colonial Secretary in London, who in turn advised that the Crown accepted the terms.

[77] The Crown and the Chippewas could not conclude a final agreement in 1825 because there was no descriptive plan of the surrendered lands available. Under established procedures, a surrender could not be made unless a descriptive plan was attached to a deed of surrender. In 1829, after the land had been surveyed, the Crown and Chippewas entered into Treaty 29, which confirmed the terms of the 1825 agreement.

[78] Treaty 29 complied with all the formalities attached to a surrender of Indian land to the Crown. A written document acknowledging the Chippewas' rights in the land and describing the surrender was signed by Superintendent of Indian Affairs George Ironside, for the Crown, and by 18 named chiefs and principal men of the part of the Chippewas inhabiting and claiming the lands affected by the surrender. Those chiefs, on behalf of the bands they represented, surrendered to the King all their rights, title and interest in the land save their rights and title in the four reserves. Their rights in those four reserves were held by them for their exclusive use and enjoyment for all time.

[79] The Chippewas do not question the validity of the surrender made by Treaty 29. As the motions judge observed, it bore all the indicia associated with a valid cession of First Nations land to the Crown. It was the product of direct negotiations between the Crown and the chiefs of the Chippewas. The terms of the surrender, including the annuity to be paid, were put to the Chippewas at a General Council meeting at Amherstburg in July 1827 and approved at that Council. The surrender was formalized in a written document executed by the appropriate officials on both sides. The document recognized pre-existing Chippewa rights in the land and acknowledged that the Chippewas were surrendering those rights to the Crown. The consideration for the surrender was set out in the deed and a

2000 CanLII 16991 (ON CA)

descriptive plan attached to it.

[80] By July 1827, the face of the map of what is now southwestern Ontario had changed dramatically. The Chippewas had surrendered 2.2 million acres of land to the Crown. They had retained four reserves, including the Upper Reserve. Those four reserves were protected not only by the Chippewas' pre-existing land rights as acknowledged by the Crown, but also by the solemn promise of the Crown in Treaty 29. The land on the reserves, including the disputed lands, belonged to the Chippewas.

[81] It would appear that Crown officials initially regarded the four reserves set out in Treaty 29 as held in common by all the various bands who were signatories to Treaty 29. By the late 1830s, however, the St. Clair Regional Band, which included the ancestors of the present Chippewas of Sarnia Band, were regarded as the owners of three of the reserves, including the Upper Reserve. The Walpole Indian Regional Band was seen as the owner of the fourth reserve. Best estimates suggest that by 1839 there were as many as eight to 10 chiefs of the St. Clair Regional Band.

[82] One of the chiefs for St. Clair Regional Band was Joshua Wawanosh. Wawanosh had a remarkable and checkered career as a leader of the St. Clair Chippewas. He became a chief shortly after the War of 1812 in part because of his military service on behalf of the Crown in the War of 1812. By the mid-1820s, Crown officials and other Chippewa chiefs recognized Wawanosh as the Head Chief. He was the first to sign Provisional Treaty 271/2 on behalf of the Chippewas, received a copy of the deed and was described by Joseph Clench, a superintendent in the Indian Department, as the "principal chief".

[83] By the 1830s, there was opposition to Wawanosh's leadership on the four reserves. That opposition grew during the 1830s, reaching its zenith in 1844 when Wawanosh was removed as Head Chief after a public inquiry by Indian Department officials. He remained a chief. Within four years, however, Wawanosh had regained the confidence of the other chiefs on the reserves and recovered from the ignominy of his

2000 CanLII 16991 (ON CA)

removal. At the suggestion of the man who had replaced him as Head Chief, Wawanosh was restored to the position of Head Chief.

[84] Throughout his long tenure, Wawanosh, who had converted to Christianity, favoured the "civilization" policy. He believed that the Chippewas should establish a permanent farming community on the Upper Reserve and learn the white man's ways. He also had a keen eye for opportunities and sought to increase his influence and personal wealth whenever the opportunity arose.

[85] Wawanosh's position as the spokesman for the Chippewas on the Upper Reserve is evident in discussions between himself and William Jones, the resident Indian Superintendent, in 1830. At the request of the Lieutenant Governor, Jones broached with Wawanosh the possibility of the Chippewas surrendering their land along the river and moving inland to establish permanent farming communities. Wawanosh advised Jones that the Chippewas were firmly against moving from their "present residence on the Upper River", but that they were "pleased with the idea of having their children educated and learning to live like white people . . .".

[86] The Indian Department accepted Wawanosh's position and did not seek a surrender of any part of the reserve, but did step up efforts to establish a permanent village and farming base on the reserve for the Chippewas.

[87] Wawanosh spoke for the bands on the Upper Reserve again in 1834 when Jones was directed to approach the Chippewas for permission to allow the private cutting of timber on part of the Upper Reserve. Jones sought out Wawanosh's view on the matter and reported back to Jarvis.

[88] Wawanosh's discussions with Jones typified the kind of preliminary discussions that Indian Department officials would have with influential chiefs when important matters arose. There is no suggestion that Wawanosh did not speak for the Band on the Upper Reserve in 1830 or 1834, or that he did not accurately convey the collective position of the Chippewas to

2000 CanLII 16991 (ON CA)

Jones.

F. The Cameron Transaction

[89] By 1839, responsibility for Indian matters was divided among various Crown departments. Those departments were under the control of the Lieutenant Governor of Upper Canada. The department was headed by a chief superintendent who had a number of deputy superintendents. Various resident superintendents lived at or near reserves and were responsible for overseeing relations with the First Nations people on those reserves. As the bureaucracy grew, those at the top ceased to have any kind of direct, long-standing relationship with First Nations chiefs. Subsequent inquiries (e.g. the Bagot Inquiry in 1844) also demonstrated that the Department was in many respects dysfunctional by 1839.

[90] The Indian Department was responsible for mediating disputes between white men and aboriginals, keeping the Crown advised of the views and attitudes of the Indians, ensuring that white settlers did not intrude onto Indian lands, supervising the surrender of Indian lands, administering payments due to First Nations under the terms of surrenders, and promoting the "civilization" policy. These responsibilities often brought Indian Department officials into conflict with white settlers. As often as not, those officials found themselves aligned with positions taken by First Nations people and opposed to positions advanced by white settlers.

[91] Samuel P. Jarvis was appointed Acting Chief Superintendent of Indian Affairs in Upper Canada in 1837 and remained in that post until his dismissal in 1845 following the revelations of the Bagot Commission. Jarvis, a Tory and member of the Family Compact, appears to have been an honest and well-intentioned person who had virtually no hands-on experience with the First Nations prior to 1837. He was an abject failure as an administrator.

[92] William Jones was the Resident Superintendent at Port Sarnia from March 1830 until June 1845 when, like Jarvis, he was dismissed as a result of the findings of the Bagot

2000 CanLII 16991 (ON CA)

Commission. Jones' relationship with the principals of the Cameron transaction (Cameron and Wawanosh) was far from friendly as of November 1839.

[93] Resident Superintendent Jones had many dealings with Chief Wawanosh. He recognized Wawanosh's influence and the need to maintain Wawanosh's support. He also came to regard Wawanosh as dishonest, greedy and intent upon advancing his own interests over those of the Chippewas on the Upper Reserve. Jones's mistrust of Wawanosh increased during the rebellion of 1837 when Wawanosh, unlike many Chippewa chiefs, refused to support the Crown but insisted on a position of neutrality. By November 1839, Jones had no reason to favour Wawanosh or to assist him in promoting his personal interests.

[94] The mistrust of Wawanosh did not stop with Jones. Chief Superintendent Jarvis and even the Lieutenant Governor had reason to doubt Wawanosh's honesty and the reliability of statements he purported to make on behalf of the Band.

[95] Malcolm Cameron, a businessman, politician and land speculator from eastern Canada, took up residence in Port Sarnia in the early 1830s. As an accomplished businessman with political connections, he quickly became one of the town's most influential citizens. Cameron was a reformer, a Methodist, and a strong proponent of the "civilization" policy. He took the forefront in attempts to secure parts of the Upper Reserve for white settlement, taking the position that the Chippewas could use the proceeds from the sale of parts of their land to finance the development of the rest.

[96] Wawanosh, like Cameron, was a Methodist and shared Cameron's entrepreneurial spirit. The two developed a close working relationship. Cameron lent money to Wawanosh from time to time. On various occasions, to the consternation of officials in the Indian Department, Cameron assisted Wawanosh in making direct representations to the Lieutenant Governor or, after 1840, the Governor General.

[97] Although Cameron had strong political support in 1839, including that of the reform-minded Lieutenant Governor Arthur,

2000 CanLII 16991 (ON CA)

Cameron did not enjoy good working relations with the officials of the Indian Department. As a Methodist reformer, he had nothing in common with High Anglican Tories like Superintendent Jarvis. His support of Wawanosh also brought him into conflict with Jones.

[98] The residents of Port Sarnia had from time to time after 1827 petitioned the government to obtain the surrender of parts of the Upper Reserve. They felt that the reserve was blocking key trade and communication channels along the St. Clair River and inhibiting the development of their town. In the late summer of 1839, Wawanosh, speaking for the Chippewas on the Upper Reserve as he had in 1830 and 1834, made it clear that the Chippewas were not prepared to sell any part of the front part of the Upper Reserve running along the St. Clair River. This was the part of the reserve coveted by the white settlers at Port Sarnia. As in 1830 and 1834, Wawanosh spoke for, and accurately expressed the position of, the Chippewas on the Upper Reserve.

[99] At almost the same time that Wawanosh told Jones that the Chippewas were not prepared to give up any land along the front of the St. Clair River, Wawanosh advised Jarvis that the Chippewas were inclined to sell part of the rear of the Upper Reserve. A document found in the papers of Jarvis and purporting to be a translation and transcription of an address given by Wawanosh in September 1839 reads in part:

> You recommended to us last year to cultivate the soil and proposed that workmen should be hired to put our fields in proper condition for sowing crops. We have thought of this & think the advice good, but are unwilling that the expense should be defrayed from our annuity. We wish your advice on a plan which we think would please us all. We propose to sell a mile in depth off the rear of our Reserve, and with the money produced by this sale to cultivate the front. What is your opinion?

[100] The exact circumstances in which Wawanosh made this purported address have been lost in time. It cannot be said whether he made the address at a Council of the Chippewas, or

2000 CanLII 16991 (ON CA)

at some public gathering of the St. Clair Regional Band. It is, however, clear that his proposal was consistent with the ongoing development of a permanent agricultural settlement on the Upper Reserve. Most of the land at the back of the reserve which Wawanosh indicated the Chippewas were prepared to give up was not as well suited for farming as the front of the reserve. Nor, contrary to the finding of the motions judge, was there any inherent contradiction between the Chippewas' refusal to sell off any part of the front of the reserve and Wawanosh's indication that they were prepared to sell off parts of the back of the Upper Reserve. The Chippewas sold off pieces of the Upper Reserve from time to time after 1827.

[101] Cameron advanced his proposal that the Upper Reserve be opened for settlement in a letter to Lieutenant Governor Arthur in August 1839. Cameron argued that the lands within the reserve exceeded those needed by the Chippewas to establish a permanent farming settlement. He suggested that the proceeds of the sale of a considerable part of the reserve could be used to improve the remaining land so that it could be effectively farmed by the Chippewas. Cameron suggested that the money could be realized by either a purchase by the government or a purchase by private individuals with government approval.

[102] In the fall of 1839 Cameron met with Lieutenant Governor Arthur and subsequently with Chief Superintendent Jarvis to promote the acquisition of a large part of the Upper Reserve. Jarvis told Cameron that he, Cameron, could negotiate with the Chippewas and, if possible, strike a bargain, subject to the approval of the Governor in Council. Cameron travelled to the Upper Reserve, met first with Jones, and later with Wawanosh and two other chiefs.

[103] Cameron advised both Lieutenant Governor Arthur and Jarvis in letters dated November 9, 1839 that he had met with Wawanosh and "other chiefs". He explained that the chiefs were reluctant to give up any part of the reserve because they feared that their agreement to give up part of the reserve would be seen by land-hungry settlers as an invitation to take more land than the Chippewas had agreed to sell. According to Cameron, he had the "confidence" of the chiefs and was able to convince them

2000 CanLII 16991 (ON CA)

that he would adhere to any bargain they made. Cameron advised that he had concluded a bargain for the purchase of four square miles at the rear of the reserve furthest from the St. Clair River. According to Cameron, the Chippewas also agreed to provide four roads running from that block of land through the reserve to the river. Cameron said that he had agreed to pay the Chippewas 10 shillings per acre with an initial payment of GBP 250. The rest of the purchase price (GBP 1,020) was to be paid in nine annual instalments . Cameron observed that the price was two shillings higher than the "government price", but that he had agreed to the higher price in lieu of paying any interest on the unpaid part of the purchase price. Cameron attached a rough map of the land which he said the Chippewas had agreed to give up. The map showed four roads running through the reserve to the river.

[104] In his letter to Lieutenant Governor Arthur, Cameron stressed the "public good" of the transaction and urged Arthur to approve it if he thought it to be a "fair and advantageous bargain for the Indians".

[105] Resident Superintendent Jones also wrote to Jarvis on November 9, 1839. He advised that Cameron had met with the only three chiefs who were on the Upper Reserve (Wawanosh, Chibigun and Corning). [See Note 7 at end of document] Those chiefs had later called on Jones and asked that he propose to the government on their behalf "the sale of one mile in depth by the whole length of the reserve off the rear of the Upper St. Clair Reserve". Jones reported the terms of the agreement as told to him by the chiefs. He also indicated that, under the bargain, a road was to run from each concession line through the reserve to the river. Jones said that the Chippewas expected to be paid for the land used for these roads.

[106] The correspondence outlined above demonstrates that all concerned appreciated that the transaction could not be completed without the approval of the Crown. Cameron and the chiefs both notified the Crown of the bargain and sought Crown approval. Neither believed that they could deal with the disputed lands without the intervention of the Crown.

2000 CanLII 16991 (ON CA)

[107] Chief Superintendent Jarvis was asked by the Lieutenant Governor's office to comment on the proposed sale. In correspondence delivered in late November 1839, Jarvis opined that the purchase price appeared to be "fair and reasonable", but went on to observe that Cameron should be required to pay interest on the unpaid balance of the purchase price. [See Note 8 at end of document] Jarvis also noted that there was some suggestion that the purchase price would be paid directly to the Chippewas. He pointed out that this was not Crown policy and that the money should be paid to the Crown to be invested for the benefit of the Chippewas. Jarvis' recommendations were accepted by the Lieutenant Governor and incorporated into two orders-in-council approving the sale.

[108] The first order-in-council, dated March 19, 1840, began with the following:

> The Executive Council are respectfully of the opinion that it would be a great public advantage as well as a benefit to the Indians were the tract of land above mentioned disposed of to white settlers at an adequate price.

It also set out the price, required the payment of interest on the instalments, and provided for an allotment of land for clergy reserves.

[109] Cameron objected to both the payment of interest and the allotment of lands for clergy reserves. Eventually he agreed to pay interest but persisted in his objection to the clergy reserves. In June 1840 a second order-in-council was passed in the same terms as the March order-in-council save that the requirement for clergy reserves was deleted.

[110] Both orders-in-council referred to the proposed purchase by Cameron of the land and neither referred to a surrender or recommended that a surrender of the lands be accepted. In contrast, orders-in-council issued at or about the same time as the Cameron order-in-council and referring to the sale of other parts of the Chippewa reserves made reference to the surrender of the land to the Crown.

2000 CanLII 16991 (ON CA)

[111] It is helpful at this stage to summarize the substance of the Cameron transaction:

-- Cameron had approached Crown officials for permission to negotiate the purchase with the Chippewa chiefs.

-- Negotiations were conducted with the authorization of the senior Crown official responsible for Indian Affairs in Upper Canada.

-- Cameron negotiated through an interpreter with three of the chiefs on the Upper Reserve, including Head Chief Wawanosh. The record is clear that no other chiefs were present but is unclear as to who, if anyone else, was privy to the negotiations.

-- The bargain arrived at by Cameron and the three chiefs was made known to Crown officials by Cameron and the chiefs separately. Both sought government approval for the transaction.

-- The negotiated purchase price was a reasonable one.

-- The appropriate official in the Indian Department considered the proposed bargain, altered two of the terms to add further protection of the Chippewa interests, and recommended the approval of the transaction.

-- The Lieutenant Governor, the representative of the Crown in Upper Canada, approved the transaction as altered by the Indian Department.

-- The land which was the subject of the transaction was not on the part of the Upper Reserve the Chippewas had refused to part with in earlier discussions with the Crown in 1839. Much of it was not ideal for farming. If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with

2000 CanLII 16991 (ON CA)

some success by November 1839. [See Note 9 at end of document]

[112] It is equally important to bear in mind, as did the motions judge, what did not occur as part of the Cameron transaction prior to the issuing of the order-in-council:

-- Crown officials were never directly involved in the negotiations with the Chippewas.

-- The transaction was never explained, discussed, or approved at a General Council of the regional bands of the Chippewas affected by the transaction.

-- Although three chiefs approved the transaction, the approval of the other chiefs (possibly five to seven) was neither sought nor obtained.

-- The bargain struck between Cameron and the chiefs was never reduced to writing in a deed, contract or treaty signed by the necessary chiefs and the Crown representative. Consequently, there was no formal document in which the Crown acknowledged the Chippewas' rights in the land and the Chippewas agreed to surrender those rights.

-- There was no descriptive plan of the lands signed by the appropriate Crown officials and chiefs of the Chippewas.

[113] We agree with the motions judge that the exchange of correspondence in November 1839, combined with the meetings involving the Chippewa chiefs, Jones and Cameron, did not amount to a surrender. As the reasons of the motions judge demonstrate, there was in this transaction a failure to follow virtually every established procedure attendant upon the surrender of Indian land. As the motions judge observed, the failure to follow these procedures makes the Cameron transaction unique among the many land dealings between the Chippewas and the Crown in the 19th century.

[114] Although we accept the motions judge's conclusion that there was no surrender in November 1839, we do not agree with

2000 CanLII 16991 (ON CA)

his description of the Cameron transaction as a "private sale" between Cameron and three chiefs. The negotiations were conducted with the knowledge of and under the authority of Crown officials in the Indian Department. The terms of the transaction were reviewed and changed by Superintendent Jarvis and only then approved by the Crown. The ultimate terms were dictated by the Crown for the protection of the Chippewas.

[115] The motions judge also repeatedly referred to the meeting between Cameron and the three chiefs as a "private meeting". We can accept this characterization if it means only that the meeting between Cameron and the chiefs was not a General Council meeting as that phrase would be understood in the context of the surrender of Indian lands. We do not, however, accept the characterization if it is meant to suggest that the three chiefs were the only Chippewas who were aware of the negotiations or the bargain reached. Although only three chiefs met with Cameron, nothing in the record suggests that they were the only Chippewas who were privy to the meetings, or that the negotiations or the bargain reached were in any way secret from Chippewas who were on the Upper Reserve. Subsequent events lend no support to either of those suggestions.

[116] It is not surprising, in the context of Indian land negotiations, that there was no actual surrender as of the end of November 1839. As indicated above, discussions between Indian Department officials and individual chiefs in which agreements were worked out subject to approval at a General Council were quite common. It would have been entirely consistent with established practice had the terms of the Cameron transaction, as agreed upon by Cameron and the three chiefs and as modified by Jarvis, been put to a General Council of the Chippewas for approval at some point after November 1839 and before the land was actually granted to Cameron.

[117] There is, however, no evidence that a surrender occurred between November 1839 and the issuing of the orders-in-council in March and June of 1840. The only reference to a surrender in the correspondence preceding the orders-in-council appears in Jarvis' letter to the Lieutenant Governor's office in November 1839. He wrote:

2000 CanLII 16991 (ON CA)

> Should the government think proper to permit the Indians to dispose of a part of their reserve the course heretofore pursued in similar transactions has been to require as a first step a surrender of the land to the Crown after which the Crown will grant the same, on such terms as may be agreed upon, and will take care that the purchase money is safely invested.

[118] No one in the Department followed up on Jarvis' statement. The failure of the Department to obtain a surrender and follow the well-established practices relating to surrenders is not explained by any conspiracy to deprive the Chippewas of their land, or even by a desire within the Indian Department to assist Cameron and allow him to circumvent established procedures and accelerate settlement of the land. Jarvis carried no brief for Cameron and had in no way supported or associated himself with the success of Cameron's negotiations with Wawanosh and the other two chiefs.

[119] Resident Superintendent Jones also had no reason to help Wawanosh or Cameron. By November 1839, Jones and Wawanosh were engaged in a heated vilification of each other involving a series of charges and counter-charges. It is unlikely that Jones would facilitate a fraudulent transaction involving Wawanosh or knowingly turn a blind eye to any legal requirements of that transaction. It is also unlikely that Jones, given his view of Wawanosh, would accept without question whatever Wawanosh told him about the Chippewas' wishes with respect to the sale of their land.

[120] Although neither Jarvis nor Jones acted to secure the appropriate surrender, there is no evidence that they or anyone else in the Indian Department had any reason to believe that a surrender would not be forthcoming if requested.

[121] True, the two orders-in-council do not refer to a surrender of the land. The language of these orders-in-council stands in stark contrast to others pertaining to land transactions involving Chippewa land, including one issued on the same day as the second Cameron order-in-council (June 18,

2000 CanLII 16991 (ON CA)

1840). All other orders-in-council referable to Chippewa land make reference to a surrender. However, the Cameron orders-in-council refer instead to a "proposed" sale, suggesting that the transaction would close at some time in the future, thereby allowing for a surrender before closing. We agree with the motions judge's conclusion that the language of the order-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future.

[122] The Crown had ample opportunity to obtain a surrender. The disputed lands were not granted to Cameron in fee simple by way of letters patent until some 14 years later in August 1853. There were several reasons for the delay, some of which will be examined below. Despite the passage of 14 years, however, the Indian Department did not arrange for surrender of the land. There was no General Council of the Chippewa bands affected by the transaction at which the details of the transaction were explained and approval of the surrender given. [See Note 10 at end of document] There was also no formal surrender document prepared and executed by the appropriate Crown official and the Chippewa chiefs. In short, none of the established procedures were followed.

[123] There were few references to a surrender in the documents touching on the Cameron transaction between 1840 and 1853. By 1851, officials in the Indian Department, none of whom had been involved in the Cameron transaction in 1839 and 1840, had come to believe that a surrender had in fact been made and that a surrender document existed. Although the existence of the document was questioned on one occasion, no one bothered to check the actual records. The form of the letters patent issued in 1853 was consistent with a surrender having been obtained.

[124] The failure to take the steps necessary to obtain a proper surrender prior to the issuing of the letters patent was explained by the motions judge in terms which we adopt:

> There is no evidence that Jarvis' recommendations of November 18, 1839 that there should be as a first step a surrender to the Crown of the disputed land, was deliberately rejected. But it was uncontradicted that it was neglected. While there

2000 CanLII 16991 (ON CA)

is no evidence that any particular official was asleep at the switch, it is uncontradicted that Jarvis' surrender recommendation simply fell between the cracks in the general chaos and lack of accountability that prevailed in the five separate bureaucracies that then dealt with Indian land. No one was in charge and no one was accountable.

[125] Cameron did nothing to encourage the Indian Department to obtain the appropriate surrender. The record suggests that he never concerned himself with obtaining a proper surrender. His attention between 1839 and 1853 was directed to several other problems, including difficulties he encountered in raising the funds to pay the purchase price. He made the initial downpayment in February 1841, but did not make the annual payments as he had promised. It was not until August 11, 1853 that he paid the outstanding amount owing on the purchase price. [See Note 11 at end of document]

[126] Cameron's disregard for the legalities associated with the transaction is evident from the fact that he sold large parts of the land and placed settlers on it years before he received the patent and the fee simple. He was a businessman in a hurry.

[127] There is no direct evidence of the Chippewas' reaction to the Cameron transaction, and, in particular, the Chippewas' reaction to the failure of the Indian Department to obtain the necessary surrender. The Chippewas' tradition is an oral one and direct evidence of their response to the Cameron transaction has been lost over the 160 years since the transaction.

[128] The Chippewas' position may, however, be inferred from events which occurred between November 1839 and 1855. After reviewing some of those events, the motions judge concluded that by 1840, the Chippewas were aware that there was an agreement to sell part of their reserve to Cameron. He further concluded, however, that the Chippewas were never made aware of the details of the sale and may well have expected that before the transaction was consummated the Crown would seek a surrender in accord with the established practice.

2000 CanLII 16991 (ON CA)

[129] The motions judge also found that there was no evidence that the Chippewas made any complaint that Wawanosh and the other chiefs had acted without authority in their dealings with Cameron, or that any representative of the Chippewas ever repudiated the transaction. We accept those findings. The motions judge went on, however, to hold that the absence of any complaint, combined with the Chippewas' knowledge of the transaction, did not constitute any evidence that the Chippewas as a community agreed to surrender their lands.

[130] The evidentiary significance of the absence of any complaint about the transaction or any repudiation of it must be assessed in the context of the entire record. There is overwhelming evidence that the Chippewas were an intelligent people who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights. By 1839, the Chippewas were well accustomed to addressing grievances to the Crown by way of petitions. Those petitions were prepared at General Council meetings and addressed many issues, including complaints with respect to land transactions. On various occasions, the Chippewas' petitions specifically repudiated earlier transactions to which they had allegedly agreed. For example, the strong objection by the Chippewas to the proposed Saugeen surrender in 1836 demonstrates that even where a proposed land transaction was initiated by the Lieutenant Governor himself, the Chippewas could and would voice strong opposition to it if it did not accord with their wishes.

[131] There can also be no doubt but that many chiefs of the St. Clair regional bands, both on and off the Upper Reserve, were not reluctant to complain to the Indian Department and the Lieutenant Governor or Governor General about the conduct of Chief Wawanosh. Complaints about Wawanosh began in the early 1830s, grew more vigorous as time went on and reached a crescendo in early 1844 when Wawanosh was removed as Head Chief following a public inquiry into his conduct. The many complaints against Wawanosh included allegations that he abused his authority as chief, misappropriated band assets, and showed gross favouritism towards friends and allies. There were also allegations that Wawanosh sold, or at least tried to sell,

2000 CanLII 16991 (ON CA)

Chippewa land without authority. For example, in October 1836, a number of Chippewas petitioned the government complaining among other things that Wawanosh was "disposing of land reserved for us, our wives and children without our consent". A similar allegation was made in 1841 when various chiefs complained that Wawanosh was trying to sell land without authority.

[132] In August 1843, a petition signed by about 200 Chippewas was directed to the Governor General. It contended that Wawanosh was not the hereditary chief, took more than his proper share of the annuity, and favoured his friends and relatives, leaving the rest of the band in poverty. The petition concluded with these strong words:

> We are not neither children or foolish. We know perfectly well who either wrongs us or does us good, and we can complain of the former and thank the latter, we therefore beg your Excellency will attend to what comes from ourselves only, and not to the unsolicited and obnoxious interference of white men with whom we neither have nor wish to have any concern; . . .

(Emphasis added)

[133] The Chippewas requested a General Council at Port Sarnia at which their complaints against Wawanosh could be aired. The Governor General decided to hold a formal public inquiry into the charges against Wawanosh. That inquiry was held in late 1843. Witnesses for and against Wawanosh testified and Wawanosh replied in detail to the allegations made against him. Summaries of the testimony have survived and provide a detailed account of the accusations against Wawanosh, and insight into the level of animosity that many of the Chippewa chiefs had developed toward Wawanosh.

[134] Superintendent Clench presided over the inquiry and prepared a report for Jarvis summarizing his findings. According to Clench, the charges against Wawanosh related to mismanagement of his office as chief, the appropriation of more than his share of the annuities due to the Chippewas, gross

2000 CanLII 16991 (ON CA)

favouritism, and making a false claim to being an hereditary chief. Clench reported that over 75 per cent of the Chippewas on the four reserves were against Wawanosh.

[135] It was determined that Wawanosh should be removed as Head Chief but should remain as a chief. Despite the efforts of Wawanosh and Cameron to prevent the removal of Wawanosh, he was in fact removed as Head Chief and not restored until 1848.

[136] The complaints made against Wawanosh between 1830 and 1844 are set out in considerable detail in various affidavits filed by the parties. None of the complaints refer to the Cameron transaction, although it occurred and was known to other Chippewas at the very height of their displeasure with Wawanosh (1839-1843). In our view, it is significant that despite the many general and specific complaints directed at Wawanosh's conduct, there was never any suggestion by the other Chippewa chiefs that Wawanosh had acted beyond his authority in reaching a bargain with Cameron, or that the purported sale was contrary to the wishes of the Chippewas.

[137] In assessing the significance of the absence of any reference to the Cameron transaction in the onslaught of complaints made against Wawanosh at the inquiry, we bear in mind that by the fall of 1843, the Chippewas knew the full extent of the lands involved in the Cameron transaction. Those lands had been surveyed into lots in the summer of 1842. The Chippewas knew by the fall of 1843 that the Cameron transaction involved about one-quarter of the land on the Upper Reserve.

[138] The absence of any reference to the Cameron transaction among the litany of complaints made against Wawanosh defies explanation if the other Chippewa chiefs looked on the Cameron transaction as a "private" deal whereby Wawanosh disposed of one-quarter of the Upper Reserve against the wishes of the Chippewas affected by that transaction. The explanation advanced by one witness for the Chippewas that the Chippewas' culture was such that complaints against Wawanosh would be indirect (a contention neither accepted nor rejected by the motions judge), does not hold up. By the fall of 1843, there was a concerted attack underway on Wawanosh's leadership in the

2000 CanLII 16991 (ON CA)

years before and following 1839. That attack included specific allegations against him by other Chippewa chiefs. Furthermore, the formal inquiry of 1843 was a trial-like inquiry conducted by Superintendent Clench. The inquiry was directed into any and all allegations that witnesses wished to advance against Wawanosh. Surely, had there been any reason to suspect that Wawanosh had acted improperly in connection with a transaction involving one-quarter of the Upper Reserve, some reference to that transaction would have been made in the many complaints brought forward against Wawanosh.

[139] The motions judge found, however, that the absence of any complaint about the Cameron transaction had no evidentiary value because in his words:

> . . . The first question is when, and exactly of what, the Chippewas should be expected to have complained. Lack of complaint about lack of surrender cannot be expected until lack of surrender becomes apparent. The legal status of the Cameron lands, between November 1839 and August 13, 1853 was unclear. . . . If the Crown officials could not know the status of the disputed lands one would hardly expect the Chippewas to know enough detail to be in a position to complain specifically. . . . Lack of complaint of lack of surrender has no evidentiary significance when future surrender is reasonably to be expected.

(Emphasis added)

[140] The motions judge missed the evidentiary significance of the absence of any complaint about the Cameron transaction by characterizing it as a failure to complain about the lack of a surrender. It is not the Chippewas' failure to complain about the lack of a surrender which is significant. What is significant is that even though the other chiefs were aware that Wawanosh had agreed to sell one-quarter of the Upper Reserve, they made no complaint about that transaction in an inquiry, the purpose of which was to air any and all complaints about Wawanosh's conduct as Head Chief. The failure to complain about Wawanosh's actions in connection with the Cameron transaction, or to repudiate that transaction, constitutes

2000 CanLII 16991 (ON CA)

evidence from which it can be reasonably inferred that Wawanosh acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known.

G. Post-Cameron Transaction Events

[141] The inference of approval or at least acceptance of the Cameron transaction by the Chippewas flowing from the absence of any complaint about it in the avalanche of complaints made against Wawanosh is strengthened by the evidence of several events which occurred between 1840 and 1855. These events shed further light on the Chippewas' attitude towards the Cameron transaction.

[142] In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English. [See Note 12 at end of document] In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of those who may have voiced any opposition to Wawanosh's actions.

[143] The first reference in the Indian Department correspondence to the Cameron transaction after November 1839 was a letter from Jones to Jarvis in early May 1840. Jones advised Jarvis that the Chippewas wanted approval for the purchase of 300 acres of land in Enniskillen. The Chippewas, including those on the Upper Reserve, had been interested in acquiring Enniskillen land for many years. There were maple groves at Enniskillen which were ideal for sugar-making, a

2000 CanLII 16991 (ON CA)

traditional Chippewa activity which had taken on commercial importance as the number of white settlers increased.

[144] Jones advised Jarvis that the Chippewas proposed that the purchase price "be paid out of the money which they are to receive from the tract to be sold to Mr. Cameron and co., or, in the event of much delay, the first instalment to be paid out of their annuity".

[145] The proposal made by the Chippewas through Jones in May 1840 was the latest of several proposals the Chippewas had made concerning the acquisition of Enniskillen land. Some involved the exchange of reserve land (not land on the Upper Reserve) for Enniskillen property, and others involved the outright purchase of Enniskillen property. These proposals were advanced by the chiefs after Council meetings and reflected the consensus of the Chippewa bands. There is no reason to doubt but that the proposal put forward through Jones in May 1840 also represented the community consensus. Jones refers only to "the Indians" in his letter, however, given his relationship with Wawanosh, we think that had the plan been advanced by Wawanosh, Jones would have said so.

[146] The motions judge concluded that the letter from Jones in May 1840 was evidence that the Chippewas on the Upper Reserve had a general awareness of the Cameron transaction as of May 1840 and knew that the land was to be sold to Cameron. We think the letter shows more than that. It indicates a communal awareness of the Cameron transaction as early as May 1840 and a communal acceptance of the transaction. The Chippewas saw the Cameron transaction as providing a source of funds with which they could develop the sugar-making resources on the Enniskillen property. In doing so, they would be pursuing a traditional practice, while at the same time improving their economic base by developing a commercial relationship between themselves and the white settlers. Far from repudiating the Cameron transaction in May 1840, the Chippewas embraced it as a means of acquiring the Enniskillen property, a long-held and actively pursued community goal.

[147] The Enniskillen lands were eventually purchased by the

2000 CanLII 16991 (ON CA)

Chippewas, but not from the proceeds of the Cameron transaction. Those proceeds were not available. The fact that the Cameron transaction did not fund the purchase has no effect on the inference to be drawn from the Chippewas' position as set out in Jones' letter of May 1840.

[148] The events leading up to the survey of the disputed lands in the summer of 1842 also shed light on the Chippewas' attitude towards the Cameron transaction. In June 1841, Cameron complained that he could not commence a settlement of the land until it was surveyed and set out in lots. In October 1841, the Surveyor General suggested that it would be more economical to survey the entire Upper Reserve rather than just the lands affected by the Cameron transaction. Jarvis agreed with his suggestion but observed:

> I entirely concur in your view of the matter but as the Chief of the tribe of Indian[s] who live on the Reserve is not on very good terms with his people I should recommend a reference being first made to them, to ascertain whether they have any objection to the land being laid out into lots.

[149] Jarvis understood that the Chippewas might well be opposed to having the entire Upper Reserve surveyed. From the Chippewas' perspective, a survey setting out lots was a precursor to settlement by the white man. Before taking that provocative step, Jarvis wanted to be sure that the Chippewa community would not oppose it. Given the relationship between Wawanosh and many of the Chippewas on the Upper Reserve by the fall of 1841, Jarvis was not prepared to act on Wawanosh's word alone. [See Note 13 at end of document]

[150] The motions judge contrasted Jarvis' careful approach to obtaining a Chippewa consensus in relation to the survey with the absence of any concern about the existence of a Chippewa consensus in connection with the Cameron transaction. With respect, the two situations were not analogous. Insofar as the survey was concerned, Jarvis had no reason to think that the Chippewas were agreeable to a survey and, given the significance of a survey to the Chippewas, very good reason to think that they would be opposed to the survey. With respect to

2000 CanLII 16991 (ON CA)

the Cameron transaction, it was brought to the Indian Department representative, Jones, as a concluded bargain by three chiefs of the Chippewas.

[151] In October 1842, Jones was told of the proposal to survey the entire reserve and was asked to determine the views of the "chiefs of the tribes generally". Two weeks later, Jones wrote back to Jarvis indicating that he had had some difficulties getting the chiefs together and that it had taken them some time to determine whether they were agreeable to a survey of the entire reserve. Jones indicated that the chiefs did not wish to have the entire reserve surveyed.

[152] As the motions judge observed, the Chippewas' consideration of whether to permit a survey of the entire reserve would have necessarily entailed knowledge of the fact of the Cameron transaction and the extent of the land involved in that transaction. The Chippewas' response to the survey request leads to two other conclusions. First, the Chippewas were perfectly capable of resisting attempts to intrude on their land. Second, there was no suggestion that the Crown was not entitled to survey the disputed lands and set out lots on that land. Acceptance of the Crown's right to survey implied recognition of imminent settlement by the white man. Such settlement was inconsistent with any claim by the Chippewas that the Cameron transaction was unauthorized by them, or at least unacceptable to them as of 1842. We infer from the Chippewas' response to the request for a survey of the entire reserve that by the fall of 1842, the Chippewas on the Upper Reserve distinguished between the disputed lands and the rest of the reserve, saw it as their right to prohibit surveys of the latter but not the former, and knew that white settlement of the disputed lands was imminent.

[153] Jarvis was inclined to press for a survey of the entire reserve despite the position of the Chippewas, but in January 1842 it was concluded that the benefits of surveying the entire reserve were not worth the harm that the survey would cause to the relations with the Chippewas on the Upper Reserve. The entire reserve was not surveyed until 1855 when the chiefs consented to the survey.

2000 CanLII 16991 (ON CA)

[154] Even after the proposal to survey the entire reserve was abandoned, there was a further delay in surveying the lands which were subject to the Cameron transaction. The delay was due in part at least to some confusion over road allowances. That confusion resulted from the absence of proper documentation of the transaction.

[155] In May 1842, John O'Mara, a surveyor, went to the Upper Reserve and spent some two weeks doing a detailed survey of the disputed lands. He divided the lands into three blocks [and] set out a road between blocks A and B, a road between blocks B and C and two roads running from the western limit of the disputed lands through the reserve to the St. Clair River. In referring to the actual making of the survey, the motions judge said:

> This is an important piece of evidence because the band was sensitive to the implications of any survey. The open and notorious presence of surveyors on the disputed land and the visible survey monumentation in the form of stakes and blazed trees would bring home to the band very vividly the fact that their land was being prepared for settlement.

[156] We agree with the conclusion of the motions judge. In our view, there were two reasonable inferences to be drawn from the Chippewas' inaction in the face of the survey. Either Wawanosh and the other chiefs acted with the approval of the Chippewas affected by the sale when they made the bargain with Cameron, or even if they did not have their approval, the Chippewas accepted the bargain when it came to their attention, [and] did not seek to repudiate it or otherwise assert any right to the disputed lands.

[157] The failed attempt by residents of Port Sarnia to acquire part of the Upper Reserve in February 1843 was the next event discussed in some detail by the motions judge. He accurately observed that the officials in the Indian Department regarded a surrender of the land as a condition precedent to any acquisition of it by the residents of Port Sarnia. He also suggested that the aborted transaction demonstrated:

2000 CanLII 16991 (ON CA)

> . . . the ease with which enthusiastic purchasers can convince government officials, wrongly, that the Chippewas had agreed to sell part of the reserve.

[158] With respect, the evidence does not support this conclusion. The government officials were not convinced of anything by the residents of Port Sarnia. Rather, Jones was instructed to convene a meeting of the principal men and determine whether a surrender could be agreed upon. Within a month, the Chippewas indicated they were not prepared to surrender the land at that time, and that ended the matter as far as Jarvis was concerned.

[159] The reference to the aborted transaction involving the residents of Port Sarnia provides little insight into the Cameron transaction. Unlike that transaction, there was no bargain presented to the Indian Department in 1843 by chiefs of the Chippewas, but rather a petition to that Department by the land-hungry residents of Port Sarnia asking the Department to obtain a surrender.

[160] The attempts by the residents of Port Sarnia to acquire part of the Upper Reserve in 1843 do, however, provide yet another example where Chief Wawanosh, speaking through his son, conveyed the position of the Chippewas on the Upper Reserve to the Indian Department. As with the earlier occasions set out above, there is no suggestion that Wawanosh inaccurately conveyed the community consensus to the Indian Department.

[161] The incident in 1843 also demonstrates that the Chippewas' objections to intrusions onto their lands were acknowledged and accepted by the Indian Department even over the opposition of settlers.

[162] The Bagot Commission Report in 1844 also deserves brief reference. That Commission examined in detail the affairs of the Indian Department, and was highly critical of the operation of that department. The Commission heard many complaints about unjust land transactions in the 1830s, but recorded no complaints or disputes with respect to the Cameron transaction.

2000 CanLII 16991 (ON CA)

The Commission was well aware of the transaction and examined its monetary details at some length. The Commission concluded that Jarvis had placed the initial payment made by Cameron in the wrong bank account and the Commission was highly critical of Jarvis' record-keeping. Nowhere, however, is there any suggestion that the transaction did not have the approval of the Crown and the Chippewas, or that it was regarded by anyone as a "private deal" between Cameron and Wawanosh.

[163] The next reference by the Chippewas to the Cameron transaction appeared in correspondence from Peter McGlashan, the clerk of the Magistrate's Court at Port Sarnia, to resident Superintendent Clench in August 1847. McGlashan, who was involved in yet another attempt by the residents of Port Sarnia to acquire land on the Upper Reserve, wrote to Clench to tell him that the Chippewas were not prepared to give up any of their land. He said:

> . . . To all these arguments the Indians have but one answer viz, that they were induced some eight years ago to consent to the sale of a large part of the reserve to Mr. Cameron of this place, for which he agreed to pay them within five years, in annual instalments but that to this time they have not received any part of the purchase money, and that they will not dispose of any more of their land for fear that they should be served in the same manner in receiving payment for it.

[164] The motions judge found that the letter was further evidence of the Chippewas' knowledge of the transaction albeit that they were mistaken as to the number of annual instalments to be paid. He went on, however, to conclude that McGlashan could not be relied on to accurately convey the Chippewas' attitude towards the transaction, and that it "has little evidentiary weight in determining whether Wawanosh on November 8, 1839 acted with the consent and authority of the band".

[165] While it is not unreasonable to conclude that the letter could not be relied on to show that Wawanosh had the consent of the affected bands when he agreed to the transaction, we see no reason to discount the value of the

2000 CanLII 16991 (ON CA)

letter as evidence of the Chippewas' attitude towards the transaction in 1847. Their comments to McGlashan do not suggest a repudiation of the agreement. Quite the contrary, they signal a willingness to comply with the agreement and a complaint that the purchaser was not complying with it. The attitude of the Chippewas, as expressed to McGlashan, is inconsistent with the claim that the Chippewas viewed the disputed lands as having been unilaterally taken from them by Cameron. It is equally inconsistent with the claim that, as of 1847, the Chippewas did not accept that the disputed lands were no longer theirs.

[166] The Chippewas maintained this same position in subsequent communications with the Indian Department. For example, in 1850, a local Indian Department official reported that the chiefs were concerned that Cameron was issuing deeds for parts of the disputed land when they had not yet been fully paid. As in 1847, the Chippewas' complaint was with Cameron's failure to comply with the bargain, not with the bargain itself.

[167] The lengthy dispute over road allowances across the Upper Reserve, between the residents of Port Sarnia and the Chippewas on the Upper Reserve, provides further evidence of the Chippewas' attitude towards the Cameron transaction. In 1849, the residents of Port Sarnia petitioned the government to open a road through the reserve. Some settlers wanted a road through the middle of the reserve, to the river. In August 1849, the provincial land surveyor recommended that a road be built through the reserve. In September 1849, the Chippewas, through their interpreter Henry Chase, responded to the proposed road as follows:

> The chiefs had granted a road should be opened for the use of their white neighbours direct from Sarnia Village, cutting diagonally the northeast corner of the Indian reserve of three quarters of a mile, as the Honourable Malcolm Cameron had proposed to be opened, to his lot of land on the rear of the reserve.

[168] Mr. Chase also reported that the chiefs would not agree to a second road being opened through the reserve. In early

2000 CanLII 16991 (ON CA)

1850, the residents of Port Sarnia filed a further petition with the government complaining that the Chippewas' opposition was due to "a child-like ignorance of what is really for their benefit".

[169] In July 1850, the residents of Port Sarnia changed tactics. They now contended that three roads had been granted to Cameron as part of the 1839 transaction. They petitioned the town Council of Port Sarnia to create a road along those allowances and indicated that the Indian Department should "order the agreement with the Honourable Malcolm Cameron to be fulfilled".

[170] An exchange of correspondence ensued dealing with the road allowances, if any, that had been granted in the Cameron transaction. The lack of proper documentation respecting the transaction fuelled the controversy. It was in the course of this correspondence that an Indian Department official asked whether a surrender of the land had been made at the time of the sale to Cameron. That question went unanswered.

[171] After making inquiries, the Indian Department advised the Port Sarnia municipal Council that:

> On the authority of an existing order of the Governor General in Council that as the land through which you wish the road to pass is an Indian reserve which has never been surrendered to the Crown, no part of it can be considered under the jurisdiction of the municipal Council as a public highway.

[172] The municipal Council was not prepared to accept this position and indicated, relying on the letter of Jones to Jarvis of November 9, 1839, that the municipality would press ahead and "abide the consequences if they overstep their authority".

[173] Clench responded with equal vigour, advising the municipality that if the road concessions were not provided for in the surrender, the letter of Jones would have no value. Clench assumed that a surrender existed. In fact, there was none.

2000 CanLII 16991 (ON CA)

[174] Eventually, the municipality resiled from its threats to proceed with the roads despite the position of the Indian Department. An agreement was reached with the Chippewas whereby the Chippewas agreed to permit a road running diagonally across the corner of the reserve. This was the offer the Chippewas had made in 1849 when they first indicated they were willing to allow their "white neighbours" to run a road through the Upper Reserve from the disputed lands to the river.

[175] The Chippewas' attitude throughout the road dispute was one of acceptance of the fact of the Cameron transaction. The back of the reserve was described as Cameron's lands. The Chippewas were also willing to co-operate with their white neighbours in road construction, but insisted that the co-operation be on their terms if the road was to run over their land. Their position was supported throughout by officials at the Indian Department.

[176] The road allowance dispute is a good example of the tripartite nature of disputes involving Indian lands in southwestern Ontario in the middle of the 19th century. The settlers stood on one side of the dispute and the Chippewas on the other with the Indian Department in the middle. That Department did not see itself as a promoter of the interests of white settlers. Where, as in the case of the road allowance dispute, the Department concluded that the Chippewas were correct, they fully supported the Chippewas' position.

[177] The willingness of the Indian Department to support the Chippewas' position even against the persistent claims of the white settlers in Port Sarnia was not unique and would not have been lost on the Chippewa leadership. Their failure to take issue with the Cameron transaction cannot be explained on the basis that they assumed that such complaints would not receive a fair hearing at the Indian Department. As the road allowance dispute demonstrates, officials in that department were prepared to support the Chippewas in contentious matters involving lands on the Upper Reserve.

[178] The final event which must be examined in considering

2000 CanLII 16991 (ON CA)

the Chippewas' attitude towards the Cameron transaction is the General Council meeting of the Chippewa chiefs in March 1855. The chiefs addressed a number of questions to Superintendent Talfourd, Clench's successor. Talfourd's notes indicate that the questions were directed to several transactions involving reserve lands. Talfourd's cryptic notes of the questions put by the Chippewa chiefs included the following reference to the Cameron transaction:

> To what amt. the principal the sale of the parcel of land brought by Mr. Cameron and the amt. of land to have the exclusive use of the money?

[179] Talfourd's report on the General Council meeting included the following:

> . . . I attended a Council . . . of the Chippewas of Sarnia when it was decided that I should communicate to Your Lordship their wants and wishes on the following subjects . . .
>
> (Firstly) the sum that will be realized by the late surrender of land at Sarnia Village, the block sold to Honourable M. Cameron in the rear of the reserve, and one lot in Bosanquet sold to Mr. Kennedy, and at what time they may expect the interest on the payments already made.

[180] After referring to these documents, the motions judge held:

> . . . The documents show that the band knew of the sale to Cameron, did not know the amount of the sale price, did not know the amount of land sold, knew there was some interest owing, and did not know when it would be paid.

[181] We cannot accept some of these conclusions. In our view, it is not reasonable to infer from these notes that the Chippewas were unaware of the purchase price. In his report, Talfourd refers to "the sum that will be realized". This is a very different matter than the purchase price since an interest calculation was involved. Nor is it reasonable to assume that

2000 CanLII 16991 (ON CA)

the Chippewas did not know the amount of land that had been sold. As indicated above, a detailed survey of the land had been carried out in 1842. A further more detailed survey was made before 1850. While the Chippewas might not have known how many white man's acres were involved in the transaction, they knew exactly what part of the Upper Reserve had been given up in the Cameron transaction. Lastly, the Chippewas' question concerning when they would pay the accumulated interest does not reflect any ignorance of the terms of the bargain made with Cameron. Actual payment to the Chippewas depended on the Crown, who held the money for the benefit of the Chippewas, and not on the terms of any bargain struck between Cameron and the three chiefs.

[182] We take the queries posed by the chiefs at the General Council in 1855 as strong evidence that the Chippewas accepted the transaction, no longer regarded the disputed land as theirs, were prepared to abide by the terms, but were also determined to get what was due to them under the terms of the transaction. As with the previous events outlined above, the Chippewas did not seek to repudiate the agreement, but rather sought compliance with the terms of the agreement by the purchaser.

[183] By 1861, some 22 years had passed since the Cameron transaction. Cameron was no longer on title and those who had purchased the land had no involvement in the transaction. They could look to an apparently valid Crown patent issued some eight years earlier for the root of their title.

H. Summary of Findings

[184] We summarize our relevant findings with respect to the Cameron transaction and the events in the ensuing 22 years as follows:

-- Crown officials responsible for First Nations relations continued throughout the relevant time to follow the central policies underlying the Royal Proclamation. The Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only

2000 CanLII 16991 (ON CA)

to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

-- Cameron, with the approval of the Crown, negotiated the transaction with three chiefs of the Chippewas, including Head Chief Wawanosh. The chiefs and Cameron reached a bargain, the terms of which were modified by Jarvis and then approved by the Crown. The bargain was consistent with the goals of the "civilization" policy of the Crown.

-- By 1851, the Crown believed that a surrender of the disputed lands had been made and issued a patent on that basis in 1853.

-- There was in fact never a surrender of the disputed lands to the Crown.

-- The Chippewas were never asked by the Indian Department to surrender the disputed lands to the Crown. Consequently, there is no evidence of the existence of a communal intention to surrender the disputed lands to the Crown at any time.

-- The failure to request and obtain the necessary surrender is explained by the dysfunctional state of the Indian Department and the neglect of those charged with the responsibility of obtaining the surrender.

-- It cannot be said whether Head Chief Wawanosh and the two other chiefs negotiated the bargain with Cameron with the authority of those Chippewa bands affected by the transaction. It is, however, clear that those bands knew of the transaction shortly after it was made. They chose not to repudiate the agreement, but rather accepted the transaction, sought to obtain the proceeds from it, and sought to apply those proceeds to other well-established communal interests.

-- In the 20 years following the transaction, those Chippewas

2000 CanLII 16991 (ON CA)

affected by it both acknowledged and accepted it. They regarded the disputed lands as no longer part of their Upper Reserve, and insisted that they obtain what was due to them under the terms of the transaction.

-- The Chippewas' repudiation of the Cameron transaction and their claim that they retain their interests and rights in the disputed lands first occurred some 140 years after the Cameron transaction, when it was discovered that there was no documentation evincing the surrender of the lands by the Chippewas to the Crown.

2000 CanLII 16991 (ON CA)

IV. NO SURRENDER OF THE DISPUTED LANDS

[185] It follows from our review of the evidence that we agree with the motions judge's finding that the Chippewas never surrendered the disputed lands to the Crown. As stated earlier, this issue, which is central to this case, is first and foremost a factual one. However, since the arguments of all parties on this issue were essentially focussed on the surrender provisions of the Royal Proclamation and the effect of the Quebec Act on those provisions, we will examine the question of surrender in that light.

A. The Royal Proclamation, 1763

[186] The Royal Proclamation, 1763 was an expression of the royal prerogative. It was used as a mode of imposing the imperial power on conquered colonies in North America, including New France. In accordance with its stated intention to "Establish New Governments in America", it created four new colonies including the province of Quebec, on which it imposed the laws of England until the pre-conquest French Law was restored in Quebec by the Quebec Act, 1774: see P.W. Hogg, Constitutional Law of Canada, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997) at pp. 2-7 to 2-8.

[187] Stripped to its essentials, the Royal Proclamation states that the King has acquired territories in America secured by the Treaty of Paris and has seen fit, with the "Advice of Our Privy Council", to grant letters patent under

the Great Seal of Great Britain to create within the territories four distinct and separate governments (i.e., Quebec, East Florida, West Florida and Grenada). The territorial boundaries are then set out; they do not include within Quebec the contested Chippewa lands. The letters patent issued pursuant to the Royal Proclamation provide that the Governors of the colonies shall call General Assemblies and that the Governors, with the consent of the assembly, are given the power to make laws for the public welfare and to constitute courts of law. The Governors and councils were also given authority and power to settle and agree with the inhabitants of the New Colonies for such lands, tenements and hereditaments as shall be in "Our Power" to dispose of and to grant certain lands to officers and men of the army and navy who have disbanded in America.

[188] The Indian provisions of the Royal Proclamation begin with the following declaration:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. . . .

[189] The Indian provisions of the Royal Proclamation are found in the next five paragraphs of the proclamation and are contained in what the motions judge calls "Part IV" (Reasons of the motions judge, paras. 250-57). Paragraph 1 creates an interior Indian territory beyond the colonies and the western settlement barrier. It prohibits government land grants of any kind in this territory and prohibits government land grants in the colonies of unceded Indian land. Paragraph 2 reserves the interior Indian territory including (until 1774) what is now the disputed land "for the use of the said Indians" and prohibits any settlement or land purchase "without Our especial Leave and Licence for that Purpose first obtained". The leave and licence provisions are of little application and have no

2000 CanLII 16991 (ON CA)

significance to this case. Paragraph 3 is a removal provision that required any persons settled in the interior Indian territory or on unceded Indian lands within the colonies to remove themselves immediately.

[190] Paragraph 4 deals with two distinct provisions; the first, part 4a, prohibits private purchases and sets requirements for the surrender to the Crown of Indian lands within colonies open to settlement. The second, part 4b, regulates the fur trade.

[191] The private purchase prohibition and the surrender procedures are introduced with a preamble noting the "great Frauds and Abuses" that have been committed in private purchases from the Indians and the need to prevent such private purchases in order to convince the Indians of the justice of the Crown and to remove sources of discontent. Paragraph 4a provides that, in areas with colonies open to settlement, Indian lands can be acquired only if they are first surrendered to the Crown by the Indians at a public meeting of the nation or tribe held for that specific purpose:

> . . . We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; . . .

[192] These are the surrender provisions of the Royal Proclamation. The Chippewas submit that these provisions survived the Quebec Act and had the force of law until replaced in 1860 by the Legislature of the Province of Canada: see An Act respecting the management of the Indian lands and property, S.C. 1860, 23 Vict., c. 151, s. 6. They submit that the Crown could only acquire legal title to Indian lands by following the

2000 CanLII 16991 (ON CA)

letter of the surrender provisions in the Royal Proclamation. Otherwise, they say, the transaction was a private sale and void ab initio, leaving the present landowners without title.

[193] The motions judge accepted the Chippewas' position. He found that: (1) there was no formal surrender of the disputed lands; (2) the sale to Cameron was a private sale; (3) the private sale of unsurrendered aboriginal land was prohibited by the Royal Proclamation and by common law; and (4) the letters patent to Cameron were illegal and void ab initio.

[194] The motions judge's reasons, in summary form, for deciding the surrender issue were as follows: the surrender procedures in the Royal Proclamation had the force of law in 1839 and accordingly any sale of Indian lands had to comply with these procedures; the disputed lands had never been surrendered by the Chippewas because the mandatory surrender procedures set out in the Royal Proclamation had not been complied with; absent a formal surrender, the Chippewas did not and could not have consented to or affirmed the sale of the disputed lands. The motions judge therefore decided the surrender issue in the Chippewas' favour and characterized their interest in the disputed lands in the nature of an "unceded unsurrendered common law aboriginal interest and title guaranteed by Treaty 29".

[195] The motions judge held that the Royal Proclamation had the force of law in 1839 and that its full surrender requirements were directly in force in the disputed lands at the material time. He also noted that "[t]he surrender procedures incorporated into the Proclamation, quite apart from the Proclamation itself, reflect fundamental aspects of Indian title at common law" and accordingly that the surrender requirements themselves were "in force in 1774 and thereafter in the area of the disputed lands as fundamental conditions precedent for the valid alienation of Indian land" (para. 286). He concluded that any surrender of Indian lands in 1839 had to comply with the Royal Proclamation and common law surrender requirements.

[196] The motions judge rejected the various defendants'

2000 CanLII 16991 (ON CA)

arguments that the surrender provisions of the Royal Proclamation had been repealed by the Quebec Act and thus rendered inoperative. He concluded, as a matter of statutory interpretation, that the Quebec Act was not intended to, and in fact did not, repeal or abrogate the surrender procedures of the Royal Proclamation. He further noted that the Quebec Act, which made no reference to Indians at all, did not evidence the "clear legislative intent" required to derogate from Indian title or treaty rights. Following a chronological review of the relevant case law, he distinguished the Bear Island case [supra, para. 19], in which this court held that "the Quebec Act repealed the surrender procedures of the Royal Proclamation" and that there was no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown (para. 333). He supported his decision not to follow the Bear Island "repeal dictum" on the basis that the case was "fact-driven", that it was overruled by subsequent Court of Appeal authorities, and that although the Supreme Court of Canada upheld this court's decision, the Supreme Court expressly stated that it did not necessarily agree with all the legal findings of this court.

[197] In the submission of the Chippewas, these findings of the motions judge support the legal conclusion that the Crown had acquired no title to the disputed land and could grant no title to Cameron. The Chippewas further submit that because they have a constitutionally entrenched right to the occupation of these lands that continues to this day, the court is not in a position to grant any relief to the present landowners.

[198] In light of our findings on the evidence before us that whatever the formal legal status of the Royal Proclamation subsequent to the passage of the Quebec Act, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57-65 above), little turns in this case on whether the surrender provisions per se of the Royal Proclamation had the force of law in 1839. We have found that those responsible for the First Nations relations

2000 CanLII 16991 (ON CA)

after 1776 continued to follow the central policies underlying the Royal Proclamation and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.

[199] As we accept the proposition that aboriginal title could be lost only by surrender to the Crown, and that a surrender required a voluntary, informed, communal decision to give up the land, it is not necessary to our analysis that we determine the precise legal status of the Royal Proclamation at the time of the Cameron transaction.

[200] On the one hand, the record contains evidence that, historically, the Royal Proclamation was intended to be a provisional arrangement which, insofar as Quebec was concerned, was replaced by the Quebec Act and that the temporal limitations of the Royal Proclamation also applied to the Indian provisions. For example, we refer to certain statements to this effect made by the Lords of Trade, [See Note 14 at end of document] the drafting of legislation for Parliament in 1764 entitled "Plan for Future Management of Indian Affairs", and the provisions of the Quebec Act itself. Further, one Crown expert, Dr. Paul Gerald McHugh, posits that the government of the day did not regard the Royal Proclamation as being operative even before the passage of the Quebec Act. According to his evidence, it would appear that instructions as to the treatment of Indians, including the formalities for the surrender of Indian lands, were treated as an ongoing exercise of the royal prerogative. He further asserted that while the spirit of the Royal Proclamation was respected in that all surrender procedures were to be of a public nature, the specific procedure in each case was a matter to be determined on a case-by-case basis by the Governor in Council.

[201] On the other hand, the evidence shows that while the Royal Proclamation was a unilateral declaration of the imperial

2000 CanLII 16991 (ON CA)

Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that the Crown took extraordinary steps to make the First Nations aware that the policy set out in the Royal Proclamation would govern Crown-First Nations relations and the importance attached to the Royal Proclamation by First Nations as their Charter. There can be little doubt that from the aboriginal perspective, the Royal Proclamation was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the Royal Proclamation were still in effect even after the passage of the Quebec Act. Moreover, the Royal Proclamation is expressly referred to in the Canadian Charter of Rights and Freedoms, s. 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 (R.S.C. 1985, App. III, No. 44) [See Note 15 at end of document] and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the aboriginal people of Canada.

[202] As stated earlier, in view of our findings of fact, we do not find it necessary to make any final determination on the precise legal status of the Royal Proclamation. We note as well that the importance of the Royal Proclamation as the source of aboriginal title has been much diminished by recent decisions of the Supreme Court of Canada. That court has made clear that, contrary to the suggestion of earlier case law, aboriginal rights, including aboriginal title, are pre-existing rights. As was stated by Dickson J. in Guerin v. R., [1984] 2 S.C.R. 335 at p. 379, 59 B.C.L.R. 301:

> Their [the Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or any other executive order or legislative provision.

[203] In Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at p. 1082, 66 B.C.L.R. (3d) 285, Lamer C.J.C. stated:

2000 CanLII 16991 (ON CA)

> Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the Royal Proclamation, 1763: see St. Catherine's Milling [St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46]. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.

And at pp. 1091-92 S.C.R.:

> Aboriginal title at common law is protected by s. 35(1) [of the Constitution Act, 1982]. This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" [emphasis added by Lamer C.J.C.]. On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g. Calder [Calder v. British Columbia (Attorney General), [1973] S.C.R. 313]), s. 35(1) has constitutionalized it in its full form.

[204] Lamer C.J.C. also stated that "the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title" (at p. 1085 S.C.R.). He quoted with approval from p. 379 S.C.R. of the reasons of Dickson J. in Guerin:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . .

(Emphasis added by Lamer C.J.C.)

2000 CanLII 16991 (ON CA)

[205] This last statement is important to this case where the Chippewas and the motions judge made much of the language of Treaty 29, consummated at Amherstburg on July 10, 1827, expressly reserving to the Indians from the lands surrendered a reservation covering the disputed lands.

B. The Quebec Act, 1774

[206] In light of these recent pronouncements by the Supreme Court, it would appear that the Quebec Act, 1774 could not and did not effect any change in the nature and extent of aboriginal title to the extent that it did revoke the Royal Proclamation. In any event, we are not concerned so much with the nature and extent of aboriginal rights, as with the question of their surrender. On that subject, we are bound by our own decision that the surrender provisions of the Royal Proclamation were revoked by the Quebec Act: see Ontario (Attorney General) v. Bear Island Foundation, supra, at p. 410 O.R.

[207] In Bear Island, it was argued that the members of the Temagami Band were not bound by the Robinson-Huron Treaty of 1850 because the surrender procedures followed by the Crown were contrary to the Royal Proclamation. As to this argument, this court said at p. 410 O.R.:

> It is at least questionable whether these provisions affected the Temagami lands since they may not have been "within those parts of Our Colonies where We have thought proper to allow Settlement". It is, however, not necessary to resolve this question since the relevant procedural aspects of the Proclamation were repealed by the Quebec Act, 1774 (U.K.), c. 83 [R.S.C. 1970, App. II, No. 2]. Section 3 of the Quebec Act, 1774 makes it clear that it does not make void, vary or alter any right, title or possession. Therefore, whatever right, title or possession the Temagami Band may have had pursuant to the Royal Proclamation was not affected by the Quebec Act, 1774. We think it clear, however, that the procedural requirements for purchase "at some public Meeting or Assembly . . ." was repealed [sic]. Thus, at the

2000 CanLII 16991 (ON CA)

> relevant times there was in existence no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown.

(Emphasis added)

[208] It is argued that these remarks were obiter dictum. They were not. The entire thrust of the judgment was that it was not necessary to determine whether that Band had acquired aboriginal rights because any rights they had were extinguished either by being parties to the Robinson-Huron Treaty or because the Band's subsequent conduct amounted to adhesion to the Treaty.

[209] The Supreme Court of Canada dismissed the appeal of the Temagami Band: [1991] 2 S.C.R. 570, 4 O.R. (3d) 133n. The Supreme Court recognized that the case was largely fact-driven and that there were concurrent findings of fact in the two lower courts with which it would not take issue. It then said at p. 575 S.C.R.:

> It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see in this context Simon v. The Queen, [1985] 2 S.C.R. 387; R. v. Sparrow, [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

[210] This court did not accept this legal conclusion either, and proceeded on the assumption that the Band had established aboriginal rights over the disputed lands. In effectively taking the same approach, the Supreme Court said at p. 575 S.C.R.:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by

2000 CanLII 16991 (ON CA)

arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.

[211] In our view, these passages cast no doubt on the legal conclusions reached by this court. In particular, the Supreme Court's acceptance of the proposition that "arrangements subsequent to the treaty" amounted to a surrender indicate that it was no longer necessary to follow the letter of the procedure prescribed by the Royal Proclamation.

[212] Nor do we accept the contention that this court "impliedly" reversed Bear Island in Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band (1993), 16 O.R. (3d) 390, 109 D.L.R. (4th) 449 (C.A.), leave to appeal to S.C.C. refused [1994] 2 S.C.R. v, and Chippewas of Kettle and Stony Point v. Canada (Attorney General) (1996), 31 O.R. (3d) 97, 141 D.L.R. (4th) 1 (C.A.), affd [1998] 1 S.C.R. 756, 38 O.R. (3d) 640n. Neither case mentions Bear Island nor the Quebec Act. The only references to the Royal Proclamation were made in an historical context. There was no suggestion that it was still in force as the operative surrender procedure.

[213] In Skerryvore, the Shawanaga Indian Band was the respondent to an action for a declaration that a road which ran through its unsurrendered Indian lands was a public road. The public had used the road from 1850 to 1978, when the Band took the position that it was a private road. The trial judge declared the road to be a public highway by reason of the common law doctrine of dedication and in addition, or in the alternative, by virtue of s. 257 of the Municipal Act, R.S.O. 1980, c. 302 [now R.S.O. 1990, c. M.45, s. 261], which provides that "all roads passing through Indian lands . . . are common and public highways". The Band appealed and the trial judgment was set aside.

[214] This court held that the doctrine of dedication is inapplicable to unsurrendered Indian lands because the sui generis nature of Indian title renders impossible an inference of intention to dedicate. This court also held that s. 257 of the Municipal Act cannot mean that [roads] passing through

2000 CanLII 16991 (ON CA)

Indian lands become public highways by the simple operation of that section because that would be legislation within the exclusive legislative jurisdiction of the Parliament of Canada and, as such, would be ultra vires the province. The section can do no more than declare public, for provincial purposes, those highways that have become public highways pursuant to the provisions of the Indian Act, R.S.C. 1985, c. I-5, which provide for the surrender to the Crown and transfer of administration and control of the lands to the provinces.

[215] The only reference to the Royal Proclamation is in the holding by the court that the doctrine of dedication is inapplicable to unsurrendered Indian land. Putting the matter in historical perspective, the court stated at p. 399 O.R.:

> The Royal Proclamation, the Robinson-Huron Treaty and the successive Indian Acts all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown.

[216] As we understand this passage, it says no more than that the aboriginal rights of the Band have been recognized by the Crown over time, starting with the Royal Proclamation and continuing with regard to this Band with the Robinson-Huron Treaty and with the Indian Act thereafter. While the court followed with quotes from both the Royal Proclamation and the Robinson-Huron Treaty, in its disposition of this issue, it confined its authorities to those applicable from 1850 to 1978 and relied solely on its interpretation of "treaties and the statutes relating to Indians".

[217] In Chippewas of Kettle and Stony Point Indian Band v. Canada, supra, the Band surrendered reserve land to the Crown in 1927. The Band complained in 1992 that the voluntary surrender provisions of the Indian Act, R.S.C. 1906, c. 81 had not been complied with. Laskin J.A., in delivering the judgment of the court, reviewed the history of surrender provisions relating to Indian lands, starting with the Royal Proclamation. He stated that the "underlying rationale" for the Royal Proclamation and the Indian Act was to prevent aboriginal peoples from being exploited. He then held that the mere

2000 CanLII 16991 (ON CA)

presence of one of the subsequent purchasers from the Crown at the surrender meetings conducted pursuant to the Indian Act did not violate the language of the Indian Act or the "rationale" of the Royal Proclamation. It has never been suggested that the surrender procedures in the Royal Proclamation survived once they were codified in the Indian Act or its predecessor statutes and that it was necessary for the Crown to comply with both the Indian Act and the Royal Proclamation. As stated, the issue in the case was whether the surrender provisions of the 1906 Indian Act had been complied with.

[218] A further appeal to the Supreme Court of Canada was dismissed: [1998] 1 S.C.R. 756. Cory J. who, as a matter of interest, had been a member of the panel of this court that decided Bear Island, delivered the court's brief reasons. He said at p. 757:

> On this appeal we are not concerned with the issue of the Crown's fiduciary duty. The sole question before us is the validity of the surrender and on this issue we are in agreement with the reasons of Laskin J.A.

[219] We are not persuaded that this court or the Supreme Court of Canada has overruled Bear Island, implicitly or otherwise. However, we do not regard the fact that Bear Island remains a binding authority as dispositive of the issues raised in this appeal. Simply put, this is not a case where the validity of the surrender turns on whether the appropriate procedures, whatever their source, were followed. Here, there was no surrender at all. Since we accept the proposition that aboriginal title can be lost only by surrender to the Crown, the issues that remain are whether, in the absence of a surrender, the Chippewas have a right to the relief they seek, and whether their claims are barred by the application of any statutory limitation periods or equitable doctrines.

V. STATUTORY LIMITATION PERIODS

[220] Canada and Ontario concede that no limitation period bars the Chippewas' claim against the Crown for breach of fiduciary duty, a cause of action for which there is no

2000 CanLII 16991 (ON CA)

statutory limitation period in Ontario. The landowners, however, moved for summary judgment to dismiss the action on the basis, inter alia, that the claims asserted against them by the Chippewas were barred by the provisions of 18 different statutes, as listed at para. 445 of the motions judge's reasons. The motions judge held that none of the statutes in question applied to bar the action, and the landowners and Ontario appeal from this aspect of the decision. For reasons that follow, however, we would not interfere with the motions judge's conclusions on this issue.

A. Issues on Appeal

[221] The motions judge first determined that, for the purpose of any limitation period, the time started to run, subject to any question of capacity and discoverability, from the date of the issuance of the Cameron patent on August 13, 1853. No appeal is taken from this finding.

[222] The motions judge then considered the scope and effect of a multitude of Ontario statutes and concluded that Ontario legislation, because of constitutional restrictions on provincial power, could not of its own force extinguish Indian title. Again, no appeal is taken from this finding.

[223] The motions judge next considered the alternative argument that, if the Ontario statutes did not apply directly of their own force, they applied because they were incorporated in federal law by reference through various provisions. In the first instance, the landowners relied on s. 88 of the Indian Act, R.S.C. 1985, c. I-5; s. 39(1) of the Federal Court Act, R.S.C. 1985, c. F-7; and s. 22 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (as am. by S.C. 1990, c. 8). The motions judge considered each statutory provision and concluded, for various reasons, that none of them applied. The landowners take issue with this finding but restrict their appeal to the applicability of the Crown Liability and Proceedings Act.

[224] Finally, the motions judge considered the effect of a number of pre-Confederation statutes: the English Nullum Tempus

2000 CanLII 16991 (ON CA)

Act of 1769, [See Note 16 at end of document] which applied to the disputed lands by virtue of the statutory reception of English law in 1792; the 1834 Upper Canada limitations statute; [See Note 17 at end of document] and the 1859 Province of Canada (Canada West) limitations statute. [See Note 18 at end of document] Although the motions judge did not deal specifically with the Nullum Tempus Act in his analysis, his reasoning with respect to the other two pre-Confederation statutes would necessarily apply to this statute as well.

[225] The motions judge held that the 1834 and 1859 pre-Confederation statutes were continued as if they were laws of the Parliament of Canada in respect of matters within the constitutional authority of Parliament by virtue of s. 129 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The question then became whether these statutes effectively extinguished the Chippewas' Indian title to the lands.

[226] The motions judge recognized that Parliament had the power before 1982 to extinguish aboriginal title unilaterally by specific legislation plainly evidencing a clear specific intent to do so, but held that this power did not extend to the extinguishment of treaty rights. Even if Parliament had the power to extinguish both aboriginal and treaty rights unilaterally, the motions judge concluded that the 1834 and the 1859 pre-Confederation statutes did not evidence any specific intent to do so and hence that they were of no effect. He further held that, in any event, the colonial legislatures that enacted these statutes had no power to affect or extinguish either aboriginal or treaty rights as these were matters exclusively within the Imperial authority and beyond the colonial legislative power at the time.

[227] The landowners and Ontario both appeal from the motions judge's finding with respect to pre-Confederation statutes. Canada does not rely on any statutory limitation defence and took no part in the argument of this issue.

[228] The following questions are raised with respect to statutory limitation periods:

2000 CanLII 16991 (ON CA)

1. Does s. 22 of the Crown Liability and Proceedings Act incorporate any Ontario limitations statute in federal law?

2. Does the Nullum Tempus Act of 1769 have any application to this litigation?

3. Were the 1834 and 1859 pre-Confederation statutes continued under s. 129 of the Constitution Act, 1867 as if they were statutes of the Parliament of Canada or as if they were provincial statutes?

4. Did Parliament before 1982 have the power to extinguish treaty rights unilaterally by statute?

5. Do the 1834 and 1859 pre-Confederation statutes evidence the required intention to extinguish the Chippewas' aboriginal or treaty rights?

6. Did the colonial legislatures that enacted the 1834 and 1859 statutes have the power to extinguish aboriginal or treaty rights?

[229] It is only necessary to answer questions 1, 2 and 5 to dispose of the question of statutory limitation periods in this case. Our view, stated succinctly, is as follows. The applicability of the Crown Liability and Proceedings Act and the Nullum Tempus Act is dependent upon the argument that the Chippewas' claim against the landowners for the recovery of land is in effect a "proceeding by the Crown" within the meaning of either of these statutes. The simple answer is that it is not. In so far as the 1834 and 1859 limitation statutes are concerned, it is our view, regardless of the answers to the other questions, that the motions judge was correct in his conclusion that neither statute evidences the clear and plain intent necessary to extinguish aboriginal or treaty rights and that, consequently, the statutes do not affect the disputed lands.

B. The Crown Liability and Proceedings Act

2000 CanLII 16991 (ON CA)

[230] Section 32 of the Crown Liability and Proceedings Act, first enacted in the Crown Liability Act, S.C. 1952-53, c. 30 in a slightly different form, incorporates by reference the Ontario limitations laws with respect to proceedings by or against the federal Crown. It reads as follows:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

(Emphasis added)

[231] Since this statute only extends to the federal Crown, Ontario does not rely on this provision and, as stated earlier, Canada does not raise any limitations defence. It is therefore not necessary to consider the application of this provision to the Chippewas' action "against the Crown". The landowners, however, argue that the Chippewas' action is, in effect, a claim made on behalf of the federal Crown and hence "a proceeding by the Crown" within the meaning of s. 32. In support of this argument, the landowners rely on the Chippewas' pleadings wherein, amongst other relief, they claim vesting orders in the Crown in trust for the Band.

[232] The motions judge rejected this argument and, in our view, rightly so. The Chippewas' claim for recovery of the land is not "a proceeding by the Crown" regardless of the form of relief sought. Even if the fact that the Crown itself would be barred from claiming the same remedy from the landowners could arguably be relevant to the court's decision whether or not to grant the relief sought by the Chippewas, it does not turn the Chippewas' action into a "proceeding by" or on behalf of the Crown so as to trigger the application of s. 32.

C. The Nullum Tempus Act

2000 CanLII 16991 (ON CA)

[233] The Nullum Tempus Act of 1769 is lengthy and is drafted in the cumbersome legislative language of the time. However, it is not necessary for the purpose of these reasons to reproduce its terms nor to consider any of its precise language because there is no dispute as to what its effect would be if it were applicable. The Nullum Tempus Act barred actions and other proceedings by the Crown with respect to any land claim commenced more than 60 years after the cause of action accrued. If applicable, it would therefore bar any action by the Crown for the recovery of land commenced after 1913, 60 years after the issuance of the Cameron patent.

[234] Ontario and the landowners contend that the Nullum Tempus Act was in force in Upper Canada and Canada West from 1792 to the date of Confederation and that it was continued thereafter by s. 129 of the Constitution Act, 1867. They argue that the Chippewas' action for recovery of land on behalf of the Crown is therefore barred, having been commenced after 1913. The Chippewas do not dispute that the Nullum Tempus Act provides for a 60-year limitation period but they argue that the Act was not in force and that, in any event, it does not apply to their action.

[235] We do not find it necessary to determine whether the Nullum Tempus Act was in force during any part of the relevant period because, in our view, it has no application to the proceeding brought by the Chippewas. As stated earlier, this action is not a proceeding brought by or on behalf of the Crown. It is therefore not affected by the Act's provisions.

D. The 1834 and 1859 Pre-Confederation Limitation Statutes

[236] The 1859 statute re-enacted the earlier 1834 statute and the relevant provisions are identical. It is therefore only necessary to consider the language of the later statute. The relevant sections are 1 and 16, the first barring the remedy and the second extinguishing the right and title of ownership. They read as follows:

s. 1 And be it further enacted by the authority aforesaid,

2000 CanLII 16991 (ON CA)

That after the first day of July, one thousand eight hundred and thirty four, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same.

s. 16 And be it further enacted by the authority aforesaid, That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing an action or suit, the right and title of such person to the Land or Rent, for the recovery whereof such entry, distress, action or suit, respectively, might have been made or brought within such period, shall be extinguished.

[237] Hence, these provisions provide for a 20-year limitation period with respect to actions for the recovery of land. The equivalent sections are found in ss. 4 and 15 of the current Ontario Limitations Act, R.S.O. 1990, c. L.15, except that the period is now 10 years.

[238] It is common ground that, prior to 1982, Parliament could unilaterally extinguish aboriginal title by statute. It is also agreed that Parliament could only do so, however, by the use of clear and plain language. While it would appear from recent decisions of the Supreme Court of Canada that, contrary to the motions judge's finding, Parliament's power in this regard extended to the extinguishment of treaty rights as well (see R. v. Marshall, [1999] 3 S.C.R. 456 at p. 496, 178 N.S.R. (2d) 201), it is not necessary to decide the matter because there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test. In our view, it does not.

[239] The jurisprudence has evolved considerably in recent

2000 CanLII 16991 (ON CA)

years in the direction of narrowing the concept of extinguishment of aboriginal rights. In Delgamuukw, supra, Lamer C.J.C., in considering whether provincial laws of general application could extinguish aboriginal rights, referred to the "clear and plain" test in these words (at p. 1120 S.C.R.):

> . . . a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being ultra vires the province. That standard was laid down in Sparrow [[1990] 1 S.C.R. 1075] at p. 1099, as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (Gladstone, [[1996] 2 S.C.R. 723] at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

[240] If the pre-Confederation statutes are considered to be continued as if they were laws of Parliament, of course no issue arises as to the constitutional division of powers. Nonetheless, these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right. McLachlin J.'s comments in R. v. Van der Peet, [1996] 2 S.C.R. 507 at p. 652, 23 B.C.L.R. (3d) 1 (dissenting, but not on this point) are also helpful to understand what is required to meet the "clear and plain" test:

> For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain":

2000 CanLII 16991 (ON CA)

Sparrow, supra, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in United States v. Dion, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

[241] While in an appropriate case a general limitations statute can bar a claim for damages arising from the loss of aboriginal or treaty rights (see e.g., Blueberry River Indian Band v. Canada [Apsassin v. Canada (Department of Indian Affairs and Northern Development)], [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193), different considerations apply where it is contended that the statute itself extinguished the aboriginal or treaty right. In this case, we agree with the motions judge's conclusion (at paras. 595-96) that the 1834 and 1859 pre-Confederation limitations statutes did not evidence any intent to affect or to extinguish the aboriginal title or treaty rights of the Chippewas in the disputed land. Consequently, we would not interfere with the motions judges' conclusions.

[242] To summarize, we agree with the motions judge that there are no statutory limitations to bar the Chippewas' claims in this case.

VI. REMEDIES AND EQUITABLE DEFENCES

A. Introduction

[243] As we have concluded that there was no proper surrender and that the Chippewas' actions are not barred by any statutory limitation periods, the issue becomes whether, on the facts of this case, the Chippewas are entitled to the remedies they seek, namely, a declaration that the Cameron patent is void and a declaration that they are entitled to possession of the disputed lands. In particular, the issue is whether it is appropriate, in deciding whether or not to accord the Chippewas

2000 CanLII 16991 (ON CA)

a remedy, for the court to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Cameron patent.

[244] The issue of remedies and equitable defences, like the other issues in this case, has both public and private law dimensions. The aboriginal right asserted by the Chippewas has been described as sui generis in nature. The sui generis nature of aboriginal title reflects the interaction between traditional aboriginal values and those of European settlers and, consequently, aboriginal title is not readily classified in the conventional categories of the English common law tradition. In some respects, aboriginal title draws upon the concepts of public law. The rights it embraces are communal in nature and can only be understood in the context of the unique relationship between the Crown and the aboriginal community asserting the right. At the same time, aboriginal title has been held on the highest authority to be a right of property and it cannot be described or understood except in relation to the concepts of traditional common law private property rights.

[245] The remedies claimed by the Chippewas reflect the dual public and private law dimensions of aboriginal title. As against the Crown, the Chippewas impugn the validity of the exercise of the Crown prerogative, invoking the principles of public law and the remedies available to challenge the legality of governmental action. At the same time, the Chippewas assert a claim to a property right against the private citizens who are the present occupiers of the property, invoking the legal principles governing the reconciliation of competing claims to private property. It follows that defences bearing upon the availability of remedies in both the public and private law settings must be considered.

[246] As we have already noted, the issue of the Chippewas' right to damages against the Crown for breach of its aboriginal rights is not before us. The damages claim was not the subject of the motions for summary judgment and it was common ground that it would proceed to trial. Accordingly, we confine our attention to the Chippewas' claim for a remedy related to the return of the lands themselves and we do so on the basis that

2000 CanLII 16991 (ON CA)

the Chippewas have a right of action against the Crown for damages.

B. Public Law Remedies

[247] The Cameron patent was in the usual form and, on its face, was apparently valid. As is apparent from the record before us, it required extensive archival research to determine that there was any reason to suspect that there had not been a proper surrender of the lands covered by the patent. For well over 100 years, no one could have had any reason to doubt its validity.

[248] The patent was issued as an exercise of Crown prerogative. The issuance of Crown patents to land was a routine governmental act. A Crown patent has been accepted from the earliest days of European settlement until the present as the foundation for title to land. For almost 150 years, successive purchasers have bought lands that were included in the Cameron patent without having any reason to suspect that the patent, and consequently their root of title, was in any way defective.

[249] Public law remedies are derived from both common law and equitable sources. The common law remedies were the prerogative writs. While the prerogative writs have now been replaced by the statutory application for judicial review, the principles governing their availability continue to apply by analogy. Since the early years of the 20th century, the equitable remedy of the declaratory judgment has been an accepted public law remedy. Whatever their origin, public law remedies are discretionary in nature. As will be explained in greater detail below, delay in asserting a claim to a public law remedy, combined with reliance by innocent third parties on the impugned act or decision, is a well-established basis for refusing a remedy.

1. The prerogative writ of scire facias

[250] The common law prerogative writ to challenge the validity of a Crown patent, grant, charter or franchise was the

2000 CanLII 16991 (ON CA)

prerogative writ of scire facias: See Evans, de Smith's Judicial Review of Administrative Action, 4th ed. (London: Stevens, 1980) at p. 585; Wade and Forsyth, Administrative Law, 7th ed. (Oxford: Clarendon Press, 1994) at p. 615; 1(1) Halsbury's Laws of England (4th ed.) at para. 279. While today in Canada, the writ of scire facias is an unfamiliar relic of the common law's past, it was an accepted and recognized remedy in the 19th century. It was described in the following terms by the Judicial Committee of the Privy Council in The Queen v. Hughes (1865), 1 L.R. (P.C.) 81 at pp. 87-88 per Lord Chelmsford:

> The writ of Scire facias to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record. . . . All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of Scire facias. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For as was said by Chief Justice Jervis, in the case of The Eastern Archipelago Company v. The Queen [2 E. & B. 94] "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by Scire facias by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General.

[251] The writ of scire facias has fallen into disuse, but it is mentioned in de Smith and Wade, supra, as falling in the same category as the more familiar prerogative writs of certiorari, mandamus, prohibition and habeas corpus.

[252] In modern times, in the domain of administrative law, the prerogative writs have been replaced by statutory remedies for judicial review, yet the principles they embrace continue to apply. A party may no longer seek a prerogative writ to challenge the validity of official or governmental acts, but the availability of the modern remedy of judicial review will be determined by reference to the foundational principles

2000 CanLII 16991 (ON CA)

developed under the earlier regime of the prerogative writs.

[253] One of those foundational principles is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs. The fact that the writ of scire facias, like the other prerogative writs, were said to issue "as of right" did not detract from the court's discretion to grant relief to the party invoking its jurisdiction. There is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case. A person aggrieved is entitled "as of right" to invoke the writ to bring the matter before the court. It remains for the court to decide how to dispose of the complaint, and in deciding the matter, the court does have a discretion to exercise. This point is explained by Wade, supra, at p. 718: "the fact that a person aggrieved is entitled to certiorari ex debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy." Similarly, Beetz J. observed in Harelkin v. University of Regina, [1979] 2 S.C.R. 561 at pp. 575-76, 96 D.L.R. (3d) 14:

> The use of the expression ex debito justitiae in conjunction with the discretionary remedies of certiorari and mandamus is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.
>
> Ex debito justitiae literally means "as of right", by opposition to "as of grace" (P.G. Osborne, A Concise Law Dictionary, 5th ed.; Black's Law Dictionary, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue ex debito justitiae simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.

[254] The statement in Hughes, supra, that the writ of scire

2000 CanLII 16991 (ON CA)

facias issues "as of right" must be read together with the statement that the purpose of the remedy of scire facias is that grants of letters patent "may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons." If the patent may be repealed on scire facias, it must equally be the case that it may not be repealed or revoked even "when contrary to law".

2. The discretionary nature of public law remedies

[255] From the discretionary nature of the prerogative remedies, there has developed and ripened a general principle of Canadian public and administrative law. That principle received clear expression in Immeubles Port Louis Lte v. Lafontaine (Village), [1991] 1 S.C.R. 326, 78 D.L.R. (4th) 175. The case involved an action in nullity under the Code of Civil Procedure, R.S.Q., c. C-25, art. 33, to quash municipal by-laws that had adopted a loan scheme that also imposed a tax on property owners. The by-laws were attacked on the ground that the municipality had failed to give affected landowners the notice required by statute. It was argued that since the statutory procedure had not been followed, and the landowners had been denied the fundamental right to be heard, the by-laws had not been properly enacted and that they should be declared a nullity. The action was brought five years after the by-laws were enacted, after the municipal bonds had been issued and the improvements had bee n made. Writing for a unanimous court, Gonthier J. accepted the submission that the municipality's failure to give the required notice violated the audi alteram partem rule, and thereby rendered the by-laws vulnerable to review, but he held that the court had a residual discretion to refuse the remedy of a declaration of nullity. While the case involved detailed considerations of the principles developed under the Quebec Code of Civil Procedure, Gonthier J. made it clear that the direct action in nullity derived from the same inherent power exercised by the superior courts to supervise the legality of the acts of all public authorities. At p. 360 S.C.R., he described this inherent power of judicial review as "the cornerstone of the Canadian and Quebec system of administrative law" and as a "necessary consequence of the rule of law". At the same time, Gonthier J. emphasized that the

2000 CanLII 16991 (ON CA)

power of judicial review was "essentially discretionary" in nature.

[256] As Gonthier J. noted, the same point had been made in earlier decisions of the Supreme Court of Canada. In Harelkin v. University of Regina, supra, the court upheld the discretion of the superior courts to refuse certiorari on grounds of delay. See also Homex Realty and Development Co. v. Wyoming (Village), [1980] 2 S.C.R. 1011 at pp. 1034-35, 116 D.L.R. (3d) 1. In Friends of Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 at p. 77, 48 F.T.R. 160n, La Forest J. put it as follows:

> There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case . . .

[257] The underlying rationale for the discretionary nature of public and administrative law remedies in general, and the consideration of delay and its consequences for third parties in particular, reflects the polycentric nature of the rights and interests implicated. There is more at stake than the rights of the individual or group asserting the claim and the applicable legal principles must reflect that element. As explained by D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 3:1100:

> . . . the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. The public interest in good government, including the principle that it should be conducted according to law, has always been an equally important factor in the development of the law of judicial review.

[258] Apparently valid acts of public officials are relied

2000 CanLII 16991 (ON CA)

upon by the members of the public at large in planning their affairs. Official documents are taken at face value. The purported exercise of a statutory or prerogative power creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration. Accordingly, as explained by the Immeubles Port Louis case and by the leading texts, (see Brown and Evans, supra, at para. 3:5100; de Smith, supra, at p. 579; D.P. Jones and A.S. de Villars, Principles of Administrative Law, 3d ed. (Scarborough, Ont.: Carswell, 1999) at p. 583), a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision.

[259] A Crown patent, apparently granting the fee simple in land, provides a classic example of an official act that will be relied on by innocent third parties. A Crown patent is accepted by all as the basis for rights to real property and no purchaser would consider it necessary to go behind the patent to determine whether or not it had been validly granted. It is for this reason that the courts have for [so] long hesitated to invalidate patents that have created third party reliance. See, for example, Bailey v. Du Cailland, [1905] 6 O.W.R. 506 (Div. Ct.) at p. 508 per Falconbridge J.:

> It was held in McIntyre v. Attorney-General, 14 Gr. 86, that where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, although it may to some extent involve proof of a negative. 'Patents are not to be lightly disturbed. They lie at the foundation of every man's title to his property.'

[260] To a similar effect is the following statement from Fitzpatrick v. The King (1926), 59 O.L.R. 331 (C.A.) at p. 342 quoting from Boulton v. Jeffrey (1845), 1 E. & A. 111 (C.A.):

> It is difficult indeed to conceive a more prolific source of

2000 CanLII 16991 (ON CA)

> litigation than would be opened in this Province, if the patentees of the Crown were exposed to be attacked upon supposed equities acquired by other parties, while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the Crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this lies at the root of every man's title.

[261] The motions judge analyzed this aspect of the case in terms of whether the Cameron patent was "void". He held that the Cameron patent was "void". A "void" patent is said to be one that has no legal effect whatsoever, while a "voidable" patent is one that does have effect unless and until it is set aside. Whatever its merits for other purposes, the language of "void" and "voidable" seems to us to be not a particularly apt or helpful analytic tool in the present context. From a remedial perspective, the inherent discretion of the court is always in play. As Wade has explained, supra, at pp. 343-44, the term "void" is "meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation." Wade adds, at p. 718, in relation to the discretionary nature of judicial review, "a void act is in effect a valid act if the court will not grant relief against it." See also Jones and de Villars, supra, at p. 404. Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside. In our view, the issue is more clearly put and understood in terms of the discretion to grant or withhold a remedy and the factors that must be considered in relation to the exercise of that discretion. In fairness to the motions judge, it should be mentioned here that the arguments regarding the discretionary nature of public law remedies do not appear to have been presented to him with the same force and clarity as they were in this court.

3. Discretion and aboriginal rights

[262] The Chippewas submit that there is no place for the

2000 CanLII 16991 (ON CA)

exercise of discretion in the present case. Aboriginal property rights are fundamental constitutionally protected rights. We fully accept that courts do not have an open-ended discretion to enforce or deny aboriginal property rights as seems to suit the convenience of the case. In particular, it would plainly be wrong to deny a remedy to vindicate a valid claim to aboriginal title purely on the grounds that recognition of the claim would be troublesome to others: see R. v. Marshall, [1999] 3 S.C.R. 533 at p. 565, 179 N.S.R. (2d) 1.

[263] On the other hand, aboriginal rights are an integral aspect of the Canadian legal landscape. Their shape, definition and enforcement do not and cannot exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights: see R. v. Nikal, [1996] 1 S.C.R. 1013 at pp. 1057-58, 19 B.C.L.R. (3d) 201; R. v. Agawa (1988), 65 O.R. (2d) 505 at p. 524, 28 O.A.C. 201 (C.A.). As the Supreme Court of Canada has made clear, aboriginal rights "must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (R. v. Van der Peet, supra, at p. 539 S.C.R.) and "with the rest of Canadian society" (R. v. Gladstone, [1996] 2 S.C.R. 723 at p. 775, 23 B.C.L.R. (3d) 155). See also Delgamuukw, supra, at pp. 1065-66, 1096, 1100, and 1107-08 S.C.R. The same need for reconciliation between the aboriginal rights and the rights of the Crown and third parties is applicable in the case of treaty rights: R. v. Sioui, [1990] 1 S.C.R. 1025 at pp. 1070-72, 30 Q.A.C. 280. In aboriginal title cases, the rules of the common law tradition must be adapted and applied by analogy. Accordingly, as explained by Lamer C.J.C. in Van der Peet, supra, at pp. 550-51 S.C.R., "a court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each". The accommodation is to be done in a manner that does not strain "the Canadian legal and constitutional structure".

[264] Is it possible to reconcile the fundamental nature of aboriginal rights, and the overarching importance of according due recognition to those rights, on the one hand, with the

2000 CanLII 16991 (ON CA)

discretionary nature of public law remedies, on the other? The answer lies in the nature of the discretion that is involved. Simply put, the discretion is narrowly circumscribed, only to be exercised on the basis of established legal principles. As explained by Wade, supra, the "discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care." The discretion to grant or withhold a public law remedy does not mean that the court is free to do as it pleases with the case, without regard to the governing legal principles. The principle of legality and the rule of law require that a priori consideration be given to the party whose rights have been taken, especially where the rights at issue are as fundamental in nature as the right of aboriginal title. However, it is a basic principle of our legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim. It is for this reason that the established principles governing the availability of public law remedies require that, before a remedy is granted, consideration be accorded to the rights and interests of others who may have had every reason to rely upon the apparent validity of the impugned act.

[265] In Immeubles Port Louis, supra, at p. 370 S.C.R., Gonthier J. provided the following helpful analysis of this point:

> I would point out that discretion and arbitrary action should not be confused. While arbitrary action means power exercised at will, just as the person likes, discretion, though it removes the strict duty to act, is subject to certain rules. A judge hearing a direct action in nullity does not decide to do what he feels like doing, but must exercise his power of review in a judicial manner, direct himself correctly in law and observe the applicable principles.

[266] Gonthier J. went on, at p. 372 S.C.R., to explain the manner in which the discretion should be exercised:

2000 CanLII 16991 (ON CA)

First, the judge must take into account the nature of the disputed act, the nature of the illegality committed and its consequences, and second, the causes of the delay between the disputed act and the bringing of the action. The nature of the right relied on is a factor relevant to the exercise of the discretion, but it is not the only one. The court must also consider the plaintiff's behaviour.

[267] In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

4. Application of discretionary factors

[268] The first factor to consider is "the nature of the disputed act, the nature of the illegality committed and its consequences". See Immeubles Port Louis, supra, at p. 372 S.C.R. As our review of the facts demonstrates, the circumstances both before and after the grant of the Cameron patent plainly demonstrate acceptance and acquiescence on the part of the Chippewas. The facts are flatly inconsistent with any suggestion that the lands were taken, either by Cameron or by the Crown, without the acquiescence of the Band members. While the Chippewas' acceptance of the Cameron transaction does not amount to a formal surrender, it is a fact that may be considered in the exercise of the court's discretion to grant or withhold a remedy.

[269] In Immeubles Port Louis, supra, at p. 372 S.C.R., Gonthier J. indicated that the discretion to refuse a remedy

2000 CanLII 16991 (ON CA)

could be exercised "apart from situations where there is a total absence of jurisdiction". We do not accept the submission that the nature of the illegality committed here fell into that category or that it was sufficient to require a court to set aside the Cameron patent without taking into account third party interests. The Governor in Council had jurisdiction to grant patents and there was not "a total absence of jurisdiction". The error in failing to obtain a formal surrender was, in our view, akin to the failure of the municipality to provide its municipal electors with the required statutory notice. If anything, the error in the present case was less significant.

[270] While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings.

[271] The transaction did not occur without the interposition of the Crown between the Chippewas and Cameron to ensure that the Chippewas' interests were protected. The terms Cameron first negotiated with the Chippewas were not acceptable to Crown officials, who insisted that provision be made for the payment of interest on the unpaid portion of the purchase price. The transaction was approved by the Governor in Council. The consideration did not flow between Cameron and the Chippewas, but rather the proceeds were paid by Cameron to the Crown, held in trust for the Chippewas, and Cameron acquired his title by way of Crown patent.

[272] There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: "It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal for the Chippewas, and simply neglected to secure a surrender because it fell through the cracks in a dysfunctional

2000 CanLII 16991 (ON CA)

bureaucracy" (para. 752) (emphasis added). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties.

[273] The second factor is the nature of the delay and its consequences for third parties. We are not satisfied that there has been any adequate explanation for the delay that should lead us to excuse its impact. In assessing the delay, due consideration must be given to the motions judge's findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal claims until the late 1970s or early 1980s. However, the delay here went well beyond failure to take legal proceedings. The motions judge found that as early as 1851, the Chippewas knew that their lands had been taken without a formal surrender. The Chippewas knew that the lands had been sold, as confirmed by their inquiries about payment of the price. Despite the obvious fact that settlers were on what had formerly been reserve lands, there was not a whisper of complaint from the Chippewas. Moreover, w ith respect to other matters affecting their interests, the Chippewas demonstrated both the ability and the willingness to bring grievances to the attention of the appropriate officials. A court cannot ignore the fact that for more than 150 years, the Chippewas made no complaint whatsoever of the evident possession by others of lands formerly within their reserve. The Chippewas gave no indication of any dissatisfaction with that state of affairs and gave every indication that they fully accepted and acquiesced in the transfer of their lands. A delay of this nature and length brings the Chippewas' situation squarely within the category of case where, on established legal principles, the court will refuse to grant a remedy.

[274] The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of

2000 CanLII 16991 (ON CA)

remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third party reliance than that presented by the landowners.

[275] We have found that there was no proper surrender of the aboriginal title to the lands. As already mentioned, aboriginal title is a fundamental and constitutionally protected right. It will require exceptional circumstances for a court to withhold a remedy to protect or vindicate aboriginal title. For the foregoing reasons, we are persuaded that exceptional circumstances exist in the present case. The interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.

C. Private Law Remedies

[276] From the perspective of the private law of property, discretionary factors are traditionally associated with the determination of equitable claims and the availability of equitable remedies. Until the fusion of law and equity in the mid-19th century, a rigid line was drawn between law and equity, and discretion was associated with claims arising from equity as distinct from purely legal claims. That rigid dichotomy has since broken down, but historical factors continue to influence the applicability of equitable principles to claims traditionally associated with the common law. The issue to be addressed here is whether, from the private law perspective, the remedies claimed by the Chippewas are subject to the discretion traditionally associated with equity.

[277] The Chippewas submit that a finding that there was no surrender of the lands covered by the Cameron patent must inevitably lead to the conclusion that their aboriginal title

2000 CanLII 16991 (ON CA)

to the lands remains unextinguished and that they have a present entitlement to possession of the lands. The Chippewas rely on the nemo dat quod non habet principle--no one gives what he does not have. The Chippewas submit that as there was no surrender, the Crown had nothing to grant and that the Cameron patent did not and could not convey the fee simple to the lands unencumbered by the aboriginal title. The Chippewas contend that given the nature of aboriginal title, it is not subject to the discretionary factors governing the availability of equitable relief. There are two aspects to this submission. First, the Chippewas submit that aboriginal title is strictly legal rather than equitable in nature. Second, it is submitted that application of equitable doctrines to preclude the Chippewas' claim to the lands would constitute an unauthorized extinguishment of aboriginal title in favour of private interests, contrary to the fundamental rule that aboriginal title can only be surrendered to the Crown.

1. Equitable nature of remedies sought

[278] In our view, the Chippewas' position that equitable principles have no bearing upon their claim cannot be accepted. To the extent that the Chippewas claim the lands as distinct from damages, they assert a claim for an equitable remedy. Before the motions judge, the Chippewas asserted a claim for declaratory relief. In the factum filed on this appeal, the Chippewas reiterated that claim and sought as well an order requiring the Crown in right of both Canada and Ontario to enter negotiations with a view to resolving the Chippewas' claim. In oral argument before this court, Mr. Cherniak on behalf of the Chippewas maintained the position that the primary relief sought by the appellants was for a declaratory judgment, accompanied by a claim for an order directing the negotiations. However, Mr. Cherniak also pointed out that the statement of claim contained a claim for an immediate vesting order, and on behalf of his clients, he asserted that claim should this court consider that a declaratory order should not be granted on discretionary grounds.

[279] It is well established, and not disputed before us, that the remedy of a declaratory judgment is equitable in

2000 CanLII 16991 (ON CA)

origin and that its award is subject to the discretion of the court: see Hong Kong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167 at pp. 189-92, 6 Alta. L.R. (3d) 337; L. Sarna, The Law of Declaratory Judgments, 2d ed. (Toronto: Carswell, 1988), in particular at pp. 17-19; I. Zamir, The Declaratory Judgment (London: Stevens, 1962) at pp. 7-9; Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438, [1921] All E.R. Rep. 329 (H.L.); Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441 at pp. 481-82, 18 D.L.R. (4th) 481; Dyson v. Attorney General, [1911] 1 K.B. 410, 81 L.J.K.B. 217 (C.A.).

[280] The power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

(Emphasis added)

[281] Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed. (London: Sweet and Maxwell, 2000) at pp. 41-42. As explained by Proudfoot V.C. in Robertson v. Robertson (1875), 22 Gr. Ch. 449 at p. 456, the statute gives the court the power "to make a vesting order whenever it might have ordered a conveyance to be executed". Quite apart from its equitable origins, by the very terms of s. 100, the power to grant a vesting order lies in the discretion of the court. Cases decided under s. 100 explicitly refer to the power to grant a vesting order in discretionary terms: see Ontario Housing Corp. v. Ong (1988), 63 O.R. (2d) 799, 26 C.P.C. (2d) 139 (C.A.); Holmsten v. Karson Kartage Konstruction Ltd.

2000 CanLII 16991 (ON CA)

(1997), 33 O.R. (3d) 54 (Gen. Div.).

[282] Assuming, without deciding, that such an order could be made, an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right. However, such a remedy should be classified in the traditional terms of law and equity; its award must therefore necessarily be subject to the discretion of the court.

[283] In our view, the Chippewas cannot escape the fact that, from a private law perspective, they are claiming remedies that are discretionary in nature and subject to equitable defences.

2. Aboriginal title and equitable principles

[284] Nor do we accept the submission that a claim to aboriginal title is strictly legal in nature and immune from the overriding principles of equity, particularly where equitable remedies are being claimed.

[285] The Chippewas rely on recent decisions of the Supreme Court of Canada elaborating the nature of aboriginal title as a sui generis legal property right: see for example Guerin, supra, at p. 382 S.C.R.; Delgamuukw, supra, at pp. 1081-97 S.C.R. These statements must not be taken out of context. They reflect the repudiation by the Supreme Court of Canada of the view that aboriginal title is a mere interest, held by grace and at the pleasure of the Crown. The important recognition of the legally enforceable nature of aboriginal title does not, however, reflect a rigid classification of aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of a common law origin. By insisting that aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify aboriginal title in terms more relevant to the 19th century, pre-Judicature Act, pre-fusion of law and equity phase of our legal development.

2000 CanLII 16991 (ON CA)

[286] The submission that aboriginal title is a strictly legal interest, untouched and untouchable by equitable considerations, ignores several important factors. As stated above, the Supreme Court of Canada has insisted that aboriginal title must not be considered in the strictly formal and traditional terms of the common law tradition, but rather that it must be seen as sui generis in nature. The Supreme Court has also held that in aboriginal title cases there is a "necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle" (Guerin, supra, at p. 380 S.C.R.). The court has also stated that "native land rights are in a category of their own, and as such, traditional real property rules do not aid" and that courts "do not approach [a case involving assertion of aboriginal title] as would an ordinary common law judge, by strict reference to intractable real property rules" (St. Mary's Indian Band v. Cranbrook (City), [1997] 2 S.C.R. 657 at p. 667, 35 B.C.L.R. (3d) 218). Moreover, in this area, courts "must ensure that form [does] not trump substance" [p. 668 S.C.R.].

[287] There can be no doubt that the juridical character of aboriginal title has been influenced and shaped by equitable principles. The very nature of aboriginal title, in particular the core concept that aboriginal lands are inalienable except to the Crown, gives rise to a fiduciary duty. The fiduciary relationship imposed upon the Crown to deal with surrendered Indian lands for the benefit of the Indians is a central and fundamental aspect of aboriginal title. In Guerin, the case that identified and imposed the fiduciary duty upon the Crown, Dickson J. stated at p. 376 S.C.R. that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title."

[288] It is difficult to see why a right having these characteristics and drawing so heavily upon the principles of equity for its shape and definition should be entirely immune from the principles of equity from a remedial perspective. Surely, a sui generis right should draw freely upon all otherwise relevant principles of our law, whatever their historic origin. An analogy may be drawn from Cadbury Schweppes

2000 CanLII 16991 (ON CA)

Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142 at p. 179, 59 B.C.L.R. (3d) 1, where the sui generis nature of breach of confidence was found to support the argument for modifying the remedial strictures of the categories of common law and equity. Referring to the line of authority, discussed in the next paragraph, to the effect that "[e]quity, like the common law, is capable of ongoing growth and development," Binnie J. held that the authority to award damages is "inherent in the exercise of general equitable jurisdiction" and is no longer dependent upon the "niceties" of specific statutory authority to award damages in lieu of an injunction. He added, at pp. 179-80 S.C.R.:

> This conclusion is fed, as well, by the sui generis nature of the action. The objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach. To that end, the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation.

[289] To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law and equity by this court, [by] the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in LeMesurier v. Andrus (1986), 54 O.R. (2d) 1 at p. 9, 12 O.A.C. 299 (C.A.), with reference to the legislative direction that the courts "shall administer concurrently all rules of equity and the common law" (now found in the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 96(1)), "the fusion of law and equity is now real and total." In Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534 at p. 582, 61 B.C.L.R. (2d) 1, La Forest J. adopted Lord Diplock's assertion in United Scientific Holdings Ltd. v. Burnley Borough Council, [1977] 2 All E.R. 62, [1978] A.C. 904 at pp. 924-25 (H.L.) that the merger of law and equity is complete and that "the waters of the confluent streams of law and equity have surely mingled now."

[290] While no doubt the categories that were shaped by the

2000 CanLII 16991 (ON CA)

historical influences of common law and equity of law remain relevant for certain purposes, the spirit of the fusion of the two streams is the dominant theme and influence in the modern era. In our view, the modern conception of our private law as a fusion of equitable and legal principles provides added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. For these reasons, we reject the contention that the sui generis right of aboriginal title should be rigidly classified as falling exclusively into one of the historic streams of our legal history, completely immune from the influence of the other. Accordingly, as the Chippewas seek remedies that are discretionary in nature to vindicate a sui generis right that draws upon both common law and equitable sources, we conclude that it is appropriate to consider the effect of the Chippewas' 150-year delay in asserting a remedy and the consequent impact upon third parties of granting the Chippewas the remedies they seek.

[291] On the facts of this case, we do not accept the submission that holding the Chippewas bound by the rules that govern the availability of equitable remedies constitutes an unauthorized extinguishment of aboriginal title. First of all, it is the Chippewas who invoke the principles of equity by their claim for the remedies described above. It is difficult to see a case for granting those remedies other than on the well-established principles governing their availability. Second, as indicated in our analysis of public law remedies, we are satisfied that although formal surrender procedures were not followed, the purpose of the surrender procedure--to protect the aboriginal interest--was fully met by the interposition of the Crown in the Cameron transaction.

3. The nemo dat principle

[292] The Chippewas submit that as there was no surrender of aboriginal title to the Crown, the Crown had nothing it could grant to Cameron by way of patent. It follows, in the submission of the Chippewas, that the Cameron patent was void and that nothing was conveyed. We have already dealt with the submission that the patent was "void" and concluded that

2000 CanLII 16991 (ON CA)

established legal principles require the court to take into account the interests of innocent third parties before declaring a patent "void". In our view, the nemo dat principle, as it was applied to Crown patents, is entirely consistent with that view.

[293] An early Canadian case, Doe d. Malloch v. Principal Officers of Her Majesty's Ordinance (1847), 3 U.C.Q.B. 387 at p. 394 dealt with a patent of land already set aside for another purpose. The judgment of Robinson C.J. was to the effect that at common law, the question whether such a patent was void or voidable was unsettled, although he was inclined to the view that it was merely voidable.

[294] Other cases show that the nemo dat principle did not render void all Crown patents of lands to which the Crown lacked title. Alcock v. Cooke (1829), 130 E.R. 1092, 5 Bing. 340 (C.P.) states that in the case of the Crown, the nemo dat rule was based on the notion that in making a subsequent grant of lands the Crown had already conveyed to another, the Crown must have been deceived. As Crown grants were "enrolled", in other words, officially recorded, the subject had the means of determining what grants had been made and was under a duty to inform the King of the existence of the prior grant before accepting a subsequent grant. It followed that the recipient of the grant previously made to another could assert no claim under the subsequent grant. However, where the Crown granted lands that were not subject to an "enrolled" grant, the court stated that the doctrine had no application. The following example was given by Best C.J. at p. 349 Bing.:

> The attention of the court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where

2000 CanLII 16991 (ON CA)

the subject cannot be deceived, and he must be deceiving the king; for if the king's prior lease be enrolled, the subject has the means of knowing of the existence of that lease, and it is his duty to inform the king of its existence.

[295] These authorities show that competing claims between subjects were reconciled according to concepts akin to modern registry systems and equitable doctrines of constructive notice. The nemo dat principle did not automatically invalidate Crown patents. As we have already explained, where the validity of a patent is impugned, established legal principles require that the interests of innocent third parties must be considered.

4. Nature of discretion to be exercised

[296] Accordingly, it is our view that whether the case is considered from the perspective of public law principles or from the perspective of private law, the discretion of the court is engaged. The discretionary factors bearing upon the availability of public law remedies is closely paralleled by equitable considerations applicable as between private parties in respect of proprietary claims. As with public law remedies, the discretion to grant or withhold an equitable remedy is constrained and is closely defined by established principles. Although the tradition of equity requires that the decision-making process be described as discretionary, upon analysis, it is apparent that there are well-defined rules and doctrines that shape the decision and control the result. Discretion is, as Lord Mansfield explained in R. v. Wilkes (1770), 4 Burr. 2527 at p. 2539, [1558-1774] All E.R. Rep. 570, a "sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful but legal and regular." Birks, "Rights, Wrongs and Remedies" (2000) 20 Oxford Journal of Legal Studies 1 at p. 16 aptly describes the orders rooted in the Court of Chancery as "weakly discretionary" in that the court acts upon firm discretionary rules that have "been settled over the centuries".

5. Laches and acquiescence

2000 CanLII 16991 (ON CA)

[297] Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The test for these defences was explained in the following terms by La Forest J. in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6 at pp. 77-78, 96 D.L.R. (4th) 289:

> A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, [Equitable Doctrines and Remedies (Butterworths, 1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. . . .
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as in the case with any equitable doctrine.

[298] The doctrine of laches has been applied to bar the claims of an Indian band asserting aboriginal land rights: Ontario (Attorney General) v. Bear Island Foundation (1984), 49 O.R. (2d) 353 at p. 447, 15 D.L.R. (4th) 321 (H.C.J.) (affd on other grounds (1989), 68 O.R. (2d) 394, 32 O.A.C. 66 (C.A.), affd [1991] 2 S.C.R. 570, 46 O.A.C. 396); Wewayakum Indian Band v. Canada (1995), 99 F.T.R. 1 at pp. 77 and 79 [affd (1999), 171 F.T.R. 320n]. There are also dicta in two decisions of the Supreme Court of Canada considering, without rejecting,

2000 CanLII 16991 (ON CA)

arguments that laches may bar claims to aboriginal title: Smith v. R., [1983] 1 S.C.R. 554 at p. 570, 147 D.L.R. (3d) 237; Guerin, supra, at p. 390 S.C.R.

[299] The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here. In our view, those facts bring this case squarely within the principles governing laches set out in M. (K.) v. M. (H.), supra. The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the status quo. This is a situation that would be unjust to disturb.

[300] The motions judge refused to apply the defence of laches on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction and that "[i]t is clear from Guerin that laches cannot bar an aboriginal claim unless the claimant has knowledge of the actual terms of the disputed transaction." The relevant passage from Dickson J.'s judgment in Guerin appears at p. 390 S.C.R.:

> Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March 1970; and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

[301] On the facts of Guerin, the terms of the transaction were essential elements of the claim and without knowing the specific terms, which had been concealed by the Crown, the Band would not know it had a claim. The specific terms of the Cameron transaction are not an integral element of the Chippewas' claim in the present case. The claim is not based on

2000 CanLII 16991 (ON CA)

the terms of the transaction, but on the assertion that the lands were transferred without a proper surrender. At para. 653, the motions judge found that the Chippewas had full knowledge of the facts essential to their claim in the 1850s:

> The Chippewas knew by 1851 that their unsurrendered land was occupied openly and notoriously by disagreeable settlers. They confirmed this knowledge, and more, in 1855 by their inquiries about the price and terms of payment. About the actual loss of their land, as opposed to the particulars of the Cameron transaction, there was nothing hidden or unknown. By January 9, 1851 at the latest their loss was clear and obvious. They knew with certainty that the disputed lands had been taken from them without a surrender. There is no evidence as to the point in time that this knowledge was lost to the plaintiffs.

[302] In our view, this amounts to a finding that the Chippewas had knowledge of the facts necessary to assert a claim, and in view of that knowledge, Guerin is distinguishable. As we have already noted in the discussion of delay in relation to public law remedies, we are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds. On these facts, we can see no reason why the equitable defences of laches and acquiescence should not apply.

6. Good faith purchaser for value

[303] The second equitable doctrine that bears upon the claim advanced by the Chippewas is the protection accorded a good faith purchaser for value. As the motions judge held: "the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner." The motions judge described the defence in the following way (at paras. 686-87):

> The defence of good faith purchaser for value without notice

2000 CanLII 16991 (ON CA)

has been a fundamental element of our law for centuries. It protects the security of title to land acquired without notice of claim. It reflects a basic social value that protects the rights of innocent parties. Based in simple fairness, it provides a strong defence for the truly innocent purchaser. As Lord Justice James said over a hundred years ago in the case of Pilcher v. Rawlins [(1872), L.R. 7 Ch. App. 259 per Sir W. M. James, L.J. at p. 268]:

> . . . according to my view of the established law of this Court, such a purchaser's plea of purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in his plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase, and also the presence of the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

[304] Mellish L.J. in the same case said [at p. 273]:

The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice. . . .

[305] The motions judge found that while it was arguable that Cameron had knowledge of the failure of the Crown to secure a proper surrender of the lands, there was no evidence to suggest that any subsequent owner knew or ought to have known that the Cameron lands were unsurrendered Indian lands. Moreover, the

2000 CanLII 16991 (ON CA)

motions judge found that there was no evidence of equitable fraud on the part of Cameron that would defeat the operation of the defence in favour of those who acquired title from Cameron. He found that a prudent purchaser and conveyancer would consider that the Cameron patent, regular on its face, was a good root of title and would make no further inquiry.

[306] The good faith purchaser defence is an equitable doctrine and the Chippewas assert that their interest in the lands is a purely legal one not caught by purely equitable defences. For reasons already given, we do not accept this argument. To the extent that the Chippewas assert a claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences.

[307] The good faith purchaser for value defence applies to the benefit of any purchaser who satisfies its requirements. On the findings of the motions judge, all purchasers from Cameron, the last of whom acquired lands in 1861, were good faith purchasers for value. However, the motions judge held that a rigid and unqualified application of the defence to cut off the Chippewas' claims in 1861 was too drastic given the nature of the aboriginal claim that was being asserted. He concluded that the need to reconcile the aboriginal and treaty rights with the rights of the landowners precluded the immediate application of the defence as of 1861, and, relying on M. (K.) v. M. (H.), supra, he imposed an "equitable limitation period" of 60 years, during which the aboriginal right would survive. The practical implication of this finding was that the Chippewas' damages claim against the Crown would have crystallized in 1921 rather than in 1861.

[308] In our view, the imposition of a strict 60-year "equitable limitation period", extending the time within which the Chippewas could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence, is not supportable in law. A limitation period prescribes the time within which a claim must be brought. M. (K.) v. M. (H.) goes no further than affirming that, in some circumstances, to prescribe a claim that was concurrently legal and equitable, a court of equity would apply by analogy a legal

2000 CanLII 16991 (ON CA)

limitation period. Properly understood, the 60-year period created by the motions judge is not a limitation period at all. On the findings of the motions judge, the good faith purchaser defence would have defeated the Chippewas' claim in 1861. The 60-year period he imposed was an "extension period", suspending the operation of a valid defence, and allowing a claim to be asserted after the point at which, by operation of ordinary legal principles, it would have been d efeated. There is nothing in M. (K.) v. M. (H.), supra, that would support this.

[309] On the other hand, we accept that the factors that motivated the creation of the 60-year "equitable limitation period", namely, the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right. It is unnecessary to consider that possibility on the facts of the case before us. As we have concluded that the Chippewas accepted the terms of the Cameron transaction at the time it was entered, we can see no reason why the good faith purchaser for value defence should not be applied to preclude the Chippewas from asserting their claim against the landowners.

D. Conclusion on Remedies

[310] For these reasons, we conclude that established rules governing the availability of public and private law remedies require the court to take into consideration the Chippewas' delay in asserting [their] claim and the reliance of innocent third parties on the apparent validity of the Cameron patent. On the facts of this case, it is our view that the Chippewas' delay, combined with the reliance of the landowners, is fatal to the claims asserted by the Chippewas.

VII. DISPOSITION

[311] For these reasons, we would allow the appeals and cross-appeals by Canada, Ontario and the landowners and we

2000 CanLII 16991 (ON CA)

would dismiss the appeal by the Chippewas. Consequently, paras. 1, 2, 5 and 6 of the motions judge's order dated April 30, 1999 are set aside, and in substitution therefor, this court orders that:

1. The landowners' motion for summary judgment dismissing the Chippewas' claim in respect of the invalidity of the Cameron patent is allowed.

2. The Chippewas' motion for summary judgment in respect of the invalidity of the Cameron patent is dismissed.

[312] In all other respects, the judgment of the motions judge is confirmed. The parties can submit written submissions on costs and they are directed to confer with Goudge J.A. to make the necessary arrangements.

Order accordingly.

Notes

Note 1: The white man had various names for the Chippewas (Ojibway, Saulteux). In their own language, the Nation is referred to as Anishnabek. We will use the name Chippewas as it appears to be the appellation most commonly used in the record. We also use the words Indian, aboriginal and First Nations people interchangeably, as did the parties to the appeal.

Note 2: Chippewas of Sarnia Band v. Canada (Attorney General), [2000] O.J. No. 138 (C.A.).

Note 3: There is a dispute over whether Cameron paid the full amount of the principal owed and whether he paid all of the interest owed. The affidavit of James Wells traces the documentary record of the payments. This dispute will figure in the outstanding damages claim advanced by the Chippewas against the federal and provincial Crowns.

Note 4: In 1860, the imperial government approved provincial legislation transferring control over the Indian Department to the provincial government: An Act respecting the management of

2000 CanLII 16991 (ON CA)

the Indian lands and property, S.C. 1860, 23 Vict., c. 151.

Note 5: Some 80 years later in the Bagot Report ("Report on the Affairs of the Indians in Canada", Province of Canada, Journals of the Legislative Assembly of Canada, 1844-1845, Appendix eee), it was observed that the First Nations had kept a copy of the Proclamation and described it as their "Charter".

Note 6: The continued Crown policy against sale of Indian land to individuals is exemplified by Superintendent Jarvis' refusal to sanction a private sale of 100 acres of the Upper Reserve in 1841 despite the fact that the chiefs supported the sale.

Note 7: It appears that these two chiefs were allies of Wawanosh in November 1839, although at other times they were opposed in interest to Wawanosh.

Note 8: Jarvis also overstated the amount of land involved, indicating that Cameron had agreed to buy some 4,000 acres. In fact he had agreed to buy 2,540 acres. There is no explanation for the mistake.

Note 9: There is evidence that the policy of establishing permanent farming settlements on the reserves had the support of some 39 Chippewa chiefs in 1840. The Chippewas on the Upper Reserves had cleared some 100 acres for farming by 1841.

Note 10: There is a reference in a letter written by Cameron in February 1850 to a Council having been held. The motions judge dismissed this letter as a self-serving characterization of events some 11 years after the fact. That finding is not unreasonable.

Note 11: See supra, n. 3.

Note 12: The only document authored by a Chippewa was an August 22, 1840 letter from David Wawanosh, the teenage son of Chief Wawanosh. He went to school at Upper Canada College and spoke and wrote English. The letter expressed regret that the Chippewas had sold so much of their land to the white man, but

2000 CanLII 16991 (ON CA)

also affirmed commitment to the "civilization" policy.

Note 13: There is no indication in the evidence that Wawanosh favoured a survey of the entire reserve or would have agreed to the request that the entire reserve be surveyed.

Note 14: The Lords of Trade formed the committee of the Privy Council responsible for the conception, drafting and making of the Royal Proclamation.

Note 15: Section 25 provides in part:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1963 ...

Note 16: An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, entitled, An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever (1769), 9 Geo. III, c. 16 (U.K.).

Note 17: An Act to Amend the Law Respecting Real Property, and to Render the Proceedings for recovering possession thereof in certain cases, less difficult and expensive (1834), 4 Will. IV, c. 1 (U.C.).

Note 18: An Act respecting the Limitation of Actions and Suits relating to Real Property, and the time of prescription in certain cases, S.C. 1859, 22 Vict., c. 88.

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2000 CanLII 16991 (ON CA)

TAB 17

COURT OF APPEAL FOR ONTARIO

CITATION: Chuang v. Toyota Canada Inc., 2016 ONCA 852
DATE: 20161110
DOCKET: M46812 (C60102)

2016 ONCA 852 (CanLII)

Doherty, MacPherson and Miller JJ.A.

BETWEEN

Dr. Sylvester Chuang, HSC Holdings Inc., Transoriental Fine Cars Ltd., 1405768 Ontario Limited and Ontasian Enterprises Inc.

Plaintiffs
(Appellants/Respondents by Cross-Appeal)

and

Toyota Canada Inc.

Defendant
(Respondent/Appellant by Cross-Appeal)

Fred A. Platt, for the appellants/respondents by cross-appeal

Timothy Pinos, for the respondent/appellant by cross-appeal

Heard: In writing

ENDORSEMENT

[1] The appellants Dr. Sylvester Chuang and several related companies seek to re-open their appeal to this court of the decision of Spence J. of the Superior Court of Justice. The trial judge interpreted a commercial contract between the Chuang plaintiffs and the corporate defendant Toyota Canada Inc. ("Toyota").

Based on his interpretation of the contract, the trial judge dismissed the Chuang action: *Chuang v. Toyota Canada Inc.*, 2015 ONSC 885.

[2] The central issue at trial was whether Toyota's termination of the contract was reasonable. The trial judge held that it was not, but went on to hold that an exclusion clause referring to Toyota's exercise of its termination rights protected Toyota from any obligation to pay damages or other losses caused to Dr. Chuang by termination of the agreement.

[3] This court dismissed the appeal: *Chuang v. Toyota Canada Inc.*, 2016 ONCA 584.

[4] Now the appellants, with different counsel than trial and appeal counsel, seek to re-open the appeal on an entirely different ground not argued in the trial court or this court. The appellants say that Toyota did not terminate the contract; rather it repudiated it and a proper legal analysis relating to the law of repudiation of a contract would lead to a different result.

[5] The motion to re-open the appeal in this case must fail. The legal theory relating to repudiation was not raised at trial; indeed the word 'repudiation' is not employed in the Statement of Claim. Nor was it advanced as a legal argument. In his opening argument, the plaintiffs' trial counsel said:

> It's the plaintiffs' position, Your Honour that Toyota's conduct was tantamount to a breach of contract; that it

2016 ONCA 852 (CanLII)

> acted unreasonably and in bad faith in *terminating* the amended LOC and that they breached the very terms of the LOC by failing to give appropriate notice; and in any event they can't rely on their own conduct in misleading the Plaintiffs, and that as a result of their wrongful *termination* the Plaintiffs are entitled to damages. [Emphasis added.]

[6] The same point applies on the appeal. In both written and oral argument, the 'repudiation' argument was entirely absent. As explained by L'Heureux-Dubé J. in *R. v. Brown*, [1993] 2 S.C.R. 918, at p. 923:

> Courts have long frowned on the practice of raising new arguments on appeal. The concerns are two-fold: first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue. [Citations omitted.]

While L'Heureux-Dubé J. was writing in dissent, the majority did not take issue with this part of her judgment. See also: *College of Optometrists of Ontario v. SHS Optical Ltd. (c.o.b. Great Glasses)*, 2008 ONCA 685, 93 O.R. (3d) 139, at para. 90 and *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

[7] A party seeking to re-open an appeal after the appeal decision has been rendered faces a high hurdle. After more than 10 years of litigation, it would be unfair to permit the appellants to re-open their appeal on a different legal issue. In *Mujagic v. Kamps*, 2015 ONCA 360, 125 O.R. (3d) 715, at para. 12, this court said that the power to re-open an appeal "will be exercised sparingly and only

2016 ONCA 852 (CanLII)

where it is clearly in the interests of justice" (citation omitted). It is not in the interests of justice that this appeal be re-opened.

[8] The motion is dismissed with costs to the respondent.

"Doherty J.A."
"J.C. MacPherson J.A."
"B.W. Miller J.A."

2016 ONCA 852 (CanLII)

TAB 18

COCK v. LABOUR RELATIONS BOARD

British Columbia Court of Appeal, O'Halloran, Smith and Davey, JJ.A. November 7, 1960.*

1960 CanLII 293 (BC CA)

A. W. Mercer, for appellant.

C. G. Robson, and *C. M. Jeffrey,* for respondent.

O'HALLORAN, J.A.:—I would allow the appeal and dismiss the motion for the reasons given by my brother Davey with whose reasons for judgment I am in entire agreement.

DAVEY, J.A.:—This is the judgment of the Court delivered pursuant to s. 26(2) of the *Court of Appeal Act,* R.S.B.C. 1948, c. 74, and amending Acts, Sidney Smith, J.A., having died after the hearing of the appeal and before the judgment of the Court was delivered.

The Canadian Brotherhood of Railway, Transport and General Workers, Local 400, applied to the Labour Relations Board to be certified under s. 10(1) and 12 of the *Labour Relations Act,* 1954, (B.C.), c. 17, as representative for a unit of employees of Black Ball Ferries Ltd., then represented by the Seafarers' International Union of North America, Canadian District. The application was based on the claim of the local that the majority of the employees in the unit, namely 90 out of 135, belonged to it and were members in good standing.

Section 8 of the Regulations passed under the Act provides

*Smith, J.A., died after the hearing of the appeal and before judgment.

that for this purpose a member in good standing is a person who has at the date of the application for certification signed an application for membership and has himself paid the specified union dues.

On the formal hearing before the Board the local led evidence under oath that some 85 employees out of the 90 had signed application cards for membership in the local and had themselves paid the dues required by Reg. 8. Specifically, it was testified that six Chinese, included in the 85 members, had themselves paid the necessary dues, and their signed applications and the receipts issued to them for the dues were filed with the Board. The Seafarers' Union, in its turn, called the six Chinese and each swore that he had not paid those dues. None of the other 79 employees were called to give similar testimony, although the Seafarers' Union claims that others were there if the Board wanted to hear them. The Board had also the information elicited by its own investigation of the application.

The Board formally rejected the application for certification on the ground, sufficiently supported by the evidence before it, that:

> The Board is satisfied that membership in good standing has been falsely represented by the applicant as, contrary to the evidence submitted by the applicant, in the opinion of the Board the necessary dues or initiation fees had not in fact been paid on their own behalf before the date of application by all who were claimed as members in good standing [of the applicant].

The local, and Cock acting on behalf of its officers and members pursuant to its authority, then moved for writs of *certiorari* and *mandamus* to quash the decision of the Board and to require it to certify the local as the representative of the unit, or alternatively to order a representation vote by the employees in the unit, or, in the further alternative, to direct the Board to hear and determine the application according to law.

The substantial grounds for the motion were that even if the six Chinese had not themselves paid the necessary dues and so were not members in good standing of the local, it still had as members in good standing the majority of the employees in the unit, which entitled it to certification; also, that s. 12(3), (4) and (5), requires the Board to dispose of the application for certification in one of three ways: in the case of doubt by directing that a representation vote be taken; by certifying the applicant if satisfied that the majority of the employees are members in good standing; or, by refusing certification if satisfied the majority are not mem-

1960 CanLII 293 (BC CA)

500

bers in good standing. It is submitted that the Board did none of those things and so did not discharge its statutory duty, but rendered a decision which it could not lawfully make.

The learned Judge below upheld those objections, quashed the decision and directed the Board to hear and determine the application according to law.

The Labour Relations Board appeals.

I find it unnecessary to consider the reasons upon which the learned Judge proceeded. While the point was not taken below, in my respectful opinion, these writs should not be granted, even upon grounds otherwise legally sufficient, to applicants who in the matters before the Board have committed the fraud, trickery, and apparently perjury, found against the respondents here.

I would allow the appeal and dismiss the motion.

Appeal allowed.

1960 CanLII 293 (BC CA)

TAB 19

Citation: DeFehr v. DeFehr 2002 BCCA 139 Date: 20020220 Docket: CA028740
Registry: Vancouver
COURT OF APPEAL FOR BRITISH COLUMBIA
ORAL REASONS FOR JUDGMENT
Before:
The Honourable Madam Justice Newbury February 20, 2002
The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine
Vancouver, B.C.

BETWEEN:
MOIRA ANN DEFEHR
also known as MOIRA ANN HUBBARD
PLAINTIFF
(RESPONDENT)
AND:
CURTIS WADE DEFEHR
DEFENDANT
(APPELLANT)

C.W. DeFehr	Appellant appearing on his own behalf
F. Nudel	appearing for the Respondent
T. Mason	appearing for the Attorney General of British Columbia

[1] **LEVINE, J.A.**: This application is for review of an order made by Lambert J.A. on December 4, 2001, dismissing the appellant, Curtis Wade de Fehr's, application for funding for counsel to assist with his appeal and the cost of transcripts. The appeal is from orders for custody and access of the four children of him and the respondent, Moira Ann Hubbard (also known as Moira Ann DeFehr), made by Loo J. in March and June, 2001.

[2] The appellant was granted indigent status by Rowles J.A. on August 14, 2001. He then brought an application for funding for counsel and the cost of transcripts for the appeal. On October 25, 2001, Mackenzie J.A. ordered that the Attorney General provide funding for counsel designated by the Legal Services Society to argue the application, and set the matter to be heard peremptorily for December 4, 2001.

[3] On December 4, the appellant appeared without counsel. He claimed that the Attorney General's department delayed the process and did not produce the required certificate on time. Lambert J.A. said that "on balance it was Mr. DeFehr who made it difficult to get counsel appointed." When asked whether he wanted to proceed with the application for counsel, the appellant responded that because of the interests of the children he did not wish to delay and wished to proceed with the argument. Counsel for the Attorney General and the respondent provided some information and outlined the basic nature of the case.

2002 BCCA 139 (CanLII)

[4] Lambert J.A. said (at para. 6):

> Mr. DeFehr's argument did not seek to make the very difficult points in relation to s. 7 and s. 11 of the ***Charter of Rights.*** I would not be quick to assume that any rights could be established and, indeed, Ms. Mason has said that the Attorney General very much opposes the argument that there are any rights to public funding in this kind of matter, or that there is any basis in the ***Charter*** for supporting such rights.

[5] He continued (at para. 7):

> Balancing the interests of justice and bearing in mind the particular interests of the children, and the uncertainty caused by this appeal to them, and having regard to the fact that the points in the appeal are entirely different from the points on this application...it is my opinion that the application for funding of the legal services of the appellant in the appeal itself should be dismissed, and I so order.

[6] A review of the decision of a chambers judge by a panel of this Court is not a rehearing of the original application. The test for review is: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge: ***Ward v. Clark***, [2001] B.C.J. No. 901 (C.A.)(QL), 2001 BCCA 264 (Donald J.A.); ***Haldorson v. Coquitlam (City)*** (2000), 3 C.P.C. (5th) 225, [2000] B.C.J. No. 2532 (C.A.)(QL) (Lambert J.A.).

[7] The appellant claimed, in oral submissions on this review, that he has been "wronged by the state" in the course of the litigation between him and the respondent concerning the custody and access of the children. He alleges that Loo J. and other judges and masters were biased and denied him fundamental justice, including the right to call witnesses and make his arguments in interlocutory applications and at trial. None of these allegations are set out in affidavit form, and many of them were not before Lambert J.A.

[8] The appellant provided a number of authorities in support of his application for funding for counsel to argue his appeal, but the only one really on point is ***New Brunswick (Minister of Health and Community Services) v. G.(J.)***, [1999] 3 S.C.R. 46. In that case, the Supreme Court held that an application **by a government** for custody of children threatens the parent's right to security of the person, protected by s. 7 of the ***Charter***, and in the circumstances of that case, would not be in accordance with fundamental justice if the parent was unrepresented at the hearing. The Court is clear that the threat to security derives from **state action**: "direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere" (para. 61 per Lamer C.J.). Whether the parent's right to a fair hearing is compromised by not having counsel to represent him or her must be determined in the circumstances of the particular case, taking into account: the seriousness of the interests at stake, the

2002 BCCA 139 (CanLII)

complexity of the proceedings, and the capacities of the appellant (para. 75 per Lamer C.J.).

[9] Thus, following **G.(J.)**, the appellant in this case has two hurdles to establish a constitutional right to counsel. First, he must establish, which he cannot, that this case involves **state action** that interfered with his relationship with his children. This case is a private dispute between two parents as to which of them will have custody and the terms of access. The ***G.(J.)*** case is not authority for the proposition that one parent has a constitutional right to parent in relation to the other. The question is which of them can best provide for the best interests of the children, taking into account all of the relevant factors, which are set out in the applicable statutes, the ***Divorce Act*** and the ***Family Relations Act***. Allegations that the actions of the judiciary violated his constitutional rights do not provide a basis for claiming a right to state funding of counsel.

[10] Furthermore, this Court made it clear in ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, [2001] B.C.J. No. 2279 (C.A.)(QL), 2001 BCCA 647, that there is no "constitutional right to provincially-funded legal fees and the courts do not have jurisdiction to order same" (at para. 36).

[11] Second, even if the appellant could show that his constitutional rights were violated in any way, the evidence before this panel does not establish that, taking into account the seriousness of the interests at stake concerning the appellant's relationship with his children, the complexity of the proceedings and the capacity of the appellant, his right to a fair hearing on his appeal would not be met if counsel were not appointed to represent him.

[12] In my view, there is no basis to interfere with Lambert J.A.'s decision to dismiss the appellant's application for funding for counsel.

[13] The appellant's application for funding for transcripts is similarly without merit. The ***Court of Appeal Rules*** make it clear that an appellant must provide copies of a transcript of any oral evidence that is required for the appeal (Rule 6). Rule 40(5) of the ***Supreme Court Rules***, which provides that "in an action", the court may order that a transcript be prepared at the expense of the Crown where the cost would be a hardship on a party, does not apply to an appeal. In any event, any such order would be discretionary and not reviewable by this Court unless the discretion were not properly exercised. There is no basis for review of Lambert J.A.'s decision to dismiss the appellant's application for funding for transcripts in this case.

[14] I would dismiss the application for review and confirm the order of Lambert J.A. that the appeal should proceed on the merits in strict compliance with the ***Rules*** without further delay.

[15] NEWBURY, J.A.: I agree.

[16] HALL, J.A.: I agree.

2002 BCCA 139 (CanLII)

[17] NEWBURY, J.A.: The application is dismissed.

"The Honourable Madam Justice Levine"

2002 BCCA 139 (CanLII)

TAB 20

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *First Majestic Silver Corp. v. Davila Santos,* 2012 BCCA 5

Date: 20120106
Docket: CA038977

2012 BCCA 5 (CanLII)

Between:

First Majestic Silver Corp., First Silver Reserve Inc. and Minera el Pilon, S.A. de C.V.

Respondents
(Plaintiffs)

And

Hector Davila Santos and Minera Arroyo Del Agua, S.A. de C.V.

Appellants
(Defendants)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, March 25, 2011
(*First Majestic Silver Corp. v. Davila*, 2011 BCSC 362)

Counsel for the Appellants: D. P. Church, Q.C. and M. W. Bühler

Counsel for the Respondents: B. Cramer

Place and Date of Hearing: Vancouver, British Columbia
December 6, 2011

Place and Date of Judgment: Vancouver, British Columbia
January 6, 2012

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice Bennett

2012 BCCA 5 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The defendants appeal an order of a chambers judge striking out a paragraph of their statement of defence and denying the defendants leave to amend their statement of defence to include certain proposed amendments.

[2] The judge made his ruling under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* on the basis that the proposed defences were bound to fail.

[3] For the reasons that follow, I agree with the conclusions of the judge and would dismiss the appeal.

Background

[4] The pleadings in this action are complex but, as I understand it, the main thrust of the claim is that the defendants wrongfully appropriated a corporate opportunity of the plaintiff, First Silver Reserve Inc. ("First Silver"), when, in August 2007, the defendant, Minera Arroyo Del Agua S.A. de C.V. ("Minera Arroyo"), acquired a silver mine and mill in Mexico known as the Bolaños property. The claims pleaded by the plaintiffs include breach of fiduciary duty, breach of trust, breach of statutory duties, fraud, interference with economic interests, conspiracy and misrepresentation.

[5] The defendant, Hector Davila Santos, had been the majority shareholder and a director and officer of First Silver. In 2004, Mr. Davila Santos learned that the owner of the Bolaños property was interested in selling it and there were negotiations between him and the owner. The plaintiffs plead that Mr. Davila Santos conducted the negotiations on behalf of First Silver and its wholly owned subsidiary, the plaintiff, Minera el Pilon, S.A. de C.V. The defendants plead that these negotiations were conducted on the understanding of First Silver's directors that, if

First Silver was not willing or did not have sufficient funds to purchase the Bolaños property, Mr. Davila Santos was free to purchase it for his own account.

[6] In April 2006, the plaintiff, First Majestic Silver Corp. ("First Majestic"), entered into a share purchase agreement with Mr. Davila Santos for the purchase of all of his shares in First Silver. Half of the purchase price was payable on the closing of the transaction with the other half of the purchase price payable in equal instalments on the first and second anniversaries of the closing. The plaintiffs plead that Mr. Davila Santos misrepresented to First Majestic that he was personally entitled to acquire the Bolaños property, in order to induce it to agree to a clause in the share purchase agreement stating that he had an interest in the Bolaños property (and giving First Majestic a right of first refusal in respect of the negotiation and purchase of the property). The share transaction closed on May 30, 2006, and Mr. Davila Santos ceased to be an officer and director of First Silver shortly thereafter.

[7] The plaintiffs plead that First Majestic came to understand in July 2006 that Mr. Davila Santos did not have a personal right to acquire the Bolaños property and that it was a corporate opportunity of First Silver.

[8] The Bolaños property was acquired by Minera Arroyo under an agreement entered into in August 2007. The defendants admit that Minera Arroyo is owned by Mr. Davila Santos and members of his family.

[9] After First Majestic became the majority owner of First Silver, it did two things that are relevant to the proposed defences in question. First, it raised funds through public offerings in order to make payments due under the share purchase agreement and, in that regard, it issued prospectuses in July 2006 and May 2007. Secondly, it acquired the shares of the minority shareholders of First Silver by way of a plan of arrangement approved by the Supreme Court of British Columbia on September 8, 2006. The minority shareholders exchanged their shares in First Silver for shares in First Majestic on a two-for-one basis, and First Silver became a wholly owned subsidiary of First Majestic.

2012 BCCA 5 (CanLII)

[10] Neither the prospectuses nor the documents relating to the plan of arrangement made reference to First Silver having an interest in, or a cause of action relating to, the Bolaños property. First Silver provided a letter dated August 2, 2006 to the firm preparing the fairness opinion in respect of the plan of arrangement stating that there had been no irregularities involving First Silver, its directors or management.

[11] In their statement of claim, the plaintiffs plead that First Majestic and First Silver should be regarded as "one business enterprise" and that Mr. Davila Santos' violations of fiduciary duties to First Silver should be regarded as violations of fiduciary duties owed to First Majestic.

The Proposed Defences

[12] The following is the paragraph in the statement of defence struck by the chambers judge:

> 41A. In order to make the May 30, 2007 payment, First Majestic was required to go into the public markets to borrow funds. Despite intending to assert that Davila Santos had acted "fraudulently", First Majestic, through its senior representatives, including Neumeyer, failed to disclose this information to First Majestic's potential shareholders in its Prospectus, despite, a statutory obligation that it make full, true and plain disclosure, therein.

[13] The following are the proposed paragraphs that the chambers judge did not allow to be included in the amendments sought by the defendants:

> 39A. As a result of FSR's conduct set out in paragraphs 38 to 39 herein, while in possession of the knowledge identified in paragraphs 24D, 28, 31A, 31E, 31G, 31I and 31J herein, the Plaintiffs can not bring or maintain the claims made in the Second Further Amended Statement of Claim, for the following reasons:
>
> a. FSR brought a proceeding in the Supreme Court of British Columbia and obtained an order which approved the Plan of Arrangement as being fair to the shareholders of FSR and binding on FSR and its shareholders. The evidence and other materials put forward by FSR in support of the relief sought on that proceeding, explicitly or implicitly, included statements to the effect that (1) there had been no material wrongdoing by the past directors of FSR, and (2) that a claim to or in relation to the Bolanos Property was not an asset of FSR. In the

2012 BCCA 5 (CanLII)

> circumstances, these issues are *res judicata*, and it is an abuse of process for FSR to make the claims that it is now making in the within proceeding against the Defendants. Furthermore, FSR is estopped from now making such claims against the Defendants.
>
> b. by taking the steps necessary to conclude the Plan of Arrangement, including by seeking and obtaining the approval of its shareholders – including Davila Santos, who remained a shareholder of FSR – for the Plan of Arrangement without stating that (1) there had been material wrongdoing by Davila Santos against FSR, and (2) that a claim to or in relation to the Bolanos Property was an asset of FSR, FSR has acquiesced in and/or waived and/or ratified the conduct that forms the basis for its claims against the Defendants in this action, thereby precluding FSR from making such claims. Furthermore, FSR is estopped from making such claims in this proceeding; and
>
> c. in the circumstances pleaded above, the Plaintiffs lack clean hands to seek equitable relief in relation to claims of wrong-doing by the Defendants in relation to the Bolanos Property.
>
> * * *
>
> 41.1 In order to have sufficient funds to pay to Davila Santos the full amount due to him on closing of the Share Purchase Agreement, First Majestic was required to go into the public markets to raise funds. First Majestic issued its final prospectus for this financing on or about July 19, 2006. Despite intending to assert that Davila Santos had acted "fraudulently", First Majestic, through its senior representatives including Neumeyer, failed to disclose this information to First Majestic's potential investors in its prospectus, despite a statutory obligation that it make full, true and plain disclosure therein.

[14] In addition, the chambers judge did not allow amendments to para. 70 of the statement of defence to the extent that it relied on the facts pleaded in the proposed para. 41.1 to support defences of waiver, acquiescence, estoppel and lack of clean hands.

[15] The defendants also sought to add paras. 41B and 41C to their statement of defence. These paragraphs related to lack of disclosure to stock exchanges. The defendants are not appealing from the judge's order to the extent that he refused to allow these paragraphs to be added to the statement of defence.

[16] The defendants are also not appealing from the judge's order to the extent that he found the proposed defences of *res judicata*, estoppel and acquiescence

2012 BCCA 5 (CanLII)

alleged in proposed para. 39A were bound to fail. The appeal is restricted to the proposed defences of abuse of process, waiver, lack of clean hands and ratification.

Discussion

[17] I wish to make two observations before considering the proposed defences in detail. In proposing the defences, the defendants are relying on non-disclosure in the two prospectuses in question and in the proceeding in which the plan of arrangement was approved (the "plan approval proceeding"). This does not involve a consideration of whether the non-disclosure gives rise to claims in favour of investors who participated in the two First Majestic financings or the minority shareholders of First Silver. Whether the non-disclosures could give rise to such claims is irrelevant to the question of whether the defendants should be allowed to put forward these defences.

[18] The second observation is that none of the proposed defences goes to the merits of the allegations made by the plaintiffs. The position of the defendants is that the proposed defences give them defences to the plaintiffs' claims or the relief sought, in whole or in part, even if the plaintiffs' allegations are true.

[19] In striking paragraph 41A and refusing the application of the defendants to add paragraphs 39A and 41.1, the chambers judge applied the well-known test articulated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 74 D.L.R. (4th) 321; namely, "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" Of course, this test was expressed in the context of a claim being struck from a statement of claim. In the context of a possible defence being struck from a statement of defence, the test is whether it is plain and obvious that the pleading does not disclose a reasonable defence.

[20] The Supreme Court of Canada recently had occasion to comment on motions to strike in *R. v. Imperial Tobacco Canada Ltd.* (*sub. nom. British Columbia v. Imperial Tobacco Canada Ltd.; Knight v. Imperial Tobacco Canada Ltd.*), 2011 SCC

2012 BCCA 5 (CanLII)

42, 335 D.L.R. (4th) 513. Chief Justice McLachlin made, among others, the following comments:

> [17] ... A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15, 233 D.L.R. (4th) 193; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, 74 D.L.R. (4th) 321. Another way of putting the test is that the claim has no reasonable prospect of success.
>
> * * *
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging ... Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455, 18 D.L.R. (4th) 481. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*).
>
> * * *
>
> [25] ... The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

Again, of course, these comments were made in the context of a motion to strike a claim and must be adapted to the present situation where it is a pleaded defence and a proposed defence that are under consideration.

[21] With these principles in mind, I will now consider whether it is plain and obvious that the potential defences of abuse of process, waiver, lack of clean hands and ratification have no reasonable prospect of success on the basis of the pleaded facts in relation to the plan approval proceeding and the two prospectuses in question.

2012 BCCA 5 (CanLII)

(a) Abuse of Process

[22] The doctrine of abuse of process is a very broad and flexible mechanism to enable judges to prevent abuses of the court's process. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35, the Supreme Court of Canada adopted descriptions of the concept of abuse of process as proceedings "unfair to the point that they are contrary to the interest of justice" and "oppressive treatment".

[23] The concept of abuse of process is used in a variety of contexts. For example, in *Toronto (City) v. C.U.P.E., Local 79,* it was used to prevent an attempt to relitigate an issue which had already been adjudicated upon in circumstances where the requirements of the doctrine of issue estoppel had not been met. In the present case, the defendants say the doctrine of abuse of process should be used to prevent the plaintiffs from bringing a subsequent action based upon allegations that are inconsistent with allegations made in support of a previous action (being the plan approval proceeding).

[24] The defendants submit the chambers judge erred in focusing on the concept of an election between inconsistent rights rather than on the type of mischief prevented in the case of *Vanmills Establishment v. Coles* (1992), 8 C.P.C. (3d) 178 (B.C.S.C. Chambers). In that case, a former shareholder of a bankrupt company had sued the trustee in bankruptcy, alleging that his negligence and wrongdoing had caused loss to the former shareholder when he sold his legal and beneficial interest in his shares to Mr. Coles. The former shareholder then sued Mr. Coles alleging that he held the beneficial interest in the shares in trust for the former shareholder. In dismissing the second action, Mr. Justice Cohen said the following:

> [10] This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that, in the case of inconsistent rights, a plaintiff's

2012 BCCA 5 (CanLII)

> irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in *Scarf v. Jardine* (1882), 7 App. Cas. 345, 30 W.R. 893 (H.L.) and *Ashmore v. Bank of British North America* (1913), 4 W.W.R. 1014, 18 B.C.R. 257, 13 D.L.R. 73 (C.A.).

[25] In *Vanmills Establishment*, Cohen J. made reference to an election having been made, and there is jurisprudence that supports the notion that the doctrine of election governs this type of situation: see, for example, *Commonwealth Investors Syndicate Ltd. v. Laxton* (1992), 15 B.C.A.C. 282, 68 B.C.L.R. (2d) 145, and *Allnorth Consultants Limited v. Tercon Construction Ltd.*, 2010 BCCA 570, 79 B.L.R. (4th) 238, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 78. However, there is support for the defendants' position that this type of defence falls under the rubric of abuse of process. In *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480, 10 Alta. L.R. (5th) 260, Mr. Justice Brooker considered the existence of inconsistent allegations within the context of the court's inherent jurisdiction to prevent abuses of the court's process. He expressed the principle in the following terms:

> [49] In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[26] The flaw in the defendants' position is that there were no statements made in the plan approval proceeding that are inconsistent with the allegations in this action. There was simply no mention in the plan approval proceeding of the Bolaños property or a possible claim against the defendants. Silence does not equate to a representation or an allegation that First Silver did not have any interest in the Bolaños property or that First Silver did not have a cause of action against the defendants. None of the allegations made in this action is inconsistent with any statement in the materials filed in the plan approval proceeding.

[27] The defendants rely on the fact that First Silver provided to the firm which prepared the fairness opinion on the plan of arrangement a letter stating that there had been no irregularities involving First Silver, its directors or management. Mr. Davila Santos was no longer a director of First Silver at the time of the plan of

2012 BCCA 5 (CanLII)

arrangement, and this letter cannot reasonably be construed as a comment on the actions of past directors.

[28] The chambers judge commented that the "plan of arrangement and the lawsuit can quite easily stand together without clashing" (para. 37). So too can the materials filed in the plan approval proceeding and the allegations in this lawsuit quite easily stand together without clashing. This is not a situation of diametrically inconsistent facts or irreconcilable positions. In my view, the defence of abuse of process has no reasonable chance of succeeding in these circumstances, and it is plain and obvious that it is bound to fail.

(b) <u>Waiver</u>

[29] The defendants wish to rely on the defence of waiver in relation to both the plan of arrangement and the prospectuses.

[30] The availability of the defence of waiver was described by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 500, 115 D.L.R. (4th) 478:

> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them.

Mr. Justice Major, for the Court, also commented at 501 that, while hard and fast rules for what constitutes waiver should not be proposed, the "overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party".

[31] Here, there is no pleading that the plaintiffs communicated to the defendants an intention to waive their causes of action against the defendants. There cannot be waiver in the air.

[32] In addition, simple non-disclosure of potential causes of action in the prospectuses and the materials filed in the plan approval proceeding does not evince an unequivocal intention to abandon those causes of action. While the

2012 BCCA 5 (CanLII)

unequivocal intention to relinquish a right may be inferred from the conduct of a party, it cannot reasonably be inferred from silence, without something more. The defendants do not propose to plead anything more than simple non-disclosure.

[33] In my opinion, the facts pleaded in para. 41A of the statement of defence and proposed paras. 39A and 41.1 cannot give rise to a defence of waiver.

(c) Lack of Clean Hands

[34] The plaintiffs are seeking, among others, equitable remedies such as equitable tracing, constructive trust and disgorgement of profits. The defendants wish to plead that the plaintiffs are not entitled to equitable remedies on the basis that they lack clean hands.

[35] In dealing with this potential defence in connection with the non-disclosure in the prospectuses, the chambers judge referred at para. 26 to the following passage from I.C.F. Spry, *The Principles of Equitable Remedies*, 6th ed. (UK: Sweet & Maxwell, 2001) at 169-170, quoted with approval and applied by this Court in *DeJesus v. Sharif*, 2010 BCCA 121, 71 B.L.R. (4th) 159 at para. 86:

> ...it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief. ... So it was once emphasised "that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract".
>
> [Emphasis added.]

[36] The chambers judge then reasoned that the defence of lack of clean hands with respect to the prospectuses was bound to fail:

> [27] Applying that analysis, the purchase of Mr. Davila's shares had no direct relationship to First Majestic's prospectuses. The plaintiffs do not have to rely on the prospectuses to found their claim. The fact that the plaintiffs may have issued shares in order to fund the transaction has no direct nexus with the transaction with Mr. Davila and does not affect him; in fact, the

2012 BCCA 5 (CanLII)

> prospectuses were issued after the share purchase transaction between him and First Majestic was concluded.

I agree with this reasoning. In addition, there is no direct relationship between the prospectuses and the Bolaños property.

[37] The chambers judge did not specifically deal with the potential defence of lack of clean hands in connection with the approval of the plan of arrangement, but the same reasoning applies. There is no direct relationship between any non-disclosure in the plan approval proceeding and the purchase of Mr. Davila Santos' shares or the Bolaños property.

[38] The defendants say there is an "immediate and necessary relation" between the approval of the plan of arrangement and the plaintiffs' pleading that First Majestic and First Silver should be regarded as "one business enterprise" so that any violations of fiduciary duties owed to First Silver are regarded as violations of fiduciary duties owed to First Majestic. The plaintiffs make this plea in an attempt to take advantage of the holding in *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277, 38 C.P.R. (2d) 74 (Ont. C.A.), that a breach of duty owed to a subsidiary can lead to a finding of a breach in favour of its parent company.

[39] In my view, there is insufficient nexus between the approval of the plan of arrangement and this plea of the plaintiffs. While it is true that First Silver became a subsidiary of First Majestic as a result of the plan of arrangement, there is no direct relationship between the plan of arrangement and the allegation of breach of fiduciary duty. Although some of the activities of Mr. Davila Santos pre-date the plan of arrangement, the consummation of the alleged breach of fiduciary duty occurred when Minera Arroyo acquired the Bolaños property in August 2007, almost a year after the plan of arrangement was approved. Also, I am unable to see how improper non-disclosure in connection with First Silver becoming a wholly-owned subsidiary of First Majestic would have a bearing in deciding whether a breach of duty owed to First Silver should also be regarded as a breach in favour of First Majestic.

2012 BCCA 5 (CanLII)

[40] In addition to the lack of sufficient nexus between the plea of lack of clean hands and the equitable remedies sought by the plaintiffs, there is no proposed plea demonstrating why the non-disclosure would constitute a lack of clean hands. For example, there is no proposed plea of a requirement on the plaintiffs to disclose what the defendants say should have been disclosed. Nor is there a proposed plea that the plan of arrangement would not have been approved or that the financings would not have been successful had the disclosure been made. By itself, non-disclosure does not equate to a lack of clean hands.

[41] In my view, the proposed plea of lack of clean hands to defeat the plaintiffs' requests for equitable relief has no reasonable prospect of success, and it is plain and obvious that the plea is bound to fail.

(d) Ratification

[42] The defendants argue that the plaintiffs effectively ratified the alleged wrongdoings of Mr. Davila Santos by failing to disclose the opportunity to purchase the Bolaños property in the plan approval proceeding and by providing the letter for the purpose of the fairness opinion that there had been no irregularities involving First Silver, its directors or management. The defendants cite no authority for this proposition and do not address the holding of the chambers judge that the concept of ratification only applies in the context of an agency relationship in situations where the principal ratifies actions of his or her agent. There is no allegation of agency in the pleadings.

[43] Outside the context of an agency relationship, the effect of an assertion that the plaintiffs ratified the alleged wrongdoings of Mr. Davila Santos is very similar, if not identical, to an assertion that the plaintiffs waived their rights with respect to those wrongdoings. To say that a person has ratified a wrongdoing seems equivalent to saying that the person has waived their rights with respect to the wrongdoing.

[44] When discussing the potential defence of waiver, I concluded that silence, without something more, does not evince an unequivocal intention to abandon

2012 BCCA 5 (CanLII)

causes of action. Similarly, mere silence does not amount to ratification. In an agency situation, silence is not ratification: see *Community Savings Credit Union v. United Assoc. of Journeymen, Local 324*, 2002 BCCA 214, 22 B.L.R. (3d) 313 at para. 36. The same principle would apply if a defence of ratification existed outside an agency relationship.

[45] Hence, it is my view that a defence of ratification, if known to law outside an agency relationship, has no reasonable prospect of success in these circumstances, and that it is plain and obvious that the proposed defence is bound to fail.

Conclusion

[46] It is for these reasons that I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice Bennett"

2012 BCCA 5 (CanLII)

TAB 21

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Friedmann v. MacGarvie,*
2012 BCCA 109

Date: 20120307
Docket: CA039348

Between:

John Friedmann

Respondent
(Petitioner)

And

Noemi MacGarvie

Appellant
(Respondent)

And

The British Columbia Human Rights Tribunal

Respondent
(Respondent)

And

West Coast Women's Legal Education and Action Fund

Applicant

Corrected Judgment: The text of the judgment was corrected at paragraph [30] on March 27, 2012

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: Supreme Court of British Columbia, August 24, 2011
(*Friedmann v. MacGarvie*, 2011 BCSC 1147, Vancouver Registry,
Docket Number S092567)

Counsel for the Applicant,
West Coast Women's Legal Education and
Action Fund: L. Track

2012 BCCA 109 (CanLII)

Counsel for the Appellant, Ms. MacGarvie:	L. Waddell
The Respondent appearing in person:	J. Friedmann
No one appearing for the respondent, British Columbia Human Rights Tribunal	
Place and Date of Hearing:	Vancouver, British Columbia February 23, 2012
Place and Date of Judgment:	Vancouver, British Columbia March 7, 2012

2012 BCCA 109 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Bennett:

I. NATURE OF THE APPLICATION

[1] West Coast Women's Legal Education and Action Fund ("West Coast LEAF") applies for intervenor status in this appeal from Mr. Justice Bernard's August 24, 2011 order allowing Mr. Friedmann's petition for judicial review and remitting the matter to the Human Rights Tribunal for rehearing.

[2] Ms. MacGarvie consents to the relief sought. The British Columbia Human Rights Tribunal (the "Tribunal") is not participating in the application.

[3] Mr. Friedmann is self-represented on the appeal. I adjourned this application twice, giving Mr. Friedmann four weeks to retain counsel and file written material. He has been unable to do either. His unfocused oral submissions at the hearing of this application pertained only to the merits of the appeal proper. I informed him that it is in his best interests to retain counsel for the appeal. He expressed his intention to continue efforts to do so. It is clear that he opposes the application.

II. BACKGROUND FACTS

[4] Ms. MacGarvie was a student at all times material to her complaint. In February 2004, she became a tenant in an apartment building owned by Mr. Friedmann after signing a one-year lease. She moved out of the apartment on February 1, 2005. She testified at the Tribunal hearing to many episodes of inappropriate comments and behaviour Mr. Friedmann directed towards her throughout her tenancy. She also testified that Mr. Friedmann's inappropriate comments and behaviour continued after her tenancy and throughout the Tribunal proceedings, although his conduct during this time period is not material to this appeal.

[5] The comments that Ms. MacGarvie testified Mr. Friedmann made to her include remarks about her physical appearance, references to himself as a "sexy, 40's, hardworking man" searching for a wife, questions about her relationship status

2012 BCCA 109 (CanLII)

and sex life, and questions and complaints about her male friend visiting from Australia. Mr. Friedmann's inappropriate behaviour to which Ms. MacGarvie testified included pointedly pruning bushes outside her apartment window while shirtless, offering her numerous unwanted gifts, and, on one occasion, placing his hand on Ms. MacGarvie's buttocks while she sat on a bicycle.

[6] When Ms. MacGarvie rejected Mr. Friedmann's advances, and particularly after she gave him one month's notice of her intention to move out, she testified that he became more aggressive and verbally abusive toward her, causing her to ask friends to be present during planned apartment showings and other of Mr. Friedmann's visits of which she had advance notice. On one occasion, the police attended at Ms. MacGarvie's request when Mr. Friedmann refused to leave after entering her apartment uninvited and unannounced.

[7] The Tribunal heard from several witnesses who were Mr. Friedmann's current or former tenants. All of the witnesses' testimony tended to corroborate Ms. MacGarvie's evidence, through either accounts of their own unpleasant experiences with Mr. Friedmann or their descriptions of the same incidents to which Ms. MacGarvie testified.

[8] Mr. Friedmann attended the hearing but did not testify.

III. PROCEEDINGS BELOW AND ERRORS ALLEGED

A. The Tribunal (2009 BCHRT 47)

[9] The Tribunal member found that Ms. MacGarvie had not proven discrimination on the basis of sex but went on to consider sexual harassment as an independent basis for an award in the residential tenancy context. She drew upon the Supreme Court of Canada's decision in *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252, which held that workplace sexual harassment constitutes sex discrimination. On the basis that Ms. MacGarvie had suffered sexual harassment, the Tribunal ordered, among other relief, a $10,000 monetary award for injury to dignity, feelings, and self-respect.

2012 BCCA 109 (CanLII)

B. BC Supreme Court (2011 BCSC 1147)

[10] The chambers judge identified the ground of appeal as a question of law alone and applied the standard of correctness. He noted that Mr. Friedmann did not challenge the Tribunal member's finding of sexual harassment or any other findings of fact.

[11] The chambers judge held that the Tribunal erred in its application of *Janzen*, namely by treating sexual harassment in the landlord-tenant context as a sufficient basis, on its own, for a monetary award based on sexual discrimination. The chambers judge also identified a question as to whether the general principle in *Janzen* is applicable to the residential tenancy context, finding it unnecessary to address this question and declining to do so.

IV. THE LAW

[12] In *Gehring v. Chevron Canada Limited.*, 2007 BCCA 557 (Chambers), Rowles J.A. outlined this Court's general approach to intervenor applications:

> [6] In *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396, 170 B.C.A.C. 2004, I gave a brief summary of the principles that are generally considered on an application for leave to intervene:
>
> > [6] …
> >
> > [7] Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

[13] In *Bazley v. Children's Foundation et al.* (1996), 75 B.C.A.C. 177 (Chambers) at 180, Goldie J.A. enumerated the relevant criteria as follows:

> [15] …
>
> 1. the nature of the group seeking the intervener status;
> 2. the directness of the group's interest in the matter;
> 3. the suitability of the issue of the case at bar.

2012 BCCA 109 (CanLII)

2012 BCCA 109 (CanLII)

A. Nature of the applicant

[14] Although an applicant for intervenor status need not have a formal structure or form, it must have a broad representative base: *Guadagni v. British Columbia (Workers' Compensation Board)* (1988), 30 B.C.L.R. (2d) 259 (C.A. Chambers) at 262.

B. Directness of the applicant's interest in the matter

[15] An intervenor applicant's interest will be direct when "legal rights of the proposed intervenor will be affected or when any additional legal obligations would be imposed on the proposed intervenor resulting in a direct prejudicial effect": *R. v. N.T.C. Smokehouse*, [1991] B.C.J. No. 2082 (C.A. Chambers); *Faculty Association of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376 (Chambers) at para. 7. A direct interest does not materialize from a mere precedential concern: *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 405 (Chambers) at paras. 6-7.

[16] An intervenor application will not necessarily be defeated because the applicant has no direct interest in the outcome. In *R. v. Watson*, 2006 BCCA 234 (Chambers), Newbury J.A. stated at para. 3 (applied in *Gehring* at para. 7 and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2011 BCCA 294 (Chambers) at para. 19):

> [3] … where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether… the proposed intervenor is likely to "take the litigation away from those directly affected by it". …

C. Suitability of the issue in the case at bar

[17] This criterion involves consideration of whether the applicant will bring something new to the issues on appeal. In *U.T.U., Locals 1778 & 1923 v. B.C. Rail*

Ltd. (1990), 45 C.P.C. (2d) 33 (B.C.C.A. Chambers), Proudfoot J.A. stated at para. 6:

> [6] Intervener status may also be granted if there is no direct interest in the issues between the parties but the applicant has an interest in the "public law issues". The Court will then consider the issues in that particular case and will consider whether the intervener will bring a new or different perspective to the consideration of the issues, or will make a useful contribution towards resolving the issues, always bearing in mind that the intervention will not be permitted if it would result in injustice to the parties.

[18] Other justices of this Court have echoed this proposition in *R. v. Kapp*, 2005 BCCA 247 (Chambers) at para. 11, *Gateway Casinos LP v. BCGEU,* 2007 BCCA 48 (Chambers) at para. 8, and *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCCA 441 (Chambers) at para. 13.

[19] The potential concern at this stage is whether the proposed intervenor would change the issues or expand the scope of the litigation, thereby commandeering the proceedings and placing an undue burden on the parties to respond to arguments and issues immaterial to their private action: *Ward v. Clark*, 2001 BCCA 264 at paras. 6-11; applied in *FortisBC Inc. v. Shaw Cablesystems Limited*, 2010 BCCA 606 (Chambers) at para. 17. In *Canadian Broadcasting Corporation v. Luo*, 2008 BCCA 335 (Chambers) at para. 18, for example, Rowles J.A. noted in dismissing the application for intervenor status that the applicant wished to present arguments on the constitutional division of powers, whereas the appeal likely came down to an issue of statutory interpretation.

V. DISCUSSION

[20] Considerations under each of the three *Bazley* criteria overlap to some degree. I frame my analysis under the following five subheadings: the applicant, the applicant's interest in the appeal, the issue under appeal, the applicant's proposed contribution to the appeal, and factors weighing against granting intervenor status.

A. The applicant

[21] West Coast LEAF is a non-profit organization and registered charity dedicated to achieving women's equality through equality rights litigation, law reform

2012 BCCA 109 (CanLII)

and public legal education. As is clear from its stated mandate, West Coast LEAF is an organization with a broad representative base. Together with its national affiliate, it has intervened in numerous cases before this Court and the Supreme Court of Canada. I am satisfied that the considerations under the traditional "nature of the applicant" criterion support granting West Coast LEAF intervenor status in this appeal.

B. The applicant's interest in the appeal

[22] West Coast LEAF does not claim to have a direct interest in the outcome of this appeal. Rather, it submits that it has a substantial indirect interest in the outcome.

C. The issue under appeal

[23] Given that West Coast LEAF does not have a direct interest in the outcome of this appeal, it is necessary to examine whether the issue is of public interest and legitimately engages the applicant's interests.

[24] As counsel for the applicant has submitted, the issue under appeal concerns a question of law alone: whether the Tribunal member erred by misapplying *Janzen* in interpreting s. 10 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [the *Code*]. Section 10 of the *Code* prohibits discrimination against prospective or current tenants on such bases as sex, sexual orientation, and marital or family status.

[25] I note that, at paras. 45-46 of her factum, Ms. MacGarvie cites *Janzen* and contends that the landlord-tenant relationship is similar to the employer-employee relationship in that both involve a power imbalance. At para. 25 of his reasons, the chambers judge stated:

> [25] This case also raises the interesting question of whether the general principle in *Janzen* is equally applicable to the landlord/tenant relationship in British Columbia; particularly in light of the wording of s. 10 of the *Code.* As it has been determined that the case must be remitted for rehearing on the principal ground raised by the petition, I am of the view that it is neither necessary nor appropriate to resolve this question within the context of this judicial review.

2012 BCCA 109 (CanLII)

In my view, in light of West Coast LEAF's stated mandate, both the narrow issue under appeal and the broader issue to which the chambers judge referred are of public interest and legitimately engage West Coast LEAF's interests.

D. The applicant's proposed contribution to the appeal

[26] West Coast LEAF's counsel submitted that, while Ms. MacGarvie is poised to argue the appeal within the context of her particular landlord-tenant experience, West Coast LEAF is in a position to assist this Court by providing a broader, systemic perspective of gender equality, sexual harassment, and the power dynamic of the landlord-tenant relationship, all of which intersect and permeate the legal issues underlying this appeal. She noted that her client has recently undertaken an analysis of the residential tenancy legislation in British Columbia to identify its actual and potential impacts upon female tenants. I am satisfied that the applicant's proposed contribution to the appeal would provide this Court with a new and useful perspective that is different from the parties' perspectives.

E. Factors weighing against granting intervenor status

[27] Under this heading, I consider whether the proposed intervention would take the litigation away from the parties or otherwise result in an injustice. In my view, neither deleterious result would ensue from granting West Coast LEAF intervenor status in this appeal. This application is distinguishable from those made in *Ward v. Clark* and *Canadian Broadcasting Corporation v. Luo*, cited above; West Coast LEAF is seeking not to raise new issues, but rather to provide insight and analysis on the particular questions of law the chambers judge and the parties to this litigation have identified.

[28] The role of an intervenor is not to support the position of one party or the other, but rather to make principled submissions on points of law pertinent to the appeal. Such submissions may well tend to support one party's position, but that is not their purpose. I am satisfied that West Coast LEAF understands this distinction and would conduct its intervention in this appeal accordingly. Thus, no injustice to either party would result from granting intervenor status to West Coast LEAF.

2012 BCCA 109 (CanLII)

VI. DISPOSITION

[29] Although West Coast LEAF does not have a direct interest in the outcome of this litigation, other considerations relevant to the analysis favour granting it intervenor status in this appeal.

[30] The application is granted on the following terms:

a) West Coast LEAF is permitted to file a factum not exceeding 20 pages in length by March 19, 2012; and

b) West Coast LEAF will not seek costs.

[31] I defer to the division of the Court hearing this appeal whether and to what extent they wish to hear oral submissions from West Coast LEAF. I also defer the question of whether West Coast LEAF should pay the parties for additional costs or disbursements arising from its intervention.

[32] Each party will bear its own costs of this application.

"The Honourable Madam Justice Bennett"

2012 BCCA 109 (CanLII)

TAB 22

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Glover v. Leakey,*
2016 BCSC 1624

Date: 20160831
Docket: M51479
Registry: Vernon

2016 BCSC 1624 (CanLII)

Between:

Diana Glover

Plaintiff

And

Kenneth Roger Leakey

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:	M. Yawney R. Irving
Counsel for the Defendant:	D. Yerema D. James (on July 8 and 28, 2016)
Place and Date of Trial and Application Hearing:	Vernon, B.C. June 28-30, July 4-8,11-15, and 28, 2016
Place and Date of Judgment:	Vernon, B.C. August 31, 2016

2016 BCSC 1624 (CanLII)

Introduction

[1] This accident concerned a motor vehicle accident on January 3, 2012 where the plaintiff Diana Glover was a backseat passenger in the 1998 Subaru Legacy which she co-owned with the her husband, the defendant Kenneth Roger Leakey. Kenneth Leakey was the driver of the Subaru. The Subaru struck the back of a snowplow on Highway 97 near Bear Lake, B.C. The plaintiff suffered significant injuries in the accident.

[2] I heard this action with a jury from June 28 to July 15, 2016. Both liability and damages were in dispute. The parties requested that I instruct the jury on both liability and damages and direct them to make a decision on both issues, whether or not they found the defendant liable for the accident.

[3] The jury found that Mr. Leakey was not liable for the accident. They provided answers to the questions related to damages.

[4] The defendant applied for judgment immediately after the jury's verdict. I did not enter judgment.

[5] Three issues arise from the jury trial:

1. the plaintiff applies for a mistrial on the issue of liability;
2. the plaintiff alleges that the defendant engaged in an abuse of process;
3. the plaintiff seeks to set aside portions of the jury's verdict in respect of damages.

[6] For the reasons that follow, I declare a mistrial, grant judgment to the plaintiff on the issue of liability because the defendant engaged in an abuse of process and decline to set aside portions of the jury's verdict on damages.

2016 BCSC 1624 (CanLII)

Mistrial

Background

[7] As noted, Ms. Glover was a backseat passenger in the vehicle that her husband was driving on January 3, 2012. Penny Yeomans was also a passenger in the front seat of the defendant's vehicle at the time of the accident and she also suffered personal injuries. She commenced a separate action (the "Yeomans Action").

[8] In this trial, the defendant denied liability and challenged the damages sought by Ms. Glover.

[9] On July 4, 2016, while the jury trial was underway, the plaintiff brought an application to have the defendant's position on liability dismissed on the basis of an abuse of process. The application was brought under Rule 9–5(1)(d) of the *Supreme Court Civil Rules* which provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> …
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[10] The application was based upon an inconsistent pleading filed by Mr. Leakey in the Yeomans Action and that filed by him in this action. The plaintiff also sought special costs.

[11] The facts upon which the plaintiff relied in bringing her application were these:

> The Within Action
>
> 6. On December 11, 2013, Glover filed a notice of civil claim in the within action. Glover alleged that Leakey was solely at fault for the Accident. In Part 3, paragraph 1, Glover particularized the negligence of Leakey which caused the Accident.
>
> 7. On June 26, 2014, Leakey filed a response to civil claim. Paragraph 1 of division 2 of part 1 reads as follows:

> The Defendant denies the particulars of negligence as alleged in Part 3, paragraphs 1(a) to (j) of the Notice of Civil Claim.
>
> The "Liability Denial"

8. On May 14, 2015, Leakey filed an amended response to civil claim. The Liability Denial was not amended. Additional facts were added raising the defence of no negligence, inevitable accident, the "agony of the moment" and the "agony of the collision".

9. At no time has Leakey claimed that any other party may be responsible for the Accident.

10. A jury trial began on June 27, 2016 and is scheduled to conclude on July 15, 2016. To date, Leakey has maintained a denial of liability.

The Yeomans Action

11. On June 29, 2012, Yeomans filed a notice of civil claim commencing Action no. 947417 in the Supreme Court of British Columbia (Kamloops Registry) (the "Yeomans Action"). Yeomans named Glover, Leakey, Yellowhead Road & Bridge (Fort George) Ltd. and Raymond Warren as defendants. Paragraph 10 of the notice of civil claim reads as follows:

> The plaintiff was injured in a motor vehicle accident that occurred on or about January 3, 2012 on Highway 87 near Bear Lake, British Columbia and at that time, the plaintiff was a seat belted passenger in the Subaru when it rear ended the Western Star that was stopped on the highway.

12. On September 5, 2012, a response to civil claim was filed on behalf of Glover and Leakey. Paragraph 1 of division 2 of part 1 reads as follows:

> The accident particularized in paragraph 10 of the Notice of Civil Claim occurred as a result of the negligence of the Defendant, Kenneth Roger Leakey, while driving a motor vehicle owned by the Defendants, Glover and Leakey.
>
> [Underlining added by counsel for the plaintiff]

13. It is believed that the Yeomans Action has now been settled.

Discovery of the Inconsistent Pleadings

14. On June 28, 2016, counsel for the plaintiff discovered the admission of liability in the Yeomans Action. Counsel for the plaintiff contacted counsel for Leakey and requested that liability be admitted. To date, Leakey has maintained the denial of liability.

[12] The defendant opposed the plaintiff's application on various bases including that the application was brought too late; the plaintiff had not met the heavy onus on her to prove that there were inconsistent pleadings; that any alleged inconsistent

2016 BCSC 1624 (CanLII)

pleadings did not lead to a finding of abuse of process; and, for reasons of public policy each claim by a plaintiff needs to be handled individually.

Hearing of July 8, 2016

[13] The application was heard on July 8, 2016. The defendant was represented by J. Derek James, rather than trial counsel, David Yerema.

[14] At the hearing, Michael Yawney, counsel for the plaintiff, suggested that because the jury trial was underway, the timing of the application was problematic. Mr. Yawney suggested that the decision on the abuse of process application wait until the jury had reached a verdict on liability, reasoning that if the Court found that there was an abuse of process the jury may perceive, having sat on the case for two weeks of evidence, declaring the defence of liability to be an abuse of process might harm their view of the integrity of the administration of justice. Mr. Yawney suggested that in the circumstances, I should defer judgment on the issue until the conclusion of the jury trial but before the final order for judgment is entered. Mr. Yawney acknowledged that that gave the Court time to consider the matter thoughtfully and let the jury finish their work. In that regard, Mr. Yawney said the jury did not have to see how the system had failed in some respects, and there would be no urgency in terms of the timeline for a decision.

[15] Mr. Yawney submitted that it was within the Court's discretion to fashion a remedy in the circumstances because it involved the integrity of the administration of justice. He referred to his suggestion to delay the decision on the application as a concession on the part of the plaintiff “recognizing the bigger picture”.

[16] At the end of the hearing I had a discussion with counsel about delaying the judgment and whether or not it may become moot if the jury decided that Mr. Leakey was liable. I asked Mr. James if he had anything that he wished to say, to which he responded:

> Well, there was one item, but I'm not sure that it's . . .
>
> Actually there's nothing. It just occurred to me though that the -- the issue of what to -- what is to be done if the remedy is to wait until the jury

2016 BCSC 1624 (CanLII)

> decides, and I must admit I'm not entirely clear what my friend is proposing in that regard, so the jury would give its verdict, of course a verdict is not an order of the court, at that time defence counsel, who will be Mr. Yerema, will move the court for -- for an order for judgment on the jury's verdict, and I suppose, is it that stage that there would be a further consideration of this issue?

[17] I then stated: “Yes, the jury -- the judgment wouldn’t be entered”, to which Mr. James responded “Okay”.

[18] Mr. James continued:

> And having heard my friend's further submissions, I see the merit in his argument to let the jury do its job, let the jury reach its verdict, and then deal -- deal with the issue as far as the remedy is concerned. I see what he's saying.

[19] It was my understanding that Mr. James agreed to the process that Mr. Yawney suggested: proceed with the jury trial and await their verdict. The judgment would not be entered pending my decision on the abuse of process application.

[20] When the hearing concluded on July 8, I had the option of delivering a decision the following Monday, July 11 or accepting Mr. Yawney's proposal to postpone the decision on the abuse of process matter until after the jury had heard the evidence and reached its verdict on both liability and damages.

Continuation of Trial on July 11, 2016

[21] I chose the latter course, and on July 11, 2016 made the following statement to Mr. Irving, who was Mr. Yawney's co-counsel, and to Mr. Yerema who acted for the defendant in the jury trial but not in respect of the abuse of process matter. Mr. Yerema asked about the ruling of the court on the application, to which I responded:

> THE COURT: Yes, the application --
>
> MR. YEREMA: On the application.
>
> THE COURT: -- to find -- the application to find ICBC in having abuse of process. And I have -- have a seat, thank you. I've considered the -- the matter and I agree with both counsel, that it -- a more -- the most practical

2016 BCSC 1624 (CanLII)

> course is to proceed and in the event that the jury -- well, when the jury comes in, if they make a finding of -- if there is no liability, that I postpone entering judgment until I make a decision. If they find that the defendant is liable, then we'll address it then and -- as it was suggested by counsel for the plaintiff and counsel for the defendant agreed to it. So I think that's the most practical course.

[22] Mr. Yerema did not object to the course that I proposed. The trial proceeded.

[23] The parties agreed that I would charge the jury on both liability and damages which I did on July 14, 2015.

Proceedings on July 15, 2016

[24] While the jury was deliberating, Mr. Yerema raised a concern about my postponing my judgment on the abuse of process application until after the verdict was rendered. He advised that Mr. James, counsel on the application, did not agree that judgment would not be entered on the jury's verdict until I ruled on the abuse of process application. Mr. James was not in the courtroom at that time. I explained my understanding to Mr. Yerema, that is, that if the jury found no liability that the judgment would not be entered pending my decision on abuse of process. I did not know what Mr. James' understanding was.

[25] On July 15, 2016, the jury reached its verdict after deliberating for approximately 9 1/2 hours.

[26] In respect of their verdict, the jury advised they were unanimous. In response to Question 1: "Was there any negligence on the part of the defendant that caused or contributed to the harm or damage suffered by the plaintiff?", the jury answered "No".

[27] The jury was asked to consider the remaining questions concerning the quantum of damages and did so.

[28] A signed copy of the jury foreperson's verdict sheet was entered as an exhibit. Mr. Yerema on behalf of the defendant asked to have the verdict entered as an order of the Court. I declined to make that order at the time because of my

2016 BCSC 1624 (CanLII)

understanding of how the abuse of process application would be addressed. The plaintiff also asserted that there was no reasonable evidence to support the jury's verdict on liability and past wage loss.

Hearing of July 28, 2016

[29] On July 28, 2016, I heard Mr. Yawney and Mr. James on the procedure to be adopted in respect of reasons on the abuse of process application. Mr. James advised that he did not agree to postpone the delivery of reasons on the application on the condition that the jury verdict not be entered. Instead, he asserted that the plaintiff waived her claim for the relief involving striking of the paragraphs of the pleadings denying liability and was content to pursue her claim for relief in costs.

[30] Mr. James referred to various excerpts from the transcript of the proceedings of July 8, 2016 where he says that Mr. Yawney, on behalf of the plaintiff, referred to the plaintiff conceding to have the jury proceed to address liability and thus waived her remedy of striking the pleadings.

[31] Mr. James took the position that judgment ought to be entered as that was the agreement that was made by the parties.

[32] Mr. James says that Mr. Yerema did not agree to the approach that I outlined on July 11, 2016. Mr. Yerema did not argue the abuse of process issue and was not present during the hearing.

Decision

[33] At the conclusion of the July 28, 2016 hearing, it was clear to all that there had been a misunderstanding between counsel in respect of how the matter would proceed before the jury and whether the jury's verdict would be entered as a judgment of this court. I was clearly of the view that Mr. Yawney was not conceding the liability issue, but suggesting that the decision on abuse of process be postponed pending the jury's verdict. I also understood that if the jury found that there was no liability, judgment would not be entered pending my decision on abuse of process.

2016 BCSC 1624 (CanLII)

[34] Mr. James says he made no such agreement. His understanding of the agreement is not reflected in the transcripts of the proceedings, nor is it likely that it was what Mr. Yawney proposed. Would plaintiff's counsel bring the application and then abandon the relief of having the defendant's position on liability dismissed on the basis of an abuse of process and only proceed with costs? I think not.

[35] The matter proceeded as it did based on a misunderstanding. The plaintiff proceeded, I find, to her detriment, because of her reliance on an agreement between counsel, where none existed.

[36] The plaintiff proceeded with her case before the jury; she chose not to cross-examine Mr. Leakey about his inconsistent pleadings; she left the matter of liability with the jury. In all, I find that the misunderstanding between counsel caused both parties to proceed on a basis that was not clearly understood. Further, had I understood that Mr. James did not agree to Mr. Yawney's proposal to reserve the decision on the abuse of process matter, I would have provided a decision before the jury proceeded on July 11, 2016. It is regrettable that Mr. James did not express his position to the Court about the agreement between counsel before the trial concluded and the jury verdict was announced.

[37] A trial judge does not have jurisdiction and is *functus officio* to hear an application after a jury has rendered its verdict, except an application that goes to an issue of trial fairness.

[38] This was confirmed by the Court in *Leslie v. Parmar*, 2006 BCCA 256, where the appellant, the defendant in the personal injury action, sought a mistrial three months after the jury's verdict was rendered to set aside a jury verdict based on a witness who gave evidence and later advised counsel for the plaintiff that her evidence may not have been accurate. The witness was not recalled. The trial judge dealt with the matter in her charge to the jury. The verdict was not entered as a court order.

2016 BCSC 1624 (CanLII)

[39] On the application the trial judge concluded that the jury must have acted on evidence that was false and misleading, although she did not identify any such evidence. She determined the trial should continue without a jury for the assessment of damages.

[40] The Court of Appeal found that the trial judge had no jurisdiction to consider the plaintiff's application and ought to have dismissed it as unfounded in law. The Court considered that the judgment should have been entered pursuant to the jury's verdict and counsel could then consider whether they ought to appeal (at paras. 23 and 25).

[41] *Leslie* was considered in *Oberreiter v. Akmali*, 2009 BCCA 557, where the defendants sought to appeal a decision of the trial judge declaring a mistrial after the delivery of the verdict by a civil jury before the judgment in the action was entered.

[42] In that case, counsel for the plaintiff learned after the jury's verdict that an exhibit, a DVD compilation of surveillance evidence on the plaintiff, contained 10 additional minutes of footage that had not been shown to the jury during the trial but was with the jury during its deliberations.

[43] The trial judge did not enter the judgment and approximately one month later heard the plaintiff’s application for a mistrial. He declared a mistrial, relying on *de Araujo v. Read*, 2004 BCCA 267, where Mr. Justice Thackray observed at para. 68: “a new trial may be ordered where the trial irregularities may have influenced the verdict or award of the jury…” (at para 13).

[44] The Court of Appeal reviewed the jurisprudence relating to whether the trial judge had jurisdiction to rectify an irregularity in a jury trial before judgment was entered.

[45] At para. 10 of the decision the Court referred to the decision of *R v. Burke,* 2002 SCC 55, where the Court confirmed that the court maintains jurisdiction to declare a mistrial after the jury was discharged as part of its remedial jurisdiction,

2016 BCSC 1624 (CanLII)

and delineated circumstances where that might occur including, a reasonable apprehension of bias: at paras. 70 to 74.

[46] After citing the authorities that confirmed that a trial judge has no jurisdiction to hear an application after the jury has rendered its verdict, including *Leslie v. Parmar*, the Court stated at paras. 23 and 24:

> [23] …In this case, the respondent's application for a mistrial was not based on an improper verdict but was made pursuant to the court's inherent jurisdiction to rectify an irregularity that went to the issue of trial fairness. This is an issue of law that is addressed pursuant to the court's remedial jurisdiction.
>
> [24] It is settled law that until a judgment or order has been entered, a trial judge continues to be seized of the matter before him or her. In *Clayton v. British American Securities,* [1935] 1 D.L.R. 432 at para. 83, [1934] 3 W.W.R. 257 (B.C.C.A.), the court noted that this was recognized as an "unquestioned practice" and "one of very long standing". Similarly in *Burke*, the court concluded that, as a principle of law, a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness (in that case it was whether there existed a reasonable apprehension of bias) after a jury verdict has been rendered and the jury discharged.
>
> [Underlining added.]

[47] I have already determined that due to the misunderstanding between counsel and the court the plaintiff proceeded with the trial and, in so doing, compromised her position. In other words, she did not have a fair trial.

[48] It is obvious (based upon my decision on the abuse of process matter, below) that had I rendered a decision on the abuse of process before the trial proceeded and before the jury reached a verdict, the result in this case would have been different.

[49] The plaintiff asserts that I ought to declare a mistrial in respect of the liability portion of the verdict only. No authority was provided and I have not found any authority where a mistrial can be declared for only a portion of the jury's verdict.

[50] While the argument has a certain attraction because of the obvious judicial efficiency, I find it would be unfair and contrary to the principle in *Oberreiter*. If a mistrial is granted to remedy an issue of trial fairness that may have impacted the

2016 BCSC 1624 (CanLII)

verdict, it is likely that the apparent unfairness tainted the entire proceeding. If not, it would be very challenging to sever a part that was not impacted by the irregularity. It is difficult to know to what extent the plaintiff's compromise impacted the entirety of the trial. While not directly the subject of the mistrial application, the defendant's position on liability and comments made to the jury minimizing the accident likely impacted the assessment of damages. There could also be a concern about litigating in slices. It would be an effective severing of issues in the trial that has already been conducted.

[51] A mistrial is appropriate where necessary to ensure that justice is done between the parties: see *de Araujo v. Read*. The plaintiff's application for a mistrial is allowed.

Abuse of Process

[52] I have already referred to the facts upon which the plaintiff asserts an abuse of process by the defendant. It is based on the inconsistent pleadings by the same defendant, Mr. Leakey in this action and the Yeomans Action. Ms. Glover and Ms. Yeomans were both passengers in the defendant's vehicle. Neither of them was contributorily negligent. They were in the exact same situation in relation to whether the defendant was negligent.

Legal Framework

[53] The court has inherent power to prevent its procedure from being used in a manner that brings the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. The doctrine of abuse of process is a broad and flexible mechanism; its purpose is to enable the court to prevent misuse of its own process: *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 22.

[54] In *Jensen v. Ross*, 2014 BCCA 173, Mr. Justice Goepel referred to the following passage from *Babavic v. Babowech* (1993), 42 A.C.W.S. (3d) 447 (S.C.):

2016 BCSC 1624 (CanLII)

> [17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. …
>
> [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...

[55] Canadian courts have invoked the doctrine of abuse of process in circumstances where, while issue estoppel may not be made out, permitting the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City)* at para. 37.

[56] In *First Majestic*, Mr. Justice Tysoe considered whether the concept of abuse of process could extend to inconsistent factual positions rather than just an inconsistent election of rights. Tysoe J.A. concluded that the plaintiffs had not made inconsistent allegations in a previous action as the defendants argued. His reasons make reference to a number of cases supporting the proposition that inconsistent positions in prior proceedings can constitute an abuse of process. *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 was cited with approval.

[57] In *Mystar*, the applicants argued that the respondent had made an inconsistent claim and that their action should be dismissed as abuse of process. The relevant Alberta rule is nearly identical to the B.C. rule:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that ... (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

[58] The alleged inconsistent claim in *Mystar* was that in a previous action against a different defendant, the respondent claimed they lost half interest in a particular property. Then in a later action the respondent claimed to have lost 100% interest in

2016 BCSC 1624 (CanLII)

the same property. While considering the applicable principles, Mr. Justice Brooker held at para. 49:

> In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.
>
> [Emphasis in original.]

[59] In the result, Brooker J. found that it was not plain and obvious that the action in that case was an abuse of process as he "[did] not read the current Amended Statement of Claim as asserting that [the respondent] never lost a 50% interest in the property" (at para. 71). The case is instructive as it recognizes that advancing irreconcilable positions in various actions is impermissible. This is adopted in *First Majestic.*

[60] The decision of *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 is also informative. In that case the appellant, Pepper's Produce entered into a contract to buy a business that failed to complete. Two parties filed a small claims action against Pepper's Produce. The president of Pepper's Produce deposed that these individuals were not parties to a contract and they had never met. Pepper later brought its own action, stemming from the same transaction after the small claims action was dismissed and sought to add the individuals that they had denied knowing as parties to the new action.

[61] Madam Justice Levine upheld the decision of the chambers judge refusing to add those defendants. She held, in part relying on *First Majestic*:

> [28] … These positions are diametrically inconsistent within the same action, and the claims against Gao and Tan are diametrically inconsistent with the appellant's response to the Small Claims action. These proceedings cannot, as a matter of protecting the integrity of the court's process, stand together.

[62] Whether taking contrary positions on the same issues in separate proceedings, i.e. inconsistent pleadings, constitutes an abuse of process depends on the context and circumstances of each case: *Mystar* at para. 53; *Stewart v. Clark,* 2013 BCCA 359 at para. 51.

2016 BCSC 1624 (CanLII)

[63] In *Halagan v. Reifel,* 1997 CarswellBC 4040, Madam Justice Satanove considered an application to amend pleadings. She refused to do so and dismissed the application because the proposed amendments were inconsistent. She found they constituted approbation and reprobation. At para. 8 she stated:

> … [N]either pleadings nor any other of the court processes are a game to be played according to what appears to be a strategic advantage of the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.

[64] The test in the context of Rule 9–5(1)(d) is a high one: it must be plain and obvious that a pleading is an abuse of process.

Position of the Parties

Plaintiff

[65] The plaintiff submits that Mr. Leakey's position in the Glover and Yeomans actions are diametrically opposed. Liability was not pleaded in the alternative in either action. The defendant was aware of his role in the accident from the outset and cannot claim that his knowledge of the accident was somehow incomplete or imperfect. The plaintiff says that in allowing Mr. Leakey to maintain a denial of liability in the Glover action is an affront to the court's process and brings the administration of justice into disrepute; it is a clear abuse of process and ought to be struck, and seeks judgment in favour of the plaintiff on the issue of liability.

Defendant

[66] The defendant's position is that his differing positions on liability for the accident are not inconsistent pleadings, irreconcilable positions or an abuse of process. He claims it is permissible to have inconsistent defences to an action. Further, if inconsistent pleadings are found, the defendant argues that it is not an improper use of the court's process; the court must consider the context and circumstances of each case and the two actions must be treated individually. He says that it has been recognized that inconsistent pleadings are permissible in the

2016 BCSC 1624 (CanLII)

context of an insurer-insuree relationship. The defendant submits that he did not knowingly advance irreconcilable positions which he submits is an essential element of an abuse of process. Prior admissions of liability should be dealt with as an admissibility issue. Finally, the defendant's position is that to find Mr. Leakey's denial of liability as an abuse of process would have an effect of discouraging admissions.

Decision

[67] In considering my analysis of this application, I must note that the Insurance Corporation of British Columbia (ICBC), the Province's public mandatory motor vehicle insurer had conduct of both the Glover and the Yeomans actions. The evidence provided is sparse, but it is clear that the adjuster in the Yeomans Action determined that liability would be admitted on behalf of Mr. Leakey whereas the adjuster in the Glover action determined that liability would be denied. I expressly find that ICBC knew of the inconsistent pleadings and that the insured, Kenneth Leakey knew or ought to have known of the inconsistent positions.

Whether the inconsistent positions are an abuse of process

[68] Courts retain jurisdiction to dismiss actions that are an abuse of process where the principles such as judicial economy, consistency, finality and the integrity of the administration of justice will be violated. This doctrine is flexible and the categories of abuse of process are open. In my view, the defendant's inconsistent positions on liability offend all these principles which are fundamental to our system of law.

[69] Before this action was filed the defendant admitted liability for the subject accident in the Yeomans Action. He obtained the benefit of settlement with that defendant. It cannot be open to him to re-litigate something that he already conceded in the Yeomans Action. That offends the principle of judicial economy, unnecessarily expending the resources of the justice system and in this particular instance it is more egregious as the case called upon the wisdom of the community in the form of jurors. It is also contrary to the principle of finality to permit something that has been admitted to be re-litigated.

2016 BCSC 1624 (CanLII)

[70] Consistency is also compromised. A position that Mr. Leakey is on one hand negligent but on the other not negligent cannot be anything but irreconcilable and inconsistent. The only distinction in the pleadings is that in the Yeomans Action the defendant asserted that Ms. Yeomans failed to properly adjust and securely fasten her seatbelt. That does not alter the bare fact of the defendant's negligence.

[71] It is not relevant that Ms. Glover was a co-owner of the vehicle. The defendant has not explained how that distinction makes a difference. The same conduct of the defendant was involved in both the Yeomans and the Glover actions. To take different positions is inconsistent and provides unpredictability in the law.

[72] I am also of the view that the administration of justice is compromised by the defendant's conflicting positions that it was his fault and then it was not his fault. Neither position was advanced in the alternative. As Levine J.A. stated in *Pepper's Produce*: "these proceedings cannot, as a matter of protecting the integrity of the court's process, stand together."

Whether the claim was brought too late

[73] The defendant claims that bringing this application in the middle of the trial of an action is too late. This is also a surprising position for the defendant to take. Clearly the defendant and his insurer were aware of the inconsistent pleadings; but that was not shared with the plaintiff or her counsel. Counsel for the plaintiff says that he discovered the pleading in the Yeomans Action after this jury trial was underway.

[74] Further, the defendant has not referred to any authorities to support its submission in this regard. I find the language in Rule 9–5 as a full answer to this point as it permits an application to be brought "at any stage of the proceeding."

Whether inconsistent defences are permissible

[75] The defendant also submits that the denial/acceptance of liability in the two actions should be characterized as inconsistent defences rather than inconsistent "positive averments". The defence argues that it is permissible to have inconsistent

2016 BCSC 1624 (CanLII)

defences and they should be treated differently. In that regard the defendant relies on *National Bank Financial Ltd. v. Potter*, 2005 NSCA 139. In that case the appellant, Mahoney, appealed from an order of the Nova Scotia Supreme Court dismissing the application to strike portions of the defence of the respondent National Bank as inconsistent between the actions. National Bank had pleaded in one action that there was no stock manipulation scheme and in the other that there was a stock manipulation scheme. The Nova Scotia Court of Appeal upheld the dismissal and held that the relevant Rules of Court in Nova Scotia (excerpted below) applied because the pleadings were in separate actions. The rule relied on was Rule 14.11 which provides:

> Unless a party amends his pleading, he shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading of his.

[76] The Court of Appeal held that the pleadings were not inconsistent but rather alternative pleadings. It also considered that the reasoning of the chambers judge that whether or not there was a stock manipulation was not yet fully within the knowledge of the parties; it was a complex trial where that very issue remained to be determined. At that point in the proceedings, the Court found it would be unfair make a party choose between two sets of alleged circumstances that they did not yet have full knowledge of.

[77] I do not find the *National Bank* case to stand for the proposition that defences in various actions stemming from the same facts may be inconsistent and should be treated differently from positive averments. The Nova Scotia decision applies when there is an application to “strike portions of the defence”.

[78] In any event, the primary holding of *National Bank* was that Rule 14.11 had no application where the alleged inconsistent pleadings were in separate actions. The Court went on to hold that the pleading could not be said to be inconsistent but rather alternative pleading because the party did not yet have full knowledge of the facts. In British Columbia, the courts have clearly recognized that inconsistent

2016 BCSC 1624 (CanLII)

pleadings in different actions can be an abuse of process (*First Majestic*). The court's interpretation of the Nova Scotia rule is unhelpful.

Whether the pleadings may be inconsistent where ICBC involved.

[79] The defendant claims that under the ICBC insurance scheme, courts have recognized that there will be inconsistent pleadings referring to the decision of *Mara v. Blake* (1996), 23 B.C.L.R. (3d) 225 (C.A.). In that case, there were four separate motor vehicle accidents involving the same plaintiff and four separate defendants. All four defendants were insured by ICBC and represented by the same counsel. Three of the defendants admitted liability but pleaded contributory negligence. The fourth defendant denied liability. The Court was asked to consider whether it was a conflict of interest for ICBC to have one counsel acting for all four defendants.

[80] I find this case to be distinguishable. In *Mara* there were multiple accidents with different facts in each. In this case, there is one vehicle and one accident. It would have been open to the different defendants in *Mara* to have divergent positions as they were based on different accidents. It is not analogous to this case where the defendant has taken two divergent positions on liability arising from the same accident. The Court of Appeal was not considering the issue of inconsistent pleadings but rather whether it was a conflict of interest for ICBC to have one counsel acting for all defendants.

Whether knowingly advancing an inconsistent position

[81] I have already noted, I find that ICBC knowingly advanced an inconsistent position and I accept that as the defendant's representative the diametrically opposed pleadings were knowingly advanced. They were not articulated as alternate claims.

[82] A pleading that is an abuse of process is not the same as the tort of abuse of process which requires “a wilful misuse or perversion of the court’s process for extraneous or ulterior purpose”: *Border Enterprises Ltd. v. Beazer East Inc.,* 2002 BCCA 449 at para. 51. A pleading is distinct from an intentional tort.

2016 BCSC 1624 (CanLII)

2016 BCSC 1624 (CanLII)

Whether issue should be determined on the basis of admissibility

[83] The defendant claims that the courts in British Columbia have determined that situations such as the present must be addressed on the basis of whether the pleading is admissible in the subsequent action. While prior proceedings can be admissible in subsequent actions and there is a body of case law addressing that point, I find that the defendant has overlooked the point that the matter before me is not admissibility but rather whether inconsistent pleadings are an abuse of process.

[84] In this regard, the defendant refers to the decisions of *Caviglia v. Tenorio* (1992), 71 B.C.L.R. (2d) 255 (S.C.) and *Theriault v. Patrick* (1995), 54 A.C.W.S. (3d) 39 (S.C.).

[85] Neither of these decisions address abuse of process.

[86] In *Caviglia* the plaintiff's car slid and stalled with its fender extending into traffic. The defendant's vehicle struck the rear end of the plaintiff's vehicle as she attempted to drive around it but hit a patch of ice. A third party hit the two vehicles after the plaintiff, the defendant and the defendant's passenger had left the vehicle. The ensuing circumstances were described by Madam Justice Allan at para. 10:

> An unusual issue arises in this case. The writ was issued on July 18, 1989 and the statement of defence, in which Ceoalia Tenorio denied liability, was filed on December 19, 1989. In a separate action, commenced in the New Westminster Registry on September 21, 1990 [the Second Action], Marlene Tenorio, who was a passenger in Ceoalia Tenorio's vehicle, sued her sister Ceoalia for damages suffered as a result of this accident. Marlene Tenorio also sued Mr. Caviglia in the Second Action but discontinued her claims against him in February 1991.

[87] The relevant issue in that case was whether the admission of liability made in one action was admissible and, if so, whether it is conclusive of liability or evidence to be given weight in the circumstances. The Court concluded that the prior admission was not conclusive and should go to weight at para. 26:

> The plaintiff submits that Ms. Tenorio's admission of liability in the Second Action should be admitted as conclusive evidence of her liability in this case for the following reasons: the factual foundation, i.e., the circumstances of the accident are the same; the legal issue, i.e., the liability for the collision

> between the Tenorio and Caviglia vehicles, is the same; the defences in both action are conducted by a common insurer.

[88] *Caviglia* possesses some factual similarities to the present case: the defendant admitted she was liable to her passenger but denied she was liable to the car she struck. Clearly, the passenger in the defendant's vehicle was not negligent and the actions of the defendant did not affect the passenger's right to claim fully for her injuries. Those circumstances are not the circumstances here. Similar circumstances would be if the defendant has had two passengers and admitted liability in respect of one passenger but not the other.

[89] Madam Justice Allan declined to view the admission is conclusive of liability and held that it goes to weight that should be determined in the particular circumstances of each case.

[90] That is the same analysis that I must undertake in these circumstances. Recalling the holding in *Mystar* and *Stewart* that whether inconsistent pleadings constitute an abuse of process depends on the context and circumstances of this case. That is to say an abuse of process will not always be made out when litigation positions are inconsistent.

[91] I do not find *Theriault* informative as it is an application to withdraw an admission of liability in a circumstance where new information came to light regarding liability.

[92] I note that the defendant says that if the pleadings are inconsistent, the defence asks for the admission in the Yeomans Action to be withdrawn and undertakes to do so. This is an empty suggestion. The Yeomans Action has been settled and no longer exists. Withdrawal of the admission in Yeomans Action has absolutely no practical effect and nor is it an answer to the allegation of abuse of process.

2016 BCSC 1624 (CanLII)

Whether contrary to public policy

[93] The defendant claims that to find these pleadings as inconsistent and an abuse of process will discourage admissions, contrary to public policy. I find that there is much larger public policy at stake. It is an abuse of process to allow a defendant to admit liability in respect of one passenger and deny liability in respect of the other where there are no facts to distinguish the two. Requiring a party, even ICBC, to file consistent pleadings is not onerous and, with respect, is a principled way to proceed. The pleading of inconsistent positions in this case cannot be condoned.

[94] I have declared a mistrial in this case. It may appear that my decision on the abuse of process application is moot. It is not for three reasons:

1. A declaration of mistrial means that the matter will proceed to a new trial.

2. I grant judgment on the liability issue in favour of the plaintiff.

3. The plaintiff seeks special costs related to the abuse of process and has asked for leave to provide further submissions in that regard.

[95] Both parties may seek to appear to address the issue of special costs based on my finding of an abuse of process.

Set aside the Jury Verdict

[96] Having declared a mistrial, I find that that the plaintiff's application to set aside the jury verdict on any basis is truly moot. I decline to rule on the plaintiff's application to set aside portions of the jury verdict.

Costs

[97] The parties have leave to address costs.

"Gropper J."

2016 BCSC 1624 (CanLII)

TAB 23

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Halalt First Nation v. British Columbia (Environment),* 2012 BCCA 191

Date: 20120404
Docket: CA039263; CA039264

CA039263

In the Matter of Sections 35 and 52 of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, the *Environmental Assessment Act*, S.B.C. 2002, c. 43, Environmental Assessment Certificate #W09-01, and the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Chief James Robert Thomas, Also known as Sulsimutstun, Chief of Halalt First Nation, on his own behalf and on behalf of all members of Halalt First Nation, and Halalt First Nation

Respondents
(Petitioners)

And

Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Environment and the Minister of Community Development

Appellant
(Respondent)

And

District of North Cowichan

Respondent
(Respondent)

- and –

Docket: CA039264

Between:

Chief James Robert Thomas, Also known as Sulsimutstun, Chief of Halalt First Nation, on his own behalf and on behalf of all members of Halalt First Nation, and Halalt First Nation

Respondents

2012 BCCA 191 (CanLII)

(Petitioners)

And

District of North Cowichan

Applicant
(Respondent)

2012 BCCA 191 (CanLII)

Before: The Honourable Madam Justice D. Smith
(In Chambers)

On appeal from the Supreme Court of British Columbia, July 13, 2011
(*Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945,
Vancouver Registry S098232)

Oral Reasons for Judgment

Counsel for the Appellant:	P.E. Yearwood
Counsel for the Respondent, Chief James Robert Thomas:	W.J. Andrews
Counsel for the Respondent, North Cowichan District	R. E. Harding M.D. Cannon
Counsel for the Intervenor Applicant, Chief Harvey Alphonse and the Cowichan Tribes	E.P. Murphy P.M. Hutchings
Counsel for the Intervenor Applicant, Tsuu T'ina Nation, Samson Cree Nation, Ermineskin Cree Nation, and Fort McMurray #468 First Nation	L. Andrychuk
Counsel for the Intervenor Applicant, First Nations Summit	M. Morellato, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia April 4, 2012
Place and Date of Judgment:	Vancouver, British Columbia April 4, 2012

[1] **D. SMITH J.A.**: There are three applications to intervene in this appeal by the Province of British Columbia (the "Province") from the July 13, 2011 order of Madam Justice Wedge. Justice Wedge found that the appellant Province had not engaged in adequate consultation with the respondent Halalt First Nation in regard to a groundwater extraction project, and that its accommodation of the Halalt's interests did not fall within the range of reasonable alternatives. A related appeal from the same order has been brought by the District of North Cowichan (the "District"). On September 14, 2011, an order was made that the two appeals be heard together. The applicants, however, only seek intervenor status for the Province's appeal.

[2] The proceedings arose after the Province granted the District an environmental assessment certificate for a project involving the construction and operation of a well field to extract groundwater from the Chemainus Aquifer (the "Project"). The proposed well field is on fee simple land owned by the District adjacent to the Halalt Reserve (the "Reserve"). The aquifer extends beneath the Reserve and is connected to the Chemainus River, which flows through the Reserve.

[3] The three applicants for intervener status are:

i. the First Nations Summit (the "Summit");
ii. Chief Harvey Alphonse, aka Swalethull't'hw, and the Cowichan Tribes, (the "Cowichan"); and
iii. Ermineskin Cree Nation, Samson Cree Nation, Tsuu T'ina Nation, and Fort McMurray #468 First Nation (collectively the "Alberta Nations").

The test for granting intervention

[4] Section 10(2) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, provides that a justice may make an order granting leave to intervene as an order incidental to an appeal. Rule 36(1) of the *Court of Appeal Rules* provides that, "[a]ny person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine."

2012 BCCA 191 (CanLII)

[5] The granting of intervenor status is a discretionary order that is subject to the following principles:

a) the applicant must have a direct interest in the matter; or

b) the applicant must have a public interest in a public law issue in question, and

c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

See *EGALE Canada Inc. v. Canada (Attorney General),* 2002 BCCA 396 at para. 7.

[6] A direct interest in the proceeding requires that an applicant's own legal rights or legal obligations be affected by the proceedings: *Guadagni v. British Columbia (Workers' Compensation Board)* (1988), 30 B.C.L.R. (2d) 259 (Chambers) at para. 12. Typically, a direct interest requires more than a concern about how the precedential value of a decision might affect an applicant or bear upon an applicant's own circumstances or case: *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2010 BCCA 113, at para. 12; *Faculty Association of the University of British Columbia v. University of British Columbia,* 2008 BCCA 376 at para. 9.

[7] Where applicants do not have a direct interest in the litigation, intervenor status may be granted where they represent a public interest on a public law issue and can make a valuable contribution or bring a unique perspective to the issues that is distinct from that of the parties. This requirement was canvassed by Madam Justice Rowles in *Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, 75 B.C.L.R. (4th) 36 at para. 7, quoting from *R. v. Watson*, 2006 BCCA 234 at para. 3:

> [W]here the applicant does not have a 'direct' interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark* [2001 BCCA 264] the proposed intervenor is likely to 'take the litigation away from those directly affected by it'.

2012 BCCA 191 (CanLII)

2012 BCCA 191 (CanLII)

1. Application to intervene by the First Nations Summit

[8] The Summit is a group representing those First Nations in British Columbia who are participating in the British Columbia Treaty Commission process. Its mandate is to facilitate reconciliation by supporting and representing the interests of First Nations who are negotiating treaties and to address issues of common concern throughout the Province. It submits that through this mandate it represents a public interest on the pubic law issues engaged in these appeals and that its perspective and experience would be valuable in the resolution of those issues.

[9] The Summit seeks leave to intervene in order to make submissions on the relationship-building and reconciliation purposes of the duty to consult. It proposes to argue the duty to consult and accommodate must be shaped by the objective of reconciliation and the goal of achieving just settlements through treaty-making. It says the duty to consult is about more than merely preventing irreparable harm to Aboriginal rights and title or minimizing the effects of infringement. It says consultation must be aimed at finding interim solutions in order to achieve reconciliation. The Summit would propose a framework for assessing meaningful consultation and accommodation which is informed by an assessment of the strength of aboriginal title and rights claims. It says the duty to consult must include timely disclosure of all relevant documents, including a strength-of-claim assessment, and greater integration of First Nations into the environmental assessment process. It also submits that the duty to accommodate should require engagement by the Province in strategic level planning about land and resource use and the development of accommodation measures that directly address title and proprietary issues. This is all in the context of the consultation process for aboriginal claims to water rights and title identified at the treaty table.

[10] The Summit says its arguments would offer a broader perspective than that of the respondent, because the Halalt's submissions focus primarily on the narrow issue of whether the Crown acted honourably in this case. The Summit says its extensive experience in engaging the Crown on duty to consult issues, and with the

relationship between First Nations and the Crown prior to the conclusion of treaties, would be valuable.

Position of the appellants Province and District

[11] The Province does not oppose the Summit being granted leave to intervene and file to a written factum, but does oppose the summit being permitted to make arguments which may expand the scope of the litigation between the parties. The District takes the same position. Specifically, they object to the Summit advancing arguments that may be aimed either directly or indirectly at the constitutional applicability or validity of the environmental assessment process. They also object to the Summit making submissions with regards to the 2005 New Relationship Agreement with the Province and to Summit making any submissions that merely support the position of the Halalt. They oppose the summit being permitted to make argument.

Discussion

[12] I agree, and this is by consent, that the Summit should be granted intervenor status. The Summit is an organization with a broad representative base and offers a unique perspective on the issues from the perspective of First Nations in British Columbia who are engaged in the B.C. Treaty process. The Summit agrees to confine its submissions to the scope of the duty to consult and accommodate. This may include the proper role of consultation and accommodation as interim measures within a broader treaty negotiation process where the management of water resources are incidental to claims of Aboriginal rights and/or title and consideration of how the strength of rights and title claims inform the scope of consultation and, where necessary, accommodation. It shall not include, and they agree that it shall not include, submissions that challenge, either directly or indirectly, the constitutional validity of the regulatory regime, the applicability of the 2005 New Relationship Agreement, or arguments directly on the strength of the Haltat's rights and title claims.

2012 BCCA 191 (CanLII)

2012 BCCA 191 (CanLII)

2. Application to intervene by the Alberta Nations

[13] The four Alberta Nations apply collectively to intervene in the appeal in order to address the specific issue of the rights of First Nations communities to groundwater resources and the duty of provincial governments to consult in relation to those resources. Each of the four nations holds reserve lands in Alberta that were set aside by Canada pursuant to treaties. Each nation relies heavily (or exclusively) on groundwater resources beneath its reserve lands and asserts rights to the water resources beneath its reserve lands. Three of the four have filed actions seeking confirmation of their water rights or damages for failure to protect water resources.

[14] The Alberta Nations face significant issues of water shortages and the connection between on-reserve groundwater resources and the use of ground and surface water by other parties off-reserve. Those issues, they argue, are similar to the issues that arise for the Halalt regarding the connection between the on-reserve aquifer and the Chemainus River. The province of Alberta has not engaged in any discussions regarding the rights to water of the various First Nations and has taken the position that the province owns the surface and groundwater on the lands that it owns, and has sole jurisdiction over the use of the water resources in the province.

[15] The Alberta Nations submit that they have a direct interest in this appeal because they each assert water rights in relation to their reserve lands that are similar or identical to the rights asserted by the Halalt in this case. They also submit that they have a broad representative base, as indicated by the support in this application of the Assembly of First Nations, which views these appeals as cases of national importance to First Nations' water rights and the Crown's duty to consult and accommodate, and by the support of the Treaty 8 First Nations of Alberta.

[16] They say that their significant experience engaging with governments around the issue of water rights and supply, and with water management issues in the context of the acute water scarcity in Alberta, gives them a unique perspective on this case. They say that each of the nations has had extensive involvement in legal and regulatory proceedings around the issue of on-reserve water rights and the duty

to consult. If leave to intervene is granted, they propose to make submissions regarding the application of existing jurisprudence to the issue of water rights on reserve lands and whether those rights have been extinguished. They also seek to make submissions regarding the scope of the duty to consult and, in particular, whether the Crown can refuse to consult on the issue of water rights and defend itself by pointing to consultation on other issues, such as fishing rights. Finally, they will submit that the duty to consult requires an assessment of the strength of the first nation's claim to water rights, particularly in relation to reserve lands.

Position of the appellant Province

[17] The Province opposes granting leave to intervene to the Alberta Nations. They say the Alberta Nations do not have a direct interest in the litigation and do not have a sufficiently broad base to qualify as public interest intervenors. They also say that there are significant differences between the interests of the Alberta Nations in the groundwater, under their reserves and the interest of the Halalt in its own groundwater as the reserves of the Alberta Nations were created by historical treaties, while the B.C. reserves were created though much different mechanisms. As such, they say the legal position of B.C. and Alberta bands in respect of water rights is significantly different. The Province says this eliminates any genuine interest the Alberta Nations can have in this appeal.

[18] The Province further submits that the arguments of the Alberta Nations would improperly expand the scope of the appeal. In particular, they point to submissions the Alberta Nations would make regarding the correctness of the chambers judge's findings that the Halalt has a strong *prima facie* title claim and an arguable case to a proprietary interest in the groundwater. The Province says it is not appealing those findings. It says the appeal is limited to the issue of whether the actions of the Province met the standard for deep consultation in this case and the appeal should not be allowed to stray into the merits of the Halalt's aboriginal rights and title claims.

2012 BCCA 191 (CanLII)

2012 BCCA 191 (CanLII)

Discussion

[19] I am not persuaded the Alberta Nations have a direct interest in this appeal. However, while they may not have an extremely broad representative base, they do represent four bands in Alberta and have the support of the Assembly of First Nations and the Treaty 8 First Nations of Alberta. I am satisfied, in these circumstances, they meet the requirement for a public interest intervenor.

[20] I am also of the view that they can offer a distinct perspective on this appeal in light of their extensive experience in negotiating with governments around water rights issues. Even with the historical differences in how their reserves were created, I am satisfied they could provide some assistance to the Court in defining the scope of consultation in the circumstances of this case and, in particular, offer broad submissions on the strength of claim assessment during the consultation process. I agree, however, with the Province that they should not be permitted to make submissions on the merits of the Halalt's claims to aboriginal rights and title, including submissions in support of the findings of the chambers judge in regard to the *prima facie* strength of those claims. Again, those findings are not under appeal and therefore are not in issue.

[21] I would therefore grant leave to intervene to the Alberta Nations but limit their submissions to the issues of the nature and scope of consultation required where First Nations' water rights are at issue. They may not address the merits of Halalt's claim to water rights or any issues regarding the legal basis for First Nations' water rights, but may make submissions regarding the nature of the assessments which are required during the consultation process (i.e. strength-of-claim assessments).

3. Application to intervene by the Cowichan Tribes

[22] The Cowichan Tribes are an Indian band neighbouring the respondent Halalt. The Cowichan is the largest community in the Hul'qumi'num Treaty Group (the "HTG") of which the Halalt is also a member. The Cowichan asserts aboriginal rights

in, and title to, the area in which the Project is proposed to operate. Its holds reserve lands on the Cowichan River and Cowichan Bay and its members obtain drinking water from wells which tap into aquifers of the Cowichan River watershed. That watershed is adjacent to the Chemainus watershed, where the Project that is at issue in these appeals is situated.

[23] The Cowichan elected to forgo involvement in these proceedings when it, along with other members of the HTG, authorized Halalt to bring this petition on its behalf. It is, however, engaged in similar proceedings by way of judicial review against the Province, in which it alleges a failure to consult and accommodate in relation to the Province's approvals of groundwater extraction from an aquifer connected to the Cowichan River, although apparently those proceedings have become stalled for a variety of reasons.

[24] The Cowichan submits that it has a direct interest in the appeal because it asserts claims to aboriginal rights and title over the same lands as the Halalt, based on a shared exclusive occupancy with the Halalt and others. It says the decision in this appeal will likely have a significant impact on its judicial review proceedings, and on the consultation and accommodation process that it is seeking in relation to the current environmental assessment of a proposed jet fuel delivery project. The Province has agreed to "deep" consultation with the Cowichan on that project and the decision in this appeal will provide guidance on the scope of the Province's duty to consult and accommodate in that case. Finally, the Cowichan expressly relies on the lower court decision in this case in its ongoing consultation with the Provincial Ministry of Transportation and Infrastructure regarding a proposed long-term lease of riverbed lands for which the Cowichan has advanced an aboriginal title claim.

[25] If the Cowichan is granted leave to intervene it would submit that the strength-of-claim assessment required by the duty to consult must include consideration of which present-day aboriginal community is likely the proper rights holder. It says if that issue had been considered in this case, the Province would not have erred in concluding that the Halalt's aboriginal title claim to the well sites was weak. It

2012 BCCA 191 (CanLII)

submits that the Province should have recognised that the HTG member communities as a group are the likely proper rights holders of a strong claim to aboriginal title. The Cowichan would also make arguments regarding the form of financial compensation the Crown ought to make available during the consultation and accommodation process. Finally, it would make submissions regarding the requirements of the duty to consult and accommodate in circumstances where aboriginal rights claims may be uncertain at law.

[26] The Cowichan says it offers a useful perspective to the Court because it is the largest community in the HTG area and is engaged in various consultations with the Province in the area. It says its submissions will supplement those provided by the respondent Halalt and will offer a different perspective.

Position of the appellant Province

[27] The Province says the Cowichan should not be granted leave to intervene because it does not have a direct interest in the discrete issues raised in the appeal regarding the adequacy of the consultation process with the Halalt prior to granting an environmental assessment certificate. It says the Cowichan's arguments are duplicative of the arguments that will, or could, be made by the Halalt. It says the Cowichan's claims to aboriginal rights and title in the affected area, and the precedential value or impact of the decision in this appeal on its litigation, do not give it a direct interest in the appeal.

[28] The Province also submits that the Cowichan does not meet the criteria for a public interest intervenor. It says the Cowichan does not have a broad representative base and does not bring a distinctive perspective. Further, it says certain of the proposed submissions of the Cowichan would expand the scope of the litigation, which is limited to the specific issue of whether the Province met its duty to consult with Halalt. In particular, it points to the Cowichan's submission regarding monetary compensation as a form of accommodation, which it says was discussed by the chambers judge in *obiter* only in light of her decision that there was not adequate consultation, and in any event, is not challenged on appeal.

2012 BCCA 191 (CanLII)

2012 BCCA 191 (CanLII)

Discussion

[29] The arguments of the Province that the Cowichan does not have a direct interest in the litigation and does not have a sufficiently broad base to be properly considered as a public interest intervenor are persuasive. More importantly, many of the submissions it wishes to make do not bring any unique perspective to the appeal and are merely duplicative of those that could and will undoubtedly be made by the Halalt. This is reflective of the fact that the Cowichan is in an almost identical position to the Halalt in regard to the issues it wishes to have addressed in its litigation.

[30] The Province correctly points out that the submissions by the Cowichan in regard to a monetary award as a form of accommodation would expand the scope of the litigation. The only other submission which the Cowichan proposes would provide a distinctive perspective is its argument that a strength-of-claim assessment should include an opinion as to who the likely proper rights holder is. This issue is being proposed for the first time on appeal and, in any event, could be advanced by Halalt if it so wishes. I would not accede to the Cowichan's application.

Conclusion

[31] In the result, the Summit and the Alberta Nations shall be granted intervenor status. The hearing of the appeals is scheduled for three days from May 23-25, 2012. There shall be an order extending the time for the filing of their factums to May 4, 2012. The length of the factums shall be no more than 15 pages.

[32] The applicants also seek to make oral arguments at the hearing of the appeals. The Halalt has stated that it does not oppose the intervenors' application in that regard and is prepared to accede to them part of its allotted time to permit them to make oral submissions. It seems to me that the Halalt's concession on this aspect of the intervenors' applications goes some distance to alleviating any concerns the Court might have, however, this is an issue that in my view must be left to the division hearing the appeals to decide.

(discussions with counsel re. reply dates)

[33] **D. SMITH J.A.**: There shall be a further order that any reply by the Province to the intervenors' factums shall be filed no later than May 16, 2012.

"The Honourable Madam Justice D. Smith"

2012 BCCA 191 (CanLII)

TAB 24

Citation: Haldorson v. Coquitlam (City) 2000 BCCA 672

Date: 20001206
Docket: CA025602
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

2000 BCCA 672 (CanLII)

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart

December 6, 2000

Vancouver, B.C.

BETWEEN:

ELIZABETH HALDORSON, JIM NYHUS, BELA SIVAK, ROGER LOUBERT, DENIS HOWARTH

PETITIONERS
(APPELLANTS)

AND:

THE CITY OF COQUITLAM

RESPONDENT
(RESPONDENT)

AND:

GREATER VANCOUVER REGIONAL DISTRICT, AND GREATER VANCOUVER HOUSING CORPORATION

RESPONDENTS
(RESPONDENTS)

Bela Sivak — appearing in person

Denis Howarth — appearing in person

D.R. Bennett — appearing for the Respondent The City of Coquitlam

R.J. McDonell — appearing for the Respondents

Greater Vancouver Regional
District and Greater Vancouver
Housing Corporation

2000 BCCA 672 (CanLII)

[1] **LAMBERT, J.A.:** This is an application to review a decision of a single judge of the court sitting in chambers. The decision was a decision of Madam Justice Southin made on 25 August 2000.

[2] The issue that was before Madam Justice Southin was whether to reinstate an appeal under the powers of a single judge under ss. 25(2) of the ***Court of Appeal Act***. The application was brought in the last few days of the six month period that follows the initial one year period and, if those few days had expired, the appeal would have stood dismissed and could only have been revitalized by an order of the chambers judge.

[3] I have no doubt that the proper principles to apply in reactivating an appeal under ss. 25(2) are not the same as the proper principles to apply in bringing an appeal that has been dismissed back into existence under ss. 25(5). In this case, in spite of the lateness of the application, the principles applicable are those that relate to s. 25(2) of the ***Act***.

[4] Madam Justice Southin described the action, which was an application for an order that a Community Plan Amendment Bylaw

of Coquitlam be set aside for illegality, and that a zoning bylaw related to it also be set aside for illegality. The applications were based on what was said to be an invalid public hearing because of failure to disclose material and to give proper notice and, consequently, an invalid rezoning because there had been no valid public hearing. All the matters relate to a change in zoning which, if it had been effective, would have permitted the building of some form of community housing on the site in question.

[5] Madam Justice Southin then set out the provisions of s. 25 and she set out a number of cases, some decided by a division of the court and some decided by single chambers judges. Madam Justice Southin referred to the fundamental legal principle which urges that a finish be brought to litigation; then Madam Justice Southin set out the relationship between this action and the action which I will call the "Loewen" action; and finally, Madam Justice Southin referred to the balancing of the interests of justice, including both the interests of justice as they affect the respective parties to the litigation, but also the broader interests of the public generally in the administration of justice which may also be a relevant concern in assessing the interests of justice.

2000 BCCA 672 (CanLII)

[6] The test that ought to be applied by a reviewing court on an application to review an order of a chambers judge is set out in the reasons of Chief Justice McEachern in ***Frew v. Roberts*** (1990), 29 B.C.L.R. (3d) 34 (B.C.C.A.). At p. 36, Chief Justice McEachern, in a majority judgment, said this:

> In my view, the determination whether an appeal should be dismissed in such circumstances is not truly a matter of discretion. It was a matter of judgment to be applied to the circumstance of the case. The learned Chambers Judge who heard the matter, in his judgment, thought that the appeal should be dismissed and that is the order he made.
>
> It is my view that we should not interfere with that decision unless we are satisfied that the Chambers Judge was wrong in the legal sense and not merely that he exercised a discretion incorrectly. I am not persuaded that he erred in his disposition of the matter. ...
>
> (my emphasis)

[7] It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.

2000 BCCA 672 (CanLII)

[8] I now turn to the principles that the chambers judge was required to apply. It is not necessary for me to repeat the cases that the chambers judge referred to though I think that perhaps I could mention two decisions of a division of the court: ***Stasiuk v. Szabo*** (1997), 29 B.C.L.R. (3d) 49 and ***Boaler v. Brar*** (1997), 9 C.P.C. (4th) 48. Perhaps most important are the decisions of single judges in chambers in ***Galiano Conservancy Assn. v. British Columbia (Ministry of Transportation & Highways)*** (1997), 40 B.C.L.R. (3d) 171 and ***Rowan v. Dunwoody & Co. (c.o.b. "BDO Dunwoody")***, [1999] B.C.J. No. 2856 (Q.L.). In the ***Rowan*** case, Chief Justice McEachern said this in relation to the scope of the consideration by a chambers judge asked to reactivate an appeal, at para. 19:

> I am not satisfied that it is wise to attempt to establish a test in this or any one case that would apply fairly in all subsequent cases. It seems to me, however, that a timely intention to appeal is important. After that, the three-part test in *Frew v. Roberts* should be considered. <u>But after considering those matters, I think it is necessary to go beyond the answers reached on that test, and decide whether, considering the merits of the case and all other relevant matters, it is in the interests of justice that the appeal be reinstated or left dismissed.</u> The onus on all these matters, of course, rests upon the applicant.
>
> (my emphasis)

Again, in para. 20, Chief Justice McEachern concluded that paragraph by saying this:

2000 BCCA 672 (CanLII)

> ... Adopting the fifth rule in *Davies v. C.I.B.C.*, I prefer to leave the assessment of the merits to the good judgment of the Chambers judges who will consider all these matters in light of the particular circumstances of each case.
>
> (my emphasis)

2000 BCCA 672 (CanLII)

[9] The fifth rule, of course, in ***Davies v. C.I.B.C.*** (1987), 15 B.C.L.R. (2d) 256 is that in deciding whether to extend time to someone who files a notice of appeal late, the overriding rule, called the fifth rule, is that there must be a balancing of the interests of justice as they affect both parties and in reaching a decision the interests of justice will prevail. The first four rules cannot be used to defeat the interests of justice but are themselves guides to the application of the interests of justice.

[10] Now that is the principle that was applied in this case by Madam Justice Southin, as I read her reasons. In the end, Madam Justice Southin specifically discusses the interests of justice and mentions that the motives lying behind this appeal are to seek a declaration by this Court that the actions of the City of Coquitlam and the Greater Vancouver Regional District were not in accordance with law. It is, presumably, hoped by the petitioners that after such a declaration the defendants would not make the same mistake, assuming it is a mistake, again.

[11] The housing building has now been built and it is not going to be torn down under any circumstance. The most, then, that could come out of saying that the rezoning was invalid would be that the zoning would revert to what it was before and this housing would be a non-conforming use. But Mr. Howarth very fairly said that the purpose of this appeal is not to create a non-conforming use but to have a declaration by this court that the breaches that are alleged of proper practice and procedure under the ***Municipal Act*** occurred. In my opinion, that is really asking this court to give legal advice on a moot question.

[12] There are some situations discussed in the ***Borowski*** decision of the Supreme Court of Canada [1989], 1 S.C.R. 342 which indicate that it will in rare circumstances be possible and proper to consider questions which are in the particular case academic but which may have a wide-reaching effect. In my opinion, having regard to the nature of the issue in this case and the fact that it is being exposed in other similar cases, the ***Borowski*** exception is inapplicable. In my opinion, no error of principle or of law, and no misunderstanding of the facts has been demonstrated on the part of the chambers judge. In those circumstances, it would not be proper to

2000 BCCA 672 (CanLII)

reconsider the matter afresh with the possibility of substituting our view for the view of the chambers judge.

[13] Accordingly, I would dismiss this application for review.

[14] **DONALD, J.A.:** I agree.

[15] **HUDDART, J.A.:** I agree.

[16] **LAMBERT, J.A.:** So ordered.

"The Honourable Mr. Justice Lambert"

2000 BCCA 672 (CanLII)

TAB 25

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2012 BCCA 414

Date: 20121018
Docket: CA039561

Between:

Hawkeye Power Corporation

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Sigma Engineering Ltd.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Bennett
The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia, November 21, 2011
(*Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2011 BCSC 1578)

Counsel for the Appellant: G. J. Allen

Counsel for the Respondent: S. M. Hirji and J. R. Schmidt

Place and Date of Hearing: Vancouver, British Columbia
September 4, 2012

Place and Date of Judgment: Vancouver, British Columbia
October 18, 2012

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Bennett

2012 BCCA 414 (CanLII)

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

Introduction

[1] In 2006, two brothers, Greg and Robert Neeld, incorporated two related companies to carry out hydroelectric energy projects: Hawkeye Power Corporation ("Power") and Hawkeye Energy Corporation ("Energy"). Power and Energy entered into an asset purchase agreement (the "APA") which governs the ownership of 36 water licence and land tenure applications (the "River Applications"). Under the APA, Power agreed to transfer beneficial and legal ownership of the River Applications to Energy in exchange for shares in Energy and certain payments and reimbursements. The APA contained an expiry clause which allowed Power to regain ownership of the River Applications if Energy did not fulfill certain obligations.

[2] The dispute is between Power and Energy's creditor, Sigma Engineering Ltd. ("Sigma"). Energy was placed into receivership on September 1, 2009, and the receiver attempted to sell the River Applications to Sigma. Power opposed the sale on the grounds that it was the legal and beneficial owner of the River Applications by operation of the expiry clause in the APA. On May 31, 2010, the Supreme Court approved the sale of the River Applications by Energy's receiver to Sigma, subject to Power's claim of ownership interest in the River Applications (2010 BCSC 1977). Power's ownership claim was tried in the Supreme Court in July 2011.

[3] In careful and thorough reasons indexed as 2011 BCSC 1578, the trial judge held Power and Energy had, by their conduct, modified the terms of the APA. As a result of this modification, the judge interpreted the APA's expiry clause to impose an additional obligation on Power in order to give effect to the expiry clause and regain ownership of the River Applications. As Power did not fulfill this additional obligation when the APA expired, the expiry clause failed to operate so as to transfer the River Applications to Power. Notably, the question of contract modification and this interpretation of the expiry clause were neither pleaded nor argued by the parties at trial.

2012 BCCA 414 (CanLII)

[4] The judge concluded Energy is the legal and beneficial owner of the River Applications and dismissed Power's claim for a declaration of ownership in the River Applications. She also dismissed Sigma's counterclaim that the APA was a fraudulent conveyance or fraudulent preference.

[5] Power appeals from the order on the basis the trial judge erred in finding Power and Energy had modified the APA so as to impose an extra obligation on Power under the expiry clause and the trial judge erred in finding the modification of the APA binding on Power and Energy, despite a lack of consideration.

[6] Alternatively, Power submits the trial judge erred in basing her decision on an analysis that was neither pleaded nor argued by the parties. Power submits the outcome was therefore unfair.

[7] Sigma cross appeals on the ground that if Power's appeal is allowed, this Court must consider Sigma's cross appeal that the conveyance was fraudulent.

[8] For the reasons that follow, I conclude the trial judge made a procedural error in resolving this case based on an interpretation of the expiry clause that was neither pleaded nor argued by the parties. Neither party had the opportunity, in its pleadings or in submissions, to address the basis for the judge's decision. This resulted in prejudice to Power and constitutes reversible error. In light of this conclusion, it is unnecessary to address the other two grounds of appeal. It is also unnecessary to address Sigma's cross appeal that the APA was a fraudulent conveyance or preference.

[9] Accordingly, I would allow the appeal, set aside the order of the trial judge and order a new trial.

Background

[10] The facts are set out comprehensively in the reasons of the trial judge so I will only summarize them here.

2012 BCCA 414 (CanLII)

[11] Two brothers, Greg and Robert Neeld, had a history of working together in the mining industry. In an effort to venture into the development of hydroelectric power claims, the brothers incorporated two companies: the appellant Power, and its associated company, Energy. The principal and directing mind of both companies is Greg Neeld, assisted by Robert Neeld.

[12] Using the business framework from their mining experience, the brothers decided to use Power as the "prospect generator" to obtain the River Applications. Energy would act as the "operating company" and raise five million dollars in financing to develop the claims, obtain ownership of the River Applications upon making certain payments to Power, and eventually become a public company. To this end, Power and Energy entered into the APA, which governs the ownership of the River Applications.

[13] Power and Energy retained Sigma for advice and engineering services. Sigma investigated and filed a total of 36 River Applications for the Neeld brothers, all of which were filed in Energy's name.

The Asset Purchase Agreement

[14] Power and Energy entered into the APA in July 2007 as Vendor and Purchaser respectively in order to transfer the beneficial ownership of the River Applications from Power to Energy.

[15] At that time, the River Applications were registered under Energy's name in order to maintain the highest priority position in the River Applications. Although Energy was always the legal owner of the River Applications, the trial judge found that Power retained beneficial ownership of the River Applications and both Power and Energy expected the future ownership of the River Applications to be governed by the terms of the APA.

[16] The APA contemplated two sets of purchases and three potential closing dates. On the First Closing Date, July 25, 2007, the beneficial ownership of three of

2012 BCCA 414 (CanLII)

the River Applications was to be conveyed from Power to Energy in exchange for 7,900,000 of Energy's shares. The Second Closing Date was to be the 60th day after Power notified Energy of Power's ability to convey the remaining River Applications to Energy. If by that date Energy had financed at least $5 million, it would pay Power $895,000 plus an amount equal to the Integrated Land Management Bureau ("ILMB") costs incurred by Power, in exchange for beneficial and legal title to the remaining River Applications. If Energy had not obtained an investment of at least $5 million by this date, it would issue two promissory notes, one in the amount of $895,000 and a separate one in an amount equal to the ILMB Costs incurred by Power, in exchange for beneficial and legal title of the remaining River Applications. These promissory notes were to be payable on or before the Third Closing Date, being the 15th business day after the day on which Energy completed the $5 million minimum financing.

[17] Clause 4.6 (the "Termination Clause") provided that if Energy did not pay $895,000 plus the ILMB Costs within twelve months after the Second Closing, Power, upon notice to Energy, would have the right to terminate the APA, with the option of returning Energy's shares and promissory notes in exchange for the original three River Applications.

[18] Clause 4.7 (the "Expiry Clause") specified that if the Third Closing did not occur by the Expiry Date of July 1, 2009, then Energy would be deemed to have quitclaimed all the River Applications to Power in exchange for the surrender of the 7,900,000 Energy shares and the promissory notes.

[19] The Termination Clause and the Expiry Clause are as follows:

> 4.6 <u>Failure of Purchaser to Pay Additional Projects Purchase Price</u> If the Purchaser [Energy] does not pay the Additional Projects Purchase Price payable for the Additional Projects and related Assets within 12 months next following the Second Closing, the Vendor [Power] will thereafter (until the earlier of the Expiry Date and that date, if any, on which the Purchaser gives written notice to the Vendor to the effect that the Purchaser has received the Minimum Financing and has deposited into trust with its solicitors an amount sufficient to pay the Additional Projects Purchase Price together with irrevocable instructions to pay the Additional Projects Purchase Price to the

2012 BCCA 414 (CanLII)

Vendor in satisfaction of the Purchaser's Third Closing obligations) have, in addition to all other rights and remedies available to it at law and in equity:

(a) the exclusive right and option, exercisable by notice in writing to the Purchaser, to terminate this Agreement in respect of the Additional Projects and related Assets, in which event neither party will have any further obligation to the other in respect of the Additional Projects and related Assets; and

(b) the additional exclusive right and option, in addition to and separate from the option provided for in clause 4.6(a), and exercisable by notice in writing to the Purchaser, to transfer and surrender the Vendor's 7,900,000 Purchaser Shares to the Purchaser in exchange for the Original Projects and related Assets; and upon the exercise of such option, beneficial title (and legal title, if applicable) to the Original Projects and related Assets will be and be deemed for all purposes to be transferred to the Vendor without the need for any further action or documentation, and neither party will have any further obligation to the other hereunder except an obligation on the part of the Purchaser to transfer registered title to the Original Projects and related Assets to the Vendor, if required to vest good and marketable title in the Vendor.

4.7 Expiry Date Notwithstanding any other provision of this Agreement, if the Third Closing does not occur before the Expiry Date, then in the absence of a written agreement to extend the time for performance of this Agreement executed and delivered by both parties hereto, the Purchaser will be and be deemed for all purposes to have quitclaimed and surrendered the Original Projects and the Additional Projects and all related Assets to the Vendor in exchange for the transfer and surrender by the Vendor of its 7,900,000 Purchaser Shares and the promissory notes described in section 4.2 of this Agreement to the Purchaser, without the need for any further action, and neither party will have any further obligation to the other hereunder.

The Conduct of the Parties to the APA

[20] On July 25, 2007, Power and Energy completed the First Closing under the APA. Energy issued 7,900,000 shares to Power and Power conveyed beneficial and legal ownership of the first three River Applications to Energy.

[21] Energy also made payments to Power for the ILMB Costs, totalling approximately $705,000, despite the fact the repayment of the ILMB Costs was not due until the Second Closing under the APA.

2012 BCCA 414 (CanLII)

[22] In July 2008, Power gave notice to Energy of its ability to convey the remaining River Applications to Energy. Under the APA, the Second Closing was to occur 60 days after this notice. Energy did not raise the minimum financing required by the Second Closing Date and did not provide any promissory notes to Power. Despite this omission, the trial judge found that the Second Closing had occurred, as the parties' conduct indicated they considered the Second Closing to be completed. As a result of the Second Closing, Energy obtained both beneficial and legal title to the remaining River Applications. Thus, by September 2008, Energy was the beneficial and legal owner of all the River Applications and Power no longer had any property interest in the River Applications. However, Power maintained a contractual right to regain ownership of the River Applications if certain requirements were fulfilled.

[23] The Third Closing was to occur on the 15th business day after Energy raised the $5 million minimum financing. It required Energy to pay Power $895,000 and the amount of the ILMB Costs before the automatic expiry of the APA on July 1, 2009. Although Energy paid the ILMB Costs before the Second Closing Date, it never raised the minimum financing required for the Third Closing, nor did it pay $895,000 to Power before July 1, 2009. Thus, the Third Closing did not occur.

[24] Under the APA's Termination Clause, Power had the right to terminate the APA before the Expiry Date and regain ownership of the first three River Applications if Energy did not pay $895,000 plus the ILMB Costs within 12 months of the Second Closing. Pursuant to this clause, Power sent Energy a notice of termination dated August 21, 2009, and delivered August 25, 2009. However, the trial judge found the notice of termination ineffective, as Power sent it after the APA Expiry Date of July 1, 2009.

[25] Pursuant to the APA's Expiry Clause, Power had the right to regain ownership of all the River Applications after July 1, 2009, in exchange for the transfer of the 7,900,000 shares and the promissory notes to Energy. Power returned the Energy shares with the notice of termination on August 25, 2009. As they had not been

2012 BCCA 414 (CanLII)

issued, Power did not return any promissory notes, nor did Power return any other payments made by Energy.

The Dispute Between Power and Sigma

[26] In 2008 and 2009, Power and Energy fell behind in paying for Sigma's engineering services. Sigma settled its debt claim against Power, but Energy's financial problems led Sigma to give notice to Energy in April 2009 of its intention to have Energy placed into receivership.

[27] Energy went into receivership in September 2009. The Receiver offered the River Applications for sale and Sigma made the favoured bid. The Receiver applied for court approval of the sale of the River Applications and Power opposed the application on the ground that by operation of the APA it was the legal and beneficial owner of the River Applications. The British Columbia Supreme Court approved the sale, subject to Power's claim to an ownership interest in the River Applications.

[28] Power's claim for a declaration that the River Applications are the legal and beneficial property of Power and for an order that the Receiver, Energy and Sigma transfer the River Applications to Power, was tried and dismissed in the Supreme Court.

The Parties' Positions at Trial

[29] At trial, Power's position was the APA is a valid and enforceable contract that governs the ownership of the River Applications. Power maintained that the written terms continued to apply, despite some conduct of Power and Energy that was inconsistent with its terms. Power argued that, pursuant to the original, written terms of the APA, Power is the legal and beneficial owner of the River Applications as the Second Closing did not occur and any River Applications that were transferred to Energy returned to Power upon expiry or, alternatively, termination of the APA.

[30] Sigma's position was the APA does not govern the ownership of the River Applications, as it is not a valid and binding agreement. Sigma argued the APA was

2012 BCCA 414 (CanLII)

essentially a sham, there was no consideration for the agreement, and the conduct of the parties was inconsistent with the terms of the APA. Sigma also advanced an alternative counterclaim that asserted the APA was formed in furtherance of a fraudulent conveyance or fraudulent preference and is therefore null and void under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, or the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164. Thus, Energy owns the River Applications.

2012 BCCA 414 (CanLII)

The Trial Judgment

[31] The trial judge rejected the arguments of both parties. First, she held the APA between Energy and Power was valid and binding, contrary to Sigma's position that it was an invalid sham. The judge found that although Energy and Power did not strictly adhere to the provisions of the APA, this did not invalidate the agreement. Rather, the inconsistencies between the parties' conduct and the terms of the APA amounted to a modification of the APA.

[32] In particular, the trial judge found the parties' conduct modified clause 4.2(b) of the APA, which required Energy to reimburse Power for all ILMB Costs by cash or promissory note at the time of the Second Closing. However, Energy made payments to Power for the ILMB Costs before the Second Closing. The judge held this inconsistent conduct modified clause 4.2(b) of the APA to allow Energy to pay the ILMB Costs as Power incurred those costs, instead of reimbursing Power for all ILMB Costs at the time of the Second Closing. To this effect, the judge said:

> [175] The effect of the Neeld brothers' evidence was that while repayment of the ILMB Costs was not due until the Second Closing, because both companies intended and treated the Second Closing as occurring, Energy simply paid Power along the way instead of waiting for the Second Closing.
>
> [176] The implication of the Neeld brothers' evidence, therefore, was that by their conduct and intentions, Energy and Power had simply modified the APA in respect of the timing of Energy's payment to Power for ILMB Costs. The Neeld brothers clearly did not consider this to be a material variation of the APA. If this was so, then by necessary implication all other material terms of the APA must have been intended to continue to apply.

[33] Contrary to the positions of both Sigma and Power, the trial judge went on to hold the Second Closing under the APA had occurred, even though Energy did not

provide a promissory note to Power for $895,000. As a result of this finding, the judge concluded legal and beneficial title to the River Applications had been transferred to Energy:

> [200] My finding that the Second Closing occurred under the APA has significant implications for Power's position in this proceeding. Under the APA, the effect of the Second Closing was to transfer all beneficial title to the River Applications subject to that closing, from Power to Energy, as well as any legal title not already transferred. Legal title was already in Energy's name.
>
> [201] Thus, as of September 2008, Energy had both beneficial and legal title to all of the River Applications subject to this proceeding. The remaining question is whether ownership subsequently changed, either based on Power's right to terminate the APA under clause 4.6, or the expiry of the APA under clause 4.7, both of which I will address shortly.

[34] The judge then went on to consider whether the Termination Clause or the Expiry Clause operated to transfer beneficial ownership of the River Applications back to Power.

[35] The judge held Power did not regain ownership of the River Applications through the operation of the Termination Clause, as the notice of termination was sent by Power after the APA had expired on July 1, 2009.

[36] The judge also held Power did not regain ownership of the River Applications through the operation of the Expiry Clause. The relevant portion of the Expiry Clause states:

> ... if the Third Closing does not occur before the Expiry Date [July 1, 2009] ... the Purchaser [Energy] will be and be deemed for all purposes to have quitclaimed and surrendered the Original Projects and the Additional Projects and all related Assets to the Vendor [Power] in exchange for the transfer and surrender by the Vendor of its 7,900,000 Purchaser Shares and the promissory notes ... without the need for any further action, and neither party will have any further obligation to the other hereunder.

[37] The judge found the Third Closing had not occurred, and therefore the Expiry Clause applied as of July 1, 2009, giving Power the right to regain ownership of the River Applications from Energy in exchange for the shares in Energy and the promissory notes for $895,000 and for the ILMB Costs. Power returned the Energy

2012 BCCA 414 (CanLII)

shares on August 25, 2009, and as Energy had failed to give Power any promissory notes, the trial judge held, at para. 229, "Power cannot be faulted for not returning a non-existent note." The judge then questioned what Power should do about the pre-paid ILMB Costs.

[38] The judge went on to reason that although the written terms of the APA did not specifically require Power to repay any pre-paid ILMB Costs under the Expiry Clause, the parties' modification to the APA to provide for the pre-payment of the ILMB Costs by Energy required an interpretation of the Expiry Clause to include such a requirement. Thus, in order to give effect to the Expiry Clause and regain ownership of the River Applications, Power was required to return the shares in Energy and repay the pre-paid ILMB Costs of approximately $705,000. The judge held this interpretation of the Expiry Clause was necessary to make the Expiry Clause consistent with the parties' earlier modification of the APA and with the structure of the APA as a whole.

[39] Based on this interpretation of the Expiry Clause, the judge concluded Power did not regain ownership of the River Applications upon the expiry of the APA, as Power did not repay the pre-Second Closing ILMB Costs. Accordingly, the judge found Energy owned the River Applications and dismissed Power's claim for a declaration of ownership of the River Applications.

[40] The judge also dismissed Sigma's counterclaim that the APA was a fraudulent conveyance or fraudulent preference.

The Issues on Appeal

[41] Power and Sigma do not dispute the trial judge's finding that the Second Closing under the APA occurred and, in turn, that Energy had both beneficial and legal ownership of the River Applications at the time the APA expired on July 1, 2009.

2012 BCCA 414 (CanLII)

[42] The dispute is over the trial judge's finding that Power and Energy, by their conduct, modified the terms of the APA to allow Energy to reimburse Power for the ILMB Costs as incurred, rather than by cash or promissory note at the Second Closing, and the effect of that modification on the APA's Expiry Clause.

[43] Power advances three grounds of appeal, alleging the trial judge erred:

1. In finding Power and Energy modified the APA as to the timing of the payment of the ILMB Costs and, in turn, interpreting the Expiry Clause to require Power to repay the ILMB Costs to Energy as a condition precedent to Power's contractual right to regain title to the River Applications, when there was no evidence to support this finding;
2. In finding the aforementioned modification of the APA was binding on Power and Energy, despite a lack of consideration; and
3. In the alternative, in basing her decision on an interpretation of the APA that neither party had pleaded or raised in submissions, denying the parties the opportunity to lead evidence or make submissions on the point.

[44] Sigma cross appeals on the ground that, if Power's appeal of the main action is allowed and Power is found to be the beneficial and legal owner of the River Applications, this Court should assess Sigma's counterclaim that the APA was a fraudulent conveyance or fraudulent preference on its merits or, in the alternative, remit this matter to the trial judge.

Analysis

[45] I will address Power's third ground of appeal first.

Did the trial judge make a procedural error in basing her decision on an interpretation of the APA that was neither pleaded nor argued by the parties at trial?

[46] As discussed above, the trial judge found Energy and Power had modified the APA to allow Energy to pay the ILMB Costs in advance. The trial judge also found

2012 BCCA 414 (CanLII)

the intent of the APA was that Energy and Power would be returned to their original positions if the APA expired and Power sought to regain the River Applications. Thus, the trial judge interpreted the Expiry Clause to require Power to repay the pre-paid ILMB Costs to Energy as a condition precedent to Power's contractual right to regain title to the River Applications upon expiry of the APA. This requirement was not specifically included in the original, written Expiry Clause, but the trial judge found it was "the only sensible commercial interpretation" of the Expiry Clause.

[47] The trial judge interpreted the Expiry Clause as follows:

> [234] The expiry clause was only to come into play if a Third Closing was necessary because Energy had not raised the Minimum Financing by the time of the Second Closing. The structure of the APA assumed that until the Minimum Financing was raised, Energy would not pay the pre-Second Closing ILMB Costs. The expiry clause envisioned that if Energy had not raised the Minimum Financing by the Expiry Date that the earlier transactions between Power and Energy could be reversed: Energy would get back from Power the shares it had issued and the promissory notes for the $895,000 and the pre-Second Closing ILMB Costs, and Power would get back the ownership of the River Applications.
>
> [235] Given that the thrust of the Neeld brothers' evidence was that they continued to follow the intentions of the APA throughout, their modification to the APA that allowed Energy to pay the pre-Second Closing ILMB Costs upfront must have been on the same basis as the intended provision of the promissory notes: that these payments would have to be returned by Power if Power ever sought to rely on the expiry clause. Any other interpretation would be inconsistent with the structure of the APA.
>
> [236] I find that if the parties by their conduct modified the APA to allow Energy to pay the ILMB Costs before the Second Closing, they must have intended that if Power sought to exercise its rights under clause 4.7 Power would be required to reimburse Energy for the pre-Second Closing ILMB Costs as a condition of Power receiving back the full ownership in the Original Projects and the Additional Projects. This is the only sensible commercial interpretation, and it is in keeping with the original structure of the APA.
>
> [237] I find that by well before the expiry date of July 1, 2009, Energy held both beneficial and legal title to the River Applications at issue in this proceeding. The APA expired on July 1, 2009 as Energy was unable to meet its obligations for the Third Closing. However, Power did not meet the conditions for exercising its contractual rights to obtain a surrendering of the River Applications pursuant to clause 4.7 of the APA, as Power did not repay Energy all of the pre-Second Closing ILMB Costs that Energy had paid Power.

2012 BCCA 414 (CanLII)

> [238] Thus, Energy remains both the beneficial and legal owner of the River Applications registered in its name.

[48] Power argues the trial judge's finding of contract modification and her resulting interpretation of the APA's Expiry Clause were neither pleaded nor argued at trial. Instead, the judge developed this interpretation on her own; it appeared for the first time in her reasons for judgment.

[49] While agreeing at trial that some of its conduct was inconsistent with some of the terms of the APA, Power did not plead or argue the APA had been modified, either in the manner found by the trial judge, or at all. Similarly, Sigma did not plead or argue the APA was valid, but had been modified by the conduct of Energy and Power.

[50] At the hearing of this appeal, Sigma initially contended, on a strained examination of its pleadings, that its defence at trial could be viewed as including an argument based on modification of the contract. To its credit, Sigma abandoned that argument and fairly conceded the trial judge's finding of a modification of the APA and her interpretation of the Expiry Clause were never pleaded, did not arise in submissions and were not raised by the court at trial.

[51] Power says the parties were thus denied the opportunity to lead evidence or make submissions on the question of modification of the APA and, in particular, the specific modification to the APA found by the trial judge and the resulting effect on the Expiry Clause. Power argues the modification issue was clearly pivotal, as the trial judge's interpretation of the Expiry Clause and ultimate conclusion about the ownership of the River Applications hinged on her finding that the APA had been modified. Neither party was given a meaningful opportunity to address this important point and fully make their cases at trial.

[52] Sigma submits that even if the judge erred in deciding the case on an issue neither pleaded nor argued at trial, Power was not prejudiced. Sigma says it was open to the trial judge to find the APA had been modified by the conduct of Power

2012 BCCA 414 (CanLII)

and Energy, as Power was aware of, and did not challenge, the evidence that Power and Energy's conduct was inconsistent with the written terms of the APA.

[53] Sigma says in its factum that Power's approach to its inconsistent conduct was to try to "explain it away", while still maintaining that the written terms of the APA governed ownership of the River Applications. In doing so, Sigma contends Power raised the prospect that either the inconsistent conduct was a modification of one or more terms of the APA, as the trial judge found, or there was no effective agreement in the first place or, if there was, it was an entirely different and unknown agreement. Sigma contends that Power's position on this appeal is actually premised on an acceptance of the trial judge's finding that the APA was valid and binding, but modified by the parties' conduct. Thus, it cannot be said that Power has suffered any fundamental unfairness in the way the trial judge approached Energy's advance payments of the ILMB Costs.

[54] Sigma further argues Power was not prejudiced because the evidence at trial would not have been different, nor had any different effect, had either party explicitly raised the issue of contract modification.

[55] I agree with Power that conduct inconsistent with the written terms of the APA can give rise to a number of legal conclusions, including waiver, modification, or a finding that the APA is not binding on the parties. Sigma only argued the latter possibility at trial, and Power successfully addressed this argument.

[56] It is also correct, in my opinion, that had the issue of contract modification and the effect on the Expiry Clause been identified in the pleadings, different documentary and testamentary evidence may have been adduced, or at a minimum, the evidence may have been subject to different emphasis or argument. The parties' submissions might have affected the judge's view of the case, her findings of credibility or her disposition of the case.

2012 BCCA 414 (CanLII)

[57] Natural justice requires that parties have notice of the case they are required to meet and the opportunity to adduce evidence and make submissions on that case. Power cannot be taken to have abandoned these rights.

[58] In *Lore Krill Housing Co-operative v. Ramirez,* 2012 BCCA 223, Madam Justice Neilson, for the Court, said at para. 17:

> Fairness requires that judges should not on their own initiative determine a matter on a pivotal point not raised by the parties without drawing their attention to it, and giving them an opportunity to address it: *R. v. Whincup,* 2011 BCCA 520 at para. 11, 314 B.C.A.C. 75; *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343 at para. 42, 298 D.L.R. (4th) 216.

[59] Madam Justice Neilson went on to say that while this Court may be in a position in some cases to address a question of law that was not addressed in the court below, that was not so in the case before her. The chambers judge determined the case on the basis of waiver, despite the fact that waiver was not pleaded or argued at the hearing. The appellant wished to lead evidence on the issue of waiver, and the trial court was the only venue that would give the appellant an opportunity to fully address the issue on both a factual and legal basis.

[60] In *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343, 83 B.C.L.R. (4th) 267, Mr. Justice Frankel, for the Court, said:

> [38] Fairness requires that a trial judge not bring issues into litigation without giving the parties an opportunity to address them. This is also reflected in *Walker v. Blades*, 2007 BCCA 436, 70 B.C.L.R. (4th) 226 at para. 16, and *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60 - 62. In *Walker*, the trial judge erred in dismissing an action on the basis that the plaintiff had repudiated the contract in issue, when repudiation had not been pleaded or argued. In *Rodaro*, the trial judge's error was in granting judgment in favour of the plaintiff on a theory of liability that had not been pleaded or argued.

[61] Mr. Justice Frankel noted, at para. 39, the common thread in the authorities is that a party is entitled to know and respond to the case against it, whether by the calling of evidence, or through submissions.

2012 BCCA 414 (CanLII)

[62] In *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), Mr. Justice Doherty, for the Court, described the fairness and reliability concerns associated with deciding a case on an issue neither pleaded nor argued:

> [61] By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.
>
> [62] In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how Spence J.'s lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by Mr. Rodaro and were therefore subject to the adversarial process were found wanting by Spence J.

[63] I agree with Power that it was prejudiced by the analytical route taken by the trial judge. The judge found the APA had been modified by the conduct of Power and Energy to allow Energy to pay the ILMB Costs in advance, despite the fact that neither party pleaded or argued the issue of contract modification at trial. This finding led the trial judge to conclude, at para. 236, that an interpretation of the Expiry Clause requiring Power to reimburse Energy for the pre-paid ILMB Costs was "the only sensible commercial interpretation". Neither party at trial made submissions on this interpretation.

[64] If the judge had raised the issue of contract modification at trial, Power could have made arguments about whether Power and Energy, by their conduct, modified the APA with respect to the timing of Energy's payment of the ILMB Costs.

[65] I am also not persuaded that the judge's interpretation of the Expiry Clause was "the only sensible commercial interpretation". Notice of the trial judge's analysis of the Expiry Clause would have allowed Power to make submissions on how the Expiry Clause should be interpreted in light of a finding that the APA was modified

2012 BCCA 414 (CanLII)

and perhaps raise other sensible interpretations. For example, even if the APA was modified with respect to the timing of the ILMB payments, another arguably reasonable interpretation of the Expiry Clause might be that upon expiry, Power had incurred a debt to Energy for the pre-paid ILMB Costs. This debt could be interpreted as an obligation that arose on expiry, rather than a "further obligation" under the Expiry Clause.

[66] In my view, the procedural error of failing to provide the parties an opportunity to address the question of whether Power and Energy modified the APA and whether Power was required, under the Expiry Clause, to repay Energy the approximately $705,000 in ILMB Costs, breached Power's right to know and respond to the case against it: *Canada Trustco*, *supra*, citing *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 at para. 27.

[67] Both parties in their factums submit this Court is well positioned to determine these issues by considering the evidentiary record from the trial, the primary facts found by the trial judge, the wording of the APA itself and the arguments before this Court on appeal.

[68] Power says the evidentiary record from the trial, together with the wording of the APA itself, do not reveal a sufficient evidentiary basis for the trial judge's finding that the APA was modified to allow Energy to pay the ILMB Costs in advance, the determination that the modification was supported by good and valuable consideration, or her interpretation of the Expiry Clause.

[69] However, at the hearing of this appeal, counsel for Power said it is unclear what other evidence his client may have wished to adduce had these issues been raised at trial. Document discovery was based on the pleadings, and as these issues were not in the pleadings, some relevant documents may not have been disclosed or may have been subject to different emphasis.

[70] Sigma, on the other hand, says if the judge erred in her finding that Power and Energy modified the APA with respect to the ILMB payments and in her

2012 BCCA 414 (CanLII)

resulting interpretation of the Expiry Clause, the necessary result is not a judgment in favour of Power. Instead, it submits that given the nature and extent of the parties' inconsistent conduct, the only other conclusion that can be drawn from the primary facts found by the judge is the APA did not become effective. Alternatively, if it did, the parties, by their conduct, disclaimed or rescinded the APA shortly after July 1, 2007, before it affected any rights to the River Applications. Sigma argues that if the APA never became effective or ceased to be effective, the evidence supports the conclusion that Energy owns the River Applications.

[71] I cannot agree that this Court is well positioned to determine the result had the parties pleaded or at least made submissions on the trial judge's reasoning. If the question of contract modification and the judge's interpretation of the Expiry Clause had been raised at trial, the evidentiary record might have been different. The trial strategy of the parties may have also been different. They may have pointed to, or emphasized, quite different evidence. In turn, the trial judge may have been persuaded by those submissions to reach different conclusions.

[72] As in *Rodaro* at para. 63, the judge based her finding on an interpretation "never pleaded and with respect to which battle was never joined at trial". Instead, as Doherty J.A. wrote in *Rodaro* at para. 62, the trial judge's interpretation of the APA must be tested in the "crucible of the adversarial process" and "subject to the rigours of the adversarial process". Otherwise, the trial judge's interpretation of the APA, even if compelling, is unreliable. If the Court were to undertake such an analysis at this point, it would fail to remedy any prejudice. The trial court is the proper forum for the parties to test the analysis.

Conclusion

[73] For the above reasons, I conclude the trial judge made a procedural error by deciding this case based on a finding that the APA was modified with respect to the timing of ILMB payments and an interpretation of the Expiry Clause that required Power to repay the pre-paid ILMB Costs when these issues were not pleaded or

2012 BCCA 414 (CanLII)

argued by the parties at trial. The trial judge's interpretation of the APA is careful and well reasoned, but she came to conclusions not advocated by either party.

[74] Accordingly, I would allow the appeal, set aside the order of the trial judge and order a new trial. If the parties wish to amend their pleadings, the appropriate forum in which to do so is the trial court.

[75] In order to preserve the River Applications, I would also order that the Receiver shall not deliver to Sigma the River Applications until further order of the Supreme Court or until Power provides its agreement in writing to the Receiver.

[76] This result makes it unnecessary to consider the two remaining grounds of appeal. It is also unnecessary to address Sigma's cross appeal.

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Bennett"

2012 BCCA 414 (CanLII)

TAB 26

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Henry v. A.B.,*
2026 BCCA 207

Date: 20260507
Docket: CA50443

Between:

Ivan William Mervin Henry

Appellant/
Respondent on Cross Appeal
(Defendant)

And

A.B., C.D., E.F., G.H., and I.J.

Respondents/
Appellants on Cross Appeal
(Plaintiffs)

And

Battered Women's Support Services Association

Intervener

And

Independent Criminal Defence Advocacy Society

Intervener

FILE SEALED IN PART

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 29, 2025 (*A.B. v. Henry*, 2025 BCSC 137, Vancouver Docket S179580).

Oral Reasons for Judgment

Counsel for the Appellant/ Respondent on Cross Appeal: P.M. McGowan, K.C.

Counsel for the Respondents/ Appellants on Cross Appeal: K. Gourlay

2026 BCCA 207 (CanLII)

Counsel for the Proposed Intervener, Battered Women's Support Services Association:	M.C. Ohama-Darcus N.L. Welsh P. Gupta, Articled Student
Counsel for the Proposed Intervener, Independent Criminal Defence Advocacy Society:	T.C. Paisana
Place and Date of Hearing:	Vancouver, British Columbia May 7, 2026
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2026

2026 BCCA 207 (CanLII)

Summary:

The Battered Women's Support Services Association (BWSS) and the Independent Criminal Defence Advocacy Society (CDAS) each seek leave to intervene in this appeal, which concerns the civil liability of the appellant for multiple counts of sexual assault after he was found wrongfully convicted of those offences in criminal proceedings and acquitted. One of the grounds of appeal contends the trial judge erred in refusing to apply the abuse of process doctrine in relation to the relitigation of findings of fact in prior criminal proceedings that resulted in acquittal. Both applicants seek to intervene on a matter of public interest to make submissions on this issue, each to provide a broader perspective.

Held: Applications allowed. This appeal engages the interests of the respective representative groups of each applicant: sexual assault complainants and defence lawyers and their clients. Both BWSS and CDAS can provide a unique perspective that will assist the Court on this issue and neither seek to expand the scope of the appeal.

2026 BCCA 207 (CanLII)

[1] **FISHER J.A.**: The applicants, the Battered Women's Support Services Association (BWSS) and the Independent Criminal Defence Advocacy Society (CDAS), each seek leave to intervene in this appeal. The appeal concerns the civil liability of the appellant, Ivan Henry, for sexual assault after he was acquitted of these offences in the criminal context.

[2] The appellant takes no position on these applications, submitting only that the factums should be in accordance with the limits in the *Court of Appeal Rules* and not duplicate submissions made by either the appellant or the respondents, and leave to make oral submissions should be determined by the division hearing the appeal. The respondents take no position provided the interventions do not jeopardise the currently scheduled hearing dates. I am satisfied that they do not. I am prepared to grant the applications for these reasons.

Background

[3] In 1983, Mr. Henry was convicted of ten counts of sexual offences by a jury. The only issue at trial was the identification of the offender. He was subsequently sentenced as a dangerous offender and was imprisoned for almost 27 years. In 2010, this Court found that Mr. Henry had been wrongfully convicted and he was acquitted of the offences. The reasons are indexed as 2010 BCCA 462.

[4] After his acquittal, Mr. Henry commenced a civil action himself against the Province of BC, the City of Vancouver and the Attorney General of Canada, alleging violations of his *Charter* rights due to non-disclosure of information by Crown counsel in the course of his prosecution. He was successful in that action. Those reasons are indexed as 2016 BCSC 1038.

[5] On October 13, 2017, the respondents, five complainants from the original criminal allegations, commenced a civil action against Mr. Henry, alleging he had sexually assaulted each of them. In reasons for judgment released January 29, 2025, the trial judge found Mr. Henry liable and awarded general and aggravated damages in the amount of $375,000 to each complainant. The reasons are indexed as *A.B. v. Henry*, 2025 BCSC 137. It is this decision that is under appeal.

Issues on appeal

[6] The issues on appeal are numerous. I take these from a brief review of the appellant's factum.

[7] The appellant asserts the trial judge erred in: applying the law regarding the frailties of identification evidence; admitting as similar fact evidence statements in respect of offences for which the appellant had been convicted in Winnipeg in the 1970s; relying on similar facts as between the respondents; admitting hearsay; permitting the respondents to relitigate prior judicial findings and failing to give weight to those findings; failing to admit statements of complainants from an investigation known as "Smallman"; failing to grapple with expert evidence; and drawing an adverse finding of credibility against the applicant on the basis of a misapprehension of and a failure to grapple with evidence.

[8] Most relevant to these applications is the issue of relitigation of prior judicial findings. The relitigation of such findings, in some cases, can constitute an abuse of process: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at paras. 33–34 and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 51–52.

2026 BCCA 207 (CanLII)

[9] During the civil trial, the appellant twice brought applications for a ruling that the relitigation of certain factual findings on identification from the criminal trial and the acquittal would be an abuse of process. He sought to bar the relitigation of certain findings and argued, in the alternative, that such findings should be accorded significant weight. The judge dismissed both applications, finding there was no abuse of process. She held that the respondents in the civil trial were not parties in the criminal context, and the evidence from the criminal context had not been tested on the civil standard. The judge also found there were issues with the identification evidence provided by the respondents at the criminal trial.

[10] The appellant will say the judge's reasoning on this point, both on the pre-trial applications and in the reasons, reflects numerous errors. He will argue that the judge applied the wrong legal test for the abuse of process by relitigation, including the mutuality requirement. He will submit that the judge impermissibly speculated on Crown diligence relating to the identification evidence it led at the criminal trial. He will also say that the judge misapprehended the "new" evidence before her and also misapprehended the standard of proof for findings of fact in prior decisions.

The proposed interveners

[11] BWSS is a non-profit organization that works with women survivors and victims of sexual violence in BC. It runs a crisis-intervention call line, a legal advocacy clinic, and is also engaged in policy work. It regularly assists women navigating the aftermath of sexual violence, including the decision of whether to pursue a legal remedy. It has intervened on issues related to sexual and domestic violence in the past.

[12] CDAS is an incorporated non-profit society engaged in advocacy, law reform and education relating to criminal defence and the administration of justice. It has approximately 300 members, composed of lawyers and law students. Its mandate includes intervening in court proceedings involving issues relevant to criminal justice and issues that impact defence counsel and their clients.

2026 BCCA 207 (CanLII)

The test for granting intervention

[13] Section 30(f) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, and R. 61 of the *Court of Appeal Rules*, B.C. Reg. 120/2022, govern applications for intervener status and allow a justice to grant leave to intervene in an appeal before the Court.

[14] An order granting leave is discretionary and may be made on any terms the Court considers appropriate: *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para. 11 (Chambers). A justice's discretion to grant intervener status is governed by the following principles, set out in *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191 at para. 5 (Chambers):

> a) the applicant must have a direct interest in the matter; or
>
> b) the applicant must have a public interest in a public law issue in question; and
>
> c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

[15] Both applicants seek to intervene on a matter of public interest.

[16] A central concern on a public interest intervention application is to ensure important legal perspectives on an issue are not overlooked. Public interest interveners must therefore show that it is in the Court's interest, or broadly, in the public interest, to grant leave for them to be heard. The scope of their intervention is limited because they must not expand the litigation by raising matters that are not already part of it: *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 8 (Chambers); *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 at para. 12 (Chambers).

[17] The Court will consider the following factors to determine intervener applications advanced on a public interest basis:

a) whether the proposed intervener has a broad representative base;

b) whether the case legitimately engages the interests of the proposed intervener in the public law issue raised on appeal;

2026 BCCA 207 (CanLII)

c) whether the proposed intervener has a unique and different perspective that will assist the Court in the resolution of the issues; and,

d) whether the proposed intervener seeks to expand the scope of the appeal by raising issues not raised by the parties.

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCCA 282 at para. 14 (Chambers).

Discussion

[18] Both applicants seek to intervene on the issue of abuse of process as it relates to relitigation of findings of fact from prior criminal proceedings, each from a different perspective.

BWSS

[19] BWSS seeks to make submissions on the connection between abuse of process and access to justice for sexual assault complainants. Its interest in this appeal is limited to the issue of the relitigation of findings of fact from prior criminal proceedings only. Its approach to the issue is from the perspective of a “front-line service provider” for victims of sexual violence.

[20] If granted leave, its submissions will focus on the impact of the abuse of process doctrine on contemporary victims of sexual violence and their ability to access a remedy in the civil process. In particular, it will submit that:

1) There are systemic and individual barriers in access to justice for sexual assault complainants, such as the mental, emotional, and financial toll of pursuing subsequent or parallel civil proceedings;

2) Existing principles in Canadian jurisprudence are aimed at safeguarding access to justice for sexual assault complainants, including the principles that a criminal acquittal does not bar civil liability and an acquittal based on a wrongful conviction establishes legal but not factual innocence; and

2026 BCCA 207 (CanLII)

3) The doctrine of abuse of process should develop in a manner that preserves rather than diminishes access to justice for sexual assault complainants. The criminal justice system affords these complainants little voice and input, and by contrast, the civil process gives them both the burden and opportunity to present their own evidence. When a civil trial is bound to follow prior criminal findings concerning the complainant's evidence, that outcome restricts a complainant's opportunity to present her own evidence.

[21] I am satisfied that the relevant factors weigh in favour of granting intervener status to BWSS on these submissions. BWSS clearly has a broad representative base of victims of sexual violence. It frequently sees such victims make the difficult decision whether to pursue civil remedies following criminal proceedings. This appeal engages their interests in the abuse of process issue as it relates to relitigation. BWSS can provide a unique perspective that will assist the Court and it does not seek to expand the scope of the appeal.

CDAS

[22] CDAS says this appeal raises issues relevant to the duty of defence lawyers, its representative base, to advise clients on various collateral matters to a criminal proceeding. It emphasizes that each client faces a prospect of civil liability after a criminal verdict. It says a civil action subsequent to a criminal prosecution is increasingly common, especially in the context of sexual offences.

[23] If granted leave, CDAS will argue that the underlying principles regarding the abuse of process doctrine in the administrative law context, as stated in *Figliola* at para. 34 and *C.U.P.E* at para. 51, should be extended to the context of criminal legal proceedings specifically where a person has been acquitted of a criminal offence prior to a civil action. In particular, CDAS will argue that, where there has been an acquittal, the following factors are important in deciding whether to permit a party to relitigate findings and conclusions from the criminal context:

1) There is significant societal interest in recognizing and in some cases preserving acquittals and their underlying findings. In some cases, judicial

2026 BCCA 207 (CanLII)

findings are so significant that allowing for relitigation would serve only to undermine the public's confidence in the administration of justice, and some findings (such as witness credibility and reliability) do not engage with the criminal standard of proof;

2) There are social costs (such as stigmatization, loss of privacy, family disruption and uncertainty of outcome and sanction) that come with criminal proceedings, such that allowing liberal relitigation of acquittals will undermine the "stigma-reducing" effect of a not-guilty finding; and

3) Miscarriages of justice prevent an accused person from conclusively proving their innocence, leaving an acquittal as their only recourse before the courts. In some cases, this should be considered in deciding whether to allow for relitigation.

[24] CDAS proposes to focus on the unique challenges criminal accused must deal with when faced with an attempt to relitigate aspects of their acquittals and why this should be considered when addressing the abuse of process doctrine.

[25] Based on these submissions, the factors weigh in favour of granting CDAS leave to intervene. How findings of fact and legal conclusions from a criminal proceeding can be used in a subsequent civil action engages the interests of both defence lawyers and their clients. It impacts the advice that defence lawyers will give to their clients. Defence lawyers are uniquely positioned to advise an accused person of the significant decisions that they will face in a criminal proceeding. I am satisfied that it is appropriate to grant leave, as well, to CDAS.

Conclusion

[26] The applications of BWSS and CDAS for leave to intervene are granted on the following terms:

1. The style of cause will be amended to include the interveners;

2026 BCCA 207 (CanLII)

2. Each applicant may file a factum of not more than 10 pages as required by the *Court of Appeal Rules*;

3. Each applicant must file its factum by May 22, 2026;

4. The appellant and respondents have leave, if the choose, to file replies to the interveners' factums by June 2, 2026; and

5. No costs will be awarded for or against BWSS or CDAS in respect of this application or the appeal itself.

[27] It will be for the division hearing this appeal to determine if oral submissions will be permitted and, if so, for what duration.

"The Honourable Madam Justice Fisher"

2026 BCCA 207 (CanLII)

TAB 27

Homex Realty and Development Company Limited (*Respondent*) *Appellant*;

and

The Corporation of the Village of Wyoming (*Appellant*) *Respondent*.

1980: February 27; 1980: November 12.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal law — By-laws — Planning legislation — Subdivision control — Refusal by successor in title to great majority of subdivision lots to carry out provisions of subdivision agreement — Appellant's lots deemed not to be plan of subdivision by by-law — By-law enacted without notice — Connection between appellant's water main and municipal water system forbidden by separate by-law until conditions met — Whether or not by-laws should be quashed — Discretionary nature of judicial review — The Planning Act, R.S.O. 1970, c. 349, s. 29 — The Interpretation Act, R.S.O. 1970, c. 225, s. 17 — The Judicial Review Procedure Act, 1971, 1971 (Ont.), c. 48 — The Registry Act, R.S.O. 1970, c. 409 — The Municipal Act, R.S.O. 1970, c. 248, ss. 283, 284, 285.

The appellant disputed an order of the Ontario Court of Appeal upholding two by-laws of the respondent municipality. The issues turned on the interpretation of s. 29 of *The Planning Act* and the jurisdiction or authority of the courts under *The Judicial Review Procedure Act, 1971*.

As a condition of registration of a plan of subdivision in the Village of Wyoming, Atkinson, the owner and subdivider of the parcel of land, entered into an agreement with the Village for the installation of municipal services in the subdivision. This agreement, dated January 22, 1968, and registered September 26, 1975, provided in a general way for the owner's providing "all the requirements financial and otherwise, of the Corporation re surfacing of roads, installation of services and drainage". The agreement also prevented the sale of the lands in question until the agreement had been fully carried out, except with the consent of the Village, but the provision did not provide that consent would operate to release Atkinson from his obligation to the Village. Before any services were installed, Homex bought the great majority of the lots on the subdivision with the Village's consent. There was some question as to wheth-

Homex Realty and Development Company Limited (*Intimée*) *Appelante*;

et

The Corporation of the Village of Wyoming (*Appelante*) *Intimée*.

1980: 27 février; 1980: 12 novembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey et Chouinard.

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

Droit municipal — Règlements — Législation sur l'urbanisme — Contrôle des lotissements — Refus du propriétaire subséquent de la majeure partie des lots d'exécuter la convention de lotissement — Aux termes du règlement, les lots de l'appelante ne sont pas réputés un plan de lotissement — Règlement adopté sans avis — Raccordement de la conduite d'eau principale au réseau municipal interdit par un règlement distinct jusqu'à ce que les conditions soient remplies — Règlements annulables ou non — Nature discrétionnaire de l'examen judiciaire — The Planning Act, R.S.O. 1970, chap. 349, art. 29 — The Interpretation Act, R.S.O. 1970, chap. 225, art. 17 — The Judicial Review Procedure Act, 1971, 1971 (Ont.), chap. 48 — The Registry Act, R.S.O. 1970, chap. 409 — The Municipal Act, R.S.O. 1970, chap. 248, art. 283, 284, 285.

L'appelante conteste un ordre de la Cour d'appel de l'Ontario qui a confirmé la validité de deux règlements de la municipalité intimée. Le litige porte sur l'interprétation de l'art. 29 de *The Planning Act* et sur la compétence ou le pouvoir des tribunaux en vertu de *The Judicial Review Procedure Act, 1971*.

Conformément à une condition de l'enregistrement d'un plan de lotissement dans le village de Wyoming, Atkinson, propriétaire et lotisseur du terrain, a conclu une convention avec le Village pour l'installation de services d'utilité publique sur ce lotissement. Cette convention datée du 22 janvier 1968 et enregistrée le 26 septembre 1975, prévoyait en termes généraux que le propriétaire s'acquitterait de «toutes les exigences, financières ou autres, de la Municipalité relativement au revêtement des routes, à l'installation des services d'utilité publique et au drainage». Cette convention interdisait aussi la vente des terrains en question avant que la convention ait été entièrement exécutée, sauf approbation du Village, mais cette disposition ne prévoyait pas que le consentement libérerait Atkinson de son obligation envers le Village. Avant même l'installation d'un de ces services, Homex a acheté la grande majorité des lots

1980 CanLII 55 (SCC)

er or not Homex had undertaken to assume the obligations of the original subdivider. Nevertheless, when protracted negotiations between the Village and Homex concerning the installation of services proved fruitless, the Village, in April 1976, pursuant to s. 29(3) of *The Planning Act* and without notice to Homex, enacted by-law 7 deeming the lots purchased by Homex not to be a registered plan of subdivision. Homex, in September 1976, made application for judicial review for an order quashing by-law 7 and, while the application was pending, checkerboarded its lots.

In November 1975, Homex and the Village negotiated the installation of services along the only street requiring them. By-law 6, enacted in December 1975, provided that it was the policy of the Village that it would neither assume responsibility for a water pipeline constructed by Homex nor permit its connection to the municipal water supply system. Homex coupled an application in judicial review to quash by-law 6 with the application for an order to quash by-law 7.

Held (Ritchie and Dickson JJ. dissenting): The appeal should be dismissed.

Per Laskin C.J. and Martland, Beetz, Estey and Chouinard JJ.: Homex, through its president, undertook to assume the obligations undertaken by the first subdivider under the subdivision agreement. Further, Homex intended to convey the lots as purchased on this subdivision without the installation of any services leaving the expense to the Village and other inhabitants.

Wherever a statute authorized the interference with property or other rights and was silent as to whether or not the agency in question was required to give notice prior to the intervention in such rights, the courts would "supply the omission of the legislature" and require the agency in question to afford the subject an opportunity of being heard before it proceeded. The application by the courts of this old principle depended on the nature of the action being undertaken by a body, such as a municipal council.

The statutory framework, the nature of the action being taken by the Village Council, and the general circumstances prevailing at the time had to be taken into account in determining the appropriate interpretation applicable to s. 29(3) of *The Planning Act*. The statute did not expressly require notice to the affected landowners; nevertheless, Council was aware that Homex would oppose by-law 7. The by-law had some characteristics of a community interest by-law and also

du lotissement avec l'accord du Village. Il y a eu des divergences d'opinion à savoir si Homex avait ou non assumé les obligations du lotisseur original. Les négociations prolongées entre le Village et Homex relativement à l'installation des services ont échoué. Sans donner d'avis à Homex, le Village a adopté en avril 1976, en vertu du par. 29(3) de *The Planning Act*, le règlement 7 en vertu duquel les terrains achetés par Homex ne sont pas réputés être des plans de lotissement enregistrés. En septembre 1976, Homex a présenté une demande d'examen judiciaire pour faire annuler le règlement 7 et alors que cette demande était pendante, elle a morcelé les lots en damier.

En novembre 1975, Homex et le Village avaient négocié l'installation des services sur la seule rue du lotissement à viabiliser. Le règlement 6 adopté en décembre 1975 dispose que, selon sa politique, le Village n'assumerait aucune responsabilité pour l'aqueduc construit par Homex ni n'en autoriserait le raccordement à la conduite d'eau du réseau municipal. Homex a présenté une demande d'examen judiciaire pour faire annuler le règlement 6 en même temps que la demande visant à obtenir l'annulation du règlement 7.

Arrêt (les juges Ritchie et Dickson sont dissidents): Le pourvoi est rejeté.

Le juge en chef Laskin et les juges Martland, Beetz, Estey et Chouinard: Par l'intermédiaire de son président, Homex a accepté d'assumer l'obligation du premier lotisseur en vertu de la convention de lotissement. De plus, Homex avait l'intention de transférer les lots du lotissement sans les viabiliser, frais que le Village et les autres habitants devraient assumer.

Lorsqu'une loi permet de toucher aux droits de propriété ou autres droits et ne dit pas si l'organisme en question doit donner un avis avant d'agir, les tribunaux «remédieront à l'omission du législateur» et exigeront que l'organisme en question accorde au citoyen la possibilité de se faire entendre avant d'agir. L'application de ce vieux principe par les tribunaux dépend de la nature de l'action entreprise par un organisme, tel un conseil municipal.

Il faut tenir compte du cadre législatif, de la nature de l'action entreprise par le Conseil du village et des circonstances particulières du moment pour déterminer l'interprétation à donner au par. 29(3) de *The Planning Act*. La Loi n'exige pas expressément qu'un avis soit donné aux propriétaires visés; néanmoins le Conseil savait qu'Homex s'opposerait au règlement 7. Ce règlement présente certaines caractéristiques d'un règlement adopté dans l'intérêt de la collectivité, mais il est égale-

1980 CanLII 55 (SCC)

represented the purported culmination of an *inter partes* dispute conducted on adversarial lines between Homex and the Council. Council's action was not in substance legislative but rather quasi-judicial in character so as to attract the principle of notice and the consequential doctrine of *audi alteram partem*. The statute did not displace the rule of *audi alteram partem* and the resultant duty in Council to hear first and decide later. There was no hearing in the formal and ordinary sense by the Council and, while each side was fully aware of the other's position, Homex did not receive an opportunity to make known its position once fully aware of the Council's final position.

The order of judicial review, sought with reference to by-law 7, was in the nature of *certiorari*. The discretionary nature of this remedy is undoubted, and a party may by his conduct disentitle himself to relief. The remedy was denied in the special circumstances of the case: the attempts by Homex to avoid the burden of the Atkinson agreement; the avoidance, through checkerboarding, of Village regulation should the by-laws be invalid; and the fact that the Village's action, made even more urgent by the litigation possible, was the only course open to it.

There was no basis for quashing by-law 6. The by-law simply recorded an agreement between the Village and the landowner, and announced the Village's policy with reference to the pipeline. Passage of by-law 6 was not tied to Homex's disposition of its lands in plan 567 and was not tainted by bad faith.

The form of proceedings taken was free from any deficiency in its statutory base. Either *The Judicial Review Procedure Act, 1971* or the quashing provisions of *The Municipal Act* were open and appropriate.

Per Dickson and Ritchie JJ., *dissenting*: Where the by-laws in question affected the land or property of specified individuals, the courts implied a common law duty to be heard. This duty was not precluded by implication by the requirement of notification after passage of the by-law.

There was no reason why the *Wiswell* principle should have been applied restrictively, or why it should not have been applied in this case. The entitlement to notice and a hearing did not depend on there being a conflict between two private owners, which the municipality had to resolve. The right to a hearing did not spring from the

ment le point culminant d'un conflit *inter partes* opposant les intérêts contradictoires d'Homex et du Conseil. L'action du Conseil n'était pas en substance législative, mais plutôt de type quasi judiciaire de manière à faire jouer le principe de l'avis et la doctrine conséquente de la règle *audi alteram partem*. La Loi n'écarte pas la règle *audi alteram partem* et l'obligation qui en résulte pour le Conseil de tenir une audition avant de prendre une décision. Le Conseil n'a pas tenu une audition au sens formel et ordinaire et quoique les deux parties aient été tout à fait conscientes de leur position mutuelle, Homex n'a pas eu la possibilité de faire connaître sa position lorsqu'elle a clairement su quelle était la position finale du Conseil.

L'ordonnance d'examen judiciaire demandée relativement au règlement 7 est de la nature d'un *certiorari*. Le caractère discrétionnaire de ce recours ne fait aucun doute, et un requérant peut par sa conduite perdre son droit au redressement. Le redressement peut être refusé compte tenu des circonstances spéciales d'une affaire: la tentative d'Homex de se soustraire aux obligations de la convention Atkinson; le fait de contourner, par le morcellement en damier, le règlement du Village si les règlements s'avéraient invalides; et le fait que le seul recours du Village était les mesures qu'il a prises, que le litige possible rendait d'autant plus urgentes.

Rien ne justifie l'annulation du règlement 6. Ce règlement ne fait que rapporter une entente intervenue entre le Village et le propriétaire et formule la politique du Village relativement à la conduite d'eau. L'adoption du règlement 6 n'a aucun lien avec l'aliénation des terrains d'Homex compris dans le plan 567 et n'est pas entachée de mauvaise foi.

La forme des procédures prise n'est pas viciée dans son fondement juridique. Il était possible et approprié de recourir à *The Judicial Review Procedure Act, 1971* ou aux dispositions d'annulation de *The Municipal Act*.

Les juges Dickson et Ritchie, *dissidents:* Lorsque les règlements en question nuisent directement aux biens-fonds ou à la propriété de personnes en particulier, les tribunaux ont reconnu implicitement l'existence du droit d'être entendu en *common law*. Ce droit n'est pas écarté implicitement par l'exigence d'un préavis après l'adoption du règlement.

Il n'y a aucune raison pour que le principe *Wiswell* s'applique restrictivement ou qu'il ne s'applique pas en l'espèce. Le droit à un avis et à une audition ne devrait pas dépendre de l'existence d'un conflit entre deux propriétaires privés, que la municipalité doit résoudre. Le droit à une audition ne découle pas du fait qu'il y a des

1980 CanLII 55 (SCC)

fact that there were competing groups or individuals, some opposed to the by-law but from the fact that the by-law interfered, in particular, with the private property rights of this one owner.

The public interest was best served by affording the private interest full disclosure and a fair opportunity to be heard. There was no *a priori* reason why the private interest should yield abjectly to the public interest. The Village could undoubtedly pass the by-law if it were in the public interest, but, prior to deciding in favour of the public interest, the Council should have heard the landowner's submissions. An act could not be labelled "legislative" for the purpose of dispensing with fairness. Although a sophisticated owner, given prior notice, could "checkerboard" and defeat the intent of the section, it was for the legislature to decide that prior notice was not necessary. Further, the requirement of both prior and subsequent notice was not redundant: the earlier notice permitted representations from those who wished to protest and the subsequent notice informed all concerned of the action taken.

The right to procedural fairness no longer demanded an *a priori* classification of a process as judicial or quasi-judicial. It was not particularly important that the function of the municipality was classified as "legislative" or "quasi-judicial". Rather, it was necessary to look at the nature of the function and to the facts of each case. The by-law in question was not of wide and general application, but was rather aimed at deliberately limiting the rights of the appellant, entitling it to some procedural safeguards—at a minimum, notice of the proposed by-law and the opportunity to be heard. The prolonged negotiations between the Village and Homex did not satisfy the onus placed on the Village and did not result in waiver of notice for Homex had been given no indication of the Village's intention to enact the impugned by-laws.

[*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Bishop v. Ontario Securities Commission*, [1964] 1 O.R. 17; *Re Buhler and Rural Municipality of Stanley* (1977), 72 D.L.R. (3d) 447; *R. v. Brighton Corporation; Thomas Tilling, Lim., Ex parte* (1916), 85 L.J. K.B. 1552; *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*, [1972) 2 Q.B. 299; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Re Zadrevec et al. and Town of Brampton*, [1973] 3 O.R. 498; *Re Hershoran and City of Windsor et al.* (1973), 1 O.R. (2d) 291; *Alliance des Professeurs catholiques de Montréal v. Commission des Relations ouvrières de la province de*

personnes ou des groupes de personnes en conflit dont certaines sont opposées au règlement, mais du fait que le règlement porte atteinte de façon particulière aux droits de propriété appartenant à ce propriétaire.

L'intérêt public est mieux servi si les intérêts privés bénéficient d'une divulgation complète et d'une possibilité raisonnable d'être entendus. Il n'y a aucune raison *a priori* pour que l'intérêt privé cède servilement à l'intérêt public. Le Village pouvait sans aucun doute adopter un règlement dans l'intérêt public, mais avant d'opter en faveur de l'intérêt public, le Conseil devait entendre les arguments du propriétaire. On ne peut qualifier un acte de «législatif» pour se dispenser d'agir équitablement. Même si un propriétaire rusé qui reçoit un préavis pouvait morceler en damier et faire ainsi échec à l'intention de l'article, il incomberait au législateur de décider qu'un préavis n'était pas nécessaire. De plus, l'exigence d'un préavis et d'un avis subséquent n'introduit rien de répétitif: le préavis permettrait aux personnes qui désirent s'opposer de se faire entendre et l'avis subséquent informerait tous les intéressés des mesures prises.

Le droit à une procédure équitable ne dépend plus de la répartition préalable des fonctions dans les catégories judiciaires ou quasi judiciaires. Il n'est pas particulièrement important de savoir si la fonction de la municipalité doit être qualifiée de «législative» ou «quasi judiciaire», mais il est plutôt nécessaire de considérer la nature de la fonction et les faits de chaque cas. Le règlement en question n'était pas un règlement général devant s'appliquer à tous les citoyens, mais il visait plutôt délibérément à limiter les droits de l'appelante par lesquels elle pouvait bénéficier de la protection qu'offre la procédure, à tout le moins, un avis du règlement envisagé et la possibilité de se faire entendre. Les longues négociations entre le Village et Homex n'ont pas satisfait à l'obligation de ce dernier et n'ont pas entraîné une renonciation à l'avis parce que le Village n'avait pas donné à Homex d'indications de son intention d'adopter les règlements contestés.

[Jurisprudence: *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Bishop v. Ontario Securities Commission*, [1964] 1 O.R. 17; *Re Buhler and Rural Municipality of Stanley* (1977), 72 D.L.R. (3d) 447; *R. v. Brighton Corporation; Thomas Tilling, Lim., Ex parte* (1916), 85 L.J.K.B. 1552; *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299; *Welbridge Holdings Ltd. c. Greater Winnipeg*, [1971] R.C.S. 957; *Re Zadrevec et al. and Town of Brampton*, [1973] 3 O.R. 498; *Re Hershoran and City of Windsor et al.* (1973), 1 O.R. (2d) 291; *Alliance des Professeurs catholiques de Montréal c. Commission des Relations ouvrières de la*

1980 CanLII 55 (SCC)

Québec et al., [1953] 2 S.C.R. 140; *Calgary Power Ltd. v. Copithorne*; [1959] S.C.R. 24; *Re Orangeville Highlands Ltd. et al. v. Attorney General of Ontario and Township of Mono et al.* (1975), 8 O.R. (2d) 97; *Wiswell et al. v. Greater Winnipeg*, [1965] S.C.R. 512; *Re Braeside Farms Ltd. et al. and Treasurer of Ontario et al.* (1978), 20 O.R. (2d) 541; *Re McMartin and City of Vancouver* (1968), 70 D.L.R. (2d) 38; *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Cock v. Labour Relations Board* (1960), 26 D.L.R. (2d) 127; *Re de Havilland Aircraft of Canada Ltd. and City of Toronto* (1980), 27 O.R. (2d) 721, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of the Divisional Court quashing the municipal by-laws in question on an application for judicial review.

J. Edgar Sexton, Q.C., and *Brian Morgan*, for the appellant.

Lyle F. Curran, Q.C., for the respondent.

The judgment of Laskin C.J. and Martland, Beetz, Estey and Chouinard JJ. was delivered by

ESTEY J.—The appellant disputes an order of the Ontario Court of Appeal upholding two by-laws of the respondent municipality being by-laws nos. 6 and 7, passed by the Village Council in 1975 and 1976. The issue turns on the interpretation of s. 29 of *The Planning Act*, R.S.O. 1970, c. 349, and the jurisdiction or authority of the courts under *The Judicial Review Procedure Act, 1971*, 1971 (Ont.), c. 48. In relating the essentials of the history of this matter, the appellant is referred to as Homex and the respondent municipality as the Village or the Council.

One Atkinson owned a parcel of land in the Village of Wyoming, County of Lambton, consisting of about 25 acres and in March of 1968 registered a plan of subdivision of that parcel as no. 567 in the Registry Division of Lambton. As a condition of such registration Atkinson entered into an agreement with the Village for the installation of municipal services on the land comprised in

[1] (1979), 23 O.R. (2d) 398; (1979), 8 M.P.L.R. 119.

province de Québec et autre, [1953] 2 R.C.S. 140; *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Re Orangeville Highlands Ltd. et al. v. Attorney General of Ontario and Township of Mono et al.* (1975), 8 O.R. (2d) 97; *Wiswell et al. c. Greater Winnipeg*, [1965] R.C.S. 512; *Re Braeside Farms Ltd. et al. and Treasurer of Ontario et al.* (1978), 20 O.R. (2d) 541; *Re McMartin and City of Vancouver* (1968), 70 D.L.R. (2d) 38; *P.P.G. Industries Canada Ltd. c. Procureur général du Canada*, [1976] 2 R.C.S. 739; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Cock v. Labour Relations Board* (1960), 26 D.L.R. (2d) 127; *Re de Havilland Aircraft of Canada Ltd. and City of Toronto* (1980), 27 O.R. (2d) 721.]

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1], qui a accueilli un appel d'un jugement de la Cour divisionnaire qui avait annulé les règlements municipaux en question sur une demande d'examen judiciaire.

J. Edgar Sexton, c.r., et *Brian Morgan*, pour l'appelante.

Lyle F. Curran, c.r., pour l'intimée.

Version française du jugement du juge en chef Laskin et des juges Martland, Beetz, Estey et Chouinard rendu par

LE JUGE ESTEY—L'appelante conteste un ordre de la Cour d'appel de l'Ontario qui a confirmé la validité de deux règlements de la municipalité intimée, les règlements n°s 6 et 7, adoptés par le Conseil du village en 1975 et 1976. Le litige porte sur l'interprétation de l'art. 29 de *The Planning Act*, R.S.O. 1970, chap. 349, et sur la compétence ou le pouvoir des tribunaux en vertu de *The Judicial Review Procedure Act, 1971*, 1971 (Ont.), chap. 48. Dans le récit des faits essentiels de ce litige, l'appelante sera appelée Homex et la municipalité intimée le Village ou le Conseil.

Un nommé Atkinson était propriétaire d'un terrain d'une superficie d'environ 25 acres dans le village de Wyoming, comté de Lambton; en mars 1968 il a enregistré un plan de lotissement de ce terrain sous le numéro 567 de la Division d'enregistrement de Lambton. Conformément à une condition de cet enregistrement, Atkinson a conclu une convention avec le Village pour l'installation

[1] (1979), 23 O.R. (2d) 398; (1979), 8 M.P.L.R. 119.

1980 CanLII 55 (SCC)

this subdivision. This agreement was dated January 22, 1968 but was not registered until September 26, 1975 perhaps because it was not until sometime in 1973 that *The Planning Act, supra*, was amended to provide for the registration of such subdivision agreements and for their enforceability against subsequent owners of the land. This agreement provided in a general way for the provision by Atkinson, the owner, of "all the requirements, financial and otherwise, of the Corporation re surfacing of roads, installation of services and drainage".

Before any services were installed on this subdivision, Homex entered into an agreement with Atkinson for the purchase of 25 lots on the subdivision and this agreement was performed by the delivery by Atkinson to Homex of a deed to which, pursuant to the subdivision agreement, the Village consented. This deed was registered in May 1973. Atkinson, the vendor, retained three lots on the subdivision. Some time prior to the sale by Atkinson to Homex, Atkinson had conveyed to the Village two lots pursuant to the subdivision agreement. There are two lots on the subdivision owned by third parties not involved in this litigation. There is some dispute as to whether Homex was to be bound by and to perform the subdivision agreement on behalf of Atkinson. In the original documentation filed in the Supreme Court of Ontario there is to be found an affidavit completed by Norman Redick, the president of Homex, and sworn on July 28, 1976 and which affidavit is referred to in the notice of motion for judicial review. In the record filed before this Court, such an affidavit appears and paragraph 4 thereof states in part as follows:

> No mention was made in this deed [from Atkinson to Homex] of the assumption by Homex of any of the obligations of Atkinson under the subdivision agreement made by him with the Village nor did Homex assent to any such assumption at such time.

However, in Appendix A of the respondent's factum, there is set forth a page 2 of an affidavit sworn by the president of Homex and filed before the Divisional Court and the Court of Appeal which states in part as follows:

des services d'utilité publique sur ce lotissement. Cette convention était datée du 22 janvier 1968 mais n'a pas été enregistrée avant le 26 septembre 1975, peut-être parce que ce n'est qu'au cours de 1973 que *The Planning Act*, précitée, a été modifiée pour imposer l'enregistrement des conventions de lotissement de cette nature et leur opposabilité aux propriétaires du terrain. Cette convention prévoyait en termes généraux qu'Atkinson, le propriétaire, s'acquitterait de [TRADUCTION] «toutes les exigences, financières ou autres, de la Municipalité relativement au revêtement des routes, à l'installation des services d'utilité et au drainage».

Avant même l'installation d'un de ces services sur ce lotissement, Homex a obtenu d'Atkinson une promesse de vente de 25 lots du lotissement à laquelle Atkinson a donné suite en délivrant à Homex un acte de vente auquel le Village a donné son approbation conformément à la convention de lotissement. Le contrat a été enregistré en mai 1973. Atkinson, le vendeur, demeurait propriétaire de trois lots de ce lotissement. Quelque temps avant la vente intervenue entre Atkinson et Homex, Atkinson avait cédé deux lots au Village conformément à la convention de lotissement. Deux lots de ce lotissement appartiennent à des tiers qui ne sont pas parties à ce litige. Il y a divergence d'opinions sur la question de savoir si Homex est liée par la convention de lotissement conclue par Atkinson et doit s'y conformer. Dans la documentation originale déposée devant la Cour suprême de l'Ontario, il y a un affidavit de Norman Redick, président d'Homex, fait sous serment le 28 juillet 1976, lequel est mentionné dans l'avis de demande d'examen judiciaire. Cet affidavit fait partie du dossier déposé devant cette Cour et voici le texte de son paragraphe 4:

> [TRADUCTION] Dans cet acte de vente [entre Atkinson et Homex], il n'est pas mentionné qu'Homex assumerait les obligations d'Atkinson aux termes de la convention de lotissement intervenue entre lui et le Village ni qu'Homex acceptait de les assumer à cette époque.

Cependant, à l'annexe A du mémoire de l'intimée, se trouve la page 2 d'un affidavit du président d'Homex déposé devant la Cour divisionnaire et la Cour d'appel où il déclare notamment:

1980 CanLII 55 (SCC)

4. That by this agreement Homex agreed to assume the obligation of Atkinson under a subdivision agreement made by him with the Corporation of the Village of Wyoming regarding park allowance. A copy of this subdivision agreement was registered against the lands of Homex by the Town Solicitor, William M'Clean Dawson, on September 25, 1975, with registration number 375351.

An examination of the original documentation filed on this appeal in this Court reveals that the affidavit, completed by Redick as president, was filed in support of the application for judicial review in the Divisional Court and forwarded to the Court of Appeal for the hearing of the appeal in the Divisional Court. It sets out as page 2 thereof the excerpt of the affidavit I have copied above from the respondent's factum. In what appears to be an explanation for this discrepancy, counsel for the respondent in his factum states:

> That affidavit [being the excerpt copied above in which Homex agreed to assume at least some of the obligations of the subdivision agreement] was filed by the Appellant's then solicitor by mistake; however, it is submitted that it is an accurate statement as to Homex's agreement with Atkinson.

It is strange indeed that what purports to be the original affidavit appended to the originating notice of motion has a retyped page 2 setting forth the affidavit which appears in the record filed in this Court. This page 2 has obviously been typed on a different typewriter, appears in double space as compared to the single spacing of the balance of the affidavit, and the insert alone has been initialled only by the person (signature illegible) who took the affidavit of Mr. Redick. The mystery is deepened by the fact that the jurat does not reveal any date of re-execution of the affidavit. I have no hesitation in finding for the purposes of disposing of this appeal that the affidavit in support of the application for judicial review was as filed in its original form and, should it become important to the disposition of this appeal, I would without hesitation find that on the record the president of Homex indeed had knowledge of the existence and the content of the subdivision agreement between Atkinson and the Village dated January 26, 1970 and that Homex, through its president, undertook to assume the obligations of Atkinson thereunder.

[TRADUCTION] 4. Qu'aux termes de cette convention, Homex a accepté d'assumer l'obligation d'Atkinson en vertu d'une convention de lotissement intervenue entre lui et la municipalité du village de Wyoming concernant la réserve pour un parc. Une copie de cette convention de lotissement a été enregistrée contre les terrains d'Homex par le procureur du Village, William M'Clean Dawson, le 25 septembre 1975, sous le numéro 375351.

L'examen de la documentation originale déposée en vue du pourvoi devant cette Cour révèle que l'affidavit, signé par Redick en sa qualité de président, a été déposé à l'appui de la demande d'examen judiciaire devant la Cour divisionnaire et acheminé à la Cour d'appel pour l'audition de l'appel. Elle reproduit la page 2 de l'affidavit précité tiré du mémoire de l'intimée. Dans ce qui paraît être une explication à cette contradiction, l'avocat de l'intimée déclare dans son mémoire:

> [TRADUCTION] Cet affidavit [soit l'extrait déjà cité par lequel Homex accepte d'assumer au moins certaines des obligations de la convention de lotissement] a été déposé par erreur par le procureur de l'appelante à l'époque; toutefois, nous soutenons que c'est là une affirmation exacte quant à la convention entre Homex et Atkinson.

Il est étrange en réalité que le document qui se veut l'affidavit original annexé à l'avis de requête introductif d'instance comprenne une page 2 retapée qui correspond à l'affidavit versé au dossier déposé devant cette Cour. Cette page 2 a manifestement été dactylographiée sur une machine à écrire différente, à interligne double contrairement à l'interligne simple utilisé dans le reste de l'affidavit, et seule l'insertion porte les initiales de la personne (dont la signature est illisible) qui a reçu l'affidavit de M. Redick. Le mystère devient encore plus profond du fait que la formule d'authentification ne révèle aucune date de nouvelle signature de l'affidavit. Je n'ai aucune hésitation à conclure aux fins de ce pourvoi que l'affidavit à l'appui de la demande d'examen judiciaire est celui qui a été déposé dans sa forme originale et, si cela devenait important pour trancher ce pourvoi, je concluerais sans hésiter que, selon la preuve au dossier, le président d'Homex connaissait effectivement l'existence et le contenu de la convention de lotissement intervenue le 26 janvier 1970 entre Atkinson et le Village et que, par l'intermédiaire

1980 CanLII 55 (SCC)

I come to this conclusion as regards the entire contents of the agreement notwithstanding the limitation in the offer to purchase of the incorporated terms of the agreement to those regarding the "park allowance". This handwritten excerpt seems to me to read as follows:

> present. subdivision agreement with the Village. regards. park allowance to be accepted by the purchaser. Wire[?] fence to be erected jointly with the purchaser and vendor.

As to the agreement itself, it was signed on behalf of Homex by Redick who then witnessed his own signature, and finally witnessed the execution of the agreement by the vendor. After the agreement was executed, Homex obtained the consent of the Village on March 23, 1970 to the conveyance of these lands from Atkinson to Homex. In his affidavit of uncertain date, the president of Homex says that "no reference is made in the deed" to the subdivision agreement. However, it hardly can be said that Homex in these circumstances was unaware of the existence of such an agreement. If one need further support for such a conclusion, it is to be found in the affidavit of the vendor, Atkinson, where he says in part that Redick was "well acquainted with the requirements and details" of the agreement before the contract was entered into between Homex and Atkinson; and that it was "clearly understood between him and me before the said contract was made that Homex would be responsible for satisfying the requirements of the Corporation of the Village of Wyoming . . .". The affidavit went on to state that for so undertaking the obligations of Atkinson, Homex was accorded a reduction in price of $5,000. This affidavit was not answered by Homex nor was Atkinson cross-examined upon it. The Court of Appeal concluded (and with respect I agree) that Homex knew of the services agreement at the time of the conveyance of the land to Homex. The Divisional Court made no finding on this matter.

The subdivision agreement between Atkinson and the Village entered into prior to the registration of plan of subdivision 567 provided in part:

de son président, Homex a assumé les obligations qu'avait Atkinson aux termes de cette convention. Je parviens à cette conclusion sur le contenu intégral de la convention bien que, dans l'offre d'achat, on se soit limité à incorporer les dispositions de la convention relatives à la «réserve pour un parc». L'extrait manuscrit me semble se lire comme suit:

> [TRADUCTION] présente. convention de lotissement avec le Village. concerne. réserve pour un parc devant être acceptée par l'acheteur. clôture en fil métallique[?] devant être installée conjointement par l'acheteur et le vendeur.

Quant à la convention elle-même, elle a été signée au nom d'Homex par Redick qui a ensuite apposé sa propre signature et a finalement servi de témoin à la signature de l'acte par le vendeur. Après la signature, Homex a obtenu le 23 mars 1970 que le Village approuve le transfert des terrains d'Atkinson à Homex. Dans son affidavit dont la date n'est pas déterminée, le président d'Homex déclare qu' [TRADUCTION] «aucune mention n'est faite dans l'acte de vente» de la convention de lotissement. Cependant, on peut difficilement dire que dans ces circonstances Homex ignorait l'existence d'une telle convention. Si une preuve supplémentaire à l'appui de cette conclusion est nécessaire, on la trouve dans l'affidavit du vendeur, Atkinson, où il dit notamment que Redick était [TRADUCTION] «bien au courant des exigences et des détails» de la convention avant la signature du contrat entre Homex et Atkinson; et qu'il était [TRADUCTION] «clairement entendu entre nous avant la signature du contrat qu'Homex devrait satisfaire aux exigences de la municipalité du village de Wyoming . . .». Plus loin l'affidavit relate qu'un rabais de $5,000 a été accordé à Homex puisqu'elle assumait les obligations d'Atkinson. Homex n'a pas répondu à cet affidavit et Atkinson n'a pas été contre-interrogé à ce sujet. La Cour d'appel a conclu (et, avec égards je souscris à cette opinion) qu'Homex était au courant de la convention relative à l'installation des services au moment où les terrains lui ont été transférés. La Cour divisionnaire ne s'est pas prononcée sur cette question.

La convention de lotissement intervenue entre Atkinson et le Village avant l'enregistrement du plan de lotissement 567 prévoit en partie:

1980 CanLII 55 (SCC)

619

The Owner hereby covenants and agrees with the Corporation to satisfy all the requirements, financial and otherwise, of the Corporation re surfacing of roads, installation of services and drainage.

There is no specific reference to the engineering specifications for the work to be done in connection with the installation of roads and services, nor is there any reference to the requirements for park allowances which were referred to in the agreement of sale to Homex. The contract prohibits the sale of any of the lands in question by Atkinson until the agreement has been fully carried out except on the consent of the Village, but such provision does not provide that the consent will operate to release Atkinson from his obligation to the Village.

Before proceeding further with the narrative, it is important to pause and observe that at this stage of events Homex was the owner of all the lots in the subdivision fronting on Norman Street, except two lots which had been conveyed by Atkinson to the Village and two other lots owned by third parties which fronted on another street which had already been serviced, and no issue arises herein with respect to those two lots. The lots retained by the vendor, Atkinson, do not front on Norman Street. The waterline was installed by Homex on Norman Street and the other services and installations mentioned in the subdivision agreement were to be installed on that street but in fact were not so installed.

After the sale to Homex by Atkinson was completed negotiations ensued between the Village and Homex for the installation of services on this plan of subdivision.

These negotiations between Homex and the Village proved abortive although numerous documents were proffered by the Village. In his cross-examination on his affidavit, Redick perhaps reveals the reason why these protracted negotiations came to nought when he stated:

Q. That's what you really want. Everything to be done on local improvement?

A. I think it should be done that way in this case.

[TRADUCTION] Le propriétaire s'engage par les présentes envers la Municipalité à satisfaire à toutes les exigences, financières ou autres, de la Municipalité relativement au revêtement des routes, à l'installation des services d'utilité publique et au drainage.

Il n'y a pas de mention particulière des spécifications de construction pour les travaux à effectuer relativement à l'installation des routes et des services d'utilité publique, ni aucune mention des exigences relatives à la réserve pour un parc dont il est question dans la promesse de vente à Homex. Le contrat interdit à Atkinson de vendre les terrains en question avant que la convention ait été entièrement exécutée, sauf avec l'approbation du Village, mais cette disposition ne prévoit pas que le consentement libérera Atkinson de son obligation envers le Village.

Avant de poursuivre cette narration, il est important de s'arrêter pour remarquer qu'à ce stade des événements, Homex était propriétaire de tous les lots donnant sur la rue Norman, à l'exception de deux lots qu'Atkinson avait cédés au Village et de deux autres terrains appartenant à des tiers et qui donnaient sur une autre rue déjà viabilisée; ces deux derniers ne sont pas en litige ici. Les terrains conservés par le vendeur Atkinson ne donnent pas sur la rue Norman. La conduite d'eau a été installée par Homex rue Norman et les autres services et installations mentionnés dans la convention de lotissement devaient y être installés, mais ils ne l'ont pas été.

Après la vente par Atkinson à Homex, les négociations se sont poursuivies entre le Village et Homex pour l'installation des services d'utilité publique sur ce lotissement.

Ces négociations n'ont pas abouti bien que le Village ait soumis de nombreux documents. Lorsqu'il a été contre-interrogé sur son affidavit, Redick a peut-être révélé la raison de l'échec de ces négociations lorsqu'il dit:

[TRADUCTION] Q. C'est ce que vous désirez vraiment. Tout devrait être fait à titre d'amélioration de quartier?

R. Je crois que c'est ainsi qu'il aurait fallu le faire en l'espèce.

1980 CanLII 55 (SCC)

Q. Yes. That's your proposal?

A. I think it should be done that way.

If it be relevant to the outcome of these proceedings, the conclusion must be reached from an examination of the record, and particularly the cross-examination of the president of Homex, that Homex had indeed purchased these lands from Atkinson with the intention at the time, or thereafter acquired, of conveying the lots on this subdivision without the installation of any services so as to leave to the Village and the other inhabitants thereof the cost of providing these services on some basis or other, but not at the expense of Homex.

After the negotiations between the parties (which spread over a period of a year and a half) with respect to the installation of services had proved fruitless, the Village, without any notice to Homex, enacted by-law no. 7 on April 1, 1976 pursuant to s. 29(3) of *The Planning Act, supra*, whereby the parts of registered plan no. 567 indicated in the by-law (and being those lots purchased by Homex)

are hereby designated as parts which shall be deemed not to be a registered plan of subdivision for the purposes of subsection (2) of Section 29 of *The Planning Act*.

In September 1976 Homex made application by way of judicial review for an order quashing by-law 7. While this application was pending before the Divisional Court, Homex checkerboarded the lots received by it from Atkinson on plan 567. By checkerboarding, reference is made to the procedure discussed in detail in *Re Herman et al. and Kalbfleisch et al.*[2] and *Reference re Certain Titles to Land in Ontario*[3] and adopted by conveyancers on occasion in the Province of Ontario to escape the strictures of *The Planning Act, supra*. By this technique, Homex conveyed to a series of third parties, including Robert C. Redick, Norman C. Redick, Orville A. Redick, Daniel J. Redick, and others, so many lots as were necessary to produce a situation in which neither Homex nor any other single registered owner, other than the vendor Atkinson and the Village, held contiguous

[2] [1972] 2 O.R. 720.

[3] [1973] 2 O.R. 613 (C.A.)

Q. Oui. C'est là votre proposition?

R. Je crois que cela pourrait être fait ainsi.

Si cela est pertinent à l'issue de cette affaire, il faut conclure d'après l'examen de la preuve, et en particulier du contre-interrogatoire du président d'Homex, qu'Homex avait effectivement acheté ces terrains à Atkinson dans l'intention à l'époque, ou après l'achat, de vendre les lots du lotissement sans les viabiliser de sorte que le Village et les autres habitants aient à assumer le coût de l'installation de ces services d'une façon ou d'une autre, sans que ce soit aux frais d'Homex.

Après l'échec des négociations entre les parties relativement à l'installation des services (elles se sont poursuivies pendant une année et demie), le Village, sans donner d'avis à Homex, a adopté le règlement nº 7 le 1er avril 1976 en vertu du par. 29(3) de *The Planning Act*, précitée, aux termes duquel les parties du plan enregistré nº 567 désignées dans le règlement (soit les terrains achetés par Homex)

[TRADUCTION] sont par les présentes désignées comme des parties qui ne sont pas réputées un plan de lotissement enregistré aux fins du par. 29(2) de *The Planning Act*.

En septembre 1976 Homex a présenté une demande d'examen judiciaire pour faire annuler le règlement 7. Alors que cette demande était pendante devant la Cour divisionnaire, Homex a morcelé en damier les lots du plan 567 qu'elle avait achetés à Atkinson. Par ce morcellement, on désigne la procédure analysée en détail dans *Re Herman et al. and Kalbfleisch et al.*[2] et *Reference re Certain Titles to Land in Ontario*[3] et adoptée à l'occasion par des experts en transfert de propriété en Ontario pour échapper aux rigueurs de *The Planning Act*, précitée. Par cette technique, Homex a transféré à plusieurs tiers, dont Robert C. Redick, Norman C. Redick, Orville A. Redick, Daniel J. Redick et à d'autres, le nombre de lots nécessaires pour que, mis à part le vendeur Atkinson et le Village, ni Homex ni aucun autre propriétaire enregistré ne soient propriétaires de deux lots

[2] [1972] 2 O.R. 720.

[3] [1973] 2 O.R. 613 (C.A.)

1980 CanLII 55 (SCC)

lots on this plan of subdivision. Thus if by-law 7 be ineffective so that plan of subdivision 567 remains fully registered under *The Planning Act, supra*, and *The Registry Act*, R.S.O. 1970, c. 409, then Homex has apparently so arranged its land holdings as to make it immune from further regulations which may be adopted by the Village under *The Municipal Act*, R.S.O. 1970, c. 284, with regard to the lots held by and for it on plan 567. On the other hand, if by-law 7 is effective, then the attempt to checkerboard has failed and Homex will be unable to convey, without further permission from the Village, any of its holdings on plan 567. I pause to point out that this rather unusual record is silent as to what declarations of trust, if any, are extant between the registered owners of some of the lots on 567 and Homex. The affidavit of one Catherine Clark Dawson simply sets out the state of the abstract of title as it existed on some date prior to the date her affidavit was taken, being September 6, 1977. The statement is made by the respondent in its factum that the lands were checkerboarded by Homex prior to the hearing of the application by the Divisional Court. This statement remains unanswered by the appellant and I take it, for the purposes of disposing of this appeal, that these lands were indeed so checkerboarded.

Almost as a sidelight to this main activity, Homex and the Village, in November 1975, entered into discussions concerning the installation of a water line on Norman Street which, as already stated, is the only street on the subdivision requiring services, and on which front the lots checkerboarded by Homex. The record contains a letter dated November 7, 1975 from the Village to Norman Redick, presumably in his capacity as president of Homex, answering a letter from him which is not in the record, and advising Redick of a decision reached by the Council of the Village:

> in regards to the installation of the 6″ water line and fire Hydrant [*sic*].

Their decision as follows: "That council reply to the letter from N. Redick, giving him the privelege [*sic*] of installing a watermain on Norman Street, providing he assures council in writing that no further services are

contigus de ce lotissement. Ainsi, si le règlement 7 est invalide de sorte que le plan 567 demeure entièrement enregistré aux termes de *The Planning Act*, précitée, et *The Registry Act*, R.S.O. 1970, chap. 409, alors Homex a apparemment manipulé de telle façon ses droits de propriété qu'elle ne peut être visée par d'autres règlements que le Village peut adopter sous le régime de *The Municipal Act*, R.S.O. 1970, chap. 284 relativement aux lots du plan 567 qu'elle détient ou qu'on détient en son nom. Par ailleurs, si le règlement 7 est valide, alors la tentative de morcellement en damier a échoué et Homex sera incapable de transférer ses lots du plan 567 sans y être à nouveau autorisée par le Village. Je m'arrête pour faire remarquer que ce dossier plutôt inhabituel ne fournit aucun renseignement sur les déclarations de fiducie qui peuvent exister entre les propriétaires enregistrés de certains des lots du plan 567 et Homex. L'affidavit de Catherine Clark Dawson ne fait que reproduire l'extrait du registre tel qu'il existait avant la date de son affidavit, soit le 6 septembre 1977. L'intimée déclare dans son mémoire qu'Homex a morcelé les lots en damier avant l'audition de la demande par la Cour divisionnaire. L'appelante n'a pas répondu à cette déclaration et je considère, aux fins de ce pourvoi, que ces lots ont effectivement été morcelés en damier.

Presque accessoirement à cette activité principale, Homex et le Village ont engagé des pourparlers en novembre 1975, concernant l'installation d'une conduite d'eau rue Norman qui, je l'ai déjà dit, est la seule rue du lotissement à viabiliser, et c'est sur cette rue que donnent les lots morcelés en damier par Homex. Le dossier contient une lettre datée du 7 novembre 1975 adressée par le Village à Norman Redick, présumément en sa qualité de président d'Homex, en réponse à une lettre de ce dernier qui n'est pas au dossier, l'informant d'une décision prise par le Conseil du village:

> [TRADUCTION] relativement à l'installation de la conduite d'eau de 6 pouces de diamètre et des bornes d'incendie.

Voici leur décision: «Que le conseil réponde à la lettre de N. Redick, lui donnant le privilège d'installer une conduite d'eau principale rue Norman à la condition qu'il garantisse par écrit au conseil que nul autre service

1980 CanLII 55 (SCC)

installed without signing an agreement with the village; the granting of such privelege [*sic*] shall in no way constitute a complete subdivision agreement, nor shall it inhibit the reopening of negotiations with Mr. Redick".

Thereafter the Village Council enacted by-law no. 6 on December 29, 1975 without any further notice to or dealings with Homex in the matter. After a recital of a request by Homex for permission to install a water pipeline on Norman Street, paragraph 2 of by-law no. 6 provides:

2. It is the policy of the Council of the Corporation of the Village of Wyoming that the said water pipe line in Norman Street from Superior Street to approximately the north limit of Lot 7 according to said Plan 567 shall not be assumed or taken over by the Corporation and no connection shall be permitted to be made to the said water pipe line and no water shall be supplied through the said water pipe line and the said water pipe line shall not form part of the municipal water supply system of the Village of Wyoming until authorized by a futher [*sic*] by-law of the Corporation of the Village of Wyoming.

Homex coupled an application in judicial review to quash this by-law with the application already mentioned for an order quashing by-law no. 7.

Although some of the issues herein raised are common to both by-laws 6 and 7, the larger question arises concerning the latter by-law and I therefore first deal with the validity of by-law no. 7.

The provisions in *The Planning Act, supra*, relating to the conveyance of land are found in s. 29, of which subss. (2) and (3) are here relevant:

(2) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

(*a*) the land is described in accordance with and is within a registered plan of subdivision; or

d'utilité publique ne sera installé tant qu'une convention ne sera pas signée avec le Village; l'octroi de ce privilège [sic] ne doit en aucune façon constituer une convention complète de lotissement ni ne doit empêcher la reprise des négociations avec M. Redick».

Par la suite le Conseil du village a adopté le règlement nº 6 le 29 décembre 1975 sans donner de préavis à Homex ni discuter avec elle de la question. Après avoir énoncé la demande de permission présentée par Homex, pour installer une conduite d'eau rue Norman, le paragraphe 2 du règlement nº 6 dispose:

[TRADUCTION] 2. C'est la politique du Conseil de la municipalité du village de Wyoming que la conduite d'eau rue Norman, depuis la rue Superior jusqu'aux abords de la limite nord du lot 7, suivant le plan 567, ne soit pas prise en charge par la Municipalité et qu'aucun raccordement à la conduite d'eau ne soit autorisé, que cette conduite d'eau ne puisse servir à l'aqueduc et qu'elle ne fasse pas partie du réseau municipal d'aqueduc du village de Wyoming avant qu'un autre règlement de la municipalité du village de Wyoming ne l'autorise.

Homex a présenté une demande d'examen judiciaire pour faire annuler ce règlement en même temps que la demande déjà mentionnée visant à obtenir l'annulation du règlement nº 7.

Bien que certaines des questions soulevées ici soient communes aux règlements 6 et 7, la question la plus importante concerne ce dernier règlement; par conséquent, j'examinerai d'abord la validité du règlement 7.

Les dispositions pertinentes en l'espèce de *The Planning Act*, précitée, sont les par. 29(2) et (3) concernant le transfert de terrains:

[TRADUCTION] Nul ne doit céder un bien-fonds par acte ou transfert, ni accorder, assigner ou exercer un mandat de désignation relativement à un bien-fonds, ni hypothéquer ou grever un bien-fonds, ni conclure une promesse de vente d'un bien-fonds ou une entente dont l'effet est d'accorder un droit d'usage ou autre sur un bien-fonds, que cela soit fait directement ou par clause de renouvellement pour une période de vingt et un ans ou plus, à moins que

a) le bien-fonds ne soit décrit conformément à un plan de lotissement enregistré dont il fait partie; ou

1980 CanLII 55 (SCC)

(*b*) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment with respect to, any land abutting the land that is being conveyed or otherwise dealt with; or

(*c*) and (*d*)—not here applicable

(*e*) a consent is given to convey, mortgage or charge the land, or grant, assign or exercise a power of appointment with respect to the land or enter into an agreement with respect to the land.

(3) The council of a municipality may by by-law designate any plan of subdivision, or part thereof, that has been registered for eight years or more, which shall be deemed not to be a registered plan of subdivision for the purposes of subsection 2.

Subsection (3) does not expressly require notice before the passage of any by-law authorized by the subsection, nor does the terminology of the subsection raise any necessary implication of a requirement of notice. Subsections (8), (9), (10) and (11) may be of some assistance in construing subs. (3), particularly as to whether it requires the giving of notice prior to the passage of a by-law such as by-law no. 7.

(8) A certified copy or duplicate of every by-law passed under subsection 3 shall be lodged by the clerk of the municipality in the office of the Minister.

(9) A by-law passed under subsection 3 is not effective until the requirements of subsections 10 and 11 have been complied with.

(10) A certified copy or duplicate of every by-law passed under this section shall be registered by the clerk of the municipality in the proper registry or land titles office.

(11) The clerk of the municipality shall send by registered mail notice of the passing of a by-law under subsection 3 to each person appearing by the last revised assessment roll to be the owner of land to which the by-law applies, which notice shall be sent to the last known address of each such person.

b) le cédant par acte ou transfert, la personne qui accorde, assigne ou exerce un mandat de désignation, le débiteur hypothécaire ou la personne qui a grevé le bien-fonds, le vendeur aux termes d'une promesse de vente ou le cédant d'un droit d'usage ou autre sur un bien-fonds, suivant le cas, ne retienne pas le droit de propriété ou le droit de rachat, ou un pouvoir ou droit d'accorder, d'assigner ou d'exercer un mandat de désignation relativement à un bien-fonds adjacent au bien-fonds qui est ainsi cédé ou qui est autrement visé; ou

c) et *d*)—non applicables en l'espèce.

e) un consentement ne soit donné pour céder, hypothéquer ou grever le bien-fonds, ou pour accorder, assigner ou exercer un mandat de désignation relativement au bien-fonds ou pour conclure une entente relative au bien-fonds.

(3) Le conseil d'une municipalité peut, par règlement, désigner un plan de lotissement, ou une partie de celui-ci, qui est enregistré depuis au moins huit ans, de façon qu'il soit réputé ne pas être un plan enregistré de lotissement aux fins du paragraphe (2).

Le paragraphe (3) n'exige pas expressément un avis avant l'adoption d'un règlement qu'il autorise et le texte du paragraphe ne permet pas de conclure à l'exigence implicite d'un avis. Les paragraphes (8), (9), (10) et (11) peuvent être utiles à l'interprétation du par. (3), surtout pour déterminer si un avis est nécessaire avant l'adoption d'un règlement tel le règlement n° 7.

[TRADUCTION] (8) Le secrétaire de la municipalité doit déposer au bureau du Ministre une copie ou un double certifié de chaque règlement adopté en vertu du paragraphe 3.

(9) Un règlement adopté en vertu du paragraphe 3 n'entre pas en vigueur avant que les exigences des paragraphes 10 et 11 aient été remplies.

(10) Le secrétaire de la municipalité doit porter au registre approprié ou déposer au bureau d'enregistrement des titres de biens-fonds une copie ou un double certifié de chaque règlement adopté en vertu du présent article.

(11) Le secrétaire de la municipalité doit envoyer par courrier recommandé avis de l'adoption d'un règlement en vertu du paragraphe 3 à chaque personne que le dernier rôle révisé d'évaluation désigne comme propriétaire du biens-fonds auquel s'applique le règlement, et ce à la dernière adresse connue de chacune de ces personnes.

1980 CanLII 55 (SCC)

Subsection (11) would indicate that the question of notice was of concern to the legislators and perhaps might be construed as indicating that, having expressly considered the question, the only notice prescribed is a notice after the passage of the by-law which, by subs. (9), is a condition precedent to the effectiveness of the by-law.

It should be noted that by an amendment to *The Planning Act, supra*, brought into effect by 1978 (Ont.), c. 93, s. 2(4), subss. 9 and 11 were repealed and the substituted sections deliberately and expressly provide that a notice is not a condition precedent to the effectiveness of a by-law passed under subs. (3); and a further procedure is prescribed for the hearing of persons who complain within a prescribed time after receipt of notice under subs. (11). Section 17 of *The Interpretation Act*, R.S.O. 1970, c. 225, provides:

> The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

The courts of course are concerned only with the state of the rights of the parties under the statute as it existed at the time of the passage of the by-law, and accordingly the interpretation of s. 29(3) as it then stood is not affected by subsequent legislative action.

The courts long ago developed the general proposition that wherever a statute authorizes the interference with property or other rights and is silent as to whether or not the agency in question is required to give notice prior to the intervention in such rights, the courts will "supply the omission of the legislature" and require the agency in question to afford the subject an opportunity of being heard before it proceeds: *Cooper v. Wandsworth Board of Works*[4]; S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed., at p. 161. Whether or not the courts today will invoke this principle of interpretation may depend upon the nature of the action being undertaken by a body such as a municipal council. There are instances where the omission of the prerequisite notice is not supplied

[4] (1863), 14 C.B. (N.S.) 180.

Le paragraphe (11) semble indiquer que le législateur s'est préoccupé de la question de l'avis et une interprétation possible de ce paragraphe serait que, après avoir expressément considéré la question, seul est prescrit un avis postérieur à l'adoption du règlement, lequel avis est, aux termes du par. (9), une condition de son entrée en vigueur.

Il faudrait remarquer que par une modification à *The Planning Act*, précitée, apportée par 1978 (Ont.), chap. 93, par. 2(4), les par. (9) et (11) ont été abrogés et que les dispositions qui les remplacent prévoient précisément et expressément qu'un avis n'est pas une condition de l'entrée en vigueur d'un règlement adopté en vertu du par. (3); une autre procédure est prévue pour que soient entendues les personnes qui portent plainte dans un délai prescrit après la réception de l'avis visé au par. (11). L'article 17 de *The Interpretation Act*, R.S.O. 1970, chap. 225 prévoit:

> [TRADUCTION] L'abrogation ou la modification d'une loi n'est pas réputée constituer ni impliquer une déclaration quelconque sur l'état antérieur du droit.

Bien sûr les tribunaux ne sont concernés que par l'état des droits des parties en vertu de la loi telle qu'elle existait au moment de l'adoption du règlement et, par conséquent, l'interprétation du par. 29(3) tel qu'il existait alors, n'est pas touchée par une mesure législative subséquente.

Les tribunaux ont formulé il y a longtemps la proposition générale que lorsqu'une loi permet de toucher les droits de propriété ou autres droits et ne dit pas si l'organisme en question doit donner un avis avant d'agir, ils [TRADUCTION] «remédieront à l'omission du législateur» et exigeront que l'organisme en question accorde au citoyen la possibilité de se faire entendre avant d'agir: *Cooper v. Wandsworth Board of Works*[4]; S.A. de Smith, *Judicial Review of Administrative Action*, 4e éd., à la p. 161. La question de savoir si les tribunaux invoqueront ce principe d'interprétation aujourd'hui peut dépendre de la nature de l'action entreprise par un organisme tel un conseil municipal. Dans certains cas, les tribunaux ne remédieront pas à l'absence de préavis, par exemple lorsqu'on

[4] (1863), 14 C.B. (N.S.) 180.

1980 CanLII 55 (SCC)

by the courts, as, for example, where the statute in question, by its very nature and by the legislative framework there adopted by the Legislature, must be read as precluding the requirement of prior notice. The Ontario Court of Appeal, for example, in *Bishop v. Ontario Securities Commission*[5], so construed s. 19 of *The Securities Act*, R.S.O. 1960, c. 363. Roach J.A., in speaking for the Court, stated:

> The whole purpose of the Act might be defeated if the chairman could make an order or ruling under that section only on notice to the person or company affected and after a hearing. Many days might elapse between the giving of the notice to the persons or company sought to be affected and the conclusion of the hearing during which time those persons or that company if dishonest and disreputable could continue to prey upon the public and plunder and fleece many people. For that reason it was essential to the purpose of the Act that the chairman should be empowered to act promptly and without notice to the person or company sought to be affected. The chairman's first duty is to the public and in empowering him to discharge that duty the Legislature has by appropriate legislation at the same time protected the person or company affected by the order by giving to him on it at their election the right to have the order reviewed by the Commission. (at p. 23)

The Planning Act of Manitoba (1975 (Man.), c. 29) contained at the time in question a provision identical to s. 29 (11). Subsequently, the Manitoba statute was amended (1977 (Man.), c. 35, s. 34) to prescribe a notice to affected parties as a condition precedential to the validity of a by-law enacted pursuant to a provision comparable to s. 29(3) of the Ontario statute. The effect of this amendment is precisely the opposite to that of the 1978 Ontario amendment. Prior to the adoption by the Manitoba Legislature of the 1977 amendment, the Court of Appeal in *Re Buhler and Rural Municipality of Stanley*[6] found that a by-law passed without notice was invalid and therefore quashed, not, however, by reason of the lack of notice but rather on the basis of bad faith in which the courts found the council to have acted.

[5] [1964] 1 O.R. 17.

[6] (1977), 72 D.L.R. (3d) 447, affirming 69 D.L.R. (3d) 602.

doit interpréter la loi en question, par sa nature même et dans le cadre législatif adopté par le législateur, de façon à écarter l'exigence d'un préavis. C'est ainsi par exemple que la Cour d'appel de l'Ontario a interprété l'art. 19 de *The Securities Act*, R.S.O. 1960, chap. 363, dans l'arrêt *Bishop v. Ontario Securities Commission*[5]. Le juge Roach qui exprimait l'opinion de la Cour, a dit:

> [TRADUCTION] On pourrait mettre en échec l'économie générale de la Loi si le président pouvait rendre une ordonnance ou une décision en vertu de cet article seulement après avoir donné un avis à la personne ou à la compagnie touchée et après audition. Plusieurs jours pourraient s'écouler entre la signification de l'avis aux personnes ou à la compagnie visées et la fin de l'audition et, pendant ce temps, les personnes ou la compagnie, si elles sont malhonnêtes et louches, pourraient continuer de s'attaquer au public, de voler et de dépouiller les gens. Pour cette raison, il est essentiel aux fins de la Loi que le président puisse agir promptement et sans devoir donner d'avis à la personne ou à la compagnie visée. Le président a au premier chef une obligation envers le public et, en lui permettant de s'en acquitter, le législateur a, par la même occasion au moyen d'une loi appropriée, protégé la personne ou la compagnie visée par l'ordonnance en lui permettant d'en appeler devant la Commission. (à la p. 23)

A l'époque qui nous intéresse ici, *The Planning Act* du Manitoba (1975 (Man.), chap. 29) contenait une disposition identique au par. 29(11). Par la suite, la loi manitobaine a été modifiée (1977 (Man.), chap. 35, art. 34) pour imposer un avis aux personnes visées comme condition préalable à la validité du règlement adopté en vertu d'une disposition comparable au par. 29(3) de la loi ontarienne. L'effet de cette modification est tout à fait opposé à celui de la modification adoptée en Ontario en 1978. Avant l'adoption de la modification de 1977 par la législature du Manitoba, la Cour d'appel dans *Re Buhler and Rural Municipality of Stanley*[6], a jugé qu'un règlement adopté sans avis était invalide et l'a donc annulé, non pas cependant en raison de l'absence d'avis mais plutôt en raison de la conclusion de mauvaise foi du conseil à laquelle les tribunaux sont parvenus.

[5] [1964] 1 O.R. 17.

[6] (1977), 72 D.L.R. (3d) 447, conf. 69 D.L.R. (3d) 602.

1980 CanLII 55 (SCC)

In determining the appropriate interpretation applicable to s. 29(3) of *The Planning Act, supra*, the statutory framework, the nature of the action being undertaken by the Village Council, and the general circumstances prevailing at the time of the action by the Village Council must be taken into account.

The Village Council is, of course, entirely a creature of statute. It derives all its power, its status, its rights as well as its limitations from various provincial legislation of which *The Municipal Act, supra*, may be said to represent the core. This legislation has assigned a wide range of activities and responsibilities to the municipal council which have been variously categorized by the courts through the years. In some instances the council acts purely as a sub-legislature enacting legislation within the ambit of the authorizing statute for the general governance of the region in respect of which the council is given its statutory authority. In other instances, as for example in the granting or withholding of individual licences pursuant to applications, the courts have classified the municipal activity as "judicial": *R. v. Brighton Corporation; Thomas Tilling, Lim., Ex parte*[7], and in so exercising their judicial function

> . . . they are bound to act judicially. It is their duty to hear and determine according to law, and they must bring to that task a fair and unbiased mind. (*per* Sankey J. at p. 1555)

More recently, in *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*[8], Lord Denning has stated:

> It is perhaps putting it a little high to say they are exercising judicial functions. They may be said to be exercising an administrative function. But even so, in our modern approach, they must act fairly: and the court will see that they do so. (at p. 308)

This aspect of municipal law is addressed by Laskin J. (as he then was) in *Welbridge Holdings Ltd. v. Greater Winnipeg*[9], at pp. 968-969:

[7] (1916), 85 L.J.K.B. 1552.
[8] [1972] 2 Q.B. 299.
[9] [1971] S.C.R. 957.

Pour déterminer l'interprétation qu'il faut donner au par. 29(3) de *The Planning Act*, précitée, il faut tenir compte du cadre législatif, de la nature de l'action entreprise par le Conseil du village et des circonstances particulières qui prévalaient au moment où le Conseil du village a agi.

Bien sûr, le Conseil du village est entièrement une création législative. Tous ses pouvoirs, son statut, ses droits et ses incapacités découlent de diverses lois provinciales dont *The Municipal Act*, précitée, peut être considérée comme le pivot. Cette loi a confié une grande variété d'activités et de responsabilités à un conseil municipal que les tribunaux ont quatifiées de façon diverse au cours des années. Dans certains cas le conseil agit simplement comme une sous-législature, qui légifère dans le cadre de la loi habilitante pour l'administration générale de la région qui relève de sa compétence. Dans d'autres cas, par exemple lorsqu'il s'agit d'accorder ou de refuser des permis particuliers suite à des demandes, les tribunaux ont qualifié l'activité municipale de «judiciaire»: *R. v. Brighton Corporation; Thomas Tilling Lim., Ex parte*[7], et dans l'exercice de leurs fonctions judiciaires.

> [TRADUCTION] . . . ils doivent agir judiciairement. Ils ont l'obligation de tenir des auditions et de rendre une décision conformément à la loi et ils doivent agir impartialement. (Le juge Sankey à la p. 1555)

Plus récemment, dans *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*[8], lord Denning a dit:

> [TRADUCTION] Il est peut-être un peu exagéré de dire qu'ils exercent des fonctions judiciaires. On peut dire qu'ils exercent une fonction administrative. Mais même là, selon notre façon moderne de voir, ils doivent agir équitablement: et les tribunaux s'assureront qu'il en est ainsi. (à la p. 308)

Le juge Laskin (maintenant Juge en chef) s'est penché sur cet aspect du droit municipal dans l'arrêt *Welbridge Holdings Ltd. c. Greater Winnipeg*[9], aux pp. 968 et 969:

[7] (1916), 85 L.J.K.B. 1552.
[8] [1972] 2 Q.B. 299.
[9] [1971] R.C.S. 957.

1980 CanLII 55 (SCC)

The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the *Wiswell* case determined) and some administrative or ministerial, or perhaps better categorized as business powers.

. . .

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority.

The act of passing by-law 7 is an exercise of the Council's legislative function. En route to that exercise there may have been a decisional process but that factor does not, in my view, alter the characterization at law of the Council's action, or append thereto other consequences at law. This problem was examined in *Welbridge, supra*, at p. 969 where Laskin J. (as he then was) stated:

> A narrower basis of liability is, however, proposed in the present case, one founded only on the failure to carry out the anterior procedural requirements for the enactment of By-law No. 177. Although those requirements were held in the *Wiswell* case to be expressions of a quasi-judicial function, this did not mean that the hearing to which they were relevant was a step unrelated to the legislative exercise in which the defendant was engaged.

It is clear that the passage of the by-law, if effective, has stripped Homex of its freedom to exercise the right of conveyance given by the provincial planning statute. On the other hand, it is equally clear that the balance of the township, that is to say the local ratepayers, may well be seriously affected by the action of Homex if the latter is successful in avoiding the consequences of the deregistration of plan 567. One effect would appear to be that the other inhabitants would be obligated in theory, or in fact, or both, to service the lots of subdivision 567 as and when they may be occupied by residences. It was submitted by the respondent that the argument of a notice requirement in these circumstances answers itself. The power granted the Village under s. 29(3) would be defeated by the response in fact taken by Homex in checkerboarding its lands prior to hearing of the application to quash. Thus we have the opposing

La défenderesse est une municipalité ayant des fonctions diverses, certaines législatives, certaines qui comportent aussi un élément quasi judiciaire (comme on l'a statué dans l'affaire *Wiswell*) et certaines administratives ou ministérielles, auxquelles la désignation de pouvoirs relatifs aux affaires convient peut-être mieux.

. . .

Au niveau qu'on pourrait appeler celui des opérations, une municipalité n'est pas la même qu'au niveau législatif ou quasi judiciaire où elle exerce un pouvoir discrétionnaire conféré par la loi.

L'adoption du règlement 7 est un exercice de la fonction législative du Conseil. Il se peut que l'exercice de cette fonction ait exigé une prise de décision mais, à mon avis, ce facteur ne modifie pas la qualification juridique de l'action du Conseil, pas plus qu'il n'y attache d'autres conséquences juridiques. Ce problème a été examiné dans l'affaire *Welbridge*, précitée, à la p. 969 où le juge Laskin (alors juge puîné) dit:

> Toutefois, en l'espèce, on propose en ce qui concerne la responsabilité une base plus restreinte, le simple défaut de se conformer aux règles de procédure pour l'adoption du règlement municipal n° 177. Même si dans l'arrêt *Wiswell*, il a été décidé que ces règles se rattachaient à l'exercice d'une fonction quasi judiciaire, cela ne voulait pas dire que l'audition à laquelle elles se rapportaient était indépendante du pouvoir législatif que la demanderesse exerçait.

Il est clair que si le règlement est valide, son adoption a privé Homex de la liberté d'exercer le droit de transfert que lui accorde la loi provinciale d'urbanisme. Par ailleurs, il est tout aussi certain que le reste du canton, c'est-à-dire les contribuables de la localité, pourrait être sérieusement touché par l'action d'Homex si cette dernière réussissait à éviter les conséquences de la cessation de l'enregistrement du plan 567. Ainsi, un des effets serait d'imposer aux autres habitants en théorie, ou en fait, ou selon les deux, de viabiliser les lots du lotissement 567 lors de la construction des habitations. L'intimée a prétendu que dans ces circonstances, l'exigence d'un avis s'explique par elle-même. Si Homex décidait de morceler ses terrains avant l'audition de la demande d'annulation, elle mettrait en échec le pouvoir accordé au Village par le par. 29(3). Ainsi il s'agit des considérations opposées à celles énoncées dans *Wands-*

1980 CanLII 55 (SCC)

considerations of *Wandsworth, supra*, and *Bishop, supra*.

The Ontario Court of Appeal in *Re Zadrevec et al. and Town of Brampton*[10] was concerned with the action of a municipal council which, as here, had failed to give notice to affected parties of proposed by-laws rezoning their lands. Such by-laws, before they could become effective in law, required the approval of the Ontario Municipal Board. Prior to that approval an action was taken under *The Municipal Act, supra*, to have the by-laws in question declared void. The Court found that the Legislature, by imposing the approval of the Board as a condition precedent to the validity of the by-laws, had removed from the Municipal Council and transferred to the Board

> . . . the judicial process which the council in the absence of such transfer would have been required to discharge. (*per* Kelly J.A. at p. 504);

and continuing at p. 507:

> It is my opinion that the Legislature has indicated its intention that the other provisions it has made relieve the Council of the obligation to act judicially in adopting the amendment to the official plan and that Council, being aware that the procedure it was following would result in an opportunity for all parties to be heard by the Board and of the Board to exercise its judgment, was relieved of the obligation to act judicially as it would have been required to do if the Legislature had not made such other provisions. Consequently, there was no denial of natural justice in the action of Council and the by-law adopting the amendment is not liable to be declared void on that account.

In somewhat similar circumstances a municipality was required by the courts to give notice prior to the enactment of a by-law which rendered forfeit the right of redemption by the payment of arrears of taxes: *Re Hershoran and City of Windsor et al.*[11] The statute was silent as to notice but the Divisional Court found that the city council lost jurisdiction on failing to notify the landowner of its impending action by by-law and hence the by-law was quashed. It is interesting to note that the by-law in question was subject to confirmation

[10] [1973] 3 O.R. 498.
[11] (1973), 1 O.R. (2d) 291.

worth et *Bishop*, précités.

Dans *Re Zadrevec et al. and Town of Brampton*[10], la Cour d'appel de l'Ontario devait examiner l'action d'un conseil municipal qui, comme en l'espèce, n'avait pas donné aux parties visées avis de projets de règlements modifiant le zonage de leurs biens-fonds. Avant d'entrer en vigueur, ces règlements devaient être approuvés par la Commission municipale de l'Ontario. Avant que cette approbation ne soit donnée, une action a été introduite en vertu de *The Municipal Act*, précitée, pour faire déclarer nuls les règlements en question. La Cour a conclu qu'en exigeant l'approbation de la Commission comme condition préalable à la validité des règlements, le législateur avait enlevé au conseil municipal et confié à la Commission

> [TRADUCTION] . . . le processus judiciaire qu'en l'absence d'un tel transfert, le conseil aurait dû suivre. (Le juge Kelly de la Cour d'appel à la p. 504)

et a poursuivi à la p. 507:

> [TRADUCTION] A mon avis, le législateur a manifesté son intention que les autres dispositions qu'il a adoptées libèrent le conseil de l'obligation d'agir judiciairement lorsqu'il adopte la modification au plan officiel et que, conscient que la procédure qu'il suivait permettrait à toutes les parties d'être entendues par la Commission et permettrait à celle-ci de prendre une décision, le conseil était libéré de l'obligation d'agir judiciairement comme il aurait été requis de le faire si le législateur n'avait pas adopté les autres dispositions. Par conséquent, l'action du conseil ne constitue pas un déni de justice naturelle et le règlement modificatif ne peut être déclaré nul de ce chef.

Dans des circonstances assez semblables, les tribunaux ont exigé qu'une municipalité donne un préavis de l'adoption d'un règlement qui annulait le droit de rachat par le paiement des arrérages de taxes: *Re Hershoran and City of Windsor et al.*[11] La Loi ne prévoyait pas d'avis, mais la Cour divisionnaire a jugé que le conseil municipal avait perdu sa compétence en n'informant pas le propriétaire de l'adoption imminente du règlement envisagé et, par conséquent, le règlement a été annulé. Il est intéressant de remarquer qu'avant

[10] [1973] 3 O.R. 498.
[11] (1973), 1 O.R. (2d) 291.

1980 CanLII 55 (SCC)

prior to its effectiveness by the Minister of Municipal Affairs and the Court likewise quashed the Minister's purported approval of the by-law on the grounds that the Minister had failed to take into account the position of the landowner in the circumstances there prevailing. The Court, speaking through Hughes J., appears to have found that the council, in the exercise of its discretion in electing to designate the lands in question as park lands with the inevitable extinction of the rights of the owner in those lands, was acting in a quasi-judicial manner within the contemplation of the judgment of this Court in *Alliance des Professeurs catholiques de Montréal v. Commission des Relations ouvrières de la province de Québec et al.*[12], rather than in an administrative capacity as that function was determined to be in law by this Court in *Calgary Power Ltd. v. Copithorne*[13]. The opposite result to that in the *Zadrevec* case, *supra*, was reached by the same court in *Orangeville Highlands Ltd. et al. v. Attorney General of Ontario and Township of Mono et al.*[14], but presumably on the basis that the ministerial order therein under review was final and not subject to Ontario Municipal Board approval. The Court there found that a zoning order affecting the property rights of the applicant and issued without notice to it was without effect in law. In the result, in was held that the ministerial order imposing provincial zoning was the exercise of a power comparable to that of a municipal council and that the order, not being subject to review elsewhere, must be taken to the exercise of a judicial or quasi-judicial function and consequently was invalid on the absence of notice to the affected owners. Superficially there may appear to be a conflict between this decision and that of the Ontario Divisional Court in *Re Braeside Farms Ltd. et al. and Treasurer of Ontario et al.*[15] where no notice was required on the part of the Minister when promulgating regulations under *The Niagara Escarpment Planning and Development Act, 1973*, 1973 (Ont.), c. 52. The Court there, however, found that the Minister, by adopting a regulation affecting a wide area comprising

[12] [1953] 2 S.C.R. 140.
[13] [1959] S.C.R. 24.
[14] (1975), 8 O.R. (2d) 97.
[15] (1978), 20 O.R. (2d) 541.

d'entrer en vigueur le règlement devait être approuvé par le ministre des Affaires municipales et que la Cour a également annulé l'approbation présumée du règlement par le Ministre pour le motif que ce dernier n'avait pas tenu compte de la situation particulière du propriétaire. Par l'intermédiaire du juge Hughes, la cour a apparemment conclu que, dans l'exercice de son pouvoir discrétionnaire de désigner les terrains en question comme parc, ce qui entraîne inévitablement l'extinction des droits du propriétaire, le conseil exerçait une fonction quasi judiciaire au sens de l'arrêt de cette Cour *Alliance des Professeurs catholiques de Montréal c. Commission des Relations ouvrières de la province de Québec et autre*[12], plutôt qu'une fonction administrative suivant la définition juridique qu'en a donnée cette Cour dans *Calgary Power Ltd. c. Copithorne*[13]. La Cour même qui avait rendu l'arrêt *Zadrevec*, précité, est parvenue à un résultat différent dans *Re Orangeville Highlands Ltd. et al. v. Attorney General of Ontario and Township of Mono et al.*[14], mais présumément parce que l'ordonnance ministérielle y attaquée était finale et non assujettie à l'approbation de la Commission municipale de l'Ontario. La Cour a conclu qu'une ordonnance de zonage touchant les droits de propriété de la requérante et rendue sans avis n'avait aucune valeur juridique. Finalement, elle a jugé l'ordonnance ministérielle qui imposait un zonage provincial constituait l'exercice d'un pouvoir comparable à celui du conseil municipal et que l'ordonnance, qui n'était pas susceptible d'un autre contrôle, devait être considérée comme l'exercice d'une fonction judiciaire ou quasi judiciaire et que, par conséquent, elle était invalide vu l'absence d'avis aux propriétaires visés. De prime abord il peut sembler y avoir un conflit entre cette décision et celle de la Cour divisionnaire de l'Ontario dans *Re Braeside Farms Ltd. et al. and Treasurer of Ontario et al.*[15] où l'on n'a pas exigé que le Ministre donne avis de l'adoption de règlements en vertu de *The Niagara Escarpment Planning and Development Act, 1973*, 1973 (Ont.), chap. 52. Cependant, dans cette

[12] [1953] 2 R.C.S. 140.
[13] [1959] R.C.S. 24.
[14] (1975), 8 O.R. (2d) 97.
[15] (1978), 20 O.R. (2d) 541.

1980 CanLII 55 (SCC)

many different owners of land, was acting in a purely legislative capacity. The British Columbia Court of Appeal in *Re McMartin and City of Vancouver*[16] classified the action of city council as being legislative where that council was adopting a general zoning by-law applicable to a wide region of the municipality. The statute prescribed a public hearing precedent to the adoption of such a by-law, and after the public hearing was held, the city council received additional representations from individual owners. The majority of the Court, by classifying the general zoning by-law as legislative rather than judicial or quasi-judicial, found no duty in council to do more than conduct the first general hearing, which it did, and no right arose in any affected landowners by reason of the reception by council thereafter of additional representations.

This Court, in *Wiswell et al. v. Greater Winnipeg*[17], was required to classify the action taken by the Council of the City of Winnipeg when adopting a by-law rezoning a specific piece of property. The Court found the action by the municipal council to be quasi-judicial in nature and hence were required to give notice to those property owners affected by the proposed action. The statute prescribed certain forms of notice which were not followed. This Court quoted with approval the remarks by Freedman J.A. (as he then was) in the Court of Appeal:

> In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it. (at p. 520)

[16] (1968), 70 D.L.R. (2d) 38.
[17] [1965] S.C.R. 512.

affaire, la Cour a jugé que par l'adoption d'un règlement qui touchait une grande région comprenant de nombreux propriétaires fonciers, le Ministre exerçait une fonction purement législative. Dans *Re McMartin and City of Vancouver*[16], la Cour d'appel de la Colombie-Britannique a qualifié de législative l'action du conseil municipal qui adopte un règlement de zonage général applicable à une grande partie de la municipalité. La Loi prévoyait une audition publique préalable à l'adoption d'un tel règlement, et, après la tenue de l'audition publique, le conseil municipal a permis à certains propriétaires de présenter des observations supplémentaires. En qualifiant le règlement de zonage de législatif plutôt que de judiciaire ou quasi judiciaire, la majorité de la cour a conclu que l'obligation du conseil se limitait à la tenue de la première audition générale, ce qu'il avait fait, et que les observations supplémentaires recueillies ultérieurement par le conseil n'avait créé aucun droit en faveur des propriétaires touchés.

Dans l'affaire *Wiswell et autres c. Greater Winnipeg*[17], cette Cour était appelée à qualifier l'adoption par le conseil municipal de Winnipeg lorsqu'il a adopté un nouveau règlement de zonage visant un bien-fonds déterminé. La Cour a jugé qu'il s'agissait d'une mesure de nature quasi judiciaire et qu'il fallait donc donner un avis aux propriétaires ainsi visés. La Loi prévoyait certains types d'avis lesquels n'avaient pas été donnés. La Cour a cité en les approuvant les remarques du juge Freedman (tel était alors son titre) en Cour d'appel:

> [TRADUCTION] Lorsqu'elle a décidé d'adopter le règlement n° 177, la municipalité voulait essentiellement régler un litige entre le Dr Ginsburg, qui désirait voir le zonage modifié en sa faveur, et d'autres habitants du quartier qui ne voulaient pas de changement. En résolvant le litige au moyen d'un règlement modificatif, la municipalité a effectivement donné à ses procédures l'apparence d'un acte législatif. Mais en réalité, elle exerçait des fonctions de nature quasi judiciaire; et, à mon avis, c'est ainsi que je dois les envisager. (à la p. 520)

[16] (1968), 70 D.L.R. (2d) 38.
[17] [1965] R.C.S. 512.

1980 CanLII 55 (SCC)

Later in his judgment, Hall J., at p. 522, adopted the observations of Masten J.A. in *Re Howard and City of Toronto*[18] at p. 576:

> In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council, while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity . . . and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

In the end Hall J. concluded (at p. 523):

> It was not merely the failure to post the placards but the manifest ignoring of the fact known to it that the Association would oppose the by-law . . .

Here we have the circumstance that the statute does not expressly require notice to the affected landowners. Council, of course, was aware that Homex would oppose such a by-law as no. 7. The by-law had some characteristics of a community interest by-law, as in the *Hershoran* case, *supra*, but it also represented the purported culmination of an *inter partes* dispute conducted on adversarial lines between Homex and the Council. As in *Hershoran* and in *Wiswell*, *supra*, I would conclude that the action taken by the Council was not in substance legislative but rather quasi-judicial in character so as to attract the principle of notice and the consequential doctrine of *audi alteram partem*, as laid down by the courts as long ago as in *Wandsworth*, *supra*. On this branch of the case all that remains is to determine whether the statutory pattern leaves this judicial principle available or is it an instance for the adoption of the principles applied in *Bishop*, *supra*, by Roach J.A. The statute requires the filing of a copy of such a by-law as by-law no. 7 with the Minister and, in order to be effective, the by-law must be registered in the Registry Office and mailed to the registered owner of the lands affected. I draw no inference from such provisions that no prior notice may be required where the action in question is essentially *inter partes* and quasi-judicial in nature. Thus the statute does not displace, in my view, the very old rule of *audi alteram partem* and the resultant duty

[18] (1928), 61 O.L.R. 563.

Plus loin dans son jugement, à la p. 522, le juge Hall a fait siennes les remarques du juge Masten de la Cour d'appel dans l'arrêt *Re Howard and City of Toronto*[18] à la p. 576:

> [TRADUCTION] Quand il prépare un projet de règlement qui porte sur un conflit d'intérêts entre des individus, le conseil, bien qu'il exerce un pouvoir discrétionnaire que lui accorde la loi, exerce une fonction quasi judiciaire . . . et ses premières enquêtes et toutes les procédures subséquentes devraient être menées de façon judiciaire, avec équité pour toutes les parties en cause.

A la fin, le juge Hall a conclu (à la p. 523):

> [TRADUCTION] Ce n'était pas simplement l'omission d'apposer les affiches, mais l'ignorance manifeste du fait qu'il savait que l'association s'opposerait au règlement . . .

Ici, la Loi n'exige pas expressément qu'un avis soit donné aux propriétaires visés. Bien sûr, le Conseil savait qu'Homex s'opposerait à un règlement de la nature du règlement n° 7. Ce règlement présente certaines caractéristiques d'un règlement adopté dans l'intérêt de la collectivité, comme dans l'affaire *Hershoran*, précitée, mais il est également le point culminant d'un conflit *inter partes* opposant les intérêts contradictoires d'Homex et du Conseil. Comme dans les affaires *Hershoran* et *Wiswell*, précitées, je suis d'avis de conclure que l'action du Conseil n'était pas en substance législative mais plutôt de type quasi judiciaire de manière à faire entrer en jeu le principe de l'avis et la doctrine conséquente de la règle *audi alteram partem*, comme l'énoncent les tribunaux depuis des décisions aussi anciennes que *Wandsworth*, précitée. Sur cet aspect de l'affaire, il ne reste qu'à décider si l'économie de la Loi permet de recourir à ce principe judiciaire ou s'il faut en l'espèce adopter les principes appliqués dans l'arrêt *Bishop*, précité, par le juge Roach en Cour d'appel. La Loi exige qu'une copie d'un règlement tel le règlement n° 7 soit déposée auprès du Ministre et, pour devenir exécutoire, le règlement doit être enregistré au Bureau d'enregistrement et expédié au propriétaire enregistré des biens-fonds visés. Je ne déduis pas de ces dispositions qu'aucun avis ne peut être requis si l'action en question est essentiellement *inter partes* et de nature quasi judiciaire.

[18] (1928), 61 O.L.R. 563.

1980 CanLII 55 (SCC)

in Council to hear first and decide later. Such a conclusion is facilitated by the further feature in this case that Council has acted as the judge of its own actions in determining the outcome of the dispute between itself and Homex with reference to the provision of services to subdivision 567.

But that is only part of the journey. Next it must be determined whether in fact Homex was "heard" by the Council. There was of course no 'hearing' in the formal and ordinary sense by the Village of the position of Homex. There had, however, been a full awareness by both sides of the position of the other in this dispute. There had been detailed negotiations and an exchange of correspondence on the subject of the subdivision agreement and the installation of services on the lands included in the subdivision. The last letter was sent by the Village to Homex on March 23, 1976 and which letter stated in part:

> If you wish to proceed, please advise us and arrange for your Professional Engineers to submit their proposals for the development to the Village's Engineers for their examination and their report to the Council.
>
> Any such agreement would of course also require that the present action against the Village of Wyoming be dismissed and that the Village be reimbursed for its expenses in connection with that action.

The by-law was passed on April 1, 1976. One can hold no reasonable doubt that Homex had had every opportunity to explain its refusal to install services on the subdivision. The Village had made known to Homex its requirements for servicing. Homex held the view, however, that services should be paid for by the ratepayers in the Village generally and not by the owner of lands remaining to be serviced in this subdivision. Homex, however, did not receive an opportunity to assess its final position on this matter in the face of any action such as that taken by the Village in the passage of by-law no. 7. In the full and final sense Homex did not receive an opportunity to make known its position once fully aware of the Village's final position. In the light of the conduct of Homex and the attitude of its principal officer, one reaches this

Ainsi la Loi n'écarte pas, à mon avis, la très ancienne règle *audi alteram partem* et l'obligation qui en résulte pour le Conseil de tenir une audition avant de prendre une décision. Le fait qu'en l'espèce le Conseil a agi comme juge de ses propres actions en décidant de l'issue du conflit avec Homex, relativement à l'obligation de viabiliser le lotissement 567, facilite une telle conclusion.

Mais cela n'est qu'une étape. Il faut ensuite décider si le Conseil a effectivement permis à Homex «de se faire entendre». Bien sûr, le Village n'a pas tenu une «audition» au sens formel et ordinaire pour entendre Homex. Toutefois, les deux parties étaient tout à fait conscientes de leur position mutuelle. Il y a eu des négociations poussées et un échange de correspondance au sujet de la convention de lotissement et de l'installation de services d'utilité publique sur les terrains du lotissement. La dernière lettre a été envoyée par le Village à Homex le 23 mars 1976; en voici un extrait:

> [TRADUCTION] Si vous désirez donner suite à vos projets, nous vous prions de nous en informer et de bien vouloir demander à vos ingénieurs de soumettre leurs propositions d'aménagement aux ingénieurs du Village afin qu'ils les étudient et fassent rapport au Conseil.
>
> Pareille convention exigerait bien sûr que la présente action contre le village de Wyoming soit rejetée et que le Village soit remboursé de ses frais y afférents.

Le règlement a été adopté le 1er avril 1976. On ne peut raisonnablement douter qu'Homex a eu amplement l'occasion d'expliquer son refus de viabiliser le lotissement. Le Village l'avait informée de ses exigences à cet égard. Cependant Homex était d'avis qu'il appartenait aux contribuables du Village d'assumer les frais d'installation et non pas au propriétaire des terrains du lotissement non encore viabilisés. Toutefois Homex n'a pas eu la possibilité d'établir sa position finale sur cette question face à l'adoption du règlement nº 7 par le Village. En somme, Homex n'a pas eu la possibilité de faire connaître sa position lorsqu'elle a clairement su quelle était la position finale du Village. Compte tenu de la conduite d'Homex et de l'attitude de son dirigeant principal, on parvient à cette conclusion avec regret et en s'appuyant

1980 CanLII 55 (SCC)

conclusion with reluctance and only on the most narrow and technical grounds.

We come then to the last substantive test. Having thus determined that Homex had the right to an opportunity to be heard and that Homex did not receive such an opportunity before the passage by the Village of by-law no. 7, is Homex in all these circumstances entitled to the remedy sought, that is the quashing of the by-law on judicial review? These proceedings are brought under *The Judicial Review Procedure Act, 1971, supra.* The procedure on this application is that formerly available under the Rules of Court where an application was made for an order in lieu of *certiorari.* The statute in s. 2(5) preserves the discretion of the Court under the former procedure:

> Where, in any of the proceedings enumerated in subsection 1, the court had before the coming into force of this Act a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review.

The discretionary nature of the remedy is undoubted: *vide* Laskin C.J. in *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*[19], at p. 749, where the Court exercised its discretion to deny *certiorari* to an applicant otherwise in law entitled. The matter was again examined in this Court in *Harelkin v. University of Regina*[20], *per* Beetz J. at pp. 575-6:

> The use of the expression *ex debito justitiae* in conjunction with the discretionary remedies of *certiorari* and *mandamus* is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.
>
> *Ex debito justitiae* literally means "as of right", by opposition to "as of grace" (P. G. Osborne, *A Concise Law Dictionary*, 5th ed.; *Black's Law Dictionary*, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace

[19] [1976] 2 S.C.R. 739.
[20] [1979] 2 S.C.R. 561.

seulement sur les moyens les plus procéduraux et étroits.

Nous en venons maintenant à l'examen du dernier critère de fond. Ayant donc déterminé qu'Homex avait le droit d'être entendue et qu'elle n'a pas eu cette possibilité avant l'adoption du règlement n° 7 par le Village, a-t-elle droit, compte tenu de toutes ces circonstances, au redressement demandé, soit la cassation du règlement par examen judiciaire? Ces procédures ont été introduites en vertu de *The Judicial Review Procedure Act*, 1971, précitée. La procédure propre à cette demande est celle qui s'appliquait antérieurement en vertu des règles de la cour sur une demande d'ordonnance tenant lieu de *certiorari*. Le paragraphe 2(5) de la Loi maintient le pouvoir discrétionnaire dont jouissait la cour selon l'ancienne procédure:

> [TRADUCTION] Lorsque, dans le cadre d'une des procédures énumérées au paragraphe (1), la cour avait avant l'adoption de la présente loi le pouvoir discrétionnaire de refuser un redressement pour quelque motif, elle le conserve pour les mêmes motifs sur une demande d'examen judiciaire.

Le caractère discrétionnaire du redressement ne fait aucun doute: voir le juge en chef Laskin dans *P.P.G. Industries Canada Ltd. c. Procureur général du Canada*[19], à la p. 749, où la Cour a exercé son pouvoir discrétionnaire pour refuser un *certiorari* à un requérant qui autrement y aurait eu droit. La question a été réexaminée par cette Cour dans l'arrêt *Harelkin c. Université de Regina*[20], par le juge Beetz aux pp. 575 et 576:

> Associer l'expression *ex debito justitiae* aux recours discrétionnaires du *certiorari* et du *mandamus* n'est pas heureux. Cette association est fondée sur une contradiction et crée beaucoup de confusion dans notre droit.
>
> Littéralement, *ex debito justitiae* signifie [TRADUCTION] «de plein droit», par opposition à [TRADUCTION] «de complaisance» (P.G. Osborne, *A Concise Law Dictionary*, 5e éd.; *Black's Law Dictionary*, 4e éd.); un bref ne peut être à la fois un bref de complaisance et un bref de plein droit. Dire qu'un bref doit être émis *ex debito justitiae* signifie simplement que les circonstances militent en faveur de l'émission du bref plutôt que du refus. Mais l'expression, bien que latine, n'a aucun pouvoir

[19] [1976] 2 R.C.S. 739.
[20] [1979] 2 R.C.S. 561.

1980 CanLII 55 (SCC)

into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.

Certiorari was there refused because other remedies had been available but not pursued by the applicant. The principles governing the exercise of discretion to decline the grant of the extraordinary remedy of *certiorari* are gathered in *Halsbury*, 4th ed., vol. 1, at p. 157, para. 162: including, from the point of view of this appeal, "... if the conduct of the party applying has not been such as to disentitle him to relief ...". Examples of such conduct are found (in addition to those already enumerated above) in *F. Hoffman-LaRoche & Co. A.G. and others v. Secretary of State for Trade and Industry*[21]; *Watson v. Northern School Board et al.*[22], where the applicant had breached a contract and then sought to quash an award by a board established to determine the financial entitlements of the applicant as a result of such breach; *Re Falconbridge Nickel Mines Ltd. and United Steelworkers of America*[23], where the judge of first instance refused *certiorari* because the applicant had acted unconscionably during the proceedings before the administrative tribunal. The Court of Appeal, adopting the same general principles of law, found that on the facts the applicant was not guilty of disentitling conduct[24].

I recognize that there has been some criticism of this exercise of judicial discretion to deny the remedy, which criticism has generally viewed the discretion as an attempt by a court to apply or impose its own code of morality. This observation, however, denies or overlooks the very history of *certiorari*, an extraordinary and discretionary remedy coming down to present day courts from ancient times. To say that the writ is universally available where the rights of an individual are adversely affected by action of some public authorities taken in excess of jurisdiction or in some circumstances where an error of law has been committed in the course of the exercise of its

[21] [1975] A.C. 295.
[22] [1976] 5 W.W.R. 703.
[23] [1972] 2 O.R. 709.
[24] [1973] 1 O.R. 136.

magique et ne peut faire d'un bref de complaisance un bref de plein droit, ni détruire le pouvoir discrétionnaire, même dans les cas d'absence de compétence.

Le *certiorari* a été refusé dans cette affaire parce que le requérant ne s'était pas prévalu des autres recours possibles. Les principes régissant l'exercice du pouvoir discrétionnaire de refuser d'accorder le redressement extraordinaire que constitue le *certiorari*, sont réunis à *Halsbury*, 4e éd., vol. 1, à la p. 157, par. 162: soit, du point de vue de ce pourvoi, [TRADUCTION] « ... Si le requérant ne s'est pas conduit de façon à perdre son droit au redressement ...». On trouve des exemples de ce genre de conduite (en plus de ceux énumérés précédemment) dans *F. Hoffman-LaRoche & Co., A.G. and others v. Secretary of State for Trade and Industry*[21]; *Watson v. Northern School Board et al.*[22], où le requérant avait violé un contrat et ensuite cherché à faire annuler une indemnité accordée par une commission établie pour déterminer les droits pécuniers du requérant par suite de cette violation; *Re Falconbridge Nickel Mines Ltd. and United Steelworkers of America*[23], où le juge de première instance a refusé le *certiorari* parce que la requérante avait agi de façon déraisonnable au cours des procédures devant le tribunal administratif. Adoptant les mêmes principes juridiques généraux, la Cour d'appel a conclu que, selon les faits, la conduite de la requérante ne l'a pas privée de ce recours[24].

Je reconnais que l'exercice de ce pouvoir discrétionnaire de refuser le redressement a été critiqué, mais cette critique envisage généralement ce pouvoir comme une tentative des tribunaux d'appliquer ou d'imposer leur propre code de moralité. Toutefois, cette remarque nie ou refuse de reconnaître l'histoire même du *certiorari*, un redressement extraordinaire et discrétionnaire dont les tribunaux contemporains ont hérité des tribunaux anciens. Dire que ce bref est un recours universel lorsqu'un organisme public porte atteinte aux droits d'une personne par une mesure qui dépasse sa compétence ou dans des circonstances où il a commis une erreur de droit dans l'exercice de cette

[21] [1975] A.C. 295.
[22] [1976] 5 W.W.R. 703.
[23] [1972] 2 O.R. 709.
[24] [1973] 1 O.R. 136.

1980 CanLII 55 (SCC)

jurisdiction, is not to say that the reviewing tribunal must slavishly apply the rules surrounding the issuance of *certiorari* and automatically respond to the application of the person affected without any further scrutiny. The principles upon which *certiorari*, and now the modern order in judicial review, have been issued have long included the principle of disentitlement where a court, because of the conduct of the applicant, will decline the grant of the discretionary remedy.

Certiorari is, of course a prerogative writ originating in the earliest times as a discretionary power of the royal courts in the control of lesser tribunals in the jurisdictional sense. As said by the learned author of S. A. de Smith, *Judicial Review of Administrative Action*, 4th ed., 1980, at p. 587:

> Certiorari was essentially a royal demand for information . . .

From the dawn of its use, which is said to be in the mid-1200's, the courts have been concerned with:

> . . . maintaining the principle that writs closely associated with the rights of the Crown should not issue out of the Chancery to the subject as of course. (de Smith, *supra*, at p. 586)

The learned author of Wade, *Administrative Law*, 4th ed., 1977, in referring to *certiorari* and other prerogative remedies, described them as:

> . . . discretionary and the court may therefore withhold them if it thinks fit. [at p. 560];

and later in the discussion stated:

> The discretion to withhold remedies against unlawful action may make inroads upon the rule of law, and must therefore by exercised with the greatest care. In any normal case the remedy accompanies the right. But the fact that a person aggrieved is entitled to certiorari *ex debito justitiae* does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy. This means that he may have to submit to some unlawful administrative act which is *ex hypothesi* ultra vires. For, as has been observed earlier, a void act is in effect a valid act if the court will not grant relief against it.

compétence, n'équivaut pas à dire que le tribunal d'appel doit appliquer servilement les règles relatives à la délivrance d'un *certiorari* et répondre automatiquement à la demande de la personne touchée sans autre examen. Les principes en vertu desquels le *certiorari* et maintenant l'ordonnance moderne d'examen judiciaire sont accordés, comprennent depuis longtemps celui de la perte du droit au redressement lorsqu'à cause de la conduite du requérant, un tribunal refuse d'accorder le redressement discrétionnaire.

Bien sûr, le *certiorari* est un bref de prérogative qui à l'origine était un pouvoir discrétionnaire des cours royales servant à contrôler les abus de pouvoir des tribunaux d'instance inférieure. Comme l'a dit le savant auteur S.A. de Smith dans *Judicial Review of Administrative Action*, 4e éd., 1980, à la p. 587:

> [TRADUCTION] Le *certiorari* était essentiellement une demande royale d'information . . .

Depuis que l'on se prévaut de ce recours, soit vers le milieu du douzième siècle, les tribunaux ont cherché à:

> [TRADUCTION] . . . maintenir le principe que les brefs intimement liés aux droits de la Couronne ne devraient pas être délivrés d'office au requérant par la chancellerie. (de Smith, précité, à la p. 586)

Lorsque Wade, savant auteur de *Administrative Law*, 4e éd., 1977, parle du *certiorari* et des autres brefs de prérogative, il dit qu'ils sont:

> [TRADUCTION] . . . discrétionnaires et la cour peut donc refuser de les accorder si elle le juge à-propos. (à la p. 560);

et il ajoute plus loin dans l'exposé:

> [TRADUCTION]Le pouvoir discrétionnaire de refuser un redressement contre une action illégale peut constituer un empiétement sur la règle de droit et il faut donc l'exercer avec la plus grande prudence. Normalement, le redressement accompagne le droit. Mais le fait qu'une personne lésée ait droit au certiorari *ex debito justitiae* ne change rien au fait que le tribunal peut exercer son pouvoir discrétionnaire contre elle comme il peut le faire pour tout redressement discrétionnaire. Cela signifie qu'elle peut devoir se soumettre à un acte administratif illégal qui, par hypothèse, constitue un excès de pouvoir. Car, comme on l'a déjà fait remarquer, un acte nul est en réalité un acte valide si le tribunal refuse d'intervenir.

1980 CanLII 55 (SCC)

1980 CanLII 55 (SCC)

While the writ of *certiorari* has been replaced by statute in the United Kingdom in 1938 by an order in the nature of *certiorari* and in some provinces in the Rules of Court for orders in lieu of *certiorari*; and in other provinces by the statutory procedures sometimes described as judicial review, the courts have continued to apply the principles of the ancient prerogative writ to the newer forms of the same remedy. There are many examples to which one can turn. The British Columbia Court of Appeal in *Cock v. Labour Relations Board*[25] reversed an order of the court below quashing, by *certiorari*, an award by a labour relations board, and in doing so stated through Davey J.A., at p. 129:

> While the point was not taken below, in my respectful opinion, these writs should not be granted, even upon grounds otherwise legally sufficient, to applicants who in the matters before the Board have committed the fraud, trickery, and apparently perjury, found against the respondents here.

It is to be noted that the Court there regarded the discretion to be one springing not from the adversarial position of the parties but from the reponsibility of the Court in the administration of superior court review to match the application of the extraordinary remedy to the circumstances of each case. Other authorities to the same point are *Ex parte Fry*[26], at p. 737; *The King v. General Commissioners for the Purposes of the Income Tax Acts*[27], at p. 519; *The King v. Williams*[28], at p. 614, as to the exercise of discretion in the first instance. Thus it will be seen that the governing principles surrounding the issuance or withholding of the extraordinary remedy of *certiorari* in old or modern form operate up through the levels of the superior courts. Indeed, it is incumbent upon all courts to apply those principles where the circumstances so require whether or not the parties

[25] (1960), 26 D.L.R. (2d) 127.
[26] [1954] 1 W.L.R. 730.
[27] [1917] 1 K.B. 486.
[28] [1914] K.B. 608.

Bien que, par une loi adoptée en 1938, le bref de *certiorari* ait été remplacé au Royaume-Uni par une ordonnance de la nature d'un *certiorari* et, dans certaines provinces, par des dispositions des règles de pratique prévoyant une ordonnance tenant lieu de *certiorari*, et dans d'autres provinces par des procédures établies par la loi parfois appelées examen judiciaire, les tribunaux ont continué d'appliquer les principes de l'ancien bref de prérogative aux nouvelles formes de ce même redressement. Plusieurs exemples s'offrent à nous. Dans l'arrêt *Cock v. Labour Relations Board*[25], la Cour d'appel de la Colombie-Britannique a infirmé l'ordonnance de la cour d'instance inférieure qui annulait par *certiorari* la décision d'une commission des relations de travail et, ce faisant, elle a déclaré par l'intermédiaire du juge Davey, à la p. 129:

> [TRADUCTION] Bien que la question n'ait pas été examinée par les cours d'instance inférieure, je suis respectueusement d'avis que ces brefs ne devraient pas être accordés, même lorsqu'ils sont par ailleurs légalement fondés, à des requérants qui, dans les affaires soumises à la Commission, se sont, comme les intimés en l'espèce, rendus coupables de fraude, de supercherie et, semble-t-il de parjure.

Il faut remarquer que, dans cette affaire-là, la cour a considéré que le pouvoir discrétionnaire ne découlait pas de la situation conflictuelle des parties, mais de la responsabilité de la cour qui, dans l'administration du pouvoir de contrôle des cours supérieures, doit adapter le recours extraordinaire aux circonstances de chaque espèce. On trouve d'autres décisions sur le même point telles *Ex parte Fry*[26], à la p. 737; *The King v. General Commissioners for the Purposes of the Income Tax Acts*[27], à la p. 519; *The King v. Williams*[28] à la p. 614, quant à l'exercice du pouvoir discrétionnaire en première instance. Ainsi on voit que les principes qui régissent la délivrance du redressement extraordinaire que constitue le *certiorari*, sous sa forme ancienne ou contemporaine, ou le refus de l'accorder filtrent jusqu'au niveau des cours supérieures. En fait, toutes les cours doivent

[25] (1960), 26 D.L.R. (2d) 127.
[26] [1954] 1 W.L.R. 730.
[27] [1917] 1 K.B. 486.
[28] [1914] K.B. 608.

address themselves to the latter.

Turning now to the application of this principle to the circumstances of this appeal, I do not propose to repeat but merely refer back to the history of the dealings by Homex with its predecessor in title Atkinson, and with the Village. Homex has sought throughout all these proceedings to avoid the burden associated with the subdivision of the lands comprised in plan 567. In the preliminary stages of this application for judicial review, Homex has taken inconsistent and even contradictory positions. Examinations on affidavits were protracted because of a lack of simple frankness on the part of its president. Homex has sought, after its application to this Court to set aside the by-law, to put its lands beyond the reach of municipal regulations by means of checkerboarding. This it apparently is entitled to do at law but it does not follow that the exercise of such a legal right may not be a factor for assessment by a court which Homex invites to exercise a discretion in its favour in connection with *certiorari* or now judicial review concerning by-law 7. Of primary concern in my view is the attempt by Homex to avoid the burden of the "Atkinson" agreement to service these lands by shifting that burden to the ratepayers in the Village by the undoing of the municipal action taken in the form of by-law 7. There is nothing in the Council's conduct of negotiations to indicate the presence of any motive in Council other than its desire to protect its constituents from an expense which had been undertaken by the owners of plan 567 when seeking the right to subdivide their land. This objective the Village had facilitated first by entering into a subdivision agreement with the then owner Atkinson, and thereafter by consenting to a conveyance of the subdivided lands to the applicant Homex. Furthermore, Homex appears to be secure against other forms of action for the recovery of the cost of services by the Village. It is not a party to the Atkinson-Village agreement and the agreement could not be registered and did not therefore run with the land at the time of the Homex acquisition. It might be that the Village could prove prior notice and somehow overcome want of privity in an action on the agreement. But Homex erected

appliquer ces principes lorsque les circonstances l'exigent, que les parties les invoquent ou non.

Pour appliquer ce principe aux circonstances de ce pourvoi, je n'ai pas l'intention de répéter mais tout simplement de mentionner l'historique des pourparlers entre Homex et son prédécesseur en titre Atkinson, et le Village. Tout au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains du plan 567. Dès le début de cette demande d'examen judiciaire, Homex a adopté des positions incompatibles et mêmes contradictoires. Les interrogatoires sur les affidavits se sont prolongés en raison du manque de franchise du président. Après avoir présenté à cette Cour une demande visant l'annulation du règlement, Homex a cherché à soustraire ses terrains à l'application des règlements municipaux au moyen du morcellement en damier. Elle a apparemment légalement le droit de recourir à cette technique, mais il ne s'ensuit pas que l'exercice de ce droit ne peut être un facteur dont tiendra compte un tribunal auquel Homex demande d'exercer un pouvoir discrétionnaire en sa faveur relativement au *certiorari* ou à la demande d'examen judiciaire concernant le règlement 7. A mon avis, le point d'importance capitale est la tentative d'Homex de se soustraire aux obligations de la convention «Atkinson» de viabiliser ces terrains et de les faire assumer par les contribuables du Village en attaquant la mesure prise par la municipalité sous la forme du règlement 7. Rien dans les négociations n'indique que le Conseil poursuivait d'autres buts que celui d'éviter à ses contribuables une dépense que les propriétaires du plan 567 avaient assumée lorsqu'ils voulaient obtenir le droit de lotir leur terrain. Le Village avait facilité les choses d'abord en signant une convention de lotissement avec le propriétaire de l'époque, Atkinson, puis en consentant à un transfert des terrains lotis à la requérante Homex. De plus Homex paraît être protégée contre d'autres formes d'actions pour le recouvrement des frais d'installation des services par le Village. Elle n'est pas partie à la convention entre Atkinson et le Village, la convention n'a pas pu être enregistrée et ne grevait pas le terrain au moment où Homex en a fait l'acquisition. Il se pourrait que dans une action fondée sur la convention, le Village puisse

1980 CanLII 55 (SCC)

another obstacle in the path of the Village by resorting to checkerboarding in December 1976. Such litigation by the Village would be difficult, no doubt protracted as were these proceedings, expensive, and of doubtful outcome. In any case, Homex and its "nominees" on title might, in the meantime, have disposed of the land and the Village would be left submerged in litigation with the new owners over the cost of services. Indeed, there is presently at least one outstanding action brought against Homex by a purchaser in which the Village is a third party.

I would, by reason of these special circumstances, deny the issuance of the order of judicial review with reference to by-law no. 7. In doing so it is reassuring to note that a like conclusion was reached by the Ontario Divisional Court in similar circumstances in *Re Bergin et al. and Township of King*[29], citing in its reasons the judgment of Anglin J. (as he then was) in *Rodd v. County of Essex*[30], at p. 143. While these authorities concern the discretion to withhold the writ on a *mandamus* application, the same sort of circumstances were examined as here.

I return now to by-law no. 6 being the by-law passed in December 1975 relating to the installation of a water main on Norman Street. The applicant seeks the quashing of by-law 6 on the grounds "that the by-law was passed in bad faith and for the purpose of preventing the applicant from proceeding with the development and sale of its lands in the said registered plan". The following is the by-law in its entirety:

> A by-law concerning a water pipeline on Norman Street.
>
> WHEREAS the Council of the Corporation of the Village of Wyoming was requested by Norman C. Redick to give him permission to install a water pipe line on Norman Street according to Registered Plan Number 567 in the Village of Wyoming from Superior Street to approximately the north limit of Lot 7 according to said Plan 567.

[29] [1973] 3 O.R. 174.
[30] (1910), 44 S.C.R. 137.

prouver un préavis et ainsi suppléer de quelque façon à l'absence de lien de droit. Mais Homex a opposé un autre obstacle au Village en recourant au morcellement en damier en décembre 1976. Pareille action par le Village serait difficile, sans doute longue comme les présentes procédures, coûteuse et son issue incertaine. Quoi qu'il en soit, Homex et ses «personnes interposées» risqueraient, dans l'intervalle, de disposer des terrains et le Village serait donc enlisé dans des litiges avec les nouveaux propriétaires quant aux frais d'installation des services. Il y a effectivement au moins une action pendante intentée contre Homex par un acquéreur, qui met en cause le Village.

Compte tenu de ces circonstances spéciales, je suis d'avis de refuser de rendre une ordonnance d'examen judiciaire relativement au règlement n° 7. Il est rassurant de remarquer que la Cour divisionnaire de l'Ontario est parvenue à une conclusion semblable dans des circonstances analogues dans *Re Bergin et al. and Township of King*[29], citant dans ses motifs le jugement du juge Anglin (alors juge puîné) dans l'arrêt *Rodd c. County of Essex*[30], à la p. 143. Bien que ces décisions portent sur le pouvoir discrétionnaire de refuser le bref de *mandamus*, l'examen portait sur le même genre de circonstances.

Je reviens maintenant au règlement n° 6, soit le règlement adopté en décembre 1975 concernant l'installation d'une conduite d'eau principale rue Norman. La requérante demande l'annulation du règlement n° 6 [TRADUCTION] «parce que le règlement a été adopté de mauvaise foi et dans le but d'empêcher la requérante de procéder à la mise en valeur et à la vente de ses terrains compris dans le plan enregistré». Voici le règlement intégral:

> [TRADUCTION] Règlement concernant une conduite d'eau rue Norman
>
> ATTENDU QUE Norman C. Redick a demandé au Conseil de la municipalité du village de Wyoming la permission d'installer une conduite d'eau rue Norman, suivant le plan enregistré numéro 567 dans le village de Wyoming depuis la rue Superior jusqu'aux abords de la limite nord du lot 7 conformément au plan n° 567.

[29] [1973] 3 O.R. 174.
[30] (1910), 44 R.C.S. 137.

1980 CanLII 55 (SCC)

AND WHEREAS Norman C. Redick represented to the Council that the immediate installation of the said water pipe line by him would save him money in connection with the development of the land owned by Homex Realty and Development Company Limited in the said Plan of Subdivision and as a courtesy to him but without making any other commitments, the Council by resolution consented to the installation of the said pipe line but made no commitment as to when the said pipe line might be assumed or taken over by the Corporation or when it could be used for the supply of water.

NOW THEREFORE the Council of the Corporation of the Village of Wyoming enacts as follows:

1. The lands affected by this by-law are Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and Norman Street according to Registered Plan 567 in the said Village of Wyoming.

2. It is the policy of the Council of the Corporation of the Village of Wyoming that the said water pipe line in Norman Street from Superior Street to approximately the north limit of Lot 7 according to said Plan 567 shall not be assumed or taken over by the Corporation and no connection shall be permitted to be made to the said water pipe line and no water shall be supplied through the said water pipe line and the said water pipe line shall not form part of the municipal water supply system of the Village of Wyoming until authorized by a futher [sic] by-law of the Corporation of the Village of Wyoming.

By-law 6 is of much less importance to the parties because whether or not there be a by-law concerning this pipeline, there is in the circumstances disclosed a contract between Homex and the Village in which the terms on which the water line was installed are set out in correspondence between the parties. It is trite law that a municipality may act only by by-law and in any case only within its statutory jurisdiction. By-law 6 does not purport to make a general rule applicable to the municipality as a whole, nor does it purport to grant or withhold any rights or privileges in respect of the municipality or its inhabitants. It simply records an agreement between the Village and the landowner and announces the policy of the Village with reference to the pipe line, namely that without further by-law action, the water main shall not form a part of the municipal water supply system.

ET ATTENDU QUE Norman C. Redick a fait valoir devant le Conseil que l'installation immédiate de la conduite d'eau lui permettrait de faire des économies sur la mise en valeur des terrains appartenant à Homex Realty and Development Company Limited dans le plan de lotissement et que, par mesure de courtoisie envers lui mais sans prendre d'autres engagements, le Conseil a consenti par résolution à l'installation de la conduite d'eau mais n'a pas dit à quel moment elle serait prise en charge par la municipalité ni à quel moment elle pourrait servir à l'aqueduc.

A CES CAUSES, le conseil de la Municipalité du village de Wyoming décrète ce qui suit:

1. Les terrains visés par le présent règlement sont les lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, et la rue Norman, conformément au plan enregistré n° 567 dans le village de Wyoming.

2. C'est la politique du Conseil de la municipalité du village de Wyoming que la conduite d'eau rue Norman, depuis la rue Superior jusqu'aux abords de la limite nord du lot 7, suivant le plan 567, ne soit pas prise en charge par la Municipalité et qu'aucun raccordement à la conduite d'eau ne soit autorisé, que cette conduite d'eau ne puisse servir à l'aqueduc et qu'elle ne fasse pas partie du réseau municipal d'aqueduc du village de Wyoming avant qu'un autre règlement de la municipalité du village de Wyoming ne l'autorise.

Le règlement 6 est beaucoup moins important pour les parties puisque, qu'il y ait ou non un règlement concernant cette conduite d'eau, les faits montrent qu'il existe un contrat entre Homex et le Village dont les termes qui ont régi l'installation de la conduite d'eau, se retrouvent dans la correspondance échangée par les parties. Il est de droit constant qu'une municipalité ne peut agir que par règlement et sans outrepasser la compétence que lui accorde la loi. Le règlement 6 ne vise pas à énoncer une règle générale applicable à l'ensemble de la municipalité, il ne vise pas non plus à accorder ou à refuser des droits ou des privilèges relativement à la municipalité ou à ses habitants. Il ne fait que rapporter une entente intervenue entre le Village et le propriétaire et formule la politique du Village relativement à la conduite d'eau, savoir qu'en l'absence d'un autre règlement la conduite d'eau ne fera pas partie du réseau municipal d'aqueduc.

1980 CanLII 55 (SCC)

The applicant alleges bad faith. There is no finding of bad faith in either court below and nothing in the record would support any such finding. The second ground alleged by the applicant Homex is that by-law 6 was enacted "for the purposes of preventing the applicant from proceeding with the development and sale of its lands in the said registered plan". There is, of course, nothing in the by-law, including its recitals, which would indicate any such purpose. There is no finding in either court below of any such purpose and again nothing in the record ties the action of the Village in the passage of by-law no. 6 to the disposition by Homex of its lands in plan 567.

The Divisional Court, speaking through Anderson J., stated:

> . . . it is not entirely clear to me what, if any, is its legal effect. Indeed, since it lacks any enacting language, it is questionable whether it can be said to be a by-law at all.

The Court then went on to quash by-law 6 "simply because it is not a by-law".

The Court of Appeal, after pointing out that s. 15 of *The Public Utilities Act*, R.S.O. 1970, c. 390, authorized a council on the application of a property owner to provide for the construction of water mains and to provide for the payment of the cost thereof, found that the by-law was a proper exercise by Council of one of its functions. The Court, speaking through Weatherston J.A., stated:

> It is apparent from the recitals in By-law No. 6 that the consent of council to the installation by Homex of a water line on Norman Street was given by Resolution only. I see nothing wrong in that Resolution being confirmed by the by-law to conform with the statute and, by registration of the by-law, to give notice to subsequent owner of the lots in the subdivision of the terms on which the consent of council was given. This is not a case of a mere assertion of facts, as was the case in *Rogers and Pyke v. The Township of North York et al.*, [1951] O.R. 79. Its real purpose is clear, and it ought not to be quashed merely because of imperfections in its form.

La requérante invoque la mauvaise foi. Ni l'une ni l'autre des cours d'instance inférieure n'a conclu à la mauvaise foi et rien au dossier n'appuie une telle conclusion. La requérante fait également valoir que le règlement 6 a été adopté [TRADUCTION] «dans le but d'empêcher la requérante de procéder à la mise en valeur et à la vente de ses terrains compris dans le plan enregistré». Bien sûr, rien dans le règlement, y compris son préambule, n'indique un tel but. Ni l'une ni l'autre des cours d'instance inférieure n'a conclu à l'existence d'un tel but et, encore une fois, rien au dossier ne rattache la mesure qu'a prise le Village en adoptant le règlement nº 6 à l'aliénation des terrains d'Homex compris dans le plan 567.

Par l'intermédiaire du juge Anderson, la Cour divisionnaire a dit:

> [TRADUCTION] . . . je ne vois pas clairement quel est, le cas échéant, son effet juridique. En fait, puisqu'il ne comprend pas de dispositif on peut se demander s'il s'agit vraiment d'un règlement.

La Cour a ensuite annulé le règlement 6 [TRADUCTION] «tout simplement parce que ce n'est pas un règlement».

Après avoir fait remarquer que l'art. 15 de *The Public Utilities Act*, R.S.O. 1970, chap. 390, permettait au conseil, à la demande d'un propriétaire, de stipuler les conditions de construction de conduites d'eau principales et celles du paiement des coûts, la Cour d'appel a jugé que le règlement constituait l'exercice approprié d'une des fonctions du Conseil. Par l'intermédiaire du juge Weatherston, la Cour a dit:

> [TRADUCTION] Il se dégage du texte du règlement nº 6 que c'est par résolution seulement que le Conseil a consenti à l'installation par Homex d'une conduite d'eau principale rue Norman. Je ne vois rien de répréhensible à ce que, pour se conformer à la Loi, on confirme cette résolution par règlement ni à ce qu'en procédant à son enregistrement, on informe les propriétaires subséquents des lots de ce lotissement des conditions auxquelles le consentement du Conseil a été donné. Il ne s'agit pas d'un simple exposé de faits, comme dans l'affaire *Rogers and Pyke v. The Township of North York et al.*, [1951] O.R. 79. Son but réel est clair et il ne doit pas être annulé pour simples vices de forme.

1980 CanLII 55 (SCC)

I am in respectful agreement with the conclusion reached by the Court of Appeal, namely that there was no basis for the quashing of by-law 6. This result happens to coincide with the practice of the courts of Ontario where they have refrained from quashing by-laws which do no more than announce policy: *vide Re de Havilland Aircraft of Canada Ltd. and City of Toronto*[31].

One last point is raised regarding the form of this proceeding brought, as has been said, under *The Judicial Review Procedure Act*, *supra*. It was alleged that such relief as that sought here should be pursued under the quashing provisions found in ss. 283-5 of *The Municipal Act*, *supra*. The courts of Ontario have frequently considered this matter as for example *In Re Maurice Rollins Construction Ltd. and South Fredericksburg*[32]; *Serre et al. v. Town of Rayside-Balfour*[33]; *Re Holmes et al. and Regional Municipality of Halton*[34]; *Rose v. Township of West Wawanosh et al.*[35]; *Re Clements & Toronto*[36] and *Sutherland v. Municipal Council of The Township of East Nissouri*[37].

I am in respectful agreement with Cory J. in *Holmes*, *supra*, that both avenues, that is *The Municipal Act*, *supra*, and *The Judicial Review Procedure Act*, *supra*, are open and appropriate. In any case, there is nothing in *The Judicial Review Procedure Act*, *supra*, to indicate a legislative intent that it supercede or be subservient to *The Municipal Act*, *supra*. Therefore, the form of proceedings here is free from any deficiency in its statutory base.

I therefore would dismiss the appeal with costs.

The reasons of Ritchie and Dickson JJ. were delivered by

DICKSON J.—Two by-laws were passed by the respondent municipality which directly and adversely affected lands owned by the appellant,

[31] (1980), 27 O.R. (2d) 721.
[32] (1975), 11 O.R. (2d) 418.
[33] (1975), 11 O.R. (2d) 779.
[34] (1977), 16 O.R. (2d) 263.
[35] (1890), 19 O.R. 294.
[36] [1960] 2 O.R. 18.
[37] (1853), 10 U.C.Q.B. 626.

Avec égards, je souscris à la conclusion de la Cour d'appel, savoir que rien ne justifie l'annulation du règlement 6. Ce résultat correspond à la pratique des tribunaux ontariens qui s'abstiennent d'annuler des règlements qui ne constituent qu'un simple énoncé de politique: voir *Re de Havilland Aircraft of Canada Ltd. and City of Toronto*[31].

Il reste une dernière question relative à la forme de cette procédure introduite, je l'ai déjà dit, en vertu de *The Judicial Review Procedure Act*, précitée. On a prétendu que le redressement demandé en l'espèce aurait dû être fondé sur les dispositions d'annulation que l'on trouve aux art. 283 à 285 de *The Municipal Act*, précitée. Les tribunaux ontariens se sont souvent penchés sur cette question, par exemple dans *In Re Maurice Rollins Construction Ltd. and South Fredericksburg*[32]; *Serre et al. v. Town of Rayside-Balfour*[33]; *Re Holmes et al. and Regional Municipality of Halton*[34]; *Rose v. Township of West Wawanosh et al*[35]; *Re Clements & Toronto*[36] et *Sutherland v. Municipal Council of The Township of East Nissouri*[37].

Avec égards, je souscris à l'opinion exprimée par le juge Cory dans l'arrêt *Holmes*, précité, que ces deux voies de recours, soit *The Municipal Act* et *The Judicial Review Procedure Act*, précitées, sont possibles et appropriées. Quoi qu'il en soit, rien dans *The Judicial Review Procedure Act*, précitée, n'indique que le législateur ait voulu que cette loi prévale ou qu'elle soit subordonnée à *The Municipal Act*, précitée. Donc, la forme des procédures en l'espèce n'est pas viciée dans son fondement juridique.

Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs des juges Ritchie et Dickson rendus par

LE JUGE DICKSON—La municipalité intimée a adopté deux règlements qui ont nui directement aux terrains appartenant à l'appelante, Homex

[31] (1980), 27 O.R. (2d) 721.
[32] (1975), 11 O.R. (2d) 418.
[33] (1975), 11 O.R. (2d) 779.
[34] (1977), 16 O.R. (2d) 263.
[35] (1890), 19 O.R. 294.
[36] [1960] 2 O.R. 18.
[37] (1853), 10 U.C.Q.B. 626.

1980 CanLII 55 (SCC)

Homex Realty and Development Company Limited. The by-laws were passed without prior notice and without affording Homex an opportunity to be heard. The question in this case is whether the by-laws are valid.

I

The controversy has its genesis in a fundamental disagreement between the respondent Village of Wyoming and Homex, a land developer, as to who will bear the cost of servicing a subdivision of some twenty-two acres of land.

On January 22, 1968, a subdivision agreement was entered into between the Village and one Atkinson, under the terms of which Atkinson was required to satisfy all the requirements of the Village, financial and otherwise, with respect to surfacing of roads, installation of services, and drainage. The subdivision agreement was not registered until some years later, on September 26, 1975. A plan of subdivision, however, was registered as plan No. 567 on March 26, 1968.

In January 1970, the appellant, Homex, acquired from Atkinson the lands included in plan No. 567. As required by the terms of the subdivision agreement, the consent of the Village was asked for, and given. Unfortunately for the Village, the form of consent did not embody therein an undertaking on the part of Homex to carry out the obligations of Atkinson, nor was Homex a party to the consent. Homex claims that all services necessary to develop the lots in the plan of subdivision were to be handled by Atkinson. Atkinson denies this. Though it is far from clear, resolution of this question is not here in issue. Nor is it necessary for this Court to decide whether Homex did, or did not, have notice of the existence or terms of the subdivision agreement at the time it purchased. *Vis à vis* the Village, Homex has taken the position that, as a stranger to the Village-Atkinson agreement, it is not bound thereby. The Village, on the other hand, is most unwilling to leave its ratepayers out of pocket for the substantial costs of servicing it feels Homex should bear. Protracted negotiations ensued between the

Realty and Development Company Limited. Les règlements ont été adoptés sans préavis et sans qu'on ait permis à Homex de se faire entendre. Il s'agit en l'espèce de décider si les règlements sont valides.

I

Le litige tire son origine d'un désaccord fondamental entre le village de Wyoming intimé et Homex, un promoteur immobilier, sur le point de savoir qui assumera les frais de l'installation des services d'utilité publique dans un lotissement d'environ vingt-deux acres.

Le 22 janvier 1968, une convention de lotissement a été signée entre le Village et un nommé Atkinson, aux termes de laquelle Atkinson devait satisfaire à toutes les exigences du Village, financières ou autres, relativement au revêtement des routes, à l'installation des services d'utilité publique et au drainage. La convention de lotissement n'a été enregistrée que quelques années plus tard, le 26 septembre 1975. Cependant, un plan de lotissement a été enregistré sous le nº 567 le 26 mars 1968.

En janvier 1970, l'appelante Homex a acheté à Atkinson les terrains faisant partie du plan nº 567. Conformément aux conditions de la convention de lotissement, les parties ont dû obtenir le consentement du Village. Malheureusement pour le Village, le texte du consentement ne comprend pas l'engagement d'Homex d'assumer les obligations d'Atkinson, et Homex n'était pas partie au consentement. Homex prétend que l'installation de tous les services nécessaires pour aménager les terrains du plan de lotissement devait être assurée par Atkinson. Atkinson le nie. Bien que ce soit loin d'être clair, cette question n'est pas en litige ici. Cette Cour n'a pas non plus à décider si Homex connaissait ou non l'existence ou les conditions de la convention de lotissement lorsqu'elle s'est portée acquéreur. Vis-à-vis du Village, Homex a adopté la position qu'étant étrangère à la convention intervenue entre le Village et Atkinson, elle n'est pas liée par celle-ci. Par ailleurs, le Village ne veut vraiment pas faire supporter par ses contribuables les lourds frais d'installation des services d'utilité publique qui devraient, à son avis, être assumés

1980 CanLII 55 (SCC)

Village and Homex in an attempt to reach agreement on the servicing but no accord was reached. The president of Homex, Norman C. Redick, has been somewhat intransigent throughout.

A draft plan of work prepared for Homex by a land surveyor was rejected by the Village in early 1975. A schedule of work prepared for Homex by professional engineers was later rejected. A draft servicing agreement, acceptable to the Village, was repudiated by Homex. In late 1975, Homex, with the permission of the Village, installed a water main to service some of the lots, but the Village shortly thereafter sought an injunction to halt work at the site claiming Homex had commenced construction of a road not authorized by the Village. The injunction application did not proceed. Nor did the road.

Without notice to or knowledge of Homex, the Village on December 29, 1975 passed by-law no. 6, which reads:

WHEREAS the Council of the Corporation of the Village of Wyoming was requested by Norman C. Redick to give him permission to install a water pipe line on Norman Street according to Registered Plan Number 567 in the Village of Wyoming from Superior Street to approximately the north limit of Lot 7 according to said Plan 567.

AND WHEREAS Norman C. Redick represented to the Council that the immediate installation of the said water pipe line by him would save him money in connection with the development of the land owned by Homex Realty and Development Company Limited in the said Plan of Subdivision and as a courtesy to him but without making any other commitments, the Council by resolution consented to the installation of the said pipe line but made no commitment as to when the said pipe line might be assumed or taken over by the Corporation or when it could be used for the supply of water.

NOW THEREFORE the Council of the Corporation of the Village of Wyoming enacts as follows:

1. The lands affected by this by-law are Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and Norman Street according to Registered Plan 567 in the said Village of Wyoming.

par Homex. Il s'en est suivi de longues négociations entre le Village et Homex afin de parvenir à une entente sur l'installation des services d'utilité publique, sans qu'ils parviennent à un accord. Le président d'Homex, Norman C. Redick, a été quelque peu intransigeant au cours de ces négociations.

Vers le début de 1975, le Village a rejeté un plan de travail préparé pour Homex par un arpenteur-géomètre. Plus tard, un programme des travaux préparé pour Homex par des ingénieurs a été rejeté. Un projet de convention sur l'installation des services d'utilité publique, auquel le Village aurait donné son approbation, a été répudié par Homex, Vers la fin de 1975, avec la permission du Village, Homex a installé une conduite d'eau principale pour desservir certains des lots mais, peu après, le Village a demandé une injonction pour faire cesser les travaux sur les lieux, prétendant qu'Homex avait commencé la construction d'une route sans son autorisation. On n'a pas donné suite à la demande d'injonction. La construction de la route a également été arrêtée.

A l'insu d'Homex et sans que celle-ci en reçoive avis, le Village a adopté le 29 décembre 1975 le règlement municipal n° 6 dont voici le texte:

[TRADUCTION]ATTENDU QUE Norman C. Redick a demandé au Conseil de la municipalité du village de Wyoming la permission d'installer une conduite d'eau rue Norman, suivant le plan enregistré numéro 567 dans le village de Wyoming depuis la rue Superior jusqu'aux abords de la limite nord du lot 7 conformément au plan n° 567.

ET ATTENDU QUE Norman C. Redick a fait valoir devant le Conseil que l'installation immédiate de la conduite d'eau lui permettrait de faire des économies sur la mise en valeur des terrains appartenant à Homex Realty and Development Company Limited dans le plan de lotissement et que, par mesure de courtoisie envers lui mais sans prendre d'autres engagements, le Conseil a consenti par résolution à l'installation de la conduite d'eau mais n'a pas dit à quel moment elle serait prise en charge par la municipalité ni à quel moment elle pourrait servir à l'aqueduc.

A CES CAUSES, le Conseil de la municipalité du village de Wyoming décrète ce qui suit:

1. Les terrains visés par le présent règlement sont les lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, et la rue Norman, conformément au plan enregistré n° 567 dans le village de Wyoming.

1980 CanLII 55 (SCC)

2. It is the policy of the Council of the Corporation of the Village of Wyoming that the said water pipe line in Norman Street from Superior Street to approximately the north limit of Lot 7 according to said Plan 567 shall not be assumed or taken over by the Corporation and no connection shall be permitted to be made to the said water pipe line and no water shall be supplied through the said water pipe line and the said water pipe line shall not form part of the municipal water supply system of the Village of Wyoming until authorized by a futher [sic] by-law of the Corporation of the Village of Wyoming.

2. C'est la politique du Conseil de la municipalité du village de Wyoming que la conduite d'eau rue Norman, depuis la rue Superior, jusqu'aux abords de la limite nord du lot 7, suivant le plan 567, ne soit pas prise en charge par la Municipalité et qu'aucun raccordement à la conduite d'eau ne soit autorisé, que cette conduite d'eau ne puisse servir à l'adduction d'eau et qu'elle ne fasse pas partie du réseau municipal d'aqueduc du village de Wyoming avant qu'un autre règlement de la municipalité du village de Wyoming ne l'autorise.

All of the lots affected by the by-law and mentioned in paragraph 1 are owned by Homex, with the exception of lots 19 and 20.

Homex est propriétaire de tous les lots visés par le règlement et mentionnés au paragraphe 1, à l'exception des lots 19 et 20.

On March 3, 1976 Homex wrote to the Village outlining the services Homex was willing to provide.

Le 3 mars 1976, Homex a écrit au Village pour décrire brièvement les services d'utilité publique qu'elle était prête à installer.

On March 23, 1976 the Village wrote Homex advising that the Village had always been and continued to be prepared to enter into an agreement with Homex concerning services. The letter outlined the requirements of the Village and concluded:

> If you wish to proceed, please advise us and arrange for your Professional Engineers to submit their proposals for the development to the Village's Engineers for their examination and their report to the Council.

Le 23 mars 1976, le Village a écrit à Homex l'informant qu'il avait toujours été et qu'il demeurait disposé à conclure une convention avec Homex concernant l'installation des services d'utilité publique. La lettre exposait les principales exigences du Village et concluait:

> [TRADUCTION] Si vous désirez donner suite à vos projets, nous vous prions de nous en informer et de bien vouloir demander à vos ingénieurs de soumettre leurs propositions d'aménagement aux ingénieurs du Village afin qu'ils les étudient et fassent rapport au Conseil.

Without awaiting a response to the invitation to continue negotiations, the Village, on April 1, 1976, again without notice to Homex, passed by-law No. 7. The by-law was given three readings in one evening. It reads in part:

> 1. The parts of Registered Plan No. 567 for the County of Lambton in the Village of Wyoming described in Section 2 of this By-Law are hereby designated as parts which shall be deemed not to be a registered plan of subdivision for the purposes of sub-section 2 of Section 29 of The Planning Act.

Le 1er avril 1976, sans attendre une réponse à l'invitation de poursuivre les négociations et sans donner d'avis à Homex, le Village a adopté le règlement nº 7. Le règlement a reçu trois lectures au cours de la même soirée. En voici un extrait:

> [TRADUCTION] 1. Les parties du plan enregistré nº 567 pour le comté de Lambton dans le village de Wyoming décrites à l'article 2 du présent règlement sont par les présentes désignées comme des parties qui ne sont pas réputées un plan de lotissement enregistré aux fins du par. 29(2) de *The Planning Act*.

The lots affected by-law No. 7 were the same as those affected by by-law No. 6. By-law No. 7 refers to, and was stated to be passed pursuant to, s. 29(3) of *The Planning Act*, R.S.O. 1970, c. 349, which provides that the council of a municipality may by by-law designate any plan of subdivision, or part thereof, that has been registered for eight

Les lots visés par le règlement nº 7 sont les mêmes que ceux visés par le règlement nº 6. Le règlement nº 7 renvoie au par. 29(3) de *The Planning Act*, R.S.O. 1970, chap. 349, lequel prévoit que le conseil d'une municipalité peut, par règlement, désigner un plan de lotissement ou une partie de celui-ci, qui est enregistré depuis au moins huit

1980 CanLII 55 (SCC)

years or more, which shall be deemed not to be a registered plan of subdivision for the purposes of s.29(2) of *The Planning Act*.

It will be recalled that the plan of subdivision had been registered on March 26, 1968. Thus, one week after the expiry of the eight years the Village moved, without notice to Homex, to deem the plan not to be a registered plan. The practical effect is to deny Homex the right to sell any of its lands unless a new plan is registered or a consent of the Committee of Adjustment of the municipality obtained for each conveyance. As no doubt intended, the Village has effectively frozen the property of Homex by passing the impugned by-laws. The lands have been seriously and adversely affected, both as to disposal and as to value. The hurried actions on the part of the Village, behind the back of Homex, taken with a view to providing the Village with a weapon with which to strike Homex in the servicing negotiations, could well be characterized as "shabby".

Homex commenced proceedings for judicial review. The Divisional Court quashed the by-laws. By-law No. 6 was invalid on the ground that it was not a by-law at all. Though there had been no bad faith giving rise to the enactment of by-law No. 7 it had been passed for an indirect or improper purpose. "Its purpose had nothing to do with planning which was the legislative area in which council purported to find its jurisdiction."

The Court of Appeal reversed. With respect to by-law No. 6, the Court found that the by-law was not merely a recitation of facts, as in *Rogers and Pyke v. The Township of North York et al.*[38] Its purpose was clear and it ought not to be quashed for imperfections in form. With respect to by-law No. 7, the Court found it was passed for a perfectly valid planning purpose, namely, to ensure that the costs of installing municipal services would be borne by the owners of the lots in the subdivision and not by the ratepayers in the municipality. The

[38] [1951] O.R. 79.

ans, de façon qu'il soit réputé ne pas être un plan enregistré de lotissement aux fins du par. 29(2) de *The Planning Act*, et c'est en vertu de ce paragraphe qu'il a été adopté.

Il faut se rappeler que le plan de lotissement avait été enregistré le 26 mars 1968. Ainsi, une semaine après l'expiration du délai de huit ans le Village a adopté un règlement, sans donner d'avis à Homex, pour que le plan soit réputé ne pas être un plan enregistré. Cela a eu comme effet pratique d'enlever à Homex le droit de vendre ses terrains à moins qu'un nouveau plan soit enregistré ou qu'elle obtienne le consentement du comité d'ajustement de la municipalité pour chaque aliénation. Tel qu'il l'a manifestement voulu, le Village a en fait gelé les terrains d'Homex en adoptant les règlements municipaux contestés. Cela a nui sérieusement à la vente des terrains et à leur valeur. Ces mesures prises par le Village à l'insu d'Homex et visant à lui fournir une arme contre cette dernière dans les négociations sur l'installation des services d'utilité publique, pourraient bien être qualifiées de «mesquines».

Homex a introduit une demande d'examen judiciaire. La Cour divisionnaire a annulé les règlements. Le règlement n° 6 a été jugé invalide pour le motif qu'il ne constituait pas du tout un règlement municipal. Malgré l'absence de mauvaise foi dans l'adoption du règlement n° 7, il a été adopté dans un but indirect ou inapproprié. [TRADUCTION] «Son but était tout à fait étranger à l'urbanisme, soit le domaine législatif sur lequel le Conseil prétend fonder son pouvoir.»

La Cour d'appel a infirmé ce jugement. Relativement au règlement n° 6, la Cour a jugé que le règlement n'était pas un simple énoncé de faits comme dans *Rogers and Pyke v. The Township of North York et al.*[38] Son but était clair et il ne devait pas être annulé pour vices de forme. Relativement au règlement n° 7, la Cour a jugé qu'il avait été adopté dans un but tout à fait valide d'urbanisme savoir, s'assurer que les frais d'installation des services municipaux seraient supportés par les propriétaires des lots du lotissement et non

[38] [1951] O.R. 79.

1980 CanLII 55 (SCC)

Court held that the Village had no duty to give prior notice to Homex before passing the by-law; the Council was exercising a legislative function when it enacted the by-law, and the over-riding consideration was the public interest of the citizens of Wyoming. This was not a case such as *Wiswell v. Greater Winnipeg*[39] in which a municipal council was merely adjudicating on the merits of competing private interests.

In the result, the Court of Appeal upheld the validity of the by-laws and set aside the order of the Divisional Court.

II

There is, of course, a long line of authority which establishes that before a public body can limit or abrogate the property rights of citizens, it must first give the individuals concerned an opportunity to be heard. This principle, of universal application, was established in the case of *Cooper v. Wandsworth Board of Works*[40]. Nor is it necessary for the legislature to provide explicitly for a hearing for a court to imply such right. On the contrary, where statutory bodies seek to limit property rights, the courts will imply a right to be heard unless there is an express declaration to the contrary: *Alliance des Professeurs catholiques de Montréal c. Commission des Relations ouvrières de la province de Québec et al.*[41] at p. 154. As Kerwin J., as he then was, noted in that case, the legislature must be presumed to know that notice is required by the general rule. And it is therefore necessary for it to use explicit terms in order to absolve from the necessity of giving notice. See also *Re Watt and Registrar of Motor Vehicles*[42].

Courts have on numerous occasions applied these principles to the case of a municipal corporation. See *In Re Maurice Rollins Construction Ltd.*

[39] [1965] S.C.R. 512.
[40] (1863), 14 C.B. (N.S.) 180.
[41] [1953] 2 S.C.R. 140.
[42] (1957), 13 D.L.R. (2d) 124 (Man. Q.B.)

par les contribuables de la municipalité. La Cour a jugé que le Village n'avait aucune obligation de donner un préavis à Homex avant d'adopter le règlement; le Conseil exerçait une fonction législative lorsqu'il l'a adopté et la considération dominante était l'intérêt public des citoyens de Wyoming. Ceci distingue cette affaire de l'affaire *Wiswell c. Greater Winnipeg*[39], où le conseil municipal ne faisait que décider sur le fond d'intérêts privés opposés.

Finalement, la Cour d'appel a maintenu la validité des règlements et a annulé l'ordonnance de la Cour divisionnaire.

II

Bien sûr, une longue tradition jurisprudentielle établit qu'avant qu'un organisme public puisse limiter ou révoquer les droits de propriété des citoyens, il doit d'abord donner aux personnes concernées la possibilité de se faire entendre. Ce principe, d'application universelle, a été établi dans l'arrêt *Cooper v. Wandsworth Board of Works*[40]. Il n'est pas non plus nécessaire que le législateur prévoie expressément une audition pour qu'un tribunal reconnaisse implicitement ce droit. Au contraire, lorsque des organismes créés par la loi cherchent à limiter des droits de propriété, les tribunaux reconnaîtront le droit d'être entendu à moins d'une déclaration expresse en sens contraire: *Alliance des Professeurs catholiques de Montréal c. Commission des Relations ouvrières de la province de Québec et al.*[41] à la p. 154. Comme le juge Kerwin, alors juge puîné, l'a fait remarquer dans cet arrêt, il faut présumer que le législateur sait qu'en règle générale un avis est requis. Il devient donc nécessaire d'employer des mots explicites pour écarter la nécessité de donner un avis. Voir également *Re Watt and Registrar of Motor Vehicles*[42].

Les tribunaux ont appliqué à maintes reprises ces principes à une municipalité. Voir *In Re Maurice Rollins Construction Ltd. and Township of*

[39] [1965] R.C.S. 512.
[40] (1863), 14 C.B.(N.S.) 180.
[41] [1953] 2 R.C.S. 140.
[42] (1957), 13 D.L.R. (2d) 124 (B.R. Man.)

1980 CanLII 55 (SCC)

and Township of South Fredericksburgh[43]; *Re Zadrevec and Town of Brampton*[44]; *Re Hershoran and City of Windsor et al.*[45]; *Re Anzil Construction Ltd. et al. and Township of West Gwillimbury et al.*[46]; *Re Multi-Malls Inc. and Attorney-General for Ontario et al.*[47]

Where the by-laws in question directly affect the land or property of specified individuals, the courts have implied a common law right to be heard. In the present case, the Village passed two by-laws which directly and detrimentally affected the lands of Homex and, virtually, only the lands of Homex. It did so without serving any notice of its intentions. One would have thought, on the basis of the authorities, that this was a classical case in which to import rules of natural justice.

The Village advances several arguments in justification of its failure to give notice and to grant a hearing. These include: (i) the common law right to be heard, if it exists, has been statutorily excluded by s. 29(11) of *The Planning Act*; (ii) in passing the by-laws, the municipality was exercising a legislative function, to which no common law right to be heard applied; and (iii) even if a common law right of fairness does apply here, the municipality has statisfied the onus placed upon it.

Statutory Exclusion of a Hearing

The combined effect of s. 29(9) and s. 29(11) of *The Planning Act* is that a by-law passed under s. 29(3) of the Act is not effective until notice of the by-law has been sent to each owner of land to which the by-law applies. Section 29(11) reads:

> (11) The clerk of the municipality shall send by registered mail notice of the passing of a by-law under subsection 3 to each person appearing . . . to be the owner of land to which the by-law applies . . .

[43] (1975), 11 O.R. (2d) 418.
[44] [1972] 3 O.R. 514, reversed [1973] 3 O.R. (2d) 498.
[45] (1973), 1 O.R. (2d) 291, affirmed (1974), 3 O.R. (2d) 423*n*.
[46] [1971] 2 O.R. 713.
[47] (1974), 5 O.R. (2d) 248.

South Fredericksburgh[43]; *Re Zadrevec and Town of Brampton*[44]; *Re Hershoran and City of Windsor et al.*[45]; *Re Anzil Construction Ltd. et al. and Township of West Gwillimbury et al.*[46]; *Re Multi-Malls Inc. and Attorney-General for Ontario et al.*[47]

Lorsque les règlements en question nuisent directement aux biens-fonds ou à la propriété de personnes en particulier, les tribunaux ont reconnu implicitement l'existence du droit d'être entendu en *common law*. En l'espèce, le Village a adopté deux règlements qui nuisent directement aux terrains d'Homex et ne visent pratiquement que ses terrains. Il a agi ainsi sans signifier d'avis de son intention. Compte tenu de la jurisprudence, on aurait cru qu'il s'agissait là d'un exemple typique où il faut appliquer les règles de justice naturelle.

Le Village avance plusieurs arguments à l'appui de son défaut de donner un avis et d'accorder une audition dont les suivants: (i) si le droit d'être entendu reconnu par la *common law* existe, il a été exclu par le par. 29(11) de *The Planning Act*; (ii) en adoptant des règlements, la municipalité exerçait une fonction législative à laquelle le droit d'être entendu reconnu par la *common law* ne s'applique pas; et (iii) même si le droit à l'impartialité reconnu par la *common law* s'applique ici, la municipalité s'est bien acquittée de l'obligation qui lui incombait.

L'exclusion de l'audition prévue par la Loi

La combinaison des par. 29(9) et 29(11) de *The Planning Act* a pour effet qu'un règlement adopté en vertu du par. 29(3) de la Loi n'est pas en vigueur tant qu'un avis du règlement n'a pas été envoyé à chaque propriétaire de bien-fonds auquel s'applique le règlement. Voici le texte du par. 29(11):

> [TRADUCTION] (11) Le secrétaire de la municipalité doit envoyer par courrier recommandé avis de l'adoption d'un règlement en vertu du paragraphe (3) à chaque personne que le dernier rôle . . . désigne comme propriétaire du bien-fonds auquel s'applique le règlement . . .

[43] (1975), 11 O.R. (2d) 418.
[44] [1972] 3 O.R. 514, infirmé par [1973] 3 O.R. 498.
[45] (1973), 1 O.R. (2d) 291 confirmé par (1974), 3 O.R. (2d) 423*n*.
[46] [1971] 2 O.R. 713.
[47] (1914), 5 O.R. (2d) 248.

1980 CanLII 55 (SCC)

It is contended by the Village that the legislature considered and rejected, impliedly, a requirement of prior notice. The argument is that the requirement of notification after passage of the by-law precludes by implication, any further requirement of prior notice. This argument was accepted by the Court of Appeal. With great respect, I cannot accept it, in light of the consistent line of high authority which holds that an express statutory statement is required before a common law right to a hearing can be excluded. Much more explicit language than that contained in s. 29(11) would be required before the Court could negate the right to a hearing. Section 29(11) does not provide for a hearing, it is merely *ex post facto* advice as to action taken.

The view that s. 29(11) does not exclude prior notice and a hearing was adopted by Thompson J. in the *Rollins* case and I am content to repeat what was said in that case:

> It is contended . . . that because s-s. (11) of s. 29 . . . provides that notice of the passing of the by-law must subsequently be given to all owners of land . . . that the intent of the statute is that prior notice need not be given. I am unable to accede to that contention. That is an entirely different notice which can in no way affect or alter the finality of the by-law as passed. The subsequent notice . . . was given . . . It was then too late for it to make representations or to be heard as the by-law had then become effective. (at p. 431)

The section 29(11) argument is not persuasive.

A "Legislative" Function?

In the Court of Appeal, emphasis was placed on the 'legislative' character of the acts performed by the Village of Wyoming in this case. It was on this basis that the present facts were distinguished from the case of *Wiswell, supra*. In *Wiswell*, the municipality was essentially dealing with a dispute between one Ginsburg, who wanted certain zoning requirements altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue unchanged. As such, the municipality in *Wiswell* was said to be acting in a judicial or quasi-judicial capacity. The Court of Appeal held that in the present case, the

Le Village prétend que le législateur a envisagé et implicitement rejeté l'exigence d'un préavis. Il fait valoir que l'exigence d'un avis après l'adoption du règlement écarte implicitement toute autre exigence d'un préavis. La Cour d'appel a accepté cet argument. Avec égards, je ne peux l'accepter compte tenu de la jurisprudence uniforme et importante selon laquelle une déclaration expresse de la loi est nécessaire avant qu'un droit d'audition reconnu par la *common law* puisse être exclu. Il faudrait un texte beaucoup plus précis que celui du par. 29(11) pour que la Cour puisse nier le droit à une audition. Le paragraphe 29(11) ne prévoit pas une audition, mais seulement un avis *ex post facto* de la mesure prise.

L'opinion que le par. 29(11) n'exclut pas un préavis et une audition a été adoptée par le juge Thompson dans l'affaire *Rollins* et il me suffit de répéter ce qu'il y dit:

> [TRADUCTION] On prétend . . . que l'intention de la loi est qu'il n'est pas nécessaire de donner avis puisque le par. 29(11) prévoit que l'avis de l'adoption d'un règlement doit être subséquemment donné à tous les propriétaires de bien-fonds. Je ne peux accepter cette prétention. Il s'agit là d'un avis tout à fait différent qui ne peut en aucune façon modifier la finalité du règlement adopté. L'avis subséquent .. a été donné . . . Il était alors trop tard pour présenter des observations ou être entendu puisque le règlement était entré en vigueur. (à la p. 431)

L'argument fondé sur le par. 29(11) n'est pas convaincant.

Une fonction «législative»?

En Cour d'appel, on a insisté sur le caractère «législatif» des actes accomplis par le village de Wyoming en l'espèce. C'est sur ce fondement qu'on a distingué les faits de l'espèce de ceux de l'affaire *Wiswell*, précitée. Dans cette affaire-là, la municipalité voulait principalement régler un litige opposant un nommé Ginsburg, qui désirait faire modifier à son avantage certaines exigences de zonage, et certains autres habitants du district qui désiraient leur maintien. Ainsi, dans l'affaire *Wiswell*, on a déclaré que la municipalité exerçait des fonctions judiciaires ou quasi judiciaires. La Cour d'appel a jugé qu'en l'espèce le litige est de nature

1980 CanLII 55 (SCC)

nature of the dispute is different; the municipality is dealing with a matter of public interest—namely, who would bear the cost of servicing; the function is legislative in nature and no right to a hearing can be implied.

I find myself unable to accept the Court's exegesis.

First, the distinction sought to be made here is that there is no conflict between the competing interests of private individuals, but a question of public interest, pure and simple. That being so, the Village exercised a legislative function in passing by-laws No. 6 and 7. A sale of unserviced lands puts the burden of development on the municipality, which is entitled to prevent that result by enactment of a s. 29(3) by-law.

As counsel for the appellant correctly points out, this reasoning leads to anomalous results. Thus if there were two identical by-laws, each affecting only one particular piece of property, and one by-law was opposed by other private individuals or groups but the other was not, only one of the two owners would be entitled to a hearing.

The right to a hearing does not spring from the fact that there are competing groups or individuals, some of whom happen to be opposed to the by-law. It results from the fact that the by-law interferes, in particular, with the private property rights of this one owner.

Counsel for Homex stresses, rightly in my view, the thrust of the *Wiswell* decision, which is that those potentially affected in their property rights by a proposed by-law concerning particular property, are entitled to notice of the hearing. If in *Wiswell*, ratepayers opposing the re-zoning were to be given notice and a hearing, *a fortiori* property owners should not have their rights tampered with, with no notice given, whether or not there is another private interest in opposition to the by-law.

différente; la municipalité doit se pencher sur une question d'intérêt public—savoir, qui supportera les frais d'installation de services d'utilité publique; il s'agit d'une fonction de nature législative et on ne peut reconnaître l'existence d'un droit implicite à une audition.

Je suis incapable d'accepter l'exégèse de la Cour.

Tout d'abord, la distinction que l'on a voulu faire ici est qu'en l'espèce aucun conflit n'oppose des intérêts privés, mais qu'il s'agit d'une question pure et simple d'intérêt public. Ceci étant, le Village a exercé une fonction législative en adoptant les règlements n°s 6 et 7. La vente de terrains non viabilisés impose le fardeau de l'installation des services à la municipalité qui est en droit d'éviter cette charge en adoptant un règlement aux termes du par. 29(3).

Comme l'avocat de l'appelante l'a correctement fait remarquer, ce raisonnement amène des résultats étranges. Ainsi, s'il y avait deux règlements identiques, chacun ne visant qu'un terrain particulier, et que l'un de ces règlements soit contesté par une personne ou un groupe de personnes alors que l'autre ne le soit pas, un seul des deux propriétaires aurait droit à une audition.

Le droit à une audition ne découle pas du fait qu'il y a des personnes ou des groupes de personnes opposés dont certains contestent le règlement. Il découle du fait que le règlement porte atteinte de façon particulière aux droits de propriété appartenant à ce propriétaire.

L'avocat d'Homex souligne, correctement à mon avis, l'effet de l'arrêt *Wiswell*, savoir que les personnes dont les droits de propriété peuvent être atteints par un règlement envisagé visant des biens en particulier ont le droit de recevoir un avis d'audition. Si dans l'affaire *Wiswell* les contribuables qui s'opposaient au nouveau zonage avaient droit à un avis et à une audition, *a fortiori* les propriétaires de biens-fonds ne devraient pas voir leurs droits amoindris sans recevoir d'avis, qu'il y ait ou non d'autres intérêts privés qui contestent le règlement.

1980 CanLII 55 (SCC)

For my own part, I see no reason why the *Wiswell* principle should be restrictively interpreted, or why it should not be applied in this case. The entitlement to notice and a hearing should not depend on there being a conflict between two private owners, which the municipality has to resolve. There were no competing interests in *Ridge v. Baldwin and others*[48]. The question was whether a policeman should be dismissed. See also *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police et al.*[49]

Second, the presence of a compelling public interest does not alone abrogate or diminish a citizen's right to procedural protection. The private property interests of Homex were here at stake. The public interest, it seems to me, is best served by affording the private interest full disclosure and a fair opportunity to be heard. There is no *a priori* reason why the private interest should yield abjectly to the public interest. The Village could undoubtedly pass a by-law such as No. 7 if it is in the public interest but, prior to deciding in favour of the public interest, the Council should hear the landowner's submissions. One cannot label an act "legislative" for the purpose of dispensing with fairness. A by-law may, in the public interest, operate to the detriment of particular individuals but not without giving those individuals a right of hearing.

It was contended that if prior notice is required a sophisticated owner receiving such notice would immediately "checkerboard" and thereby defeat the intent of the section. That may be true but, if so, it is an argument which should be addressed to the legislature accompanied by a request for an amendment which would specifically state that prior notice is not necessary.

Finally on this point, a requirement of both prior notice and subsequent notice does not introduce an element of redundancy. The earlier notice would permit representations by those affected and wishing to protest; the later notice would acquaint those who did not make represen-

[48] [1964] A.C. 40.
[49] [1979] 1 S.C.R. 311.

Personnellement, je ne vois pas pourquoi le principe énoncé dans l'arrêt *Wiswell* devrait être interprété restrictivement, ou pourquoi il ne s'appliquerait pas en l'espèce. Le droit à un avis et à une audition ne devrait pas dépendre de l'existence d'un conflit entre deux propriétaires privés, que la municipalité doit résoudre. Il n'y avait pas d'intérêts opposés dans l'arrêt *Ridge v. Baldwin and others*[48]. Il s'agissait de savoir si un policier devait être congédié. Voir également l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police et autre*[49].

Deuxièmement, la présence d'un intérêt public impérieux n'abroge ni ne diminue en lui-même le droit d'un citoyen à la protection qu'offre la procédure. Les intérêts privés d'Homex sur ses propriétés étaient en jeu. Il me semble que l'intérêt public est mieux servi si les intérêts privés bénéficient d'une divulgation complète et d'une possibilité raisonnable d'être entendus. Il n'y a aucune raison *a priori* pour que l'intérêt privé cède servilement à l'intérêt public. Le Village pouvait sans aucun doute adopter un règlement tel le règlement n° 7 dans l'intérêt public, mais avant d'opter en faveur de l'intérêt public, le Conseil devait entendre les arguments du propriétaire des biens-fonds. On ne peut qualifier un acte de «législatif» pour se dispenser d'agir équitablement. Un règlement peut, dans l'intérêt public, s'appliquer au détriment de personnes en particulier, mais non sans leur avoir accordé la possibilité de se faire entendre.

On a prétendu que si un préavis était nécessaire, un propriétaire rusé qui reçoit un tel avis pourrait immédiatement «morceler en damier» et faire ainsi échec à l'intention de l'article. Cela peut être vrai mais, si c'est le cas, c'est un argument qu'il faudrait présenter au législateur accompagné d'une demande de modification qui disposerait avec précision qu'un préavis n'est pas nécessaire.

Finalement sur cette question, l'exigence d'un préavis et d'un avis subséquent n'introduit rien de répétitif. Le préavis permettrait aux personnes visées qui désirent s'opposer, de se faire entendre; l'avis subséquent informerait celles qui ne se sont pas opposées, de même que celles qui se sont

[48] [1964] A.C. 40.
[49] [1979] 1 R.C.S. 311.

1980 CanLII 55 (SCC)

tations, as well as those who did, with the fact that action had been taken affecting their lands.

Third, the question of the proper classification of a statutory power was, for a time, believed to be crucial in the determination of whether a right to a hearing could be implied. It was suggested that a right to a hearing only existed in circumstances where the process was judicial or quasi-judicial in nature: *Nakkuda Ali v. Jayaratne*[50]. But this line of authority was rejected in England in *Ridge v. Baldwin, supra,* and, more recently, by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police et al., supra,* and in *Martineau v. Matsqui Institution Disciplinary Board*[51]. The latter two cases clearly establish that a right to procedural 'fairness' no longer demands an *a priori* classification of a process as judicial or quasi-judicial. As the Chief Justice stated in *Nicholson:*

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281. (at p. 325).

In *Martineau*, it was said that review by *certiorari* was available whenever a public body has power to decide "any matter affecting the rights, interests, property, privileges, or liberties of any person" (at p. 628). Once it is clear that rights are being affected, it is necessary to determine the appropriate procedural standard that must be met by the statutory body. Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection. See *Re Braeside Farms Ltd. et al. and Treasurer of*

[50] [1951] A.C. 66 (P.C.)

[51] [1980] 1 S.C.R. 602; (1979), 30 N.R. 119.

opposées, du fait qu'une mesure a été prise concernant leurs biens-fonds.

Troisièmement, on a cru un certain temps que la question de la classification appropriée d'un pouvoir accordé par la Loi était cruciale pour déterminer s'il y avait un droit implicite à une audition. On a prétendu que le droit à une audition n'existait que dans des circonstances où les fonctions étaient de nature judiciaire ou quasi judiciaire: *Nakkuda Ali v. Jayaratne*[50]. Mais cette tendance jurisprudentielle a été rejetée en Angleterre dans l'arrêt *Ridge v. Baldwin*, précité, et, plus récemment, par cette Cour dans les arrêts *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police et autre*, précité, et *Martineau c. Comité de discipline de l'Institution de Matsqui*[51]. Les deux derniers arrêts établissent clairement que le droit à une procédure «équitable» ne dépend plus de la répartition préalable des fonctions dans les catégories judiciaires ou quasi judiciaires. Comme l'a déclaré le Juge en chef dans l'arrêt *Nicholson*:

> L'apparition de cette notion résulte de la constatation qu'il est souvent très difficile, sinon impossible, de répartir les fonctions créées par la loi dans les catégories judiciaire, quasi judiciaire ou administrative; de plus il serait injuste de protéger certains au moyen de la procédure tout en la refusant complètement à d'autres lorsque l'application des décisions prises en vertu de la loi entraînent les mêmes conséquences graves pour les personnes visées, quelle que soit la catégorie de la fonction en question. Voir Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L. J. 281. (à la p. 325)

Dans l'arrêt *Martineau*, cette Cour a conclu qu'un examen par *certiorari* peut être demandé lorsqu'un organisme public a le pouvoir de décider «une question qui touche les droits, intérêts, biens, privilèges ou liberté d'une personne» (à la p. 628). Dès qu'il est évident qu'il y a atteinte aux droits, il devient nécessaire d'établir la norme de procédure appropriée que doit respecter l'organisme créé par la Loi. Il faut avant tout faire preuve de souplesse dans cette analyse. Il y a, comme toujours, tout un éventail. Classiquement, une décision purement ministérielle fondée sur l'intérêt public n'assurera au particulier qu'une faible protection au moyen

[50] [1951] A.C. 66 (C.P.)

[51] [1980] 1 R.C.S. 602; (1979), 30 N.R. 119.

1980 CanLII 55 (SCC)

Ontario et al.[52] On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards, particularly when personal or property rights are targetted, directly, adversely and specifically.

It seems to me that a similar analysis should be employed in the present case. That is, it is not particularly important whether the function of the municipality be classified as "legislative" or as "quasi-judicial". Such an approach would only return us to the conundrums of an earlier era. One must look to the nature of the function and to the facts of each case. I would adopt what was said by Judson J. in the *Wiswell* case. Although Judson J. dissented in *Wiswell*, being of opinion that adequate notice had been given, he did say:

> I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected. (My emphasis.) (at p. 526)

The Court of Appeal noted that the municipality was acting out of what it conceived to be the public interest. I have no doubt this is true. Council was seeking to protect members of the public from potential injury in the purchase of unserviced land and to protect its ratepayers from paying the costs of servicing. But that is no answer to the case made by the appellant. What we have here is not a by-law of wide and general application which was to apply to all citizens of the municipality equally. Rather, it was a by-law aimed deliberately at limiting the rights of one individual, the appellant Homex. In these circumstances, I would hold that Homex was entitled to some procedural safeguards. This does not mean that the municipality

[52] (1978), 20 O.R. (2d) 541 (Ont. Div. Ct.)

de la procédure sinon aucune. Voir *Re Braeside Farms Ltd. et al. and Treasurer of Ontario et al.*[52] Par ailleurs, une fonction qui s'approche de l'extrémité judiciaire de l'éventail comportera une protection importante au moyen de la procédure, en particulier lorsque des droits personnels ou des droits de propriété sont visés de façon directe, défavorable et précise.

Il me semble qu'il faut recourir à une analyse analogue en l'espèce. C'est-à-dire qu'il n'est pas particulièrement important de savoir si les fonctions de la municipalité doivent être qualifiées de «législatives» ou «quasi judiciaires». Une telle méthode nous reporterait simplement aux énigmes passées. Il faut considérer la nature de la fonction et les faits de chaque cas. Je suis d'avis d'adopter l'opinion du juge Judson dans *Wiswell*. Malgré sa dissidence dans cette affaire, puisqu'il était d'opinion qu'un avis suffisant avait été donné, le juge Judson a dit:

> [TRADUCTION] Je ne pense pas que l'on fasse un pas vers la solution de ce litige en étiquetant la forme d'activité à laquelle se livrait le conseil municipal lorsqu'il a adopté ce règlement modificatif. L'avocat de la municipalité déclare qu'il s'agit d'une fonction législative et qu'il n'était donc pas nécessaire de donner un avis pour agir. La majorité des juges préfère l'expression quasi judiciaire. Quelle que soit la qualification de la fonction, elle mettait en jeu des droits privés en plus de ceux du requérant et je préfère dire que la municipalité ne pouvait agir sans donner d'avis aux personnes touchées. (C'est moi qui souligne.) (à la p. 526)

La Cour d'appel a fait remarquer que la municipalité agissait dans un but qu'elle estimait d'intérêt public. Je n'ai aucun doute que cela soit vrai. Le Conseil essayait de protéger des membres du public d'un préjudice possible lors de l'achat d'un terrain non viabilisé et de protéger ses contribuables des frais d'installation des services d'utilité publique. Mais cela ne répond pas aux arguments présentés par l'appelante. Il ne s'agit pas d'un règlement général devant s'appliquer à tous les citoyens de la municipalité au même titre. Il s'agit plutôt d'un règlement visant délibérément à limiter les droits d'une seule personne, l'appelante Homex. Dans ces circonstances, je suis d'avis qu'Homex avait le droit de bénéficier de la protection qu'offre

[52] (1978), 20 O.R. (2d) 541 (C. Div. Ont.)

1980 CanLII 55 (SCC)

was under a duty to observe the procedures appropriate to a court of law. But, at a minimum, it was under a duty to give Homex notice of the proposed by-law and the opportunity to be heard. The 'fundamental rule', formulated by Lord Denning in *Selvarajan v. Race Relations Board*[53], and quoted by the Chief Justice in *Nicholson*, *supra*, applies.

> ... that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. (at p. 19).

Has the Onus Been Satisfied?

Counsel for the Village argued that, even assuming Homex to be entitled to some procedural safeguards, the Village had not violated these safeguards. It is contended that the two parties had conducted extensive negotiations on the issue over a period of years; that the Village was well aware of the position of Homex and there was no suggestion that Homex would have any further representations to make had it received notice. The key passage in the judgment of the Court of Appeal reads:

> But even though By-Law No. 7 operated to the special detriment of Homex, it was not unfair of the council to enact it without first giving notice and hearing what Homex had to say. From the negotiations which had taken place, the council already knew of the position being taken by Homex, and Homex knew of the attitude of the council. The intervention of the Court ought not to be called on to quash the by-law on this ground. The public interest, on the facts of this case, very obviously called for its enactment.

With all respect, I disagree.

There were indeed prolonged negotiations but at no time during the course of these negotiations did the Village ever indicate to Homex its intention to enact the impugned by-laws. Homex had no notice whatever of the by-laws. I fail to see how the negotiations can be said to have satisfied the onus placed on the Village. The prior negotiations did not result in waiver of notice.

[53] [1976] 1 All E.R. 12 (C.A.)

la procédure. Cela ne signifie pas que la municipalité avait l'obligation de respecter la procédure d'un tribunal. Mais, à tout le moins, elle avait l'obligation de donner à Homex un avis du règlement envisagé et de lui accorder la possibilité de se faire entendre. La «règle fondamentale» formulée par lord Denning dans l'arrêt *Selvarajan v. Race Relations Board*[53], et citée par le Juge en chef dans l'arrêt *Nicholson*, précité, s'applique:

> [TRADUCTION] ... dès qu'on peut infliger des peines ou sanctions à une personne ou qu'on peut la poursuivre ou la priver de recours, de redressement ou lui faire subir de toute autre manière un préjudice en raison de l'enquête et du rapport, il faut l'informer de la nature de la plainte et lui permettre d'y répondre. (à la p. 19)

L'obligation a-t-elle été respectée?

L'avocat du Village prétend que même si l'on tient pour acquis qu'Homex avait le droit de bénéficier de la protection qu'offre la procédure, le Village ne l'en a pas privée. Il allègue que les deux parties ont mené de longues négociations sur cette question pendant plusieurs années; que le Village était bien conscient de la position d'Homex et que rien ne laissait croire qu'Homex aurait eu d'autres observations à faire si elle avait reçu un avis. Le passage-clé de l'arrêt de la Cour d'appel se lit comme suit:

> [TRADUCTION] Même si le règlement n° 7 était particulièrement défavorable à Homex, le conseil n'a pas été injuste en l'adoptant sans lui donner de préavis ni lui accorder la possibilité de se faire entendre. Suite aux négociations, le Conseil connaissait déjà la position d'Homex et Homex connaissait l'attitude du conseil. On ne devrait pas faire intervenir la Cour pour casser le règlement sur ce moyen. Selon les faits de l'espèce, l'intérêt public exigeait manifestement son adoption.

Avec égards, je ne peux partager cette opinion.

Il y a effectivement eu de longues négociations mais jamais pendant leur déroulement le Village n'a laissé entendre à Homex qu'il avait l'intention d'adopter les règlements contestés. Homex n'a reçu aucun avis des règlements. Je ne vois pas comment l'on peut dire que les négociations ont permis au Village de satisfaire à son obligation. Les négociations antérieures n'ont pas entraîné une renonciation à l'avis.

[53] [1976] 1 All E.R. 12 (C.A.)

1980 CanLII 55 (SCC)

Moreover, the argument that Homex would have had no further representations to make is pure speculation. The Court should not be put in the position of having to speculate as to the possible success a person might have enjoyed had he or she, in fact, received notice.

In my view, *in fine*, the Village was under a common law duty to give notice to Homex before passing by-laws aimed directly at the land of Homex. The common law duty has not been explicitly excluded by *The Planning Act* and I would hold that the respondent has not satisfied the notice requirement through prior negotiations. Accordingly, I would hold that the by-laws are void.

In light of the foregoing, it is not necessary to pronounce on the other grounds of appeal raised by Homex. In particular, it is not necessary to decide whether by-law No. 7 was invalid as having been passed for an indirect or improper purpose, as the Divisional Court held, or to decide whether by-law No. 6 was invalid due to an alleged lack of enacting language.

Two points in closing. First, the question of whether Mr. Redick knew of the terms of the Atkinson agreement at the time of purchase was not the subject of argument in this Court. Neither factum saw this question as being relevant to the issues at bar. In the Divisional Court only passing reference was made to the agreement. Anderson J., for the Court, said:

> There appears to be some dispute as to whether the applicant did or did not have notice of the existence and terms of the subdivision agreement at the time it purchased. There is reference to it in the offer to purchase. In my view nothing turns on this in any event.

Second, the respondent did not in this Court, nor, apparently, in the Court of Appeal, take the technical point that the conduct of the appellant was such as to disentitle the appellant to relief by way of *certiorari*. The appellant was not called upon to face this issue in either Court. I would not deny relief on a ground not raised nor argued.

De plus, l'argument selon lequel Homex n'aurait eu aucune autre observation à faire n'est que pure spéculation. La Cour ne devrait pas avoir à se prononcer sur les chances de succès possible qu'une personne aurait pu avoir si elle avait effectivement reçu un avis.

Enfin il incombait au Village de par la *common law* de donner un avis à Homex avant d'adopter des règlements qui visaient directement les terrains en cause. L'obligation de *common law* n'a pas été expressément exclue par *The Planning Act* et je suis d'avis que l'intimée n'a pas satisfait à l'obligation de donner un préavis par les négociations antérieures. Par conséquent je suis d'avis que les règlements sont nuls.

Compte tenu de ce qui précède, il n'est pas nécessaire de se prononcer sur les autres moyens invoqués par Homex. En particulier, il n'est pas nécessaire de décider si le règlement n° 7 est invalide parce qu'il aurait été adopté dans un but indirect ou irrégulier, comme l'a jugé la Cour divisionnaire, ni de décider si le règlement n° 6 était invalide puisqu'il ne comportait pas de dispositif.

Mentionnons deux points avant de terminer. Tout d'abord, la question de savoir si M. Redick connaissait les dispositions de la convention Atkinson au moment de l'achat n'a pas été plaidée devant cette Cour. Aucun des mémoires ne fait valoir que cette question est pertinente aux points en litige. Devant la Cour divisionnaire on a simplement mentionné la convention. Le juge Anderson, qui a exprimé l'opinion de la Cour, a dit:

> [TRADUCTION] Il paraît y avoir conflit quant à savoir si le requérant connaissait l'existence de la convention de lotissement au moment de l'achat et sa teneur. Elle est mentionnée dans l'offre d'achat. A mon avis, quoi qu'il en soit, rien ne dépend de cette question.

Deuxièmement, ni devant cette Cour ni apparemment devant la Cour d'appel, l'intimée n'a fait valoir la question procédurale de savoir si la conduite de l'appelante l'empêchait de demander un redressement par *certiorari*. L'appelante n'a eu à plaider cette question dans aucune de ces cours. Je ne refuserais pas un redressement sur un moyen qui n'a été ni soulevé ni plaidé.

1980 CanLII 55 (SCC)

I would allow the appeal, set aside the judgment of the Court of Appeal of Ontario and restore the judgment of the Divisional Court with costs to the appellant in all courts.

Appeal dismissed with costs, RITCHIE *and* DICKSON JJ. *dissenting.*

Solicitors for the respondent, appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the appellant, respondent: Lyle F. Curran, Sarnia.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement de la Cour divisionnaire avec dépens à l'appelante dans toutes les cours.

Pourvoi rejeté avec dépens, les juges RITCHIE *et* DICKSON *étant dissidents.*

Procureurs de l'intimée, appelante: Osler, Hoskin & Harcourt, Toronto.

Procureur de l'appelante, intimée: Lyle F. Curran, Sarnia.

1980 CanLII 55 (SCC)

TAB 28

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook n° 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

N^o^ du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

2002 SCC 33 (CanLII)

failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été fixés à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans l'affirmative, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

2002 SCC 33 (CanLII)

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à raffiner les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. Enfin, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justifiant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle.

2002 SCC 33 (CanLII)

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

2002 SCC 33 (CanLII)

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les modifier.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves

Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas modifiées en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

2002 SCC 33 (CanLII)

not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même déficient. Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

2002 SCC 33 (CanLII)

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

2002 SCC 33 (CanLII)

a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle.

2002 SCC 33 (CanLII)

Cases Cited

By Iacobucci and Major JJ.

Applied: *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2; *McCannell v. McLean*, [1937] S.C.R. 341; *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; **considered:** *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670; **referred to:** *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574; *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504; *Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Palsky v. Humphrey*, [1964] S.C.R. 580; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Dube v. Labar*, [1986] 1 S.C.R. 649; *C.N.R. v. Muller*, [1934] 1 D.L.R. 768; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497; *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402; *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557.

By Bastarache J. (dissenting)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, rev'g (1980), 112 D.L.R. (3d) 297 (*sub nom. Taylor v. The Queen in Right of British Columbia*), rev'g (1978), 95 D.L.R. (3d) 82; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491; *Williams v. Town of North Battleford* (1911), 4 Sask.

Jurisprudence

Citée par les juges Iacobucci et Major

Arrêts appliqués : *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2; *McCannell c. McLean*, [1937] R.C.S. 341; *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; **arrêt examiné :** *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670; **arrêts mentionnés :** *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574; *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504; *Anderson c. Bessemer City*, 470 U.S. 564 (1985); *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78; *Palsky c. Humphrey*, [1964] R.C.S. 580; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Dube c. Labar*, [1986] 1 R.C.S. 649; *C.N.R. c. Muller*, [1934] 1 D.L.R. 768; *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15; *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497; *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402; *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557.

Citée par le juge Bastarache (dissident)

Canada (Directeur des enquêtes et recherches) c. Southam Inc., [1997] 1 R.C.S. 748; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487; *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, inf. (1980), 112 D.L.R. (3d) 297 (*sub nom. Taylor c. The Queen in Right of British Columbia*), inf. (1978), 95 D.L.R. 82; *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491; *Williams c. Town of North Battleford* (1911), 4 Sask.

2002 SCC 33 (CanLII)

L.R. 75; *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627; *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Schreiber Products Ltd. v. Currie Brothers Ltd.*, [1980] 2 S.C.R. 78; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68; *R. v. Jennings*, [1966] S.C.R. 532; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884; *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46.
Highway Traffic Act, S.S. 1986, c. H-3.1, ss. 33(1), 44(1).
Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192 [am. 1992, c. 63, s. 47; am. 1993, c. T-20.1, s. 7].

Authors Cited

American Bar Association. Judicial Administration Division. *Standards Relating to Appellate Courts*. Chicago: American Bar Association, 1995.
Cambridge International Dictionary of English. Cambridge: Cambridge University Press, 1996, "palpable".
Gibbens, R. D. "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445.
Goodhart, A. L. "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402.
Kerans, Roger P. *Standards of Review Employed by Appellate Courts*. Edmonton: Juriliber, 1994.
New Oxford Dictionary of English. Edited by Judy Pearsall. Oxford: Clarendon Press, 1998, "palpable".
Random House Dictionary of the English Language, 2nd ed. Edited by Stuart Berg Flexner. New York: Random House, 1987, "palpable".
Wright, Charles Alan. "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751.

APPEAL from a judgment of the Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, setting aside a decision of the Court of Queen's Bench, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Appeal allowed, Gonthier, Bastarache, Binnie and LeBel JJ. dissenting.

L.R. 75; *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627; *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40; *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Moge c. Moge*, [1992] 3 R.C.S. 813; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15; *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68; *R. c. Jennings*, [1966] R.C.S. 532; *Comté de Parkland n° 31 c. Stetar*, [1975] 2 R.C.S. 884; *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46.
Highway Traffic Act, S.S. 1986, ch. H-3.1, art. 33(1), 44(1).
Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192 [mod. 1992, ch. 63, art. 47; mod. 1993, ch. T-20.1, art. 7].

Doctrine citée

American Bar Association Judicial Administration Division. *Standards Relating to Appellate Courts*. Chicago : American Bar Association, 1995.
Gibbens, R. D. « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445.
Goodhart, A. L. « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402.
Grand Larousse de la langue française, Paris : Librairie Larousse, 1975, « manifeste ».
Grand Robert de la langue française, 2e éd. Paris : Dictionnaires Le Robert, 2001, « manifeste ».
Kerans, Roger P. *Standards of Review Employed by Appellate Courts*. Edmonton : Juriliber, 1994.
Trésor de la langue française. Paris : Gallimard, 1985, « manifeste ».
Wright, Charles Alan. « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, qui a infirmé une décision de la Cour du Banc de la Reine, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Pourvoi accueilli, les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents.

2002 SCC 33 (CanLII)

Gary D. Young, *Q.C.*, *Denis I. Quon* and *M. Kim Anderson*, for the appellant.

Michael Morris and *G. L. Gerrand*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND MAJOR JJ. —

I. Introduction

A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

Gary D. Young, *c.r.*, *Denis I. Quon* et *M. Kim Anderson*, pour l'appelant.

Michael Morris et *G. L. Gerrand*, *c.r.*, pour l'intimée.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Iacobucci, Major et Arbour rendu par

LES JUGES IACOBUCCI ET MAJOR —

I. Introduction

1 Il va sans dire qu'une cour d'appel ne devrait modifier les conclusions d'un juge de première instance qu'en cas d'erreur manifeste et dominante. On reformule parfois cette proposition en disant qu'une cour d'appel ne peut réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision.

2 Il existe une abondante jurisprudence étayant cette proposition, particulièrement des décisions émanant de cours d'appel, tant au Canada qu'à l'étranger (voir *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (C.A. Ont.); *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60). En outre, des auteurs, tant à l'échelle nationale qu'internationale, y souscrivent (voir C. A. Wright, « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751, p. 780; l'honorable R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994); et American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), p. 24-25).

3 Le rôle des tribunaux d'appel a été défini de manière judicieuse dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204, où la cour a dit ceci :

> [TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

2002 SCC 33 (CanLII)

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

Quoique cette théorie soit généralement acceptée, elle n'est pas appliquée de manière systématique. Le fondement de cette théorie est aussi valide aujourd'hui qu'il l'était il y a 100 ans. Cette théorie repose sur l'idée que le caractère définitif des décisions est un aspect important du processus judiciaire. Personne ne prétend que les juges des cours d'appel seraient, d'une manière ou d'une autre, plus intelligents que les autres et donc capables d'arriver à un meilleur résultat. Leur rôle n'est pas de rédiger de meilleurs jugements, mais de contrôler les motifs à la lumière des arguments des parties et de la preuve pertinente, puis de confirmer la décision à moins que le juge de première instance n'ait commis une erreur manifeste ayant conduit à un résultat erroné.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317). *Le Grand Robert de la langue française* (2e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évidente. [. . .] Qui est clairement, évidemment tel. [. . .] *Erreur, injustice manifeste* » (p. 1139). Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « . . . Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* » (p. 3213).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ». Si l'on applique ce critère au présent pourvoi, il faut que l'« erreur manifeste et dominante » décelée par le juge Cameron soit évidente pour que la Cour d'appel de la Saskatchewan puisse infirmer la décision de la juge de première instance. Comme nous le verrons plus loin, nous ne croyons pas qu'on a satisfait à ce critère en l'espèce.

II. The Role of the Appellate Court in the Case at Bar

II. Le rôle de la Cour d'appel en l'espèce

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant

Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le présent pourvoi. Nous estimons donc utile d'examiner brièvement

2002 SCC 33 (CanLII)

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

8 Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

9 Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

2002 SCC 33 (CanLII)

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raffiner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *Standard of Review for Findings of Fact*

B. *La norme de contrôle applicable aux questions de fait*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justifiant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous fions à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

12 With respect to findings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

2002 SCC 33 (CanLII)

Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

[TRADUCTION] La retenue est souhaitable pour diverses raisons : pour limiter le nombre et la durée des appels, pour promouvoir l'autonomie et l'intégrité des procédures devant le tribunal de première instance ou la cour des requêtes auxquelles de nombreuses ressources ont été consacrées, pour maintenir la confiance des plaideurs, pour reconnaître la compétence du juge de première instance ou du juge des requêtes, et pour réduire la multiplication inutile des procédures qui n'entraînent aucune amélioration correspondante de la qualité de la justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. . . . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

Le juge La Forest a exprimé des préoccupations semblables dans l'arrêt *Schwartz*, précité, par. 32 :

Il est établi depuis longtemps que les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait d'un juge de première instance. La règle se justifie principalement par la situation avantageuse dont bénéficie le juge des faits pour ce qui est d'évaluer la crédibilité des témoignages entendus au procès. [. . .] D'autres préoccupations liées à la politique judiciaire ont par ailleurs été invoquées pour justifier la règle. Une intervention illimitée des cours d'appel ferait augmenter considérablement le nombre et la durée des appels en général. D'importantes ressources sont mises à la disposition des tribunaux de première instance pour qu'ils puissent évaluer les faits. Il faut préserver l'autonomie et l'intégrité du procès en faisant preuve de retenue à l'égard des conclusions de fait des tribunaux de première instance; voir R. D. Gibbens, « Appellate Review of Findings of Fact » (1992), 13 *Adv. Q.* 445, aux pp. 445 à 448; *Fletcher c. Société d'assurance publique du Manitoba*, [1990] 3 R.C.S. 191, à la p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504, at p. 537.

Voir aussi, dans le contexte d'une poursuite touchant un brevet, *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504, p. 537.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

Dans *Anderson c. Bessemer City*, 470 U.S. 564 (1985), p. 574-575, la Cour suprême des États-Unis a aussi dressé une liste de raisons qui justifient de faire preuve de retenue à l'égard des conclusions de fait des juges de première instance :

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate

[TRADUCTION] La raison d'être de la retenue à l'égard des conclusions de fait du juge de première instance ne se limite pas au fait que ce dernier est mieux placé pour statuer sur la crédibilité. Le rôle principal du juge de première instance est de constater les faits, et l'expérience qu'il acquiert en s'acquittant de ce rôle lui confère son expertise à cet égard. Si les cours d'appel refaisaient le travail du juge de première instance, il est fort possible que ces efforts n'amélioreraient que marginalement l'exactitude des conclusions de fait, malgré

2002 SCC 33 (CanLII)

their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" . . . For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

les ressources judiciaires considérables qui devraient être réaffectées à cette fin. En outre, les parties à un appel ont déjà dû consacrer énergies et ressources à convaincre le juge de première instance de la justesse de leur version des faits; ce serait abuser que de leur demander de convaincre trois autres juges en appel. Comme l'a dit notre Cour dans un contexte différent, le procès sur le fond devrait être considéré comme « "l'épreuve principale" [. . .] plutôt que comme un "banc d'essai" ». [. . .] Pour ces motifs, le contrôle des décisions de fait selon la norme de la décision manifestement erronée — et la retenue envers le juge de première instance qu'elle suppose — est la règle, et non l'exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446:

D'autres observations sur les avantages dont disposent le juge de première instance ont été formulées par R. D. Gibbens dans « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445, p. 446 :

The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

[TRADUCTION] On dit que le juge de première instance possède de l'expertise dans l'évaluation et l'appréciation des faits présentés au procès. Il a également entendu l'affaire au complet. Il a assisté à toute la cause et son jugement final reflète cette connaissance intime de la preuve. Cette connaissance, acquise par le juge au fil des jours, des semaines voire des mois qu'a durés l'affaire, peut se révéler beaucoup plus profonde que celle de la cour d'appel, dont la perception est beaucoup plus limitée et étroite, et souvent déterminée et déformée par les diverses ordonnances et décisions qui sont contestées.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are <u>not</u> in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

Cet avantage reconnu des tribunaux et des juges de première instance a pour corollaire que les cours d'appel <u>ne</u> sont <u>pas</u> dans une position favorable pour évaluer et apprécier les questions de fait. Les juges des cours d'appel n'examinent que la transcription des témoignages. De plus, les appels ne se prêtent pas à l'examen de dossiers volumineux. Enfin, les appels ont un caractère « focalisateur », en ce qu'ils s'attachent à des questions particulières plutôt qu'à l'ensemble de l'affaire.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

À notre avis, ces diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous les trois principes de base suivants.

(1) <u>Limiting the Number, Length and Cost of Appeals</u>

(1) <u>Réduire le nombre, la durée et le coût des appels</u>

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be

Vu la rareté des ressources dont disposent les tribunaux, il faut encourager l'établissement

2002 SCC 33 (CanLII)

encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

de limites à la portée du contrôle judiciaire. La retenue à l'égard des conclusions de fait du juge de première instance sert cet objectif d'une manière rationnelle. D'importantes ressources sont allouées aux tribunaux de première instance aux fins d'évaluation des faits. Permettre un large contrôle des conclusions factuelles des juges de première instance entraîne une inutile répétition de procédures judiciaires, tout en n'améliorant que peu ou pas le résultat. En outre, de longs appels causent préjudice aux plaideurs moins bien nantis et compromettent l'objectif qui consiste à mettre à leur disposition des recours efficients et efficaces.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

(2) Favoriser l'autonomie du procès et son intégrité

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

17 L'organisation de notre système judiciaire repose sur la présomption que le juge de première instance est qualifié pour trancher l'affaire dont il est saisi et qu'une solution juste et équitable résultera du procès. Des appels fréquents et illimités affaibliraient cette présomption et saperait la confiance du public dans le processus judiciaire. L'appel est l'exception, non la règle.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

(3) Reconnaître l'expertise du juge de première instance et sa position avantageuse

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

18 Le juge de première instance est celui qui est le mieux placé pour tirer des conclusions de fait, parce qu'il a l'occasion d'examiner la preuve en profondeur, d'entendre les témoignages de vive voix et de se familiariser avec l'affaire dans son ensemble. Étant donné que le rôle principal du juge de première instance est d'apprécier et de soupeser d'abondantes quantités d'éléments de preuve, son expertise dans ce domaine et sa connaissance intime du dossier doivent être respectées.

C. *Standard of Review for Inferences of Fact*

C. *La norme de contrôle applicable aux inférences de fait*

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our

19 Nous estimons nécessaire de nous pencher sur la question de la norme de contrôle appropriée quant aux inférences de fait des juges de première instance, parce que les motifs de notre collègue suggèrent qu'une norme de contrôle moins exigeante peut

2002 SCC 33 (CanLII)

view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

être appliquée à cet égard. En toute déférence, nous sommes d'avis que l'application d'une telle norme de contrôle romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait.

20 Our colleague acknowledges that, in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

Notre collègue reconnaît que dans l'arrêt *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, notre Cour a jugé qu'il fallait faire preuve du même degré de retenue à l'égard des inférences de fait du juge de première instance qu'à l'égard de ses constatations de fait. Voici le passage pertinent des motifs de madame le juge Wilson (aux p. 388-389) :

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts . . . . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. . . .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

> C'est maintenant un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne soit prouvé que le juge de première instance a commis une erreur manifeste et dominante qui a faussé son appréciation des faits [. . .] Même si une constatation de fait ne dépend pas de la crédibilité, notre Cour a pour principe de ne pas intervenir pour réviser les constatations des tribunaux de première instance . . .
>
> Et même dans les cas où une constatation de fait n'est ni liée inextricablement à la crédibilité du témoin ni fondée sur une mauvaise compréhension de la preuve, la règle reste la même : l'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. C'est pourquoi, dans l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, notre Cour a refusé d'infirmer la conclusion du juge de première instance que certaines marchandises étaient défectueuses, disant, aux pp. 84 et 85, qu'une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve (citant *Métivier c. Cadorette*, [1977] 1 R.C.S. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

Notre Cour a réitéré cette opinion à maintes reprises : voir *Palsky c. Humphrey*, [1964] R.C.S. 580, p. 583; *Schwartz*, précité, par. 32; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, p. 426, le juge La Forest; *Toneguzzo-Norvell*, précité. La Cour suprême des États-Unis a adopté une position semblable : voir *Anderson*, précité, p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

Dans son examen de la norme de contrôle applicable aux inférences de fait du juge de première instance, notre collègue dit ce qui suit, au par. 103 :

2002 SCC 33 (CanLII)

In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. . . . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. [. . .] Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Nous soulignons.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

En toute déférence, nous estimons que ce passage comporte deux erreurs. Premièrement, selon nous, la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte.

Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

22

Deuxièmement, nous croyons en toute déférence qu'en faisant une distinction analytique entre les conclusions factuelles et les inférences factuelles, le passage précité pourrait amener les cours d'appel à soupeser la preuve à nouveau et sans raison. Bien que nous partagions l'opinion selon laquelle il est loisible à une cour d'appel de conclure qu'une inférence de fait tirée par le juge de première instance est manifestement erronée, nous tenons toutefois à faire la mise en garde suivante : lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante. Comme nous l'avons dit précédemment, les tribunaux de première instance sont dans une position avantageuse pour apprécier et soupeser de vastes quantités d'éléments de preuve. Pour tirer une inférence factuelle, le juge de première instance doit passer les faits pertinents au crible, en apprécier la valeur probante et tirer une conclusion factuelle. En conséquence, lorsque cette conclusion est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance.

2002 SCC 33 (CanLII)

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

Nous rappelons qu'il n'appartient pas aux cours d'appel de remettre en question le poids attribué aux différents éléments de preuve. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. La cour d'appel n'est pas habilitée à modifier une conclusion factuelle avec laquelle elle n'est pas d'accord, lorsque ce désaccord résulte d'une divergence d'opinion sur le poids à attribuer aux faits à la base de la conclusion. Comme nous le verrons plus loin, nous estimons en toute déférence que constitue un exemple de ce genre d'intervention inadmissible à l'égard d'une inférence de fait la conclusion de notre collègue selon laquelle la juge de première instance a commis une erreur en prêtant à la municipalité la connaissance du danger dans la présente affaire.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

De plus, en établissant une distinction entre les inférences de fait et les conclusions de fait, notre collègue dit, au par. 102, que la retenue à l'égard des secondes « repose principalement sur le fait que, puisqu'il [le juge de première instance] est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix », justification non pertinente dans le cas des inférences de fait. En toute déférence, nous ne partageons pas cette opinion. Comme nous l'avons dit plus tôt, il existe de nombreuses raisons de faire preuve de retenue à l'égard des constatations de fait du juge de première instance, dont plusieurs valent autant pour toutes ses conclusions factuelles. Cette observation a été faite dans l'arrêt *Schwartz*, précité. Après avoir énuméré les nombreuses considérations de politique judiciaire invoquées pour justifier la règle de la retenue à l'égard des constatations de fait, le juge La Forest, au par. 32, ajoute :

> Cela explique pourquoi la règle [selon laquelle les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait des juges de première instance] s'applique non seulement lorsque la crédibilité des témoins est en cause, quoiqu'elle puisse alors s'appliquer plus strictement, mais également à toutes les conclusions de fait tirées par le juge de première instance. [Nous soulignons.]

2002 SCC 33 (CanLII)

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra.* McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

. . .

I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

Although the trial judge will always be in a distinctly privileged position when it comes to

Notre Cour a récemment donné son appui à la règle de la retenue judiciaire à l'égard de l'ensemble des conclusions factuelles du juge de première instance dans l'arrêt *Toneguzzo-Norvell*, précité. Madame le juge McLachlin (maintenant Juge en chef), qui a rédigé le jugement unanime de notre Cour, a dit ceci, aux p. 121-122 :

Une cour d'appel n'est manifestement pas autorisée à intervenir pour le simple motif qu'elle perçoit la preuve différemment. Il appartient au juge de première instance, et non à la cour d'appel, de tirer des conclusions de fait en matière de preuve.

. . .

Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve. [Nous soulignons.]

Nous considérons que ces propos du juge McLachlin signifient que, bien que le même degré élevé de retenue s'applique à l'ensemble des décisions factuelles du juge de première instance, lorsqu'une telle conclusion factuelle repose sur l'appréciation de la crédibilité d'un témoin, il faut reconnaître l'énorme avantage dont jouit le juge de première instance à cet égard. Cela ne veut toutefois pas dire qu'une norme de contrôle moins rigoureuse s'applique lorsque la question en jeu ne porte pas sur la crédibilité d'un témoin, ni qu'il n'existe pas de nombreuses considérations de principe justifiant de faire montre de retenue à l'égard de toutes les conclusions factuelles. À notre avis, cela ressort clairement du passage souligné dans l'extrait précité. Le point essentiel est qu'une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue.

Bien que le juge de première instance soit toujours dans une position privilégiée pour apprécier

2002 SCC 33 (CanLII)

assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

la crédibilité des témoins, ce n'est pas là le seul domaine où il bénéficie d'un avantage sur les juges des cours d'appel. Parmi les avantages dont jouit le juge de première instance sur le plan des inférences factuelles, mentionnons son expertise relative en matière d'appréciation et d'évaluation de la preuve, de même que la connaissance unique qu'il possède de la preuve souvent abondante produite par les parties. Cette familiarité avec toute la trame factuelle lui est d'une grande utilité lorsque vient le moment de tirer des conclusions de fait. En outre, les considérations relatives au coût, au nombre et à la durée des appels sont tout aussi pertinentes pour ce qui est des inférences de fait que pour ce qui est des conclusions de fait, et justifient l'application aux unes comme aux autres d'une norme empreinte de retenue. En conséquence, nous ne partageons pas l'opinion de notre collègue selon laquelle la raison principale justifiant de faire montre de retenue à l'égard des conclusions de fait est la possibilité qu'a le juge de première instance d'observer les témoins directement. Nous sommes d'avis que le juge de première instance jouit, par rapport aux juges d'appel, de nombreux avantages qui influent sur toutes les conclusions de fait et que, même si ces avantages n'existaient pas, d'autres considérations impérieuses justifient de faire montre de retenue à l'égard des inférences de fait. Par conséquent, nous concluons en soulignant qu'il n'y a qu'une seule et unique norme de contrôle applicable à toutes les conclusions factuelles tirées par le juge de première instance, soit celle de l'erreur manifeste et dominante.

D. *Standard of Review for Questions of Mixed Fact and Law*

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal

D. *La norme de contrôle applicable aux questions mixtes de fait et de droit*

D'entrée de jeu, il importe de distinguer les questions mixtes de fait et de droit des conclusions factuelles (qu'il s'agisse de conclusions directes ou d'inférences). Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits : *Canada (Directeur des enquêtes et des recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35. Par contre, les conclusions ou les inférences de fait exigent que soit tirée une conclusion factuelle d'un ensemble de faits. Tant les questions mixtes de fait et de droit que les questions

2002 SCC 33 (CanLII)

or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the

de fait exigent souvent du tribunal qu'il tire des inférences; la différence réside dans le caractère — juridique ou factuel — de ces inférences. En raison de cette similitude, on confond parfois les deux catégories de questions. Cette confusion a été soulignée par A. L. Goodhart dans « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402, p. 405 :

> [TRADUCTION] La distinction entre [la perception des faits et l'appréciation de ceux-ci] a tendance à être embrouillée parce que nous utilisons la formule « le juge a conclu au fait que le défendeur avait été négligent », alors que ce que nous voulons dire, c'est que « le juge a constaté le fait que le défendeur a commis les actes A et B et, suivant son opinion, il a conclu qu'il n'était pas raisonnable pour ce dernier d'avoir agi ainsi ».

L'affaire qui nous occupe présente des exemples des deux catégories de questions. Pour répondre à la question de savoir si la municipalité aurait dû connaître le danger présenté par le chemin, il faut apprécier les faits à l'origine de l'affaire et tirer des conclusions factuelles relativement à la connaissance de la municipalité. Il faut appliquer à ces conclusions factuelles une norme juridique qui, en l'occurrence, est énoncée au par. 192(3) de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. De même, pour pouvoir conclure à la négligence, il faut apprécier les faits essentiels, en tirer des conclusions factuelles puis en dégager une inférence, c'est-à-dire se demander si la municipalité a oui ou non omis de respecter la norme de diligence raisonnable et si elle a, par conséquent, été négligente ou non.

27

Une fois établi que la question examinée exige l'application d'une norme juridique à un ensemble de faits et qu'il s'agit donc d'une question mixte de fait et de droit, il faut alors déterminer quelle est la norme de contrôle appropriée et l'appliquer. Vu les diverses normes de contrôle qui s'appliquent aux questions de droit et aux questions de fait, il est souvent difficile de déterminer celle qui s'applique. Dans l'arrêt *Southam*, précité, par. 39, notre Cour a expliqué comment une erreur touchant une question mixte de fait et de droit peut constituer une pure erreur de droit, assujettie à la norme de la décision correcte :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les

2002 SCC 33 (CanLII)

decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

faits, il ne prend en considération que A, B, et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

Par conséquent, ce qui peut paraître une question mixte de fait et de droit peut, après plus ample examen, se révéler en réalité une pure erreur de droit.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, at para. 37:

Cependant, lorsque l'erreur ne constitue pas une erreur de droit, une norme de contrôle plus exigeante s'impose. Dans les cas où le juge des faits examine tous les éléments de preuve que le droit lui commande de prendre en considération mais en tire néanmoins une conclusion erronée, il commet alors une erreur mixte de fait et de droit, qui est assujettie à une norme de contrôle plus rigoureuse : *Southam*, précité, par. 41 et 45. Bien que facile à énoncer, cette distinction peut s'avérer difficile à établir en pratique parce que les questions mixtes de fait et de droit s'étalent le long d'un spectre comportant des degrés variables de particularité. Cette difficulté a été soulignée dans l'arrêt *Southam*, par. 37 :

> . . . the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

> . . . il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that

Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, notre

2002 SCC 33 (CanLII)

a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

Cour a jugé que les cours d'appel devaient faire preuve de retenue à l'égard de la conclusion du juge de première instance. Dans l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, p. 4, le juge Dickson (plus tard Juge en chef) a infirmé la décision de la Cour d'appel de la Colombie-Britannique portant que le juge de première instance avait erronément conclu à la négligence, pour le motif qu'« une cour d'appel commet une erreur lorsqu'elle infirme un jugement de première instance s'il n'y a pas une erreur manifeste et dominante, et si l'interprétation de l'ensemble de la preuve est le seul point en litige » (voir aussi l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, p. 84).

2002 SCC 33 (CanLII)

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This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

(*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343)

See also *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 662, and *C.N.R. v. Muller*, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury rein-

Il convient d'appliquer cette norme de contrôle plus exigeante aux conclusions de négligence, étant donné que de telles conclusions peuvent également être tirées par des jurys en première instance. Si la norme applicable était celle de la décision correcte, il s'ensuivrait que les cours d'appel appliqueraient cette norme pour contrôler même des conclusions de négligence tirées par jurys. Actuellement, il n'y a ouverture à un tel contrôle que si le juge du procès a donné des directives erronées au jury sur le droit applicable. Suivant la règle générale, les tribunaux font montre d'une grande retenue envers les conclusions des jurys dans les procès civils pour négligence :

> [TRADUCTION] Le principe pertinent a été énoncé dans bon nombre d'arrêts de notre Cour, à savoir qu'il n'y a pas lieu d'écarter le verdict d'un jury parce qu'il va à l'encontre du poids de la preuve, à moins que le verdict en question ne soit nettement déraisonnable et injuste au point de convaincre le tribunal qu'aucun jury examinant la preuve dans son ensemble et agissant de façon judiciaire n'aurait pu le prononcer.

(*McCannell c. McLean*, [1937] R.C.S. 341, p. 343)

Voir également *Dube c. Labar*, [1986] 1 R.C.S. 649, p. 662, et *C.N.R. c. Muller*, [1934] 1 D.L.R. 768 (C.S.C.). Adopter la norme de la décision correcte aurait pour effet de modifier le droit et de porter atteinte au rôle traditionnel du jury. Par conséquent, le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux

forces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Toutefois, lorsque le juge du procès conclut erronément à la négligence par suite d'une formulation incorrecte de la norme juridique, cela peut constituer une erreur de droit. Cette distinction a été faite par le juge Cory dans l'arrêt *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670, p. 690-691 :

> La définition de la norme de diligence est une question mixte de droit et de fait. Il incombera habituellement au juge du procès de déterminer, compte tenu des circonstances de l'espèce, ce qui constituerait une conduite raisonnable de la part de la personne raisonnable légendaire placée dans la même situation. Dans certains cas, un simple rappel suffira, tandis que dans d'autres, par exemple lorsqu'un très jeune enfant est passager, le conducteur peut avoir à attacher lui-même la ceinture de sécurité de l'enfant. Cependant, en l'espèce, le conducteur n'a pris aucune mesure pour veiller à ce que l'enfant porte sa ceinture de sécurité. Il s'ensuit que la décision du juge du procès sur la question équivalait à une conclusion qu'aucune obligation n'incombait au conducteur, ce qui constituait une erreur de droit.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

L'arrêt *Galaske*, précité, illustre bien l'idée exposée dans l'arrêt *Southam*, précité, selon laquelle il est possible de dégager une pure question de droit de ce qui paraît être une question mixte de fait et de droit. Toutefois, en l'absence d'erreur de droit ou d'une erreur manifeste et dominante, la conclusion de négligence tirée par un juge de première instance ne doit pas être modifiée.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing

L'analogie qui peut être établie entre les inférences de fait et les questions mixtes de fait et de droit étaye notre conclusion. Comme nous l'avons dit précédemment, dans les deux cas des inférences doivent être tirées des faits à l'origine de l'affaire. La différence dépend de la question de savoir si l'inférence se rapporte à une norme juridique ou non. Parce que le résultat des deux processus est tributaire du poids accordé à la preuve, les diverses considérations de principe justifiant de faire montre de retenue à l'égard des inférences de

2002 SCC 33 (CanLII)

deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an

fait du juge de première instance justifient également, dans une certaine mesure, de faire de même à l'égard de ses inférences mixtes de fait et de droit.

33 Par contre, lorsqu'il peut être établi que la conclusion erronée du juge de première instance découle d'une erreur quant à la norme juridique à appliquer, ce facteur touche au rôle de création du droit de la cour d'appel, et une retenue moins élevée s'impose, conformément à la norme de la décision « correcte ». Notre Cour a apporté cette nuance dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 48-49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou, en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. [Nous soulignons.]

34 Un bon exemple de ce principe subtil est l'arrêt *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497, p. 515-516. La question en litige dans cette affaire consistait à déterminer si certaines personnes faisaient partie des âmes dirigeantes d'une société. Il s'agit d'une question mixte de droit et de fait. Toutefois, la conclusion erronée des juridictions inférieures était facilement imputable à une erreur de droit qui pouvait être dégagée de la question mixte de droit et de fait. La question de droit ainsi isolable était celle des fonctions que devait remplir une personne pour qu'on puisse à bon droit la considérer comme une « âme dirigeante » de la société (p. 515-516). Le juge Iacobucci s'est exprimé ainsi au nom des juges de la majorité, à la p. 526 :

> En toute déférence, je crois que les juridictions inférieures ont trop insisté sur l'importance de la subdélégation en l'espèce. Le facteur clé qui permet de distinguer les âmes dirigeantes des employés ordinaires est la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale, plutôt que

2002 SCC 33 (CanLII)

operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante.

2002 SCC 33 (CanLII)

37

In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

À cet égard, nous ne pouvons en toute déférence pas souscrire à l'opinion de notre collègue lorsqu'il affirme, au par. 106, qu'« [u]ne fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel ». À notre avis, il est bien établi en droit que la question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe isolable en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

III. Application des principes qui précèdent à l'espèce : la norme de diligence applicable à la municipalité

A. *The Appropriate Standard of Review*

A. *La norme de contrôle appropriée*

38

We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule

À l'instar de notre collègue, nous sommes d'avis que la norme de diligence applicable à la municipalité a été convenablement énoncée par le juge Martin dans l'arrêt *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (C.A. Sask.), p. 558-559 :

> [TRADUCTION] L'étendue de l'obligation légale d'entretien qui incombe aux corporations municipales à l'égard des routes qui se trouvent sur leur territoire a été énoncée de diverses façons dans nombre de décisions publiées. Il est toutefois possible de dégager la règle générale suivante de ces décisions : le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La question de savoir en quoi consiste un état raisonnable d'entretien est une question de fait, qui est fonction de toutes

2002 SCC 33 (CanLII)

by which to determine another case where the facts are different . . . .

les circonstances de l'espèce; le terme « entretien » est une notion relative et, par conséquent, les faits propres à une affaire donnée ne permettent pas de dégager de règle déterminée permettant de trancher une autre affaire présentant des circonstances différentes . . .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

Toutefois, contrairement à notre collègue, nous estimons que la juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté la norme de diligence à laquelle elle était tenue, et que la juge n'a donc pas commis une erreur de droit du genre de celle décrite dans l'arrêt *Southam*, précité. La juge de première instance a appliqué aux faits de l'espèce tous les éléments du critère énoncé dans l'arrêt *Partridge*, et sa conclusion que la municipalité défenderesse n'a pas respecté ce critère ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante.

B. *The Trial Judge Did Not Commit an Error of Law*

B. *La juge de première instance n'a pas commis d'erreur de droit*

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

Nous soulignons que notre collègue fonde sa décision que la municipalité a respecté la norme de diligence sur sa conclusion que la juge de première instance a négligé de prendre en compte le comportement de l'automobiliste moyen et n'a donc pas appliqué la bonne norme de diligence, commettant ainsi une erreur de droit le justifiant de réexaminer la preuve (par. 114). Pour les besoins de l'analyse du critère de l'automobiliste moyen ou raisonnable, nous tenons au départ à signaler que l'omission d'examiner en profondeur un facteur pertinent, voire de ne pas l'examiner du tout, n'est pas en soi un fondement suffisant pour justifier une cour d'appel de réexaminer la preuve. Ce principe a été clairement énoncé dans l'arrêt récent *Van de Perre*, précité, où le juge Bastarache a dit ceci, au par. 15 :

. . . omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

. . . des omissions dans les motifs ne signifieront pas nécessairement que la cour d'appel a compétence pour examiner la preuve entendue au procès. Comme le dit l'arrêt *Van Mol (Guardian ad Litem of) c. Ashmore* (1999), 168 D.L.R. (4th) 637 (C.A.C.-B.), autorisation d'appel refusée [2000] 1 R.C.S. vi, une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. Faute d'une telle conviction rationnelle, la cour d'appel ne peut pas réexaminer la preuve.

2002 SCC 33 (CanLII)

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

À notre avis, comme nous allons le voir, la présente espèce ne peut faire naître la conviction rationnelle que la juge de première instance a oublié d'examiner la question du conducteur moyen, en a fait abstraction ou l'a mal interprétée. Il serait donc erroné de réexaminer la preuve relative à cette question.

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

Le fait que, dès le départ, la juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen ressort clairement du fait qu'elle a commencé son examen de la norme de diligence en formulant le critère approprié, c'est-à-dire en citant le passage susmentionné de l'arrêt *Partridge*, précité. En l'absence d'indications claires qu'elle a subséquemment modifié sa méthode d'analyse, cette mention initiale de la norme juridique appropriée constitue un indice solide qu'il s'agit bien de la norme qu'elle a appliquée. Non seulement rien n'indique qu'elle s'est écartée du critère énoncé, mais d'autres indices étayent la conclusion qu'elle a appliqué le critère de l'arrêt *Partridge*. Le premier de ces indices est que la juge s'est bel et bien interrogée, tant explicitement qu'implicitement, sur la conduite de l'automobiliste moyen ou raisonnable s'approchant du virage. Le deuxième indice est qu'elle a fait état des témoignages des experts, MM. Anderson et Werner, qui ont tous deux analysé le comportement de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait que la juge de première instance ait imputé une partie de la responsabilité à M. Nikolaisen indique qu'elle a évalué sa conduite eu égard au critère du conducteur moyen, et qu'elle a donc pris en compte la conduite de ce dernier.

41 The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

On trouve l'analyse relative à l'automobiliste moyen dans cet extrait du jugement de première instance qui suit immédiatement l'énoncé de la norme de diligence requise :

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

2002 SCC 33 (CanLII)

There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.

. . . where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide.

. . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Nous soulignons; en italique dans l'original.]

([1998] 5 W.W.R. 523, par. 84-86)

À notre avis, cet extrait indique que la juge de première instance a effectivement pris en compte la façon dont l'automobiliste prenant des précautions normales s'approcherait du virage en question. Qualifier le virage de [TRADUCTION] « danger caché », danger qui « n'est pas facilement décelable par les usagers du chemin », implique que le danger en est un qu'il est impossible de prévoir. Il s'ensuit que, même si l'automobiliste prend des précautions normales, il ne pourra pas réagir à la présence du virage. Par ailleurs, la juge de première instance a explicitement fait état de la conduite de l'automobiliste prenant des précautions normales : [TRADUCTION] « [I]l est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86 (nous soulignons)).

2002 SCC 33 (CanLII)

With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

43 Relativement à la vitesse à laquelle les automobilistes s'approchent du virage, il existe également un indice confirmant que la juge de première instance a pris en compte la conduite de l'automobiliste moyen. Premièrement, elle a dit qu'elle acceptait les témoignages de MM. Anderson et de Werner en ce qui concerne la conclusion que la courbe constituait un danger pour le public. Leurs témoignages suggèrent qu'une vitesse de 60 à 80 km/h est une vitesse raisonnable à certains endroits de ce chemin et que, à cette vitesse, la courbe constitue un danger. Leurs témoignages indiquent également qu'ils estiment de façon générale que la courbe est dangereuse. De dire M. Anderson, le virage est difficile à prendre à des [TRADUCTION] « vitesses normales ». Il ajoute que, [TRADUCTION] « si on ne connaît pas la présence de ce virage à cet endroit, le caractère prononcé du virage, et qu'on ne s'aperçoit pas qu'il y a un virage avant de s'être déjà engagé trop loin dans celui-ci, il faut tourner dans un rayon inférieur à 118 mètres pour corriger sa trajectoire afin d'être en mesure de prendre le deuxième virage ». Il affirme également qu' [TRADUCTION] « on peut être amené à croire qu'on se trouve sur une route où il est possible de rouler à 80 km/h, jusqu'à ce qu'on soit engagé trop loin dans le virage serré pour être capable de réagir ».

The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary

44 La Cour d'appel a jugé que, vu la nature et l'état du chemin Snake Hill, la prétention selon laquelle l'automobiliste moyen roulerait sur cette route rurale à 80 km/h était insoutenable. Toutefois, il ressort clairement des motifs de la juge de première instance qu'elle ne considérait pas que l'automobiliste moyen s'approcherait du virage à 80 km/h. Elle a plutôt conclu, à partir des témoignages des experts, que [TRADUCTION] « ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide » (par. 85 (en italique dans l'original)). De cette constatation, conjuguée à celle que le virage était caché et imprévu, il est logique de conclure que la juge de première instance a estimé que l'automobiliste prenant des précautions normales pouvait aisément être amené à s'approcher du virage à des vitesses supérieures à la vitesse sécuritaire pour le prendre, et se retrouver ensuite pris au dépourvu. La juge de première

2002 SCC 33 (CanLII)

motorist and it follows that she applied the correct standard of care.

instance a donc conclu que le virage était dangereux pour l'automobiliste moyen et il s'ensuit qu'elle a appliqué la norme de diligence appropriée.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

En toute déférence, notre collègue commet une erreur en souscrivant à la conclusion de la Cour d'appel selon laquelle la juge de première instance aurait dû examiner de manière plus approfondie la conduite de l'automobiliste moyen (par. 124). Il écrit ceci, au par. 119 :

> Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d'« intrinsèquement » dangereux ne vide pas la question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge* test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

Plus loin, il dit : « À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin » (par. 125). En toute déférence, considérer que la juge de première instance aurait dû faire cette analyse particulière dans ses motifs est incompatible avec l'arrêt *Van de Perre*, précité, lequel établit clairement que l'omission ou le défaut d'analyser un facteur en profondeur ne constitue pas, en soi, une raison justifiant de modifier les conclusions du juge de première instance et de réexaminer la preuve. Comme nous l'avons dit précédemment, il est clair que, quoique la juge de première instance n'ait peut-être pas fait une analyse approfondie de ce volet du critère énoncé dans l'arrêt *Partridge*, elle a effectivement tenu compte de ce facteur en formulant le critère approprié puis en l'appliquant aux faits de l'espèce.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others:

Nous tenons à souligner que, en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins. Toutefois, cela ne suffit pas pour établir qu'elle a « oublié, négligé d'examiner ou mal interprété » la preuve. La juge de première instance disposait de l'ensemble du dossier et on peut présumer qu'elle l'a étudié d'un bout à l'autre, en l'absence d'autre indication qu'elle a oublié, négligé d'examiner ou mal interprété la preuve, commettant ainsi une erreur de droit. Le juge de première

2002 SCC 33 (CanLII)

Toneguzzo-Norvell, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

instance peut retenir la déposition de certains témoins de préférence à d'autres : *Toneguzzo-Norvell*, précité, p. 123. Le fait pour le juge de première instance de s'appuyer sur certains témoignages plutôt que sur d'autres ne peut à lui seul fournir l'assise d'une « conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). Cette conclusion est compatible avec la portée restreinte de l'examen qu'il convient de faire en appel dans la présente affaire.

A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

47 Une autre indication que la juge de première instance s'est interrogée sur la façon dont conduit l'automobiliste moyen sur le chemin Snake Hill est sa conclusion que M. Nikolaisen et la municipalité ont tous deux manqué à leur obligation de diligence envers M. Housen, et que le défendeur Nikolaisen était responsable de négligence concourante dans une proportion de 50 p. 100. Comme une conclusion de négligence implique un manquement à la norme de diligence habituelle, et comme la négligence de M. Nikolaisen était liée à sa manière de conduire dans le virage, la conclusion que sa conduite à cet endroit ne respectait pas le critère du conducteur moyen suppose qu'on s'est demandé comment ce conducteur s'approcherait du virage. La distinction qu'a établie la juge de première instance entre la négligence dont a fait preuve M. Nikolaisen lorsqu'il roulait sur le chemin et celle dont la municipalité a fait montre en omettant d'installer un panneau d'avertissement prouve qu'elle n'a pas perdu de vue la norme juridique régissant la municipalité et l'application de cette norme aux faits, et que la juge a appliqué cette norme au conducteur moyen, et non au conducteur négligent.

To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the

48 En résumé, dans ses motifs la juge de première instance a d'abord énoncé la norme de diligence requise par l'arrêt *Partridge*, précité, relativement à la conduite de l'automobiliste moyen. Elle a ensuite appliqué cette norme aux faits, se reportant encore une fois à la conduite de l'automobiliste moyen. Enfin, vu sa conclusion que la municipalité avait manqué à cette norme de diligence, elle a réparti la responsabilité entre le conducteur

2002 SCC 33 (CanLII)

ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

et la municipalité d'une manière qui, une fois de plus, atteste la prise en compte du critère du conducteur moyen. En conséquence, nous en venons irrésistiblement à la conclusion que la juge de première instance a pris en compte et appliqué ce critère.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

Par conséquent, nous estimons que la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne la norme de diligence à laquelle était tenue la municipalité. Sur ce point, nous ne souscrivons pas aux raisons sur lesquelles se fondent notre collègue pour réexaminer la preuve (aux par. 122 à 142) et nous considérons ce réexamen comme une intervention injustifiée relativement à la conclusion de la juge de première instance portant que la municipalité a manqué à la norme de diligence à laquelle elle était tenue. Cette conclusion porte sur une question mixte de droit et de fait et elle ne peut pas être infirmée en l'absence d'erreur manifeste et dominante. Comme nous le verrons plus loin, nous sommes d'avis qu'aucune erreur de cette nature n'a été commise, car la juge de première instance a fait une analyse raisonnable, fondée sur son appréciation de la preuve.

C. *The Trial Judge Did Not Commit A Palpable or Overriding Error*

C. *La juge de première instance n'a pas commis d'erreur manifeste ou dominante*

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

Malgré cette norme de contrôle sévère, la Cour d'appel a jugé que la juge de première instance avait commis une erreur manifeste et dominante ([2000] 4 W.W.R. 173, 2000 SKCA 12, par. 84). En toute déférence, cette conclusion repose sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, présomption qu'adopte également notre collègue dans ses motifs (par. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than

Comme nous l'avons vu plus tôt, la conclusion de la juge de première instance était que l'automobiliste moyen pourrait s'approcher du virage à une vitesse supérieure à 60 km/h sur chaussée sèche, et 50 km/h sur chaussée humide, mais qu'à ces vitesses le virage était dangereux. Cette conclusion n'était pas fondée sur une vitesse précise à laquelle l'automobiliste moyen s'approcherait du virage. La juge de première instance a plutôt estimé que, parce que le virage est caché et plus serré que ce à quoi on

2002 SCC 33 (CanLII)

the speed at which it would be safe to negotiate the curve.

s'attend normalement, il était possible qu'un automobiliste prenant des précautions normales s'en approche à une vitesse supérieure à la vitesse sécuritaire pour prendre le virage.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

52 Comme nous allons le préciser plus loin, nous sommes d'avis que non seulement cette appréciation est-elle loin de constituer une erreur manifeste et dominante, mais elle est une réponse judicieuse et logique eu égard à l'abondance d'éléments de preuve contradictoires. Il serait irréaliste de fixer une quelconque vitesse à laquelle l'automobiliste moyen s'approcherait vraisemblablement du virage. Les conclusions de la juge de première instance à cet égard découlent d'une évaluation raisonnable et réaliste de l'ensemble de la preuve.

53 In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

53 En concluant à l'existence d'une erreur manifeste et dominante, le juge Cameron de la Cour d'appel s'est appuyé sur le fait que la juge de première instance avait retenu les témoignages d'expert de MM. Anderson et Werner, lesquels étaient fondés sur la vitesse limite *de facto* de 80 km/h prévue par la *Highway Traffic Act*, S.S. 1986, ch. H-3.1. Toutefois, que le témoignage des experts ait été ou non fondé sur cette limite, la juge de première instance n'a pas retenu cette vitesse comme étant celle à laquelle l'automobiliste moyen s'approche du virage. Rappelons que la juge de première instance a estimé qu'il n'était pas possible d'aborder le virage en sécurité à une vitesse supérieure à 60 km/h sur chaussée sèche et 50 km/h sur chaussée humide, et il existe au dossier des éléments étayant cette conclusion. Par exemple, M. Anderson a dit ceci :

> If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

> [TRADUCTION] Si vous ne prévoyez pas l'arrivée du virage et que vous vous engagez trop loin dans celui-ci avant d'amorcer votre manœuvre correctrice, vous risquez d'avoir des ennuis même à, probablement à 60. À cinquante il faudrait que vous soyez engagé assez loin, mais à 60 vous pourriez certainement en avoir.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

Il convient également de signaler que MM. Anderson et Werner auraient tous deux recommandé l'installation d'un panneau avertissant les automobilistes de l'imminence du virage et fixé la vitesse maximale permise à 50 km/h.

54 Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be

54 Le virage ne pouvait manifestement pas être pris en sécurité à 80 km/h, mais il ne pouvait l'être non

2002 SCC 33 (CanLII)

negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

plus à des vitesses beaucoup plus réduites. Il convient également de souligner que la juge de première instance n'a pas retenu intégralement les témoignages d'expert de MM. Anderson et Werner. Elle a dit : [TRADUCTION] « Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner » (par. 85 (nous soulignons)). Ces propos ne permettent pas de présumer qu'elle acceptait une vitesse limite *de facto* de 80 km/h, particulièrement si l'on se rappelle (1) qu'elle a dit qu'on pouvait rouler en sécurité à des vitesses de 50 et de 60 km/h, et (2) que ces deux experts ont considéré que le chemin n'était pas sûr même à des vitesses bien inférieures à 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

Puisque la juge de première instance n'a pas fondé son analyse de la norme de diligence sur une vitesse limite *de facto* de 80 km/h, il s'ensuit que la conclusion de la Cour d'appel relativement à l'existence d'une erreur manifeste et dominante ne saurait être confirmée.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be

En outre, vu la portée restreinte de la révision en appel, on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres. Étant d'avis que la juge de première instance n'a pas commis d'erreur de droit en concluant que la municipalité avait violé la norme de diligence à laquelle elle était tenue, nous estimons aussi, en toute déférence, que le réexamen de la preuve auquel procède notre collègue sur cette question (aux par. 129 à 142) constitue une intervention injustifiée relativement aux conclusions de la juge de première instance, fondée sur une divergence d'opinions quant aux inférences devant être tirées de la preuve et au poids qu'il convient d'accorder à divers éléments. Par exemple, notre collègue est d'avis, sur la foi de certaines parties des témoignages d'expert, qu'un conducteur raisonnable prenant des précautions normales roulerait sur une route rurale à une vitesse maximale de 50 km/h, parce qu'il aurait de la difficulté à voir que le virage est serré et s'il vient des véhicules en sens inverse (par. 129). Or, se

2002 SCC 33 (CanLII)

deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

fondant sur d'autres parties des témoignages d'expert, la juge de première instance a estimé que la nature du chemin était telle qu'un automobiliste pourrait être amené à croire que le chemin ne comporte pas de virage serré et, de ce fait, à y rouler normalement, sans soupçonner l'existence du danger caché.

We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal . . . that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

57 En l'espèce, nous sommes en présence de témoignages d'expert contradictoires sur la question de la vitesse à laquelle l'automobiliste moyen s'approcherait du virage du chemin Snake Hill. Les inférences différentes que la juge de première instance et la Cour d'appel tirent de la preuve équivalent à une divergence d'opinion quant au poids à accorder à divers éléments de preuve contradictoires. Le témoin Sparks a émis l'opinion suivante, que cite également notre collègue : [TRADUCTION] « [Si] vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs [. . .] que l'attention et la prudence s'imposent ». M. Nikolaisen, et même MM. Anderson et Werner ont d'ailleurs témoigné au même effet. Cela contraste avec l'affirmation de MM. Anderson et Werner selon laquelle un conducteur raisonnable serait [TRADUCTION] « amené » à croire qu'il se trouve sur un chemin où l'on peut rouler à 80 km/h.

As noted by McLachlin J. in *Toneguzzo-Norvell*, *supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach

58 Comme l'a souligné madame le juge McLachlin, à la p. 122 de l'arrêt *Toneguzzo-Norvell*, précité, « selon notre système de procès, il appartient essentiellement au juge des faits [. . .] d'attribuer un poids aux différents éléments de preuve ». Dans cette affaire, notre Cour a conclu à l'unanimité que la Cour d'appel avait commis une erreur en modifiant les conclusions de fait du juge de première instance, au motif qu'il était loisible à celui-ci d'accorder un poids moins grand à certains éléments de preuve et à accepter d'autres éléments contradictoires, qu'il considérait plus convaincants. (*Toneguzzo-Norvell*, p. 122-123). De même, en l'espèce, il n'y a pas lieu de modifier les conclusions de fait de la juge de première instance au sujet de la vitesse à laquelle il faudrait approcher du virage. Il lui était loisible d'accorder plus de poids à certaines parties des témoignages de MM. Anderson et Werner, dans les cas où la preuve était contradictoire. Son

2002 SCC 33 (CanLII)

the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

appréciation de la vitesse appropriée constituait une inférence raisonnable, fondée sur la preuve, et elle ne constitue pas une erreur manifeste et dominante. Dans ce contexte, il n'y a pas lieu d'écarter ses conclusions concernant la norme de diligence.

IV. Knowledge of the Municipality

IV. Connaissance de la municipalité

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act*, *1989*, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

À l'instar de notre collègue, nous estimons que le par. 192(3) de la *Rural Municipality Act, 1989*, oblige le demandeur à démontrer que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill pour qu'il soit possible de conclure qu'elle a manqué à l'obligation de diligence qui lui incombe en vertu de l'art. 192. Nous sommes nous aussi d'avis que la preuve des accidents antérieurs n'est pas, en soi, suffisante pour prêter cette connaissance à la municipalité. Cependant, nous arrivons à la conclusion que la juge de première instance n'a pas commis d'erreur lorsqu'elle a conclu que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

Comme nous l'avons vu, la question de savoir si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill est une question mixte de droit et de fait. Il s'agit, d'une part, d'une question de droit en ce que la municipalité est tenue à une norme juridique qui lui impose de connaître la nature du chemin, et, d'autre part, d'une question de fait en ce qu'il faut déterminer si, eu égard aux faits de l'espèce, elle avait la connaissance requise. Comme nous l'avons dit précédemment, en l'absence d'erreur de droit ou de principe isolable, une telle conclusion est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». En l'espèce, notre collègue conclut que la juge de première instance a commis une erreur de droit en ne considérant pas la question de la connaissance du point de vue du conseiller municipal prudent, et il estime qu'on ne pouvait s'attendre à ce qu'un conseiller municipal prudent s'aperçoive du risque que le danger en question faisait courir au conducteur moyen. Il est également d'avis que la juge de première instance a commis une erreur de droit en ne reconnaissant pas que la charge de prouver la connaissance incombait au demandeur. En toute déférence, nous ne pouvons souscrire à ces conclusions.

2002 SCC 33 (CanLII)

61

The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

Le danger en question est une courbe serrée et soudaine, qui n'est annoncée par aucune signalisation. À notre avis, lorsqu'un danger constitue, comme celui-ci qui nous intéresse, une caractéristique permanente qui, a-t-on jugé, présente un risque pour le conducteur moyen, le juge de première instance peut, pour ce seul motif, inférer qu'un conseiller municipal prudent aurait dû connaître l'existence d'un danger. Pour étayer sa conclusion sur la question de la connaissance, notre collègue affirme que la connaissance de la municipalité est intimement liée à celle de la norme de diligence, et il lie sa conclusion sur la connaissance à sa conclusion selon laquelle la courbe ne constituait pas un danger pour l'automobiliste moyen (par. 149). Nous reconnaissons que la question de la connaissance est étroitement liée à celle de la norme de diligence, et, comme nous estimons que la juge de première instance a eu raison de conclure que la courbe présentait un danger pour l'automobiliste moyen, elle pouvait dès lors juger que la municipalité aurait dû connaître ce danger. Soulignons également que cette conclusion visant une question mixte de fait et de droit est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». Sur ce point, toutefois, nous limitons la portée de notre opinion aux situations analogues à celle qui nous occupe, où le danger constitue une caractéristique permanente du chemin, par opposition à un danger temporaire dont une municipalité pourrait raisonnablement ne pas être informée en temps utile pour empêcher un accident de survenir.

62

In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above,

Par ailleurs, notre collègue se fonde sur les dépositions de témoins ordinaires, Craig et Toby Thiel, qui habitaient sur le chemin Snake Hill et qui ont témoigné n'avoir jamais éprouvé de difficulté à conduire à cet endroit (par. 149). En toute déférence, nous estimons que le fait de se fonder sur ces témoignages pose trois problèmes. D'abord, vu la conclusion que la courbe constituait un danger à cause de sa nature cachée et imprévue, ce n'est pas en se basant sur le témoignage de ceux qui empruntent quotidiennement le chemin qu'il est possible, à notre avis, de déterminer si cette courbe présentait un danger pour l'automobiliste moyen, ou si la municipalité aurait dû connaître l'existence du danger. De plus, en concluant que la municipalité

2002 SCC 33 (CanLII)

it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

aurait dû connaître le mauvais état du chemin, la juge de première instance a clairement choisi de ne pas se fonder sur les témoignages susmentionnés. Comme nous l'avons dit précédemment, le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge du procès.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

Qui plus est, étant donné que la question de la connaissance doit être considérée du point de vue du conseiller municipal prudent, nous estimons que le témoignage des témoins ordinaires est peu utile. Dans l'arrêt *Ryan*, précité, par. 28, le juge Major a dit que la norme de diligence qui s'applique est celle de la personne agissant aussi diligemment que « le ferait une personne ordinaire, raisonnable et prudente placée dans la même situation » (nous soulignons). Les conseillers municipaux sont élus pour gérer les affaires de la municipalité. Pour s'acquitter de cette tâche, il leur faut, dans un cas donné, examiner la situation et recueillir de l'information, faire davantage que ce que fait le simple citoyen de la municipalité. De fait, ils peuvent avoir à consulter des experts pour respecter leur obligation d'être informés. Bien que les conseillers municipaux ne soient pas des experts, il est à notre avis erroné d'assimiler le point de vue du « conseiller municipal prudent » à l'opinion de témoins ordinaires qui habitent sur le chemin.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

C'est à la lumière de ce contexte que nous interprétons les commentaires suivants de la juge de première instance (au par. 90) :

> [TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

2002 SCC 33 (CanLII)

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

Selon notre interprétation, la juge de première instance a voulu dire que, compte tenu des accidents antérieurs sur ce chemin à faible débit de circulation, de la présence de résidents permanents et du type de conducteurs qui empruntent le chemin, la municipalité n'a pas pris les mesures raisonnables qu'elle aurait dû prendre pour faire en sorte que le chemin Snake Hill ne comporte pas de danger comme celui en cause. À partir de ces éléments, la juge de première instance a inféré que la municipalité aurait dû être informée de la situation sur le chemin Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger. Cette inférence factuelle, qui repose sur l'appréciation de la preuve faite par la juge de première instance, était selon nous fondée et loin de constituer l'erreur manifeste et dominante requise par la norme pertinente.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

À l'instar de notre collègue, nous estimons que les circonstances des accidents survenus antérieurement, en l'espèce, ne constituent pas une preuve directe que la municipalité aurait dû avoir connaissance du danger particulier en cause, mais, selon la juge de première instance, ces circonstances auraient dû inciter la municipalité à faire enquête à l'égard du chemin Snake Hill, ce qui lui aurait permis de prendre connaissance concrètement du danger. Dans la présente affaire, les accidents antérieurs sont loin d'avoir incité la municipalité à faire enquête. D'ailleurs, M. Danger, administrateur de la municipalité pendant 20 ans, a témoigné que, jusqu'au procès, il n'était même pas au fait des trois accidents survenus entre 1978 et 1987 sur le chemin Snake Hill. En conséquence, nous n'estimons pas que la juge de première instance a fondé sa conclusion sur quelque autre point de vue autre que celui du conseiller municipal prudent, et elle n'a donc pas commis d'erreur de droit à cet égard. De plus, nous sommes d'avis qu'elle n'a pas prêté à la municipalité la connaissance requise sur la base des accidents antérieurs. L'existence de ces accidents ne constituait rien de plus qu'un des éléments qui l'ont amenée à conclure que la municipalité aurait dû être au fait de l'état du chemin Snake Hill (par. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality

Nous tenons à souligner que la juge de première instance n'a pas, à notre avis, transféré le fardeau de

2002 SCC 33 (CanLII)

on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

la preuve à la municipalité sur cette question. Dès lors qu'elle a conclu qu'il existait sur le chemin Snake Hill une caractéristique permanente présentant un danger pour l'automobiliste moyen, il lui était loisible d'inférer que la municipalité aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Selon nous, c'est ce que la juge de première instance a fait dans l'extrait précité lorsqu'elle dit : [TRADUCTION] « Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill » (par. 90 (nous soulignons)). L'existence de cette inférence ressort clairement du fait que le passage précité suit immédiatement la conclusion de la juge de première instance selon laquelle, pour les raisons qu'elle énumère, la municipalité aurait dû connaître l'existence du danger. Par conséquent, nous sommes d'avis que la juge de première instance n'a pas fait erreur et transféré le fardeau de la preuve à la municipalité en l'espèce.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the

De même, bien que les accidents survenus antérieurement en l'espèce ne constituent pas une preuve solide que la municipalité aurait dû connaître l'existence du danger, la preuve d'accidents antérieurs n'est pas une condition nécessaire pour qu'un tribunal puisse conclure à la violation de l'obligation de diligence prévue par l'art. 192 de la *Rural Municipality Act, 1989*. Si c'était le cas, la première victime d'un accident sur une route négligemment entretenue ne pourrait obtenir réparation, alors que les victimes subséquentes d'accidents survenant dans des circonstances identiques le pourraient. Bien que, au regard du par. 192(3), la municipalité ne puisse être tenue responsable du mauvais état d'une route dont elle n'aurait pu avoir connaissance, elle ne saurait se contenter d'attendre qu'un accident se produise avant de remédier au mauvais état de la route et, si un demandeur n'apporte pas la preuve de l'existence d'accidents antérieurs, soutenir qu'elle n'aurait pu connaître l'existence du danger. Dans cette hypothèse, non seulement imposerait-on à la première victime d'un accident un fardeau de preuve disproportionné, mais on encouragerait aussi

2002 SCC 33 (CanLII)

municipality knew or ought to have known of the disrepair.

les municipalités à ne pas recueillir d'informations concernant les accidents survenant sur leurs routes, puisqu'il serait en conséquence plus difficile à la victime d'un accident d'automobile qui intente des poursuites de prouver que la municipalité visée connaissait le mauvais état de la route ou aurait dû le connaître.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

68 Bien que, en l'espèce, la juge de première instance ait souligné les accidents antérieurs dont le demandeur a effectivement prouvé l'existence, nous sommes d'avis qu'il n'est pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3). Exiger du demandeur qu'il fournisse une preuve substantielle et tangible de la connaissance par la municipalité du mauvais état de ses routes revient à lui imposer un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

69 Pour résumer notre position sur cette question, nous ne pouvons conclure que la juge de première instance a commis une erreur de droit soit parce qu'elle aurait omis d'examiner la question du point de vue du conseiller municipal prudent, soit parce qu'elle aurait à tort transféré le fardeau de la preuve à la défenderesse. Par conséquent, il faudrait une erreur manifeste et dominante pour écarter sa conclusion que la municipalité connaissait le danger ou aurait dû le connaître et, selon nous, aucune erreur de cette nature n'a été commise.

V. Causation

V. Lien de causalité

70 We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

70 Nous faisons nôtres les propos énoncés par notre collègue, au par. 159, selon lesquels la conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait : *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), p. 407; cité et approuvé dans *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557 (H.C. Ont.), p. 566. En conséquence, cette conclusion ne doit pas être modifiée en l'absence d'erreur manifeste et dominante.

2002 SCC 33 (CanLII)

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings

La juge de première instance a fondé ses conclusions au sujet du lien de causalité sur trois éléments (au par. 101) :

> (1) l'accident est survenu à un endroit dangereux du chemin, où un panneau de signalisation aurait dû être installé pour avertir les automobilistes du danger caché;
>
> (2) même s'il y avait eu un panneau de signalisation, le degré d'ébriété de M. Nikolaisen avait accru chez lui le risque qu'il ne réagisse pas du tout ou de façon inappropriée à une signalisation;
>
> (3) malgré cela, M. Nikolaisen ne conduisait pas de façon si téméraire qu'il était à prévoir qu'il ne voit pas un panneau de signalisation ou n'en tienne pas compte. Quelques instants plus tôt, à son départ de la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

La juge de première instance a estimé que, selon la prépondérance des probabilités, M. Nikolaisen aurait réagi et peut-être évité l'accident si on lui avait signalé à l'avance la présence de la courbe. Toutefois, elle a également conclu que l'accident avait été causé en partie par la conduite de M. Nikolaisen, et elle a réparti la responsabilité en conséquence, soit dans une proportion de 50 p. 100 à M. Nikolaisen et de 35 p. 100 à la municipalité rurale (par. 102).

Comme nous l'avons indiqué précédemment, notre Cour a jugé, dans une autre affaire, qu'« une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). En l'espèce, les motifs de la juge de première instance n'indiquent pas clairement sur quelles parties des témoignages de M. Laughlin, de Craig et Toby Thiel et de Paul Housen elle s'est appuyée, ni dans quelle mesure elle l'a fait. Cependant, comme nous l'avons dit plus tôt, la juge de première instance disposait de l'ensemble de la preuve et, en l'absence d'autre élément

2002 SCC 33 (CanLII)

on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para. 15.

indiquant que cette omission dans ses motifs résulte du fait qu'elle aurait mal interprété des éléments de la preuve ou négligé d'en examiner certains, nous pouvons présumer qu'elle a examiné l'ensemble de la preuve et que ses conclusions de fait reposaient sur cet examen. En l'absence de preuve établissant de façon suffisante qu'il y a eu mauvaise interprétation d'éléments de preuve ou négligence d'examiner certains de ceux-ci, cette présomption permet de conclure à l'absence d'erreur importante du type de celle requise pour satisfaire au critère de l'erreur « manifeste et dominante ». Nous tenons à rappeler que le juge de première instance peut préférer le témoignage de certains témoins et accorder plus de poids à certaines parties de la preuve qu'à d'autres, particulièrement en présence de preuves contradictoires : *Toneguzzo-Norvell*, précité, p. 122-123. Le simple fait que la juge de première instance n'a pas analysé en profondeur un point donné ou un élément de preuve particulier ne constitue pas un motif suffisant pour justifier l'intervention des tribunaux d'appel : *Van de Perre*, précité, par. 15.

For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

73 Pour ces motifs, nous n'estimons pas opportun d'examiner à nouveau les dépositions de M. Laughlin et des témoins ordinaires. Comme nous l'avons affirmé précédemment, il n'y a pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle la courbe présentait un danger caché. Ses conclusions touchant le lien de causalité reposent en partie sur cette conclusion relative à l'existence d'un danger caché nécessitant l'installation d'un panneau d'avertissement. Tout comme ses conclusions relatives à l'existence d'un danger caché, celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve.

As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the

74 Pour ce qui est du silence de la juge de première instance concernant le témoignage de M. Laughlin, signalons simplement que ce témoignage paraît être de nature générale et, partant, d'une utilité limitée. M. Laughlin a reconnu qu'il ne pouvait faire que des observations générales quant aux effets de l'alcool sur les automobilistes, et non apporter une expertise particulière sur l'effet concret de l'alcool sur un conducteur donné. Il s'agit d'un point important, puisque le seuil de tolérance d'un conducteur donné

2002 SCC 33 (CanLII)

motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

joue un rôle essentiel dans la détermination de l'effet concret de l'alcool sur cet automobiliste; bien que dangereuse, la personne qui a l'habitude de boire se débrouillera probablement mieux sur la route qu'une personne qui n'en a pas l'habitude. Il convient de souligner que la juge de première instance a cru le témoignage de M. Anderson selon lequel le véhicule de M. Nikolaisen roulait à une vitesse relativement faible, soit entre 53 et 65 km/h, au moment de l'impact avec le remblai. Il lui était également permis de retenir les dépositions des témoins ordinaires selon lesquelles M. Nikolaisen avait réussi à prendre un virage apparemment serré quelques instants avant l'accident, plutôt que le témoignage de M. Laughlin, lequel était de nature hypothétique et générale. De fait, la nature hypothétique du témoignage de M. Laughlin est représentative de toute l'analyse de la question de savoir si M. Nikolaisen aurait aperçu un panneau de signalisation et aurait réagi en conséquence, ou à quelle vitesse précise un conducteur raisonnable s'approcherait du virage. Le caractère théorique de ces analyses justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance et permet d'affirmer qu'on n'a pas satisfait à la norme rigoureuse imposée par l'expression « erreur manifeste et dominante ».

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

Par conséquent, nous estimons que les constatations factuelles de la juge de première instance concernant la causalité étaient raisonnables, qu'elles ne constituent donc pas une erreur manifeste et dominante et, partant, que la Cour d'appel n'aurait pas dû les modifier.

VI. Common Law Duty of Care

VI. Obligation de diligence prévue par la common law

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

Puisque nous concluons à la responsabilité de la municipalité en vertu de la *Rural Municipality Act, 1989*, nous n'estimons pas nécessaire de nous demander s'il existe en l'espèce une obligation de diligence prévue par la common law.

VII. Disposition

VII. Dispositif

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying

Comme nous l'avons dit au départ, d'importantes raisons et d'importants principes commandent aux tribunaux d'appel de ne pas modifier indûment

2002 SCC 33 (CanLII)

these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

les décisions des tribunaux de première instance. Appliquant ces raisons et principes à la présente espèce, nous sommes d'avis d'accueillir le pourvoi, d'infirmer le jugement de la Cour d'appel de la Saskatchewan et de rétablir la décision de la juge de première instance, avec dépens devant toutes les cours.

Version française des motifs des juges Gonthier, Bastarache, Binnie et LeBel rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

78 Le présent pourvoi découle d'un accident impliquant un seul véhicule survenu le 18 juillet 1992 sur le chemin Snake Hill, route rurale située dans la municipalité de Shellbrook, en Saskatchewan. L'appelant, Paul Housen, qui était passager dans le véhicule, est devenu quadriplégique à la suite de cet accident. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant que ses facultés étaient affaiblies. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation de tenir le chemin dans un état raisonnable d'entretien comme le lui impose l'art. 192 de la loi intitulée la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. La Cour d'appel a infirmé la décision de la juge de première instance concluant à la négligence de la municipalité intimée. La question en litige dans le présent pourvoi consiste à déterminer si la Cour d'appel avait des motifs suffisants pour modifier la décision du tribunal de première instance. L'intimée demande également à notre Cour d'infirmer les conclusions de la juge de première instance portant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, et que l'accident a été causé en partie par sa négligence. Il faut également répondre à la question incidente de savoir si une obligation de diligence de common law coexiste avec l'obligation légale imposée à l'intimée par l'art. 192.

2002 SCC 33 (CanLII)

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

J'estime que la Cour d'appel a eu raison d'infirmer la conclusion de la juge de première instance selon laquelle la municipalité intimée a été négligente. Je ne modifierais pas les conclusions de fait de la juge de première instance sur cette question, mais je suis d'avis qu'elle a commis une erreur de droit en n'appliquant pas la norme de diligence appropriée. J'infirmerais également ses conclusions en ce qui concerne la question de la connaissance et le lien de causalité. En concluant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, la juge de première instance a commis une erreur de droit en n'appréciant pas l'exigence relative à la connaissance du point de vue du conseiller municipal prudent et en ne tenant pas compte du fait que le fardeau de la preuve incombait à l'appelant. De plus, la juge de première instance a tiré une inférence déraisonnable en prêtant à l'intimée la connaissance requise, en raison d'accidents survenus sur d'autres tronçons du chemin alors que des automobilistes circulaient en sens inverse. La juge de première instance a également commis une erreur relativement au lien de causalité. Elle a mal interprété la preuve qui lui était soumise, elle en a tiré des conclusions erronées et elle n'a pas tenu compte d'éléments de preuve pertinents. Enfin, je ne modifierais pas la décision des juridictions inférieures ayant rejeté l'argument de l'appelant selon lequel il existait une obligation de diligence de common law. Il est inutile d'imposer une obligation de common law lorsqu'il existe une obligation légale. Qui plus est, l'application des principes de la common law en matière de négligence n'aurait aucune incidence sur l'issue de la présente instance.

II. Factual Background

80 The sequence of` events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately

II. Les faits

La suite d'événements ayant abouti au tragique accident a commencé quelque 19 heures avant l'accident lui-même, dans l'après-midi du 18 juillet 1992. Le 17 juillet, M. Nikolaisen a participé à un barbecue à la résidence de Craig et Toby Thiel, sur le chemin Snake Hill. Arrivé en fin d'après-midi, il a pris son premier verre de la journée vers 18 h. Il en a pris quatre ou cinq avant de quitter la résidence des Thiel vers 22 h ou 22 h 30. Après avoir passé

2002 SCC 33 (CanLII)

10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be

quelques heures chez lui, M. Nikolaisen s'est rendu au jamboree de Sturgeon Lake, où il a rencontré l'appelant. Sur les lieux du jamboree, M. Nikolaisen a consommé huit ou neuf ryes doubles et plusieurs bières. L'appelant buvait lui aussi. L'appelant et M. Nikolaisen ont fait la fête sur les lieux du jamboree pendant plusieurs heures. Vers 4 h 30, l'appelant a quitté le jamboree en compagnie de M. Nikolaisen. Après avoir roulé sur des routes de campagne pendant un certain temps, ils sont retournés à la résidence des Thiel. Il était environ 8 h. L'appelant et M. Nikolaisen ont pris plusieurs autres verres au cours de la matinée. M. Nikolaisen a cessé de boire deux ou trois heures avant de quitter la résidence des Thiel en compagnie de l'appelant vers 14 h.

81 Une faible pluie tombait lorsque l'appelant et M. Nikolaisen ont quitté la résidence des Thiel et pris la route, en direction est, à bord d'une camionnette Ford conduite par M. Nikolaisen. L'arrière de la camionnette a zigzagué lorsque le véhicule a tourné à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Alors que M. Nikolaisen prenait un léger virage d'une longueur de quelque 300 mètres, tout en accélérant à 65 km/h environ, l'arrière de sa camionnette a zigzagué à nouveau à plusieurs reprises. La camionnette s'est mise à déraper lorsque M. Nikolaisen a amorcé un virage plus serré vers la droite. Il a donné un coup de volant, mais n'a pas réussi à prendre le virage. La roue arrière gauche de la camionnette a heurté un remblai situé du côté gauche du chemin. Le véhicule a continué sa course sur une distance d'environ 30 mètres, puis sa roue avant gauche est montée sur un remblai de 18 pouces du côté gauche du chemin, après l'avoir heurté. Sous la force du second impact, la camionnette a fait un tonneau complet, le toit du côté du passager touchant le sol en premier.

82 Lorsque le véhicule s'est immobilisé, l'appelant n'éprouvait plus aucune sensation. M. Nikolaisen s'est hissé hors du véhicule par la fenêtre arrière et a couru chez les Thiel pour demander de l'aide. Plus tard, la police a accompagné M. Nikolaisen à l'hôpital de Shellbrook, où un échantillon de sang a été prélevé. Le témoignage d'expert a révélé

2002 SCC 33 (CanLII)

between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 milligrammes par 100 milligrammes, taux largement supérieur à la limite permise par la loi intitulée la *Highway Traffic Act*, S.S. 1986 ch. H-3.1, et par le *Code criminel*, L.R.C. 1985, ch. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

M. Nikolaisen avait emprunté le chemin Snake Hill à trois reprises au cours des 24 heures ayant précédé l'accident, mais il n'y avait jamais circulé auparavant. Ce chemin, flanqué de routes au nord et à l'est, fait environ un mille et trois quarts de longueur. À partir de son extrémité nord, il franchit une courte distance en direction sud, traverse des champs, puis tourne vers le sud-est pour ensuite descendre en lacet vers le sud autour du mont Snake Hill, passant devant des arbres, buissons et pâturages, jusqu'au fond de la vallée. De là, il tourne brusquement vers le sud-est devant l'entrée de la résidence des Thiel. Tout de suite après, il tourne doucement vers le sud-est sur une distance d'environ 300 mètres, puis décrit une courbe plus prononcée vers le sud. C'est à cet endroit que l'accident s'est produit. De là, le chemin traverse un ruisseau, tourne encore, puis monte une pente raide vers l'est, se redresse et continue vers l'est sur une distance d'un peu plus d'un demi mille et passe devant des champs bordés d'arbres et une autre ferme, jusqu'à une voie d'accès à la route.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The

Construit en 1923, le chemin Snake Hill est entretenu par la municipalité intimée dans le but premier de permettre aux fermiers de la région d'accéder à leurs champs et pâturages. Il sert également de voie d'accès à deux résidences permanentes et à une clinique vétérinaire. Le tronçon nord du chemin, dont l'extrémité part de la route, est considéré comme un chemin d'accès local de « type C » selon le système provincial de classification des routes. Cela signifie qu'il est nivelé, gravelé et possède une chaussée surélevée. Le tronçon du chemin situé à l'est de la résidence des Thiel et sur lequel l'accident s'est produit est considéré comme un chemin nivelé de « type B », c'est-à-dire essentiellement un chemin dont les ornières ont été remplies pour le rendre carrossable. Les chemins nivelés suivent le tracé qui présente le moins d'obstacle à travers le terrain environnant et ne sont ni surélevés ni gravelés. La

2002 SCC 33 (CanLII)

province of Saskatchewan has some 45,000 kilometres of bladed trails.

According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

province de Saskatchewan compte quelque 45 000 kilomètres de chemins nivelés.

85 Selon le système de classification des routes, tant les chemins nivelés que les chemins d'accès local sont [TRADUCTION] « non désignés », c'est-à-dire qu'ils ne sont pas visés par le document intitulé *Saskatchewan Rural Development Sign Policy and Standards* (« Politique et normes de signalisation routière en milieu rural en Saskatchewan »). Le conseil de la municipalité rurale installe des panneaux de signalisation sur ces chemins s'il constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Trois accidents sont survenus sur le chemin Snake Hill de 1978 à 1987. Tous ces accidents se sont produits à l'est de l'endroit où la camionnette de Nikolaisen a fait un tonneau et les véhicules concernés circulaient en direction ouest. Un quatrième accident s'est produit sur le chemin Snake Hill en 1990, mais aucune preuve indiquant l'endroit exact de l'accident n'a été présentée. Rien ne permettait de conclure que la topographie des lieux était à l'origine de l'un ou l'autre de ces accidents. La municipalité intimée n'avait installé aucun panneau signalisateur le long du chemin Snake Hill.

III. Relevant Statutory Provisions

The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.

. . .

(2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.

III. Les dispositions législatives pertinentes

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1

[TRADUCTION]

192(1) Le conseil tient dans un état raisonnable d'entretien tous les chemins municipaux, barrages et réservoirs, ainsi que les accès à ces ouvrages qui ont été construits ou sont fournis par la municipalité ou par toute autre personne avec la permission du conseil ou qui ont été construits ou sont fournis par le gouvernement de la province, eu égard à la nature de l'ouvrage en question et à la localité où il est situé ou qu'il traverse.

. . .

(2) Lorsque le conseil omet de s'acquitter des obligations qui lui incombent en vertu des paragraphes (1) et (1.1), la municipalité est, sous réserve de la *Contributory Negligence Act* [*Loi sur le partage de la responsabilité*], civilement responsable des dommages subis par toute personne à la suite de ce manquement.

2002 SCC 33 (CanLII)

(3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway . . . .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

IV. Judicial History

A. *Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in

(3) En cas d'action reprochant un manquement visé aux paragraphes (1) et (1.1) la responsabilité de la municipalité concernée n'est engagée que si le demandeur établit que cette dernière connaissait ou aurait dû connaître le mauvais état du chemin municipal ou autre ouvrage mentionné aux paragraphes (1) et (1.1).

The Highway Traffic Act, S.S. 1986, ch. H-3.1

[TRADUCTION]

33(1) Sous réserve des autres dispositions de la présente loi, il est interdit de conduire sur une voie publique à une vitesse supérieure, selon le cas :

a) à 80 kilomètres à l'heure;

b) à la vitesse maximale indiquée par la signalisation routière le long de la voie publique en question . . .

(2) Il est interdit de conduire un véhicule sur une voie publique à une vitesse supérieure à celle qui est raisonnable et sécuritaire dans les circonstances.

44(1) Il est interdit de conduire un véhicule sur une voie publique sans faire preuve de la prudence et de l'attention nécessaires.

IV. L'historique des procédures judiciaires

A. *Cour du Banc de la Reine de la Saskatchewan*, [1998] 5 W.W.R. 523

La juge Wright a conclu que l'intimée avait fait preuve de négligence en omettant d'installer un panneau signalant aux automobilistes l'existence du virage à droite serré sur le chemin Snake Hill, virage qu'elle a qualifié de [TRADUCTION] « danger caché ». Elle a également estimé que M. Nikolaisen avait été négligent en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant qu'il avait les facultés affaiblies. L'appelant a été tenu responsable de négligence concourante parce qu'il avait accepté de monter à bord du véhicule de M. Nikolaisen. La responsabilité a été partagée ainsi : 15 p. 100 à l'appelant, le reste étant réparti solidairement entre M. Nikolaisen (50 p. 100) et l'intimée (35 p. 100).

La juge Wright a d'abord conclu que l'art. 192 de la *Rural Municipality Act, 1989* imposait à l'intimée une obligation légale de diligence envers les personnes circulant sur le chemin Snake Hill. Elle s'est ensuite demandée si l'intimée s'était

2002 SCC 33 (CanLII)

s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality . . . the situation of the road therein, whether required to be used by many or by few; . . . to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

conformée à la norme de diligence énoncée à l'art. 192 et dans la jurisprudence portant sur l'interprétation de cet article. Elle a fait état, en particulier, de l'arrêt *Partridge c. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555, dans lequel la Cour d'appel de la Saskatchewan a déclaré, à la p. 558, que [TRADUCTION] « le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité ». Elle a également cité le passage suivant de l'affaire *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (C.A. Sask.), p. 630 : [TRADUCTION] « [I]l faut tenir compte de la localité où est situé le chemin, [. . .] de son emplacement dans celle-ci, se demander s'il sera beaucoup ou peu fréquenté; [. . .] du nombre de chemins à entretenir; des ressources budgétaires dont dispose le conseil à cette fin et des besoins du public qui emprunte ce chemin ». Se fondant sur l'affaire *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40 (B.R. Sask.), la juge Wright a fait observer que, bien que la Loi ne mentionne pas explicitement l'obligation d'installer des panneaux d'avertissement, l'obligation générale d'entretien comporte néanmoins celle de signaler aux automobilistes l'existence d'un danger caché.

Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

89 Après avoir fait état de la jurisprudence pertinente, la juge Wright a poursuivi en examinant la nature du chemin. S'appuyant principalement sur les témoignages donnés par deux experts au procès, MM. Anderson et Werner, elle a conclu que le virage à droite serré constituait un danger que les usagers du chemin ne pouvaient voir aisément. De leurs témoignages, elle a tiré la conclusion suivante (au par. 85) :

It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater

[TRADUCTION] Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce

2002 SCC 33 (CanLII)

than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

virage ne peut être pris en sécurité à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide. [En italique dans l'original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

La juge Wright a ensuite précisé que, bien qu'on ne puisse raisonnablement exiger de l'intimée qu'elle construise le chemin selon une norme plus élevée ou qu'elle enlève toutes les broussailles, il était raisonnable de s'attendre à ce qu'elle installe et maintienne un panneau d'avertissement ou de signalisation [TRADUCTION] « afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

La juge Wright a ensuite analysé le par. 192(3) de la Loi, qui prévoit qu'il n'y a manquement à l'obligation de diligence que si la municipalité connaissait ou aurait dû connaître l'existence du danger. Elle a rappelé que quatre accidents étaient survenus sur le chemin Snake Hill de 1978 à 1990. Trois de ceux-ci se sont produits [TRADUCTION] « aux environs » de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, et deux ont été signalés aux autorités. Sur la base de cette information, elle a conclu que [TRADUCTION] « [s]i la M.R. [municipalité rurale] ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître » (par. 90). La juge Wright a également accordé de l'importance au débit relativement faible de la circulation sur le chemin, au fait que des résidences permanentes étaient situées en bordure de celui-ci et au fait que le chemin était fréquenté par des conducteurs jeunes et peut-être moins expérimentés.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

En ce qui concerne le lien de causalité, la juge Wright a estimé qu'un panneau de signalisation aurait probablement permis à M. Nikolaisen de prendre des mesures correctives et de conserver la maîtrise de son véhicule, même si ses facultés étaient affaiblies. Elle a aussi tiré la conclusion suivante, au par. 101 :

Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded

[TRADUCTION] Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il

2002 SCC 33 (CanLII)

a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

92 La juge Wright s'est également penchée sur l'argument de l'appelant voulant que la municipalité ait manqué à une obligation de diligence de common law qui ne serait pas atténuée ou restreinte par l'une ou l'autre des dispositions de l'art. 192. Elle a estimé que l'arrêt *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228, ainsi que la jurisprudence antérieure et postérieure à cette décision ne s'appliquaient pas à l'affaire dont elle était saisie, vu l'existence de l'obligation légale de diligence. Elle a également jugé que les termes restrictifs de l'art. 192 de la Loi visaient la norme de diligence et n'avaient pas pour effet de limiter la portée de l'obligation légale de diligence.

B. *Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SKCA 12

B. *Cour d'appel de la Saskatchewan*, [2000] 4 W.W.R. 173, 2000 SKCA 12

On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

93 En appel, exprimant la décision unanime de la cour, le juge Cameron s'est attaché principalement à la conclusion de la juge de première instance portant que, en omettant d'installer un panneau d'avertissement ou de signalisation à l'endroit de l'accident, l'intimée avait manqué à son obligation légale d'entretien des routes. Il n'a pas jugé nécessaire de se prononcer sur la question du lien de causalité, vu sa conclusion que la juge de première instance avait commis une erreur en déclarant l'intimée responsable de négligence.

Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings

94 Le juge Cameron a qualifié la conclusion de la juge de première instance que l'intimée avait manqué à son obligation légale de diligence de conclusion portant sur une question mixte de fait et de droit. Il a souligné qu'une cour d'appel ne doit pas modifier les conclusions de fait du juge de première instance à moins que ce dernier n'ait commis une « erreur manifeste et dominante » ayant faussé son appréciation des faits. Pour ce qui est des erreurs de droit, toutefois, le juge Cameron a fait remarquer que le pouvoir d'une cour d'appel d'infirmer la conclusion du juge de première instance est [TRADUCTION] « presque illimité ». En ce qui concerne les erreurs

2002 SCC 33 (CanLII)

of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.

2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a

mixtes de fait et de droit, le juge Cameron a précisé qu'elles sont normalement assujetties à la même norme de contrôle que les conclusions de fait. Selon le juge Cameron, cette règle générale souffre une exception, qui s'applique dans les cas où, bien que le juge du procès ait retenu le bon critère juridique applicable, il omet d'en appliquer un élément aux faits de l'affaire dont il est saisi. Au soutien de cette affirmation, le juge Cameron a cité, au par. 41, les propos suivants du juge Iacobucci dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 39 :

> [Si] un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Relativement au droit applicable en l'espèce, le juge Cameron a reconnu que la norme de diligence énoncée dans la Loi et dans la jurisprudence portant sur l'interprétation de cette loi exige des municipalités qu'elles installent des panneaux de mise en garde pour signaler les dangers que les conducteurs prudents et prenant des précautions normales ne pourraient vraisemblablement pas mesurer. Se fondant sur la jurisprudence, le juge Cameron a établi, au par. 50, un cadre analytique permettant de déterminer si une municipalité a manqué à son obligation à cet égard. Suivant ce cadre, le juge doit examiner les aspects suivants :

[TRADUCTION]

1. Le juge doit déterminer la nature et l'état du chemin au moment de l'accident. Il s'agit, bien sûr, d'une question de fait, qui nécessite une appréciation des caractéristiques physiques du chemin à l'endroit où l'accident s'est produit, ainsi que de tous les facteurs se rapportant à la norme d'entretien, à savoir l'emplacement du chemin, le type de chemin dont il s'agit, les utilisations habituelles de celui-ci, et ainsi de suite.

2. Il soit se demander si les personnes qui devaient emprunter le chemin pouvaient généralement, en prenant des précautions normales, y circuler en sécurité. Il s'agit essentiellement du critère de la

2002 SCC 33 (CanLII)

reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra.* In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise

personne raisonnable, qui sert à déterminer comment se serait comporté un conducteur raisonnable sur ce chemin en particulier. À cette étape, il faut tenir compte des nombreux facteurs énoncés dans la jurisprudence mentionnée précédemment, c'est-à-dire l'emplacement du chemin, la nature et le type du chemin, la norme d'entretien à laquelle on pouvait raisonnablement s'attendre d'une municipalité, et ainsi de suite. Ces facteurs doivent être soupesés dans le contexte de la question suivante : Comment un conducteur raisonnable aurait-il conduit son véhicule sur ce chemin en particulier? Puisque cette question suppose l'application d'une norme juridique à un ensemble donné de faits, elle constitue une question mixte de fait et de droit.

3. Il doit déterminer si le chemin était dans un état raisonnable d'entretien, compte tenu des conclusions tirées à la deuxième étape. S'il est établi que le chemin ne se trouvait pas dans un état raisonnable d'entretien, il faut alors déterminer si la municipalité connaissait ou aurait dû connaître le mauvais état d'entretien avant de conclure à la responsabilité de celle-ci.

96 Selon le juge Cameron, la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne le critère juridique applicable. Elle a cependant commis une erreur de droit du genre de celle exposée par le juge Iacobucci dans l'arrêt *Southam*, précité. À son avis, lorsqu'elle a appliqué le droit aux faits de l'espèce, la juge de première instance a omis, d'une part, de se demander comment un conducteur raisonnable, faisant montre de prudence normale, aurait conduit son véhicule sur ce chemin, et, d'autre part, d'évaluer le risque, s'il en est, que le virage non annoncé aurait pu constituer pour le conducteur moyen. Comme l'a souligné le juge Cameron de la Cour d'appel, la juge de première instance [TRADUCTION] « a évoqué la question à deux reprises, mais elle ne l'a pas abordée » (par. 57).

97 Le juge Cameron a également estimé que la juge de première instance avait commis une erreur de fait « manifeste et dominante » en concluant que l'intimée n'avait pas exercé le degré de diligence requis. Selon le juge Cameron, cette erreur de fait découlait de l'importance accordée par la juge Wright aux témoignages d'experts de MM. Werner et Anderson. À son avis, les témoignages de ces deux experts

2002 SCC 33 (CanLII)

that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

reposaient sur la prémisse fondamentale qu'on pouvait s'attendre à ce que le conducteur moyen circule sur le chemin à une vitesse de 80 km/h. Selon lui, cette prémisse était erronée et n'était pas étayée par la preuve.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

Le juge Cameron a conclu que, bien qu'il fût loisible à la juge de première instance d'accorder davantage foi à certains témoignages qu'à d'autres, il ne lui était pas loisible de retenir un témoignage d'expert fondé sur une prémisse factuelle erronée. Selon lui, si la juge de première instance avait estimé qu'un conducteur prudent prenant des précautions normales pour assurer sa sécurité n'aurait généralement pas roulé sur cette portion du chemin Snake Hill à plus de 60 km/h, alors elle aurait dû conclure à l'absence de danger caché puisque le virage pouvait être pris en sécurité à cette vitesse.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

Le juge Cameron a souscrit à l'opinion de la juge de première instance que l'obligation de diligence de common law ne s'appliquait pas en l'espèce. Il a fait les commentaires suivants à ce sujet, au par. 44 de ses motifs :

> [TRADUCTION] En ce qui concerne l'obligation de diligence, il convient de préciser que, contrairement aux dispositions législatives qui habilitent les municipalités à entretenir les chemins, sans toutefois leur imposer l'obligation de le faire, en l'espèce l'obligation doit son existence à une loi, plutôt qu'au principe de common law fondé sur la proximité : *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228. On saisit immédiatement que l'obligation de diligence existe en faveur de tous ceux qui circulent sur les routes.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

V. Les questions en litige

A. La Cour d'appel a-t-elle eu raison de modifier la conclusion de la juge de première instance portant que l'intimée avait manqué à son obligation légale de diligence?

B. La juge de première instance a-t-elle commis une erreur en concluant que l'intimée connaissait ou aurait dû connaître le danger allégué?

C. La juge de première instance a-t-elle commis une erreur en concluant que l'accident a été en partie causé par la négligence de l'intimée?

2002 SCC 33 (CanLII)

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis

A. *Did the Court of Appeal Properly Interfere with the Decision at Trial?*

(1) The Standard of Review

Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam*, *supra*, at para. 60; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road

D. Est-ce qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence?

VI. L'analyse

A. *La Cour d'appel a-t-elle eu raison de modifier la décision de la juge de première instance?*

(1) La norme de contrôle

101 Bien qu'elles ne soient pas toujours faciles à distinguer, les questions auxquelles doit répondre un tribunal de première instance se classent généralement en trois catégories : les questions de droit, les questions de fait et les questions mixtes de fait et de droit. En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties et les questions mixtes de fait et de droit consistent à déterminer si les faits satisfont au critère juridique (*Southam*, précité, par. 35).

102 De ces trois catégories, ce sont les conclusions de fait du juge de première instance qui commandent le degré le plus élevé de retenue. La Cour ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée (*Southam*, précité, par. 60; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 121). Cette retenue repose principalement sur le fait que, puisqu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, le juge de première instance est en conséquence plus à même de choisir entre deux versions divergentes d'un même événement (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 32). Cependant, il est important de reconnaître que tirer une conclusion de fait implique souvent davantage que le simple fait de déterminer qui a fait quoi, ainsi que où et quand il l'a fait. Le juge de première instance est très souvent appelé à faire des inférences à partir des faits qui lui sont

2002 SCC 33 (CanLII)

that the respondent knew or should have known of the hidden danger.

présentés. En l'espèce, par exemple, la juge de première instance a inféré du fait que des accidents s'étaient produits sur le chemin Snake Hill que l'intimée connaissait ou aurait dû connaître l'existence du danger caché.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

Notre Cour a jugé qu'il fallait appliquer aux inférences de fait du juge de première instance le même degré de retenue qu'à ses conclusions de fait (*Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353). La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. En toute déférence, je ne partage pas l'opinion de la majorité selon laquelle des inférences ne peuvent être rejetées que dans les cas où le processus qui les a produites est lui-même déficient : voir *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 45 :

> Lorsqu'une cour de justice contrôle les conclusions de fait d'un tribunal administratif ou les inférences qu'il a tirées de la preuve, elle ne peut intervenir que « lorsque les éléments de preuve, perçus de façon raisonnable, ne peuvent étayer les conclusions de fait du tribunal » : *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, à la p. 669, le juge McLachlin.

Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Mes collègues eux-mêmes reconnaissent qu'un juge est souvent appelé à tirer des inférences mixtes de fait et droit (par. 26). Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait.

2002 SCC 33 (CanLII)

My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

104 Mes collègues ne sont pas d'accord avec l'énoncé susmentionné — savoir celui portant que la cour d'appel se demande si une inférence peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance — estimant qu'il s'agit d'une norme de contrôle moins exigeante que celle de l'erreur « manifeste et dominante ». Pour ma part, je ne crois pas que cet énoncé implique l'application d'une norme moins exigeante. À mon avis, il n'y a aucune différence entre le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est purement sémantique.

By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 833; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

105 En revanche, une cour d'appel ne contrôle pas les conclusions tirées par le juge de première instance à l'égard des questions de droit simplement pour déterminer si elles sont raisonnables, mais plutôt pour déterminer si elles sont correctes : *Moge c. Moge*, [1992] 3 R.C.S. 813, p. 833; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), p. 90. Un des rôles principaux d'une cour d'appel consiste à corriger les erreurs de droit et, par conséquent, cette cour peut et doit vérifier si les conclusions juridiques de la juridiction inférieure sont correctes.

In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of

106 Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est forcément une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel. Comme l'a dit Kerans, *op. cit.*, p. 103, [TRADUCTION] « [l]'examen de la

2002 SCC 33 (CanLII)

facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

question de savoir si les faits satisfont ou non à un critère juridique donné est un processus qui implique une fonction créatrice de droit. Qui plus est, il est probablement exact d'affirmer que *chaque* nouvelle tentative d'appliquer une règle de droit à un ensemble de faits emporte une certaine interprétation de cette règle et, partant, l'élaboration de règles de droit additionnelles » (en italique dans l'original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

Dans une affaire de négligence, le juge de première instance est appelé à décider si la conduite du défendeur était raisonnable eu égard à toutes les circonstances. Bien que la prise de cette décision demande l'examen de questions de fait, elle exige également du juge de première instance qu'il établisse ce qui est raisonnable. Comme il a été mentionné plus tôt, dans bien des cas cette décision implique l'établissement de politiques d'intérêt général ou la « création de règles de droit », rôle qu'une cour d'appel est mieux placée pour remplir (Kerans, *op. cit.*, p. 5 à 10). En l'espèce, par exemple, le degré de connaissance que la juge de première instance aurait dû prêter au conseiller municipal raisonnablement prudent soulevait une considération participant d'une politique d'intérêt général, savoir le genre de système d'information sur les accidents qu'une petite municipalité rurale aux ressources budgétaires limitées est censée tenir. Ce rôle créateur de droit a été reconnu par la Cour suprême des États-Unis dans l'arrêt *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), à la note 17, dans le contexte d'une action en diffamation :

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

> [TRADUCTION] Une conclusion de fait est, dans certains cas, indissociable des principes qui ont été appliqués pour y arriver. À un point donné, le raisonnement menant à la « constatation d'un fait » cesse d'être l'application des principes ordinaires de logique et d'expérience générale, qui est généralement l'apanage du juge de première instance, pour devenir l'application d'une règle de droit, tâche où le tribunal de révision doit exercer son propre jugement. Cette ligne de démarcation se déplace selon la nature de la règle de droit substantiel en litige. Dans quelques branches du droit, certaines questions largement factuelles soulèvent des enjeux — incidence sur d'éventuelles affaires et le comportement futur — qui sont trop importants pour être confiés en premier et dernier ressort au juge de première instance.

2002 SCC 33 (CanLII)

My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

108 Mes collègues affirment que la question de savoir si, dans une affaire de négligence, le défendeur a respecté ou non la norme de diligence appropriée est assujettie au critère de l'erreur manifeste et dominante, sauf si le juge de première instance a clairement commis une erreur de principe isolable relativement à la détermination de la norme à appliquer ou à son application, auquel cas l'erreur peut constituer une erreur de droit (par. 36). Je ne suis pas d'accord. Dans bon nombre de cas, il ne sera pas possible d'« isoler » une question de droit pur de l'analyse de la norme de diligence applicable en matière de négligence, qui est une question mixte de fait et de droit. En outre, bien que certaines questions mixtes de fait et de droit puissent ne pas avoir « une grande valeur comme précédents » (*Southam*, précité, par. 37), ces questions impliquent souvent une analyse normative que devrait pouvoir contrôler une cour d'appel.

Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge

109 Revenons maintenant à la question de savoir si la municipalité connaissait ou aurait dû connaître le danger allégué. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de prêter cette connaissance à la municipalité eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Si le juge de première instance applique une autre norme juridique, par exemple celle de la personne raisonnable, il commet une erreur de droit. Cependant, même en supposant que le juge de première instance détermine correctement la norme juridique à appliquer, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique. Par exemple, il peut exister une preuve indiquant qu'un accident s'était déjà produit sur le tronçon de chemin en cause. Le juge de première instance qui se demande si ce fait satisfait ou non au critère juridique applicable à la question de la connaissance doit poser un certain nombre d'hypothèses normatives. Il doit se demander si le fait qu'un accident se soit déjà produit au même endroit alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents. Selon moi, la question de savoir si le fait qu'un accident se soit produit antérieurement

2002 SCC 33 (CanLII)

requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

satisfait à l'exigence de connaissance applicable est une question mixte de fait et de droit, et il serait artificiel de la qualifier autrement. Comme l'indique clairement l'exemple qui précède, cette question peut également soulever des questions normatives que devrait pouvoir contrôler une cour d'appel selon la norme de la décision correcte.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

Je partage l'opinion de mes collègues selon laquelle on ne peut poser comme principe général que toutes les questions mixtes de fait et de droit sont assujetties à la norme de la décision correcte : citant *Southam*, précité, par. 37 (par. 28). Cependant, je ne crois pas que l'opinion formulée dans *Southam* signifie que, dans une affaire de négligence, les conclusions du juge de première instance sur des questions mixtes de fait et de droit commandent systématiquement une attitude empreinte de retenue. Dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, affaire de négligence médicale, notre Cour a différencié cette affaire de l'arrêt *Southam* sur la question de la norme de contrôle applicable aux questions mixtes de fait et de droit dans les cas où le tribunal ne possède d'expertise particulière. Exposant la décision unanime de la Cour, le juge Gonthier a dit ceci, aux par. 48 et 49 :

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. C'est la norme applicable à la négligence médicale. Il n'est pas question de l'expertise d'un tribunal spécialisé dans un domaine particulier, pouvant toucher la détermination des faits et avoir une incidence sur la définition de la norme appropriée et exiger de ce fait une certaine déférence de la part d'une cour générale d'appel (*Southam*, par. 45; *Nova Scotia Pharmaceutical Society*, précité, p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, is authority for the proposition that when the question

Je ne peux non plus me ranger à l'avis de mes collègues selon lequel l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, permet d'affirmer

2002 SCC 33 (CanLII)

of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Taylor v. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Taylor (Guardian ad litem of) v. British Columbia* (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks in *Jaegli Enterprises*, *supra*, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he

que, lorsque la question mixte de fait et de droit en litige est la conclusion de négligence tirée par le juge de première instance, les cours d'appel doivent faire preuve de retenue à l'égard de cette conclusion. Dans cette affaire, le juge de première instance avait conclu que le défendeur, un instructeur de ski, avait respecté la norme de diligence à laquelle il était tenu. Il avait aussi conclu que l'accident serait survenu, indépendamment de la conduite de l'instructeur de ski (*Taylor c. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Le juge Seaton de la Cour d'appel de la Colombie-Britannique a exprimé son désaccord avec la conclusion du juge de première instance que l'instructeur de ski avait respecté la norme de diligence applicable (*Taylor (Guardian ad litem of) c. British Columbia* (1980), 112 D.L.R. (3d) 297). Il a néanmoins reconnu que [TRADUCTION] « l'ultime question » consistait à se demander si « l'omission de l'instructeur de rester près de la demanderesse avait été une cause de l'accident » (p. 307). Sur la question du lien de causalité, qui est une question de fait, le juge Seaton a clairement substitué son opinion à celle du juge de première instance sans tenir compte de la norme de contrôle appropriée. Ses remarques finales sur la question de la causalité, à la p. 308, font ressortir son absence de retenue à l'égard de la conclusion du juge de première instance sur ce point :

> [TRADUCTION] Tout bien considéré, j'estime que la preuve étaye la prétention des demandeurs voulant que la conduite de l'instructeur, qui l'a laissée seule sous la crête de la butte, a été l'une des causes de l'accident.

112 En rétablissant la décision du juge de première instance, notre Cour n'a pas précisé si elle le faisait parce que la cour d'appel avait eu tort de modifier la conclusion de ce dernier sur la négligence ou parce qu'elle avait erronément modifié ses conclusions sur la causalité. Les motifs donnent à penser que la dernière proposition est la bonne. La seule partie du jugement de première instance mentionnée par notre Cour se rapporte à la conclusion sur le lien de causalité. Le juge Dickson (plus tard Juge en chef) a fait les remarques suivantes dans l'arrêt *Jaegli Enterprises*, précité, à la p. 4 :

> À la fin d'un procès de neuf jours, le juge Meredith, qui a présidé le procès, a rendu un jugement dans lequel il a

2002 SCC 33 (CanLII)

very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

examiné soigneusement toute la preuve et a conclu que l'accident était imputable uniquement à Larry LaCasse et que les demandeurs pouvaient recouvrer de LaCasse des dommages-intérêts pour un montant à déterminer. Les réclamations contre Paul Ankenman, Jaegli Enterprises Limited et les autres défendeurs ont été rejetées avec dépens.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli Enterprises* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli Enterprises* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

La Cour a ensuite cité quelques décisions, dont certaines ne traitent pas de négligence (voir *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78), au soutien de la proposition générale qu'« une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve » (p. 84). Étant donné que la Cour s'est attachée à la question du lien de causalité, question de fait seulement, je ne crois pas que l'arrêt *Jaegli Enterprises* établisse que les cours d'appel doivent faire montre de retenue lorsque le juge de première instance conclut à la négligence. À mon avis, dans l'arrêt *Jaegli Enterprises*, la Cour n'a fait que confirmer le principe bien établi portant qu'une cour d'appel ne doit pas modifier une conclusion de fait du juge de première instance en l'absence d'erreur manifeste et dominante.

(2) Error of Law in the Reasons of the Court of Queen's Bench

(2) L'erreur de droit dans les motifs de la Cour du Banc de la Reine

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée dans la jurisprudence, la juge de première instance devait se demander si le tronçon du chemin Snake Hill sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. Après avoir déterminé quel était le critère juridique applicable, la juge de première instance a toutefois omis de se demander si un tel conducteur aurait pu rouler en sécurité sur le tronçon en question. Le fait d'omettre entièrement une étape d'un critère juridique, dans l'application de celui-ci aux faits de l'espèce, équivaut à mal interpréter le droit (*Southam*, précité, par. 39). Par conséquent, la Cour d'appel de la Saskatchewan a donc eu raison de qualifier cette omission d'erreur de droit et de contrôler les conclusions de fait tirées par la juge de première instance à la lumière du critère juridique approprié.

2002 SCC 33 (CanLII)

The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act, 1989* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge*, *supra*, at p. 558; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

115 La jurisprudence de longue date portant sur l'interprétation de l'art. 192 de la *Rural Municipality Act, 1989* et des dispositions qu'il a remplacées établit clairement que les municipalités ont l'obligation de tenir les chemins [TRADUCTION] « dans un état raisonnable d'entretien de façon que ceux qui doivent l[es] emprunter puissent, en prenant des précautions normales, y circuler en sécurité » (*Partridge*, précité, p. 558; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (C.A. Sask.), p. 766; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (B.R.), p. 71 et 72). Plusieurs autres provinces ont adopté des lois établissant une obligation de diligence semblable, et les tribunaux de ces provinces ont interprété cette obligation de la même façon (*R. c. Jennings*, [1966] R.C.S. 532, p. 537; *Comté de Parkland n° 31 c. Stetar*, [1975] 2 R.C.S. 884, p. 892; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717 (C.S.C.), p. 718). Interprétant une disposition similaire de la *Highway Improvement Act* de l'Ontario, R.S.O. 1960, ch. 171, notre Cour a indiqué, dans l'arrêt *Jennings*, précité, p. 537, qu'[TRADUCTION] « [i]l a été décidé à maintes reprises en Ontario que, lorsque l'obligation de maintenir une route en bon état d'entretien est légalement imposée à un organisme, celui-ci doit maintenir la route dans un état permettant à ceux qui l'empruntent en prenant des précautions normales d'y circuler en sécurité ».

There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v.*

116 Il existe de bonnes raisons de limiter l'obligation d'entretien des routes incombant aux municipalités au respect d'une norme suffisante pour permettre aux conducteurs qui prennent des précautions normales d'y circuler en sécurité. Comme l'a dit notre Cour dans l'arrêt *Fafard*, précité, p. 718 : [TRADUCTION] « [l]es municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues; leur obligation consiste à faire preuve de diligence raisonnable et de maintenir leurs rues dans un état raisonnablement sécuritaire pour la circulation normale des personnes qui prennent des précautions normales en vue d'assurer leur propre sécurité ». En conséquence, les cours d'appel estiment depuis longtemps que le juge de première instance commet une erreur s'il conclut qu'une municipalité

2002 SCC 33 (CanLII)

Town of North Battleford (1911), 4 Sask. L.R. 75 (*en banc*), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact . . . I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient . . . . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved

manque à son obligation du seul fait qu'un danger existe, indépendamment de la question de savoir si ce danger présente ou non un risque pour l'usager ordinaire du chemin. Le genre d'erreur qu'il faut éviter a été décrit ainsi par le juge en chef Wetmore dans l'affaire *Williams c. Town of North Battleford* (1911), 4 Sask. L.R. 75 (*in banco*), p. 81 :

> [TRADUCTION] Il me semble que la question qui se pose dans ce genre d'action — soit celle de savoir si le chemin est tenu dans un état d'entretien tel que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité — est essentiellement une question de fait [. . .] j'hésiterais à écarter une conclusion de fait du juge de première instance s'il avait relevé l'existence des faits nécessaires pour trancher l'affaire, mais il ne l'a pas fait. Il a conclu que l'intersection était « un endroit dangereux non éclairé, et qu'aucun accident ne s'y produirait si on faisait preuve d'une prudence extrême, mais que cet endroit n'était pas tenu dans un état d'entretien propre à rendre improbable un tel accident ». Il n'a pas examiné la question en se demandant si ceux qui doivent emprunter ce chemin peuvent, en prenant des précautions normales, y circuler en sécurité. Le seul fait que l'intersection soit dangereuse n'est pas suffisant . . . [Je souligne.]

Il ressort clairement de la jurisprudence susmentionnée que la simple existence d'un risque ou danger ne fait pas en soi naître pour la municipalité l'obligation d'installer un panneau de signalisation. Même si, à partir des faits, le juge de première instance arrive à la conclusion que l'état du chemin crée effectivement un risque, il doit poursuivre son analyse et se demander si ce risque présente un danger pour le conducteur raisonnable prenant des précautions normales. Le conducteur moyen rencontre souvent des conditions de conduite intrinsèquement dangereuses. Les automobilistes conduisent leur véhicule sur des chaussées glacées ou humides. Ils roulent la nuit sur des chemins de campagne mal éclairés. Ils rencontrent des obstacles comme des bancs de neige et des nids-de-poule. Souvent ces obstacles ne sont pas visibles, car ils sont dissimulés ou « cachés ». Le bon sens suggère que les automobilistes font toutefois preuve d'une certaine prudence en présence de conditions de conduite dangereuses. On n'attend de la municipalité qu'elle prenne des mesures d'avertissement supplémentaires que lorsque l'état du chemin et l'ensemble des

2002 SCC 33 (CanLII)

bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

autres circonstances ne signalent pas au conducteur la possibilité qu'un danger existe. Par exemple, le conducteur moyen s'attend à ce qu'un chemin de terre devienne glissant lorsqu'il est mouillé. À l'opposé, les tabliers de pont asphaltés qui se trouvent sur les routes sont souvent glissants, bien qu'ils paraissent complètement secs. Par conséquent, des panneaux sont installés pour alerter les conducteurs de cette possibilité non apparente.

The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. . . .
>
> . . . where the existence of . . . bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

118 En l'espèce, l'appelant a plaidé, au par. 27 de son mémoire, que la juge de première instance s'était, en fait, demandé si un conducteur raisonnable prenant des précautions normales considérerait que le tronçon du chemin Snake Hill où s'est produit l'accident constitue un risque. Il souligne en particulier les commentaires suivants de la juge de première instance, aux par. 85 et 86 :

> [TRADUCTION] Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché . . .
>
> . . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Je souligne.]

The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not

119 L'appelant semble prétendre que la juge de première instance s'est acquittée de son devoir d'appliquer le droit aux faits simplement en intégrant les faits de l'espèce à la formulation du critère juridique. Ce n'était toutefois pas suffisant. Bien qu'il ressorte clairement des passages précités que la juge de première instance a, à partir des faits, conclu que la portion du chemin Snake Hill où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien dans cette partie de ses motifs qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. Le fait de conclure à l'existence d'un danger, même caché, n'implique pas forcément que le conducteur

2002 SCC 33 (CanLII)

travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

raisonnable prenant des précautions normales ne peut pas y circuler en sécurité. Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d' « intrinsèquement » dangereux ne vide pas la question. Mes collègues affirment que la juge de première instance pouvait inférer la connaissance du danger du seul fait que la courbe serrée constituait une caractéristique permanente du chemin (par. 61). Ici encore, rien dans les motifs de la juge de première instance n'indique qu'elle a tiré une telle inférence ou n'explique en quoi une telle inférence satisfaisait aux conditions juridiques relatives à l'obligation de diligence.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate lookout considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

La juge de première instance n'a pas non plus examiné cette question ailleurs dans ses motifs. Son omission à cet égard devient encore plus évidente lorsqu'on compare son analyse (ou son absence d'analyse) à celle des affaires où les tribunaux ont appliqué la bonne démarche. La Cour d'appel a donné comme exemple deux de ces affaires. Dans *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (B.R.), le demandeur prétendait que la municipalité défenderesse aurait dû installer des panneaux signalant la présence, au milieu du chemin, d'un sillon résultant de travaux municipaux de nivellement. Le juge de première instance a estimé que, si le conducteur avait pris des précautions normales, il aurait pu rouler en sécurité sur la chaussée. Au lieu de cela, il a roulé trop vite et manqué de vigilance compte tenu des travaux d'entretien qui étaient effectués sur le chemin. Dans *Diebel Estate*, précité, il s'agissait de déterminer si la municipalité avait, en vertu de l'art. 192, l'obligation d'installer un panneau avertissant les automobilistes qu'une route rurale se terminait de façon abrupte à un croisement en T. Le juge de première instance s'est demandé comment un conducteur raisonnable prenant des précautions normales aurait roulé sur ce chemin, et il a répondu ainsi à cette question, à la p. 74 :

His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on

[TRADUCTION] Ses conclusions [celles de l'expert] pour ce qui concerne l'arrêt des automobiles découlent

2002 SCC 33 (CanLII)

the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

toutefois d'opérations mathématiques et bien que je n'aie jamais emprunté le chemin en question, d'après les descriptions faites au procès, je suis d'avis que le croisement pourrait constituer un danger la nuit pour quelqu'un qui ne connaît absolument pas l'endroit, eu égard à la vitesse de réaction de chacun et à la possibilité que quelqu'un confonde le croisement en T avec quelque chose d'autre. Par ailleurs, j'estime que quelqu'un ne connaissant aucunement l'endroit agirait de façon tout à fait téméraire en roulant à 80 kilomètres à l'heure la nuit sur un chemin de terre comme celui qui nous intéresse. [Je souligne; soulignement dans l'original omis.]

The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

121 Le fait de conclure que la juge Wright a commis une erreur de droit en omettant d'appliquer un élément essentiel du critère juridique n'invalide pas forcément ses conclusions de fait. En effet, la compétence de notre Cour en matière d'examen des questions de droit l'autorise, lorsqu'une telle erreur est décelée, à reprendre telles quelles les conclusions de fait du juge de première instance et à les réévaluer au regard du critère juridique approprié.

In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

122 Selon moi, ni les faits retenus par la juge Wright ni aucun autre élément de preuve au dossier qu'elle aurait pu prendre en considération si elle s'était posé la bonne question n'appuient sa conclusion que l'intimée a manqué à son obligation. La portion du chemin Snake Hill où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général et les conditions auxquelles les automobilistes doivent faire face à l'endroit précis de l'accident avertissent l'automobiliste raisonnable que la prudence s'impose. Les automobilistes sachant reconnaître les divers facteurs qui appellent à la prudence auraient pu franchir le soi-disant [TRADUCTION] « danger caché » sans l'aide d'un panneau de signalisation.

The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a

123 Pour savoir comment un conducteur raisonnable prenant des précautions normales aurait conduit son véhicule sur le chemin Snake Hill, il faut tenir compte de la nature du chemin et de la configuration des lieux. Un automobiliste raisonnable ne roulera pas sur une étroite route de campagne gravelée de la même façon que sur une route asphaltée. Il est raisonnable de s'attendre à ce qu'un automobiliste conduise moins vite et soit plus attentif à la présence

2002 SCC 33 (CanLII)

road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on . . . " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

de dangers potentiels sur un chemin de catégorie inférieure, particulièrement s'il n'est pas familier avec celui-ci.

Bien que, en l'espèce, la juge de première instance ait fait certains commentaires sur la nature du chemin, je souscris à la conclusion de la Cour d'appel selon laquelle [TRADUCTION] « [e]lle aurait pu examiner la question de manière plus approfondie, en tenant davantage compte du type de terrain que le chemin traversait, de la nature et de la désignation du chemin selon le système de classification des routes et ainsi de suite . . . » (par. 55). Au lieu de cela, son analyse s'est limitée aux commentaires suivants, au par. 84 de ses motifs :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin. Dans son analyse, la juge de première instance s'est attachée presque exclusivement à l'utilisation qui est faite du chemin, sans prendre en compte le genre de conditions qu'il présente aux conducteurs. Il n'est peut-être pas surprenant qu'elle ne se soit pas livrée à cette analyse approfondie, puisqu'elle ne s'est pas demandé comment un conducteur raisonnable aurait roulé sur ce chemin. Si elle s'était posé cette question, elle aurait vraisemblablement procédé à une évaluation analogue à celle qu'a faite la Cour d'appel au par. 13 de son jugement :

> [TRADUCTION] Le chemin, d'une largeur de 20 pieds environ, a été qualifié de « chemin nivelé », qu'on appelle aussi parfois « chemin d'accès », soit tout juste une catégorie au-dessus d'un « chemin de prairie ». Comme tel, il n'a été ni renforcé ni revêtu de gravier, sauf légèrement à l'une de ses extrémités, il s'agit tout simplement d'un chemin nivelé à même le terrain, suivant le tracé présentant le mois d'obstacles. On n'y a installé aucune signalisation.

2002 SCC 33 (CanLII)

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

Comme le chemin Snake Hill est une route de catégorie inférieure, à peine un ou deux niveaux au-dessus d'un chemin de prairie, on peut présumer qu'un conducteur raisonnable prenant des précautions normales y roulerait avec une certaine prudence.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

126 Après avoir examiné la nature générale du chemin et avoir conclu que, du fait de cette nature même, une certaine prudence s'imposait, il faut néanmoins prendre en considération les caractéristiques physiques du chemin à l'endroit où l'accident s'est produit. Même sur des chemins de catégorie inférieure, un conducteur raisonnable prenant des précautions normales pourrait être pris par surprise sur un tronçon particulièrement dangereux. Il s'agit là, en fait, de l'argument central présenté par l'appelant en l'espèce. Selon sa thèse, dite de la « nature hybride » du chemin, au par. 8 de son mémoire, le fait que la courbe où est survenu l'accident se trouve entre des tronçons en ligne droite risquait d'amener les automobilistes à croire que les virages pouvaient être pris à des vitesses supérieures à celles auxquelles ils pouvaient l'être en réalité.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

127 Bien que les motifs de la juge de première instance n'indiquent pas clairement si elle a retenu la thèse de la « nature hybride » du chemin, il semble que sa conclusion selon laquelle la municipalité a manqué à son obligation d'entretien ait reposé largement sur son examen des caractéristiques physiques du chemin, à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. S'appuyant sur les témoignages de deux experts, MM. Anderson et Werner, elle a estimé que la portion du chemin où s'est produit l'accident constituait un [TRADUCTION] « danger pour le public ». Selon elle, le fait que la distance de visibilité ait été réduite par la présence de broussailles empêchait les automobilistes de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Sur la base des témoignages d'experts, elle a conclu que le virage ne pouvait être pris à une vitesse supérieure à 60 km/h dans des conditions favorables, ou 50 km/h sur chaussée humide.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an

128 Je ne rejetterais pas, je le répète, la conclusion de fait selon laquelle la courbe présentait un risque

2002 SCC 33 (CanLII)

inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

intrinsèque pour les automobilistes. Toutefois, il n'y a rien dans la preuve qui permette de conclure qu'un conducteur raisonnable prenant des précautions normales aurait été incapable de prendre le virage en sécurité. Comme je l'ai expliqué plus tôt, l'obligation d'entretien des municipalités n'est en cause que lorsqu'il existe une situation objectivement dangereuse et qu'il est établi qu'un conducteur raisonnable s'approchant du danger serait incapable d'assurer sa sécurité en raison des caractéristiques de ce danger.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

Je partage l'opinion de la juge de première instance selon laquelle une partie du danger créé par les broussailles se trouvant en bordure de la route tenait au fait qu'un conducteur ne pourrait deviner le rayon de courbure prononcé du virage à droite serré qu'elles dissimulaient. À mon sens, toutefois, le véritable danger intrinsèque de ce tronçon du chemin résidait dans le fait que les broussailles, ainsi que le court rayon de courbure du virage, empêchent les automobilistes circulant en direction est de voir si un véhicule s'approche en sens inverse. Par conséquent, il est très peu probable qu'un conducteur raisonnable prenant des précautions normales approcherait de ce virage à une vitesse supérieure à 50 km/h, vitesse à laquelle la juge de première instance a conclu qu'il était possible de le prendre en sécurité. Étant donné qu'un conducteur raisonnable n'approcherait pas de ce virage à une vitesse supérieure à celle lui permettant de le prendre en sécurité, je conclus que le virage ne constituait pas un risque pour le conducteur raisonnable.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed

Il suffit d'examiner les photos du tronçon du chemin Snake Hill où l'accident est survenu pour constater à quel point il existait des indices visuels propres à inciter les conducteurs à s'approcher du virage avec prudence (dossier de l'intimée, vol. II, p. 373-376). Les photos, qui montrent ce que voit le conducteur sur le point d'amorcer le virage, laissent voir la présence de broussailles s'avançant considérablement au-dessus du chemin. Il ressort clairement de ces photographies qu'un automobiliste approchant du virage ne manquerait pas pressentir le risque que présente celui-ci, savoir qu'il est tout simplement impossible de voir de l'autre côté de la courbe ce qui peut arriver en sens inverse. De plus,

2002 SCC 33 (CanLII)

by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> . . . if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. . . . You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

le danger que constitue l'incapacité de voir ce qui arrive en sens inverse est d'une certaine manière exacerbé par le fait que le chemin est utilisé par des exploitants agricoles. Au procès, ce risque a été décrit ainsi par M. Sparks, ingénieur, qui témoignait à titre d'expert :

> [TRADUCTION] . . . si vous ne pouvez pas voir, si vous ne pouvez pas voir assez loin sur le chemin pour, vous savez, savoir si quelqu'un arrive en sens inverse avec un tracteur tirant une herse et que vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs, selon moi, que l'attention et la prudence s'imposent.

131 Le témoignage d'expert retenu par la juge de première instance n'étaye pas sa conclusion que la portion du chemin Snake Hill où s'est produit l'accident présente un risque pour un conducteur raisonnable prenant des précautions normales. Lorsqu'on lui a demandé si un automobiliste prenant des précautions normales amorcerait le virage à vitesse réduite étant donné qu'il ne peut voir ce qui l'attend au détour du chemin, M. Werner a reconnu que lui-même prend le virage [TRADUCTION] « à vitesse réduite » et qu'il serait prudent que les conducteurs ralentissent en raison de la distance de visibilité limitée. De même, M. Anderson a admis avoir pris le virage à 40-45 km/h la première fois qu'il est passé par là, car il [TRADUCTION] « ne voulait pas se placer dans une situation difficile ». Lorsqu'on lui a demandé s'il avait pris le virage à cette vitesse parce qu'il ne pouvait pas voir ce qui l'attendait, il a répondu par l'affirmative : [TRADUCTION] « [c']est la raison pour laquelle je l'ai approché comme je l'ai fait. »

132 Fait encore plus révélateur peut-être, M. Nikolaisen lui-même a témoigné qu'il ne pouvait pas savoir si un véhicule venait en sens inverse lorsqu'il s'approchait du virage. L'échange suivant, durant le contre-interrogatoire de M. Nikolaisen au procès par l'avocat de la partie adverse, est éclairant :

> [TRADUCTION]
>
> Q. . . . Vous avez dit à mon savant collègue, M. Logue, que votre visibilité était plutôt réduite, est-ce exact? La visibilité sur le chemin est plutôt réduite, n'est-ce pas?

2002 SCC 33 (CanLII)

A. As in regards to travelling through the curves, yes, that's right, yeah.

Q. Yes. And you did not know what was coming as you approached the curve, that is correct?

A. That's correct, yes.

Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?

A. Or a tractor or a cultivator or something, that's right.

Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?

A. That's right, yeah, that is correct.

R. Lorsqu'on se trouve dans les courbes, oui, c'est exact.

Q. Oui. Et vous ne saviez pas ce qui s'en venait lorsque vous approchiez du virage, est-ce exact?

R. C'est exact, oui.

Q. Il aurait pu y avoir un véhicule venant dans votre direction de l'autre côté de la courbe ou quelqu'un se promenant à cheval sur le chemin, est-ce exact?

R. Ou un tracteur, un cultivateur ou autre chose, c'est vrai.

Q. Ou un tracteur ou un cultivateur. Vous savez, puisque vous avez grandi en milieu rural en Saskatchewan, que toutes ces situations sont autant de possibilités, n'est-ce pas?

R. C'est vrai, oui.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

Je ne retiens pas non plus l'argument de l'appelant portant que la « nature hybride » du chemin avait pour effet d'amener les conducteurs à prendre le virage à une vitesse inappropriée. Cette théorie repose sur l'hypothèse que les automobilistes roulent sur les portions en ligne droite du chemin à une vitesse pouvant atteindre 80 km/h, et qu'ils se trouvent en conséquence pris de court lorsqu'ils doivent prendre un virage soudain. Pourtant, bien que la vitesse permise sur le chemin soit 80 km/h, rien dans la preuve n'indiquait qu'un conducteur raisonnable aurait roulé à cette vitesse à quelque endroit du chemin. Après avoir témoigné que les conducteurs [TRADUCTION] « étaient autorisés » à rouler à une vitesse maximale de 80 km/h, cette vitesse étant la vitesse permise par défaut (et non la vitesse affichée), M. Werner a reconnu que les chemins nivelés de la province ne sont pas conçus pour permettre la circulation à une vitesse de 80 km/h. À l'instar de la Cour d'appel, je suis d'avis que la preuve établit que [TRADUCTION] « le chemin Snake Hill était manifestement un chemin de terre ou un chemin nivelé » et qu'il « n'était clairement pas conçu pour permettre une vitesse générale de 80 kilomètres à l'heure ». Comme je l'ai souligné précédemment, la configuration du chemin, de même que sa nature et sa catégorie doivent être prises en considération pour décider si le conducteur raisonnable aurait pu y rouler en sécurité.

2002 SCC 33 (CanLII)

134

Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?

A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.

Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?

A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.

Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?

A. Yes, it changed, yes.

Q. Now you were faced with something other than a straight road?

A. M'hm. Yes.

Q. Now you were on -- and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

En outre, rien dans la preuve présentée au procès n'indiquait que les conducteurs avaient été trompés de quelque façon par la soi-disant « nature hybride » du chemin. L'échange suivant, entre l'avocat de l'intimée et M. Werner, illustre bien la façon dont les automobilistes perçoivent le chemin :

[TRADUCTION]

Q. Maintenant M. Werner, ne seriez-vous pas d'accord pour dire que le changement dans la nature de ce chemin lorsque vous rouliez d'est en ouest était très évident?

R. On roulait en ligne droite, puis on descendait une colline, et on ne savait vraiment pas ce qui pouvait se trouver de l'autre côté de la colline.

Q. C'est vrai. Mais je veux dire, le fait que le chemin suivait d'abord un tracé horizontal et en ligne droite pour soudainement devenir une colline et que vous ne pouviez pas voir -- vous pouviez voir du haut de la colline que le chemin ne continuait pas en ligne droite, n'est-ce pas?

R. Oui, vous pouviez, du haut de la colline, c'est une colline très abrupte, oui.

Q. Et au fur et à mesure que vous descendiez la colline il devenait assez évident, n'est-ce pas, que la nature du chemin changeait?

R. Oui, ça changeait, oui.

Q. Vous vous trouviez alors devant autre chose qu'un chemin en ligne droite?

R. M'hm. Oui.

Q. Vous étiez maintenant sur -- et à un moment donné la surface du chemin changeait, n'est-ce pas?

R. Oui.

Q. Et, évidemment, le chemin n'était plus, j'utilise le terme aménagé pour désigner un chemin possédant une certaine élévation et qui est dans une certaine mesure drainé. Au fur et à mesure que vous rouliez d'ouest en est, vous constatiez, vous pouviez voir, il était évident, qu'il ne s'agissait plus d'un chemin aménagé?

R. Il s'agit essentiellement d'un chemin tracé suivant la topographie des lieux et sans fossés, et il y avait un accotement à droite du conducteur. C'était différent de la portion précédente.

Q. Oui. Et toutes ces différences étaient évidentes, n'est-ce pas?

2002 SCC 33 (CanLII)

A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

R. Bien, je -- elles étaient évidentes, suffisamment évidentes pour moi, oui. [Je souligne.]

Bien qu'ils puissent constituer des facteurs concluants dans d'autres affaires, la « nature hybride » du chemin, le rayon de courbure du virage, le revêtement du chemin et l'absence d'élévation n'étayent pas en l'espèce la conclusion de la juge de première instance. Pour répondre à la question de savoir comment un conducteur raisonnable prenant des précautions normales roulerait sur ce chemin, il faut faire appel au bon sens. Il n'était pas nécessaire d'installer un panneau de signalisation en l'espèce, et ce pour la simple raison que n'importe quel conducteur raisonnable aurait réagi aux indices naturels l'invitant à ralentir. Le droit n'oblige pas les municipalités à installer des panneaux signalant aux automobilistes des dangers qui ne font pas courir de risque véritable aux conducteurs prudents. Imposer à la municipalité l'obligation d'installer un panneau dans un cas comme celui qui nous occupe équivaut à modifier la nature de l'obligation qu'ont les municipalités envers les conducteurs. Les municipalités ne sont pas tenues d'aménager des panneaux d'avertissement à l'intention des conducteurs en état d'ébriété et, ainsi, de remédier à leur incapacité de réagir aux indices qui alertent le conducteur moyen de la présence d'un danger.

Mes collègues affirment que la juge de première instance a dûment pris en considération tous les aspects du critère juridique applicable, y compris la question de savoir si la courbe présentait un risque pour le conducteur moyen qui prend des précautions normales. Ils disent que la juge de première instance a effectivement examiné, explicitement et implicitement, la conduite de l'automobiliste moyen ou raisonnable qui s'approche du virage. Ils font ensuite remarquer qu'elle a fait état du témoignage des experts MM. Anderson et Werner, qui ont tous deux analysé la conduite de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait qu'elle ait imputé une partie de la responsabilité à M. Nikolaisen indique, à leur avis, qu'elle a évalué sa conduite au regard à la norme du conducteur moyen, et qu'elle a donc pris en compte la façon dont ce dernier aurait conduit (par. 40).

2002 SCC 33 (CanLII)

I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

137 En toute déférence, je ne crois pas qu'il ressorte explicitement des motifs de la juge de première instance qu'elle s'est demandé si la portion du chemin où s'est produit l'accident constituait un risque pour le conducteur raisonnable prenant des précautions normales. Comme je l'ai expliqué précédemment, le fait que la juge de première instance ait reformulé le critère juridique sous forme de conclusion n'indique aucunement qu'elle s'est demandé si le conducteur moyen aurait considéré la courbe comme dangereuse.

Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

138 Je n'estime pas non plus que l'examen de la façon de conduire de l'automobiliste moyen dans cette situation ressorte « implicitement » des motifs de la juge de première instance. À mon avis, il est très problématique de présumer qu'un juge de première instance a tiré des conclusions de fait à l'égard d'une question précise alors qu'il n'y a aucune indication dans ses motifs quant à la nature de ces conclusions. Bien que le juge de première instance soit censé connaître le droit, on ne peut présumer qu'il a tiré à une conclusion factuelle en l'absence d'indication dans ses motifs qu'il est effectivement arrivé à cette conclusion. Si le tribunal de révision est prêt à supposer que le juge de première instance a tiré certaines conclusions, sur la foi de la preuve figurant au dossier, bien que rien dans les motifs n'indique qu'il a vraiment tiré ces conclusions, alors le tribunal de révision ne saurait conclure que le juge de première instance a mal interprété des éléments de preuve ou a négligé d'en tenir compte.

In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if

139 À mon avis, tout au long de leurs motifs, mes collègues ont à tort présumé que la juge de première instance était arrivée à certaines conclusions de fait fondées sur la preuve, malgré le fait que ces conclusions ne soient pas formulées dans ses motifs. Quant à la question de savoir si le virage présentait un risque pour le conducteur moyen, mes collègues ont fait remarquer qu'« en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins » (par. 46). Le problème que pose cet énoncé est que, même si la juge de première instance s'est appuyée sur les témoignages de MM. Anderson et Werner

2002 SCC 33 (CanLII)

any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

pour conclure que la portion du chemin Snake Hill où s'est produit l'accident constituait un danger, il est impossible, à partir de ses motifs, de dire si elle s'est appuyée sur un témoignage — et, dans l'affirmative, sur lequel de ceux-ci — pour conclure que la courbe présentait un risque pour le conducteur moyen qui prend des précautions raisonnables. En l'absence de toute indication que la juge de première instance s'est penchée sur cette question, je ne suis pas disposé à présumer qu'elle l'a fait.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge <u>only</u> to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

De même, mes collègues supposent l'existence de conclusions factuelles dans leur examen de la question de la connaissance incombant à la municipalité. Sur ce point, ils réitèrent que « le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge de procès » (par. 62). Au paragraphe 64 de leurs motifs, mes collègues examinent les conclusions de la juge de première instance sur la question de la connaissance et concluent qu'elle « a inféré que la municipalité aurait dû être informée de la situation sur le chemin à Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger ». Je ne crois pas qu'on puisse à juste titre conclure que la juge de première instance est arrivée à la conclusion que le système d'inspection routière de la municipalité était inadéquat, alors que rien dans ses motifs n'indique qu'elle a tiré cette conclusion. Mes collègues estiment en outre que la juge de première instance n'a pas prêté à la municipalité la connaissance requise sur la base des accidents survenus antérieurement sur le chemin Snake Hill (par. 65). Ils disent même qu'il n'était pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3) (par. 67). À mon avis, ils donnent à ces conclusions une nouvelle interprétation, qui contredit directement les motifs qu'elle a exposés. La juge de première instance examine d'autres facteurs qui touchent à la connaissance requise, <u>uniquement</u> pour souligner l'importance qu'elle accorde au fait que des accidents sont survenus antérieurement ailleurs sur le chemin (au par. 90) :

2002 SCC 33 (CanLII)

If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

[TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que ce chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. [Je souligne.]

141 My colleagues refer to the decision of *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

Mes collègues citent l'arrêt *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60, dans lequel j'ai dit, au par. 15, qu'« une omission [dans les motifs du juge de première instance] ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée ». Cependant, le présent pourvoi peut être distingué de l'affaire *Van de Perre*. Dans cette affaire, la Cour d'appel avait irrégulièrement substitué ses propres conclusions de fait aux conclusions factuelles évidentes du juge de première instance, au motif que celui-ci n'avait pas pris en compte tous les éléments de preuve. Par contraste, dans le présent pourvoi, mes collègues affirment que notre Cour ne doit pas modifier les « conclusions de la juge de première instance », même si aucune conclusion n'a été tirée et s'il faut supposer leur existence à partir de la preuve. En l'espèce, je suis d'avis que l'omission de la juge de première instance de tirer quelque conclusion que ce soit quant à la question de savoir si le conducteur moyen aurait considéré comme dangereux le tronçon du chemin où s'est produit l'accident fait naître la conviction rationnelle que, sur ce point, elle a négligé d'examiner la preuve de telle manière que sa conclusion en a été affectée.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an

Enfin, je ne peux souscrire à l'opinion que la conclusion de la juge de première instance selon laquelle M. Nikolaisen a fait preuve de négligence vaut examen de la question de savoir si l'automobiliste moyen prenant des précautions normales aurait estimé que la courbe où s'est produit l'accident était dangereuse. Il ressort clairement des motifs de la juge de première instance qu'elle a tiré les conclusions de fait suivantes : il était possible de prendre

2002 SCC 33 (CanLII)

excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

le virage en sécurité à 60 km/h à l'heure sur chaussée sèche et à 50 km/h sur chaussée humide, et M. Nikolaisen s'est approché du virage à une vitesse excessive. Comme je l'ai indiqué plus tôt, elle a omis de se demander si le conducteur moyen qui prend des précautions normales se serait approché du virage à une vitesse qui lui aurait permis de le prendre en sécurité ou, autrement dit, si la courbe présentait un danger réel pour le conducteur moyen.

B. *Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?*

B. *La juge de première instance a-t-elle commis une erreur en concluant que la municipalité intimée connaissait ou aurait dû connaître le danger que présentait le chemin municipal?*

143 Pursuant to s. 192(3) of *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

Conformément au par. 192(3) de la *Rural Municipality Act, 1989*, aucune faute n'est imputée à la municipalité à moins que le demandeur n'établisse que celle-ci « connaissait ou aurait dû connaître le mauvais état du chemin ».

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le mauvais état dans lequel se trouvait, prétend-on, le chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. C'est ce qui ressort de ses conclusions à cet égard, aux par. 89 à 91 de ses motifs :

> Breach of the statutory duty of care imposed by section 192 of the *Rural Municipality Act*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance

> [TRADUCTION] On ne peut reprocher à la municipalité rurale d'avoir manqué à l'obligation légale de diligence imposée par l'art. 192 de la loi intitulée la *Rural Municipality Act*, précitée, que si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill. De 1978 à 1990, quatre accidents sont survenus sur ce chemin. Trois de ces accidents ont eu lieu dans le même secteur que celui où le véhicule de Nikolaisen a fait un tonneau. On ne connaît pas le lieu précis du quatrième accident. Bien que, dans au moins trois de ces accidents, les automobilistes aient circulé en sens inverse du véhicule de Nikolaisen, les accidents se sont produits dans la partie la plus dangereuse du chemin Snake Hill — là où commencent les courbes, et non dans la partie où le chemin est généralement droit et plat. Au moins deux de ces accidents ont été signalés aux autorités.
>
> Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas

2002 SCC 33 (CanLII)

given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

J'estime que, en omettant d'installer et de maintenir un panneau d'avertissement ou de signalisation dans cette partie du chemin Snake Hill, la M.R. n'a pas satisfait à la norme de diligence qui est raisonnable dans les circonstances. Par conséquent, elle ne s'est pas acquittée de son obligation de diligence à l'égard des automobilistes en général et à l'égard de M. Housen en particulier. [Je souligne.]

145 La question de savoir si la municipalité aurait dû connaître le mauvais état du chemin (en l'occurrence, le risque que présentait l'absence de signalisation) soulève à la fois des questions de droit et des questions de fait. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, au regard des obligations qui incombent au conseiller municipal ordinaire, raisonnable et prudent (*Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 28). Le juge de première instance répond ensuite à la question en appréciant les faits de l'espèce dont il est saisi.

146 J'estime que la juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin. Elle a commis une erreur de droit lorsqu'elle a examiné la question de la connaissance du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent. Elle a commis une autre erreur de droit en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a clairement commis une erreur de fait en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur le chemin Snake Hill.

2002 SCC 33 (CanLII)

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

Il ressort implicitement des motifs de la juge de première instance qu'elle n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue du conseiller municipal prudent. Pour trancher la question de la connaissance requise suivant le critère prévu par la loi, l'intimée ne pouvait être tenue aux mêmes normes qu'un spécialiste analysant la courbe après l'accident. Pourtant, c'est exactement ce qu'a fait la juge de première instance. Elle s'est fondée sur les témoignages d'expert donnés par MM. Anderson et Werner pour conclure que la courbe présentait un danger caché. Elle a également reconnu implicitement que le risque visé par la courbe n'était pas un risque facilement décelable par un profane. Cela ressort clairement du passage de son jugement où elle considère comme une excuse valable pour justifier le dépôt tardif de l'action contre l'intimée l'explication de l'avocat de l'appelant selon laquelle il ne croyait pas que l'intimée était dans son tort jusqu'à ce qu'il prenne connaissance des opinions des experts. La juge de première instance a dit ceci à cet égard : [TRADUCTION] « [c]e n'est que plus tard, après avoir obtenu l'opinion des experts, que la possibilité que la nature du chemin Snake Hill puisse avoir été un facteur ayant contribué à l'accident a été sérieusement envisagée » (par. 64). Son omission de s'interroger sur le risque que courrait le conducteur prudent apparaît elle aussi clairement, lorsqu'on considère qu'elle n'a pas tenu compte de la preuve concernant la façon dont les deux experts avaient eux-mêmes pris le virage dangereux (voir le par. 54 qui précède).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of

Si la juge de première instance avait répondu à la question de savoir si la municipalité aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin en se plaçant du point de vue du conseiller municipal prudent, elle serait nécessairement arrivée à une conclusion différente. Il n'y avait aucune preuve établissant que le danger existant créait un risque que l'intimée aurait dû connaître. Cette dernière n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers. Elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des

2002 SCC 33 (CanLII)

trees and vegetation which grew up along the sides of the road.

In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at pp. 503-4:

. . . "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge

courbes ou à la présence d'arbres et de végétation en bordure du chemin.

149 En outre, la question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, la juge de première instance n'aurait pas dû attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Outre les éléments de preuve examinés précédemment relativement à la norme de diligence, les témoignages de plusieurs témoins ordinaires qui ont déposé au procès étayent cette conclusion. Craig Thiel, qui habite le long de ce chemin, a témoigné qu'il ne savait pas que le chemin Snake Hill avait la réputation d'être dangereux et qu'il n'avait lui-même jamais éprouvé de difficulté à conduire à l'endroit du chemin où est survenu l'accident. Sa conjointe, Toby, a également dit ne pas avoir connu de problème sur ce chemin.

150 La juge de première instance a clairement commis une autre erreur de fait en présumant, sur la foi des quatre accidents survenus auparavant sur le chemin Snake Hill, que la municipalité connaissait l'existence du danger. Bien que ses conclusions de fait relativement aux accidents eux-mêmes soient solidement étayées par la preuve, elles n'appuient tout simplement pas sa conclusion qu'un conseiller municipal prudent aurait dû savoir qu'il existait un risque pour le conducteur prudent. En conséquence, la juge de première instance a fait erreur en tirant une inférence déraisonnable de la preuve qui lui était soumise. Comme il a été indiqué plus tôt, la norme de contrôle applicable aux inférences de fait est, d'abord et avant tout, celle de la décision raisonnable. Les propos suivants du juge Spence dans l'arrêt *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491, p. 503-504, illustrent bien ce principe :

. . . « c'est un principe bien connu que les tribunaux d'appel ne doivent pas remettre en cause les conclusions

2002 SCC 33 (CanLII)

if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

de fait du juge de première instance, s'il existait des témoignages dignes de foi sur lesquels le juge pouvait raisonnablement fonder ses conclusions ». [Je souligne.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

Comme je l'ai mentionné précédemment, il n'y avait aucune preuve indiquant que l'intimée savait concrètement que d'autres accidents étaient survenus auparavant sur le chemin Snake Hill. Au contraire, M. Danger, l'administrateur de la municipalité, a témoigné qu'il avait entendu parler de ces accidents pour la première fois au procès.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

Par conséquent, il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière. L'appelant a expressément plaidé cet argument devant notre Cour, insistant fortement sur le fait que l'intimée [TRADUCTION] « ne dispose pas d'un mécanisme structuré de collecte de cette information, que ce soit par l'entremise des conseillers ou d'autres personnes ». Suivant cet argument, on prétend que, si la municipalité avait établi un système officiel lui permettant de savoir si des accidents sont survenus sur une route donnée, elle aurait su que des accidents s'étaient produits sur le chemin Snake Hill et elle aurait pris les mesures correctives appropriées pour faire en sorte que le chemin soit sécuritaire pour les usagers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the *The Rural Municipality Act, 1989* was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity

J'estime que l'argument susmentionné présente deux lacunes importantes. Premièrement, l'argument selon lequel les autres accidents survenus sur le chemin Snake Hill étaient pertinents en l'espèce repose sur la présomption que la municipalité intimée avait l'obligation d'avoir un système « structuré » d'information sur les accidents, et que le système informel en place était d'une certaine manière déficient. À mon avis, l'appelant ne s'est pas acquitté du fardeau qui lui incombait de démontrer que le système sur lequel la municipalité se fondait pour remplir ses obligations au titre de l'art. 192 de la *Rural Municipality Act, 1989*, était déficient. La preuve établit que, avant 1988, il n'existait pas de système officiel d'information sur les accidents. Il existait néanmoins, un système informel dans le cadre duquel les conseillers municipaux étaient chargés de s'enquérir de l'existence de dangers

2002 SCC 33 (CanLII)

with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

sur les routes. Les conseillers étaient informés de l'existence de dangers par suite des plaintes qu'ils recevaient et par leur propre expérience des routes situées dans les cantons qu'ils représentaient. La juge de première instance a commis une erreur manifeste en concluant que ce système informel était déficient, alors qu'aucune preuve n'indiquait quelles étaient les pratiques suivies par d'autres municipalités à cet égard au moment des accidents, ni n'expliquait en quoi aurait consisté un système raisonnable, compte tenu particulièrement du fait que la municipalité rurale concernée ne comptait que six conseillers. Il n'y a aucune preuve indiquant qu'une municipalité rurale de ce genre a besoin du genre de mécanisme élaboré de collecte de renseignements dont peut avoir besoin une grande ville, où les accidents sont plus fréquents et où il est peu probable que le bouche à oreille soit suffisant pour porter les dangers à l'attention des conseillers.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

La municipalité intimée possède maintenant un système plus officiel d'information sur les accidents. Depuis 1988, en effet, le ministère de la Voirie et du Transport de la Saskatchewan communique annuellement à chaque municipalité la liste de tous les accidents d'automobile survenus sur son territoire et signalés aux policiers. Bien que ce système puisse, j'en conviens, permettre aux municipalités de mieux repérer les dangers dans certaines circonstances, je ne crois pas que son adoption soit pertinente eu égard aux faits de l'espèce. Un seul accident, survenu en 1990, a été signalé à l'intimée par le truchement de ce système. L'appelant n'a produit aucun élément de preuve indiquant que cet accident est survenu au même endroit que celui où le véhicule de M. Nikolaisen a fait un tonneau, ou qu'il était attribuable à l'état de la route plutôt qu'à la négligence du conducteur.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite

Deuxièmement, élément peut-être plus important encore, il était tout simplement illogique pour la juge de première instance d'inférer de l'existence des accidents antérieurs que l'intimée aurait dû savoir que l'endroit où le véhicule de M. Nikolaisen a fait un tonneau présentait un risque pour les conducteurs prudents. Les trois accidents — qui sont survenus en 1978, 1985 et 1987

2002 SCC 33 (CanLII)

direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

— se sont produits dans des courbes différentes, et les véhicules concernés circulaient en sens inverse. L'accident de 1978 et celui de 1987 ont eu lieu dans le premier virage à droite au pied de la colline, les automobilistes roulant alors en direction ouest. L'accident de 1985 s'est produit dans la deuxième courbe, toujours en direction ouest, encore une fois dans une courbe différente de celle où le véhicule de M. Nikolaisen a fait un tonneau. Si ces accidents indiquent quoi que ce soit, c'est plutôt que la municipalité aurait dû se préoccuper des courbes qui, pour les véhicules circulant en direction ouest, se trouvent à l'est de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. La preuve n'a révélé aucun accident qui se serait produit à l'endroit précis où est survenu l'accident qui nous intéresse.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

Qui plus est, le simple fait qu'un accident se produise n'emporte pas en soi l'obligation d'installer un panneau signalisateur. Dans bien des cas, les accidents surviennent non pas à cause de l'état de la route, mais plutôt à cause de la négligence du conducteur. Un bon exemple de cela est l'accident dont a été victime M. Agrey sur le chemin Snake Hill en 1978. Ce dernier a témoigné que, juste avant l'accident, il avait quitté des yeux la route pour parler à l'un des passagers du véhicule. Un autre passager lui a crié de faire attention, mais il était déjà trop tard pour bien exécuter le virage. Accusé de conduite imprudente, M. Agrey a été déclaré coupable et condamné à une amende. Comme on l'a vu plus tôt, dans le contexte de la norme de diligence, une municipalité n'a pas l'obligation de rendre les chemins sécuritaires pour tous les conducteurs, indépendamment de la prudence et de l'attention avec lesquelles ils conduisent. Elle est seulement tenue de maintenir les chemins dans un état propre à permettre au conducteur raisonnable qui prend des précautions normales d'y circuler en sécurité.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does not recall

Outre les erreurs substantielles examinées précédemment, je tiens également à souligner que, selon moi, la juge de première instance ne s'est pas souciée du fardeau de preuve sur cette question. Lorsqu'elle a examiné la preuve relative aux autres accidents survenus sur le chemin Snake Hill, la juge

2002 SCC 33 (CanLII)

any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. *Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?*

The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only

de première instance a fait les remarques suivantes au par. 31 : [TRADUCTION] « La gendarme Forbes ne se souvient pas de quelque autre accident sur le chemin Snake Hill durant la période où elle était affectée au détachement de la GRC de Shellbrook, de 1987 à 1996. Le caporal Healey avait entendu parler d'un autre accident. Forbes et Healey ne sont que deux des neuf membres du détachement de la GRC à Shellbrook » (je souligne). Par cette remarque, la juge de première instance semble laisser entendre que d'autres accidents sur le chemin Snake Hill ont pu avoir été signalés et que l'intimée aurait dû le savoir. En toute déférence pour la juge de première instance, s'il y avait eu d'autres accidents que ceux qui ont été mentionnés au procès, il appartenait à l'appelant d'en faire la preuve, soit en faisant témoigner les membres de la GRC à qui les accidents avaient été signalés ou encore les personnes en cause dans ces accidents, soit en utilisant tout autre moyen à sa disposition. En outre, l'importance que la juge de première instance a accordée aux autres accidents survenus sur le chemin Snake Hill dépendait du postulat que l'intimée aurait dû posséder un système officiel d'information sur les accidents. L'intimée n'était pas tenue de prouver qu'elle n'avait pas l'obligation de disposer d'un tel système. Il incombait plutôt à l'appelant d'établir que ce genre de système était nécessaire et que le système informel existant était insuffisant.

C. *La juge de première instance a-t-elle commis une erreur en concluant que l'accident avait été causé, en partie, par le défaut de la municipalité intimée d'installer un panneau de signalisation près de la courbe?*

158 Les conclusions de la juge de première instance au sujet du lien de causalité figurent au par. 101 de son jugement, où elle dit ceci :

[TRADUCTION] J'estime que l'accident s'est produit parce que M. Nikolaisen s'est engagé dans le virage sur le chemin Snake Hill à une vitesse légèrement supérieure à celle qui lui aurait permis de réussir la manœuvre. L'accident est survenu dans la portion la plus dangereuse du chemin Snake Hill, à un endroit où un panneau d'avertissement ou de signalisation aurait dû être installé et maintenu pour avertir les automobilistes de

2002 SCC 33 (CanLII)

served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

l'imminence d'un danger caché. Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir. Je suis convaincue, selon la prépondérance des probabilités, que si on avait prévenu M. Nikolaisen de l'existence de la courbe, il aurait réagi et pris des mesures appropriées, qui l'auraient empêché de perdre la maîtrise de son véhicule en s'engageant dans le virage.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

Les conclusions susmentionnées de la juge de première instance touchant le lien de causalité sont des conclusions portant sur des questions de fait. Par conséquent, notre Cour n'interviendra que si elle estime que, pour arriver à ses conclusions, la juge a commis une erreur manifeste, n'a pas tenu compte d'un élément de preuve déterminant ou pertinent, a mal compris la preuve ou en a tiré des conclusions erronées (*Toneguzzo-Norvell*, précité, p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the

En arrivant à sa conclusion sur le lien de causalité, la juge de première instance a commis plusieurs des erreurs mentionnées par notre Cour dans l'arrêt *Toneguzzo-Norvell*, précité. Dans la mesure où la juge de première instance s'est fondée sur le témoignage de M. Laughlin, le seul expert à avoir témoigné sur la question du lien de causalité, j'estime qu'elle a mal interprété son témoignage ou qu'elle en a tiré des conclusions erronées. Les éléments anecdotiques des témoignages de Craig Thiel, Toby Thiel et Paul Housen concernant le degré d'ébriété de M. Nikolaisen constituent la seule autre preuve testimoniale sur le lien de causalité. Bien que leurs témoignages aient fourni quelques éléments de preuve touchant cette question, il ne s'agit pas, pour des raisons que j'examinerai plus loin, d'éléments sur lesquels la juge de première instance pouvait raisonnablement s'appuyer. Je n'estime pas non plus qu'elle pouvait se fonder sur la preuve que M. Nikolaisen avait réussi à prendre le virage permettant d'accéder au chemin Snake Hill depuis l'entrée des Thiel. L'inférence que la juge de première instance a tirée de ce fait était déraisonnable et faisait abstraction de la preuve selon laquelle

2002 SCC 33 (CanLII)

road three times in the 18 to 20 hours preceding the accident.

le véhicule de M. Nikolaisen avait fait une embardée même dans cette courbe. En outre, la juge de première instance a clairement commis une erreur en ne prenant pas en considération d'autres éléments de preuve pertinents concernant le lien de causalité, en particulier le fait que M. Nikolaisen avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident.

I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

161 Je ne partage pas l'avis de la juge de première instance voulant que le témoignage de M. Laughlin, spécialiste judiciaire en matière d'alcool au service de la GRC, étaye la conclusion que M. Nikolaisen aurait réagi à un panneau lui signalant l'imminence du virage droite où s'est produit l'accident. Le témoignage de M. Laughlin établit de façon prépondérante que des personnes dans un état d'ébriété aussi avancé que celui de M. Nikolaisen au moment de l'accident ne réagiraient vraisemblablement pas à un panneau d'avertissement. De plus, le témoignage de M. Laughlin mène irrésistiblement à la conclusion que l'alcool a été le facteur causal de l'accident. La juge de première instance a commis une erreur à cet égard, car elle a mal interprété un élément de la déposition de M. Laughlin et elle a omis de tenir compte de l'importance de son témoignage, considéré globalement.

Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

162 À la lumière des échantillons de sang prélevés par la gendarme Forbes environ trois heures après l'accident, M. Laughlin a estimé que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 mg par 100 ml de sang. Dans son témoignage, M. Laughlin a commenté en détail l'incidence d'une telle alcoolémie sur la capacité d'une personne de conduire :

Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

[TRADUCTION] Bien, Madame, l'alcoolémie que j'ai calculée en l'espèce est très élevée. Les facultés mentales essentielles qui jouent un rôle important dans la conduite d'un véhicule automobile sont affaiblies par l'alcool. Et toute habileté tributaire de ces facultés mentales est affectée, notamment l'anticipation, le jugement, l'attention, la concentration, la capacité de partager son attention entre deux choses ou plus. Et parce qu'elles sont affectées à ce point, il serait risqué pour quiconque possède un tel taux d'alcool dans son sang de conduire un véhicule automobile.

2002 SCC 33 (CanLII)

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. . . . if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. . . . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied

Interrogé sur l'état des recherches touchant l'incidence de l'alcool sur le risque d'accident automobile, voici ce qu'a dit M. Laughlin :

> [TRADUCTION] À ce taux-là, le risque qu'une personne qui consomme modérément de l'alcool provoque un accident est extrêmement élevé, probablement 100 fois plus élevé que le conducteur à jeun, ou plus encore. Et dans certains cas, à ce taux-là, j'ai lu des textes scientifiques dans lesquels on indiquait que le risque de provoquer un accident mortel est de 200 à 300 fois plus élevé que celui d'un conducteur à jeun. [. . .] [S]i la personne en état d'ébriété est quelqu'un qui a l'habitude de boire, le risque n'est pas aussi élevé. Cependant, il est plus grand que si la personne avait été à jeun. [. . .] Mais au dessus de 100 mg par 100 ml de sang, peu importe le degré de tolérance à l'alcool, une personne a les facultés affaiblies pour ce qui concerne sa capacité de conduire.

Après avoir fait ces remarques, M. Laughlin a décrit la capacité d'une personne en état d'ébriété avancé de réagir à la présence d'un danger lorsqu'elle conduit.

> [TRADUCTION] Madame, j'aimerais ajouter que conduire un véhicule est une activité exigeante, qui demande d'accomplir une multiplicité de tâches simultanément. Le danger pour la personne qui conduit en état d'ébriété réside dans le fait qu'il lui faut plus de temps pour déceler la présence d'un risque ou d'un danger; il lui faut plus de temps pour décider quelle mesure corrective est requise, et elle prend plus de temps à mettre cette décision à exécution; de plus, une telle personne peut avoir tendance à prendre de mauvaises décisions. Ce processus accroît donc le risque. Aussi, si l'ébriété est avancée au point où les habiletés motrices sont affaiblies, l'exécution de la décision s'en trouve compromise. Il s'ensuit donc une tentative plutôt malhabile de corriger la situation. De plus, certaines personnes tendent à prendre davantage de risques lorsqu'elles sont en état d'ébriété. Elles ne font pas preuve de discernement et de jugement. Elles sont incapables d'évaluer correctement les changements dans l'état de la route et les conditions météorologiques et d'adapter leur conduite en conséquence. Mais même si elles reconnaissent qu'il s'agit effectivement de dangers, elles peuvent avoir tendance à prendre davantage de risques que le conducteur à jeun.

Les remarques qui précèdent étayent la conclusion que l'accident s'est produit en raison de l'état d'ébriété de M. Nikolaisen et non de quelque manquement de la part de l'intimée. De fait, lorsque les extraits du témoignage de M. Laughlin sur lesquels

2002 SCC 33 (CanLII)

on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence.

s'est fondée la juge de première instance sont examinés dans leur contexte, ils n'appuient pas la conclusion de cette dernière que M. Nikolaisen aurait été capable de réagir à un panneau de signalisation s'il y en avait eu un. Répondant à la question d'un avocat lui demandant s'il était possible qu'une personne ayant l'alcoolémie de M. Nikolaisen voit un panneau de signalisation et y réagisse, M. Laughlin a dit ceci :

> [TRADUCTION] Oui, il est possible qu'une personne le voit et y réagisse et peut-être qu'elle réagisse adéquatement. Il est possible qu'elle ne réagisse pas adéquatement ou qu'elle ne le voit même pas. J'estime que l'élément fondamental à retenir ici est qu'il est probable que la personne ayant atteint cette alcoolémie ne voit pas le panneau, ou ne réagisse pas adéquatement, comparativement au conducteur à jeun. Que le conducteur avec cette alcoolémie commette plus d'erreurs que le conducteur à jeun. [Je souligne.]

Il est clair, dans le passage qui précède, que M. Laughlin reconnaît simplement que tout est possible, tout en avançant avec conviction qu'il y a une plus forte probabilité que les conducteurs ayant atteint ce degré d'ébriété ne réagissent pas à un panneau de signalisation ou à une autre mesure d'avertissement. Cette opinion ressort également clairement de l'extrait suivant, où il donne des précisions supplémentaires sur la capacité d'une personne en état d'ébriété de réagir aux panneaux de signalisation et à d'autres éléments sur les routes :

> [TRADUCTION] Sur le plan de la perception, le conducteur en état d'ébriété a tendance à se concentrer sur son champ visuel central et à manquer certains indices en périphérie, c'est ce qu'on appelle la vision tubulaire. En outre, les conducteurs ont tendance à se concentrer sur la partie inférieure de ce champ visuel central et, en conséquence, ils ne voient pas très loin devant eux sur la route lorsqu'il sont au volant. Et, par conséquent, les recherches indiquent que les conducteurs en état d'ébriété ont tendance à manquer davantage de panneaux de signalisation, d'avertissements, d'indices, particulièrement ceux situés dans leur champ visuel périphérique ou plus loin sur la route. [Je souligne.]

164

Au cours des plaidoiries devant notre Cour, l'appelant a souligné que, bien que M. Laughlin ait été le seul expert entendu au sujet du lien de causalité, les témoins ordinaires ont attesté que M. Nikolaisen n'avait pas les facultés visiblement

2002 SCC 33 (CanLII)

It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the *Criminal Code* process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may

affaiblies avant de quitter la résidence des Thiel. Les motifs de la juge de première instance n'indiquent pas clairement si elle s'est appuyée sur les témoignages de Craig Thiel, Toby Thiel et Paul Housen à cet égard. Dans la mesure où elle se serait fondée sur cette preuve pour conclure que l'accident avait été causé en partie par la négligence de l'intimée, j'estime qu'il était déraisonnable de le faire. En l'espèce, bien que compétents pour exprimer leur opinion sur la question de savoir s'ils pourraient, en tant que conducteurs moyens, manœuvrer en toute sécurité sur le tronçon du chemin Snake Hill où l'accident s'est produit, les témoins ordinaires n'étaient pas compétents pour évaluer le degré d'ébriété de M. Nikolaisen. La raison de leur absence de compétence à cet égard a été expliquée en ces termes par M. Laughlin, dans la réponse suivante qu'il a donnée à l'un des avocats qui lui demandait s'il était possible de tirer des conclusions du fait qu'une personne ne démontre ni signe d'affaiblissement de ses habiletés motrices ni problème d'élocution :

> [TRADUCTION] Non, votre Honneur, puisque, Madame, lorsqu'on vérifie s'il y a affaiblissement des habiletés motrices ou des signes de cet affaiblissement, on cherche des indices d'ébriété, et non d'affaiblissement des facultés. Rappelez-vous que j'ai dit que les premières facultés affectées par l'alcool sont les facultés cognitives et mentales. Elles sont toutes importantes lorsqu'il s'agit de conduire un véhicule. Cependant, lorsqu'on examine une personne qui a consommé de l'alcool, il est très difficile de dire si son attention ou sa capacité de diviser son attention, ou si sa concentration ou son jugement sont réduits. En conséquence les habiletés motrices ne sont pas des indices fiables d'affaiblissement des facultés. Et si on pense au processus prévu par le *Code criminel*, on a cessé d'y recourir depuis 30 ans en tant qu'indices utiles de l'affaiblissement des facultés. On ne se fie plus à l'appréciation subjective policier quant aux habiletés motrices d'une personne pour déterminer si les facultés de celle-ci sont affaiblies. [Je souligne.]

Il appert également des motifs de la juge de première instance qu'elle s'est dans une certaine mesure fondée sur la preuve indiquant que M. Nikolaisen avait réussi à prendre le virage à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Je partage l'avis de l'intimée selon lequel ce fait n'est tout simplement pas pertinent. La capacité de M. Nikolaisen de prendre ce virage n'établit pas que sa capacité de conduire

2002 SCC 33 (CanLII)

have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

n'était pas affaiblie. Comme l'a souligné l'intimée, au par. 101 de son mémoire, il a pu réduire sa vitesse à cet endroit, ou simplement avoir eu de la chance. Facteur plus important encore cette preuve n'aide d'aucune façon à déterminer si M. Nikolaisen aurait réagi à un panneau placé à l'approche de la courbe où s'est produit l'accident, si un tel panneau avait existé. Il n'y avait aucun panneau aux abords de la courbe située à la sortie de l'entrée, tout comme il n'y en avait pas aux abords de celle où s'est produit l'accident.

At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

166 Quoi qu'il en soit, en se fondant sur le fait que M. Nikolaisen avait pris avec succès le virage devant l'entrée des Thiel, la juge de première instance a fait abstraction de l'élément de preuve pertinent indiquant que l'arrière de son véhicule avait zigzagué à son départ de la résidence des Thiel. On peut raisonnablement inférer de cette preuve que, quoique M. Nikolaisen ait été en mesure de prendre ce virage, il n'y est pas parvenu sans difficulté. Bien que cette preuve ne soit pas nécessairement importante en soi, elle aurait dû néanmoins alerter la juge de première instance quant aux problèmes intrinsèques de l'inférence qu'elle tirait de la capacité de M. Nikolaisen de prendre ce premier virage.

In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

167 En plus de ne pas avoir tenu compte de la preuve pertinente que constituaient les traces des zigzags, la juge de première instance n'a pas considéré pertinent le fait que M. Nikolaisen avait circulé sur le chemin Snake Hill à trois reprises au cours des 18 à 20 heures ayant précédé l'accident. Dans son examen de la preuve, elle a souligné, au par. 8 de ses motifs, que [TRADUCTION] « M. Nikolaisen ne connaissait pas bien le chemin Snake Hill. Bien qu'il ait emprunté ce chemin à trois reprises au cours des 24 heures précédentes, il ne l'a fait qu'une seule fois dans la même direction que celle qu'il a prise en quittant la résidence des Thiel. »

I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether

168 Je ne vois tout simplement pas comment la juge de première instance a pu conclure que les accidents qu'ont eu des automobilistes circulant en sens inverse étaient pertinents pour statuer sur la connaissance par l'intimée de l'existence d'un risque d'accident, tout en suggérant du même souffle que le fait que M. Nikolaisen ait roulé à deux reprises

2002 SCC 33 (CanLII)

or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

en sens inverse sur le chemin en question n'était pas pertinent pour déterminer s'il aurait reconnu que la courbe présentait un risque ou s'il aurait réagi à un panneau d'avertissement. Indépendamment de cette contradiction, j'estime que le fait que M. Nikolaisen ait roulé dans la même direction sur le chemin Snake Hill après avoir quitté la résidence des Thiel pour se rendre au jamboree, la veille de l'accident, est fort pertinent en ce qui concerne le lien de causalité. La conclusion que le résultat aurait été différent si une signalisation avait prévenu M. Nikolaisen de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Je souscris à l'opinion de l'intimée que la raison évidente pour laquelle M. Nikolaisen n'a pas réussi à prendre le virage en toute sécurité dans l'après-midi du 18, alors qu'il avait déjà pris ce virage et d'autres sans difficulté au cours des 18 à 20 heures précédentes, était l'effet combiné de sa consommation d'alcool, de son manque de sommeil et du fait qu'il n'avait pas mangé.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

Pour conclure sur la question du lien de causalité, j'aimerais préciser que le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur ce point n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. La norme de contrôle applicable aux conclusions de fait est celle de la décision raisonnable et non celle de la retenue absolue. Cette norme permet au tribunal d'appel de se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse. Kerans, *op. cit.*, p. 44, a habilement exposé la logique de cette démarche dans le passage suivant :

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other

> [TRADUCTION] La solution au problème réside dans la réponse à la question de savoir si le tribunal de révision doit simplement se demander s'il existe « des éléments de preuve étayant » la conclusion. Il est possible que certains éléments de preuve étayent effectivement la conclusion alors que d'autres éléments conduisent irrésistiblement à la conclusion inverse. Un tribunal pourrait être en mesure de dire qu'un juge des faits raisonnable ne s'appuierait pas sur « certains » éléments vu l'existence des « autres »; de fait, il pourrait dire que, eu égard à

2002 SCC 33 (CanLII)

evidence" is to turn one's back on review for reasonableness.

l'ensemble des circonstances, il est convaincu qu'il était tout à fait déraisonnable de se fonder sur certains éléments compte tenu des autres. En conséquence, affirmer que « certains éléments de preuve » suffisent, sans égard aux « autres éléments », revient à abandonner l'examen du caractère raisonnable.

D. *Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?*

D. *Les juridictions inférieures ont-elles commis une erreur en concluant qu'aucune obligation de diligence de common law ne coexiste avec l'obligation légale imposée par l'art. 192 de la Rural Municipality Act, 1989?*

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

L'appelant invite notre Cour à conclure qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence imposée à l'intimée par l'art. 192 de la *Rural Municipality Act, 1989*. Selon l'appelant, l'application de l'obligation de diligence de common law dispenserait la Cour de la nécessité de se demander comment un conducteur raisonnable prenant des précautions normales aurait roulé sur le chemin en cause. L'appelant soutient que la Cour pourrait plutôt appliquer le [TRADUCTION] « critère classique de la conduite raisonnable », lequel, à son avis, l'obligerait à tenir compte des éléments suivants : la probabilité qu'un préjudice connu ou prévisible survienne, la gravité de ce préjudice et le fardeau ou le coût qu'il faudrait assumer pour le prévenir. L'appelant prétend que, suivant ce critère, l'intimée serait tenue responsable.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

Les juridictions inférieures ont rejeté l'argument susmentionné de l'appelant. Je ne modifierais pas leur décision sur cette question, car il est inutile que notre Cour impose une obligation de diligence de common law lorsqu'il existe clairement une obligation d'origine législative. Quoi qu'il en soit, l'application du critère prévu par la common law ne modifierait pas l'issue de la présente instance.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown*

Je souscris à l'argument de l'intimée selon lequel, en l'espèce, il serait redondant et inutile de conclure qu'elle est assujettie à une obligation de diligence de common law alors que le législateur lui a clairement imposé une obligation légale de diligence. Le critère à deux volets énoncé dans l'arrêt *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, pour statuer sur l'existence d'une obligation de diligence de common law, ne s'applique tout

2002 SCC 33 (CanLII)

v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> . . . if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only rea-

simplement pas lorsque le législateur a prescrit l'obligation dans la loi. Comme l'a indiqué notre Cour dans l'arrêt *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420, p. 424 :

> . . . s'il existait une obligation d'entretien imposée par la loi comme c'est le cas dans certaines provinces, il serait inutile de rechercher une obligation en droit privé en se fondant sur le principe du prochain établi dans l'arrêt *Anns c. Merton London Borough Council*, [1978] A.C. 728. En outre, il est nécessaire d'examiner la dichotomie politique générale-opérations seulement en ce qui concerne la recherche d'une obligation de diligence en droit privé.

Tous les arrêts invoqués par l'appelant pour justifier sa prétention que la municipalité devrait être assujettie à une obligation indépendante de diligence de common law peuvent être distingués de la présente affaire, étant donné qu'il n'existait aucune obligation légale de diligence dans ces affaires (*Just*, précitée; *Brown*, précitée; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Ryan*, précitée).

En outre, j'estime que le résultat serait le même en l'espèce si l'affaire était tranchée d'après les principes ordinaires de la négligence. Tout d'abord, si la Cour faisait l'analyse prévue par la common law, elle appliquerait quand même la norme légale de diligence établie dans la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée par la jurisprudence, pour déterminer l'étendue de la responsabilité de l'intimée envers l'appelant. Comme l'a dit notre Cour dans l'arrêt *Ryan*, précité, par. 29 :

> Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce qui constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent. En conséquence, les tribunaux peuvent examiner le cadre législatif dans lequel les personnes et les sociétés doivent agir, tout en reconnaissant qu'il est impossible de se soustraire à l'obligation sous-jacente de diligence raisonnable simplement en s'acquittant de ses obligations légales.

De plus, même dans le cadre de l'analyse requise par la common law, notre Cour devrait s'interroger sur le type de dangers que l'intimée aurait dû prévoir en l'espèce. Indépendamment de l'approche choisie,

2002 SCC 33 (CanLII)

sonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

VII. Disposition

In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal allowed with costs, GONTHIER, BASTARACHE, BINNIE *and* LEBEL JJ. *dissenting.*

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Solicitors for the respondent: Gerrand Rath Johnson, Regina.

il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur.

175 Depuis longtemps, les tribunaux limitent l'étendue de la norme de diligence découlant de l'existence d'un devoir légal de diligence à l'obligation pour les municipalités d'éliminer seulement les dangers qui présenteraient un risque pour le conducteur raisonnable prenant des précautions normales. Des raisons impérieuses militent en faveur du maintien de cette interprétation. Les municipalités de la province de la Saskatchewan assument l'entretien et la surveillance de quelque 175 000 kilomètres de route, dont 45 000 kilomètres font partie de la catégorie des « chemins nivelés ». La plupart de ces municipalités ne disposent ni d'effectifs permanents considérables ni de ressources importantes en temps et en argent. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle. Il s'agit en conséquent d'un changement que je ne serais pas disposé à apporter.

VII. Dispositif

176 En définitive, le jugement de la Cour de l'appel de la Saskatchewan est confirmé et le pourvoi est rejeté avec dépens.

Pourvoi accueilli avec dépens, les juges GONTHIER, BASTARACHE, BINNIE *et* LEBEL *sont dissidents.*

Procureurs de l'appelant : Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Procureurs de l'intimée : Gerrand Rath Johnson, Regina.

2002 SCC 33 (CanLII)

TAB 29

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jensen v. Ross,*
2014 BCCA 173

Date: 20140502
Docket: CA040471

2014 BCCA 173 (CanLII)

Between:

Cynthia Jane Jensen

Appellant
(Plaintiff)

And

Margaret Ross, Dr. Kirstie Overhill,
Ministry of Children and Family Development,
Polly Powley, Janice Pentland-Smith, Paul McKinnon,
Don Fairweather, Blaine Hagedorne, Elaine Hagedorne,
Super Valu Grocery Store, Dr. Ruth Campling,
North Shore Home Support Services, and
RCMP, Gibsons Detachment

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated November 29, 2012 (*Jensen v. Ross*, Fort St. John Docket No. 20551).

The Appellant Cynthia Jane Jensen:	Appearing in Person
Counsel for the Respondent Margaret Ross:	S. Brearley
Counsel for the Respondents Dr. Kirstie Overhill and Dr. Ruth Campling:	R.D. Irving
Counsel for the Respondent North Shore Home Support Services:	S.L. Hamilton
Counsel for the Respondent Don Fairweather:	J.G. Bye

Counsel for the Respondents Blaine Hagedorne, Elaine Hagedorne and Super Valu Grocery Store:	J. Flemming
Counsel for the Respondent Ministry of Children and Family Development, Polly Powley, Janice Pentland-Smith and Paul McKinnon:	P. Manhas
Place and Date of Hearing:	Vancouver, British Columbia April 7, 2014
Place and Date of Judgment:	Vancouver, British Columbia May 2, 2014

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

2014 BCCA 173 (CanLII)

Summary:

The appellant brought proceedings in 2011 concerning events that took place between 1988 and 1990. On an application to amend her style of cause the chambers judge expressed concern that the claims appeared to have been brought out of time, seized herself of the matter and ordered a case planning conference. At the case planning conference the chambers judge struck the appellant's claims as being an abuse of process under Rule 9-5(1) because they were barred by the Limitation Act. The appellant submits the chambers judge erred in making a final order at the case planning conference and in striking her claims without a factual foundation.

Held: appeal allowed, matter remitted to the Supreme Court. The chambers judge should not have determined the matter on her own motion. An application requiring affidavit evidence or leading to a final judgment should not be decided at a case planning conference. Based on the notice of civil claim alone it was not clear and obvious that the plaintiff could not succeed or that the action was an abuse of process. The limitation issue only arises if it is pleaded in defence and cannot be resolved in an evidentiary vacuum because of the 30-year ultimate limitation period.

2014 BCCA 173 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal raises for consideration the power of a Supreme Court judge to dismiss a proceeding at a case planning conference ("CPC"); whether a cause of action which on its face appears to be outside the applicable limitation period can be dismissed as an abuse of process; and the appropriateness of a judge deciding a matter on her own motion.

BACKGROUND

[2] The appellant commenced these proceedings on February 28, 2011. The notice of civil claim makes allegations against the various named defendants concerning events surrounding the birth of her daughter and her daughter's subsequent apprehension by representatives of the Ministry of Social Services and Housing. The events which are the subject matter of the allegations took place between August 1988, and July 1990. There are numerous claims against each of the defendants and the appellant alleges that as a result of their actions she sustained various personal injuries.

[3] On March 5, 2012, and May 29, 2012, the appellant received orders extending the time to serve the various defendants. By the end of June 2012, she had served all of the named defendants except the RCMP, Gibsons Detachment.

[4] On June 28, 2012, the appellant filed an *ex parte* application in which she sought to amend her style of cause to properly name the RCMP as a defendant and to add as defendants several additional individuals who were employees of certain of the organizations already named as defendants in the actions.

[5] When the application came on for hearing on June 29, 2012, the appellant, who has been self-represented throughout, appeared by telephone. The chambers judge expressed her concern to the appellant that all her claims appeared to have been brought out of time. She urged the appellant to obtain legal advice and warned

2014 BCCA 173 (CanLII)

her that if applications were brought by the named defendants to strike out her claim, the defendants could all get costs against her.

[6] In the course of the hearing the chambers judge suggested that the proceedings were an abuse of process because they had no hope of succeeding. She told the appellant it would not be appropriate for all the defendants to be troubled with the lawsuit if it was not properly brought and it appeared to her that it was not.

[7] In the result, the chambers judge adjourned the application to add additional parties, seized herself of the proceeding and directed that no further steps be taken in the action until a CPC could be convened.

[8] On September 4, 2012, the appellant wrote to trial scheduling to arrange the CPC that the chambers judge had ordered. The conference was ultimately scheduled for 9:15 a.m. on November 29, 2012. By that time seven responses to the notice of civil claim had been filed by six separate law firms on behalf of the various defendants who had been served. Six of the responses pled that the claims were barred pursuant to the *Limitation Act*, R.S.B.C. 1996, c. 266. Four of the responses pled that some or all of the claims did not disclose a cause of action. One response pled that the claims were frivolous and vexatious. None of the defendants pled that the claims were an abuse of process.

[9] In advance of the CPC all of the parties, including the appellant, filed case plan proposals. Under the heading “Other” the appellant raised for consideration scheduling for service of the notice of civil claim on amended parties, amending her pleadings and arguments regarding postponement of limitation. The defendants in their case plan proposals indicated under the heading “Other” that they intended to seek an order that the plaintiff’s claims be struck given the expiry of the limitation period, an order for security for costs, and an order that the action which was set in the Fort St. John registry be transferred to the Vancouver registry. The defendants did not, however, file any applications seeking the relief set out in their CPC briefs.

2014 BCCA 173 (CanLII)

[10] The defendants attached to their case plan proposals a written argument that the claim should be struck out under the *Limitation Act*. In their written submissions the defendants suggested, in the alternative, that it was plain and obvious that the claims could not succeed and the action should be dismissed pursuant to Rule 9-5(1)(a) as disclosing no reasonable claim or as an abuse of process within the meaning of Rule 9-5(1)(d).

[11] On November 16, 2012, the appellant wrote to trial scheduling concerning the case planning conference. She inquired as to whether or not she could be allowed to file affidavit evidence.

[12] In response the appellant was advised in an email of November 19, 2012, from trial scheduling that:

> You should come prepared with an argument as to why the claims you are asserting are not out of time. You do not need to have affidavits, but a brief written outline of your argument (just a page or two) would be helpful. You should describe in a general way what amendments you intend to make to the pleading. This should be sent to the Court and the other lawyers two days before the CPC. The rest of the questions can be addressed at the case planning conference.

[13] On November 28, 2012, the appellant filed a 17-page submission setting out her factual and legal arguments in regards to the postponement of the limitation period. In explaining the reasons why the action had been delayed she indicated that she had been under severe stress and a dissociative state after her daughter was taken from her, that she could not get the documents she needed and that she had received inadequate legal advice. She also indicated that she feared suing the Ministry of Children and Family Development and others earlier because she had reason to believe that they would retaliate by taking her daughter away from her again. In addition the submission dealt with the need to amend her pleadings, add certain parties, and whether her notice of civil claim was an abuse of process. In regards to the latter she submitted that the notice of claim was not an abuse of process because the 30-year ultimate limitation period exists to protect claims that have been commenced after the apparent expiry of the limitation period.

2014 BCCA 173 (CanLII)

2014 BCCA 173 (CanLII)

THE CASE PLANNING CONFERENCE

[14] At the CPC the appellant again appeared by telephone as did counsel for two groups of the defendants. The remaining four counsel were in the courtroom with the judge. At the outset the chambers judge advised that the purpose of the CPC was for her to address the question as to whether the claims that the appellant had brought should be dismissed or struck because of the time it had taken for the action to be commenced. She indicated that she had read the appellant's argument and complimented her for articulating the reasons why the limitation period should be postponed. She then asked the appellant if there was anything she wished to add to her written argument. The appellant indicated that she had provided an explanation in a general way and could probably make a few more specific formal arguments. In response the chambers judge indicated that she considered it to be a very good argument and she did not think there was anything more that could be said.

[15] The chambers judge then indicated she was going to give her reasons for judgment and in doing so she would assume that the appellant could prove all of the facts set out in her argument. Before giving the judgment the chambers judge indicated she had received material from other counsel which she had read but she did not need to hear from any of them because her decision was based on the argument made by the appellant.

[16] In her reasons for judgment the chambers judge set out the history of the proceeding and how it had first come before her on the application that the appellant had brought to add parties. She noted that at the time of that first application she had pointed out to the appellant that her claims were brought 11 to 20 years after the incidents described and were therefore on their face barred by the provisions of the *Limitation Act*. She stated that at the time of the initial application she had adjourned the application to add parties and directed that a CPC be convened to revisit the question as to whether the claim should be struck out under Rule 9-5(1)(d) as an abuse of process.

[17] The chambers judge then set out certain of the arguments that the appellant had made in regards to a postponement of the limitation period. She then indicated that assuming all of the facts set out in the appellant's submission were true, the appellant had waited too long to bring these proceedings and they were barred by the *Limitation Act*. In reaching this conclusion she made reference to the decision of this Court in *Vance v. Peglar* (1996), 22 B.C.L.R. (3d) 251 (C.A.) in which the rules to be applied in determining when a limitation period begins to run are set out. The chambers judge concluded in her reasons as follows:

> [39] Having considered all of the submissions and the statement of claim, the claims in my view are barred, and they have no prospect of success. As I said to you, Ms. Jensen, last day, it is not in your interest for the Court to permit you to carry on with a case that will only cause you more stress and anxiety and at the end of the day could result in you being faced with a large award of costs against you, costs of the other parties' legal expenses.
>
> [40] I have concluded, therefore, that it is just and right, and indeed necessary for me to strike out your statement of claim under Rule 9-5(1). That means that no further action can be commenced in relation to those claims that you have described in that statement of claim.

[18] Following the delivery of the reasons there was some further discussion between the appellant and the chambers judge. The appellant indicated that there was much more evidence that she could lead to substantiate her claim that the limitation period could be postponed.

[19] The chambers judge ended the CPC by saying that because the appellant was impecunious and had been acting on her own she was not inclined to award costs.

[20] The entered order contains the following provisions:

1. The plaintiff's claim is struck pursuant to Rule 9-5(1);

2. The plaintiff is barred from commencing any further actions based on the claims described in the notice of civil claim; and

3. Each party is to bear their own costs.

2014 BCCA 173 (CanLII)

2014 BCCA 173 (CanLII)

THE APPEAL

[21] The appellant now challenges that decision. She submits that the chambers judge erred in striking out the action at a CPC because a judge cannot make a final order at such a conference. She further submits that the chambers judge erred in striking out the action under Rule 9-5(1)(d) as an abuse of process without evidence or a factual foundation for doing so.

[22] The various groups of respondents have all filed nearly identical factums supporting the judgment below. They submit that the order below was a "final order", not a final judgment and accordingly could be made at a CPC. They further submit that Rules 5-3 and 9-5 should be read together in determining the powers of the Court to make an order respecting abuse of its process and that a judge has the power at any stage of the proceedings to strike an action as an abuse of process. They submit that even if an incorrect process was followed, it was an irregularity but can be cured by Rule 22-7. In that regard they submit that the chambers judge's analysis of the postponement provisions of the *Limitation Act* was correct and that the appellant suffered no prejudice because the chambers judge proceeded on the basis that the appellant could prove the truth of the contents of her submission.

DISCUSSION

A. Overview

[23] In this matter the chambers judge acted from the very best of intentions. She was trying to spare a self-represented appellant from the costs of what she considered a doomed proceeding. Judges, however, cannot always do what they want. In this case, in her well-meaning attempt to do what she considered right, the chambers judge fell into procedural and substantive error. The procedural errors concern her acting on her own motion and deciding the matter at a CPC. The substantive error concerns the application of the test for striking pleadings under Rule 9-5(1).

B. Acting On Own Motion

[24] Civil litigation is an adversarial process. The judge is the referee. Judges must leave it to the parties to determine the court processes that they wish to engage to resolve a proceeding. Absent extraordinary circumstances such as those facing Chief Justice McEachern when picketers threatened to shut down the courthouse (*Re British Columbia Government Employees Union et al. and Attorney General of British Columbia et al.* (1982), 2 D.L.R. (4th) 705; aff'd (1985) 20 D.L.R (4th) 399; aff'd [1988] 2 S.C.R. 214), judges should not act on their own motion. To do so compromises their role of impartial arbitrator.

[25] The chambers judge quite properly brought to the self-represented appellant's attention the provisions of the *Limitation Act* and the cost consequences to her if the defendants brought an application to have her claim dismissed on that ground. Having taken those steps, the chambers judge should not have gone further. It was not her role to save the appellant from potential folly.

[26] It was for the parties to decide how they wished this action to be determined. The various defendants all pled the *Limitation Act*. Some pled that certain of the claims did not disclose a cause of action. None suggested the claim was an abuse of process. If some or all of the defendants wished to have the matter determined in a summary fashion it was for them, not the chambers judge, to set down a motion.

[27] The chambers judge decided the case on her own initiative in the absence of any application by the parties. For the chambers judge to act on her own motion was a clear error. She took from the parties their right to control the proceedings and determine for themselves the battleground upon which they wanted the proceedings resolved.

C. The Case Planning Conference

a. The Rule

[28] Rule 5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, governs the conduct and procedures at a CPC. Rule 5-3 sets out a broad range of orders that a

2014 BCCA 173 (CanLII)

judge or master can make at a CPC. Rule 5-3(2) limits the applications that can be heard and orders that can be made at a CPC. The relevant portion of the Rule reads:

> (2) A case planning conference judge or master must not, at a case planning conference,
>
> (a) hear any application supported by affidavit evidence… or
>
> (b) make an order for final judgment, …

[29] Rule 12-2(11) similarly limits the nature of applications and orders that can be heard and made at a trial management conference ("TMC").

[30] In this case the procedure followed by the chambers judge violated both prongs of Rule 5-3(2).

b. Rule 5-3(2)(a) – Affidavit Evidence

[31] The Court at a CPC or a TMC can hear contested applications which can be determined on the basis of representations of counsel: *Gill v. A & P Fruit Growers Ltd*., 2011 BCSC 1421. If an application requires affidavit evidence it cannot be heard: *Vernon v. British Columbia (Ministry of Housing and Social Development, Liquor Distribution Branch)*, 2010 BCSC 1688.

[32] The chambers judge directed a CPC to determine whether the action should proceed. In advance of the conference she gave no indication as to the Rule upon which she intended to rely. The chambers judge appears to have based her decision on Rule 9-5(1). That Rule, as did its predecessor Rule 19(24), reads:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,

2014 BCCA 173 (CanLII)

> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> (2) No evidence is admissible on an application under subrule (1)(a).

[33] In her reasons the chambers judge indicated that the question before her was whether the proceeding brought by the appellant should be struck out as an abuse of process. While evidence is not admissible under Rule 9-5(1)(a) it is admissible under Rule 9-5(1)(d) which deals with abuse of process. The appellant in advance of the CPC sought clarification as to whether she would be able to file affidavit evidence. She was advised that she need not file affidavits but should come prepared to argue why the claims were not out of time.

[34] The limitation issue cried out for affidavit evidence. The applicability of the postponement provisions is a fact-intensive question. It could only be decided on a proper factual foundation. It was not the type of question that could be decided on the basis of counsel's representations. It was an error to hear the application at a CPC.

c. Rule 5-3(2)(b) – Order for Final Judgment

[35] The respondents submit that there is a distinction between an order and a judgment, and that what occurred in this case was not a judgment of the issues raised by the appellant in her pleadings. In support of that position they cite *Stroub v. Kazakoff* (1977), 2 B.C.L.R. 262 (S.C.) and *First City Trust Co. v. Triple Five Corporation Ltd.* (1989), 94 A.R. 106, 57 D.L.R. (4th) 554 (C.A.).

[36] In *Canadian Imperial Bank of Commerce v. Bury* (1979), 103 D.L.R. (3d) 560, 11 Alta. L.R. (2d) 93 (S.C.), Stephenson J. (as he then was) explained the distinction between an "order" and a "judgment" at pp. 561-62:

> Williston & Rowles, *The Law of Civil Procedure* 1970, vol. 2, pp. 1020-21, refer to authorities that distinguish between judgments and orders. One of the references is to *Loring v. Illsley* (1850), 1 Cal. 24, and the following quotation from that case is included:
>
> > What then is the distinction between an order and a final judgment?... The former is a decision made during the

2014 BCCA 173 (CanLII)

> progress of the cause, either prior or subsequent to final judgment settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be decided upon by the Court, or necessary to be determined in carrying the execution into effect.
>
> The authors say that where the controversy between the parties is determined it is a judgment and every other decision is an order.

[37] In this case, the decision of the chambers judge determined the controversy between the parties. It brought the appellant's action to an end. It was an order for final judgment. It was an order that cannot be made at a CPC.

D. Striking the Claim

[38] Turning to the point of substance I would first note that because there was no application before the Court it is not entirely clear what Rule the chambers judge relied on. While she made specific reference in her reasons to Rule 9-5(1)(d), the order states that the action was struck pursuant to Rule 9-5(1).

[39] In *Chapman v. Canada,* 2003 BCCA 665, this Court set out at paras. 12-13 the criteria for applications brought under the then Rule 19(24); it must be plain and obvious that the impugned pleading has the fault alleged:

> [12] The criteria for application of all provisions of Rule 19(24) are established in authorities considered by the chambers judge: *Hunt v. Carey Can. Inc.*, [1990] 2 S.C.R. 959; *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (B.C.S.C.); *Babavic v. Babowech*, [1993] B.C.J. No. 1802, *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1996), 17 B.C.L.R. (3d) 187 (B.C.C.A.), and *Kripps v. Touche Ross & Co.* (1990), 48 B.C.L.R. (2d) 171 (B.C.C.A.). The test is whether it is plain and obvious that the impugned pleading has the fault alleged. Otherwise the party whose pleading is challenged is entitled to a trial of the issue.
>
> [13] The orders in this case were made under Rule 19(24)(a) and (d). Thus in order to succeed the applicant is required to establish that it is plain and obvious that the pleadings disclose no cause of action (Rule 19(24)(a)) or that the proceedings are an abuse of process (Rule 19(24)(d)). Otherwise the litigation will be allowed to proceed.

[40] In *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 42 A.C.W.S. (3d) 447 (S.C.), Baker J. in an oft-cited passage commented on the principle of abuse of process at paras. 17-18:

2014 BCCA 173 (CanLII)

> [17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. …
>
> [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...

2014 BCCA 173 (CanLII)

[41] The chambers judge held that the action brought by the appellant should be struck because it was brought outside of the time set out in the *Limitation Act* for bringing the proceedings and had no prospect for success. She cited no authorities in support of her conclusion.

[42] There are numerous cases which have held that Rule 9-5 is not the appropriate mechanism to determine a limitation issue. The cases include: *Canadian Pacific Ltd. v. British Columbia Hydro and Power Authority* (1979), 10 B.C.L.R. P 6 (S.C.); *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784; *Fuoco Estate v. Kamloops (City),* 2001 BCCA 325 [*Fuoco*]; *Border Enterprises Ltd. v. Beazer East, Inc.,* 2003 BCSC 49; *Rain Coast Water Corp. v. British Columbia*, 2008 BCSC 1182; *Mattson v. Remus*, 2009 BCSC 836; and *Hughes v. Hughes*, 2011 BCSC 1569.

[43] In *Fuocu* this Court noted at para. 15:

> [15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a), standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence. ...

[44] Those words resonate in this case. The notice of civil claim, in and of itself, does not raise a limitation issue. The limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum. The *Limitation Act* contains provisions pursuant to which the running of time is

postponed. Pursuant to s. 8(1)(c) of the *Limitation Act* the ultimate postponement is 30 years from the date on which the right to bring the action arose.

[45] In this case the events which are the subject matter of the litigation commenced approximately 22 years prior to the issuance of the writ. The respondents have now raised the *Limitation Act* as a defence to the claim. The appellant has indicated that she intends to rely on the postponement provisions to escape the consequences of the *Act*. Whether she can or cannot do so successfully will undoubtedly be determined in a properly brought application. Based on the appellant's pleading alone it is not plain and obvious that her action cannot succeed.

[46] Similarly it is not plain and obvious that the action is an abuse of process. While the action may ultimately fall on the limitation issue it cannot be said that the court's process is being used for any improper purpose. The fact that a claim arises outside the initial limitation period does not in itself allow a claim to be struck out as an abuse of process. Different considerations might arise if a claim is brought outside the ultimate limitation period. In such a case it may be plain and obvious that the action cannot succeed and such a claim can be properly resolved pursuant to Rule 9-5(1): *Chisamore v. Cumis Life Insurance Co.*, 2006 BCSC 462.

[47] What occurred in this case was more than an irregularity. It cannot be cured under Rule 22-7. The limitation issue is one which must be determined on a proper application with a full evidentiary foundation. It cannot be determined pursuant to Rule 9-5(1). It cannot be determined at a CPC. It matters not whether the chambers judge's analysis of the *Limitation Act* ultimately proves to be correct.

DISPOSITION

[48] For all the above reasons I would allow the appeal, set aside the order dismissing the action and remit the action to the Supreme Court. It is clear from the case planning briefs that there are numerous procedural matters to be resolved. These include the appellant's desire to file a reply, amend her pleadings and add new parties. The defendants in turn wish to schedule applications to strike the claim

2014 BCCA 173 (CanLII)

under the *Limitation Act* or as disclosing no cause of action. They also wish to seek security for costs.

[49] The timing of these applications is a matter best determined at a CPC. Accordingly, I would direct that no steps be taken in the action by any party before a CPC is convened in the Supreme Court to determine how matters shall proceed further, save and except the appellant will have liberty to file a reply to plead the postponement provisions in advance of the CPC.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Garson"

2014 BCCA 173 (CanLII)

TAB 30

Jones v. Tsige

108 O.R. (3d) 241
2012 ONCA 32

Court of Appeal for Ontario,
Winkler C.J.O., Sharpe J.A. and Cunningham
A.C.J. (ad hoc)
January 18, 2012

2012 ONCA 32 (CanLII)

Torts -- Invasion of privacy -- Intrusion upon seclusion -- Right of action for intrusion upon seclusion existing in Ontario -- Range of damages for intrusion upon seclusion being up to $20,000 -- Defendant committing tort of intrusion upon seclusion when she used her position as bank employee to repeatedly examine private banking records of her spouse's ex- wife -- Damages in amount of $10,000 awarded.

The plaintiff and the defendant did not know each other, but they worked for different branches of the same bank and the defendant had formed a common law relationship with the plaintiff's ex-husband. For about four years, the defendant used her workplace computer to access the plaintiff's personal bank accounts at least 174 times. She did not publish, distribute or record the information in any way. When she discovered the conduct, the plaintiff brought an action for damages for invasion of privacy and moved for summary judgment. The defendant brought a cross-motion for summary judgment dismissing the action. The motion judge found that the tort of invasion of privacy does not exist at common law in Ontario. He dismissed the plaintiff's motion and granted the defendant's motion. The plaintiff appealed.

Held, the appeal should be allowed.

A right of action for intrusion upon seclusion should be recognized in Ontario. The case law supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our social and political order. Finally, the facts of this case cried out for a remedy.

The key features of the cause of action of intrusion upon seclusion are, first, that the defendant's conduct must be intentional (which includes recklessness); second, that the defendant must have

invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not an element of the cause of action.

Given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum. The appropriate range is up to $20,000. Awards of aggravated and punitive damages may be appropriate in exceptional cases, but are not to be encouraged, as predictability and consistency are paramount values in an area where symbolic or moral damages are awarded. [page242]

The defendant committed the tort of intrusion upon seclusion when she repeatedly examined the plaintiff's private bank records. The intrusion was intentional, it amounted to an unlawful invasion of the plaintiff's private affairs, it would be viewed as highly offensive to the reasonable person and it caused distress, humiliation or anguish. The plaintiff was awarded damages in the amount of $10,000. The intrusion upon her seclusion did not exhibit any exceptional quality calling for an award of aggravated or punitive damages.

APPEAL by the plaintiff from the summary judgment of Whitaker J., [2011] O.J. No. 1273, 2011 ONSC 1475 (S.C.J.) dismissing an action for damages for breach of privacy.

The judgment of the court was delivered by

Cases referred toEuteneier v. Lee (2005), 77 O.R. (3d) 621, [2005] O.J. No. 3896, 260 D.L.R. (4th) 123, 202 O.A.C. 278, 133 C.R.R. (2d) 292, 142 A.C.W.S. (3d) 340 (C.A.), revg [2003] O.J. No. 4239, 113 C.R.R. (2d) 44 (Div. Ct.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 516], consd Other cases referred to Athans v. Canadian Adventure Camps Ltd. (1977), 17 O.R. (2d) 425, [1977] O.J. No. 2417, 80 D.L.R. (3d) 583, 4 C.C.L.T. 20, 34 C.P.R. (2d) 126, [1977] 2 A.C.W.S. 1066 (H.C.J.); Aubry v. Editions Vice Versa, [1998] 1 S.C.R. 591, [1998] S.C.J. No. 30, 157 D.L.R. (4th) 577, 224 N.R. 321, J.E. 98-878, 39 C.C.L.T. (2d) 100, 45 C.C.L.T. (2d) 119, 78 C.P.R. (3d) 289, 50 C.R.R. (2d) 225, 78 A.C.W.S. (3d) 775, REJB 1998-05646; Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 A.C. 457, [2004] 2 All E.R. 995 (H.L.); Capan v. Capan, [1980] O.J. No. 1361, 14 C.C.L.T. 191, 5 A.C.W.S. (2d) 245 (H.C.J.); Dulude v. Canada, [2000] F.C.J. No. 1454, [2001] 1 F.C. 545, 192 D.L.R. (4th) 714, 264 N.R. 1, 100 A.C.W.S. (3d) 1006 (C.A.); Dyne Holdings Ltd. v. Royal Insurance Co. of Canada, [1996] P.E.I.J. No. 28, 135 D.L.R. (4th) 142, 138 Nfld. & P.E.I.R. 318, 34 C.C.L.I. (2d) 180, [1996] I.L.R. I-3366, 62 A.C.W.S. (3d) 1206 (S.C. App. Div.) [Leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 344]; Evans v. Detlefsen, 857 F.2d 330 (6th Cir. 1988); F. (J.M.) v. Chappell, [1998] B.C.J. No. 276, 158 D.L.R. (4th) 430, [1998] 7 W.W.R. 57, 103 B.C.A.C. 110, 45 B.C.L.R. (3d) 64, 41 C.C.L.T. (2d) 26, 15 C.R. (5th) 259, 77 A.C.W.S. (3d) 673 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 154, 231 N.R. 400]; Garrett v. Mikalachki, [2000] O.J. No. 1326, [2000] O.T.C. 248 (S.C.J.); Grant v. Torstar Corp., [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, 2009 SCC 61, 204 C.R.R. (2d) 1, 258 O.A.C. 285, EYB 2009-167615, J.E. 2010-8, 314 D.L.R. (4th) 1, 397 N.R. 1, 79 C.P.R. (4th) 407, 72 C.C.L.T. (3d) 1; Grosse v. Purvis, [2003] Q.D.C. 151, Aust. Torts Report 81-706; Haskett v. Trans Union of Canada Inc., [2001] O.J. No. 4949, [2001] O.T.C. 914, 10 C.C.L.T. (3d) 128, 110 A.C.W.S. (3d) 574 (S.C.J.);

2012 ONCA 32 (CanLII)

Heckert v. 5470 Investments Ltd., [2008] B.C.J. No. 1854, 2008 BCSC 1298, 62 C.C.L.T. (3d) 249, 299 D.L.R. (4th) 689, 75 R.P.R. (4th) 278, 170 A.C.W.S. (3d) 648; Hill v. Church of Scientology of Toronto (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, 126 D.L.R. (4th) 129, 184 N.R. 1, J.E. 95-1495, 84 O.A.C. 1, 25 C.C.L.T. (2d) 89, 30 C.R.R. (2d) 189, 56 A.C.W.S. (3d) 495; Hollinsworth v. BCTV, a division of Westcom TV Group Ltd., [1998] B.C.J. No. 2451, [1999] 6 W.W.R. 54, 113 B.C.A.C. 304, 59 B.C.L.R. (3d) 121, 44 C.C.L.T. (2d) 83, 83 A.C.W.S. (3d) 525 (C.A.), affg [1996] B.C.J. No. 2638, 34 C.C.L.T. (2d) 95 (S.C.); Hosking v. Runting, [2004] NZCA 34, [2005] 1 NZLR 1 (C.A.); Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36, 11 D.L.R. (4th) 641, 55 N.R. 241, [1984] 6 W.W.R. 577, J.E. 84-770, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, 9 C.R.R. 355, 84 D.T.C. 6467; Insurance Corp. of British Columbia v. Somosh, [1983] B.C.J. No. 2034, 51 B.C.L.R. 344, 24 A.C.W.S. (2d) 82 (S.C.); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); Krouse v. Chrysler Canada Ltd. (1973), 1 O.R. (2d) 225, [1973] O.J. No. 2157, 40 D.L.R. (3d) 15, 13 C.P.R. (2d) 28 (C.A.); Lee v. Jacobson; Weber v. Jacobson, [1994] B.C.J. No. 2459, 120 D.L.R. (4th) 155, 53 B.C.A.C. 75, 99 B.C.L.R. (2d) 144, 51 A.C.W.S. (3d) 376 (C.A.), revg [1992] B.C.J. No. 132, 87 D.L.R. (4th) 401, 31 A.C.W.S. (3d) 329 (S.C.); [page243] Lenah Game Meats Pty Ltd. v. Australian Broadcasting Corp., [2001] H.C.A. 63, 185 A.L.R. 1 (H.C. Aust.); Lipiec v. Borsa, [1996] O.J. No. 3819, 17 O.T.C. 64, 31 C.C.L.T. (2d) 294, 66 A.C.W.S. (3d) 794 (Gen. Div.); MacKay v. Buelow, [1995] O.J. No. 867, 24 C.C.L.T. (2d) 184, 11 R.F.L. (4th) 403, 54 A.C.W.S. (3d) 606 (Gen. Div.); Malcolm v. Fleming, [2000] B.C.J. No. 2400, 2000 CarswellBC 1316 (S.C.); Mosely v. News Group Newspapers Ltd., [2008] EWHC 1777, [2008] All E.R. (D) 322 (Q.B.); Motherwell v. Motherwell, [1976] A.J. No. 555, 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550, 1 A.R. 47 (S.C. App. Div.); Nesbitt v. Neufeld, [2010] B.C.J. No. 2232, 2010 BCSC 1605, [2011] B.C.W.L.D. 407 (S.C.); Nitsopoulos v. Wong, [2008] O.J. No. 3498, 298 D.L.R. (4th) 265, 60 C.C.L.T. (3d) 318, 169 A.C.W.S. (3d) 74 (S.C.J.); Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229, [1994] O.J. No. 1864, 117 D.L.R. (4th) 449, 49 A.C.W.S. (3d) 1059, 24 W.C.B. (2d) 302 (Gen. Div.); Palad v. Pantaleon, [1989] O.J. No. 985 (Dist. Ct.); Pateman v. Ross, [1988] M.J. No. 640, 68 Man. R. (2d) 181 (Q.B.); Provincial Partitions Inc. v. Ashcor Inplant Structures Ltd., [1993] O.J. No. 4685, 50 C.P.R. (3d) 497, 41 A.C.W.S. (3d) 823 (Gen. Div.); R. v. Dyment, [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82, 55 D.L.R. (4th) 503, 89 N.R. 249, J.E. 89-77, 73 Nfld. & P.E.I.R. 13, 45 C.C.C. (3d) 244, 66 C.R. (3d) 348, 38 C.R.R. 301, 10 M.V.R. (2d) 1, 6 W.C.B. (2d) 78; R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, 130 D.L.R. (4th) 235, 191 N.R. 1, [1996] 2 W.W.R. 153, J.E. 96-64, 68 B.C.A.C. 1, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, 29 W.C.B. (2d) 152; R. v. Salituro, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, 131 N.R. 161, J.E. 92-16, 50 O.A.C. 125, 68 C.C.C. (3d) 289, 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 14 W.C.B. (2d) 407; R. v. Tessling, [2004] 3 S.C.R. 432, [2004] S.C.J. No. 63, 2004 SCC 67, 244 D.L.R. (4th) 541, 326 N.R. 228, J.E. 2004-2035, 192 O.A.C. 168, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207, 123 C.R.R. (2d) 257, 62 W.C.B. (2d) 525; R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, [2002] S.C.J. No. 7, 2002 SCC 8, 208 D.L.R. (4th) 385, 280 N.R. 333, [2002] 4 W.W.R. 205, J.E. 2002-268, 217 Sask. R. 22, [2002] CLLC Â220-008, 90 C.R.R. (2d) 189, 78 C.L.R.B.R. (2d) 161, 111 A.C.W.S. (3d) 272; R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, 33 D.L.R. (4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 577, J.E. 87-81, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 CLLC Â14,002 at 12037, 25 C.R.R. 321, 2 A.C.W.S. (3d) 243; Robbins v. Canadian Broadcasting Corp. (1957), 12 D.L.R. (2d) 35

2012 ONCA 32 (CanLII)

(Que. S.C.); Roe v. Cheyenne Mt. Conf. Resort, Inc., 124 F.3d 1221 (10th Cir. 1997); Roth v. Roth (1991), 4 O.R. (3d) 740, [1991] O.J. No. 1301, 9 C.C.L.T. (2d) 141, 34 M.V.R. (2d) 228, 28 A.C.W.S. (3d) 622 (Gen. Div.); S. & A. Nagy Farm v. Repsys, [1987] O.J. No. 1987 (Dist. Ct.); Saccone v. Orr (1981), 34 O.R. (2d) 317, [1981] O.J. No. 3132, 19 C.C.L.T. 37, 11 A.C.W.S. (2d) 402 (Co. Ct.); Shred-Tech Corp. v. Viveen, [2006] O.J. No. 4893, 153 A.C.W.S. (3d) 819, 2006 CarswellOnt 7762 (S.C.J.); Somwar v. McDonald's Restaurants of Canada Ltd. (2006), 79 O.R. (3d) 172, [2006] O.J. No. 64, 263 D.L.R. (4th) 752, [2006] O.T.C. 28, 144 A.C.W.S. (3d) 1128 (S.C.J.); Tran v. Financial Debt Recovery Ltd., [2000] O.J. No. 4293, 193 D.L.R. (4th) 168, [2000] O.T.C. 806, 2 C.C.L.T. (3d) 270, 101 A.C.W.S. (3d) 189 (S.C.J.); Wainwright v. Home Office, [2003] UKHL 53, [2004] 2 A.C. 406, [2003] 4 All E.R. 969 (H.L.); Wasserman v. Hall, [2009] B.C.J. No. 1932, 2009 BCSC 1318, 87 R.P.R. (4th) 184; Watts v. Klaemt, [2007] B.C.J. No. 980, 2007 BCSC 662, [2007] 11 W.W.R. 146, 71 B.C.L.R. (4th) 362, 61 C.C.E.L. (3d) 115, 157 A.C.W.S. (3d) 871 Statutes referred to Canadian Charter of Rights and Freedoms, ss. 7, 8, 9, 12, 15 Charter of Human Rights and Freedoms, R.S.Q. c. C-12, s. 5 Civil Code of Québec, S.Q. 1991, c. 64, arts. 3, 35 [as am.], 36, 37 Consumer Reporting Act, R.S.O. 1990, c. C.33 [as am.] [page244] Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 [as am.] Human Rights Act 1998 (U.K.), 1998 c. 42 Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 [as am.] Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sch. A [as am.] Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [as am.] Privacy Act, R.S.B.C. 1996, c. 373 [as am.] Privacy Act, R.S.M. 1987, c. P125 [as am.], s. 4(2) Privacy Act, R.S.N.L. 1990, c. P-22 [as am.] Privacy Act, R.S.S. 1978, c. P-24 [as am.] Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01(1) (b), 76 Treaties and conventions referred to Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, art. 8 International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, art. 17 Universal Declaration of Human Rights, G.A. Res. 217(III) UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, (1948) 71, art. 12 Authorities referred to American Law Society, Restatement (Second) of Torts (2010) Bell, Robyn M. Ryan, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Archibald, Todd L., and Michael Cochrane, eds., Annual Review of Civil Litigation (Toronto: Carswell, 2005) Burns, Peter, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1 Craig, John D.R., "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 52 McGill L.J. 355 Gibson, Dale, "Common Law Protection of Privacy: What to do Until the Legislators Arrive" in Klar, Lewis, ed., Studies in Canadian Tort Law (Toronto: Butterworths, 1977) Glenn, H. Patrick, "The Right to Privacy in Quebec Law" in Gibson, Dale, ed., Aspects of Privacy Law: Essays in Honour of John M. Sharp (Toronto: Butterworths, 1980) Lee, J.D., and Barry A. Lindahl, Modern Tort Law: Liability & Litigation, 2nd ed., looseleaf (West Group, 2002) Linden, Allen M., and Bruce Feldthusen, Canadian Tort Law, 9th ed. (Toronto: LexisNexis, 2011) McIsaac, Barbara, Rick Shields and Kris Klein, The Law of Privacy in Canada, looseleaf (Toronto: Carswell, 2000) McNairn, Colin H.H., and Alexander K. Scott, Privacy Law in Canada (Toronto: Butterworths, 2001) Osborne, Philip, The Law of Torts, 4th ed. (Toronto: Irwin Law, 2011) Prosser, William L., Law of Torts, 4th ed. (St. Paul: West Publishing Company, 1971) Prosser, William L., "Privacy" (1960), 48 Cal. L. Rev. 383 Waddams, Stephen M., The Law of Damages, looseleaf (Toronto: Canada Law Book, 2011) Warren, Samuel D., and Louis D. Brandeis, "The Right to Privacy" (1890), 4 Harv. L. Rev. 193

2012 ONCA 32 (CanLII)

[page245] Westin, Alan F., Privacy and Freedom (New York: Atheneum, 1967) Winfield, P.H., "Privacy" (1931), 47 Law Q. Rev. 23

Christopher Du Vernet and Carlin McGoogan, for appellant.

Alex Cameron and N. Melanson, for respondent.

[1] SHARPE J.A.: -- Does Ontario law recognize a right to bring a civil action for damages for the invasion of personal privacy?

[2] In July 2009, the appellant, Sandra Jones, discovered that the respondent, Winnie Tsige, had been surreptitiously looking at Jones' banking records. Tsige and Jones did not know each other despite the fact that they both worked for the same bank and Tsige had formed a common-law relationship with Jones' former husband. As a bank employee, Tsige had full access to Jones' banking information and, contrary to the bank's policy, looked into Jones' banking records at least 174 times over a period of four years.

[3] The central issue on this appeal is whether the motion judge erred by granting summary judgment and dismissing Jones' claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. Facts

[4] Jones and Tsige worked at different branches of the Bank of Montreal ("BMO"). Jones maintains her primary bank account there. Jones and Tsige did not know or work with each other. However, Tsige became involved in a relationship with Jones' former husband. For about four years, Tsige used her workplace computer to access Jones' personal BMO bank accounts at least 174 times. The information displayed included transactions details as well as personal information, such as date of birth, marital status and address. Tsige did not publish, distribute or record the information in any way.

[5] Jones became suspicious that Tsige was accessing her account and complained to BMO. When confronted by BMO, Tsige admitted that she had looked at Jones' banking information, that she had no legitimate reason for viewing the information and that she understood it was contrary to BMO's code of business conduct and ethics and her professional responsibility. Tsige explained then, and maintains in this action, that she was [page246] involved in a financial dispute with the appellant's former husband and accessed the accounts to confirm whether he was paying child support to the appellant. Jones does not accept that explanation as she says it is inconsistent with the timing and frequency of Tsige's snooping.

[6] Tsige has apologized for her actions and insists that she has ceased looking at Jones' banking information. Tsige is contrite and embarrassed by her actions. BMO disciplined Tsige by suspending her for one week without pay and denying her a bonus.

> [7] In her statement of claim, Jones asserts that her privacy interest in her confidential banking information has been "irreversibly destroyed" and claims damages of $70,000 for invasion of privacy and breach of fiduciary duty, and punitive and exemplary damages of $20,000. 1. Motions for summary judgment

2012 ONCA 32 (CanLII)

[8] Jones proceeded under the simplified procedure of Rule 76 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 and moved for summary judgment. Tsige brought a cross-motion for summary judgment to dismiss the action.

[9] The motion judge found that Tsige did not owe Jones a fiduciary obligation and dismissed that claim. Jones has not appealed that finding.

[10] The motion judge then reviewed the jurisprudence concerning the existence of a tort of invasion of privacy. He observed that recent Superior Court decisions have refused to strike out such claims at the pleading stage and that some academic writing indicates that the tort may exist.

[11] The motion judge concluded, however, that the statement of Cronk J.A. in Euteneier v. Lee (2005), 77 O.R. (3d) 621, [2005] O.J. No. 3896 (C.A.), at para. 63, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 516 is, in his words, "binding and dispositive of the question" of whether the tort of invasion of privacy exists at common law in Ontario. Euteneier concerned a lawsuit brought by a woman whose clothes were forcibly removed by police following her suicide attempt while she was detained in a holding cell. In considering whether the trial judge had accurately described the plaintiff's privacy and dignity interests, Cronk J.A. observed, at para. 63, "[the plaintiff] properly conceded in oral argument before this court that there is no 'free-standing' right to dignity or privacy under the Charter or at common law". [page247]

[12] The motion judge added that given the existence of privacy legislation protecting certain rights, any expansion of those rights should be dealt with by statute rather than common law.

[13] The motion judge dismissed Jones' motion for summary judgment and granted the motion brought by Tsige. He rejected Jones' submission that costs should be denied on the ground that the issue was novel and that Tsige's conduct was objectionable. The motion judge felt that Jones had pursued the litigation aggressively and failed to accept reasonable settlement offers. He awarded costs fixed at $35,000. Issues

> [14] Jones appeals to this court, raising the following issues:
> (1) Did the motion judge err in holding that Ontario law does not recognize a cause of action for invasion of privacy? (2) Did the motion judge err with respect to costs?
> Analysis

Issue 1. Does Ontario law recognize a cause of action for invasion of privacy?
(a) Introduction

[15] The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past 120 years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance and various property rights. Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain. As Adams J. stated in Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229, [1994] O.J. No. 1864, 117 D.L.R. (4th) 449 (Gen. Div.), at p. 688 D.L.R., after a

2012 ONCA 32 (CanLII)

comprehensive review of the case law, "invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept, primarily operating to extend the margins of existing tort doctrine".

[16] Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren and L.D. Brandeis, "The Right to Privacy" (1890), 4 Harv. L. Rev. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L. Rev. 383 as their starting point.

[17] Warren and Brandeis argued for the recognition of a right of privacy to meet the problems posed by technological and social [page248] change that saw "instantaneous photographs" and "newspaper enterprise" invade "the sacred precincts of private life" (at p. 195). They identified the "general right of the individual to be let alone", the right to "inviolate personality" (at p. 205), "the more general right to the immunity of the person" and "the right to one's personality" (at p. 207) as fundamental values underlying such well-known causes of action as breach of confidence, defamation and breach of copyright. They urged that open recognition of a right of privacy was well-supported by these underlying legal values and required to meet the changing demands of the society in which they lived.

[18] Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the 70 years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[19] Most American jurisdictions now accept Prosser's classification and it has also been adopted by the Restatement (Second) of Torts (2010). The tort that is most relevant to this case, the tort of "intrusion upon seclusion", is described by the Restatement, at 652B as:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[20] The comment section of the Restatement elaborates this proposition and explains that the tort includes physical intrusions into private places as well as listening or looking, with or without mechanical aids, into the plaintiff's private affairs. Of particular relevance to this appeal is the observation that other non-physical forms of investigation or examination into private concerns may be actionable. These include opening private and personal mail or examining a

2012 ONCA 32 (CanLII)

private bank account, [page249] "even though there is no publication or other use of any kind" of the information obtained.

[21] If Jones has a right of action, it falls into Prosser's first category of intrusion upon seclusion. While I will make some reference to the fourth category of appropriation of the plaintiff's name or likeness in my discussion below, I will focus primarily on intrusion upon seclusion. I do so for two reasons. First, I accept Prosser's insight that the general right to privacy embraces four distinct torts, each with its own considerations and rules, and that confusion may result from a failure to maintain appropriate analytic distinctions between the categories. Second, as a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case, but could also amount to an unmanageable legal proposition that would, as Prosser warned, breed confusion and uncertainty.

[22] The following discussion will examine whether the common law recognizes a cause of action for invasion of privacy. I will canvass case law from Ontario and other provinces and examine federal and provincial legislation relating to privacy. For completeness, I will also discuss the state of the law in foreign jurisdictions.
(b) Case law

[23] Reflecting on Canadian jurisprudence, Allen M. Linden and Bruce Feldthusen, Canadian Tort Law, 9th ed. (Toronto:
LexisNexis, 2011) observed, at p. 59, that "[w]e seem to be drifting closer to the American model". See, also, Colin H.H. McNairn and Alexander K. Scott, Privacy Law in Canada (Toronto:
Butterworths, 2001), at ch. 3; Barbara McIsaac, Rick Shields and Kris Klein, The Law of Privacy in Canada, looseleaf (Toronto: Carswell, 2000), at 2.4; Philip Osborne, The Law of Torts, 4th ed. (Toronto: Irwin Law, 2011), at pp. 267-71.

[24] My analysis of the case law supports the same conclusion: Ontario has already accepted the existence of a tort claim for appropriation of personality and, at the very least, remains open to the proposition that a tort action will lie for an intrusion upon seclusion.
(i) Ontario case law

[25] In Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion [page250] category. Ontario trial judges have, however, often refused to dismiss such claims at the pleading stage as disclosing no cause of action and some have awarded damages for claims based on violations of the right to be free of intrusion upon seclusion. The clear trend in the case law is, at the very least, to leave open the possibility that such a cause of action does exist.

[26] Saccone v. Orr (1981), 34 O.R. (2d) 317, [1981] O.J. No. 3132 (Co. Ct.), for example, involved the recording of a private conversation without the knowledge or consent of the plaintiff. The recording was then played at a municipal council meeting and a transcript of the conversation published in a local newspaper. Jacob Co. Ct. J. dismissed the defendant's argument

2012 ONCA 32 (CanLII)

against the existence of a tort of invasion of privacy, found in favour of the plaintiff and awarded damages of $500.

[27] Roth v. Roth (1991), 4 O.R. (3d) 740, [1991] O.J. No. 1301 (Gen. Div.) involved interference with the plaintiffs' ability to use and enjoy their cottage property. Mandel J. considered the application of several torts -- assault, battery, nuisance and trespass -- but found that the cumulative effect of the defendants' actions could best be described as an invasion of privacy. He rejected the contention that the common law did not allow for a claim for invasion of privacy and held, at p. 743 O.R., that the common law should not be confined to existing categories but must evolve. In recognizing the right of privacy, Mandel J. quoted a passage from a leading torts text indicating that liability for breach of privacy should only be imposed where the intrusion is substantial and would be regarded as offensive and intolerable to a person of reasonable sensitivity. He then stated, at p. 758 O.R., "whether the invasion of privacy of an individual will be actionable will depend on the circumstances of the particular case and the conflicting rights involved".

[28] A third trial judgment to award damages for breach of privacy falls under Prosser's fourth category of appropriation of the plaintiff's name or likeness. Athans v. Canadian Adventure Camps Ltd. (1977), 17 O.R. (2d) 425, [1977] O.J. No. 2417 (H.C.J.) involved a claim by an expert water-skier against a public relations firm that had copied a distinctive photograph of the plaintiff water skiing. Henry J. relied on Krouse v. Chrysler Canada Ltd. (1973), 1 O.R. (2d) 225, [1973] O.J. No. 2157 (C.A.), in which Estey J.A. had suggested that an action in tort for the appropriation of personality did exist under the common law of Ontario. Henry J. held that the plaintiff failed to make out the tort of passing off, but did have a claim for the tort of "appropriation of personality". The plaintiff recovered damages [page251] measured by the amount the plaintiff ought reasonably to have received in the market for permission to use his image.

[29] There are also several Ontario cases in which the trial judge refused to strike pleadings alleging the tort of invasion of privacy as disclosing no cause of action.

[30] Somwar v. McDonald's Restaurants of Canada Ltd. (2006), 79 O.R. (3d) 172, [2006] O.J. No. 64 (S.C.J.) contains perhaps the most coherent and definitive pronouncement in Ontario jurisprudence of the existence of a common law tort of invasion of privacy corresponding to the intrusion upon seclusion category. Somwar accused his employer, McDonald's Restaurants, of unlawfully invading his privacy by conducting a credit bureau check on him without his consent. The plaintiff claimed damages for invasion of privacy and for punitive damages. The defendant moved to strike the statement of claim and dismiss the plaintiff's action on the basis that it did not disclose a reasonable cause of action under rule 21.01(1)(b) of the Rules of Civil Procedure.

[31] Stinson J. reviewed the Ontario case law and observed that while the cases were not entirely consistent, even where the courts did not accept the existence of a privacy tort, they rarely went so far as to rule out the potential of such a tort. The body of case law, together with the recognition by the Supreme Court of Canada of the protection of privacy under s. 8 of the Canadian Charter of Rights and Freedoms, led him to conclude, at paras. 29 and 31:

2012 ONCA 32 (CanLII)

> With advancements in technology, personal data of an individual can now be collected, accessed (properly and improperly) and disseminated more easily than ever before. There is a resulting increased concern in our society about the risk of unauthorized access to an individual's personal information. The traditional torts such as nuisance, trespass and harassment may not provide adequate protection against infringement of an individual's privacy interests. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with Charter values and an "incremental revision" and logical extension of the existing jurisprudence. . . . . .

> Even if the plaintiff's claim for invasion of privacy were classified as "novel" (which, in any event, is not a proper basis for dismissing it), the foregoing analysis leads me to conclude that the time has come to recognize invasion of privacy as a tort in its own right. It therefore follows that it is neither plain nor obvious that the plaintiff's action cannot succeed on the basis that he has not pleaded a reasonable cause of action.

[32] Somwar was followed in Nitsopoulos v. Wong, [2008] O.J. No. 3498, 298 D.L.R. (4th) 265 (S.C.J.). See, also, Capan v. Capan, [1980] O.J. No. 1361, 14 C.C.L.T. 191 (H.C.J.); Lipiec v. Borsa, [1996] O.J. No. 3819, 31 C.C.L.T. (2d) 294 (Gen. Div.); [page252] Shred-Tech Corp. v. Viveen, [2006] O.J. No. 4893, 2006 CarswellOnt 7762 (S.C.J.), at para. 30. Compare Haskett v. Trans Union of Canada Inc., [2001] O.J. No. 4949, 10 C.C.L.T. (3d) 128 (S.C.J.).
(ii) Provincial case law

[33] While there appears to be no appellate decision from another province definitively establishing a common law right of action for intrusion upon seclusion, dicta in at least two cases support the idea. In Motherwell v. Motherwell, [1976] A.J. No. 555, 73 D.L.R. (3d) 62 (S.C. App. Div.), a case involving harassing telephone calls, the court held the plaintiff had a right of action in nuisance but added, at para. 25, that "the interests of our developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a

2012 ONCA 32 (CanLII)

new category, rather than seeking by rationalization to enlarge" the existing categories of nuisance.

[34] The issue in Dyne Holdings Ltd. v. Royal Insurance Co. of Canada, [1996] P.E.I.J. No. 28, 135 D.L.R. (4th) 142 (S.C. App. Div.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 344, was an insurer's duty to defend. One aspect of the claim arguably amounted to an invasion of privacy akin to the category of intrusion upon exclusion. After a review of the jurisprudence, Carruthers C.J. observed, at p. 160 D.L.R.: "the courts in Canada are not far from recognizing a common law right to privacy if they have not already done so. It is also clear that Canadian courts do not hesitate to protect privacy interests under some recognized tort."
(iii) Euteneier v. Lee

[35] This brings me to Euteneier v. Lee, and the statement from the case that the motion judge here found to be dispositive. In my respectful view, the motion judge's reliance on Euteneier for the proposition Ontario law excludes any and all claims for breach of privacy interests was misplaced. The plaintiff in Euteneier had been arrested and detained on criminal charges. She complained of her treatment while in police custody and sought damages for negligence, assault, civil conspiracy and breach of her ss. 7, 9, 12 and 15 rights under the Charter. The trial judge found that based on the appellant's own behaviour while in custody, which included an apparent suicide attempt, the defendant police officers had conducted themselves in a reasonable and prudent manner. They had breached no duty nor exhibited any bad faith or malice to ground any of the claims she had asserted and the claim was dismissed. [page253]

[36] The plaintiff's first appeal was to the Divisional Court on account of the quantum of damages assessed by the trial judge: see Euteneier v. Lee, [2003] O.J. No. 4239, 113 C.R.R. (2d) 44 (Div. Ct.). The Divisional Court allowed the appeal in part. A new trial was ordered on the issue of whether, after disrobing the plaintiff to prevent her from continuing to use articles of clothing to hang herself, the police were negligent, committed assault or breached the plaintiff's Charter rights [at para. 42] "by confining her in the [holding cell] and by handcuffing her to its bars without taking steps to maintain her dignity or to prevent her humiliation".

[37] The defendants appealed the order for a new trial to this court and the plaintiff cross-appealed seeking a new trial on all issues. This court allowed the appeal and dismissed the cross-appeal. Cronk J.A., writing for the court, held that the Divisional Court had failed to apply the proper standard of review with respect to the trial judge's factual findings. Of particular significance to the point at issue on this appeal is Cronk J.A.'s observation, at paras. 47 and 56. She noted that the plaintiff did not plead that the defendants owed her any duty to maintain her dignity and prevent her humiliation, and that any reference to her dignity or privacy interests were as particulars of other causes of action or as the consequences she alleged flowed from the actions of the defendants. Cronk J.A. held that the Divisional Court had erred in treating those allegations as stand-alone causes of action.

[38] Accordingly, it is clear from the context and from the words used that the passage, at para. 63, relied on by the motion judge -- "[the plaintiff] properly conceded in oral argument before this court that there is no 'free standing' right to dignity or privacy under the Charter or at common law" -- could not have been intended to express any dispositive or definitive opinion as

2012 ONCA 32 (CanLII)

to the existence of a tort claim for breach of a privacy interest. No such claim had been advanced by the plaintiff, no argument on that point was addressed by counsel, and in my view, no opinion on that point was expressed by this court.
(c) Charter jurisprudence

[39] Charter jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state. The Supreme Court of Canada has consistently interpreted the Charter's s. 8 protection against unreasonable search and seizure as protecting the underlying right to privacy. In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.R. No. 36, at pp. 158-59 S.C.R., [page254] Dickson J. adopted the purposive method of Charter interpretation and observed that the interests engaged by s. 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens.

[40] In R. v. Dyment, [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82, at p. 427 S.C.R., La Forest J. characterized the s. 8 protection of privacy as "[g]rounded in a man's physical and moral autonomy" and stated that "privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order." La Forest J. added, at p. 429 S.C.R.:

> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

[41] Charter jurisprudence has recognized three distinct privacy interests: Dyment, at pp. 428-29 S.C.R.; R. v. Tessling, [2004] 3 S.C.R. 432, [2004] S.C.J. No. 63, 2004 SCC 67, at paras. 19-23. The first two interests, personal privacy and territorial privacy, are deeply rooted in the common law. Personal privacy, grounded in the right to bodily integrity, protects "the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal". Territorial privacy protects the home and other spaces where the individual enjoys a reasonable expectation of privacy. The third category, informational privacy, is the interest at stake in this appeal. In Tessling, Binnie J. described it, at para. 23:

> Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the state (R. v. S.A.B., [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (R. v. Law, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, Privacy and Freedom (1970), at p. 7. Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit.

2012 ONCA 32 (CanLII)

(Report of a Task Force established jointly by Department of Communications/Department of Justice, Privacy and Computers
(1972), at p. 13).

[42] This characterization would certainly include Jones' claim to privacy in her banking records. [page255]

[43] In Hill v. Church of Scientology of Toronto (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, Cory J. observed, at para. 121, that the right to privacy has been accorded constitutional protection and should be considered as a Charter value in the development of the common law tort of defamation. In Hill, Cory J. stated, at para. 121: "reputation is intimately related to the right to privacy which has been accorded constitutional protection". See, also, R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, at para. 113, per L'Heureux-Dubé J.: identifying privacy as "an essential component of what it means to be 'free'".

[44] The Charter treatment of privacy accords with art. 12 of the Universal Declaration of Human Rights, G.A. Res. 271(III), UNGAOR, 3d Sess., Supp. No. 13, UN. Doc. A/810 (1948) 71, which provides that "[n]o one shall be subjected to arbitrary interference with his privacy, home or correspondence" and proclaims that "[e]veryone has the right to the protection of the law against such interference or attacks". Privacy is also recognized as a fundamental human right by art. 17 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171.

[45] While the Charter does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with Charter values: see R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, at p. 603 S.C.R.; R. v. Salituro, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, at pp. 666 and 675 S.C.R.; Hill v. Scientology, at p. 1169 S.C.R.; R.W.D.S.U., Local 558 v. Pepsi- Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, [2002] S.C.J. No. 7, 2002 SCC 8; Grant v. Torstar Corp., [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, 2009 SCC 61.

[46] The explicit recognition of a right to privacy as underlying specific Charter rights and freedoms, and the principle that the common law should be developed in a manner consistent with Charter values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion: see John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 42 McGill L.J. 355.
(d) Legislation
(i) Acts relating to private information

[47] The federal and Ontario governments have enacted a complex legislative framework addressing the issue of privacy. [page256] These include Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"); Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sch. A; Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56; Consumer Reporting Act, R.S.O. 1990, c. C.33.

2012 ONCA 32 (CanLII)

[48] Tsige argues that it is not open to this court to adapt the common law to deal with the invasion of privacy on the ground that privacy is already the subject of legislation in Ontario and Canada that reflects carefully considered economic and policy choices. It is submitted that expanding the reach of the common law in this area would interfere with these carefully crafted regimes and that any expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.

[49] I am not persuaded that the existing legislation provides a sound basis for this court to refuse to recognize the emerging tort of intrusion upon seclusion and deny Jones a remedy. In my view, it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area: see Robyn Bell, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Archibald and Cochrane, eds., Annual Review of Civil Litigation (Toronto: Carswell, 2005), at p. 225.

[50] PIPEDA is federal legislation dealing with "organizations" subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province. While BMO is subject to PIPEDA, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a PIPEDA complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under PIPEDA do not include damages, and it is difficult to see what Jones would gain from such a complaint.

[51] The Ontario legislation essentially deals with freedom of information and the protection of certain private information with respect to government and other public institutions. Like PIPEDA, it has nothing to do with private rights of action between individuals.
(ii) Provincial Privacy Acts

[52] Four common law provinces currently have a statutorily created tort of invasion of privacy: British Columbia, [page257] Privacy Act, R.S.B.C. 1996, c. 373; Manitoba, Privacy Act, R.S.M. 1987, c. P125; Saskatchewan, Privacy Act, R.S.S. 1978, c. P-24; and Newfoundland, Privacy Act, R.S.N.L., 1990, c. P-22. All four Privacy Acts are similar. They establish a limited right of action, whereby liability will only be found if the defendant acts wilfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances".

[53] Under Quebec law, the right to privacy is explicitly protected both by arts. 3 and 35-37 of the Civil Code of Québec, S.Q. 1991, c. 64 and by s. 5 of the Charter of Human Rights and Freedoms, R.S.Q. c. C-12. See Robbins v. Canadian Broadcasting Corp. (1957), 12 D.L.R. (2d) 35(Que. S.C.); Aubry v. Éditions Vice-Versa, [1998] 1 S.C.R. 591, [1998] S.C.J. No. 30; H. Patrick Glenn, "The Right to Privacy in Quebec Law" in Dale Gibson, ed., Aspects of Privacy Law: Essays in Honour of John M. Sharp (Toronto: Butterworths, 1980), at ch. 3.

[54] Significantly, however, no provincial legislation provides a precise definition of what constitutes an invasion of privacy. The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes. The nature of these acts does

2012 ONCA 32 (CanLII)

not indicate that we are faced with a situation where sensitive policy choices and decisions are best left to the legislature. To the contrary, existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right.
(e) Other jurisdictions
(i) United States

[55] As already indicated, most American states have recognized a right of action for invasion of privacy rights as defined by the four categories identified by Prosser and now adopted by the Restatement.

> [56] Generally speaking, to make out cause of action for intrusion upon seclusion, a plaintiff must show (1) an unauthorized intrusion; (2) that the intrusion was highly offensive to the reasonable person; (3) the matter intruded upon was private; and [page258] (4) the intrusion caused anguish and suffering. See William Prosser, Law of Torts, 4th ed. (West Publishing Company, 1971), at pp. 808-12.

[57] The first element indicates that the tort focuses on the act of intrusion, as opposed to dissemination or publication of information: Roe v. Cheyenne Mt. Conf. Resort, Inc., 124 F.3d 1221 (10th Cir. 1997), at p. 1236 F.3d. The focus of the court in determining whether this element is satisfied is on "the type of interest involved and not the place where the invasion occurs": Evans v. Detlefsen, 857 F.2d 330 (6th Cir. 1988), at p. 338 F.2d.

[58] With regard to the second element, factors to be considered in determining whether a particular action is highly offensive include the degree of intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives and the expectations of those whose privacy is invaded: see J.D. Lee and Barry A. Lindahl, Modern Tort Law: Liability & Litigation, 2nd ed., looseleaf (West Group, 2002), at 48:6.

[59] In determining the third element, the plaintiff must establish that the expectation of seclusion or solitude was objectively reasonable. The courts have adopted the two-prong test used in the application of the Fourth Amendment of the United States Constitution. The first step is demonstrating an actual subjective expectation of privacy, and the second step asks if that expectation is objectively reasonable: Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967), at p. 361 U.S.

[60] The fourth element has received considerably less attention as anguish and suffering are generally presumed once the first three elements have been established.
(ii) Commonwealth jurisdictions

[61] In England, privacy is expressly protected by art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, incorporated by the Human Rights Act 1998 (U.K.), 1998 c. 42:
"Everyone has the right to respect for his private and family life, his home and his correspondence." However, the House of Lords held in Wainwright v. Home Office, [2003] UKHL 53, [2003] 4 All E.R. 969 (H.L.), at para. 31, that while privacy may be "a value which

2012 ONCA 32 (CanLII)

underlies the existence of a rule of law (and may point the direction in which the law should develop)", privacy is not "a principle of law in itself" capable of supporting a private law right if action for damages. Yet the next year, in Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 A.C. 457 (H.L.), the House of Lords granted an injunction to restrain on grounds of breach [page259] of confidence publication of newspaper stories and photographs of a supermodel leaving a drug addiction treatment facility. Lord Hoffman held, in Campbell, at para. 51, that the tort of breach of confidence had evolved into a form of privacy protection, described by the court as a tort of misuse of private information:

> [T]he new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity
> -- the right to control the dissemination of information about one's private life and the right to the esteem and respect of people.

[62] The reformulated action for breach of confidence has been held to embrace damages claims to protect privacy interests that would easily fall within the intrusion upon seclusion category: see Mosely v. News Group Newspapers Ltd., [2008] EWHC 1777, [2008] All E.R. (D) 322 (Q.B.), at para. 7: "[t]he law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence".

> [63] In Lenah Game Meats Pty Ltd v. Australian Broadcasting Corp., [2001] H.C.A. 63, 185 A.L.R. 1 (H.C. Aust.), the High Court of Australia expressly left the door open to the recognition of a common law right to privacy despite earlier authority to the contrary. This was applied in Grosse v. Purvis, [2003] Q.D.C. 151, Aust. Torts Reports 81-706, where the elements for the tort were found to be (1) a willed act by the defendant; (2) which intrudes upon the privacy or seclusion of the plaintiff; (3) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and (4) which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

[64] In Hosking v. Runting, [2004] NZCA 34, [2005] 1 NZLR 1 (C.A.), the New Zealand Court of Appeal recognized a common law tort of breach of privacy that is separate and distinct from the tort of breach of confidence. Although the court dismissed the claim on the merits, the majority judgment confirmed the existence of a privacy tort in New Zealand dealing with wrongful [page260] publication of private facts to address publicity that is (at para. 126) "truly humiliating and distressful or otherwise harmful". The elements of the tort were described, at para. 117:

> 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and

2012 ONCA 32 (CanLII)

2. Publicity given to those private facts must be considered highly offensive to an objective reasonable person. 2. Defining the tort of intrusion upon seclusion
(a) Introduction

[65] In my view, it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.
(b) Rationale

[66] The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. Many legal scholars and writers who have considered the issue support recognition of a right of action for breach of privacy: see, e.g., P. Winfield, "Privacy" (1931), 47 Law Q. Rev. 23; D. Gibson, "Common Law Protection of Privacy: What to do Until the Legislators Arrive" in Lewis Klar, ed., Studies in Canadian Tort Law (Toronto:
Butterworths, 1977) 343; Robyn M. Ryan Bell, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Todd Archibald and Michael Cochrane, eds., Annual Review of Civil Litigation (Toronto: Carswell, 2005) 225; Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1; John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 52 McGill L.J. 355.

[67] For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written [page261] of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender": "The Law and Privacy: the Canadian Experience", at p. 1. See, also, Alan Westin, Privacy and Freedom (New York:
Atheneum, 1967). The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic databases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled and the nature of our communications by cellphone, e-mail or text message.

[68] It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our social and political order.

2012 ONCA 32 (CanLII)

[69] Finally, and most importantly, we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones' position would be profoundly disturbed by the significant intrusion into her highly personal information. The discipline administered by Tsige's employer was governed by the principles of employment law and the interests of the employer and did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.
(c) Elements

[70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would [page262] include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.
(d) Limitations

[72] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

> [73] Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. A useful analogy may be found in the Supreme Court of Canada's elaboration of the common law of defamation in Grant v. Torstar where the court held, at para. 65, that "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know." 3. Damages
> (a) Introduction

2012 ONCA 32 (CanLII)

[74] As I have indicated, proof of actual loss is not an element of the cause of action for intrusion upon seclusion. However, the question necessarily arises: what is the appropriate approach to damages in cases, like the present, where the plaintiff has suffered no pecuniary loss? [page263]

[75] Where the plaintiff has suffered no provable pecuniary loss, the damages fall into the category of what Professor Stephen M. Waddams, The Law of Damages, looseleaf (Toronto: Canada Law Book, 2011), at para. 10.50, describes as "symbolic" and others have labelled as "moral" damages: see Dulude v. Canada, [2000] F.C.J. No. 1454, 192 D.L.R. (4th) 714 (C.A.), at para. 30. They are awarded "to vindicate rights or symbolize recognition of their infringement": Waddams, at para. 10.50. I agree with Prof. Waddams' observation that a conventional range of damages is necessary to maintain "consistency, predictability and fairness between one plaintiff and another".

[76] Guidance in determining an appropriate range of damages can be gleaned from existing case law from Ontario as well as from the provinces where there is a statutory cause of action.
(b) Damages under Ontario case law

[77] Although the tort of intrusion upon exclusion has not been fully recognized in Ontario law, several cases award damages for invasion of privacy in conjunction with, or under the head of, a traditional tort such as nuisance or trespass. These claims typically involve intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses. I attach, as Appendix A, a summary of these cases and the damages awarded and will briefly discuss the facts of some of those cases here.

[78] In Saccone v. Orr, the court found that the proven damages were minimal; the plaintiff had not lost his job or suffered any material loss. However, acknowledging that the plaintiff's privacy was invaded and that he was embarrassed and felt that his confidence had been betrayed, the court awarded damages in the amount of $500. Similarly, in Provincial Partitions Inc. v. Ashcor Inplant Structures Ltd., [1993] O.J. No. 4685, 50 C.P.R. (3d) 497 (Gen. Div.), the judge found that the defendant committed the tort of nuisance by invasion of privacy through abuse of telephone communications when they called the plaintiff, a competitor company, dozens of times. The judge awarded only $500 against each defendant and because the defendants had already ceased placing the phone calls, the judge declined to provide injunctive relief.

[79] In Roth v. Roth, the plaintiff claimed $100,000 in damages for intimidation, harassment and invasion of privacy, in addition to approximately $400,000 in additional damages for other tortious acts. The judge found that because the various causes of action overlapped, damages were best addressed as a lump sum and that the plaintiff was entitled to aggravated [page264] damages. Despite the lack of evidence of actual physical or psychological harm, the plaintiff was awarded the sum of $20,000.

[80] MacKay v. Buelow, [1995] O.J. No. 867, 24 C.C.L.T. (2d) 184 (Gen. Div.) involved a family law dispute in which the defendant had harassed his ex-wife over a period of four months. He continuously called her, stalked her on several occasions, threatened to kill her and threatened to kidnap their child and take her to another country. The trial judge found that the plaintiff was entitled to a remedy for the [at para. 17] "calculated, devilishly creative and entirely

2012 ONCA 32 (CanLII)

reprehensible conduct by the defendant" and awarded $25,000 general damages, $15,000 aggravated damages, $15,000 punitive damages, together with special damages and a significant award for the future medical care she would require.
(c) Damages under provincial legislation

[81] The four provincial privacy acts do not require proof of damage as an element of the cause of action. The Manitoba Privacy Act, however, is the only statute that provides specific guidance with regard to the determination of damages:

Considerations in awarding damages

> 4(2) In awarding damages in an action for a violation of privacy of a person, the court shall have regard to all the circumstances of the case including
>
> > (a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person;
> >
> > (b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family;
> >
> > (c) any relationship, whether domestic or otherwise, between the parties to the action;
> >
> > (d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and
> >
> > (e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant.

[82] The other provincial statutes leave this determination to judicial discretion. The case law, however, demonstrates that courts frequently consider the same factors enumerated in the Manitoba Act. Appendix B contains a summary of these cases, mostly from British Columbia.

[83] Absent proof of actual pecuniary loss, the awards are, for the most part, modest. For example, in Heckert v. 5470 Investments Ltd., [2008] B.C.J. No. 1854, 2008 BCSC 1298, 299 D.L.R. (4th) 689, [page265] the judge noted [at para. 148] that the only evidence regarding damages were "Ms. Heckert's general statements that she felt stressed and needed to see her chiropractor and acupuncturist for additional visits". The judge still found that Ms. Heckert's landlord had invaded her privacy by installing close imaging cameras in the hallway outside of her door, but that the lack of medical evidence meant that the award could be not more than nominal damages of $3,500.

[84] Egregious conduct, however, has attracted awards of aggravated damages. In Watts v. Klaemt, [2007] B.C.J. No. 980, 2007 BCSC 662, 71 B.C.L.R. (4th) 362, the plaintiff was terminated from her job when her next door neighbour, the defendant, recorded her phone calls

2012 ONCA 32 (CanLII)

and after discovering she was perpetrating fraud against her company, reported this to her employer. The plaintiff claimed general damages for emotional pain and suffering, loss of enjoyment of life and diminution of her reputation as well as punitive or exemplary damages for the invasion of privacy. In assessing the quantum of damages, the judge considered the degree to which the plaintiff's life was destroyed following the invasion of privacy -- notably the termination of her employment, the need to seek psychological care for depression and post-traumatic stress disorder -- and weighed this against the plaintiff's own misconduct. The judge awarded [at para. 68] $30,000, including aggravated damages for the "substantial degree of suffering experienced by the plaintiff".

[85] The benchmark case for exemplary or punitive damages for an invasion of privacy under the British Columbia regime is Malcolm v. Fleming, [2000] B.C.J. No. 2400, 2000 CarswellBC 1316 (S.C.). The defendant, the plaintiff's landlord, installed a video camera in the plaintiff's apartment and recorded her in various stages of undress in her bathroom and bedroom. The judge awarded punitive damages of $35,000 in addition to $15,000 in general damages. In determining the figure for punitive damages the judge considered such factors as the intimate location of the invasion, the relationship between the parties as landlord and tenant as having a high expectation of privacy, the substantial premeditation and planning, the additional humiliation of discovery prior to trial, the fact that a permanent record of the violation existed creating the potential for future embarrassment and the fact that there was no other means of punishment as there was no criminal act perpetrated.

[86] Other cases have awarded punitive damages in consideration of society's abhorrence of the defendant's actions, a lack of remorse on the part of the defendant and the desire to promote specific deterrence: see [page266] Watts v. Klaemt; Lee v. Jacobson; Weber v. Jacobson, [1992] B.C.J. No. 132, 87 D.L.R. (4th) 401 (S.C.), revd [1994] B.C.J. No. 2459, 120 D.L.R. (4th) 155 (C.A.). In Hollinsworth v. BCTV, a division of Westcom TV Group Ltd., [1996] B.C.J. No. 2638, 34 C.C.L.T. (2d) 95 (S.C.), affd [1998] B.C.J. No. 241, 1998 B.C.C.A. 304 (C.A.), for example, the court assessed the plaintiff's damages for both breach of confidentiality and for the invasion of privacy at $15,000. The court there noted, at para. 27 (S.C.), that these damages were higher than usual for breaches of the Privacy Act in consideration of the "reprehensible conduct" of the defendant. In Hollinsworth, the defendant lied to a reporter, saying that he had consent to use a videotape of the plaintiff undergoing surgery to treat baldness. The video was then aired during a news broadcast.

(d) Determining the quantum of damages

> [87] In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba Privacy Act, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:
> (1) the nature, incidence and occasion of the defendant's wrongful act; (2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position; (3) any relationship, whether domestic or otherwise, between the parties; (4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and (5) the

2012 ONCA 32 (CanLII)

conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

[88] I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified. [page267] 3. Application to this case

[89] It is my view that, in this case, Tsige committed the tort of intrusion upon seclusion when she repeatedly examined the private bank records of Jones. These acts satisfy the elements laid out above: the intrusion was intentional, it amounted to an unlawful invasion of Jones' private affairs, it would be viewed as highly offensive to the reasonable person and caused distress, humiliation or anguish.

[90] In determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this case at the mid- point of the range I have identified and award damages in the amount of $10,000. Tsige's intrusion upon Jones' seclusion, this case does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages.

Issue 2. Did the motion judge err with respect to costs?

[91] As I would set aside the judgment in favour of Tsige and grant judgment in favour of Jones, it is not necessary for me to consider Jones' contention that the motion judge erred in his costs award. Disposition

[92] Accordingly, I would allow the appeal, set aside the summary judgment dismissing the action and in its place substitute an order granting summary judgment in Jones' favour for damages in the amount of $10,000.

[93] Both parties have filed bills of costs asking for significant awards. In my view, it is appropriate to take into account the novel issue raised by this case which has clearly broken new ground. There is discretion to depart from the usual order in cases of novelty. In my view, in the unusual circumstances of this case, the parties should bear their own costs throughout and I would make no order as to costs.

Appeal allowed. [page268] Appendix A: Ontario damage awards

2012 ONCA 32 (CanLII)

[QL:GRAPHIC NAME="108OR3d241-1.jpg"/] [page269]

[QL:GRAPHIC NAME="108OR3d241-2.jpg"/] [page270] Appendix B: Damage awards under provincial privacy legislation

[QL:GRAPHIC NAME="108OR3d241-3.jpg"/] [page271]

[QL:GRAPHIC NAME="108OR3d241-4.jpg"/] [page272]

2012 ONCA 32 (CanLII)

TAB 31

1978 CanLII 202 (SCC)

Lucien Landreville (*Expropriated party*) *Appellant*;

and

Town of Boucherville (*Expropriating party*) *Respondent*.

1977: June 9; 1978: February 7.

Present: Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Expropriation — Contestation of the right to expropriate — Bad faith of the expropriating party — Burden of proof — Code of Civil Procedure, art. 777.

Municipal law — Validity of a by-law disputed by incidental arguments — Statutory right of a municipality to expropriate — Cities and Towns Act, R.S.Q. 1964, c. 193, ss. 411, 605.

Appellant is contesting the right to expropriate of respondent (the "Town"), which passed a by-law ordering the expropriation of his land for purposes of a municipal park and offering him an indemnity of one dollar. The land is a shale quarry covering forty arpents located approximately three miles from the centre of the Town of Boucherville. On December 7, 1965, the Town issued a permit for appellant to work this quarry but made it subject to a number of conditions, *inter alia* that the Town could take 10,000 tons of stone free of charge and that appellant would transfer the part of his lot that was used as a quarry to the Town for $1. The Town did in fact take the specified quantity of stone free of charge, but appellant refused to transfer his quarry. On March 1, 1966 the municipal council passed a resolution requiring appellant to sign the contract transferring the quarry to the Town. At the same time counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until appellant had signed the contract. On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167, namely appellant's land, be homologated for purposes of a park. On August 9, 1966 the municipal council passed a resolution ordering "that appropriate legal proceedings be taken regarding the operation of a quarry [belonging to appellant] . . . and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay". Finally, on December 6, 1966 the contested expropriation by-law was passed. The Superior Court judge concluded that the Town had expropriated appellant not for the reason put forward but solely to prevent him from operating his quarry, and

Lucien Landreville (*Exproprié*) *Appelant*;

et

Ville de Boucherville (*Expropriante*) *Intimée*.

1977: 9 juin; 1978: 7 février.

Présents: Les juges Martland, Ritchie, Pigeon, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Expropriation — Contestation du droit à l'expropriation — Mauvaise foi de l'expropriante — Fardeau de la preuve — Code de procédure civile, art. 777.

Droit municipal — Validité d'un règlement attaquée par moyens incidents — Droit statutaire d'une municipalité à l'expropriation — Loi des cités et villes, S.R.Q. 1964, c. 193, art. 411, 605.

L'appelant conteste le droit à l'expropriation de l'intimée (la «Ville») qui a décrété, par règlement, l'expropriation de son terrain pour fin de parc municipal et lui a offert un dollar comme indemnité. Le terrain est une carrière de schiste de quarante arpents située à environ trois milles du centre de la ville de Boucherville. La Ville avait émis à l'appelant, le 7 décembre 1965, un permis pour en extraire de la pierre mais en l'assujettissant à certaines conditions, entre autres, qu'elle puisse prélever gratuitement 10,000 tonnes de pierre et que l'appelant lui cède pour le prix de $1 la partie du lot servant de carrière. La Ville a effectivement prélevé gratuitement la quantité de pierre prévue mais l'appelant a refusé de céder sa carrière. Le 1er mars 1966, le conseil municipal, par résolution, requiert l'appelant de signer le contrat cédant la carrière à la Ville. En même temps, les avocats de la Ville reçoivent mandat de prendre les mesures nécessaires pour arrêter l'extraction de la pierre jusqu'à ce que l'appelant ait signé le contrat. Le 19 avril 1966, le conseil municipal adopte un règlement décrétant l'homologation pour fin de parc d'une partie du lot 167, soit le terrain de l'appelant. Le 9 août 1966, le conseil municipal décrète par résolution «que des procédures légales appropriées soient prises relativement à l'exploitation d'une carrière [de l'appelant] . . . et s'il y a insuffisance de règlement à cet effet, qu'une recommandation soit faite à ce conseil sans délai». Enfin, le 6 décembre 1966 le règlement d'expropriation contesté est adopté. Le juge de la Cour supérieure a conclu que la Ville n'avait pas exproprié l'appelant pour la raison invoquée mais uniquement pour l'empêcher d'exploiter sa carrière et qu'ainsi elle avait agi de mauvaise foi et abusé de son

1978 CanLII 202 (SCC)

had thus acted in bad faith and abused its power: he found in favour of appellant and quashed the by-law. The Court of Appeal reversed the judgment on the ground that the expropriated party, on whom the burden of proof rested, had failed to establish fraud and flagrant injustice. Hence the appeal to this Court.

Held: The appeal should be allowed.

The trial judge made no error of law and drew no incorrect conclusions from the facts when he decided that the resolutions passed by the Town, and the content of these resolutions, showed clearly that the Town's bad faith was such as to be the equivalent of a fraud upon the party concerned. It may be added that while the resolutions and by-laws passed by the municipal council clearly condemn the Town, this condemnation is confirmed by the other circumstances. There is no legislation permitting the Town to make the issuing of a permit to operate the quarry conditional upon appellant's transferring his land to the Town. Since the wrongful and unjust conduct of the Town with regard to appellant prior to the adoption of the expropriation by-law had been proved, it was up to the Town to prove a subsequent change, which it did not do. On the contrary, in its efforts to acquire appellant's property for $1, the Town continued to act in bad faith since its valuation was clearly unfair and disregarded a recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not the value to the expropriating party. Appellant did not have to demonstrate that the Town did not intend to use the quarry as a park. Once the initial bad faith was proved, it vitiated and nullified the Town's actions regardless of the intentions that the Town may eventually have formed in order to attain its objectives. We are dealing with a cause of nullity that transcends the others and vitiates whatever it produces.

The argument that a municipal by-law can be nullified only by a petition to quash, as provided by s. 411 of the *Cities and Towns Act*, cannot be allowed. Section 411 creates an additional but not an exclusive remedy. It is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments, such as the contestation of the right to expropriate in the case at bar. Finally, the Town's statutory right to expropriate under s. 605 of the *Cities and Towns Act* is not an absolute right. It may be contested, as in the case at bar, if the expropriating party commits abuses that vitiate the substance of its decisions.

Kuchma v. Rural Municipality of Taché, [1945] S.C.R. 234; *Lazarus Estates Ltd. v. Beasley*, [1956] 1

pouvoir: il a maintenu la contestation et annulé le règlement. La Cour d'appel a infirmé le jugement pour le motif que l'exproprié, sur qui reposait le fardeau de la preuve, n'avait pas établi la fraude et l'injustice flagrante. D'où le pourvoi en cette Cour.

Arrêt: Le pourvoi doit être accueilli.

Le juge de première instance n'a pas fait d'erreur de droit et il n'a pas non plus tiré des faits des conclusions erronées lorsqu'il a décidé que les résolutions adoptées par la Ville et leur contenu montraient clairement que la mauvaise foi de la Ville était telle qu'elle équivalait à une fraude envers l'intéressé. On peut ajouter que si les résolutions et règlements du conseil municipal condamnent explicitement la Ville, les autres circonstances confirment cette condamnation. Aucun texte de loi ne permettait à la Ville d'imposer comme condition à la délivrance d'un permis pour l'exploitation de la carrière, que l'appelant lui cède son terrain. La preuve ayant été faite du comportement abusif et injuste de la Ville à l'égard de l'appelant avant l'adoption du règlement d'expropriation, il incombait à la Ville de prouver que les choses auraient changé par la suite, ce qu'elle n'a pas fait. Au contraire, en cherchant à obtenir la propriété de l'appelant pour la somme de $1, la Ville continue à agir de mauvaise foi, puisque son évaluation n'est pas, à sa face, honnête et méconnaît un principe de droit reconnu selon lequel l'indemnité doit être calculée d'après la valeur pour le propriétaire et non la valeur pour l'expropriant. L'appelant n'avait pas à démontrer que la Ville n'avait pas l'intention d'utiliser la carrière pour fin de parc. La mauvaise foi initiale ayant été prouvée, elle viciait les actes de la Ville et entraînait leur nullité abstraction faite des intentions que la Ville a finalement pu former pour atteindre ses fins. Il s'agit d'une cause de nullité qui transcende les autres et qui vicie ce qui en découle.

L'argument selon lequel un règlement municipal peut être attaqué en nullité uniquement par requête en cassation tel que prévu à l'art. 411 de la *Loi des cités et villes* ne peut être retenu. L'article 411 crée un recours supplémentaire mais non exclusif. Il est également possible d'attaquer la validité d'un règlement municipal en défense ou par des moyens incidents, comme en l'espèce par la contestation du droit d'expropriation. Enfin le droit statutaire d'expropriation de la Ville, en vertu de l'art. 605 de la *Loi des cités et villes*, n'est pas un droit absolu. Il peut être contesté, comme on l'a fait en l'espèce, si l'expropriant commet des abus qui vicient le fond de sa décision.

Arrêts appliqués: *Kuchma c. La municipalité rurale de Taché*, [1945] R.C.S. 234; *Lazarus Estates Ltd. v.*

1978 CanLII 202 (SCC)

Q.B. 702; *Marquess of Clanricarde v. Congested Districts Board of Ireland* (1915), 79 J.P. 481 (H. of L.); *Duquet v. The Town of Sainte-Agathe-des-Monts*, [1977] 2 S.C.R. 1132, applied; *City of Sillery v. Sun Oil Co. and Royal Trust Co.*, [1964] S.C.R. 552; *Cedar Rapids Manufacturing and Power Company v. Lacoste*, [1914] A.C. 569; *Fraser v. Fraserville*, [1917] A.C. 187; *The City of Montreal v. McAnulty Realty Co.*, [1923] S.C.R. 273; *Attorney General of Quebec v. Hébert*, [1967] S.C.R. 690; *Place Versailles Inc. et al. v. Minister of Justice of Quebec*, [1977] 2 S.C.R. 1118, referred to; *Hamel v. Town of Asbestos*, [1967] S.C.R. 534, distinguished.

APPEAL from a decision of the Court of Appeal of Quebec reversing a judgment of the Superior Court. Appeal allowed.

Viateur Bergeron, Q.C., and *Richard Gaudreau*, for the appellant.

Yvon Denault, for the respondent.

The judgment of the Court was delivered by

BEETZ J.—The issue is whether respondent committed an abuse of power in expropriating appellant's land. The case also raises both procedural and jurisdictional questions.

By-law No. 533 ordering expropriation of this land for purposes of a municipal park was adopted on December 6, 1966 by resolution No. 66-906 of the municipal council of the Town of Boucherville. The notice of expropriation estimated the value of the expropriated immovable (part of lot 167) at one dollar; this was the amount of the indemnity offered to the expropriated party by the expropriating party.

Lucien Landreville contested "the right to expropriate" under art. 777 *C.C.P.*, pleading *inter alia* that:

[TRANSLATION] Under the pretext of exercising a statutory right specifically granted to cities and towns under ss. 605 *et seq.* of the *Cities and Towns Act*, namely the right to expropriate for municipal purposes, the expropriating municipality in its notice of expropriation falsely and unlawfully alleged its desire to acquire the property of the expropriated party for purposes of a municipal park, when in fact it wished to acquire the said property not for municipal purposes but solely with the objective of putting an end to the operation of a

Beasley, [1956] 1 Q.B. 702; *Marquess of Clanricarde v. Congested Districts Board of Ireland* (1915), 79 J.P. 481 (H. of L.); *Duquet c. La ville de Sainte-Agathe-des-Monts*, [1977] 2 R.C.S. 1132; arrêts mentionnés: *Cité de Sillery c. Sun Oil Co. et Royal Trust Co.*, [1964] R.C.S. 552; *Cedar Rapids Manufacturing and Power Company v. Lacoste*, [1914] A.C. 569; *Fraser v. Fraserville*, [1917] A.C. 187; *La Cité de Montréal c. McAnulty Realty Co.*, [1923] R.C.S. 273; *Procureur général du Québec c. Hébert*, [1967] R.C.S. 690; *Place Versailles Inc. et autre c. Ministre de la Justice du Québec*, [1977] 2 R.C.S. 1118; distinction faite avec l'arrêt *Hamel c. Ville d'Asbestos*, [1967] R.C.S. 534.

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Québec infirmant un jugement de la Cour supérieure. Pourvoi accueilli.

Viateur Bergeron, c.r., et *Richard Gaudreau*, pour l'appelant.

Yvon Denault, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE BEETZ—Il faut décider si, en expropriant le terrain de l'appelant, l'intimée a commis un abus de pouvoir. La cause soulève également des questions de procédure et de juridiction.

Le règlement n° 533, décrétant l'expropriation de ce terrain pour fin de parc municipal, a été adopté le 6 décembre 1966 par la résolution n° 66-906 du conseil municipal de la ville de Boucherville. L'avis d'expropriation estime à un dollar la valeur de l'immeuble exproprié (partie du lot 167); c'est l'indemnité que l'expropriante offre à l'exproprié.

Lucien Landreville a contesté «le droit à l'expropriation» suivant l'art. 777 *C.p.c.* Il plaide entre autres que

Sous prétexte d'exercer un droit statutaire spécifiquement reconnu aux cités et villes, en vertu des articles 605 et suivants de la *Loi des cités et villes*, soit celui d'exproprier pour fins municipales, la Municipalité Expropriante à l'occasion de son avis d'expropriation, allègue faussement et illégalement vouloir acquérir la propriété de l'Exproprié pour fins de parc municipal alors qu'en réalité elle désire acquérir ladite propriété non pas pour fins municipales mais plutôt dans le seul et unique but de mettre fin à l'exploitation d'une carrière

1978 CanLII 202 (SCC)

quarry located on it, more specifically, a shale borrow pit . . .

Lucien Landreville also pleaded that the Town:

[TRANSLATION] falsely and in bad faith alleged the necessity of developing the said lot P-167 for purposes of a municipal park . . .

He further pleaded that:

[TRANSLATION] the expropriating municipality attempted unlawfully and in bad faith to camouflage its true intention, which is to put an end to the operation being carried out on lot P-167 . . .

The Superior Court (Nolan J.) held that the expropriation was motivated by a reason other than the reason put forward: the sole aim of the Town was to prevent Lucien Landreville from operating his quarry. The Town had therefore acted in bad faith, treated Landreville unfairly and abused its power. Consequently, the trial judge found in favour of appellant, dismissed the notice of expropriation and quashed the resolution and the by-law ordering the expropriation.

The Court of Appeal (Tremblay C.J.A. and Casey and Turgeon JJ.A.) reversed the judgment of the Superior Court and dismissed Lucien Landreville's contestation. Turgeon J.A., with whom Tremblay C.J.A. concurred, held that:

[TRANSLATION] the expropriated respondent, on whom the burden of proof rested, failed to establish the fraud and flagrant injustice alleged in his defence. The evidence of the engineer Gilles Chabot and the town planner Victor Lambert convinced me of this.

The Chief Justice and Turgeon J.A. took for granted, without deciding the point, that in its contestation the expropriated party could argue the nullity of the by-law ordering the expropriation. Casey J.A. paid more attention to this latter question, which does not appear to have been raised in Superior Court, but he agreed with the opinion of his colleagues on the main issue:

The motivation of the Councillors or the suspicion that they do not intend to proceed with the work requires proof far stronger than that contained in this record.

The appeal, filed under the old s. 36 of the *Supreme Court Act*, asks this Court to set aside the decision of the Court of Appeal and restore the

s'y trouvant, plus particulièrement d'un banc d'emprunt de schiste . . .

Lucien Landreville plaide aussi que la Ville

invoque faussement et de mauvaise foi les nécessités d'aménager pour fins de parc municipal ledit lot P-167 . . .

Il plaide également que

la municipalité expropriante tente illégalement et de mauvaise foi de camoufler ses véritables intentions qui sont de faire cesser l'exploitation faite sur le lot P-167 . . .

La Cour supérieure (le juge Nolan) a jugé que l'expropriation a été inspirée par un motif autre que la raison invoquée: le mobile unique de la Ville était d'empêcher Lucien Landreville d'exploiter sa carrière; la Ville a donc agi de mauvaise foi, traité Landreville injustement et abusé de son pouvoir. Le premier juge maintient par conséquent la contestation, rejette l'avis d'expropriation et annule la résolution et le règlement décrétant l'expropriation.

La Cour d'appel (le juge en chef Tremblay et les juges Casey et Turgeon) a infirmé le jugement de la Cour supérieure et rejeté la contestation de Lucien Landreville. Le juge Turgeon, avec qui le juge en chef Tremblay est d'accord, juge que

l'exproprié intimé sur qui reposait le fardeau de la preuve, n'a pas établi la fraude et l'injustice flagrante qu'il a alléguées en défense. Les dépositions de l'ingénieur Gilles Chabot et de l'urbaniste Victor Lambert m'en ont convaincu.

Le Juge en chef et le juge Turgeon prennent pour acquis sans le décider que l'exproprié peut dans sa contestation attaquer en nullité le règlement décrétant l'expropriation. Le juge Casey s'attache davantage à cette dernière question qui ne paraît pas avoir été soulevée en Cour supérieure mais il rejoint l'opinion de ses collègues sur le fond:

[TRADUCTION] Les visées des conseillers ou la possibilité qu'ils n'aient pas vraiment l'intention de procéder aux travaux doivent être prouvées de façon plus convaincante qu'en l'espèce.

Le pourvoi, déposé suivant l'art. 36 (ancien) de la *Loi sur la Cour suprême* nous demande de casser l'arrêt de la Cour d'appel et de rétablir le

1978 CanLII 202 (SCC)

judgment of the Superior Court. (Affidavits attesting that the value of the matter in controversy exceeds ten thousand dollars were filed by appellant. The jurisdiction of this Court was not questioned.)

The evidence consisted mainly of resolutions and by-laws adopted by the Town. The remainder of the evidence included the testimony of Lucien Landreville, Victor Lambert, town planner and witness for Lucien Landreville, Gilles Chabot, engineer and witness for the Town, and Eugène McClish, Town clerk.

The facts are not disputed but the Court of Appeal and the Superior Court did not draw the same conclusions from them.

The land that the Town wished to expropriate is a shale quarry covering forty arpents (1,472,027 sq. ft.) located in an open field approximately three miles from the centre of the Town of Boucherville in the Parish of Sainte-Famille de Boucherville, which was annexed by the Town in 1963. At the time the expropriation was ordered the quarry was approximately twenty-five feet deep and covered forty per cent of the farm belonging to Lucien Landreville. Exploitation began in December 1965 when the owner transferred to contractors the right of quarrying the shale, at first for a one-year period and later for a ten-year period.

Believing he needed a permit, Lucien Landreville sent a written request to the municipal authorities on December 7, 1965, after he had transferred quarrying rights to the first contractor. At first, the Mayor, whom he went to see, told him that the matter was "as good as money in the bank". Later, however, at the Town Hall, the Town's engineer, Gilles Chabot, and the Mayor told him that the Town could not agree to issue him a permit unless he transferred the land to the Town once the quarrying was over. In the application for a permit, dated December 7, 1965, which was dictated to him, Lucien Landreville wrote "that in consideration of this application" he "would undertake" to transfer this part of his lot to the Town "for the sum of $1 plus other consideration and an access to the said land". (The offer was withdrawn on April 11, 1968.)

jugement de la Cour supérieure. (Des affidavits attestant que la valeur de la matière en litige dépasse dix mille dollars ont été déposés par l'appelant. La juridiction de cette Cour n'a pas été mise en doute.)

La partie la plus importante de la preuve consiste en résolutions et règlements adoptés par la Ville. Le reste de la preuve comprend la déposition de Lucien Landreville, celle de Victor Lambert, urbaniste, témoin de Lucien Landreville, celle de Gilles Chabot, ingénieur et témoin de la Ville et celle d'Eugène McClish, greffier de la Ville.

Les faits ne sont pas contestés, mais la Cour d'appel et la Cour supérieure n'en tirent pas les mêmes conclusions.

Le terrain que la Ville veut exproprier est une carrière de schiste de quarante arpents (1,472,027 p.c.) située en plein champ à environ trois milles du centre de la ville de Boucherville dans la Paroisse Sainte-Famille de Boucherville annexée à la Ville en 1963. Au moment où l'expropriation est décrétée, la carrière est profonde d'environ vingt-cinq pieds. Elle occupe quarante pour cent de la ferme appartenant à Lucien Landreville. Son exploitation a commencé en décembre 1965, le propriétaire ayant cédé à des entrepreneurs le droit d'en extraire le schiste, d'abord pour une période d'un an et ensuite pour une période de dix ans.

Croyant avoir besoin d'un permis, Lucien Landreville en fait la demande par écrit aux autorités municipales le 7 décembre 1965, après avoir cédé un droit d'extraction à un premier entrepreneur. Le maire, à qui il avait rendu visite, lui avait d'abord déclaré que cette bonne affaire était «de l'argent tout trouvé». Mais subséquemment, à l'Hôtel de ville, l'ingénieur de la Ville, Gilles Chabot, et le maire lui ont dit que la Ville ne pouvait consentir à lui émettre un permis à moins qu'il ne cède le terrain à la Ville après l'extraction. Dans la demande de permis en date du 7 décembre 1965, qui lui a été dictée, Lucien Landreville écrit «qu'en considération de la présente demande» il «s'engagerait» à céder cette partie de son lot à la Ville «pour la somme de $1 et autres considérations ainsi qu'un accès audit terrain». (L'offre sera révoquée le 11 avril 1968.)

1978 CanLII 202 (SCC)

Pursuant to this application, a resolution of the municipal council dated December 16, 1965 authorized Lucien Landreville to lease part of his lot to Mégantic Construction Inc. for quarrying of the stone, but with a number of conditions, including the following: the excavation was limited to a depth of twenty feet; all excavation or quarrying of stone was to end on May 1, 1967; the earth removed was to be deposited at a place to be specified by the Town and to remain its property; the Town could take 10,000 tons of stone free of charge; Lucien Landreville was to transfer to the Town for $1, by means of a notarized contract, the part of his lot that was used as a quarry; a notary was chosen to prepare the contract, which the Mayor and the Secretary-Treasurer were empowered to sign.

The 10,000 tons of stone, valued at $0.85 a ton, were in fact used for municipal purposes free of charge, but Lucien Landreville did not agree to transfer his quarry to the Town.

On March 1, 1966 the municipal council passed a resolution refusing to grant Paul-Emile Lamontagne and Lucien Landreville permission to use lot 167 as a dump. The same resolution required Lucien Landreville to sign the contract transferring the quarry to the Town. Counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until Lucien Landreville had signed the contract. If he refused, they were to see that the quarrying was halted indefinitely and sue him for damages.

On March 15, 1966 a proposal was made to the municipal council that a land surveyor [TRANSLATION] "be authorized to prepare plans for the piece of land to be homologated on lot 167 belonging to Mr. Lucien Landreville". (The copy in the record does not mention, however, whether this proposal was adopted.)

On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167 be homologated for purposes of a park. (The record does not show whether the homologation was actually carried out.)

Suite à cette demande, une résolution du conseil municipal en date du 16 décembre 1965 autorise Lucien Landreville à louer partie de son lot à Mégantic Construction Inc. pour l'extraction de la pierre, mais à certaines conditions dont les suivantes: l'excavation est limitée à une profondeur de 20 pieds; toute excavation ou extraction de pierre doivent se terminer le 1er mai 1967; la terre déplacée doit être déposée à un endroit déterminé par la Ville et demeurer sa propriété; il est permis à la Ville de prélever gratuitement 10,000 tonnes de pierre; Lucien Landreville doit par contrat notarié céder à la Ville pour le prix de $1 la partie de son lot servant de carrière; un notaire est désigné pour préparer le contrat que le maire et le secrétaire-trésorier sont habilités à signer.

Les 10,000 tonnes de pierre, valant $0.85 la tonne, serviront effectivement et gratuitement à des fins municipales. Mais Lucien Landreville ne consentira pas à céder sa carrière à la Ville.

Le 1er mars 1966, le conseil municipal, par résolution, refuse à Paul-Émile Lamontagne et à Lucien Landreville la permission d'utiliser le lot 167 comme dépotoir. Par la même résolution, Lucien Landreville est requis de signer le contrat cédant la carrière à la Ville. Les avocats de la Ville reçoivent mandat de prendre les mesures nécessaires pour arrêter l'extraction de la pierre jusqu'à ce que Lucien Landreville ait signé le contrat. S'il refuse, les avocats doivent prendre des dispositions pour que l'extraction de la pierre cesse indéfiniment et que Lucien Landreville soit recherché en dommages-intérêts.

Le 15 mars 1966, il est proposé au conseil municipal qu'un arpenteur géomètre «soit autorisé à faire les plans concernant la partie de terrain à homologuer sur le lot 167 de M. Lucien Landreville». (La copie qui se trouve au dossier ne mentionne pas cependant si cette proposition a été adoptée.)

Le 19 avril 1966, le conseil municipal adopte un règlement décrétant l'homologation pour fins de parc d'une partie du lot 167. (Le dossier ne révèle pas si on a effectivement procédé à l'homologation.)

1978 CanLII 202 (SCC)

On August 9, 1966 the municipal council resolved [TRANSLATION] "that appropriate legal proceedings be taken regarding the operation of a quarry known as a borrow pit within our boundaries, namely on lot No. 167 of the official cadastre of the Parish of Ste-Famille, and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay".

On December 6, 1966 the council adopted the [TRANSLATION] "by-law to provide for the acquisition by mutual consent or by expropriation of part of lot No. 167 of the official cadastre of the Parish of Ste-Famille de Boucherville, registration division of Chambly, for the sum of $1 for purposes of a municipal Park". Counsel for the Town were authorized to take the necessary measures to acquire the land by mutual consent or expropriation with prior taking of possession.

On January 17, 1967, the municipal council adopted construction and zoning by-laws Nos. 545 and 546, covering the entire area of the Town of Boucherville. According to these by-laws and the accompanying plan (D-5), Lucien Landreville's quarry is in a residential development zone. In the middle of this zone quite a large area is zoned as a park (P-48). This is a proposed regional park outlined on the plan by curved or elliptical lines, with the exception of a single rectangular projection. This rectangle represents Lucien Landreville's quarry, which the municipality said it wanted to add to the proposed park.

The notice of expropriation is dated February 21, 1967.

The following are the trial judge's reasons for his conclusions:

If this expropriation were being contested solely on the grounds that the City was wrong or unwise in deciding to add Petitioner's property to the park zone P-48 because of the alleged incongruity of adding to the said park zone 40 arpents of land used as a quarry, the whole superficies of which consists of a hole some 25 feet deep, the undersigned would have no hesitation in dismissing the Contestation as it is not the function of the Court to substitute its views for those of the municipal council.

Le 9 août 1966, il est résolu par le conseil municipal «que des procédures légales appropriées soient prises relativement à l'exploitation d'une carrière appelée banc d'emprunt dans nos limites, soit sur le lot n° 167 du cadastre officiel de la Paroisse Ste-Famille et s'il y a insuffisance de règlement à cet effet, qu'une recommandation soit faite à ce Conseil sans délai».

Le 6 décembre 1966 est adopté le «règlement pourvoyant à l'acquisition de gré à gré ou par voie d'expropriation de partie du lot n° 167 du cadastre officiel de la Paroisse Ste-Famille de Boucherville, division d'enregistrement de Chambly, pour la somme de $1 pour fin de parc municipal». Les conseillers juridiques de la Ville reçoivent mandat de prendre les procédures nécessaires pour l'acquisition de gré à gré ou par voie d'expropriation avec prise de possession au préalable.

Le 17 janvier 1967, le conseil municipal adopte des règlements de construction et de zonage, les règlements n°s 545 et 546, s'appliquant à tout le territoire de la ville de Boucherville. Selon ces règlements et le plan qui y est joint, (D-5), la carrière de Lucien Landreville se trouve en pleine zone de développement résidentiel. Au milieu de cette zone, il y a une zone de parc (P-48) de dimensions considérables. Il s'agit d'un projet de parc régional qui apparaît au plan sous une forme aux lignes plutôt courbes ou elliptiques sauf une seule projection de forme rectangulaire. Ce rectangle représente la carrière de Lucien Landreville que la municipalité dit vouloir annexer au parc qu'elle se propose d'aménager.

L'avis d'expropriation est en date du 21 février 1967.

Voici comment le premier juge motive ses conclusions:

[TRADUCTION] Si cette expropriation était contestée uniquement au motif que la ville manquait de discernement ou avait tort de vouloir adjoindre le terrain de la demanderesse à la zone de parc (P-48) parce qu'il serait absurde d'ajouter à cette zone de parc 40 arpents de terre utilisés comme carrière, profonde d'environ 25 pieds, le soussigné n'aurait pas hésité à rejeter la demande puisque la Cour n'a pas à substituer son point de vue à celui du conseil municipal. Pour cette raison, la

1978 CanLII 202 (SCC)

For the same reason, the Court is of the opinion that the fact that the park P-48 may not be built for fifteen years or more (as was proven) should not be considered per se as a valid ground for invalidating the City's by-law decreeing the expropriation. Nor is it its function to pass judgment on the valuation of $1.00 placed on the Contestant's land in the certificate accompanying the Notice of Expropriation even though the municipal valuation for tax purposes was proven to be $100.00 per arpent.

The Court's decision has been reached on the evidence as a whole. Considered by themselves the complaints of Petitioner on the three points mentioned above are irrelevant. But considered together with the other actions of Petitioner they help to confirm Contestant's contention that Petitioner acted unjustly towards him in this matter.

The undersigned is satisfied from the proof which was adduced in this case that Petitioner had an ulterior motive in decreeing the expropriation of Contestant's land and that this motive was its determination to stop Contestant from exploiting his quarry.

The resolutions which were passed, and the contents of these resolutions, show clearly that Petitioner was determined to prevent Contestant from operating a quarry on his land unless he first deeded the land over to the City; and that when all other threats and maneuvers failed it was decided to foil Contestant by expropriating his land. In fact, Petitioner was so anxious to teach Contestant a lesson that the by-law decreeing the expropriation of Contestant's land was passed more than a month before Petitioner's land was added to the park zone P-48 by the Plan D-5.

In the opinion of the undersigned, Petitioner's bad faith is further evidenced by the fact that when this case was heard in March 1970, more than three years after Petitioner passed the by-law decreeing the expropriation of Contestant's land, Petitioner had taken no steps to expropriate any of the other lots forming part of the park zone P-48 except for one single lot on which a road was built as part of the network of roads in the Petitioner municipality and which the undersigned seriously doubts was in any way, other than accidentally, related to park zone P-48.

The principle has been clearly laid down in many cases dealing with decisions reached by municipal corporations that the Courts must not interfere unless fraud is established or a violation of the law or an abuse of power, in either case so violent as to be the equivalent of a fraud upon the public or the parties concerned.

Corporation de la Ville de Dorval v. Sanguinet Automobile Ltée, [1960] Que. K.B. 706, Roy v. Corporation

Cour est aussi d'avis que le fait que le parc (P-48) ne puisse être aménagé avant quinze ans ou plus (selon la preuve) ne peut être considéré en soi comme un motif valable d'annulation du règlement municipal prévoyant l'expropriation. Elle n'a pas non plus à rendre jugement sur l'évaluation du terrain du défendeur qui a été fixée à $1, selon le certificat accompagnant l'avis d'expropriation, même si l'on a prouvé qu'aux fins des taxes municipales sa valeur était de $100 l'arpent.

La décision de la Cour se fonde sur l'ensemble de la preuve. En eux-mêmes, les trois points mentionnés précédemment ne sont pas pertinents. Mais examinés en même temps que les autres actes de la demanderesse, ils confirment la prétention du défendeur selon laquelle la demanderesse s'est comportée de façon injuste à son égard.

Le soussigné est convaincu que la preuve a établi que la demanderesse avait un autre motif inavoué pour exproprier la terre du défendeur: mettre fin à l'exploitation de la carrière du défendeur.

Les résolutions qui ont été adoptées et leur contenu montrent clairement que la demanderesse était résolue à empêcher le défendeur d'exploiter une carrière sur son terrain s'il n'en transférait pas d'abord la propriété à la ville; lorsque toutes les autres menaces et manœuvres eurent échoué, on décida d'avoir raison du défendeur en expropriant sa terre. En fait, la demanderesse était si pressée de donner une leçon au défendeur qu'elle a adopté le règlement prévoyant l'expropriation du terrain du défendeur plus d'un mois avant que le terrain de la demanderesse ne soit inclus dans la zone de parc P-48 par le plan D-5.

A mon avis, la mauvaise foi de la demanderesse est en outre mise en lumière par le fait qu'en mars 1970, date de l'audition, soit plus de trois ans après l'adoption par la demanderesse du règlement prévoyant l'expropriation de la terre du défendeur, la demanderesse n'avait pris aucune autre mesure pour exproprier les autres lots compris dans la zone de parc P-48, excepté un lot sur lequel fut construite une rue faisant partie du réseau routier de la municipalité demanderesse. Je doute sérieusement que la construction de cette rue soit directement reliée à l'aménagement de la zone de parc P-48.

Il a été établi par de nombreux arrêts relatifs à des décisions des municipalités, que les tribunaux ne doivent pas modifier ces décisions à moins qu'on puisse prouver qu'il y a eu fraude ou violation de la loi ou abus de pouvoir si manifestes que cela équivaut à une fraude envers le public ou les parties intéressées.

Corporation de la Ville de Dorval c. Sanguinet Automobile Ltée, [1960] B.R. 706, Roy c. Corporation d'Au-

1978 CanLII 202 (SCC)

d'Aubert-Gallion, [1929] 46 Que. K.B. 15—Rivard, J. at pp. 29-30, Sula vs Cité de Duvernay, [1970] Que. K.B. 234.

The undersigned believes this to be a case which falls within the principles laid down in the above cases.

The undersigned therefore has no hesitation in finding that in passing By-law No. 533 on December 6, 1966 decreeing the expropriation of Contestant's property, Petitioner committed an abuse of power, a flagrant injustice equivalent to bad faith towards Contestant.

I find no error of law in the reasons of the trial judge and I cannot say that the conclusions he draws from the facts are manifestly incorrect.

I would, however, add the following reasons to those of the trial judge.

The burden of proof is a heavy one when it involves establishing the commission of an "abuse of power equivalent to fraud" and "resulting in a flagrant injustice": *City of Sillery v. Sun Oil Co. and Royal Trust Co.*[1], at p. 557.

In the case at bar, however, the municipal council is clearly condemned by its own resolutions and by-laws, and this condemnation is confirmed by the other circumstances.

In the resolution of December 16, 1965, far from opposing the operation of a quarry on Lucien Landreville's farm because of existing or expected zoning or a proposed park, the municipal council indicated that it was prepared to allow this operation on the conditions mentioned above: that the earth removed, 10,000 tons of stone and above all the land itself be given to the Town. From the very beginning, therefore, the Town was trying to appropriate the quarry without paying for it.

There is explicit legislation enabling municipalities to require, as a condition precedent to the approval of a subdivision plan, that the owner convey to them free of charge a specified percentage of his land, to be used for parks or playgrounds; or to appropriate without indemnity in specific cases land to be used for streets or lanes or the land necessary for the first public road on a lot. For example, s. 429 of the *Cities and Towns Act*,

[1] [1964] S.C.R. 552.

bert-Gallion, [1929] 46 B.R. 15—Le juge Rivard aux pages 29 et 30, Sula c. Cité de Duvernay, [1970] B.R. 234.

Je crois que les principes formulés dans ces arrêts s'appliquent à la présente cause.

Je n'ai donc aucune hésitation à déclarer que la demanderesse, en adoptant, le 6 décembre 1966, le règlement n° 533 prévoyant l'expropriation du terrain du défendeur, a commis un abus de pouvoir, une injustice flagrante prouvant sa mauvaise foi envers le défendeur.

Je ne trouve aucune erreur de droit dans les motifs du premier juge et il m'est impossible de dire que les conclusions qu'il tire des faits sont manifestement erronées.

Aux motifs du premier juge, j'ajouterai cependant ceux qui suivent.

Le fardeau de la preuve est lourd quand il s'agit d'établir la commission d'un «abus de pouvoir équivalant à fraude» et «ayant pour effet une injustice flagrante»: *Cité de Sillery c. Sun Oil Co. et Royal Trust Co.*[1], à la p. 557.

Mais, dans la présente affaire, les résolutions et règlements mêmes du conseil municipal le condamnent explicitement, les autres circonstances confirmant cette condamnation.

Dans la résolution du 16 décembre 1965, loin de s'opposer à l'exploitation d'une carrière sur la ferme de Lucien Landreville à cause d'un zonage actuel ou anticipé ou à cause d'un projet de parc, le conseil municipal se montre disposé à permettre cette exploitation mais aux conditions que l'on sait: don de la terre déplacée et de 10,000 tonnes de pierre, et surtout, don du terrain à la Ville. Dès ce premier moment, la Ville tente donc de s'approprier la carrière sans la payer.

Des textes de loi explicites permettent aux municipalités d'exiger, comme condition préalable à l'approbation d'un plan de subdivision, que le propriétaire leur cède gratuitement un pourcentage déterminé de terrain aux fins d'aménagement de parcs ou de terrains de jeu, ou de s'approprier sans indemnité dans des cas précis l'emprise de rues ou de ruelles ou le terrain nécessaire au premier chemin de front sur un lot. Aussi, l'art. 429 de la

[1] [1964] R.C.S. 552.

1978 CanLII 202 (SCC)

R.S.Q. 1964, c. 193, as amended by L.Q. 1975, c. 66, s. 15—a provision subsequent to the facts at issue—states that the municipal council may make by-laws:

(8) To require, as a condition precedent to the approval of a subdivision plan, whether it provides for streets or not, that the owner convey to the municipal corporation, for park or playground purposes, an area of land not exceeding ten per cent of the land comprised in the plan and situated at a place which, in the opinion of the council, is suitable for the establishment of parks or playgrounds; or to exact from the owner, instead of such area of land, the payment of a sum not exceeding ten per cent of the real value of the land comprised in the plan, notwithstanding the application of section 21 of the Real Estate Assessment Act (1971, chapter 50) . . .

See also art. 392f(*g*) of the *Municipal Code*, ss. 610a, 610b, 610c and 1054 of the *Charter of the City of Montreal*, S.Q. 1959-60, c. 102, S.Q. 1960-61, c. 97, s. 30, S.Q. 1963, c. 70, s. 21, L.Q. 1969, c. 91, s. 6; s. 336(204) of the *Charter of the City of Quebec*, L.Q. 1976, c. 54, s. 15. Municipalities may not, however, extend this legislation by using permit-granting powers that they have or think they have to extort from an owner advantages such as those that the Town attempted to obtain from Lucien Landreville on December 16, 1965: such action by a municipality demonstrates bad faith and constitutes an abuse of power.

The Town repeated its conduct five and a half months later with its resolution of March 1, 1966. I am not thinking of its refusal to authorize use of lot 167 as a dump but of the notice to transfer title that was sent to Lucien Landreville with a threat of legal proceedings and prevention of further quarrying. The Town still had no objection in principle, however, to the operation of a quarry on this site provided that Lucien Landreville agreed to relinquish his property; and there was no mention of a park.

The threats became more specific with the resolution or proposal of March 15, 1966 authorizing a surveyor to make plans for homologation which necessarily suggests expropriation. There was still no mention of a park.

Loi des cités et villes, S.R.Q. 1964, c. 193, modifié par L.Q. 1975, c. 66, art. 15—une disposition subséquente aux faits en litige—porte que le conseil municipal peut faire des règlements:

8° Pour exiger, comme condition préalable à l'approbation d'un plan de subdivision, que des rues y soient prévues ou non, que le propriétaire cède à la corporation municipale, pour fins de parcs ou de terrains de jeux, une superficie de terrain n'excédant pas dix pour cent du terrain compris dans le plan et situé à un endroit qui, de l'avis du conseil, convient pour l'établissement de parcs ou de terrains de jeux, ou exiger du propriétaire, au lieu de cette superficie de terrain, le paiement d'une somme n'excédant pas dix pour cent de la valeur réelle du terrain compris dans le plan, nonobstant l'application de l'article 21 de la Loi sur l'évaluation foncière (1971, chapitre 50) . . .

Voir également l'art. 392f*g*) du *Code municipal*, les art. 610a, 610b, 610c, et 1054 de la *Charte de la Ville de Montréal*, S.Q. 1959-60, c. 102, S.Q. 1960-61, c. 97, art. 30, S.Q. 1963, c. 70 art. 21, L.Q. 1969, c. 91, art. 6; l'art. 336, 204° de la *Charte de la Ville de Québec*, L.Q. 1976, c. 54, art. 15. Mais une municipalité ne peut suppléer à ces textes en se servant du pouvoir qu'elle possède ou croit posséder d'octroyer un permis pour extorquer d'un propriétaire des avantages comme ceux que la Ville a tenté d'obtenir de Lucien Landreville le 16 décembre 1965: elle fait alors preuve de mauvaise foi et commet un abus de pouvoir.

La Ville récidive cinq mois et demi après, avec sa résolution du 1er mars 1966. Ce n'est pas au refus d'autoriser l'utilisation du lot 167 comme dépotoir que je songe, mais à la mise en demeure de passer titre qui doit être adressée à Lucien Landreville avec la menace de procédures judiciaires, et celle d'arrêter l'extraction de la pierre. Mais la Ville n'a toujours pas d'objection de principe à l'exploitation d'une carrière sur cet emplacement pourvu que Lucien Landreville consente à se départir de son bien. Et il n'est pas question de parc.

Les menaces se précisent avec la résolution ou la proposition du 15 mars 1966 autorisant un arpenteur à faire des plans d'homologation: l'homologation fait nécessairement penser à l'expropriation. Il n'est toujours pas question de parc.

1978 CanLII 202 (SCC)

The park was mentioned for the first time in the resolution of April 19, 1966, ordering the homologation for purposes of a park of a site that, a month and a half earlier, the Town had been willing in principle to have used as a quarry.

Moreover, the resolution of August 9, 1966 must be interpreted in the light of the resolutions that preceded and followed it: the municipal council was in fact asking for suggestions of how it could attain the objectives that it had been pursuing unlawfully from the beginning.

Finally, there is by-law No. 533, dated December 6, 1966, ordering the expropriation of Lucien Landreville's quarry for purposes of a park. It is this by-law that must be considered, but not in isolation from the events that preceded and culminated in it. If implemented to the letter, this by-law would secure for the Town in substance the very thing it had been wrongfully seeking to obtain by its resolutions of December 16, 1965 and March 1, 1966, namely ownership of Lucien Landreville's land for the sum of $1. What begins and continues in abuse and bad faith remains vitiated to the end, unless there is evidence of a change in circumstances and attitudes that indicates the supervening of good faith. The resolutions leading up to the by-law of December 6, 1966 establish the initially wrongful and unjust conduct of the Town with regard to Lucien Landreville's property. From that moment on, in my view, it was up to the Town to prove a subsequent change. It did not do so.

The Court of Appeal relied on the testimony of Victor Lambert and Gilles Chabot, to which the trial judge did not refer specifically.

Victor Lambert is a town planner and witness for Lucien Landreville. The part of his testimony most favourable to the Town is the part in which he approves the creation of park zone P-48 by means of a by-law dated January 17, 1967. He also says, however, that he found the addition of the rectangular area representing Lucien Landreville's quarry to be incongruous, and that he could not understand what priorities would lead the Town to acquire this land for a park ten or fifteen

Il en est question pour la première fois dans la résolution du 19 avril 1966, décrétant l'homologation pour fins de parc d'un emplacement, qu'un mois et demi auparavant la Ville était prête, en principe, à laisser utiliser comme carrière.

De plus, la résolution du 9 août 1966 doit s'interpréter à la lumière de celles qui la précèdent et de celles qui la suivent: le conseil municipal demande en fait qu'on lui suggère quelque moyen d'atteindre les fins qu'il poursuit illégalement depuis le début.

Vient enfin le règlement n° 533, en date du 6 décembre 1966, décrétant l'expropriation pour fin de parc de la carrière de Lucien Landreville. C'est ce règlement qu'il faut juger. Mais on ne peut le juger en faisant abstraction de ce qui le prépare et dont il est l'aboutissement. S'il est mis en œuvre suivant sa lettre, ce règlement procurera en substance à la Ville la chose même qu'elle cherchait à obtenir abusivement par ses résolutions du 16 décembre 1965 et du 1er mars 1966, savoir, la propriété du terrain de Lucien Landreville pour la somme de $1. Ce qui commence et se poursuit dans l'abus et la mauvaise foi reste vicié jusqu'à la fin, à moins que l'on ne démontre un changement de circonstances et de sentiments qui indique la survenance de la bonne foi. Les résolutions menant au règlement du 6 décembre 1966 établissent le comportement initialement abusif et injuste de la Ville relativement à la propriété de Lucien Landreville. Dès lors, à mon avis, c'est à la Ville qu'il incombait de prouver que les choses avaient changé par la suite. Elle ne l'a pas fait.

La Cour d'appel s'appuie sur la déposition de Victor Lambert et celle de Gilles Chabot, auxquelles le premier juge n'a pas spécifiquement référé.

Victor Lambert est un urbaniste, témoin de Lucien Landreville. La partie de son témoignage la plus favorable à la Ville est celle où il approuve la création de la zone de parc P-48 par le règlement du 17 janvier 1967. Mais il déclare aussi trouver incongrue l'addition à cette zone du rectangle représentant la carrière de Lucien Landreville. Il déclare également ne pouvoir s'expliquer en vertu de quelles priorités la Ville ferait l'acquisition de ce terrain pour fin de parc dix ou quinze ans avant

1978 CanLII 202 (SCC)

years before it was needed for this purpose. Taken as a whole, this testimony does not appear to me to strengthen the Town's position.

Gilles Chabot is the Town's engineer. He stated that the Town's planning board had been studying the construction and zoning by-law adopted on January 17, 1967 since 1962. Though he did not actually say so, he implied that the municipal council may have had this by-law in mind before its adoption. In his view, the Town was faced with a "*fait accompli*" in the form of the excavation of Lucien Landreville's quarry; it was better to fill in the excavation completely or partially and add it to what would later become a large regional park than to let it remain in an area that had just been designated residential. As for the nominal value of $1 offered to Lucien Landreville for his land, he explained that this was due to the fact that the Town's costs for filling in the excavation would be much greater than the value of the land.

This is the same Gilles Chabot, however, who, along with the Mayor, told Lucien Landreville in December 1965 that the Town would agree to let him operate his quarry provided that he transferred the ownership of it after the excavation was completed. How can this witness later speak of a "*fait accompli*" when he contributed to bringing it about? If the operation of a quarry on this site was not desirable in view of a proposed zoning by-law then under study, why, in so far as it believed it could do otherwise, did the Town allow the operation and even become involved in it?

The explanation of the nominal value of $1 offered to Lucien Landreville for his land is taken up again by the Town in its factum submitted to this Court. This explanation is unexpected, to say the least: the Town takes 10,000 tons of stone free of charge, thereby helping to transform the expropriated property into a hole, which the expropriated party is then charged for filling in by having the cost of this filling deducted from the expropriation indemnity. From the Town's point of view this hole was indeed a treasure-trove. In my view, the offer of $1 and the explanation seeking to justify it are

d'en avoir besoin pour cette fin. Ce témoignage, considéré dans son ensemble, ne me paraît pas renforcer la position de la Ville.

Gilles Chabot est l'ingénieur de la Ville. Il atteste que la commission d'urbanisme de la Ville étudiait depuis 1962 le règlement de construction et de zonage effectivement adopté le 17 janvier 1967. Il ne le dit pas expressément, mais il laisse entendre que le conseil municipal pouvait avoir ce règlement à l'esprit avant son adoption. Selon lui, la Ville s'était trouvée devant «un fait accompli» avec l'excavation de la carrière de Lucien Landreville; il était préférable de remplir totalement ou partiellement cette excavation et de l'annexer à ce qui allait plus tard devenir un grand parc régional plutôt que de la laisser subsister dans ce que l'on venait de désigner comme quartier résidentiel. Quant à la valeur nominale de $1 offerte à Lucien Landreville pour son terrain, elle s'explique, dit-il, du fait que les frais que la Ville devrait encourir pour remplir l'excavation excéderaient de beaucoup la valeur du terrain.

Pourtant, c'est ce même Gilles Chabot qui, avec le maire, déclarait à Lucien Landreville en décembre 1965 que la Ville consentirait à le laisser exploiter sa carrière s'il en cédait la propriété après l'excavation. Comment ce témoin peut-il par la suite parler de «fait accompli» alors qu'il a concouru à son accomplissement? Si l'exploitation d'une carrière n'était pas souhaitable sur cet emplacement, compte tenu d'un projet de règlement de zonage alors sous étude, pourquoi, dans la mesure où la Ville croyait pouvoir faire autrement, en a-t-elle permis l'exploitation et même y a-t-elle pris part?

L'explication de la valeur nominale de $1 offerte à Lucien Landreville pour son terrain est reprise par la Ville dans le factum qu'elle adresse à cette Cour. Cette explication est pour le moins inattendue: la Ville prélève gratuitement 10,000 tonnes de pierre et contribue pour autant à transformer d'abord la propriété expropriée en un trou dont elle mettrait ensuite le remplissage à la charge de l'exproprié en déduisant le coût du remplissage de l'indemnité d'expropriation. Voilà un trou recélant pour la Ville des richesses surprenantes. Cette offre de $1 et l'explication qui prétend la justifier

1978 CanLII 202 (SCC)

based on a valuation that is clearly unfair, since it disregards the long-recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not the value to the expropriating party: *Cedar Rapids Manufacturing and Power Company v. Lacoste*[2]; *Fraser v. Fraserville*[3]; *The City of Montreal v. McAnulty Realty Co.*[4], at pp. 278, 281, 282, 290, 297; *Attorney General of Quebec v. Hébert*[5], at p. 695; *Place Versailles Inc. et al. v. Minister of Justice of Quebec*[6], at pp. 1128, 1129. The Town's bad faith is therefore clear from the actual by-law ordering the expropriation, and not only from the preceding resolutions.

In addition, if Lucien Landreville had not contested the right to expropriate, the deposit of this one dollar, representing an indemnity calculated on the basis of a false principle, would have allowed the Town to obtain prior possession until such time as the Public Service Board determined the true value of a piece of land which, for municipal tax purposes, had already been assessed at $4,000. Furthermore, for the only other expropriation carried out within zone P-48, which took place in 1970 and involved a road, the Town borrowed $1,600 and did not require prior possession in its by-law.

Under these circumstances, it is not surprising that the trial judge, who saw and heard the witnesses and says that he based his conclusions on the evidence as a whole, did not find it necessary to refer specifically to the oral evidence.

In the Court of Appeal, Casey J.A. expressed the opinion that in order to succeed Lucien Landreville would have had to prove that the Town did not intend to use the quarry as a park. The key allegation in Lucien Landreville's case, however, is the bad faith of the Town. If bad faith is proved, as I believe it was, it vitiates and nullifies the Town's actions regardless of the intentions that the

[2] [1914] A.C. 569.
[3] [1917] A.C. 187.
[4] [1923] S.C.R. 273.
[5] [1967] S.C.R. 690.
[6] [1977] 2 S.C.R. 1118.

sont à mon avis fondées sur une évaluation qui, à sa face, n'est pas honnête: elle méconnaît un principe de droit reconnu depuis longtemps selon lequel l'indemnité doit être calculée d'après la valeur pour le propriétaire et non pas d'après la valeur pour l'expropriant: *Cedar Rapids Manufacturing and Power Company v. Lacoste*[2]; *Fraser v. Fraserville*[3]; *La Cité de Montréal c. McAnulty Realty Co.*[4], aux pp. 278, 281, 282, 290, 297; *Procureur général du Québec c. Hébert*[5], à la p. 695; *Place Versailles Inc. et autre c. Ministre de la Justice du Québec*[6], aux pp. 1128, 1129. La mauvaise foi de la Ville se manifeste donc dans le règlement même qui décrète l'expropriation et non pas seulement dans les résolutions qui l'ont précédé.

Au surplus, si Lucien Landreville n'avait pas contesté le droit à l'expropriation, le dépôt de ce dollar unique, représentant une indemnité calculée suivant un faux principe, aurait permis à la Ville d'obtenir la possession préalable en attendant que la Régie des services publics fixe la valeur véritable d'un terrain qui, pour fins de taxe municipale, était déjà évalué à $4,000. Par ailleurs, pour la seule autre expropriation faite à l'intérieur de la zone P-48, celle d'un chemin en 1970, la Ville a emprunté $1,600 et n'a pas exigé la possession préalable dans son règlement.

Dans ces circonstances, il n'y a pas lieu de s'étonner que le premier juge, qui a vu et entendu les témoins et qui déclare s'appuyer sur toute la preuve, n'ait pas trouvé nécessaire de référer expressément à la preuve testimoniale.

En Cour d'appel, le juge Casey exprime l'avis que, pour réussir, Lucien Landreville aurait dû prouver que la Ville n'avait pas l'intention d'utiliser la carrière pour fin de parc. Or l'allégation cruciale de Lucien Landreville dans sa contestation est la mauvaise foi de la Ville. Si la mauvaise foi est prouvée, comme je crois qu'elle l'a été, elle vicie les actes de la Ville et entraîne leur nullité

[2] [1914] A.C. 569.
[3] [1917] A.C. 187.
[4] [1923] R.C.S. 273.
[5] [1967] R.C.S. 690.
[6] [1977] 2 R.C.S. 1118.

1978 CanLII 202 (SCC)

Town may eventually have formed in order to attain its objectives.

The appellant here contends that the "by-law is not in the public interest" and further, that the council acted "in bad faith and through fraud and partiality". The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid.

Estey J., speaking for the majority of this Court in *Kuchma v. Rural Municipality of Taché*[7], at p. 239.

Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transends all others.

Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever . . .

Lord Denning in *Lazarus Estates Ltd. v. Beasley*[8], at p. 712.

This was also the opinion of Lord Loreburn in *Marquess of Clanricarde v. Congested Districts Board of Ireland*[9]:

There is only one point in the case, a short point, whether the Congested Districts Board could be restrained from using its compulsory power to acquire Lord Clanricarde's lands in county Galway. In form their proceedings were regular, but in substance, so the appellant contended, they were proceeding *ultra vires*. At first there was another contention that they were not proceeding bona fide, and it was explained that this conveyed no sort of reflection upon their honesty or good faith, but merely that there was some by-motive. I think it would be better to select some happier expression. I do not understand an honest dishonesty. . . . fraud or dishonesty stands on a different footing. A court will always defeat that under any shape, and quite regardless of all form.

[7] [1945] S.C.R. 234.
[8] [1956] 1 Q.B. 702.
[9] (1915), 79 J.P. 481 (H. of L.).

abstraction faite des intentions que la Ville a finalement pu former pour atteindre ses fins:

[TRADUCTION] L'appelant prétend en l'espèce que «le règlement n'est pas d'intérêt public» et que le conseil a agi «de mauvaise foi, frauduleusement et avec partialité». La jurisprudence a clairement établi qu'il incombe au demandeur de prouver ces allégations. Il est clair également que le règlement devient invalide si le demandeur réussit à faire la preuve de ces allégations.

Le juge Estey, parlant pour la majorité de cette Cour dans *Kuchma c. La municipalité rurale de Taché*[7], à la p. 239.

La fraude, la malhonnêteté, la mauvaise foi, l'extorsion ou la corruption forment une catégorie particulière de causes de nullité qui transcende toutes les autres.

[TRADUCTION] La fraude fait échec à toutes les règles. La Cour ne doit conclure qu'il y a fraude que si elle est explicitement plaidée et prouvée; mais une fois prouvée, elle vicie les jugements, les contrats et toutes les transactions quelles qu'elles soient . . .

Lord Denning dans *Lazarus Estates Ltd. v. Beasley*[8], à la p. 712.

C'était aussi l'avis de Lord Loreburn dans *Marquess of Clanricarde v. Congested Districts Board of Ireland*[9]:

[TRADUCTION] La présente cause ne soulève qu'un seul point qui se résume ainsi: peut-on empêcher le Congested Districts Board d'utiliser son pouvoir coercitif pour faire l'acquisition des terres du comté de Galway appartenant à lord Clanricarde. Les procédures ne sont entachées d'aucun vice de forme mais, comme le prétend l'appelant, il y a excès de pouvoir sur le fond. Au début, on a prétendu que le Conseil n'avait pas agi selon les motifs invoqués et on a expliqué que cette allégation ne mettait pas en cause son honnêteté ni sa bonne foi, mais simplement qu'il avait un motif secondaire. Je suis d'avis qu'il serait préférable de s'exprimer différemment. Je ne puis concevoir de malhonnêteté honnête. . . . la fraude et la malhonnêteté doivent être traitées différemment. Un tribunal doit toujours leur faire obstacle quelle que soit leur forme.

[7] [1945] R.C.S. 234.
[8] [1956] 1 Q.B. 702.
[9] (1915), 79 J.P. 481 (H. of L.).

1978 CanLII 202 (SCC)

This brings me to the questions of procedure and jurisdiction.

The question of procedure was raised in the Court of Appeal by Casey J.A., who found merit in the argument that a municipal by-law could be nullified only by a petition to quash on the ground of illegality, a direct remedy provided for in s. 411 of the *Cities and Towns Act*, and not by incidental arguments or on defence, as in the case at bar, where Lucien Landreville is disputing the validity of the by-law ordering the expropriation by contesting the notice of expropriation.

Section 411 of the *Cities and Towns Act* creates an additional but not an exclusive remedy; it cannot have the effect of depriving a person of other remedies that would normally be available to him. In my view, it is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments. This is the meaning of the rather long-standing line of authority for which this Court demonstrated its preference in *Duquet v. The Town of Ste-Agathe-des-Monts*[10].

The Superior Court could not dispose of Lucien Landreville's contestation without ruling on the validity of the resolution and the by-law ordering the expropriation. Having concluded that they were invalid, should the Court have limited itself in the order it made to dismissing the notice of expropriation, without explicitly quashing the resolution and the by-law as requested by the expropriated party? I think not. This would be nothing but formalism, since the resolution and by-law have no purpose other than the expropriation in question. In my view, Lucien Landreville could ask in defence that the resolution and the by-law ordering the expropriation be quashed.

Article 777 *C.C.P.* provides that:

the party being expropriated can only contest the right to expropriate.

Article 1066e of the old *Code of Civil Procedure* provided that:

[10] [1977] 2 S.C.R. 1132.

Ce qui m'amène aux questions de procédure et de juridiction.

La question de procédure a été soulevée en Cour d'appel par le juge Casey qui trouve de la valeur à l'argument selon lequel un règlement municipal peut être attaqué en nullité uniquement par requête en cassation pour cause d'illégalité, recours direct prévu à l'art. 411 de la *Loi des cités et villes*, et non pas par des moyens incidents ou en défense comme c'est le cas en l'espèce puisque c'est par une contestation de l'avis d'expropriation que Lucien Landreville attaque la validité du règlement décrétant l'expropriation.

L'article 411 de la *Loi des cités et villes*, crée un recours supplémentaire mais non exclusif; il ne peut avoir pour effet de priver les justiciables des autres recours dont ils disposeraient normalement. A mon avis, il est également possible d'attaquer la validité d'un règlement municipal en défense ou par des moyens incidents. C'est le sens d'une jurisprudence assez ancienne pour laquelle cette Cour a manifesté sa préférence dans *Duquet c. La ville de Ste-Agathe-des-Monts*[10].

La Cour supérieure ne pouvait disposer de la contestation de Lucien Landreville sans opiner sur la validité de la résolution et du règlement décrétant l'expropriation. Ayant conclu à leur invalidité, devait-elle, dans le dispositif de son jugement, se contenter de rejeter l'avis d'expropriation sans annuler expressément cette résolution et ce règlement comme le lui demandait l'exproprié? Je ne le crois pas. Ce serait là pur formalisme car la résolution et le règlement n'ont aucun autre objet que la présente expropriation. Lucien Landreville pouvait selon moi demander en défense l'annulation de la résolution et du règlement décrétant l'expropriation.

Par ailleurs, l'art. 777 *C.p.c.* porte que

l'exproprié ne peut contester que le droit à l'expropriation.

L'article 1066e de l'ancien *Code de procédure* prescrivait que

[10] [1977] 2 R.C.S. 1132.

1978 CanLII 202 (SCC)

No party being expropriated may file any plea against the notice save to contest the right of the expropriating party to have recourse to expropriation.

In *Hamel v. Town of Asbestos*[11], this Court, which was called upon to apply art. 1066e, held (at p. 538):

[TRANSLATION] in opposition to the notice, the expropriated party may argue that the expropriating party does not have the statutory right to resort to expropriation, but not that there were irregularities or illegalities in the procedure followed in exercising this right.

In the case at bar, however, the Town contends that the statutory right of the municipal council to expropriate for purposes of a park cannot be questioned in view of s. 605(*c*) of the *Cities and Towns Act*, which enables it to:

expropriate any immoveable property, any part thereof or any servitude it may need for any municipal purpose.

Since the Town's statutory right to expropriate is indisputable, Lucien Landreville's defence would appear to contravene art. 777 *C.C.P.*

This submission by the Town goes beyond procedure and gets into jurisdiction. It cannot be retained, however, since it would enable a town to thwart any efforts to contest its expropriations by wording them in such a way as to give them an appearance of legality.

In *Hamel (supra)*, appellant alleged that the municipality had committed procedural irregularities, and in particular that the by-law ordering the expropriation had been adopted by an illegally convened and improperly held meeting. He did not, however, contest the municipality's right to expropriate his immovable. He did not deny that in his case the expropriating party was entitled to resort to expropriation.

In the case at bar, although in general Lucien Landreville recognized the Town's authority to expropriate immovables, including hiw own, for municipal purposes, he contested its right to exercise this authority as it had done in the circumstances, by committing not procedural irregularities but abuses that vitiated the substance of its

[11] [1967] S.C.R. 534.

l'exproprié ne peut produire un plaidoyer à l'encontre de l'avis que pour contester le droit de l'expropriant au recours de l'expropriation.

Dans l'arrêt *Hamel c. Ville d'Asbestos*[11], cette Cour, qui devait appliquer l'art. 1066e, a décidé (à la p. 538):

l'exproprié peut, à l'encontre de l'avis, plaider que l'expropriant n'a pas le droit statutaire de recourir à l'expropriation, mais non les irrégularités ou illégalités dans la procédure suivie pour exercer le droit à ce recours.

Or, selon la Ville, dans la présente cause, le droit statutaire du conseil municipal d'exproprier pour fin de parc ne peut être mis en doute vu l'al. *c*) de l'art. 605 de la *Loi des cités et villes* qui lui permet d'avoir recours aux procédures d'expropriation pour

s'approprier tout immeuble ou partie d'immeuble ou servitude dont il a besoin pour toutes fins municipales.

Le droit statutaire de la Ville à l'expropriation étant incontestable, la défense de Lucien Landreville contreviendrait donc à l'art. 777 *C.p.c.*

Cet argument de la Ville dépasse la procédure et rejoint la juridiction. Mais il ne peut être retenu: il permettrait à une ville de faire échec à toute contestation de ses expropriations en libellant ces dernières de façon à leur donner une apparence de droit.

Dans l'arrêt *Hamel (supra)*, l'appelant reprochait à la municipalité d'avoir commis des irrégularités de procédure, alléguant en particulier que le règlement décrétant l'expropriation avait été adopté par une assemblée illégalement convoquée et irrégulièrement tenue. Mais il ne contestait pas le droit qu'avait la municipalité d'exproprier son immeuble. Il ne niait pas que l'expropriant avait, dans son cas, droit de recourir à l'expropriation.

Dans la présente affaire, quoique Lucien Landreville reconnaisse généralement le pouvoir que possède la Ville d'exproprier des immeubles, y compris le sien, pour des fins municipales, il lui conteste le droit de l'exercer comme elle l'a fait dans les circonstances, en commettant non pas des irrégularités de procédure mais des abus qui

[11] [1967] R.C.S. 534.

1978 CanLII 202 (SCC)

decision. In so doing and in so far as he is concerned, Lucien Landreville is in my view contesting "the right to expropriate" in the sense in which this phrase from art. 777 *C.C.P.* must be understood.

The appeal should be allowed, the decision of the Court of Appeal set aside and the judgment of the Superior Court restored, with costs in this Court as in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Bergeron & Gaudreau, Hull, Quebec.

Solicitors for the respondent: Viau, Bélanger, Hébert, Mailloux, Paquet, Pinard & Denault, Montreal.

vicient le fond de sa décision. Ce faisant, en ce qui le concerne, Lucien Landreville conteste à mon avis «le droit à l'expropriation» comme il faut entendre cette expression de l'art. 777 *C.p.c.*

Le pourvoi doit être accueilli, l'arrêt de la Cour d'appel, cassé, et le jugement de la Cour supérieure rétabli, avec dépens en cette Cour comme en Cour d'appel.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant: Bergeron & Gaudreau, Hull, Québec.

Procureurs de l'intimée: Viau, Bélanger, Hébert, Mailloux, Paquet, Pinard & Denault, Montréal.

TAB 32

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Law Society of British Columbia v. British Columbia,* 2024 BCSC 1292

Date: 20240717
Docket: S243258
Registry: Vancouver

Between:

Law Society of British Columbia

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia and the Attorney General of British Columbia

Defendants

- and-

Docket: S243325
Registry: Vancouver

Between:

Trial Lawyers Association of British Columbia and Kevin Westell

Plaintiffs

And

His Majesty the King in Right of the Province of British Columbia, the Attorney General of British Columbia, and the Lieutenant Governor in Council

Defendants

Corrected Judgment: The text of the judgment was corrected at the second page and paragraph 124 on July 17, 2024.

Before: The Honourable Justice Gropper

Reasons for Judgment

2024 BCSC 1292 (CanLII)

Counsel for the Law Society of British Columbia:	C. Ferris, K.C. L. Bevan J. Andrews
Counsel for Trial Lawyers Association of British Columbia and Kevin Westell	G. Cameron T. Posyniak W. Andrews (A/S)
Counsel for His Majesty the King in Right of the Province of British Columbia and the Attorney General of British Columbia:	E. Lapper T. Bant S. Ortega K. Kotliarsky
Counsel for the Law Foundation:	B. Olthuis, K.C.
The Attendee, E. Currie, appearing in person:	E. Currie
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. June 17-19, 2024
Place and Date of Judgment:	Vancouver, B.C. July 17, 2024

2024 BCSC 1292 (CanLII)

Table of Contents

INTRODUCTION **5**
THE PARTIES **6**
Law Society 6
Trial Lawyers 6
Law Foundation 7
The Province 7
CHRONOLOGY **8**
THE *ACT* **10**
INJUNCTIVE RELIEF IN CONSTITUTIONAL CASES **11**
THE TEST FOR INTERIM INJUNCTION **12**
Serious Question to be Tried 12
Irreparable Harm 13
Balance of Convenience 14
DISCUSSION **15**
Is there a serious question to be tried? 15
The Law Society 15
Trial Lawyers 16
The Province 18
Conclusion on serious issue to be tried 19
Will irreparable harm result if the interlocutory injunction is not granted? 20
Distinction between Transitional and Substantive Provisions 20
Law Society 21
Trial Lawyers 22
The Province 24
Conclusion on irreparable harm 25
Distinction between Transitional and Substantive Provisions 25
Transitional Provisions 25
Substantive Provisions 26
Does the balance of convenience, taking into account the public interest, favour granting injunctive relief? 27
Law Society 27
Trial Lawyers 28
The Province 28

2024 BCSC 1292 (CanLII)

Conclusion on the balance of convenience..... 29
SUMMARY 30

2024 BCSC 1292 (CanLII)

2024 BCSC 1292 (CanLII)

Introduction

[1] On May 16, 2024, the British Columbia Legislature enacted Bill 21, the *Legal Professions Act*, S.B.C. 2024, c. 26 (*Act*). It creates a new single regulator of legal professions in British Columbia: the Legal Professions of British Columbia (LPBC) to regulate lawyers, notaries public, and certain paralegals practicing in the Province, as well as new classes of government-created legal professionals that may be created and governed by Cabinet regulation.

[2] The Law Society of British Columbia (Law Society), and the Trial Lawyers Association of British Columbia and Kevin Westell (collectively referred to as the "Trial Lawyers") apply for injunctive relief, pending the trial in these actions.

[3] The issue in both cases is the same: whether the defendants (jointly referred to as the "Province"), have exceeded their constitutional competence by enacting this legislation.

[4] The plaintiffs assert that the *Act* is unconstitutional because it eliminates the self-governance and self-regulation of lawyers in British Columbia. The Trial Lawyers take the same position, and add that Bill 21 infringes the *Charter*, particularly s. 2(d) (freedom of association); individual rights under ss. 7 (life, liberty and security of the person) and 8 (unreasonable search and seizure), and are not saved by s. 1.

[5] In this application, the plaintiffs seek injunctive relief to prevent the *Act* from causing immediate and irreparable harm to the public interest in the administration of justice. In particular, the plaintiffs seek these orders:

a) suspending the operation of ss. 215, 223-229 of the *Act*; and

b) enjoining the Lieutenant Governor in Council (LGIC) from bringing ss. 1-214, 216-222, 230-310, 315-316 of the *Act* into force until the determination by this Court of the claims in the Law Society's notice of civil claim.

[6] This decision addresses whether the Province should be enjoined from implementing any part of the *Act*, until the court has considered and determined the plaintiffs' constitutional challenge. For the reasons that follow, I decline to order injunctive relief.

2024 BCSC 1292 (CanLII)

The Parties

Law Society

[7] The Law Society is the body through which lawyers exercise self-government and self-regulation in British Columbia. It is an independent non-profit society continued by s. 2(1) of the *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*) to govern the professional bar for the purposes of upholding and protecting the public interest in the administration of justice.

[8] It is the Law Society's position that the practice of law is, and must continue to be, an independent and self-regulating profession. The Law Society fulfills its obligation to regulate lawyers practicing in British Columbia in the public interest by, among other things, preserving and protecting the rights and freedoms of all persons, and ensuring the independence, integrity, honour and competence of lawyers. The fundamental obligation on the professional bar to self-regulate lawyers in the public interest is reflected in s. 3 of the *LPA*.

[9] The Law Society asserts that Bill 21 ends self-governance and self-regulation of lawyers in British Columbia and compromises the independence of the bar.

Trial Lawyers

[10] The Trial Lawyers Association is a non-profit society with a membership of approximately 1600 legal professionals. Its mission is to support and promote the rights of individuals in British Columbia. Its members practice in many areas, from family and employment law to criminal defence and personal injury litigation, representing individuals rather than corporations or governments.

[11] Kevin Westell is a criminal defence lawyer practicing in Vancouver, British Columbia. Mr. Westell is a member and elected bencher of the Law Society.

[12] The Trial Lawyers describe that their application is “to restrain the executive from furthering the processes created by legislation which has already been passed to end the Law Society and lawyer self-regulation, irreparably damaging the independence of the bar, and undermining the building blocks of the rule of law.”

[13] They specifically note that “none of that is hyperbole or ‘might happen, might not, let’s wait and see’. It will happen, and it will be contrary to the Constitution of this Province and Country.”

Law Foundation

[14] The Law Foundation is not a party, it is an application respondent. I mention it in this section to clarify its participation in this application. It appears to address the impact that he *Act* will have on it. Its position is that all of the provisions of the *Act* must be enjoined until the constitutional challenge brought by the plaintiffs is determined, to avoid unnecessary complications and expense.

The Province

[15] The Province says that the legislation was enacted to address the implementation of a single regulator for lawyers, notaries public and paralegals. The plaintiffs do not oppose there being a single regulator.

[16] In addition, the Province says that the goals of Bill 21 are to address the costs of legal services (access to justice) and prioritize reconciliation with Indigenous peoples. The plaintiffs support these goals.

[17] The Province asserts that the *Act* also addresses the problem that it perceives as governance issues arising from bencher elections. It points out that the election of benchers has some advantages, but also some significant disadvantages. The disadvantages are that electing individuals makes it less likely that the board will have the complete range of competencies that a public interest regulator should have and may not provide appropriate diversity of expertise, perspective, and lived experience. Bencher elections may create the appearance, or

2024 BCSC 1292 (CanLII)

even the reality that benchers are beholden to the lawyers who elect them rather than to the public interest.

[18] The plaintiffs do not agree that any problem exists regarding bencher elections.

Chronology

[19] On March 1, 2022, the Attorney General wrote to the Law Society and the Society of Notaries Public of British Columbia (Society of Notaries Public) regarding the government's intention to change the regulatory model governing lawyers in British Columbia and to seek the Law Society and Society of Notaries Public's involvement in the transitional planning process.

[20] On September 14, 2022, the Ministry of Attorney General (Ministry) released an Intentions Paper on Legal Professions Regulatory Modernization (Intentions Paper). The Law Society issued a response to the Intentions Paper on November 16, 2022. It agreed with the Ministry's emphasis on access to justice and some of the steps outlined in the Intentions Paper (such as licensing paralegals), but expressed concerns that the Intentions Paper did not make clear how the government intended to preserve independence of the bar. The Law Society asserted that an independent bar requires self-governance by a regulatory board on which lawyers are in the majority; that a reduction in the size of the governing board would undermine diversity on the board; that defining the regulated scope of practice for paralegals would create an unnecessary barrier to their entry into practice; and that the public interest is best served by legislation that enables, rather than constrains, an independent regulator.

[21] The Province issued a "What We Heard" report detailing the responses to the Intentions Paper in May 2023.

[22] In January 2024, the Federation of Law Societies of Canada wrote to the Attorney General to request the opportunity to review the government's proposed

2024 BCSC 1292 (CanLII)

draft single-regulator legislation, and provide feedback from its perspective. The Attorney General did not respond to the request.

[23] The Attorney General released a public update in March 2024. The Law Society publicly responded to express the concern that there had not been sufficient recognition of the necessary independence of a new legal regulator from the government. The Trial Lawyers and other organizations from across Canada wrote an open letter to the Attorney General on March 25, 2024, expressing concern about the proposed legislation and that it had not been shared publicly with stakeholders. They noted that an independent bar is “critical to the integrity of the legal system and a properly functioning democratic society. The bar can only be independent if it is self-governed and self-regulated.”

[24] The text of Bill 21 was made available publicly when it was introduced in the Legislature for first reading on April 10, 2024.

[25] The Law Society issued a response to Bill 21 on the same day. It noted that the public interest required the public’s trust that the legal regulator is independent of government influence. The Law Society advised that if Bill 21 was passed and enacted, it had instructed counsel to challenge its constitutionality. The Trial Lawyers Association issued its own statement in opposition to Bill 21 on April 10, 2024.

[26] On April 26, 2024, the benchers of the Law Society wrote to the Attorney General to urge the government to reconsider proceeding with Bill 21 without significant amendment.

[27] The Province moved to close the debate on Bill 21 on May 15, 2024. Bill 21 remained in Committee Stage at that time. On the same day, counsel for the Law Society wrote to the Attorney General to provide formal notice of the Law Society’s impending court challenge to Bill 21.

[28] Bill 21 received third reading on May 15, 2024, and Royal Assent after 4:00 p.m. on May 16, 2024.

2024 BCSC 1292 (CanLII)

[29] The Law Society commenced this proceeding on May 17, 2024. This action was filed the same day. The Trial Lawyers commenced 10heir action on May 21, 2024.

[30] At this time, only a few provisions of the *Act* are currently in force. They prescribe a transitional planning process. The rest of Bill 21 is not in force. It will come into force upon regulation by the LGIC in accordance with s. 317.

The *Act*

[31] The *Act* provides a two-part structure:

a) sections 215 and 223-229 are currently in force. They begin a transitional planning process (transitional provisions);

b) the remaining provisions of Bill 21 are substantive provisions (substantive provisions). They are not currently in force, but will come into force by regulation (s. 317).

[32] The transitional provisions establish the transitional board, transitional Indigenous council, and advisory committee.

[33] The transitional board set out in the transitional provisions comprise a seven-person transitional board of which four members are appointed by the benchers, one member is appointed by the directors of the Society of Notaries Public, one member is appointed by the BC Paralegal Association, and one member appointed by the LGIC.

[34] The transitional Indigenous council is comprised of a five- or six-person transitional Indigenous council, consisting of three members appointed by the BC First Nations Justice Council, a member appointed by Métis Nation British Columbia, and one or two members of the transitional board appointed by the transitional board.

[35] The *Act* requires the transitional board to:

2024 BCSC 1292 (CanLII)

a) appoint a person responsible for managing the transition, who will eventually become the first CEO of the regulator;

b) develop the first rules of the board in collaboration with the Indigenous council; and

c) appoint a transitional tribunal chair, who must develop the first tribunal rules.

[36] The transitional provisions require the Law Society and Society of Notaries Public to cooperate with the transitional board and pay certain transition costs. They immunize the members of the transitional board, transitional Indigenous council, and advisory committee from any liability for any actions done in good faith.

[37] The remaining substantive provisions address the governance of the legal profession under a single regulator, its board of directors and chief executive officer, the establishment and participation of an Indigenous council; licencing and authority to practise; professional conduct, competence and discipline and other related matters.

[38] The Province says that the substantive provisions, if they come into force, require the necessary transitional planning process to be complete, which the Province anticipates will take 18-24 months.

Injunctive Relief in Constitutional Cases

[39] An injunction may be granted by an interlocutory order in cases where it appears to the court to be just or convenient that the order should be made. This court has the jurisdiction to grant interlocutory injunctive relief against the Crown in constitutional cases.

[40] The Courts have recognized that orders staying legislation, or enjoining legislation from being brought into force, are fundamentally different from injunctions in private law matters, where the injunction merely prevents an individual from exercising a private right. An order staying legislation, or enjoining legislation from

2024 BCSC 1292 (CanLII)

being brought into force, interferes with the Legislature's law-making function and deprives the public of the benefit of a law that their elected representatives have determined to be in the public interest, before anything has been determined on the merits. It should be ordered in rare and exceptional circumstances: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 147–48.

[41] There is a presumption that the legislation will produce a "public good". As explained in *Harper v. Canada (Attorney General)*, 2000 SCC 57 at para. 9:

> … The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that … a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

<u>The Test for Interim Injunction</u>

[42] The test to be applied is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The applicant must establish that:

a) there is a serious question to be tried;

b) the applicant will suffer irreparable harm if the injunction is not granted; and

c) the balance of convenience favours the granting of the injunction.

[43] In this case, as I have noted, the plaintiffs seek to suspend the transitional provisions of the *Act* that are in force and enjoin the LGIC from bringing the substantive provisions into force, until this action is concluded.

Serious Question to be Tried

[44] The first step is "a serious question to be tried". It is not a rigorous test: the threshold is not high. It is not likely to be dispositive of the application. It excludes frivolous or vexatious claims: *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290 at para. 35. The determination is made on the basis of common sense and an extremely limited view of the merits:

2024 BCSC 1292 (CanLII)

RJR-MacDonald at para. 348. There is no higher standard in a constitutional case: *Harm Reduction Nurses* at para. 48.

Irreparable Harm

[45] The second step is "irreparable harm". *RJR-MacDonald* describes that test at para. 84:

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

[46] It is in the context of the second step that the distinction between staying or suspending legislation that is in effect (the transitional provisions) and enjoining the provisions that are not in effect (substantive provisions) is important.

[47] As noted, in constitutional challenges, suspending legislation that has been enacted must only be done in clear, rare and exceptional cases. This applies to the transitional provisions of the *Act*.

[48] In respect of an interlocutory injunction that seeks to enjoin the Province from enacting legislation in the future, the substantive provisions of the *Act*, it may be premature to address the issue of irreparable harm. Nevertheless, the court has the jurisdiction to consider irreparable harm at this stage: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at paras. 48-49 citing the "clear case" hurdle set out in *Harper*.

[49] *Cambie Surgeries* also cites *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2018 MBQB 125. The quoted passage includes the conclusion of Edmond J. that "... only in clear cases will interlocutory injunctions against the enforcement of the law on grounds of alleged unconstitutionality or a violation of the *Charter* succeed." In his analysis:

> Although the facts of these cases are different, they make it clear that interlocutory injunctions or stays are rarely granted in constitutional cases because it is assumed that laws enacted by democratically enacted

2024 BCSC 1292 (CanLII)

> legislatures are directed to the common good and serve a valid public purpose.
>
> That does not mean that injunctions are never granted. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the moving plaintiffs who rely on the public interest must demonstrate that the suspension or exemption of the legislation would provide a public benefit. [At paras. 154-5; emphasis added [by BCCA])]

[50] This was in contention in *Harm Reduction Nurses*. There, the Province argued that an interlocutory injunction ought not to be granted because the impugned legislation was not yet in force. The plaintiffs asserted that despite that, the legislation that sought to enjoin people from consuming certain illegal substances in certain public areas, could result in irreparable harm, even at the interlocutory injunction stage.

[51] Chief Justice Hinkson determined that the application for an injunction was not premature, as the applicants had demonstrated that in spite of the legislation not being in effect, he could assess the irreparable harm.

Balance of Convenience

[52] The third step in the test is the "balance of convenience". *RJR-MacDonald* notes at paras. 85-86 that:

> The third branch of the test, …will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party.

[53] When the nature and declared purpose of legislation is to promote the public interest, the court hearing the interlocutory injunction must assume that is does. Thus, the party seeking the injunction who also relies on the public interest: "must demonstrate that the suspension of the legislation would itself provide a public benefit." The Court goes on to note that at the third stage, "harm to the [plaintiffs] is balanced with harm to the [Province] including any harm to the public interest established by the [Province]."

2024 BCSC 1292 (CanLII)

[54] *RJR-MacDonald* placed this limitation on the court in determining the balance of convenience, at para. 77:

> … A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. …

Discussion

Is there a serious question to be tried?

[55] The Law Society and the Trial Lawyers assert that their claim is not frivolous or vexatious. The Province agrees.

[56] Because of the low threshold that must be met to determine that there is a serious issue to be tried and because this stage is not dispositive of whether an interlocutory injunction should be granted, I will summarize the parties' positions. I have fully considered the extensive submissions made but it is not my role to assess the merits of the applications.

The Law Society

[57] The Law Society argues that Bill 21 is inconsistent with the independence of the bar and is unconstitutional as a result. This raises a serious question to be tried that is clearly arguable.

[58] It asserts that independence of the bar is a constitutional imperative and is a cornerstone of our legal system. It is an unwritten constitutional principle, but flows by necessary implication from numerous express constitutional terms, in particular, from the preamble to and ss. 96-101 of the *Constitution Act*, 1867 and ss. 7, 10(b), and 11(d) of the *Charter*. It is inextricably linked with and necessary to the independence of the judiciary and the rule of law. The Province's legislative authority must be interpreted in a manner consistent with the independence of the bar.

[59] The Law Society submits that independence of the bar requires both individual and institutional independence. The principle protects lawyers'

2024 BCSC 1292 (CanLII)

performance of their multi-faceted role in our legal system, including their duties to their clients, to the court, and the administration of justice. Institutional independence is required to safeguard individual independence. The independence of the bar is maintained in Canada by self-governance and self-regulation of the legal profession.

[60] It says that Bill 21 is inconsistent with the institutional dimension of the independence of the bar. It ends self-government and self-regulation in the legal profession. Instead of the current regime, lawyers, notaries public, paralegals as well as an Indigenous council will all be involved in regulating the legal profession.

[61] The Law Society's conclusion in this first stage is: "Bill 21 ends the self-governance of the legal profession, circumscribes the mandate of lawyers' governing body, and gives Cabinet the power to regulate lawyers. It is inconsistent with the independence of the bar and unconstitutional as result."

Trial Lawyers

[62] The Trial Lawyers adopt the Law Society's arguments about the independence of the bar as a constitutional imperative and lawyer self-regulation. They assert that the *Act*:

a) results in the termination of the Law Society as the entity that regulates lawyers in British Columbia. In its place, Bill 21 purports to create a single regulator governing lawyers, notaries, paralegals, and entirely new classes of legal professionals in the province created and controlled by the government;

b) limits the scope of the new LPBC's duty to regulate the combined legal professions in the public interest;

c) imposes a governance model on lawyers that makes them subject to regulation by a functional majority of non-lawyers, government appointees, and other governments, each of whom have pecuniary and other interests

2024 BCSC 1292 (CanLII)

engaged in shaping the manner in which lawyers can, and cannot, act against them;

d) allows the government to make new legal professions in parallel to lawyers on the government's own assessment, scope of practice, and rules;

e) allows the government to exercise direct control over the regulation of the practice of law, competence, and professional discipline of lawyers in British Columbia; and

f) compromises the independence of the judiciary, whose members must be selected from an independent and impartial bar.

[63] The Trial Lawyers also raise *Charter* issues.

[64] Their position is that the *Act* violates individual rights prescribed under s. 7 that provides individuals with a right to the effective assistance of counsel in the face of state action interfering with personal autonomy and/or psychological integrity. The effective assistance of counsel is predicated on an independent bar. Section 7 also guarantees an accused's right to a fair trial absent abuse of process. This right is dependent on the integrity of the judicial process, which is itself dependent on the independence of the bar and judiciary. The independence of the bar is a necessary component of an accused's right to a fair trial.

[65] Equally, they argue that the *Act* may interfere with lawyers' rights to liberty and security of the person under s. 7 and specifically refers to the substantive sections of the *Act* that deal with mental health and competence.

[66] Section 10(b) provides individuals the right to retain and instruct counsel on arrest or detention. The individual and institutional independence of lawyers plays a crucial role in the effective protection of these rights of an accused.

[67] Section 11(d) guarantees any person charged with an offence a right to a fair and public hearing before an independent judiciary. Our adversarial system of law

2024 BCSC 1292 (CanLII)

depends on an independent bar, and more specifically independent legal expertise and professional advice, to function as an effective mode of procedure, in particular for those charged with criminal offences. An independent bar is essential to and forms the foundation of an independent judiciary. An independent bar is therefore vital, in many respects, to the right of those charged with an offence to a fair and public hearing before an independent judiciary.

[68] The Trial Lawyers submit that the *Act* offends the right to associate under s. 2(b) of the *Charter*. Whether lawyers' rights of association for the purposes of self-regulation and self-governance are activities protected under s. 2(d) of the *Charter*, and whether Bill 21 has, in purpose or effect, substantially interfered with those activities are serious issues to be tried.

[69] They also assert that the *Act* may authorize the unreasonable search and seizure of lawyers' premises, offending s. 8 of the *Charter*.

The Province

[70] The Province agrees that based upon the low threshold required, the plaintiffs have likely satisfied this first test, but point out that there are "some frailties" in the plaintiffs' submissions. These include whether unwritten constitutional principles can invalidate legislation and whether the independence of the bar means that lawyers must be "free from influence or incursion by any source", and whether they are under the current *LPA*. The Province says that lawyers are not and have never been "free from influence or incursion by any source". Lawyers have always been subject to some kinds of influence by non-lawyers and external regulation, including from the Law Society, and the Truth and Reconciliation Commission. They are subject to the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 and the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[71] The Province argues that the *Act* will not result in the state interference with anything that affects lawyers' advice or advocacy. Any unwritten constitutional principle about the independence of the bar should be interpreted in a functional manner: the state cannot interfere with those aspects of the regulation of the bar that

2024 BCSC 1292 (CanLII)

bear directly and immediately on a lawyer's function of advising and advocating on behalf of clients. If it does, it would be *ultra vires* the *Act*.

[72] The Province challenges the *Charter* arguments of the Trial Lawyers. They assert that the Law Society is not an association that advances lawyers' interests but rather a statutory regulator.

[73] In respect of the Trial Lawyers' position on s. 78 (authorizing the chief executive officer to enter and inspect lawyers' offices) and s. 88 (authorizing the chief executive officer to require licensees to do certain things and impose limits or conditions on licensees), the Province points out that these powers are transferred to executive director under the *Act*.

[74] The Province argues that s. 7 of the *Charter* does not create a right to be licensed to work in any particular profession. An order requiring that a person obtain certain medical treatment, failing which their licence may be suspended or made subject to conditions, does not engage s. 7: *Hoogerbrug v. British Columbia*, 2024 BCSC 794 at paras. 276-294.

Conclusion on serious issue to be tried

[75] I have set out the parties' submissions on this question to add context to the determination of this first step. The plaintiffs have set out their challenges clearly and forcibly. While the defendants pointed to some frailties with the arguments presented, they agree that this test is satisfied.

[76] There is no doubt that there is a serious question to be tried.

[77] In *Harm Reduction Nurses*, Hinkson C.J. addressed the question of whether the application to enjoin prospective legislation in the context of this first step. He set out the Province's argument that the impugned act in that case must be considered together with the forthcoming regulations to provide a full context. He disagreed (at para. 56):

> I conclude that I must determine the application before me on the *Act* as it is presently written; that is, without any regulations, as that is the form that the

2024 BCSC 1292 (CanLII)

> Province proposes to bring into force. Unless the LGIC were to, in effect, exempt from the *Act* so as to render it moot entirely, the *Charter* implications pleaded by the plaintiff would remain attendant, and the issues to be tried would remain serious. Just because the LGIC may have the authority to tailor the application of the *Act* does not guarantee the form that any such tailoring may take, nor does it guarantee that any such tailoring will occur at all.

[78] Chief Justice Hinkson suspended the legislation for three months pending a constitutional challenge.

[79] I intend to address this argument at the second step of the test.

Will irreparable harm result if the interlocutory injunction is not granted?

Distinction between Transitional and Substantive Provisions

[80] The plaintiffs argue that the distinction between staying legislation currently in force (the transitional provisions) and enjoining legislation that is not in effect (the substantive provisions) is unnecessary.

[81] The Law Society says that the irreparable harm flows from the *Act* as a whole, as all of the provisions are inextricably intertwined.

[82] It also argues that this application is not premature, it is timely. The harm and threat are even greater later. The proper course is not to wait and see if the transitional board and transitional Indigenous council reach an irreconcilable impasse, with the attendant consequences for public confidence in the administration of justice, but to prevent this impasse from happening while the constitutional challenge is determined.

[83] The Trial Lawyers support that position. They say that the Province is committed to its path. If the plaintiffs are shown to be correct at trial, the *Act*, without suspending the transitional provisions, “the constitution has been and will continue to be infringed each day moving forward as the ‘transition’ unfolds.”

[84] The Province asserts that when assessing the irreparable harm and the balance of convenience criteria, it is necessary to distinguish between the two orders

2024 BCSC 1292 (CanLII)

sought: One is a stay of the transitional provisions that are currently in force. The other is *quia timet* injunction, enjoining the LGIC from bringing the substantive provisions into force. These orders are different and the legislative provisions at issue are different.

[85] Robert J. Sharpe describes *quia timet* injunctions in his text, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2023) at §1:20.:

> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*—because he or she fears—and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction. Thus, while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relate to the situation where the difficulties of prediction are more acute in that the plaintiff is asking for injunctive relief before any of the harm to be prevented by the injunction has been suffered.

Law Society

[86] The Law Society asserts that all of the provisions of the *Act* must be suspended and enjoined. The transitional provisions are inextricably intertwined with the substantive provisions. The irreparable harm begins with the transitional provisions and continues with the substantive provisions.

[87] The Law Society says that the injunction sought regarding the substantive provisions is not premature. It is skeptical that the LGIC will not enact the substantive provisions for 18-24 months or will let the transitional planning process complete. It provides this example:

> The Province goes so far as to suggest that it would be better to wait and see if the Transitional Board and transitional Indigenous Council reach an irreconcilable impasse in trying to make the first rules, with the attendant consequences for public confidence in the administration of justice, than to prevent this impasse from happening while the constitutional challenge is determined.

[88] The irreparable harm the Law Society says that it will suffer is its continued existence is in doubt, and its administrative programs will be irreparably interrupted. It will be forced to discharge a duty to participate in the transitional planning process

2024 BCSC 1292 (CanLII)

that does not uphold and protect the public interest in the administration of justice. It will have been forced to act against both the independence of the bar and its mandate. The benchers will have been forced to act against their oaths of office. This harm to the Law Society's institutional fabric and to its reputation could not be repaired.

[89] The Law Society asserts that it will suffer irreparable monetary loss: section 228 of Bill 21 requires the Law Society and the Society of Notaries Public to pay the operational costs incurred by the transitional board; the transitional Indigenous council and the advisory committee in the exercise of their powers and the performance of their duties; remunerate the members of the transitional board and transitional Indigenous council and reimburse them for reasonable travel expenses and out-of-pocket expenses; and remunerate the person responsible for managing the transition from the current operation to the operation of Bill 21. The Law Society estimates these costs could exceed $1 million.

[90] The Law Society says that public confidence in the administration of justice will be shaken. It asserts:

> In the event the Law Society is ultimately successful in demonstrating that Bill 21 is inconsistent with the independence of the bar and unconstitutional as a result, a reasonable and informed person will have witnessed the government's concerted and determined efforts to implement a governance scheme that undermines the independence of the bar, not only in the face of opposition by the Law Society, [and other legal organizations], but also by forcing the Law Society to cooperate in the process.

Trial Lawyers

[91] The Trial Lawyers agree with and adopt the submission of the Law Society that the implementation of Bill 21 will cause irreparable harm.

[92] They assert that Bill 21 will irrevocably terminate lawyers' rights under s. 2(d) of the *Charter* to associate for the purposes of self-regulation and other purposes. It will be the end of the Law Society, institutionally, financially, and physically and be replaced by a regulator over which non-lawyers and representatives of government

2024 BCSC 1292 (CanLII)

hold a functional majority, marking the end of any meaningful self-regulation and self-governance.

[93] The Trial Lawyers argue that Bill 21 will impair lawyers' ability to challenge government action and imperil individuals' *Charter* rights if there is no guarantee of an independent lawyer regulated by an independent regulator. Members of the legal profession are regularly involved in litigation for or against the government and self-governing First Nations. This may create a conflict in certain matters, for example, lawyers are also called upon to negotiate, conclude, and interpret agreements with governments and self-governing First Nations. They can no longer do so, because Bill 21 "affords the government and self-governing First Nations direct influence and control over lawyers' professional conduct." It creates a conflict of interest and imperils individuals' rights under ss. 7, 10(b), and 11(d) of the *Charter*.

[94] They point to an example where lawyers are seeking to challenge government action on the basis of alleged infringements of the *Charter*, Constitution, or otherwise. Lawyers' independence from government is "fundamental to lawyers' ability stand fearlessly between the state and its citizens". By abolishing self-regulation and the independence of the bar, Bill 21 undermines lawyers' ability to advocate for the rights of individuals and against inappropriate exercises of executive power.

[95] The Trial Lawyers say that Bill 21 will expose lawyers to potential investigation into their physical and mental health conditions, compelled treatment, and criminal sanctions. This is the combined effect of ss. 68 and 88 of Bill 21. This may expose lawyers to the threat of prosecution and potential imprisonment for refusing to submit to compelled medical treatment by LPBC. Further, lawyers will also be subject to sweeping and unreasonable warrantless searches by their new regulator. If Bill 21 is not stopped pending trial, lawyers can be the subject of warrantless searches and inquiries dealing with their mental health because mental health is now inseparable from competence under the new scheme.

2024 BCSC 1292 (CanLII)

The Province

[96] The Province argues that neither the transitional provisions nor the substantive provisions pose a risk of irreparable harm, or any harm. In this context, it urges a distinction be made between staying the transitional provisions in effect and a *quia timet* injunction enjoining the LGIC from bringing the substantive provisions into effect.

[97] In respect of the transactional provisions, the Province asserts that the transitional provisions have no practical consequence for lawyers or their clients.

[98] It says that for the Law Society, $1 million amounts to $70 per lawyer. In 2023, the Law Society earned more than $1 million of interest income on the $39 million reserve in its general fund and had an operating surplus of more than $2 million.

[99] The Province acknowledges that an interim injunction was granted in *Harm Reduction Nurses*, despite the regulations not being in effect, because of the irreparable harm arising from among other reasons: drug users would have to use drugs alone or in less public spaces, putting them at risk of dying from an overdose that may have been reversable if someone else had been nearby; and drug users found by police in prohibited areas could have whatever remained of their drug supply destroyed, which could lead them to purchase cheaper, lower quality drugs that are more likely to be toxic and cause death (at paras. 76-94).

[100] The Province submits that the transitional provisions do not impose any new obligations on lawyers. If the constitutional challenge succeeds and any constitutional problems with the *Act* are incurable by amendment, some time and modest resources may have been spent developing rules that are not ultimately implemented. The resources would not be wasted in any event: the work of the transitional board and transitional Indigenous council may result in useful concepts that can be considered by the benchers for incorporation into the rules.

2024 BCSC 1292 (CanLII)

[101] In respect of the substantive provisions, the Province argues that the plaintiffs have not established a *quia timet* injunction to prevent prospective harm should be granted. They have not shown that "a high degree of probability the alleged harm will in fact occur imminently or in the near future" without the injunction.

[102] The Province has expressed through their counsel that the substantive provisions will not be brought into force until the transitional planning process is completed and that will likely take 18-24 months. Thus, the application is premature. If this action is not resolved by the time the transitional planning process nears completion and it becomes realistic that the LGIC may bring the substantive provisions into force, then the Law Society can renew this application.

Conclusion on irreparable harm

Distinction between Transitional and Substantive Provisions

[103] It is my view that a distinction ought to be made between the transitional provisions that are in force and the substantive provisions that are not in effect. The jurisprudence makes a clear distinction.

Transitional Provisions

[104] Suspending legislation must only be done in clear, rare and exceptional cases.

[105] I do not find that the plaintiffs have established that irreparable harm will result from the enforcement of the transitional provisions. On the contrary, the plaintiffs' argument that they are inextricably intertwined with substantive provisions such that they must be suspended is speculative. Their assertion is that the transitional provisions lead to the enactment of the substantive provisions and they do not wish to participate in the transitional planning process set out in the *Act*.

[106] The transitional provisions do not threaten the existence of the Law Society. Its participation in such a process is vital in order to protect the independence of the bar, and ensure that its initiatives concerning access to justice and reconciliation are considered in the transitional planning process. Combining the regulation of legal

2024 BCSC 1292 (CanLII)

professionals into a single regulator is supported by the Law Society and the Trial Lawyers. This transition will take place. The Law Society's expertise is necessary to make such a transition. The Law Society says it is being conscripted into a planning process that they do not agree with. The Law Society can make its concerns clear from within the transitional planning process.

[107] I am not convinced that requiring the Law Society to participate in the transitional planning process creates any harm, and certainly not irreparable harm. It is far from a clear case to justify the suspension of the legislation in force. I make the same finding in respect of the money that the Law Society must contribute to the transitional planning process. It is modest in relation to its assets. It may produce a positive, rather than negative result.

Substantive Provisions

[108] I reiterate that the position of the Law Society and the Trial Lawyers is that all of the provisions of the *Act* should be enjoined because they are inextricably intertwined. I have found that they are not.

[109] The *Act* provides for two stages, with the transitional planning process being completed before the substantive provisions take effect.

[110] The Province has assured the court, through its counsel, that the LGIC will not bring the substantive provisions into effect until the transitional planning process is complete, likely 18-24 months from now. The plaintiffs are skeptical. They say that the Province has not provided an undertaking not to do so. There are no statutory preconditions to the LGIC bringing further provisions into force.

[111] Counsel for the Province have assured me that the transitional planning process must be complete and that it is unlikely to be complete before 18-24 months elapses. If it appears that the LGIC intends to bring the substantive provisions into effect before the transitional planning process is complete, the plaintiffs will have leave to bring an injunction application at that time. It is also likely that the plaintiffs' constitutional challenge will be heard and determined by this court in that time.

2024 BCSC 1292 (CanLII)

[112] I have found the Law Society's involvement in the transitional planning process to be valuable and appropriate, conscripted or not. That process may produce recommendations about what substantive provisions should be reflected in the *Act*.

[113] There is also the possibility that the transitional planning process does not complete or is not approved and that no substantive provisions, or those presently contained in the *Act* will be the substantive provisions that come into effect. Despite the Trial Lawyers assertion that it is inevitable, I consider that it is difficult to predict.

[114] In order to obtain a *quia timet* injunction, the plaintiffs must demonstrate a high probability that the alleged harm will, in fact, occur.

[115] The circumstances here are not analogous to the *Harm Reduction Nurses*.

[116] In short, I find that the plaintiffs have not satisfied the test of irreparable harm.

Does the balance of convenience, taking into account the public interest, favour granting injunctive relief?

Law Society

[117] The Law Society says that it is "advancing a serious constitutional question that strikes at the bedrock of the Canadian legal system and of the administration of justice in this province." An injunction at this stage will protect the public interest in the administration of justice, before the any provision of the *Act* takes effect. The public interest is served because the constitutionality of the scheme will be determined as the first stage.

[118] The Law Society says that it is not asking this Court to determine whether the government is governing well, or to inquire into the effectiveness of government action. It does not resist the presumption that Bill 21 serves a public interest. Its argument is that "there is a countervailing, distinct, and significant public interest in an injunction pending determination of this critical constitutional question".

2024 BCSC 1292 (CanLII)

[119] The Law Society asserts that there is no real harm that arises from maintaining and preserving the *status quo*. It will continue with its work to implement the Truth and Reconciliation Action Plan, the Indigenous Framework, and the recommendations of the Mental Health Task Force, among many other initiatives and innovations, will continue uninterrupted. There are other ways to achieve the transition to a single regulator.

[120] The Law Society says that maintaining the *status quo* prevents Bill 21 from implementing "a radical and historic transformation from the longstanding *status quo* of legal governance in this province". Thus, the balance of convenience must weigh in favour of the issuance of an injunction. It adds that there is no risk to the public interest in the administration of justice if the injunction is granted and the *status quo* maintained.

Trial Lawyers

[121] The Trial Lawyers reiterate the Law Society's position on the *status quo*: there is a compelling public interest in enjoining the provisions of Bill 21 and determining its constitutional validity first. They say that "beyond the government's usual prerogative to have its laws effected, there is no equally urgent competing interest of the government that justifies changing the *status quo* pending trial."

The Province

[122] The Province refers to *Harper*, quoted above, that it is wrong to insist that the government provide proof that the law will produce a public good. In this case, "it is presumed that the *Act* will improve access to legal services and make lawyer regulation more responsive to the public interest. The public benefits of the *Act* must weigh heavily in the balance of convenience." This court must not assess whether the legislation will be successful in achieving its goals or whether there are preferable alternatives.

[123] Referring again to *Harm Reduction Nurses*, the Province says that Hinkson C.J. did not evaluate whether the impugned legislation was actually in the public

2024 BCSC 1292 (CanLII)

interest, would succeed in realizing its objectives, or was preferable to conceivable alternatives. Rather, he found that the balance of convenience weighed in favour of a stay because the legislation would cause serious and specific harm that could not be reversed if the constitutional challenge succeeded: potentially preventable overdose deaths.

[124] The Province takes a similar position to that which it took in regard to the test of irreparable harm: there is no point in delaying the transitional planning process from taking place; there will be modest resources spent; the Province can amend the *Act* to conform with any constitutional problems that the court may find after a factual basis is established by the transitional planning process.

Conclusion on the balance of convenience

[125] It is my view that enjoining the *Act* engages the concern expressed in *RJR-MacDonald*: it implies the possibility that the government action does not have the effect of promoting the public interest. I find that it also implies that the Law Society and the Trial Lawyers have a superior understanding of the public interest and a greater role to play in protecting it. I do not agree with either implication.

[126] In particular, I specifically find that the transitional provisions promote a public good that the Law Society and the Trial Lawyers support: a single regulator, promoting reconciliation and access to justice.

[127] The balance of convenience test is not met by suspending the transitional provisions.

[128] I further find that it is premature to enjoin the substantive provisions of the legislation and the balance of convenience is not met by doing so. I do not find that they are inextricably intertwined with transitional provisions because it assumes that the transitional planning process will not produce any results. I also accept the transitional planning process must be completed first and that it may influence the substantive provisions that do come into effect.

2024 BCSC 1292 (CanLII)

[129] Because the Law Foundation's submission refers to the effect of the substantive provisions I will not address it. Its position supporting an injunction is premature.

[130] Both the Law Society and the Trial Lawyers assert that the balance of convenience favours the *status quo* and that no change means no risk of harm. With respect, such a position at this third step of the test renders a consideration of irreparable harm superfluous. It is entirely undermined by a conclusion that balance of convenience favours the *status quo* because there will be no risk of harm in maintaining it.

[131] The plaintiffs have not demonstrated that the balance of convenience favours an interim injunction.

Summary

[132] While the plaintiffs have met the first test in *RJR-MacDonald*, a serious issue to be tried, I have found that they have not established that irreparable harm will result or that the balance on convenience supports the granting of an injunction.

[133] The application for an interlocutory injunction is dismissed without prejudice to the plaintiffs' right to reapply if there is a material change in circumstances and it becomes realistic that the LGIC may bring the substantive provisions into force in the near future.

"Gropper J."

2024 BCSC 1292 (CanLII)

TAB 33

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Law Society of British Columbia v. British Columbia (Attorney General),* 2026 BCSC 779

Date: 20260429
Docket: S243258
Registry: Vancouver

Between:

Law Society of British Columbia

Plaintiff

And

The Attorney General of British Columbia, and the Lieutenant Governor in Council

Defendants

And

Canadian Bar Association, Indigenous Bar Association, Society of Notaries Public of British Columbia, Law Foundation of British Columbia, and Law Society of Manitoba

Intervenors

-and-

Docket: S243325
Registry: Vancouver

Between:

Trial Lawyers Association of British Columbia and Kevin Westell

Plaintiffs

And

The Attorney General of British Columbia, and the Lieutenant Governor in Council

Defendants

And

Canadian Bar Association, Indigenous Bar Association, Society of Notaries Public of British Columbia, Law Foundation of British Columbia, and Law Society of Manitoba

Intervenors

2026 BCSC 779 (CanLII)

Corrected Judgment: The text of the judgment was corrected on page 2 on June 17, 2026

Before: The Honourable Chief Justice Skolrood

Reasons for Judgment

In Chambers

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Counsel for the Intervenor, Law Foundation of British Columbia:	B. Olthuis K.C. C. Crane
Place and Date of Trial:	Vancouver, B.C. October 14-17, 20-24, 27-28, 2025
Place and Date of Judgment:	Vancouver, B.C. April 29, 2026

2026 BCSC 779 (CanLII)

Table of Contents

OVERVIEW **5**

PRELIMINARY ISSUES **5**

Proper Defendants 5

Evidentiary Issues 6

CURRENT REGULATORY MODEL: *LEGAL PROFESSION ACT*, S.B.C. 1998, C. 9 ..... **6**

NEW REGULATORY MODEL: BILL 21 ..... **7**

LSBC'S AND TLABC'S CHALLENGES TO BILL 21 ..... **11**

POSITION OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA **12**

THE INTERVENORS **13**

Canadian Bar Association 13

Law Society of Manitoba 14

Society of Notaries Public of British Columbia 15

Indigenous Bar Association 16

Law Foundation of British Columbia 17

BACKGROUND/CONTEXT **18**

History of the Regulation of Legal Professions in British Columbia and Elsewhere in Canada 18

British Columbia 18

Other Canadian Jurisdictions 19

The International Context 21

Process Leading to the Enactment of Bill 21 22

ISSUES **23**

ANALYSIS **24**

Overview 24

Is the Independence of the Bar an Unwritten Constitutional Principle? 27

What Is the Meaning of or Content to Be Given to the Principle of the Independence of the Bar? 31

The Relationship of Unwritten Constitutional Principles to the Written Constitution 33

Is Bill 21, in Whole or in Part, *Ultra Vires* the Provincial Legislature? 40

Composition of the New Board 40

Duties and Guiding Principles 48

2026 BCSC 779 (CanLII)

Role of the Indigenous Council and Transitional Indigenous Council 50
Lieutenant Governor in Council's Regulation-Making Power 53
Does Bill 21 Infringe the *Charter of Rights and Freedoms*? 56
Section 2(d): Right to Associate..... 56
Section 7: Right to Life, Liberty, and Security of the Person 57
Section 8: Unreasonable Search and Seizures 59
The Public's Rights Under ss. 7, 10(b), and 11(d) 62
CONCLUSION..... 63

2026 BCSC 779 (CanLII)

2026 BCSC 779 (CanLII)

Overview

[1] For over 150 years, since its creation in 1874, the Law Society of British Columbia [LSBC] has been an independent, self-governing society charged with regulating lawyers in the public interest.

[2] In 2024, the Legislature of British Columbia enacted Bill 21, *Legal Professions Act*, 5th Sess, 42nd Leg, British Columbia, 2024 (transition provisions assented to 16 May 2024) S.B.C. 2024, c. 26 [Bill 21] which provides for the amalgamation of the LSBC with the Society of Notaries Public of British Columbia [SNPBC] in order to create a new regulator (the "new regulator") with regulatory jurisdiction over lawyers, notaries public and paralegals as well as, potentially, new legal professions. A central element of Bill 21 is the elimination of self-governance and self-regulation of lawyers by a board comprised of a majority of elected lawyers.

[3] The plaintiffs in these two actions, the LSBC (Action No. S243258) and Trial Lawyers of British Columbia and Kevin Westall [together, TLABC] (Action No. S243325) challenge Bill 21 on the basis that it undermines the independence of the Bar, which is a foundational, underlying principle of the Canadian Constitution, and is therefore *ultra vires* the provincial legislature.

[4] The TLABC also alleges that aspects of Bill 21 violate the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, specifically ss. 2(d), 7, 8, 10(b) and 11(d).

Preliminary Issues

Proper Defendants

[5] The defendants seek an order removing His Majesty the King in Right of the Province of British Columbia as a defendant on the basis that the proper defendant in a constitutional challenge is the Attorney General: *Allen v. British Columbia (Superintendent of Motor Vehicles)*, 2 B.C.L.R. (2d) 255 at 260–61, 1986 CanLII 1044 (S.C.). The plaintiffs do not take issue with this position, thus the relief sought by the defendants will be granted and the style of cause amended accordingly. The

Lieutenant Governor in Council [LGinC] remains a proper party given the plaintiffs' request for injunctive relief.

Evidentiary Issues

[6] Various evidentiary issues were raised. For example, the LSBC challenged the admissibility of certain affidavit evidence filed by the SNPBC describing the historical relationship between notaries and lawyers. The defendants also challenged portions of the evidence filed by the LSBC on the basis that it is hearsay, opinion, or both. The portions challenged as hearsay evidence include descriptions of the different law societies' involvement in developing legal professions legislation and historical facts drawn from academic and other literature. The evidence challenged as opinion includes, for example, legal opinion on the meaning and effect of the legislation.

[7] It is not necessary for me to rule on these objections. While I agree that aspects of the impugned evidence are problematic, for example various statements in the affidavit evidence filed by the LSBC effectively opining on the perceived impact of Bill 21 on the independence of the Bar, none of that evidence factors into my analysis in any meaningful way. Rather, the analysis turns on facts and evidence that are largely uncontradicted.

Current Regulatory Model: *Legal Profession Act*, S.B.C. 1998, c. 9

[8] At present, the LSBC is continued pursuant to the *Legal Profession Act*, S.B.C. 1998, c. 9, as amended [*LPA*]. Key elements of the current regulatory model, for the purposes of this case, include:

a) **Section 3** confirms that it is the object and duty of the LSBC to "uphold and protect the public interest". Section 3 then sets out a number of functions of the LSBC which are intended to achieve that object.

b) **Section 4** sets out the composition of the LSBC governing board. The directors, known as "benchers", are comprised of the Attorney General, up to six persons appointed by the Attorney General (pursuant to s. 5), and

2026 BCSC 779 (CanLII)

elected lawyers (pursuant to s. 7). Under s. 7, the benchers may establish rules governing elections, which rules currently provide for the election of 25 benchers distributed across nine geographic regions in the province.

c) **Section 11** empowers the LSBC to make rules for the governing of the society, lawyers, law firms, articled students and applicants and for carrying out the *LPA*. The rules do not require government approval, although certain rules must be approved by a vote of members at a general meeting.

d) As part of its rule-making function under s. 11, the LSBC has established a Code of Professional Conduct, which is based in large part on the Federation of Law Societies' Model Code of Professional Conduct.

[9] Together, these provisions, as well as other aspects of the *LPA*, create the current self-governing and self-regulating model for the regulation of the legal profession in British Columbia.

New Regulatory Model: Bill 21

[10] As noted above, if brought into force, Bill 21 will significantly alter the regulation of lawyers in British Columbia. The key changes highlighted by the plaintiffs, which they say eliminate self-governance and self-regulation and undermine the independence of the Bar, include:

a) **Section 3** designates the legal professions subject to regulation under Bill 21, including lawyers, notaries public, regulated paralegals and "a profession designated by regulation" (s. 3(d)). **Section 4** then authorizes the LGinC, on the recommendation of the Attorney General, to make regulations designating a profession as a legal profession. Section 4(2) identifies a number of factors that the Attorney General must consider before making a recommendation, including in s. 4(2)(v) "whether the designation would have an undue impact on the independence of licensees under this Act".

2026 BCSC 779 (CanLII)

b) **Section 5** provides for the amalgamation of the LSBC and the SNPBC, with the newly formed regulator to be known as "Legal Professions British Columbia".

c) **Section 6** sets out the duties of the new regulator, which include: (i) regulating the practice of law in BC; (ii) establishing standards and programs for the education, training, competence, practice and conduct of applicants, trainees, licensees and law firms; and (iii) ensuring the independence of licensees. Section 6(2) further directs that the regulator "must exercise its powers and perform its duties under this Act in the public interest".

d) **Section 7** sets out a number of guiding principles that the regulator "must" have regard to in carrying out its functions, including in s. 7(b) "supporting reconciliation with Indigenous peoples and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples" [UNDRIP] and in s. 7(c) "identifying, removing or preventing barriers to the practice of law in British Columbia that have a disproportionate impact on Indigenous persons and other persons belonging to groups that are under-represented in the practice of law".

e) **Section 8** provides for a board of directors for the new regulator comprised of 17 directors as follows:

(i) 5 directors elected by and from among lawyers;

(ii) 2 directors elected by and from among notaries public who are not also lawyers;

(iii) 2 directors who are regulated paralegals;

(iv) 3 directors appointed by the LGinC, of whom at least one must be an individual of a First Nation;

2026 BCSC 779 (CanLII)

(v) 5 directors appointed by a majority of the other directors holding office, after a merit-based process, of whom 4 must be lawyers, one must be a notary public who is not a lawyer, and at least one must be an Indigenous person.

Pursuant to this section, the board of the new regulator is no longer controlled by a majority of elected lawyers. Prior to the creation of the new board, a transitional board will be put in place pursuant to s. 230.

f) Under **section 10**, the board of the new regulator may establish an executive committee of no more than five people, a maximum of two of whom can be elected lawyer directors.

g) **Section 27** empowers the board to make any rules it considers necessary or advisable for the performance of the regulator's duties and provides that the board may make different rules for different legal professions. **Section 26** provides that before making a rule, the board must consult the Indigenous Council (see below) respecting the extent to which the rule accords with the principles set out in ss. 7(b) and (c) [dealing with reconciliation and the removal of barriers].

h) **Section 29** establishes the Indigenous Council and sets out the composition of the council. **Section 30** sets out the role of the Indigenous Council, which includes:

(i) Advising and working in collaboration with the regulator on any matter relating to the implementation of UNDRIP in the context of the regulation of the practice of law in BC, including in respect of the incorporation of Indigenous legal traditions and Indigenous practices and the systemic challenges faced by Indigenous persons that require investigation and action by the regulator;

2026 BCSC 779 (CanLII)

(ii) Advising on matters that under the Act require consultation with the Indigenous Council;

(iii) Participating in the regulator's strategic planning processes; and

(iv) Exercising certain approval powers as conferred by the Act.

i) **Section 224** establishes a Transitional Indigenous Council which, pursuant to **section 226**, is required to collaborate with the transitional board of the new regulator to develop the first rules of the new regulator. Under s. 226(2)(b), any such new rules may not be made unless first approved by the Transitional Indigenous Council.

j) **Section 37** provides that a person must not practice law in BC unless licenced under the Act. **Section 38** sets out a number of exceptions to the s. 37 prohibition, including, in s. 38(1)(i), "a person in a class of persons prescribed under section 212" [which authorizes the LGinC to pass regulations prescribing classes of persons so exempted].

k) **Section 211** confers a general regulation-making authority on the LGinC to make "regulations respecting any matter for which regulations are contemplated" by Bill 21. Pursuant to **section 214**, in the event of an inconsistency between a regulation made by the LGinC and a rule made under Bill 21, the regulation prevails.

[11] In addition to these provisions, the TLABC points to a number of additional sections of Bill 21 that it submits breach various *Charter* rights, including:

a) **Section 78** authorizes the chief executive officer of the new regulator to enter the office of a lawyer or law firm and examine records relating to the practice of law and further, for the purposes of an investigation, to order a licensee or law firm to produce records and attend for an examination under oath.

2026 BCSC 779 (CanLII)

b) **Section 68,** which sets out a number of definitions relating to professional conduct and competence, includes reference to a "health condition" preventing a licensee from practising law with reasonable skill and competence. In other words, according to the TLABC, Bill 21 equates a health condition, including a mental health condition, with incompetence.

c) **Section 88** empowers the chief executive officer of the new regulator, upon determining that someone has practised law incompetently, to require a licensee or trainee to receive counselling or medical treatment, including treatment for a substance use disorder.

2026 BCSC 779 (CanLII)

LSBC's and TLABC's Challenges to Bill 21

[12] I will address the specific arguments advanced by the LSBC and the TLABC under the various issues set out below, but it is useful to provide a general overview of their respective positions.

[13] The LSBC submits that an independent Bar is a fundamental, underlying principle of the Canadian Constitution and is vital to maintaining the legitimacy of Canada's constitutional democracy. They argue that the principle of an independent Bar is reflected in the written constitution, specifically the judicature provisions of the *Constitution Act, 1867* (ss. 96–101), and in ss. 7, 10 and 11(d) of the *Canadian Charter of Rights and Freedoms*. They submit that provincial legislatures cannot use the legislative authority granted under s. 92 of the *Constitution Act, 1867* to enact legislation undermining an independent Bar.

[14] The LSBC submits that Bill 21 does exactly that. It overturns over 150 years of self-governance and self-regulation and, in doing so, erodes the essential conditions of an independent Bar. As such, the LSBC contends that Bill 21 is *ultra vires* the provincial legislature and its powers under ss. 92(13) and 92(14) of the *Constitution Act, 1867*.

[15] While the principal focus of the LSBC's challenge is the composition of the governing board of the new regulator, the LSBC submits that it is the "waterfall

effect" of numerous measures contained in Bill 21 that, taken together, significantly erode the independence of the Bar.

[16] The TLABC supports the position of the LSBC on its *vires* arguments. Additionally, the TLABC submits that Bill 21 violates individuals' rights under ss. 7, 10(b) and 11(d) of the *Charter* by undermining the independence of the Bar and thereby impeding access to effective assistance by independent counsel and to a fair hearing before an independent judge. The TLABC further submits that Bill 21 violates lawyers' s. 2(d) right to free association, s. 8 right to be free from unreasonable search and seizure, and s. 7 right to life, liberty and security of the person. The s. 7 argument focusses on what the TLABC submits are provisions of Bill 21 that permit the chief executive officer of the new regulator to compel lawyers to undergo treatment for mental health conditions.

Position of the Attorney General of British Columbia

[17] The defendants acknowledge that independent lawyers play a crucial role in the administration of justice. However, the defendants argue that lawyers are not constitutionally guaranteed the right to be free from any and all forms of democratic regulation. They submit that the regulatory powers of lawyers' governing bodies are delegated to them by provincial legislatures and that the regulatory model chosen is a matter of legislative policy.

[18] The defendants also acknowledge that the regulatory powers of provincial legislatures are not unconstrained. For example, the legislature cannot enact legislation creating rules or imposing requirements on lawyers that undermine their fundamental duty to provide clients with independent advice and advocacy. Such a duty, they acknowledge, is a principle of fundamental justice protected under s. 7 of the *Charter*. The defendants submit that Bill 21 preserves the independence of lawyers when independence is understood in this sense.

[19] However, according to the defendants, the plaintiffs' claims go well beyond the protection of this duty by asserting that a model of self-governance, by which lawyers are governed by an independent regulator with a board comprised of a

2026 BCSC 779 (CanLII)

majority of elected lawyers, is constitutionally mandated. The defendants submit that there is no authority in Canada, or elsewhere in the democratic world, supporting this expansive definition of independence.

[20] With respect to the TLABC's *Charter* arguments, the defendants submit that these arguments are premised in large measure on a misreading of Bill 21 and a misapplication of the various *Charter* provisions and, accordingly, the *Charter* grounds are devoid of merit.

The Intervenors

[21] A number of parties were granted leave to intervene in the two proceedings. The positions advanced by the intervenors are summarized below.

Canadian Bar Association

[22] The Canadian Bar Association [CBA] submits that Bill 21 unconstitutionally impairs the independence of the Bar, both in fact and appearance, by eliminating self-regulation and giving the state control over the regulation of lawyers. They contend that lawyers play an indispensable role in the administration of justice through their independent advice and advocacy and that independence of the Bar and self-regulation are essential to protecting lawyer's crucial role in the administration of justice.

[23] They submit that to ensure public confidence in the justice system, the public must have the utmost confidence that the profession has institutional protections in place to ensure independence. They submit that self-regulation, defined as the governing board having a substantial majority of elected lawyers, is essential to maintaining both individual and institutional independence, as it ensures the regulator is answerable to the profession, not government, enabling lawyers to safeguard the independence of the Bar.

[24] Further, the CBA submits that while the Constitution does not expressly guarantee self-regulation or an independent Bar, a number of constitutional protections have no meaning without a self-regulating and independent Bar. They

2026 BCSC 779 (CanLII)

argue that these concepts are protected as unwritten constitutional principles that safeguard the rule of law and as necessary corollaries to the written guarantees in the judicature provisions and fair trial rights under the *Charter*.

[25] In the CBA's submission, Bill 21 eliminates self-regulation by replacing the strong majority of elected lawyers with a co-governance regime where government controls and participates directly in the regulation of lawyers. In their view, the new board being functionally controlled by non-lawyers and accountable to non-lawyers removes a structural protection to independence.

[26] Further, the CBA submits that Bill 21 puts lawyer regulation squarely in the hands of the state through: (a) rule-making power being held by a board not answerable or functionally controlled by lawyers; (b) Cabinet's authority to pass regulations to create new legal professions and define their scope of practice; (c) the legislature's role in defining professional conduct standards and competence requirements; (d) the removal of tools for democratic participation by lawyers in their governance; and (e) the changes to the regulator's mandate and the imposition of a government-defined guiding principle of independence. They submit that taken together these changes eliminate structural protections for institutional independence and grant unnecessarily broad powers to government to directly regulate the practice of law.

Law Society of Manitoba

[27] The Law Society of Manitoba [LSM] submits that an independent regulator is necessary to ensuring an independent Bar and that Bill 21 establishes a regulator that is not, or will not be seen to be, independent of government. While the LSM admits that there is no single way to ensure an independent Bar, it submits that self-regulation and self-governance are hallmarks of an independent Bar.

[28] The LSM focuses on the consequences of the proposed board structure and the ability of government to enact regulations that would override the regulator's decisions. The LSM submits that these two components of Bill 21 remove self-regulation and permit government control of the regulator.

2026 BCSC 779 (CanLII)

[29] The LSM contends that the board is not self-regulating and thus not independent because: (1) lawyers do not form the majority of those appointing the board-appointed directors; (2) when the board is fully populated, lawyers have a majority by only one, such that attendance will dictate whether the regulator is self-governing; and (3) lawyers will not be a majority of the executive committee, if established. The LSM distinguishes its own board structure on the basis that none of its appointed benchers are appointed by government and appointed lawyers are appointed by a group of which the majority are duly elected lawyers.

[30] The LSM further submits that the government's power to make regulations which would prevail against any rule made by the regulator would mean that government could always override the decisions of the regulator and effectively eliminate the independence of the Bar. This ability, it contends, operates as a "trump" card allowing the government to usurp the regulator's decisions without limit, making the entire scheme subject to the whim of the government of the day.

Society of Notaries Public of British Columbia

[31] The intervenor the SNPBC submits that the proper constitutional framework to address this case is that the Constitution guarantees the independence of legal professions, not just lawyers. As such, the SNPBC submits that co-regulation and co-governance is constitutionally sound.

[32] The SNPBC submits that the rule of law, an essential component of the Constitution's architecture, is supported by the role of independent legal professionals beyond just advocacy and representation. It notes that notaries public play an important role in educating and guiding society to facilitate voluntary compliance with the law and that such compliance is an essential precondition to the rule of law. Thus, it submits that the Constitution's protection of independent legal professionals should focus on function rather than title.

[33] Under this framing, the SNPBC argues that the board composition constitutes appropriate government regulation which does not infringe independence of the legal professions. The SNPBC stresses that legal professions are not guaranteed

2026 BCSC 779 (CanLII)

independence from each other, just government or third parties, and cooperation between professions has the potential to further their shared constitutional role. As such, the SNPBC submits that Bill 21 simply creates a new framework for the self-governance of independent legal professionals.

[34] In response to the TLABC's s. 2(d) *Charter* arguments, the SNPBC submits that to the extent the TLABC suggests that a single regulator infringes lawyers' rights by compelling association with non-lawyers, this argument must be rejected. The SNPBC submits that such compelled association through collective regulation is appropriate in the circumstances and presents no danger to lawyers' liberty interests.

Indigenous Bar Association

[35] The intervenor the Indigenous Bar Association [IBA] submits that neither the Indigenous Council nor the s. 7(b) guiding principles undermine the independence of the Bar as properly understood and construed.

[36] The IBA contends that the Indigenous Council's role is carefully prescribed, is limited in scope, and does not create a model of co-governance. It cautions that a broad notion of independence cannot be enforced in the abstract; not all constraints on the governance and regulation of lawyers constitute an intrusion on independence. While the IBA questions the LSBC's articulation of independence as an unwritten constitutional principle, it submits that even under this articulation the Indigenous Council does not infringe the independence of the Bar. The IBA notes that the Indigenous Council's approval powers post-transition are limited in a way that does not undermine self-regulation. Further, it submits that the Transitional Indigenous Council does not undermine independence as it simply ensures an Indigenous voice in the creation of the first set of rules, and the first board, once constituted, may make any rules it considers necessary or advisable.

[37] Further, the IBA submits that any risk suggested by the plaintiffs that the Indigenous Council may be involved in the creation of rules that erode the independence of the Bar is not an inherent or structural risk and could be properly

2026 BCSC 779 (CanLII)

addressed through judicial review. It also asserts that having members of First Nations on the Indigenous Council does not create any inherent potential for bias or conflict of interest nor otherwise impair their ability to properly fulfill the mandate of the Indigenous Council. Such involvement has no proper analogy to threats to independence from direct state regulation.

[38] Regarding the guiding principles in s. 7(b), the IBA submits that these principles are not an imposition of government policy: they do not prescribe how the regulator must have regard to these principles and do nothing more than require the regulator to consider things it has already adopted. The IBA notes that the LSBC has itself taken steps to implement UNDRIP and further reconciliation. Further, they assert that neither UNDRIP nor reconciliation are “government policy”: reconciliation is the grand purpose of s. 35 of the *Constitution Act, 1982* and through the *Declaration of the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*DRIPA*] the province has affirmed the application of UNDRIP to the laws of BC.

[39] Finally, the IBA submits that the principles of independence of the Bar and reconciliation should be considered together when interpreting the Constitution. The IBA notes that traditionally the concept of independence has been formulated without consideration of Indigenous perspectives, but that moving forward any conceptualization must account for an Indigenous perspective and be expressed in a way that furthers reconciliation.

Law Foundation of British Columbia

[40] The Law Foundation of British Columbia (the “Foundation”) intervened for the limited purpose of opposing the plaintiffs’ proposed alternative remedy that only some parts of Bill 21 be declared *ultra vires*. While the Foundation took no position on the outcome of the application generally, it submits that the alternative remedies could destabilize the Foundation’s ability to carry out its mandate.

[41] Bill 21 proposes several changes to the Foundation’s structure, including absorbing the Notary Foundation and making corresponding changes to its board. The Foundation submits that if Part 18, which revises the makeup of the Foundation,

2026 BCSC 779 (CanLII)

is declared *ultra vires* but Part 11, which sets out the role of the Foundation following the creation of the new regulator, remains, the Foundation would face procedural hurdles to their operations and a confusing and piecemeal governance structure.

[42] It submits that this would place the Foundation into a post-amalgamation state without the necessary transitional provisions to effect this change and make sense of the provisions that remain. The Foundation cautions that this resulting state of limbo would hinder their ability to fund vital legal services in BC.

2026 BCSC 779 (CanLII)

Background/Context

[43] Considerable evidence was led by both the LSBC and the defendants about the history of legal regulation in BC and throughout Canada, regulatory structures in other countries and the process leading to the enactment of Bill 21.

[44] While this evidence provides some useful context, it has minimal bearing on the issues the Court needs to decide. I will therefore not review the evidence in detail but will highlight some of the key points that emerge.

History of the Regulation of Legal Professions in British Columbia and Elsewhere in Canada

British Columbia

[45] Since the LSBC was incorporated as the regulator of the legal profession in 1874, it has been largely self-regulating and self-governing. It has been led by benchers, a majority of whom have been elected lawyers, and since 1884 it has held the exclusive right to make rules and regulations in respect of the discipline of lawyers and admission to the bar with no requirement for consultation with, or approval by, any government or other external body.

[46] Throughout its existence, the LSBC has taken the lead on changes to its governing legislation, including by proposing and drafting amendments, often after consultation with the profession. Where the legislature has revised these proposals, the LSBC has historically maintained a collaborative role through this process.

[47] For example, when the *LPA* was revised and modernized in 1987, resulting in the *Legal Profession Act*, S.B.C. 1987, c. 25, the process was initiated and largely driven by the LSBC. It involved extensive consultation with the Bar and consensus-building, something noted by the government when the new legislation was introduced in the Legislature. Numerous subsequent amendments were made to the *LPA* leading to its current form, all of which involved extensive participation by and input from the LSBC. The LSBC submits that this history reflects an acknowledgement of its essential role in maintaining an independent Bar.

Other Canadian Jurisdictions

[48] At the time of Confederation, self-governance and self-regulation were not consistent features of lawyer regulation in the original provinces, and indeed each of the provinces had a different model of lawyer regulation. The provinces and territories that subsequently joined Canada also had varied regulatory models and none, at the time they joined, satisfied the conditions for both self-governance and self-regulation.

[49] Nonetheless, subject to certain exceptions described below, there are now several common features of lawyer regulation across Canadian jurisdictions, including: (1) the legal regulator is self-governing, governed by a majority of lawyers elected by lawyers, who are empowered to make rules for the governance of the society and the legal profession; (2) the legal regulator controls admission and discipline of lawyers; (3) the legal regulator is not required to consult with or get approval from any government or other entity in making rules and such entities are not allowed to make rules or regulations; and (4) the legal regulator plays a substantive role in developing and amending its governing legislation, including by making proposals for amendments.

[50] While these features can be described as general trends, they are not airtight rules.

[51] When these features came into being varies by jurisdiction. For example, while power over admission was often delegated fairly quickly following the creation

2026 BCSC 779 (CanLII)

of a legal regulator, when jurisdictions delegated disciplinary powers varies quite widely, with some legal regulators not gaining such powers until the 1920s or 30s. In the Yukon, lawyer discipline was regulated by the courts until 1984.

[52] Further, there are a number of exceptions to the trend of legal regulators holding independent and exclusive power to make rules and regulations. In Saskatchewan, if the Legislative Assembly finds a rule or amendment to a rule to be prejudicial to the public interest, then the rule ceases to have effect and is deemed to have been revoked. In New Brunswick, rules about the taxation of lawyers' fees require Cabinet approval. In Nova Scotia, Cabinet has a broad regulation-making power in relation to lawyer regulation.

[53] The Yukon is also a notable exception. Lawyers in the Yukon only became self-regulating in 1984, when the Law Society of the Yukon came into existence. From 1984 to 2017, Yukon's Cabinet had the power to annul any rule of the legal regulator it considered contrary to the public interest. In 2017, Yukon's Cabinet was granted the authority to create new categories of legal professionals.

[54] Manitoba and Québec are also particular outliers. Manitoba does not meet the LSBC's definition of self-governance as only 12 of its 25 benchers are lawyers elected by lawyers. The other 13 benchers consist of four appointed lawyer benchers, six appointed lay benchers, one articled student elected by the articling class, the immediate past president of the Law Society of Manitoba, and the Dean of the Faculty of Law of the University of Manitoba. Appointed benchers are selected through a committee process established by the Law Society of Manitoba.

[55] In Québec, the regulation of professional corporations was standardized by the *Professional Code*, S.Q. 1973, c. 43 (now in amended form, C.Q.L.R., c. C-26), leading to significant government oversight through a co-regulatory model. This legislation established the Offices des professions du Québec (the "Office"), whose members are appointed by Cabinet. Any proposed rule or regulation must be approved by both the Office and Cabinet. The Barreau must first send the rule or regulation to the Office for review for compliance with the *Professional Code*. After

2026 BCSC 779 (CanLII)

this review, the Office makes its recommendation to Cabinet, who may approve the rule or regulation, with or without modification, or withhold its approval. In exceptional circumstances, should the Barreau fail to draft rules or regulations required by the *Professional Code* or the Office, Cabinet can unilaterally impose those rules or regulations and determine their content. This oversight extends to the Barreau's Code of Professional Conduct.

The International Context

[56] The LSBC underscores the importance of maintaining a strong, independent Bar by reference to events in the United States where the current federal administration has engaged in what the LSBC describes as an "unprecedented assault on lawyers and the rule of law". The LSBC highlights these events not to suggest that Bill 21 is the equivalent to the actions taken in the United States, but rather to make the point that the elimination of self-governance and self-regulation undermines the independence of the Bar and thereby weakens an essential safeguard for ensuring that the rule of law and our essential democratic structures remain intact. For their part, the defendants point to the regulatory models adopted in Australia and New Zealand which involve systems of co-regulation in which the courts, government, professional associations and statutory boards all have defined roles. For example, in certain Australian states and in New Zealand, aspects of lawyer discipline are handled by statutory commissioners or boards. The defendants submit that these different models function well in serving the public interest and do not threaten lawyer independence.

[57] The evidence of the regulatory models in Australia and New Zealand illustrates that there are different approaches to the regulation of lawyers in other jurisdictions. However, given the very different constitutional frameworks existing in those countries, these examples have minimal relevance to the issues that arise in this case.

2026 BCSC 779 (CanLII)

Process Leading to the Enactment of Bill 21

[58] In the same way that the substance of Bill 21 represents a significant departure from the long-established approach to the regulation of lawyers in BC, so too did the process leading to its enactment.

[59] As discussed above, while the LSBC has always been established and governed pursuant to statute, it has also always been consulted, and indeed has generally taken the lead, on developing legislative amendments impacting the regulation of lawyers.

[60] That was not the case in respect of the development of Bill 21.

[61] The government first announced in March 2022 that it intended to create a new regulatory model to govern lawyers, notaries and paralegals. That announcement was followed in September 2022 with the publication of an Intentions Paper on the Legal Professions Regulatory Modernization (the "Intentions Paper") which outlined the policy objectives of the proposed new model. The Intentions Paper expressly addressed the independence of the Bar. It stated:

> The importance of an independent bar to the functioning of a free and democratic society cannot be overstated. The Ministry is not proposing, and has no intention of implementing, changes that would interfere with the ability of a lawyer (or other legal service provider) to fearlessly advocate for their client and provide independent legal advice to their client, even, and especially, when their client is at odds with government.

[62] The Intentions Paper invited submissions from the Bar and the public on those policy objectives and in May 2023, the Ministry published a "What We Heard" report summarizing the submissions received. Those submissions included responses from the CBA and other legal organizations, as well as individual lawyers and members of the public.

[63] Thereafter, and indeed throughout the 2022–2024 period, there were numerous meetings between government representatives and the various legal organizations at which the policy underpinnings of the proposed new regulatory

2026 BCSC 779 (CanLII)

model were discussed. Benchers of the LSBC were provided with copies of the draft legislation during these meetings, although they were required to keep the drafts confidential.

[64] While the LSBC acknowledges that the government consulted in a general way about the proposed changes to the regulation of the various legal professions, its central complaint is that government did not share publicly a draft of Bill 21 before it was first tabled in the legislature and, as such, the government made no effort to build consensus with the Bar and the public.

[65] The point made by the LSBC and TLABC is that the long and established history of the Bar, through the LSBC, being consulted and directly involved in developing its own governing legislation reflects an acknowledgment of the self-governing status of the profession as an integral aspect of an independent Bar. The failure to follow a similar process in respect of Bill 21, in the LSBC's submission, demonstrates a disregard for the LSBC's role and for the importance of an independent Bar.

[66] However, as I noted at the outset, the evidence about the process leading to the enactment of Bill 21 has minimal bearing on the issues before the Court in this litigation. While that process did indeed depart from past practice, I agree with the defendants that this is a political issue rather than a legal or constitutional one.

Issues

[67] The following issues arise:

a) Is the independence of the Bar an unwritten constitutional principle?

b) If so, what is the content of or meaning to be given to that principle?

c) Does Bill 21, in whole or in part, infringe the principle of an independent Bar?

2026 BCSC 779 (CanLII)

d) Does Bill 21 infringe the *Charter of Rights and Freedoms*, specifically ss. 2(d), 7, 8, 10(b) and/or 11(d)?

e) If so, can the infringement(s) by justified in a free and democratic society pursuant to s. 1?

f) If some or all of Bill 21 is found to be unconstitutional, what is the appropriate remedy?

2026 BCSC 779 (CanLII)

Analysis

Overview

[68] It is common ground that the provinces have legislative authority to regulate the practice of law in the province pursuant to ss. 92(13) and 92(14) of the *Constitution Act, 1867*: *Law Society of British Columbia v. Mangat,* 2001 SCC 67 at paras. 38, 42 [*Mangat*]. Indeed, it has long been recognized that the authority of governing bodies like the LSBC is delegated to those bodies by the provincial legislatures: *Finney v. Barreau du Québec*, 2004 SCC 36 at paras. 1, 14, 22.

[69] The central question in this case is whether the legislature, in enacting Bill 21, acted outside of that authority by creating a regulatory structure that improperly undermines the independence of the Bar.

[70] As a preliminary point, it is useful to note that the parties differ on the proper analytical framework. The LSBC submits that the first part of the analysis should be broken down into two issues: (i) is the independence of the Bar an unwritten constitutional principle? and (ii) if so, what is the meaning and content of the principle of the independence of the Bar?

[71] The defendants argue that these two issues are better analyzed through the lens of a single question: does the Constitution protect absolute lawyer independence as claimed by the plaintiffs? As part of this approach, the defendants say that the LSBC defines independence in the broadest possible way. They go so far as to suggest that the LSBC's formulation of lawyer independence would mean

that law societies, and individual lawyers, could not be subject to the provisions of the *Criminal Code* and human rights legislation or to oversight by the courts.

[72] The difficulty with the defendants' formulation is that it mischaracterizes the LSBC's position and purports to address an argument not advanced by the LSBC. Specifically, the LSBC does not argue that an independent Bar requires lawyers to have "absolute" independence in the sense of being free from "any and all forms of democratic regulation", and, as such, the defendants' proposed single question approach does not align with the case as advanced by the plaintiffs.

[73] Further, I agree with the LSBC that the analysis of the constitutional status of an independent Bar involves two distinct concepts or questions: (i) is the independence of the Bar a foundational constitutional principle? and (ii) if so, what is the meaning or content of that principle and what legal rules flow therefrom?

[74] Another central theme of the defendants' position is that the harms alleged by the plaintiffs, and by the CBA, in terms of the impact of Bill 21 on an independent Bar are largely speculative in that they assume hypothetical worst-case scenarios. The defendants submit that that is an improper basis for assessing the constitutionality of legislation. They cite *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 61–88, where the court observed at para. 79 that there "is no proposition of law that legislation, to pass constitutional muster, must exclude all possibility of unconstitutional exercises of discretion." The defendants argue that in the event the new regulator makes a decision, or takes an action, that undermines the principle of independence, that decision or action can be challenged by way of judicial review. The IBA makes a similar argument.

[75] That is true; however, that does not obviate the need to examine Bill 21 to determine whether it creates a regulatory structure that improperly undermines the independence of the Bar. Put another way, the LSBC's challenge is directed at the regulatory model created by Bill 21, not the possible future decisions of the new regulator. As the Supreme Court of Canada held in *Reference re Impact Assessment Act*, 2023 SCC 23:

2026 BCSC 779 (CanLII)

> [74] … a court cannot circumvent its duty to meaningfully review the constitutionality of legislation by suggesting that, insofar as an administrative decision maker applies a law unconstitutionally, the application of that law may be judicially reviewed. The constitutional validity of a law and its administrative application are distinct concepts. Where a constitutionally valid law grants a decision maker broad and imprecise discretion, that discretion must be exercised reasonably and in accordance with the purpose for which it was given … But where a law is ultra vires and therefore unconstitutional, it cannot be saved by the prospect of administrative judicial review.

[76] One other preliminary point is worth highlighting. Throughout their submissions, both written and oral, the defendants offered no clear rationale for the significant changes brought about to the regulation of lawyers under Bill 21 or to the jettisoning of the long-established practice of consultation and collaboration with the legal profession about changes to their governing legislation.

[77] The defendants describe the purpose of Bill 21 in these terms (written submission at para. 115):

> … the purpose of the *Act* is to provide for simpler, streamlined regulation of all legal professionals in the province through a single regulator, to offer more choices (and more affordable choices) of legal service providers for the public, to modernize the governance and electoral structure of the regulator, to preserve the independence of licensees, and to advance reconciliation within the legal professions. The purpose of the Act is not to end or diminish lawyer independence. (Nor does the *Act* have that effect …).

[78] While the plaintiffs take issue with this last statement, they support generally the objects of Bill 21 as stated by the defendants. However, as they note, those objects do not explain or support the fundamental governance changes brought about by Bill 21.

[79] The defendants rightly submit that absence of a clear justification for the legislation, as well as the failure to obtain consensus with lawyers and the public, are irrelevant to the constitutionality of the legislation ultimately enacted by the legislature. That is true. However, the inability, or failure, to justify overturning 150 years of self-regulation, in the face of widespread opposition from the Bar, is notable.

2026 BCSC 779 (CanLII)

Is the Independence of the Bar an Unwritten Constitutional Principle?

[80] It has long been established that Canada's Constitution has both written and unwritten terms. The written constitution includes the *Constitution Act, 1867*, *Constitution Act, 1982* as well as the *Canadian Charter of Rights and Freedoms*. The unwritten constitution includes principles central to Canada's system of democratic governance, including federalism, democracy, constitutionalism and the rule of law, and respect for minorities: *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32, 1998 CanLII 793 [*Secession Reference*]. In identifying these "fundamental and organizing principles", the Supreme Court made it clear that this list is not exhaustive.

[81] The unwritten constitutional principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based": *Secession Reference* at para. 49.

[82] In *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 1997 CanLII 317, Chief Justice Lamer held that judicial independence is also an unwritten constitutional principle:

> [83] … Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an <u>unwritten</u> constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle in the institutional apparatus which they create or contemplate" …
>
> [Emphasis in original.]

[83] An independent Bar has similarly been described by Canadian courts at all levels as an essential underpinning of Canada's constitutional order and as necessary for maintaining an independent judiciary and the proper administration of justice.

2026 BCSC 779 (CanLII)

[84] One of the most oft-cited articulations of this concept is found in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335–36, 1982 CanLII 29 [*Jabour*], where Justice Estey, speaking for the Court said:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

[85] In a similar vein, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 187, 1989 CanLII 2, Justice McIntyre said:

> It is incontestable that the legal profession plays a very significant — in fact, a fundamentally important — role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or *quasi*-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.

[86] In *R. v. Neil*, 2002 SCC 70, the Supreme Court again emphasized the importance of an independent Bar, of which a lawyer's duty of undivided loyalty is a fundamental component, as essential to maintaining public confidence in the legal system:

> [12] … Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies …
>
> [13] The value of an independent bar is diminished unless the lawyer is free from conflicting interests.

[87] These are but three of an innumerable number of judicial statements acknowledging the importance of an independent Bar. In my view, these are not merely examples of judges spouting eloquent but meaningless platitudes. Rather,

2026 BCSC 779 (CanLII)

they reflect judicial acknowledgement that an independent Bar is a foundational constitutional principle.

[88] While the independence of the Bar is an unwritten constitutional principle, it is a principle that is implicit in certain parts of the written constitutional text, specifically in the judicature provisions of the *Constitution Act, 1867* (ss. 96–101) and in the fundamental rights and freedoms guaranteed under ss. 7, 10(b) and 11(d) of the *Charter.*

[89] The judicature provisions establish certain requirements for maintaining an independent superior judiciary. Those provisions protect the core jurisdiction of the superior courts, granting them a "special and inalienable status": *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 29 [*Trial Lawyers*].

[90] Sections 97 and 98 specifically acknowledge the existence of the Bars of Ontario, Nova Scotia, New Brunswick and Quebec and direct that judges appointed to the superior courts of those provinces must be selected from the Bars of the respective province. In doing so, the Constitution implicitly contemplates the continuance of independent Bars.

[91] Professor, now Justice, Patrick Monahan made this point in his article "The Independence of the Bar as a Constitutional Principle in Canada" in *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at p. 131:

> The link between the independence of the judiciary and the independence of the Bar is also implicitly recognized by sections 97 and 98 of the *Constitution Act, 1867*, which require that judges of the Superior Courts in the provinces be chosen from the Bars of those provinces. Like the other guarantees in Part VII of the Act, this requirement is intended to protect the independence of the judiciary, given the independence of the Bars of the provinces as they existed in 1867. In this sense, the *Constitution Act, 1867* assumes the continued existence of independent bars in the provinces, as an essential element in the protection of the independence of the judiciary.

2026 BCSC 779 (CanLII)

See also: Roy Millen, “The Independence of the Bar: An Unwritten Constitutional Principle” (2005) 84:1 The Canadian Bar Review 107.

[92] The independence of the courts is, in turn, inextricably tied to the independence of the Bar, both by virtue of the fact that judges are selected from the independent Bars of each province and territory and, equally importantly, that the courts can only function by having lawyers present evidence and arguments in accordance with their duties owed to their clients and to the administration of justice more generally.

[93] The defendants submit that the judicature provisions do not support a finding that independence of the Bar is a constitutional principle because those provisions are structural in nature rather than rights-conferring: *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at paras. 191–195, citing *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 at para. 31.

[94] However, the LSBC does not rely on the judicature provisions as conferring rights on individual lawyers. Rather, as Professor Monahan notes, those provisions protect the independence of the judiciary as a key structural component of the Canadian constitutional framework which assumes, and indeed is largely dependent upon, the existence of an independent Bar. Similarly, an independent Bar is necessary to ensure that the fundamental rights enshrined by ss. 7, 10(b) and 11(d) are properly acknowledged and protected.

[95] To conclude on this issue, I am satisfied that the independence of the Bar is an unwritten constitutional principle, the importance of which is well captured in the oft-cited statement of Jack Giles K.C. in his article “The Independence of the Bar” (2001) 59:4 The Advocate 549 at 549, where he said:

> The principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law are placed in jeopardy.
>
> It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen’s

2026 BCSC 779 (CanLII)

> constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar.

What Is the Meaning of or Content to Be Given to the Principle of the Independence of the Bar?

[96] As noted above, the LSBC does not advance a conception of "absolute" lawyer independence as suggested by the defendants. Rather, the LSBC's conception of independence is well stated in its written submission (at para. 67):

> An independent Bar composed of lawyers who are free of influence by public authorities (or any other source) is a fundamental component of our free society. Independence of the Bar is the fundamental public right that lawyers may provide legal assistance for or on behalf of a client without fear of interference or sanction by the government, subject only to the lawyer's professional responsibilities as prescribed by the Law Society, and the lawyer's general duty as a citizen to obey the law.

[97] This formulation aligns with Justice Estey's description in *Jabour* (see para. 84 above) of an independent Bar being free from influence by "the state in all of its pervasive manifestations" to ensure that members of the public receive independent and impartial legal advice and services.

[98] Independence of the Bar is not an abstract concept but rather manifests itself in the work that lawyers do to advance and protect the interests of their clients.

[99] Throughout the history of Canada, and particularly since the enactment of the *Charter*, Canadian courts have been called upon to make decisions having direct and significant impacts on the social and economic fabric of the country.

[100] These cases only happened because of the diligent and courageous efforts of lawyers who advanced novel positions in the face of opposing interests, often represented by the state.

[101] Chief Justice McEachern (in dissent but not on this point) underscored this essential role of counsel in *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, 85 B.C.L.R. (2d) 85, 1993 CanLII 1366 (C.A.):

> [53] … One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that

2026 BCSC 779 (CanLII)

> independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.

[102] The importance of an independent Bar is of course not limited to litigation matters. In the commercial world, lawyers are at the heart of the transactions that drive our economy. It is lawyers who negotiate, structure and paper the deals in our natural resource, real estate, technology and other sectors that impact so directly on the financial well-being of the citizens of our province and our country.

[103] Similarly, lawyers are intimately involved in advising governments at all levels on the constitutionality and general legality of public laws and initiatives.

[104] The essential role of lawyers is perhaps best reflected in the area of criminal law where, on a daily basis, lawyers act to protect the liberty of their clients in criminal prosecutions backed by the weight and resources of the state.

[105] In *Andrews* at 188, Justice McIntyre commented on the role of lawyers in the administration of justice, noting the particular burdens on lawyers in the criminal law:

> … While it may be arguable whether the lawyer exercises a judicial, *quasi*-judicial, or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the State in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

[106] It is axiomatic that in carrying out their advisory and advocacy roles in each of these areas, lawyers must be, and must be seen to be, independent from outside influences, including, in particular, the influence of the state.

[107] This concept of lawyer independence is central to the concept of an independent Bar as formulated in the various decisions referred to above and reflects the fact that the right to impartial advice free from undue outside influence is a right that belongs to clients: *Jabour* at 335–36.

2026 BCSC 779 (CanLII)

[108] Thus, legislation or other measures said to undermine the independence of the Bar must be examined through the lens of the impact on lawyers' ability to provide such impartial advice and zealous advocacy. This includes measures directed at lawyers individually that might affect the lawyer-client relationship, but also legislation establishing the regulatory model and structures governing matters such as eligibility for licensure, competence, professional conduct and discipline. Simply put, lawyers cannot be said to be truly independent if they are subject to regulation by a body which is itself controlled, or unduly influenced, by outside forces, particularly those exerted by the state.

[109] The need for institutional independence acknowledges the fact that in addition to the duties owed to clients, lawyers owe broader duties to the courts and to the administration of justice more generally. As Justice McIntyre said in *Andrews*, the powers and duties exercised by lawyers "are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community": at 188 (see para. 105 above). See also: *Fortin v. Chrétien*, 2001 SCC 45 at paras. 52–53; *Mangat* at para. 45.

[110] Accordingly, determination of the plaintiffs' *vires* arguments turns on whether Bill 21 violates this conception of an independent Bar, by interfering with or unduly influencing the duties owed by lawyers, both to their clients and to the administration of justice more broadly, either through its direct application to lawyers and their clients or by way of the regulatory structure it creates.

The Relationship of Unwritten Constitutional Principles to the Written Constitution

[111] Having found that the independence of the Bar is an unwritten constitutional principle, the next question is how that principle applies to the analysis of the constitutional validity of Bill 21.

[112] The role of unwritten constitutional principles in interpreting and applying the written text of the Constitution was considered by the Supreme Court of Canada in

2026 BCSC 779 (CanLII)

Toronto (City) v. Ontario (Attorney General), 2021 SCC 34, a decision that both the LSBC and the defendants rely on in support of their respective positions.

[113] *Toronto (City)* was a constitutional challenge to legislation enacted by the Ontario legislature reducing the size of the Toronto city council. The legislation was passed during the course of an ongoing municipal election.

[114] The judge at first instance found that the legislation limited the municipal candidates' right to freedom of expression as guaranteed by s. 2(b) of the *Charter* and municipal voters' right to effective representation under s. 2(b) and that the legislation could not be saved under s. 1. The Court of Appeal allowed the appeal.

[115] A further appeal to the Supreme Court of Canada was dismissed on the basis of a slim 5-4 majority. For the purposes of the present case, of note is the Supreme Court's discussion of the unwritten constitutional principle of democracy and whether it could be used by a court to invalidate otherwise valid provincial legislation.

[116] The majority, relying on previous decisions of the Court (for example *Secession Reference*), confirmed that certain unwritten principles are foundational components of the Canadian Constitution that have "full legal force" and that "can guide and constrain the decision-making of the executive and legislative branches": at para. 49.

[117] According to the majority, unwritten principles are not "provisions" of the Constitution, rather they are general principles that serve to give effect to the written text: at para. 54. The unwritten principles do so in two ways:

a) They may be used in the interpretation of constitutional provisions, e.g., the unwritten principles of judicial independence and the rule of law have aided in the interpretation of ss. 96–100 of the *Constitution Act, 1867* which safeguard the core jurisdiction of superior court judges (at para. 55); and

2026 BCSC 779 (CanLII)

b) They can be used to develop structural doctrines unstated in the written Constitution (at para. 56).

[118] However, according to the majority:

> [57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.
>
> [58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers …
>
> [59] Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concept[t] of democracy . . . ha[s] no canonical formulation[n]" …

[119] The majority went on to make the point that unwritten principles, particularly the principle of democracy, weigh strongly in favour of upholding the validity of legislation that conforms to the written text of the Constitution and thus cannot be used to narrow the broad legislative competence afforded provincial legislatures under s. 92: at para. 80.

[120] The defendants submit that the majority decision in *Toronto (City)* is fatal to the position of the plaintiffs, who seek to invalidate Bill 21 by reason of the unwritten principle of the independence of the Bar.

[121] The LSBC disagrees. The LSBC submits that it is seeking to apply the unwritten constitutional principle of an independent Bar in the first way acknowledged by the Court in *Toronto (City)*—to interpret written aspects of the Constitution, specifically ss. 92(13) and (14). It says that, based on the principle of the independence of the Bar, those provisions of the Constitution must be interpreted narrowly so as not to undermine that independence.

2026 BCSC 779 (CanLII)

[122] The LSBC submits that this interpretation and application of *Toronto (City)* is consistent with other Supreme Court of Canada authorities. For example, the LSBC cites *Trial Lawyers* where the Court invalidated hearing fees established under the BC *Supreme Court Rules* as being inconsistent with s. 96 of the *Constitution Act, 1867*.

[123] Speaking for the majority in *Trial Lawyers*, Chief Justice McLachlin noted that while s. 92(14) confers broad authority on provincial legislatures in connection with the administration of justice, which include the power to levy hearing fees, that power is not unconstrained. Rather, the province's authority under s. 92(14) must be considered and interpreted in light of other provisions of the Constitution, specifically s. 96: at paras. 24–25.

[124] According to Chief Justice McLachlin, s. 96, while referring to the appointment of judges, protects the core jurisdiction of the superior courts, a central element of which is the resolution of disputes: at paras. 28–29, 32. Thus, hearing fees that impede people's ability to access the courts undermine that core function and are therefore inconsistent with s. 96: at para. 32.

[125] While this finding was sufficient to dispose of the issue before the Court, Chief Justice McLachlin also found support for her position in the unwritten constitutional principle of the rule of law, which is "inextricably intertwined" with the s. 96 function (at para. 39). The Chief Justice said:

> [40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-69, *per* Newbury J.A.

2026 BCSC 779 (CanLII)

[126] Thus, the principle of the rule of law supported Chief Justice McLachlin's finding that "s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction": at para. 43.

[127] In *Toronto (City)*, the majority referred to *Trial Lawyers* and described Chief Justice McLachlin's analysis in these terms:

> [75] … The rule of law was used in [*Trial Lawyers*] as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

[128] The LSBC submits that, similarly, in this case, the independence of the Bar is being used as an aid in interpreting the scope of provincial legislative authority under ss. 92(13) and (14).

[129] As noted above, the defendants submit that the majority finding in *Toronto (City)* is a complete answer to the LSBC's arguments. They further submit that if there is any uncertainty arising out of *Toronto (City)*, that uncertainty is put to rest by *Mercer v. Yukon (Government of)*, 2025 YKCA 5.

[130] There, the appellant brought a constitutional challenge to the Yukon *Civil Emergency Measures Act*, R.S.Y. 2002, c. 34 [*CEMA*] pursuant to which the territorial government declared a state of emergency during the COVID-19 pandemic. The appellant argued that *CEMA* improperly delegated various legislative functions to the executive branch of government and, as such, the Act violated the unwritten constitutional principles of democracy, rule of law, separation of powers, responsible government and parliamentary sovereignty.

[131] The Court of Appeal reproduced the trial judge's summary of the appellant's argument as an accurate distillation of the position advanced at trial and on appeal (at para. 12):

2026 BCSC 779 (CanLII)

> [56] The plaintiffs say that *CEMA* is inconsistent with the structure of the *Yukon Act* that provides for three branches of government—legislative, executive, and judicial—each operating within their own sphere of activity. This structure is informed not only by the text of the *Yukon Act* but also by unwritten constitutional principles, identified by the plaintiffs as democracy, rule of law, separation of powers, responsible government, and parliamentary sovereignty. These principles assist in interpreting the text of the *Yukon Act*, the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of political institutions (*Reference Secession* at para. 52). The plaintiffs say a consideration of *CEMA* in the context of these principles and the text of the *Yukon Act*, reveals it as legislation that improperly interferes with the legislative and judicial realms, by giving powers or protections to the executive that intrude into those of the other two branches. The plaintiffs say there are limits on the delegation of powers by the Legislature, limits that come from the constitutional text (i.e. the *Yukon Act*) and unwritten constitutional principles. *CEMA* does not respect those limits and as such is unconstitutional. The plaintiffs refer to this as an improper delegation of the core competence of the Legislature.

[132] As is the case here, the parties in *Mercer* disagreed on the proper interpretation and application of *Toronto (City).* The Court of Appeal noted the permissible uses of unwritten constitutional principles as determined by the Supreme Court in *Toronto (City)* and observed that the appellant was not seeking to rely on either of those permissible uses:

> [45] Having rejected the dissent's approach to [unwritten constitutional principles], the Court in *City of Toronto* explained that [unwritten constitutional principles] "<u>may assist courts in only two distinct but related ways</u>": at para. 54, emphasis added. These two ways are: 1) to aid in the interpretation of constitutional provisions; and 2) to assist in developing unstated structural doctrines that can fill gaps regarding questions on which the text of the Constitution is silent.
>
> [46] I note that Mr. Mercer does not rely on either of these permissible uses here. He does not seek to interpret particular provisions of the *Yukon Act* or Constitution, nor does he rely on [unwritten constitutional principles] to fill gaps in the constitutional structure. Rather, he asks this Court to conclude that *CEMA* is invalid because it does not respect [unwritten constitutional principles]. This is directly contrary to the majority's holding in *City of Toronto* that "[a]ttempts to apply unwritten constitutional principles…as an independent basis to invalidate legislation" suffer from two "fatal" deficiencies: at para. 57. First, there is the possibility of an unwarranted intrusion by the court into the legislative authority to amend the Constitution. Second, the "highly abstract" nature of [unwritten constitutional principles], if used in this way, could serve to decrease legal certainty and predictability: at para. 59. As the Court noted, "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box": *City of Toronto* at para. 59,

2026 BCSC 779 (CanLII)

> quoting *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 66.

[133] The Court of Appeal concluded:

> [49] In sum, Mr. Mercer's position is similar to that rejected by the majority in *City of Toronto*: he is inviting judicial invalidation of *CEMA* in a manner that is wholly untethered from basic constitutional structure. The structure of the Constitution is to be addressed via purposive textual interpretation: *City of Toronto* at para. 53. Here, Mr. Mercer argues *CEMA* interferes with ss. 10–16 of the *Yukon Act*, but offers no explanation as to how that occurs. With the exception of the reference to "responsible government" in the preamble of the *Yukon Act*, which I address in the next section, Mr. Mercer's arguments do not point to any text, with or without the support of [unwritten constitutional principles], to support his assertion of constitutional invalidity.

[134] The Court of Appeal went on to find that the appellant's reliance on the term "responsible government" was misplaced. Specifically, the Court held that the delegation of certain functions to the executive branch under *CEMA* was well within the legislature's authority: at paras. 60–61.

[135] The defendants here submit that the LSBC is advancing arguments similar to those rejected by the Court in *Mercer*. I disagree. In my view, there are two key differences in the LSBC's position. First, the LSBC does seek to rely on one of the permissible uses of unwritten principles identified by the Supreme Court in *Toronto (City)*, namely to aid in the interpretation of ss. 92(13) and (14). Second, the LSBC is not relying on arguments "wholly untethered from basic constitutional structure"; rather, its position is that the independence of the Bar is an essential structural element of the constitution.

[136] In my view, the unwritten constitutional principle of an independent Bar is properly being applied by the LSBC as an interpretive aid in determining the scope of ss. 92(13) and (14).

[137] Paraphrasing Jack Giles K.C. (see para. 95 above), it is inconceivable that a constitution that protects fundamental rights would not also protect access to independent courts by way of an independent Bar. Put another way, the idea that

2026 BCSC 779 (CanLII)

the legislature could use its plenary authority under ss. 92(13) and (14) to regulate lawyers in such a manner as to eviscerate an independent Bar is simply unthinkable.

Is Bill 21, in Whole or in Part, *Ultra Vires* the Provincial Legislature?

[138] This then leads me to the issue that lies at the heart of this case. What is the impact of Bill 21 on the independence of the Bar?

[139] As described above, the plaintiffs identify a number of provisions of Bill 21 that they say violate the principle of an independent Bar, both in terms of their specific impact as well as in their cumulative effect. I propose to consider the specific provisions challenged by the plaintiffs and will then examine, if necessary, the manner in which they cumulatively operate, i.e. the "waterfall effect" as labelled by the LSBC.

Composition of the New Board

[140] I turn first to the provisions of Bill 21 that eliminate self-governance and self-regulation, specifically s. 8, which establishes the new governing board that is not comprised of a majority of elected lawyers.

[141] At the outset, I note that both parties adduced evidence going to the question of whether governance of lawyers by lawyers constitutes "best practice." For example, the LSBC relies on the expert report of Professor Poonam Puri of Osgoode Hall Law School, who was qualified as an expert in corporate governance.

[142] In her report, Professor Puri opines:

> … In the case of a regulator of lawyers, having a majority of elected lawyers is important for good governance. …
>
> …
>
> In the context of a regulator of lawyers, independence for directors means independence both from the entity and its management, but also from the government. Given the unique role of lawyers in upholding the rule of law, it is important for the board of a regulator of lawyers to have voices around the table that are willing to go against the interests of the government where necessary.

2026 BCSC 779 (CanLII)

> In my view, when considering governance at a regulator of lawyers, director independence is not maximized when: (i) the board is not a majority of elected lawyers; (ii) the executive committee does not need to be majority elected lawyers; and (iii) quorum for making decisions does not require a majority elected lawyers to be present.
>
> …
>
> … having a majority of elected lawyers promotes good self-regulation in the public interest.

[143] For their part, the defendants cite a number of academic and other sources that question whether self-governance of lawyers by lawyers is an appropriate or effective model given the inherent conflicts that may arise between the duties owed by directors to the public interest and the self-interest of those lawyers and their constituents: see e.g., Michael J. Trebilcock, “Regulating the Market for Legal Services” (2008) 45:5 Alta. L.R. 215 at 229–31; Anita Anand, “Governance Gone Wrong: Examining Self-Regulation of the Legal Profession” (2018) 21:2 Legal Ethics 99 at 104, 112–13.

[144] The defendants submit that a purely electoral model whereby the board is comprised of a majority of lawyers elected by lawyers creates an appearance, and sometimes the reality, of regulatory capture that undermines public confidence in the regulation of the practice of law.

[145] It is not necessary to resolve this conflict in order to determine the issues in this litigation. Specifically, the validity of Bill 21 does not turn on whether it establishes a “better” governance structure than the current *LPA*. Rather, the central question is whether Bill 21’s governance model undermines the independence of the Bar in an unconstitutional manner. That said, it is worth noting that nothing in the evidence adduced in this litigation supports any suggestion that the LSBC in its current form has governed the legal profession in a manner contrary to the public interest.

[146] I have referred above to the numerous judicial statements describing an independent Bar as a bedrock principle of the Canadian Constitution and, indeed, I have found the independence of the Bar to be an unwritten constitutional principle. I

2026 BCSC 779 (CanLII)

have also found that unwritten principles can be used to interpret the written text of the Constitution, even in a manner that limits or narrows the scope of the written provisions. Again, this is how the unwritten principle of the rule of law was applied to s. 92(14) in *Trial Lawyers*.

[147] However, as the defendants submit, no authority has gone so far as to hold that the model of self-governance advanced by the LSBC is constitutionally guaranteed and that ss. 92(13) and (14) must be interpreted in a way that precludes a provincial legislature imposing a different model.

[148] In fact, the courts have described the choice of governance model as a matter of legislative choice and/or public policy.

[149] For example, in *Jabour*, where Justice Estey described an independent Bar as one of the hallmarks of a free society, he also noted that the regulation of legal professionals was implemented for the protection of the public. It is worth quoting Justice Estey at some length (at 334–36):

> … It is the establishment of this protection that is the primary purpose of the *Legal Professions Act.* Different views may be held as to the effectiveness of the mode selected by the Legislature, but none of the parties here challenged the right of the province to enact the legislation. It is up to the Legislature to determine the administrative technique to be employed in the execution of the policy of its statutes. I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; in other provinces the Attorney General is seized with the duty as an *ex officio* Bencher of safe-guarding the public interest; a right of appeal from decision affecting members is given to the Court; and the confirmation by the Provincial Executive, the Lieutenant Governor in Council, of all regulations adopted by the Society as a prerequisite to their validity**. It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere as is the case here.**

2026 BCSC 779 (CanLII)

> There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community. Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an *ex officio* member of the Benchers and the legislative need of some or all of the authority granted to the Law Society. **In any case this decision is for the province to make.**
>
> [Emphasis added.]

[150] In its written submissions, the LSBC argues that this reference to the regulatory model being a decision “for the province to make” is simply referring to the relationship between the provincial and federal levels of government. In oral submissions, in response to a question, counsel for the LSBC suggested that the choice for the province was about whether or not to legislate, not about the preferred regulatory model.

[151] Respectfully, Justice Estey’s decision in *Jabour* cannot be construed so narrowly. His statement about it being a decision for the province to make follows a passage in which he discusses the pros and cons of self-regulation and where he again observes that it “is for the Legislature to weigh and determine all these matters” (at 335). Justice Estey then goes on to state that he sees “no constitutional consequences necessarily flowing from the regulatory mode adopted by the province” (at 335).

2026 BCSC 779 (CanLII)

[152] Similarly, in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 888, 1991 CanLII 26, the Supreme Court of Canada, while acknowledging that self-government of the legal professions was created in the public interest, recognized it was nonetheless a matter of legislative choice:

> In the case at bar, the Manitoba Legislature has spoken, and spoken clearly. The *Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected.

[153] Earlier in its reasons, at 886–87, the Court quoted a report entitled *The Report of the Professional Organizations Committee* (1980) produced by the Ontario Ministry of the Attorney General, for the legislative rationale for making the legal profession self-governing, which included the following statement, endorsed by the Court:

> In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, <u>is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.</u>
>
> On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of those bodies. <u>Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice</u>. In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable.
>
> [Emphasis added in SCC decision.]

[154] This is consistent with other statements made by the Supreme Court of Canada that have recognized the importance of self-regulation, but as a matter of privilege granted by the legislature rather than as a constitutional imperative. For example, in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, the Court at

2026 BCSC 779 (CanLII)

para. 36 cited David A.A. Stager & Harry W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 31 where the authors stated:

> The privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned…
>
> [Emphasis added.]

[155] The same point was made in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Trinity Western*] where the Court said:

> [32] The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest …
>
> [Emphasis added.]

[156] Elsewhere in *Trinity Western*, the Court expanded on the notion of the legislature delegating regulatory authority to self-governing bodies as a means of protecting the public interest and maintaining the independence of the Bar:

> [37] To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society (*Canada (A.G.)*, at pp. 335-36). Therefore, where a statute manifests a legislative intent to leave the governance of the legal profession to lawyers, "unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected" (*Pearlman*, at p. 888). As Iacobucci J. later explained in *Ryan*, we give deference to law society decisions to "giv[e] effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating" (para. 40).
>
> [38] In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

[157] As is apparent from these various references, while the determination of the appropriate regulatory model for lawyers is a matter of legislative choice, legislatures in Canada, including in British Columbia, have largely exercised that choice in favour

2026 BCSC 779 (CanLII)

of self-government and self-regulation in recognition of lawyers' professional expertise and commitment to the public interest.

[158] That said, as the defendants submit, there is no authority for the proposition that a regulatory board comprised of a majority of elected lawyers is necessary for maintaining both individual lawyer and institutional independence.

[159] Nor does the evidence support such a proposition. Manitoba is, as noted, a jurisdiction in which the governing law society does not have a majority of elected lawyer directors and yet its ability to function independently is not challenged. The LSM CEO deposes:

> In my time as a senior executive, the LSM has acted independently of government consistent with its designation as the regulator of the practice of law for the purpose of upholding and protecting "the public interest in the delivery of legal services with competence, integrity and independence". In my experience, despite being a creature of statute the LSM has operated, and continues to operate, without direction or interference from the government of the day. That is to say, consistent with its statutory designation as the regulator of the practice of law in Manitoba the LSM acts independently.

[160] Further, the LSBC has long had a number of benchers appointed by the provincial government, including non-lawyer benchers. There is no evidence to suggest, nor does the LSBC allege, that those benchers have failed to act independently and in the public interest.

[161] Even if that was a concern, which it is not, pursuant to Bill 21, the LGinC appoints only three out of a total of 17 directors. Thus, its ability to control or unduly influence the new regulator through the exercise of its appointment power is limited.

[162] I note as well that five of the 17 directors are to be appointed by the majority of other directors holding office. Of these five, four must be lawyers (s. 8 (1)(e)). Thus, when fully constituted, the board of the new regulator will be comprised of an, albeit slim, majority of lawyers. There is no basis on which to suggest that the appointed lawyers will act any less independently, or be more vulnerable to government influence, than the elected lawyer directors.

2026 BCSC 779 (CanLII)

[163] The same holds true for the other non-lawyer legal professionals on the board (ss. 8(1) (b) and (c)).

[164] The CBA and the defendants both make arguments about the representative nature of a governing board comprised of a majority of elected lawyers. For example, the CBA submits that the electoral model ensures that the elected benchers remain accountable to lawyers, rather than to non-lawyers or to the government. The CBA highlights the fact that Bill 21 eliminates the ability of member lawyers to direct the benchers by way of binding resolutions, thereby further diminishing benchers' accountability to the membership.

[165] The defendants essentially flip this argument on its head and submit that a governing board comprised of a majority of elected lawyers would be too accountable to the lawyer members who elect them and would give rise to at least the perception, if not the reality, of regulatory capture (see paras. 143–44 above).

[166] Neither argument is compelling. As I noted above (see para. 145), there is nothing in the record to suggest that the LSBC in its current form has failed to govern lawyers in the public interest. The CBA's argument also misses the mark given that the object and duty of the legal regulator is to act in the public interest and not to advance, or be accountable to, the interests of lawyers.

[167] In summary on this point, it is well established that the legislature has the authority to determine how lawyers should be regulated and, while the legislature has historically chosen a self-governance model, that model is not constitutionally mandated as a requirement for maintaining an independent Bar. As Professor Monahan notes in his article at 136 (see para. 91 above): "it is the *independence* of the profession that is constitutionally protected, but not necessarily its '*self governing status*'" [emphasis in original].

2026 BCSC 779 (CanLII)

Duties and Guiding Principles

[168] The LSBC puts considerable emphasis on the fact that under Bill 21, the new regulator no longer has as its core object the broad mandate to "uphold and protect the public interest", which is currently set out in s. 3 of the *LPA*.

[169] Instead, s. 6 identifies the new regulator's duties, which include regulating the practice of law in BC, establishing applicable standards for education, competence, conduct etc., and ensuring the independence of licensees. Section 6(2) further directs that the regulator "must exercise its powers and perform its duties under this Act in the public interest". The LSBC describes the commitment to the public interest under s. 6 as "considerably denuded".

[170] I do not accept that the new formulation under Bill 21 undermines or diminishes the obligation of the new regulator to act in the public interest. Specifically, there is, in my view, no meaningful difference between a provision stipulating that the object and duty of the regulator is to uphold and protect the public interest and one that mandates that the regulator exercise its duties in the public interest.

[171] It is important to note that the "public interest" mandate language found in s. 3 of the current *LPA* was only added to the statute in 1987. It cannot seriously be contended that the LSBC had no obligation prior to that date to act in the public interest.

[172] Further, language similar to s. 3 of the *LPA* exists in the governing statute of only one other provincial law society (New Brunswick). Legislation in other provinces (Saskatchewan, Ontario, Manitoba and Nova Scotia) largely mirrors the language used in Bill 21. The LSBC does not argue that those provincial law societies lack a public interest mandate.

[173] The LSBC also takes issue with the imposition of mandatory guiding principles under s. 7 of Bill 21, including under s. 7(b) the principle of "supporting

2026 BCSC 779 (CanLII)

reconciliation with Indigenous peoples and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples".

[174] The LSBC submits that a legislated requirement to support reconciliation and the implementation of UNDRIP effectively makes the new regulator an instrument of government policy and is antithetical to the concept of an independent Bar. In particular, they contend that the provisions of Bill 21 require the new regulator to take an institutional position on reconciliation which may be inconsistent with the legitimate interests of lawyers' clients involved in matters in which reconciliation, or at least the nature and content of reconciliation activities, may be in issue. Further, the LSBC submits that the requirement to support the implementation of UNDRIP goes well beyond the scope of what courts have described as the constitutional imperative of reconciliation.

[175] I am unable to accede to the LSBC's arguments on this issue for a number of reasons. First, it is not clear how a legislated requirement of institutional support for reconciliation compromises the duties that lie at the heart of an independent Bar to provide independent and objective advice and advocacy to clients. The guiding principles provide a framework for the new regulator in carrying out its public interest mandate. The principles do not direct the manner in which individual lawyers must act in relation to their clients. Further, the guiding principles must be read alongside the regulator's express duty to ensure the independence of licensees (s. 6(1)(c)).

[176] Second, as discussed above, the LSBC's conception of independence is not absolute as suggested by the defendants but acknowledges that lawyers, and the LSBC itself, are subject to laws of general application. In this regard, the Court of Appeal has recognized that there is an obligation generally on all public institutions to pursue reconciliation: *Servatius v. Alberni School District No. 70*, 2022 BCCA 421 at paras. 105–107.

[177] With respect to UNDRIP, the provincial government has an obligation to ensure that the laws of the province are consistent with the UN Declaration: *DRIPA*. The Court of Appeal has held that the effect of *DRIPA* is to incorporate UNDRIP into

2026 BCSC 779 (CanLII)

the positive law of the province*: Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 at para. 143.

[178] Thus, as the defendants submit, s. 7(b) simply requires the new regulator to operate within the existing legal framework in British Columbia, in the same way that it must take account of *Charter* values and comply with legislation like the *Human Rights Cod*e, R.S.B.C. 1996, c. 210.

[179] Third, the LSBC has itself long been committed to reconciliation and has implemented a number of measures in pursuit of that goal. While the LSBC rightfully distinguishes between measures adopted voluntarily and those imposed by government, there is no meaningful difference in terms of the impact of such measures. For example, the LSBC's support of reconciliation has not impeded the ability of lawyers to act for clients in opposition to claims of Indigenous rights. There is no basis to suggest that the independence of those lawyers has been compromised or that they have been subject to sanction by the LSBC.

[180] In short, I am not satisfied that the legislative imposition of guiding principles on the new regulator improperly compromises the independence of the Bar.

Role of the Indigenous Council and Transitional Indigenous Council

[181] The LSBC frames the creation of the Indigenous Council and Transitional Indigenous Council as introducing a model of co-governance and unilaterally imposing government policy on the legal regulator. They take issue with both the composition of these bodies and their role in the new regulator.

[182] Turning first to the Indigenous Council, respectfully, the LSBC overstates the role of this body. While the Indigenous Council has an important role in the new regulator, it is a carefully circumscribed role. The Indigenous Council has approval power in respect of two sets of rules: (1) rules respecting the use of alternative resolution processes in discipline and competence matters that reflect or are influenced by Indigenous practices (at s. 94(3)); and (2) rules that are designed to

2026 BCSC 779 (CanLII)

meet the specific needs of Indigenous persons who are parties to, or witnesses in, a proceeding before the tribunal (at s. 131(6)).

[183] The other aspects of the Indigenous Council's role, as laid out in s. 30 and referenced throughout Bill 21, are purely advisory. The Indigenous Council is to advise and work in collaboration with the board on a range of issues, many of which clearly benefit from the structural inclusion of Indigenous perspectives, including the systemic challenges faced by Indigenous persons that require investigation and action by the regulator, and the incorporation of Indigenous legal traditions and practices into the practices and procedures of the regulator.

[184] In my view, the role of the Indigenous Council does not undermine independence because the Council does not have independent rule-making authority. In many areas its role is advisory. As for the two areas for which it has approval powers, such approval powers cannot threaten independence because it does not enable the unilateral imposition of rules.

[185] The LSBC also argues that the composition of the Indigenous Council is a threat to independence, with a particular focus on the fact that its members do not have to be lawyers. Section 29 sets out the composition of the Indigenous Council. Its members are appointed by the board following a merit-based process. The Indigenous Council is to consist of: two members who are directors; one member who is not a director; two to four members appointed from among persons nominated by the BC First Nations Justice Council; and one to two members appointed from among persons nominated by Métis peoples or entities representing Métis peoples: at s. 29(1). The appointed members must be Indigenous persons (at s. 29(2)(a)) and are, to the extent possible, to collectively reflect the diversity of the Indigenous population of BC (at s. 29(2)(b)).

[186] The LSBC's argument in this regard assumes a false binary: if regulation is not by lawyers, it is regulation by government. The defendants' response is apt: "The members of the Indigenous council and transitional Indigenous council need not be lawyers, but that is not reason to dismiss their perspectives, let alone to fear that

2026 BCSC 779 (CanLII)

their perspectives will somehow be dangerous." There is no basis for believing that the inclusion of another set of perspectives, through the vehicle of the Indigenous Council, will in any way threaten the independence of the Bar. As already noted, they have no power to unilaterally impose rules: they have limited approval powers and a larger advisory role. As already noted, self-regulation and self-governance are not steadfast requirements for ensuring an independent Bar. I would add that, as noted above, the LSBC has long had the benefit of different perspectives in the form of lay benchers.

[187] Turning next to the Transitional Indigenous Council, as set out in s. 226, the Transitional Indigenous Council and the transitional board must collaborate to develop the board's first set of rules, and the Transitional Indigenous Council must approve these rules.

[188] The defendants contend that this power does not undermine independence because it does not give the Transitional Indigenous Council unilateral rule-making authority and the board still has an ongoing duty, including in making the first rules, to ensure the independence of licensees.

[189] The defendants submit that the Transitional Indigenous Council's role in making the first rules is to ensure "that the lived experience of Indigenous persons is considered when creating the first rules" and is meant to help counteract their historic exclusion and ongoing underrepresentation in the profession.

[190] As with the Indigenous Council's approval powers, the Transitional Indigenous Council's approval powers over the first rules does not undermine independence. Approval power does not equate to rule-making authority. The transitional board has the duty to ensure the independence of licensees such that any rules that the Indigenous Council might consider for approval should not pose any threat to independence in the first place.

[191] The LSBC also objects to these new bodies on the basis that they constitute a unilateral imposition of government policy and direct government interference.

2026 BCSC 779 (CanLII)

They reason that the creation of the Indigenous Council and Transitional Indigenous Council reflect the implementation of government policy, namely the BC First Nations Justice Strategy, furthering a partnership between the provincial government and the BC First Nations Justice Council.

[192] The defendants, for their part, submit that there is nothing objectionable about the content of the BC First Nations Justice Strategy, which has as its primary objective reversing the overrepresentation of Indigenous persons in the criminal justice system and underrepresentation as actors with roles and responsibilities within that system.

[193] As discussed above, the provincial legislature has latitude in deciding how to set up the legal regulator; the regulatory model is, within constitutional constraints, a policy choice. If the legislature wants to pursue a particular model in the hopes that it will, as suggested by the defendants, reduce barriers to Indigenous individuals becoming lawyers and judges, that is open to it so long as it does not undermine the independence of the Bar. Beyond characterizing this choice as a “government policy”, the LSBC has not pointed to anything specific about the Indigenous Council’s existence, as a policy choice, that threatens independence of the Bar. As such, creating these bodies falls squarely within the legislature’s authority when determining an appropriate regulatory model for the legal profession.

Lieutenant Governor in Council’s Regulation-Making Power

[194] The LSBC argues that the regulation-making powers given to the LGinC, i.e. Cabinet, allow the government to regulate the practice of law directly.

[195] The LSBC contends that s. 211(1) gives Cabinet a broad and vague power to make regulations that supersede the board’s rules based on Cabinet’s assessment of what is “necessary and advisable” for carrying out Bill 21 according to its intent. This interpretation is based on reading s. 211(1) of Bill 21 together with s. 41(1)(a) of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

2026 BCSC 779 (CanLII)

[196] The defendants submit that the *Interpretation Act* does not grant Cabinet "new or broader" regulation-making authority; it merely affirms the common law doctrine of jurisdiction by necessary implication. The defendants submit that this provision cannot change the express limits on Cabinet's regulation-making powers as set out in Bill 21.

[197] Respectfully, the plaintiffs read this power too broadly. Section 211(1) states:

> **General regulation-making authority**
>
> 211(1) The Lieutenant Governor in Council may make regulations respecting any matter for which regulations are contemplated by this Act.

[198] The LSBC's interpretation of this provision gives no meaning to the phrase "respecting any matter for which regulations are contemplated by this Act." Regulations are only "contemplated" in a few specific matters under Bill 21: (a) designating a profession as a legal profession (s. 4); (b) prescribing classes of persons as exempt from the prohibition against unauthorized practice (s. 212); and (c) prescribing the scope of practice for notaries and regulated paralegals (s. 213). As such, s. 211(1) does not extend the scope of regulations that Cabinet can make but simply empowers Cabinet to make regulations where regulations are already contemplated.

[199] The LSBC also objects to those areas where Bill 21 specifically contemplates regulations. They submit that these powers should only be held by the legal regulator and that in giving them to Cabinet, the government is fragmenting the authority of the regulator, amounting to government capture of the regulator. They go so far as to claim that giving these powers to Cabinet is akin to a "sword of Damocles above the head of the legal regulator that clearly preserves to the executive unlimited power to directly regulate the practice of law in the province."

[200] The defendants contest the idea that these provisions amount to giving the executive the direct power to regulate the practice of law. They note, correctly, that if Cabinet designates an additional profession, that profession will be regulated by the regulator. If Cabinet exempts a class of persons from the prohibition on unlicensed

2026 BCSC 779 (CanLII)

practice, those persons will be unregulated. The defendants also note that there is nothing novel about allowing certain non-lawyers to provide legal services within defined spheres, listing as examples, among others, notaries, Native court workers and family justice counsellors, all of which are currently outside the ambit of LSBC regulation.

[201] The powers given to Cabinet in Bill 21 are not at odds with the principle of independence of the Bar nor do they amount to direct government regulation. These powers amount to tools that could allow the government, if necessary, to address unmet areas of legal services by allowing non-lawyers to provide legal services within defined spheres. There is nothing inherent to the exercise of these powers that threatens the ability of lawyers to fulfill their duties as independent advocates, nor does it threaten the ability of the regulator to act independently in regulating lawyers. While, as is clear from the concerns of the LSBC, it is possible in an extreme scenario for such a power to be used in a way that threatens the independence of the Bar, the LSBC's arguments ignore the presumption that executive actors will exercise their delegated authority constitutionally: *Brown* at paras. 61–88.

[202] If these powers were somehow used in a way that threatens the independence of the Bar, that decision could be challenged on judicial review. Any regulation that threatens the independence of licensees, which the regulator has a duty to ensure under s. 6(1)(c), would be *ultra vires* the legislation as regulations "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object": *Auer v. Auer*, 2024 SCC 36 at para. 33. It could also be challenged on the basis of the constitutional principle of independence of the Bar.

[203] In a related argument, the LSBC takes issue with the fact that Bill 21 codifies aspects of legal regulation, for example the definitions of "professional misconduct", "incompetence" and "conduct unbecoming" that under the *LPA* were left to the benchers to define. The LSBC submits that this attacks "both the theory and the practice of self-regulation and self-governance".

2026 BCSC 779 (CanLII)

[204] The LSBC did not develop this argument in any meaningful way. Further, the definitions in Bill 21 are general in nature and must be read in conjunction with s. 6(1) of Bill 21 which confers a duty on the new regulator to “regulate the practice of law in British Columbia” and to “establish standards and programs for the education, training, competence, practice and conduct of applicants, trainees, licensees and law firms”. The LSBC has not identified how the codified provisions impede the ability of the new regulator to act independently or how these provisions interfere with lawyers’ ability to provide independent advice and advocacy.

[205] In sum, none of the impugned provisions of Bill 21 interfere with the independence of the Bar. There is no doubt that the cumulative impact of the various provisions constitutes a dramatic change in the way in which lawyers will be regulated, but I am not satisfied that the new regulatory structure is unconstitutional.

Does Bill 21 Infringe the *Charter of Rights and Freedoms*?

[206] The TLABC raises a range of *Charter* concerns, which I will deal with in turn.

Section 2(d): Right to Associate

[207] The TLABC argues that by ending self-regulation, Bill 21 violates lawyers’ right to freedom of association under s. 2(d). They argue that the LSBC is the only institution that can effect lawyers’ associative rights because of its regulatory authority and the fact that it by definition represents all lawyers.

[208] Section 2(d) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 66.

[209] Courts follow a two-step framework to decide whether a complainant’s s. 2(d) rights have been infringed: (1) whether activities fall within the range of activities protected under the freedom of association guarantee; and (2) whether the legislation or government action, in purpose or effect, substantially interferes with

2026 BCSC 779 (CanLII)

those activities: *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras. 5–7.

[210] The inherent flaw in the TLABC's reasoning is that the LSBC is not an association meant to represent lawyers; its purpose is to regulate lawyers in the public interest. As such, its activities do not fall within the range of activities protected under s. 2(d). Since Bill 21 was enacted for the purpose of regulating the profession, s. 2(d) has no application: *Murtaza v. Registrar of the Association of Professional Engineers of Ontario*, 2016 ONSC 1745 at para. 16. Regardless, Bill 21 does not limit lawyers' association rights because it neither precludes an activity because of its associational nature (*R. v. N.S.*, 2022 ONCA 160 at para. 169, citing *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 125) nor prevents lawyers from associating in pursuit of shared objectives through lawyers' associations, as evidenced by the participation of both the TLABC and CBA in this litigation.

[211] As such, Bill 21 does not infringe lawyers' s. 2(d) rights.

Section 7: Right to Life, Liberty, and Security of the Person

[212] The TLABC argues that Bill 21 infringes lawyers' s. 7 rights to life, liberty, and security of the person because it allows the regulator to impose unilateral forced treatment and conflates mental health and substance abuse issues with competence, stigmatizing lawyers with mental health conditions and increasing the risk of harm to said lawyers.

[213] The TLABC rests its argument on the association it contends is created in s. 68 between mental health conditions and competence. It argues that this association makes a lawyer's health condition relevant to a range of regulatory interventions, most notably what they term "forced treatment".

[214] The TLABC argues that this "forced treatment" infringes lawyers' rights to liberty and security of the person, which protect an individual's autonomy and dignity, including the right of a person to make fundamental decisions about their life,

2026 BCSC 779 (CanLII)

including whether, and when, to receive medical interventions. The TLABC further contends that due to the operation of s. 198, which details offences under the legislation, and s. 202, which lays out penalties for committing said offences, a lawyer could be subject to a fine or imprisonment for refusing medical treatment prescribed by the new regulator.

[215] The key statutory provision is the definition of “incompetently” in s. 68, which reads in part:

> "incompetently", in relation to the practice of law, means in a manner that demonstrates either of the following:
>
> …
>
> (b) a health condition that prevents a licensee from practising law with reasonable skill and competence;

[216] Contrary to the TLABC’s contentions, practicing incompetently under this definition does not turn on the existence of a health condition but on whether a health condition is affecting a licensee’s ability to practice with reasonable skill and competence. The focus remains conduct, not condition.

[217] The defendants submit that these provisions are aimed at helping both the public and lawyers experiencing health problems. They allow the regulator to understand *why* issues are arising in a lawyer’s practice, so that the appropriate steps can be taken to get them back on track. The acknowledgment that health conditions may influence a lawyer’s ability to practice law to an acceptable standard is not stigmatizing; it is a reality which a regulator has a duty to address.

[218] The defendants submit further that while the primary purpose of these provisions is to protect the public by ensuring that licensee are not impaired by health conditions from practicing law to an acceptable standard, their secondary purpose is to convey that, when a licensee’s ability to practice is impaired by a health condition, there is nothing fundamentally wrong with them, they are simply experiencing a health issue for which they need health care. This is based on compassion, not stigmatization.

2026 BCSC 779 (CanLII)

[219] The TLABC also objects to the ability of the new regulator to require a licensee or trainee to receive counselling or medical treatment, including treatment for a substance use problem or substance use disorder: at ss. 88(1)(c), 122(3)(c)(ii). However, as noted by the defendants, the new regulator cannot compel lawyers to receive treatment they do not want. It is open to the lawyer to decline, though this may lead to consequences such as a suspension or cancellation of their license.

[220] It has already been determined that such consequences do not engage the complainant's s. 7 rights. In *Hoogerbrug v. British Columbia*, 2024 BCSC 794 (appeal dismissed as moot in *Tatlock v. British Columbia (Attorney General)*, 2025 BCCA 181), a case dealing with COVID-19 vaccination requirements for health care workers, Mr. Justice Coval stated:

> [276] On the evidence, the Orders compelled none of the Tatlock petitioners to accept unwanted medical treatment. Thus, unlike *Carter*, their s. 7 rights associated with bodily integrity and medical self-determination were not engaged.
>
> [277] Instead, they lost their jobs because they chose not to accept vaccination against a highly contagious virus which posed the risk of serious illness and death to vulnerable patients and other healthcare workers. In my view, this loss did not engage their s. 7 right to liberty because of the well-established principle that s. 7 does not protect the right to work in any specific employment or particular profession, particularly when the job-loss arises from non-compliance with its governing rules and regulations. This is not a constitutionally-protected fundamental life choice.

[221] Further, the TLABC's interpretation of s. 198 is inconsistent with the plain language meaning of that provision. Declining to comply with an order for medical treatment would not constitute an offence under this provision.

[222] The TLABC makes a range of other arguments about how lawyers' s. 7 rights are engaged by the provisions around health and treatment, but none are relevant in light of the above interpretation of these provisions.

Section 8: Unreasonable Search and Seizures

[223] The TLABC also argues that s. 78 authorizes unreasonable search and seizures contrary to s. 8 of the *Charter*.

2026 BCSC 779 (CanLII)

[224] Section 78(1) authorizes the following:

> (1) For the purpose of an investigation, the chief executive officer may, subject to any limit or condition established in the rules, do any of the following without a warrant:
>
> > (a) during business hours, enter the business premises in which a licensee, trainee or law firm practises law;
> >
> > (b) inspect or examine the records, or any other thing, of a licensee, trainee or law firm that relate to the practice of law by the licensee, trainee or law firm;
> >
> > (c) observe the practice of law by the licensee, trainee or law firm or the licensee's supervision of the practice of law.

[225] A warrantless search is presumptively unreasonable, however that presumption may be rebutted where the search or seizure is: (i) authorized by law; (ii) the law is itself reasonable; and (iii) the manner in which the search is carried out is reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278, 1987 CanLII 84.

[226] As there is no specific search or seizure in issue, the TLABC's challenge turns on the reasonableness of s. 78.

[227] As noted, the courts have upheld similar search provisions in the current *LPA*. In *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 437, the Court of Appeal found that s. 36 of the *LPA*, which authorizes the LSBC to make rules concerning investigations, and the specific rules enacted for that purpose, do not violate s. 8. The Court of Appeal endorsed the analysis of the chambers judge who came to the same conclusion:

> [35] Relying on *Branch*, *Mulgrew v. Law Society of British Columbia,* 2016 BCSC 1279 and *Goodwin v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 46, the judge held that a flexible approach to reasonableness must be taken in this regulatory context. He applied the framework from *Goodwin* and concluded that the nature and purpose of the legislative scheme, the mechanism employed and the degree of intrusiveness, as well as the availability of judicial supervision, all weighed in favour of a finding that the authorizing law was reasonable:
>
> > [157] In my view, the exercise of the investigatory power under R. 4-55, while broad, is not arbitrary. Rather, it requires a reasonably held belief of misconduct and it is rationally connected to the Law Society's ability to fulfill its duty to the public. Given its duty to protect the public, it is not unreasonable that R. 4-55(6) authorized the R. 4-55 Order to

2026 BCSC 779 (CanLII)

> require the [appellant] to produce all documents and permit them to be copied. These powers and requirements are not unreasonable given the important duty the Law Society has in protecting the public.
>
> [158] Section 36 of the [*Legal Profession Act*] provides the Law Society with the authority to make rules to fulfill its mandate to protect the public. The Law Society made one such rule by establishing R. 4-55. In my view, considerable deference should be provided to the Law Society in making rules to fulfill its mandate by issuing an order under R. 4-55 … In my view, the mechanism employed (ie., the R. 4-55 Order) and its degree of intrusiveness is not unreasonable given the Law Society's duty to uphold the public interest by regulating the practice of law.
>
> [159] Furthermore, there are a number of safeguards, or checks, built into the R. 4-55 investigatory process that also support the reasonableness of the process and its degree of intrusiveness.
>
> …
>
> [164] … While the legislative scheme in question may not provide the [appellant] with immediate resort to judicial supervision in respect of the seizure of the Firm's records, it does provide for a review mechanism which is, in my view, appropriate in the context.
>
> …
>
> [166] The scope of a seizure made under R. 4-55 is admittedly broad. However, given the [appellant's] diminished expectation of privacy over the Firm's records, the seizure of those records pursuant to the R. 4-55 Order does not, in my view, amount to a major intrusion upon [the appellant's] privacy. Moreover, the seizure of records under R. 4-55 does not result in any immediate consequences for the [appellant]. It is only after (and if) a citation is issued that a tribunal or panel is established by ss. 38 and 41 of the [*Legal Profession Act*] for the purposes of holding a hearing which could result in sanctions. The Discipline Committee's decision is ultimately reviewable by the Court of Appeal. In the circumstances, the review mechanism provided for is reasonable and the availability of judicial supervision is adequate.

[228] The TLABC raises concerns about the impact of the search and seizure provision of Bill 21 on solicitor-client privilege. The defendants submit that these concerns are conclusively answered by the Court of Appeal decision in *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310, where the Court held that confidential and privileged information disclosed to the LSBC as part of an investigation remains protected pursuant to s. 88 of the *LPA*.

2026 BCSC 779 (CanLII)

[229] The protections in s. 88 of the *LPA* are largely replicated in s. 209 of Bill 21, including ss. 209(4) and (5) which state:

> (4) A licensee, trainee or law firm that, in accordance with this Act or the rules, provides the regulator with any information or records that are confidential or privileged is deemed conclusively not to have breached any duty or obligation that would otherwise have been owed to the regulator or to the client of the licensee, trainee or law firm not to disclose the information or records.
>
> (5) For certainty, if a licensee, trainee or law firm discloses, in accordance with this Act or the rules, any privileged information or privileged records to the regulator, the privilege of the information or records is not affected by the disclosure.

2026 BCSC 779 (CanLII)

[230] The TLABC seeks to distinguish cases decided under the *LPA* based upon the altered structure and makeup of the new regulator. Specifically, the TLABC submits that the statutory protections are significantly undermined by the fact that the new regulator is not a body controlled by lawyers. This follows on the position advanced by both plaintiffs that under the structure created by Bill 21, the new regulator is no longer independent.

[231] However, I have found that the new regulatory model, in terms of the makeup of the board, does not undermine the independence of the regulator. Moreover, the provisions of s. 209 are clear and unambiguous in their protection of privilege.

[232] In the result, I am not satisfied that s. 78 is unreasonable and violates s. 8 of the *Charter*. This finding does not, of course, immunize the new regulator from *Charter* scrutiny in the event it conducts a specific search or seizure in a manner that violates an individual's s. 8 rights.

The Public's Rights Under ss. 7, 10(b), and 11(d)

[233] The TLABC contends that Bill 21 deprives the public of independent lawyers, thus infringing their fair trial rights under ss. 7, 10(b) and 11(d). As I have already concluded that Bill 21 does not infringe the independence of the Bar, these *Charter* arguments also fail.

Conclusion

[234] In summary, I find that Bill 21 does not improperly undermine the independence of the Bar and is not *ultra vires* the provincial legislature. Nor does it violate the *Charter*. The actions of both the LSBC and the TLABC are dismissed.

[235] If the parties are unable to agree on costs, they may make arrangements to speak to the issue. If the parties do wish to do so, they should contact Supreme Court Scheduling within 60 days to schedule a conference at which the process and timing for dealing with costs will be addressed.

[236] I am indebted to counsel for all of the parties and intervenors for their professionalism throughout this matter and for their helpful and thorough submissions.

"The Honourable Chief Justice Skolrood"

2026 BCSC 779 (CanLII)

TAB 34

Law Society of Saskatchewan *Appellant*

v.

Peter V. Abrametz *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Law Society of Alberta, Law Society of Manitoba, College of Physicians and Surgeons of Ontario, College of Nurses of Ontario, Ontario College of Pharmacists, Royal College of Dental Surgeons of Ontario, Federation of Law Societies of Canada, Alberta Securities Commission, British Columbia Securities Commission, Barreau du Québec and Canadian Association of Refugee Lawyers *Interveners*

Law Society of Saskatchewan *Appelante*

c.

Peter V. Abrametz *Intimé*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, Law Society of Alberta, Société du Barreau du Manitoba, Ordre des médecins et chirurgiens de l'Ontario, Ordre des infirmières et infirmiers de l'Ontario, Ordre des pharmaciens de l'Ontario, Ordre royal des chirurgiens dentistes de l'Ontario, Fédération des ordres professionnels de juristes du Canada, Alberta Securities Commission, British Columbia Securities Commission, Barreau du Québec et Association canadienne des avocats et avocates en droit des réfugiés *Intervenants*

Indexed as: Law Society of Saskatchewan *v.* Abrametz

2022 SCC 29

File No.: 39340.

2021: November 8; 2022: July 8.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

Répertorié : Law Society of Saskatchewan *c.* Abrametz

2022 CSC 29

N° du greffe : 39340.

2021 : 8 novembre; 2022 : 8 juillet.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer et Jamal.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Administrative law — Abuse of process — Delay — Disciplinary proceedings brought by law society against member lawyer — Lengthy delay in proceedings prompting member to apply for stay of proceedings on basis of inordinate delay amounting to abuse of process — Whether

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit administratif — Abus de procédure — Délai — Procédures disciplinaires engagées par un barreau contre un avocat membre — Long délai dans les procédures à l'origine d'une demande d'arrêt des procédures par le membre pour cause de délai excessif constituant un abus

2022 SCC 29 (CanLII)

delay amounted to abuse of process — Whether stay of proceedings warranted.

Administrative law — Appeals — Standard of review — Standard of review applicable to questions of procedural fairness and to abuse of process in statutory appeals.

The Law Society of Saskatchewan brought disciplinary proceedings against one of its member lawyers in 2012. In 2018, the member was found guilty of four charges of conduct unbecoming a lawyer, and in 2019, disbarred without a right to apply for readmission for almost two years. During the disciplinary proceedings, the member applied for a stay of the proceedings on the basis of inordinate delay amounting to an abuse of process. His application was dismissed by the Hearing Committee of the Law Society. The Court of Appeal dismissed the member's conduct appeal but allowed his appeal of the stay decision. It granted the stay, concluding that there had been inordinate delay which resulted in significant prejudice to the member such that the public's sense of decency and fairness would be affected and the Law Society's disciplinary process brought into disrepute.

Held (Côté J. dissenting)*:* The appeal should be allowed, the judgment of the Court of Appeal set aside and the matter remitted to the Court of Appeal to address the outstanding grounds of appeal.

Per Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ.: The instant case is a statutory appeal pursuant to Saskatchewan's *The Legal Profession Act, 1990*. Therefore, the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law. Whether there has been an abuse of process is a question of law; thus, the applicable standard of review is correctness. While the Court of Appeal correctly determined the standard of review, it failed to apply it properly. There was also no proper basis for the Court of Appeal to contradict the Hearing Committee's attribution of certain delays to the member, and no palpable and overriding error justified the Court of Appeal's substitution of its own views for the Hearing Committee's conclusions that there was no significant prejudice to the member. While the actions of the Law Society were not above reproach, the delay was not inordinate. There was no abuse of process.

de procédure — Le délai a-t-il constitué un abus de procédure? — L'arrêt des procédures est-il justifié?

Droit administratif — Appels — Norme de contrôle — Norme de contrôle applicable aux questions d'équité procédurale et d'abus de procédure dans les appels prévus par la loi.

En 2012, la Law Society of Saskatchewan (« Barreau ») a engagé des procédures disciplinaires contre l'un de ses avocats membres. En 2018, ce dernier a été déclaré coupable de quatre chefs d'accusation de conduite indigne d'un avocat, et en 2019, il a été radié sans avoir le droit de solliciter sa réinscription pendant presque deux ans. Durant les procédures disciplinaires, le membre a demandé l'arrêt des procédures pour cause de délai excessif constituant un abus de procédure. Sa demande a été rejetée par le Comité d'audition du Barreau. La Cour d'appel a rejeté l'appel du membre de la décision relative à la conduite professionnelle, mais a accueilli son appel de la décision relative à l'arrêt des procédures. Elle a accordé l'arrêt des procédures, concluant à l'existence d'un délai excessif qui avait causé au membre un préjudice important de nature à heurter le sens de la décence et de l'équité du public et susceptible de déconsidérer le processus disciplinaire du Barreau.

Arrêt (la juge Côté est dissidente) : Le pourvoi est accueilli, l'arrêt de la Cour d'appel est annulé et l'affaire est renvoyée à la Cour d'appel pour qu'elle examine les moyens d'appel restants.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer et Jamal : Le présent pourvoi porte sur un appel interjeté en vertu de la loi de la Saskatchewan intitulée *The Legal Profession Act, 1990*. En conséquence, la norme de contrôle applicable aux questions de droit est celle de la décision correcte, alors que celle applicable aux questions de fait et aux questions mixtes de fait et de droit est la norme de l'erreur manifeste et déterminante. La question de savoir s'il y a eu abus de procédure est une question de droit; c'est donc la norme de contrôle de la décision correcte qui s'applique. Bien que la Cour d'appel ait choisi la norme de contrôle appropriée, elle ne l'a pas appliquée adéquatement. Il n'existait, en outre, aucun fondement valable justifiant la Cour d'appel d'annuler l'attribution par le Comité d'audition de certains délais au membre, et aucune erreur manifeste et déterminante justifiant la substitution par la Cour d'appel de ses propres conclusions à celles du Comité d'audition à savoir qu'il y avait absence de préjudice important causé au membre n'a été relevée. Malgré le fait que les actions du Barreau n'étaient pas irréprochables, le délai n'était pas excessif. Il n'y a pas eu abus de procédure.

2022 SCC 29 (CanLII)

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.

Dans l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, la Cour a conclu que, dans les cas où un législateur établit dans une loi un mécanisme d'appel à une cour de justice des décisions d'un décideur administratif, cela indique que les normes générales en matière d'appel trouvent application. Bien que cette conclusion ait été formulée dans un contexte de contrôle judiciaire sur le fond, la directive prescrivant que les appels doivent être décidés selon la norme générale en matière d'appel était catégorique. Par conséquent, lorsque des questions d'équité procédurale sont examinées dans le cadre d'un mécanisme d'appel prévu par la loi, elles sont soumises aux normes de contrôle en matière d'appel.

In administrative proceedings, abuse of process is a question of procedural fairness. The Court dealt with abuse of process as it relates to administrative delay in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and recognized that decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay. Delay may constitute an abuse of process in two ways: the fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, or, even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay.

Dans le contexte de procédures administratives, l'abus de procédure est une question d'équité procédurale. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, la Cour s'est penchée sur la question de l'abus de procédure relativement aux délais administratifs, et a reconnu que les décideurs administratifs possèdent, corollairement à leur devoir d'agir équitablement, le pouvoir d'examiner les allégations de délai abusif. Le délai en cause peut constituer un abus de procédure dans deux situations : l'équité de l'audience peut être compromise lorsque le délai en cause nuit à la capacité d'une partie de répondre à la plainte portée contre elle, ou, même dans les cas où il n'y a pas d'atteinte à l'équité de l'audience, il peut y avoir abus de procédure si un préjudice important a été causé en raison d'un délai excessif.

Blencoe sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. This is determined on an assessment of the context overall, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case. These factors are not exhaustive, such that additional contextual factors can be considered in a particular case. Second, the delay must have directly caused significant prejudice. Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party

L'arrêt *Blencoe* établit une analyse à trois volets pour déterminer si un délai qui ne porte pas atteinte à l'équité de l'audience constitue néanmoins un abus de procédure. Premièrement, le délai en cause doit être excessif. Cette détermination se fait en appréciant le contexte dans son ensemble, y compris la nature et l'objet des procédures, la longueur et les causes du délai ainsi que la complexité des faits de l'affaire et des questions en litige. Comme il ne s'agit pas d'une liste exhaustive, d'autres facteurs contextuels peuvent être pris en considération dans une affaire donnée. Deuxièmement, ce délai doit avoir directement causé un préjudice important. L'existence ou non d'un préjudice est une question de fait. Par exemple, il peut s'agir d'un préjudice psychologique important, d'une réputation entachée, d'une vie familiale perturbée ou encore de la perte d'un emploi ou d'occasions d'affaires. Le préjudice peut également prendre la forme d'une attention médiatique prolongée et envahissante. Lorsque ces deux conditions

2022 SCC 29 (CanLII)

or in some other way brings the administration of justice into disrepute.

sont réunies, le tribunal judiciaire ou administratif procède à une dernière évaluation afin de déterminer si le délai constitue un abus de procédure. Un délai constituera un abus de procédure s'il est manifestement injuste envers une partie ou s'il déconsidère d'une autre manière l'administration de la justice.

When an abuse of process is found, several remedies are available. Courts and tribunals must be mindful as to appropriate remedies in the various contexts in which abuse of process can occur. Remedies for abuse of process can serve several purposes: they can compensate the applicant for the prejudice caused by the delay, serve as an incentive for the decision maker to address any problems of systemic delay, or express the court or the tribunal's concern relating to delay in the administrative system. As the doctrine of abuse of process is broad, it can usefully be appreciated on a spectrum. Various remedies are available, up to and including a permanent stay of proceedings.

Lorsqu'un abus de procédure a été établi, plusieurs réparations peuvent être accordées. Les tribunaux judiciaires et administratifs doivent examiner attentivement les réparations qui sont appropriées dans les divers contextes susceptibles de donner lieu à un abus de procédure. Les réparations accordées en cas d'abus de procédure peuvent viser différents objectifs : elles peuvent indemniser la partie demanderesse du préjudice que lui a causé le délai, inciter le décideur à s'attaquer à des problèmes de délai systémique, ou exprimer les préoccupations du tribunal judiciaire ou administratif concerné à l'égard des délais dans le système de justice administrative. Comme la doctrine de l'abus de procédure est un vaste concept, il peut être utile de l'examiner selon une échelle de gravité. Diverses formes de réparation peuvent être accordées, pouvant aller jusqu'à l'arrêt des procédures de façon permanente.

A stay of proceedings is the ultimate remedy for abuse of process, because it is final: the process will be permanently stayed. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should be granted only in the clearest of cases, when the abuse falls at the high end of the spectrum of seriousness. The decision whether to grant a stay involves a balancing of public interests. On one hand, the public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On the other hand, the public has an interest in the resolution of administrative cases on the merits. A balance must be struck between the public interest in a fair administrative process untainted by abuse and the competing public interest in having the complaint decided after a public hearing. When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself whether going ahead with the proceeding would result in more harm to the public interest than if the proceedings were permanently halted. If the answer is yes, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a

L'arrêt des procédures est l'ultime réparation en cas d'abus de procédure parce qu'elle est définitive : le processus sera arrêté de façon permanente. Cela signifie, en matière disciplinaire, que des accusations ne seront pas examinées, que des plaintes ne seront pas entendues et que le public ne sera pas protégé. Vu ces conséquences, l'arrêt des procédures ne devrait être accordé que dans les cas les plus manifestes, soit lorsque l'abus se situe à l'extrémité supérieure de l'échelle de gravité. La décision d'accorder ou non un arrêt des procédures implique la mise en balance d'intérêts publics. D'une part, le public a intérêt à s'assurer qu'un tribunal administratif constitué pour le protéger suit une procédure équitable et exempte d'abus de procédure. D'autre part, le public a intérêt à ce que les instances administratives soient décidées au fond. Un juste équilibre doit être établi entre l'intérêt du public à ce qu'il existe un processus administratif équitable et exempt d'abus de procédure et son intérêt opposé à ce que les plaintes soient décidées au fond au terme d'une audience publique. En présence d'une instance qui a donné lieu à un abus de procédure, le tribunal judiciaire ou administratif doit se poser la question à savoir si continuer les procédures serait plus préjudiciable à l'intérêt public que les arrêter de façon permanente. Si la réponse est oui, l'arrêt des procédures devrait être ordonné. Dans le cas contraire, la demande

2022 SCC 29 (CanLII)

stay, would adequately protect the public's interest in the proper administration of justice.

d'arrêt des procédures devrait être rejetée. Dans le cadre de cette analyse, le tribunal judiciaire ou administratif peut se demander s'il est possible de recourir à d'autres réparations, moins radicales que l'arrêt des procédures, qui protégeraient adéquatement l'intérêt du public dans la bonne administration de la justice.

When an abuse of process is established, but the abuse is not such that a stay of proceedings is warranted, other remedies may be appropriate. While proof of significant prejudice is required to establish an abuse of process, the remedies ordered may vary according to the degree of prejudice. A high degree of prejudice may justify a stay. Lesser, but nevertheless significant prejudice, could justify other remedies. In such cases, the public interest can be properly served by continuation of the proceedings, while the applicant receives some compensation for the abuse that he or she suffered. In the context of a disciplinary tribunal, a stay of proceedings, a reduction in sanction, or variation of an award of costs are possible remedies. This is not an exhaustive list. Various tribunals may be empowered by their enabling statutes to grant other remedies. They should not hesitate to use such tools to combat inordinate delay amounting to an abuse of process.

Lorsqu'un abus de procédure est établi, mais que l'abus n'est pas tel qu'un arrêt des procédures est justifié, d'autres réparations peuvent être appropriées. Bien que la preuve d'un préjudice important soit nécessaire afin d'établir l'existence d'un abus de procédure, la réparation ordonnée peut varier en fonction du degré de préjudice constaté. Un degré élevé de préjudice peut justifier un arrêt des procédures, alors qu'un préjudice de degré moindre, néanmoins important, pourrait justifier d'autres réparations. Dans de tels cas, l'intérêt public peut être adéquatement servi par la continuation des procédures, tout en s'assurant que la partie demanderesse reçoit une certaine forme de compensation pour l'abus dont elle a souffert. Dans le contexte des tribunaux disciplinaires, l'arrêt des procédures, la réduction de la sanction ou la modification d'une ordonnance relative aux dépens représentent autant de possibles réparations. Il ne s'agit pas d'une liste exhaustive. Divers tribunaux disposent, en vertu de leur loi habilitante, du pouvoir d'accorder d'autres réparations. Ils ne devraient pas hésiter à se prévaloir de tels pouvoirs pour remédier à un délai excessif constituant un abus de procédure.

Per Côté J. (dissenting): There is disagreement with the majority's disposition. The delay in these proceedings amounted to an abuse of process, and the Court of Appeal did not err in quashing the penalty for professional misconduct imposed on the member. Disagreement with the majority also extends to the legal principles governing the assessment of inordinate delay in administrative proceedings, including the majority's reframing of the test for whether administrative delay amounts to an abuse of process and its reliance on *Vavilov* for the proposition that appellate standards of review apply in the present case.

La juge Côté (dissidente) : Il y a désaccord quant au dispositif des juges majoritaires. Le délai en l'espèce constituait un abus de procédure, et la Cour d'appel n'a pas commis d'erreur en annulant la sanction pour inconduite professionnelle infligée au membre. Le désaccord avec les juges majoritaires concerne aussi les principes juridiques régissant l'appréciation du délai excessif dans les procédures administratives, y compris la reformulation, par les juges majoritaires, du test pour déterminer si un délai administratif constitue un abus de procédure et le fait qu'ils se fondent sur l'arrêt *Vavilov* pour appuyer la thèse selon laquelle il faut recourir aux normes de contrôle applicables en l'appel en l'espèce.

The Court recognized in *Blencoe* that inordinate delay, on its own, is a breach of procedural fairness and thus abusive. An applicant need not demonstrate significant prejudice for unfair conduct to constitute an abuse of process; this requirement applies only where a stay of proceedings is sought. Inordinate delay risks bringing the administration of justice into disrepute. For this reason alone, courts must sanction it whenever it is brought to their attention. They possess a wide range of remedial tools, including declarations, costs, orders for an expedited hearing, reductions

La Cour a reconnu dans l'arrêt *Blencoe* qu'un délai excessif, à lui seul, porte atteinte à l'équité procédurale, et qu'il est de ce fait abusif. Il n'est pas nécessaire que le demandeur fasse la preuve d'un préjudice important pour qu'une conduite inéquitable constitue un abus de procédure; cette exigence s'applique uniquement lorsque l'arrêt des procédures est demandé. Un délai excessif risque de déconsidérer l'administration de la justice. Pour cette seule raison, les tribunaux doivent sanctionner de tels délais chaque fois qu'ils sont portés à leur attention.

2022 SCC 29 (CanLII)

in penalty, and stays of proceedings, to grant relief that is proportionate to the abuse of process.

Les tribunaux disposent d'un vaste éventail de mesures de redressement — notamment les jugements déclaratoires, l'adjudication de dépens, les ordonnances enjoignant de tenir une audience accélérée, les réductions de peine et les arrêts des procédures — afin d'accorder une réparation qui soit proportionnelle à l'abus de procédure.

The majority purportedly relies on *Blencoe* in articulating a three-step test for determining whether delay in administrative proceedings amounts to an abuse of process; however, this framework rests on a mistaken understanding of the doctrine of abuse of process. Under the majority's approach, even inordinate delay that directly causes significant prejudice is not per se abusive, as the last step of its test indicates. Not only is this proposition doctrinally flawed, but it results in an unduly elevated standard that is disproportionate to the remedies available for abusive delay, which range from a mere declaration to a stay of proceedings. The majority's test is so onerous that it invites complacency in administrative proceedings. The Court rightly recognized in *Blencoe* that inordinate delay, on its own, is a breach of the duty of fairness. Prejudice is not a necessary condition for delay to be inordinate, although it may contribute to such a finding. Evidence of prejudice remains highly significant at the remedial stage, since the remedy must be proportionate to the abuse of process. This is consistent with the central principle laid down by the majority in *Blencoe*, namely that courts may grant a stay of proceedings only in the clearest of cases, where the applicant has demonstrated significant prejudice arising from inordinate administrative delay.

Les juges majoritaires affirment se fonder sur l'arrêt *Blencoe* en formulant un test à trois volets pour déterminer si le délai dans des procédures administratives constitue un abus de procédure; or, ce cadre d'analyse repose sur une compréhension erronée de la doctrine de l'abus de procédure. Suivant l'approche adoptée par les juges majoritaires, même le délai excessif qui cause directement un préjudice important n'est pas en soi abusif, comme l'indique le dernier volet de leur analyse. Non seulement cette proposition est-elle viciée sur le plan théorique, mais elle crée une norme indûment élevée qui est disproportionnée par rapport aux réparations disponibles en cas de délai abusif, lesquelles vont du simple jugement déclaratoire à l'arrêt des procédures. L'analyse des juges majoritaires est si exigeante qu'elle invite à la complaisance dans les procédures administratives. Dans l'arrêt *Blencoe*, la Cour a reconnu à juste titre que le délai excessif, à lui seul, est un manquement à l'obligation d'équité. Le préjudice n'est pas une condition nécessaire pour que le délai soit considéré comme excessif, bien qu'il puisse contribuer à une telle conclusion. La preuve d'un préjudice demeure fort pertinente au stade de la réparation, puisque celle-ci doit être proportionnelle à l'abus de procédure. Cette démarche est compatible avec le principe fondamental qu'ont établi les juges majoritaires dans l'arrêt *Blencoe*, soit que les tribunaux ne peuvent ordonner l'arrêt des procédures que dans les cas les plus manifestes, où le demandeur a prouvé l'existence d'un préjudice important découlant d'un délai administratif excessif.

Abuse of process must be disentangled analytically from a stay of proceedings, which is but one of the remedies available at common law to redress abusive conduct. It is crucial to draw this distinction because the threshold for demonstrating abusive conduct is much lower than the one for obtaining a stay of proceedings. The Court has established stringent requirements for granting a stay of proceedings. To obtain a stay, an applicant must satisfy the following test: there must be prejudice to the fairness of the trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; there must be no alternative remedy capable of redressing the prejudice; and where it is unclear whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and

Il faut dissocier l'abus de procédure de l'arrêt des procédures, lequel ne représente qu'une des mesures de redressement pouvant être accordées en common law pour remédier à la conduite abusive. Il est essentiel de faire cette distinction, car le seuil à atteindre pour démontrer qu'il y a eu conduite abusive est beaucoup moins élevé que celui applicable à l'arrêt des procédures. La Cour a établi des exigences rigoureuses pour accorder l'arrêt des procédures. Un demandeur doit satisfaire au test suivant pour obtenir l'arrêt des procédures : il doit y avoir une atteinte à l'équité du procès ou à l'intégrité du système de justice qui sera révélée, perpétuée ou aggravée par le procès ou par son issue; il ne doit y avoir aucune autre réparation susceptible de remédier à l'atteinte; et, s'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premières étapes, le tribunal doit mettre

2022 SCC 29 (CanLII)

preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits. This test also applies to abusive delay in administrative proceedings.

The majority conflates the doctrine of abuse of process with the test for stays of proceedings, which are only a subset of the remedies that courts may order to sanction abusive conduct. The majority thus fails to distinguish between, on the one hand, the test for whether conduct amounts to an abuse of process and, on the other hand, the test for whether a stay of proceedings is warranted in the circumstances. The former is flexible and unencumbered by particular requirements; the court must simply determine whether the impugned conduct undermines adjudicative fairness or the integrity of the justice system. The latter establishes an onerous threshold that is met only in the clearest of cases, where the applicant satisfies specific, stringent requirements.

Where the applicant has demonstrated that the delay is inordinate, the next step in the analysis is for the court to determine the appropriate remedy in the circumstances. Courts possess an extensive arsenal of remedial tools to sanction and redress abusive conduct that account for the circumstances of each case, ranging from a declaration to a stay of proceedings. The choice of remedy for an abuse of process falls within the trial judge's discretion. Applicants must satisfy a specific test to obtain a stay of proceedings, but other remedies are not subject to that test. The guiding principle in determining the appropriate remedy is proportionality. Courts must consider the nature and magnitude of the prejudice as primary factors, alongside the length and causes of the delay, in selecting a remedy proportionate to the abuse of process. As mandated by *Blencoe*, the applicant must demonstrate significant prejudice to obtain a stay of proceedings for inordinate delay in the administrative law context, but this standard does not apply to alternative remedies.

With respect to the applicable standard of review, the Court's jurisprudence is clear: the question of whether an administrative decision maker has complied with its duty of fairness is subject to the standard of correctness, regardless of the existence of an appeal mechanism. There is no reason to revisit this well-established starting point. The majority purports to clarify the standard of review applicable to questions of procedural fairness in a statutory appeal. It

en balance les intérêts militant en faveur de cet arrêt, comme le fait de dénoncer la conduite répréhensible et de préserver l'intégrité du système de justice, et l'intérêt que représente pour la société un jugement définitif statuant sur le fond. Ce test s'applique également au délai abusif dans des procédures administratives.

Les juges majoritaires confondent la doctrine de l'abus de procédure avec l'analyse applicable aux arrêts des procédures, qui ne sont qu'un sous-ensemble des réparations que les tribunaux peuvent ordonner pour sanctionner une conduite abusive. Les juges majoritaires ne font donc pas la distinction entre, d'une part, le test pour déterminer si la conduite constitue un abus de procédure et, d'autre part, celui pour juger si un arrêt des procédures est justifié dans les circonstances. Le premier test est souple et n'est encombré d'aucune exigence particulière; le tribunal n'a qu'à déterminer si la conduite contestée mine l'équité juridictionnelle ou l'intégrité du système de justice. Le second test établit un seuil élevé qui n'est atteint que dans les cas les plus manifestes, lorsque le demandeur satisfait à des exigences particulières rigoureuses.

Lorsque le demandeur a établi que le délai est excessif, l'étape suivante de l'analyse du tribunal consiste à déterminer la réparation appropriée dans les circonstances. Les tribunaux disposent d'un vaste arsenal de mesures de redressement qui tiennent compte des circonstances de chaque cas pour sanctionner et réparer la conduite abusive, allant du jugement déclaratoire à l'arrêt des procédures. Le choix de la réparation pour un abus de procédure relève du pouvoir discrétionnaire du juge de première instance. Les demandeurs doivent satisfaire à un test spécifique pour obtenir l'arrêt des procédures, mais les autres réparations n'y sont pas assujetties. Le principe directeur pour déterminer la réparation appropriée est la proportionnalité. Les tribunaux doivent prendre en considération la nature et l'ampleur du préjudice en tant que facteurs principaux, parallèlement à la durée et aux causes du délai, dans le choix d'une réparation proportionnelle à l'abus de procédure. Comme l'exige l'arrêt *Blencoe*, le demandeur doit faire la preuve d'un préjudice important afin d'obtenir un arrêt des procédures pour délai administratif excessif. Cette exigence ne s'applique toutefois pas aux autres réparations.

En ce qui a trait à la norme de contrôle applicable, la jurisprudence de la Cour est claire : la question de savoir si un décideur administratif s'est acquitté de son obligation d'équité est soumise à la norme de la décision correcte, sans égard à l'existence d'un mécanisme d'appel. Il n'y a aucune raison de revenir sur ce point de départ bien établi. Les juges majoritaires prétendent préciser la norme de contrôle applicable aux questions d'équité procédurale

2022 SCC 29 (CanLII)

does so, however, without meaningfully considering *Khela*, the governing authority on this point of law, or any other case relating to the duty of procedural fairness. The mere reference to *Vavilov*, a judgment that was rendered in a different context and that excluded procedural fairness review from its purview, does not suffice to oust *Khela* and other directly applicable precedents.

While clarifications to the framework for determining the standard of review applicable to questions of procedural fairness are warranted, the Court should draw on its existing jurisprudence to articulate a principled approach. The standard of correctness must remain the starting point of the analysis in the context of procedural fairness review. It is for the courts to provide the legal answer to procedural fairness questions. The correctness standard applies to questions of compliance with the duty of procedural fairness as defined by the common law or by statute. However, the requirements of fairness are context-dependent, and deference is owed to the administrative decision maker's underlying findings of fact.

The majority's articulation of the standard of review in the context of inordinate administrative delay cannot be agreed with. Inordinate delay constitutes an abuse of process on its own; it is the legal standard against which an administrative body's conduct is measured. Courts do not owe deference to an administrative decision maker's conclusion on whether delay is inordinate and its choice of remedy for abuse of process.

In the case at bar, there is agreement with the analysis of the Court of Appeal. The delay grossly exceeded the inherent time requirements of this case; it is plainly inordinate and, as a result, abusive. This inordinate delay caused serious prejudice to the member and his employees. In these circumstances, the Court of Appeal correctly sanctioned this abuse of process by ordering that the penalty for professional misconduct, but not the convictions themselves, be set aside.

Cases Cited

By Rowe J.

Applied: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **distinguished:** *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Mission Institution v. Khela*, 2014 SCC

dans le cas des appels prévus par la loi. Or, ils le font sans véritablement prendre en compte l'arrêt *Khela*, qui fait autorité sur ce point de droit, ou tout autre arrêt relatif à l'obligation de respecter l'équité procédurale. Le seul renvoi à l'arrêt *Vavilov*, un jugement qui a été rendu dans un contexte différent et qui a exclu l'équité procédurale de son champ d'application, ne suffit pas pour écarter l'arrêt *Khela* et d'autres précédents directement applicables.

Bien qu'il soit nécessaire de clarifier le cadre d'analyse guidant le choix de la norme de contrôle applicable aux questions d'équité procédurale, la Cour doit s'inspirer de sa jurisprudence pour définir une approche fondée sur des principes. La norme de la décision correcte doit demeurer le point de départ de l'analyse dans le contexte du contrôle de l'équité procédurale. Il appartient aux tribunaux judiciaires de donner une réponse juridique aux questions d'équité procédurale. C'est la norme de la décision correcte qui s'applique aux questions de respect de l'obligation d'équité procédurale définie par la common law ou par la loi. Toutefois, les exigences de l'équité dépendent du contexte, et il faut faire preuve de déférence à l'égard des conclusions de fait sous-jacentes du décideur administratif.

Il n'est pas possible d'être d'accord avec la façon dont les juges majoritaires conçoivent la norme de contrôle dans le contexte du délai administratif excessif. Le délai excessif constitue à lui seul un abus de procédure; il est la norme juridique à l'aune de laquelle la conduite de l'organisme administratif est évaluée. Les tribunaux n'ont pas à faire preuve de déférence à l'égard de la conclusion d'un décideur administratif sur le caractère excessif ou non du délai et quant au choix de la réparation pour abus de procédure.

En l'espèce, il y a accord avec l'analyse de la Cour d'appel. Le délai a largement dépassé le temps intrinsèquement requis par cette affaire; il est manifestement excessif, et par le fait même, abusif. Ce délai excessif a causé un préjudice sérieux au membre de même qu'à ses employés. Dans ces circonstances, c'est à bon droit que la Cour d'appel a sévi contre cet abus de procédure en ordonnant que la sanction pour inconduite professionnelle, mais non les déclarations de culpabilité elles-mêmes, soit annulée.

Jurisprudence

Citée par le juge Rowe

Arrêts appliqués : *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653; **distinction d'avec les arrêts :** *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S.

2022 SCC 29 (CanLII)

24, [2014] 1 S.C.R. 502; **considered:** *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420, leave to appeal refused, [2013] 2 S.C.R. xii; *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Investment Dealers Association of Canada v. MacBain*, 2007 SKCA 70, 299 Sask. R. 122; *Law Society of Upper Canada v. Abbott*, 2017 ONCA 525, 139 O.R. (3d) 290, leave to appeal refused, [2018] 1 S.C.R. v; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Young* (1984), 40 C.R. (3d) 289; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Béliveau v. Barreau du Québec* (1992), 101 D.L.R. 324; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *Wachtler v. College of Physicians and Surgeons (Alta.)*, 2009 ABCA 130, 448 A.R. 317; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221, 39 B.C.L.R. (6th) 87; *Camara v. Canada*, 2015 FCA 43, 91 Admin. L.R. (5th) 13; *Hennig v. Institute of Chartered Accountants (Alta.)*, 2008 ABCA 241, 433 A.R. 221; *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), 1994 CarswellBC 2980 (WL); *Stefani v. College Of Dental Surgeons (British Columbia)* (1996), 27 B.C.L.R. (3d) 34; *Financial and Consumer Services Commission v. Emond*, 2020 NBCA 42; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Robertson v. British Columbia (Commissioner, Teachers Act)*, 2014 BCCA 331, 64 B.C.L.R. (5th) 258; *R. (J.) v. College of Psychologists (British Columbia)* (1995), 33 Admin. L.R. (2d) 174; *Adams v. Law Society of Alberta*, 2000 ABCA

339; *Établissement de Mission c. Khela*, 2014 CSC 24, [2014] 1 R.C.S. 502; **arrêts examinés :** *Sazant c. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420, autorisation d'appel refusée, [2013] 2 R.C.S. xii; *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Investment Dealers Association of Canada c. MacBain*, 2007 SKCA 70, 299 Sask. R. 122; *Law Society of Upper Canada c. Abbott*, 2017 ONCA 525, 139 O.R. (3d) 290, autorisation d'appel refusée, [2018] 1 R.C.S. v; **arrêts mentionnés :** *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Ward c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 CSC 43, [2021] 3 R.C.S. 176; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; *Behn c. Moulton Contracting Ltd.*, 2013 CSC 26, [2013] 2 R.C.S. 227; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. Young* (1984), 40 C.R. (3d) 289; *R. c. Cawthorne*, 2016 CSC 32, [2016] 1 R.C.S. 983; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481, inf. par 2002 CSC 63, [2002] 3 R.C.S. 307; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Scott*, [1990] 3 R.C.S. 979; *Colombie-Britannique (Workers' Compensation Board) c. Figliola*, 2011 CSC 52, [2011] 3 R.C.S. 422; *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460; *R. c. Jordan*, 2016 CSC 27, [2016] 1 R.C.S. 631; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541; *Pharmascience Inc. c. Binet*, 2006 CSC 48, [2006] 2 R.C.S. 513; *Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17; *Fortin c. Chrétien*, 2001 CSC 45, [2001] 2 R.C.S. 500; *Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869; *Béliveau c. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822; *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392; *Wachtler c. College of Physicians and Surgeons (Alta.)*, 2009 ABCA 130, 448 A.R. 317; *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Diaz-Rodriguez c. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221, 39 B.C.L.R. (6th) 87; *Camara c. Canada*, 2015 CAF 43; *Hennig c. Institute of Chartered Accountants (Alta.)*, 2008 ABCA 241, 433 A.R. 221; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), 1994 CarswellBC 2980 (WL); *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 27 B.C.L.R. (3d) 34; *Commission des services financiers et des services aux consommateurs c. Emond*, 2020 NBCA 42; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Robertson c. British Columbia (Commissioner, Teachers Act)*, 2014

2022 SCC 29 (CanLII)

240, 266 A.R. 157; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Hydro-Québec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729.

By Côté J. (dissenting)

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Carosella*, [1997] 1 S.C.R. 80; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149; *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*,

BCCA 331, 64 B.C.L.R. (5th) 258; *R. (J.) c. College of Psychologists (British Columbia)* (1995), 33 Admin. L.R. (2d) 174; *Adams c. Law Society of Alberta*, 2000 ABCA 240, 266 A.R. 157; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352; *Hydro-Québec c. Matta*, 2020 CSC 37, [2020] 3 R.C.S. 595; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *Salomon c. Matte-Thompson*, 2019 CSC 14, [2019] 1 R.C.S. 729.

Citée par la juge Côté (dissidente)

Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov, 2019 CSC 65, [2019] 4 R.C.S. 653; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *Behn c. Moulton Contracting Ltd.*, 2013 CSC 26, [2013] 2 R.C.S. 227; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *Canada (Citoyenneté et Immigration) c. Harkat*, 2014 CSC 37, [2014] 2 R.C.S. 33; *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566; *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167; *R. c. Babos*, 2014 CSC 16, [2014] 1 R.C.S. 309; *États-Unis d'Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587; *R. c. Scott*, [1990] 3 R.C.S. 979; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. Carosella*, [1997] 1 R.C.S. 80; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206; *R. c. Sullivan*, 2022 CSC 19, [2022] 1 R.C.S. 460; *Ontario c. S.E.E.F.P.O.*, 2003 CSC 64, [2003] 3 R.C.S. 149; *A.I.E.S.T., local de scène nº 56 c. Société de la Place des Arts de Montréal*, 2004 CSC 2, [2004] 1 R.C.S. 43; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *Vancouver (Ville) c. Ward*, 2010 CSC 27, [2010] 2 R.C.S. 28; *Établissement de Mission c. Khela*, 2014 CSC 24, [2014] 1 R.C.S. 502; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, 2001 CSC 41, [2001] 2 R.C.S. 281; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Kane c. Conseil d'administration (Université de la Colombie-Britannique)*, [1980] 1 R.C.S. 1105; *Procureur*

2022 SCC 29 (CanLII)

[1980] 2 S.C.R. 735; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Dussault*, 2022 SCC 16, [2022] 1 S.C.R. 306; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326; *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5; *R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609; *R. v. Virk*, 2021 BCCA 58, 403 C.C.C. (3d) 492.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 58(2)(b).
Canadian Charter of Rights and Freedoms, ss. 7, 11(b), 24(1).
Legal Profession Act, 1990, S.S. 1990-91, c. L-10.1, ss. 3.1, 3.2, 39, 56, 63.

Authors Cited

Brown, Donald J. M., and John M. Evans, with the assistance of David Fairlie. *Judicial Review of Administrative Action in Canada*. Toronto: Thomson Reuters, 1998 (loose-leaf updated June 2022, release 2).
Casey, James T. *The Regulation of Professions in Canada*. Toronto: Carswell, 1994 (loose-leaf updated June 2022, release 4).
Coughlan, Steve. "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015), 71 *S.C.L.R.* (2d) 415.
Evans, John M. "Fair's Fair: Judging Administrative Procedures" (2015), 28 *C.J.A.L.P.* 111.
Garant, Patrice, avec la collaboration de Philippe Garant et Jérôme Garant. *Droit administratif*, 7e éd. Montréal: Yvon Blais, 2017.
Jones, David Phillip, and Anne S. de Villars. *Principles of Administrative Law*, 7th ed. Toronto: Carswell, 2020.
Lowery, Finn. "Abuse of Process: The Need for Structure" (2014), 20 *Auckland U. L. Rev.* 223.
Macaulay, Robert W., James L. H. Sprague and Lorne Sossin. *Practice and Procedure Before Administrative Tribunals*. Toronto: Carswell, 2004 (loose-leaf updated June 2022, release 6).
MacKenzie, Gavin. *Lawyers & Ethics: Professional Responsibility and Discipline*. Toronto: Carswell, 2009 (loose-leaf updated June 2022, release 2).

général du Canada c. Inuit Tapirisat of Canada, [1980] 2 R.C.S. 735; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *R. c. Shepherd*, 2009 CSC 35, [2009] 2 R.C.S. 527; *R. c. Dussault*, 2022 CSC 16, [2022] 1 R.C.S. 306; *R. c. Le*, 2019 CSC 34, [2019] 2 R.C.S. 692; *R. c. Katigbak*, 2011 CSC 48, [2011] 3 R.C.S. 326; *Bergeron c. Canada (Procureur général)*, 2015 CAF 160; *R. c. Owen*, 2003 CSC 33, [2003] 1 R.C.S. 779; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, 2002 CSC 11, [2002] 1 R.C.S. 249; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *R. c. Yusuf*, 2021 SCC 2, [2021] 1 R.C.S. 5; *R. c. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609; *R. c. Virk*, 2021 BCCA 58, 403 C.C.C. (3d) 492.

Lois et règlements cités

Administrative Tribunals Act, S.B.C. 2004, c. 45, art. 58(2)(b).
Charte canadienne des droits et libertés, art. 7, 11b), 24(1).
Legal Profession Act, 1990, S.S. 1990-91, c. L-10.1, art. 3.1, 3.2, 39, 56, 63.

Doctrine et autres documents cités

Brown, Donald J. M., and John M. Evans, with the assistance of David Fairlie. *Judicial Review of Administrative Action in Canada*, Toronto, Thomson Reuters, 1998 (loose-leaf updated June 2022, release 2).
Casey, James T. *The Regulation of Professions in Canada*, Toronto, Carswell, 1994 (loose-leaf updated June 2022, release 4).
Coughlan, Steve. « Threading Together Abuse of Process and Exclusion of Evidence : How it Became Possible to Rebuke Mr. Big » (2015), 71 *S.C.L.R.* (2d) 415.
Evans, John M. « Fair's Fair : Judging Administrative Procedures » (2015), 28 *R.C.D.A.P.* 111.
Garant, Patrice, avec la collaboration de Philippe Garant et Jérôme Garant. *Droit administratif*, 7e éd., Montréal, Yvon Blais, 2017.
Jones, David Phillip, and Anne S. de Villars. *Principles of Administrative Law*, 7th ed., Toronto, Carswell, 2020.
Lowery, Finn. « Abuse of Process : The Need for Structure » (2014), 20 *Auckland U. L. Rev.* 223.
Macaulay, Robert W., James L. H. Sprague and Lorne Sossin. *Practice and Procedure Before Administrative Tribunals*, Toronto, Carswell, 2004 (loose-leaf updated June 2022, release 6).
MacKenzie, Gavin. *Lawyers & Ethics : Professional Responsibility and Discipline*, Toronto, Carswell, 2009 (loose-leaf updated June 2022, release 2).

2022 SCC 29 (CanLII)

McKee, Derek. "The Standard of Review for Questions of Procedural Fairness" (2016), 41 *Queen's L.J.* 355.

Mullan, David J., and Deirdre Harrington. "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002), 27 *Queen's L.J.* 879.

Perell, Paul M. "A Survey of Abuse of Process", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2007*. Toronto: Thomson Carswell, 2007.

Régimbald, Guy. *Canadian Administrative Law*, 3rd ed. Toronto: LexisNexis, 2021.

Villeneuve, Jean-Guy, et autres. *Précis de droit professionnel*. Cowansville, Que.: Yvon Blais, 2007.

McKee, Derek. « The Standard of Review for Questions of Procedural Fairness » (2016), 41 *Queen's L.J.* 355.

Mullan, David J., and Deirdre Harrington. « The *Charter* and Administrative Decision-Making : The Dampening Effects of *Blencoe* » (2002), 27 *Queen's L.J.* 879.

Perell, Paul M. « A Survey of Abuse of Process », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2007*, Toronto, Thomson Carswell, 2007.

Régimbald, Guy. *Canadian Administrative Law*, 3rd ed., Toronto, LexisNexis, 2021.

Villeneuve, Jean-Guy, et autres. *Précis de droit professionnel*, Cowansville (Qc), Yvon Blais, 2007.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Ottenbreit, Leurer and Barrington-Foote JJ.A.), 2020 SKCA 81, [2020] S.J. No. 266 (QL), 2020 CarswellSask 336 (WL), setting aside a decision of the Hearing Committee for the Law Society of Saskatchewan (Chow, McCuskee and Sorestad), 2018 SKLSS 8, [2018] L.S.D.D. No. 265 (QL). Appeal allowed, Côté J. dissenting.

Alyssa Tomkins, *Paul Daly* and *Charles R. Daoust*, for the appellant.

Amanda M. Quayle, *Q.C.*, *Gordon J. Kuski*, *Q.C.*, and *Lauren J. Wihak,* for the respondent.

Alexandra Clark and *Matthew Chung*, for the intervener the Attorney General of Ontario.

Stéphane Rochette and *Abdou Thiaw*, for the intervener the Attorney General of Quebec.

Meera Bennett and *Robert Danay*, for the intervener the Attorney General of British Columbia.

Laura Mazenc and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

James T. Casey, *Q.C.*, and *Katrina Haymond*, for the intervener the Law Society of Alberta.

Ayli Klein, for the intervener the Law Society of Manitoba.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (les juges Ottenbreit, Leurer et Barrington-Foote), 2020 SKCA 81, [2020] S.J. No. 266 (QL), 2020 CarswellSask 336 (WL), qui a infirmé une décision du Comité d'audition de la Law Society of Saskatchewan (Chow, McCuskee et Sorestad), 2018 SKLSS 8, [2018] L.S.D.D. No. 265 (QL). Pourvoi accueilli, la juge Côté est dissidente.

Alyssa Tomkins, *Paul Daly* et *Charles R. Daoust*, pour l'appelante.

Amanda M. Quayle, *c.r.*, *Gordon J. Kuski*, *c.r.*, et *Lauren J. Wihak*, pour l'intimé.

Alexandra Clark et *Matthew Chung*, pour l'intervenant le procureur général de l'Ontario.

Stéphane Rochette et *Abdou Thiaw*, pour l'intervenant le procureur général du Québec.

Meera Bennett et *Robert Danay*, pour l'intervenant le procureur général de la Colombie-Britannique.

Laura Mazenc et *Johnna Van Parys*, pour l'intervenant le procureur général de la Saskatchewan.

James T. Casey, *c.r.*, et *Katrina Haymond*, pour l'intervenante Law Society of Alberta.

Ayli Klein, pour l'intervenante la Société du Barreau du Manitoba.

2022 SCC 29 (CanLII)

Lisa Brownstone, *Amy Block* and *Linda Rothstein*, for the interveners the College of Physicians and Surgeons of Ontario, the College of Nurses of Ontario, the Ontario College of Pharmacists and the Royal College of Dental Surgeons of Ontario.

Ewa Krajewska and *Mannu Chowdhury*, for the intervener the Federation of Law Societies of Canada.

Lorenz Berner, *Tracy Knight* and *Jennifer L. Whately*, for the interveners the Alberta Securities Commission and the British Columbia Securities Commission.

Sylvie Champagne, *Nicolas Le Grand Alary* and *André-Philippe Mallette*, for the intervener Barreau du Québec.

Audrey Macklin and *Prasanna Balasundaram*, for the intervener the Canadian Association of Refugee Lawyers.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

ROWE J. —

I. Introduction

[1] This appeal arises from disciplinary proceedings pursued by the appellant, the Law Society of Saskatchewan ("Law Society"), against the respondent, Peter V. Abrametz. Mr. Abrametz was found guilty of four charges of conduct unbecoming a lawyer, and disbarred without a right to apply for readmission for almost two years.

[2] During the disciplinary proceedings, Mr. Abrametz applied for a stay of the proceedings on the basis of inordinate delay amounting to an abuse of process. His application was dismissed by the Hearing Committee for the Law Society ("Hearing Committee"), but allowed on appeal by the Court of Appeal for Saskatchewan. The Law Society appeals from that decision.

Lisa Brownstone, *Amy Block* et *Linda Rothstein*, pour les intervenants l'Ordre des médecins et chirurgiens de l'Ontario, l'Ordre des infirmières et infirmiers de l'Ontario, l'Ordre des pharmaciens de l'Ontario et l'Ordre royal des chirurgiens dentistes de l'Ontario.

Ewa Krajewska et *Mannu Chowdhury*, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

Lorenz Berner, *Tracy Knight* et *Jennifer L. Whately*, pour les intervenantes Alberta Securities Commission et British Columbia Securities Commission.

Sylvie Champagne, *Nicolas Le Grand Alary* et *André-Philippe Mallette*, pour l'intervenant le Barreau du Québec.

Audrey Macklin et *Prasanna Balasundaram*, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Version française du jugement du juge en chef Wagner et des juges Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer et Jamal rendu par

LE JUGE ROWE —

I. Introduction

[1] Le présent pourvoi découle de procédures disciplinaires engagées par l'appelante, la Law Society of Saskatchewan (« Barreau »), contre l'intimé, Peter V. Abrametz. Ce dernier a été déclaré coupable de quatre chefs d'accusation de conduite indigne d'un avocat et a été radié sans avoir le droit de solliciter sa réinscription pendant presque deux ans.

[2] Durant les procédures disciplinaires, Me Abrametz a demandé l'arrêt des procédures pour cause de délai excessif constituant un abus de procédure. Sa demande a été rejetée par le Comité d'audition du Barreau (« Comité d'audition » ou « Comité »), mais accueillie en appel par la Cour d'appel de la Saskatchewan. Le Barreau se pourvoit maintenant devant notre Cour.

2022 SCC 29 (CanLII)

[3] This appeal affords the Court the opportunity to address once again the doctrine of abuse of process as it relates to inordinate delay in the administrative context. This was recognized more than 20 years ago in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307. This appeal also allows us to clarify the standard of review applicable to questions of procedural fairness and to abuse of process in statutory appeals.

[4] I would allow the appeal. While the Court of Appeal correctly determined the standard of review, it failed to apply it properly. The Hearing Committee did not err when it concluded that there was no abuse of process.

II. Facts

[5] Mr. Abrametz is a member of the Law Society of Saskatchewan. He has practiced in Prince Albert, Saskatchewan, for 49 years.

A. *Pre-Charge Investigation*

[6] In 2012, the Law Society commenced an audit investigation of Mr. Abrametz's financial records due to apparent irregularities in the use of a trust account. On the eve of a visit by investigators to his office in December 2012, Mr. Abrametz self-reported to the Law Society that he had failed to promptly deposit more than $36,000 in fees into his office account.

[7] The Law Society's investigation related to eight transactions by Mr. Abrametz. In seven of these, Mr. Abrametz had issued cheques to clients that were then endorsed by the clients and cashed by Mr. Abrametz. In the other case, he had issued three cheques to a fictitious person, endorsed that false name on the cheques and cashed them. In addition, Mr. Abrametz had on 11 occasions advanced money to clients, relating to settlement funds, charging them a flat 30 percent fee of the amount advanced, as well as a 30 percent contingency fee, and interest.

[3] La présente affaire donne à la Cour l'occasion de se pencher à nouveau sur la doctrine de l'abus de procédure en cas de délai excessif en contexte administratif. Cette doctrine a été reconnue il y a plus de 20 ans dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307. Le présent pourvoi nous permet également de clarifier la norme de contrôle applicable aux questions d'équité procédurale et d'abus de procédure en cas d'appels prévus par la loi.

[4] Je suis d'avis d'accueillir le pourvoi. Bien que la Cour d'appel ait choisi la norme de contrôle appropriée, elle ne l'a pas appliquée adéquatement. Le Comité d'audition n'a pas commis d'erreur en concluant à l'absence d'abus de procédure.

II. Faits

[5] Maître Abrametz est membre du Barreau de la Saskatchewan. Il exerce le droit à Prince Albert, en Saskatchewan, depuis 49 ans.

A. *Enquête antérieure au dépôt des accusations*

[6] En 2012, le Barreau a procédé à une vérification des registres financiers de Me Abrametz en raison d'irrégularités apparentes dans l'utilisation d'un compte en fiducie. La veille d'une visite des enquêteurs à son bureau en décembre 2012, Me Abrametz a lui-même déclaré au Barreau qu'il avait omis de déposer promptement dans son compte d'entreprise plus de 36 000 $ en honoraires.

[7] L'enquête du Barreau visait huit opérations effectuées par Me Abrametz. Dans sept de ces opérations, Me Abrametz avait émis des chèques à l'ordre de clients. Ces chèques avaient ensuite été endossés par les clients, puis encaissés par Me Abrametz. Dans l'autre opération, il avait émis trois chèques à l'ordre d'une personne fictive, les avait endossés en signant d'un faux nom, puis les avait encaissés. De plus, à 11 occasions, Me Abrametz avait avancé à des clients de l'argent, en lien avec des fonds découlant de règlements, leur facturant des honoraires fixes correspondant à 30 p. 100 du montant avancé, ainsi que des honoraires conditionnels de 30 p. 100, et des intérêts.

2022 SCC 29 (CanLII)

[8] The investigation also looked into whether some of these transactions were carried out to evade tax.

[9] In February 2013, Mr. Abrametz was served with a notice of intention to interim suspend. However, by agreement with the Law Society in March 2013, Mr. Abrametz was allowed to continue to practice, subject to certain conditions: Mr. Abrametz had to retain another lawyer to supervise and monitor his practice and trust account activities; he had to seek prior approval from this supervisor for withdrawals/cheques from any trust account; and he could not accept the return of trust cheques from clients, nor accept endorsed cheques to be cashed or negotiated. A second notice of intention to interim suspend was served in November 2014, but the Law Society and Mr. Abrametz again agreed that he could continue to practice under substantially similar conditions. Mr. Abrametz continued to practice under these conditions without incident while the Law Society investigation continued.

[10] In October 2014, the auditor submitted a final trust report to the Law Society.

[11] In October 2015, the Law Society issued a formal complaint containing seven charges against Mr. Abrametz and appointed a Hearing Committee.

B. *Post-Charge Prosecution*

[12] A simultaneous investigation into Mr. Abrametz's tax situation gave rise to litigation before the Court of Queen's Bench between the Law Society and Mr. Abrametz regarding the scope of the Law Society's investigatory powers: 2016 SKQB 134; 2016 SKQB 320, 408 D.L.R. (4th) 134.

[13] In March 2016, Mr. Abrametz applied to the Hearing Committee for an interim stay of the disciplinary proceedings until the resolution of the tax investigation. The Hearing Committee dismissed the request in August 2016.

[8] L'enquête visait également à déterminer si certaines de ces opérations avaient été effectuées à des fins d'évasion fiscale.

[9] En février 2013, Me Abrametz a reçu signification d'un avis d'intention de suspension provisoire. Cependant, par suite d'une entente conclue avec le Barreau en mars 2013, Me Abrametz a pu continuer d'exercer le droit, sous réserve de certaines conditions : il devait faire appel à un autre avocat pour surveiller et contrôler son cabinet et les activités liées aux comptes en fiducie; il devait obtenir l'autorisation de cet avocat afin de pouvoir effectuer des retraits de tout compte en fiducie ou émettre des chèques à partir d'un tel compte; il ne pouvait pas accepter le retour de chèques en fiducie de clients ni accepter des chèques endossés pour les encaisser ou les négocier. Un deuxième avis d'intention de suspension provisoire a été signifié en novembre 2014, mais le Barreau et Me Abrametz ont de nouveau convenu qu'il pouvait continuer d'exercer sous réserve de conditions essentiellement similaires. Maître Abrametz a continué d'exercer le droit selon ces conditions, sans incident, pendant que le Barreau poursuivait son enquête.

[10] En octobre 2014, le vérificateur a transmis au Barreau un rapport définitif sur les comptes en fiducie.

[11] En octobre 2015, le Barreau a déposé une plainte officielle contenant sept chefs d'accusation contre Me Abrametz et a constitué un comité d'audition.

B. *Poursuite postérieure au dépôt des accusations*

[12] Une enquête menée au même moment sur la situation fiscale de Me Abrametz a donné lieu à un litige devant la Cour du Banc de la Reine entre ce dernier et le Barreau concernant l'étendue des pouvoirs d'enquête du Barreau : 2016 SKQB 134; 2016 SKQB 320, 408 D.L.R. (4th) 134.

[13] En mars 2016, Me Abrametz a demandé au Comité d'audition de suspendre provisoirement les procédures disciplinaires jusqu'à la conclusion de l'enquête fiscale. Le Comité a rejeté la demande en août 2016.

2022 SCC 29 (CanLII)

[14] The Hearing Committee heard the disciplinary matter on May 17-19, August 9-10 and September 29, 2017. The conduct decision was rendered on January 10, 2018. Mr. Abrametz was found guilty of four of the seven charges. The four convictions were for matters disclosed in his self-report; they related to the advances to clients on settlement funds (referred to above).

[15] On July 13, 2018, Mr. Abrametz applied for a stay of proceedings on the basis that the time taken by the Law Society to investigate and decide his case constituted an abuse of process. The application was heard on September 18, 2018, at the same hearing as that for submissions regarding penalty. The stay application was dismissed on November 9, 2018, in the stay decision.

[16] On January 20, 2019, the penalty decision was rendered; the Committee ordered Mr. Abrametz disbarred without a right to apply for readmission until January 1, 2021.

[17] The conduct, stay and penalty decisions were published as one. In these reasons I address primarily the stay.

III. Judgments Below

A. *Hearing Committee for the Law Society of Saskatchewan, 2018 SKLSS 8 (D. Chow, J. McCuskee and E. Sorestad)*

[18] On the question of delay, the Hearing Committee found that Mr. Abrametz had made extensive efforts to conceal his actions. The Committee also referred to the complexity arising from the nature and number of allegations of conduct unbecoming and the number of client files and other documents that needed to be examined. The Hearing Committee also found that a significant share of delay in the

[14] Le Comité d'audition a entendu l'affaire disciplinaire du 17 au 19 mai, les 9 et 10 août ainsi que le 29 septembre 2017, et il a rendu sa décision relative à la conduite professionnelle de Me Abrametz le 10 janvier 2018. Ce dernier a été reconnu coupable de quatre des sept chefs d'accusation. Les quatre déclarations de culpabilité portaient sur des faits divulgués dans sa déclaration volontaire : elles se rapportaient aux avances consenties à des clients sur des fonds découlant de règlements (tel que je l'ai mentionné précédemment).

[15] Le 13 juillet 2018, Me Abrametz a demandé un arrêt des procédures au motif que le temps mis par le Barreau pour enquêter à son égard et rendre sa décision constituait un abus de procédure. La demande a été entendue le 18 septembre 2018, lors de la même audience que celle consacrée aux observations concernant la sanction. La demande d'arrêt des procédures a été rejetée le 9 novembre 2018 dans la décision relative à l'arrêt des procédures.

[16] Le 20 janvier 2019, le Comité d'audition a rendu sa décision relative à la sanction; il a ordonné que Me Abrametz soit radié et n'ait pas le droit de demander sa réinscription avant le 1er janvier 2021.

[17] La décision relative à la conduite professionnelle, ainsi que celles relatives à l'arrêt des procédures et à la sanction ont été publiées dans une seule et unique décision. Dans les présents motifs, je vais examiner principalement la décision relative à l'arrêt des procédures.

III. Décisions des juridictions inférieures

A. *Comité d'audition du Barreau de la Saskatchewan, 2018 SKLSS 8 (D. Chow, J. McCuskee et E. Sorestad)*

[18] En ce qui concerne la question du délai, le Comité d'audition a conclu que Me Abrametz avait déployé des efforts considérables pour dissimuler ses actions. Le Comité a également souligné qu'il s'agissait d'une affaire complexe du fait de la nature et du nombre des allégations de conduite indigne, ainsi que de la quantité de dossiers-clients et d'autres documents à examiner. Le Comité d'audition a en

2022 SCC 29 (CanLII)

proceedings should be attributed to Mr. Abrametz, due to his unavailability or the unavailability of his counsel. The Hearing Committee further noted that Mr. Abrametz had brought an application for a temporary stay of proceedings in April 2016.

[19] The Hearing Committee found that the delay was neither inordinate nor unacceptable given the complexity of the case, the extent of the investigation and the delay attributed directly to Mr. Abrametz's conduct. The Hearing Committee also concluded that any prejudice that Mr. Abrametz may have experienced as a result of the delay was not so significant that continuation of the process would be so unfair to him that the public's sense of fairness would be harmed, having regard to the Law Society's mandate to protect the public.

B. *Court of Appeal for Saskatchewan, 2020 SKCA 81 (Ottenbreit, Leurer and Barrington-Foote JJ.A.)*

[20] Mr. Abrametz appealed the conduct, penalty and stay decisions to the Court of Appeal pursuant to s. 56(1) of *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1.

[21] The Court of Appeal dismissed Mr. Abrametz's conduct appeal but allowed the stay appeal.

[22] The Court of Appeal held that whether there had been delay constituting an abuse of process is a question of law, reviewable on the basis of correctness; the findings of fact underlying the stay decision are reviewable on the standard of palpable and overriding error.

[23] The Court of Appeal stated that *Blencoe* set a high threshold for finding an abuse of process where hearing fairness had not been compromised. The Court of Appeal concluded, nonetheless, that Mr. Abrametz was entitled to a stay.

outre statué qu'une partie importante du délai devait être attribuée à Me Abrametz en raison de son indisponibilité ou de celle de son avocat. Il a également souligné le fait que Me Abrametz avait demandé la suspension temporaire des procédures disciplinaires en avril 2016.

[19] Le Comité d'audition a conclu que le délai n'était ni excessif ni inacceptable compte tenu de la complexité de l'affaire, de l'ampleur de l'enquête et du délai directement attribuable à la conduite de Me Abrametz. Le Comité a également conclu que tout préjudice qu'avait pu subir Me Abrametz en raison du délai n'était pas à ce point important que la continuation du processus serait si injuste envers lui qu'elle serait susceptible de heurter le sens de l'équité et de la décence du public, eu égard à la mission de protection du public qui incombe au Barreau.

B. *Cour d'appel de la Saskatchewan, 2020 SKCA 81 (les juges Ottenbreit, Leurer et Barrington-Foote)*

[20] Maître Abrametz a interjeté appel à la Cour d'appel de la Saskatchewan des décisions relatives à la conduite professionnelle, à la sanction et à l'arrêt des procédures en vertu du par. 56(1) de la loi intitulée *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1.

[21] La Cour d'appel a rejeté l'appel de Me Abrametz relatif à la conduite professionnelle, mais a accueilli celui relatif à l'arrêt des procédures.

[22] La Cour d'appel a déclaré que la question de savoir s'il y a eu un délai constituant un abus de procédure est une question de droit susceptible de contrôle selon la norme de la décision correcte. Les conclusions de fait à la base de la décision relative à l'arrêt des procédures sont susceptibles de contrôle selon la norme de l'erreur manifeste et déterminante.

[23] La Cour d'appel a indiqué que l'arrêt *Blencoe* a fixé un seuil élevé à atteindre pour que les tribunaux puissent conclure à l'existence d'un abus de procédure dans les cas où l'équité de l'audience n'a pas été compromise. Elle a néanmoins conclu que Me Abrametz avait droit à l'arrêt des procédures.

2022 SCC 29 (CanLII)

[24] The Court of Appeal concluded that there were significant periods that were not adequately explained and that could not be justified by the scale and complexity of the proceedings. The Court of Appeal concluded that of the 53-month period in issue, only 18 months were inherent to the process, and only 2 ½ months were attributable to Mr. Abrametz. The remainder, totaling 32 ½ months, the Court of Appeal concluded, was undue delay. The Hearing Committee's failure to reach that conclusion was the result of palpable and overriding errors (as referred to), and the Hearing Committee's failure to apply the law correctly to the facts.

[25] The Court of Appeal concluded that there had been inordinate delay which resulted in significant prejudice to Mr. Abrametz, such that the public's sense of decency and fairness would be affected. It concluded that this inordinate delay would bring the Law Society's disciplinary process into disrepute. Mr. Abrametz's application for a stay should have been granted by the Hearing Committee.

IV. Analysis

A. *Standard of Review*

[26] This case allows the Court to clarify the standard of review applicable to questions of procedural fairness and abuse of process in a statutory appeal. The Court received submissions from the parties and interveners on this point.

[27] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply: paras. 33 and 36-52. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.

[24] La Cour d'appel a jugé qu'il y avait d'importantes périodes qui n'avaient pas été expliquées adéquatement et qui ne pouvaient être justifiées par l'ampleur et la complexité des procédures. Elle a également statué que, de la période litigieuse de 53 mois, seuls 18 mois représentaient des délais inhérents au processus et seuls 2 ½ mois étaient attribuables à Me Abrametz. Le reste de la période, soit 32 ½ mois au total, constituait, selon elle, un délai injustifié. La conclusion différente du Comité d'audition à cet égard résultait d'erreurs manifestes et déterminantes (telles que décrites) et du fait qu'il n'avait pas appliqué correctement le droit aux faits.

[25] La Cour d'appel a conclu à l'existence d'un délai excessif qui avait causé à Me Abrametz un préjudice important de nature à heurter le sens de l'équité et de la décence du public. Elle a jugé que ce délai excessif était susceptible de déconsidérer le processus disciplinaire du Barreau. La demande d'arrêt des procédures de Me Abrametz aurait dû être accueillie par le Comité d'audition.

IV. Analyse

A. *Norme de contrôle*

[26] La présente affaire permet à la Cour de clarifier la norme de contrôle applicable aux questions d'équité procédurale et d'abus de procédure en cas d'appel prévu par la loi. Les parties et les intervenants ont soumis à la Cour des observations sur ce point.

[27] Dans l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, la Cour a conclu que, dans les cas où un législateur établit dans une loi un mécanisme d'appel à une cour de justice des décisions d'un décideur administratif, cela indique que les normes générales en matière d'appel trouvent application : par. 33 et 36-52. Bien que cette conclusion ait été formulée dans un contexte de contrôle judiciaire sur le fond, la directive prescrivant que les appels doivent être décidés selon les normes générales en matière d'appel était catégorique. Par conséquent, lorsque des questions d'équité procédurale sont examinées dans le cadre d'un mécanisme d'appel prévu par la loi, elles sont soumises aux normes de contrôle en matière d'appel.

2022 SCC 29 (CanLII)

[28] This does not depart from *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, as those decisions related to judicial review and to the granting of prerogative writs. Here, we are dealing with a statutory appeal. As our Court has stated in *Vavilov*, at para. 36, "[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis."

[29] This case is a statutory appeal pursuant to *The Legal Profession Act, 1990*. Therefore, the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176, at paras. 24-25.

[30] Whether there has been an abuse of process is a question of law. Thus, the applicable standard of review is correctness.

B. *Inordinate Delay in Administrative Law*

(1) Introduction

[31] Administrative decision makers regularly decide issues that affect individuals' rights, privileges and interests. This Court recognized the important role of administrative decision makers in *Vavilov*, at para. 4:

This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of

[28] Cela ne déroge pas aux affaires *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, et *Établissement de Mission c. Khela*, 2014 CSC 24, [2014] 1 R.C.S. 502, puisque ces décisions concernaient respectivement un contrôle judiciaire et la délivrance de brefs de prérogative. En l'espèce, nous sommes saisis d'un appel prévu par la loi. Comme l'a affirmé notre Cour dans *Vavilov*, par. 36, « [l]orsqu'il accorde aux parties la possibilité de porter en appel, de plein droit ou sur autorisation, une décision administrative devant une cour de justice, le législateur assujettit le régime administratif à une compétence d'appel et indique qu'il s'attend à ce que la cour vérifie attentivement cette décision lors d'un processus d'appel. »

[29] Le présent pourvoi porte sur un appel interjeté en vertu de la loi intitulée *The Legal Profession Act, 1990*. En conséquence, la norme de contrôle applicable aux questions de droit est celle de la décision correcte, alors que celle applicable aux questions de fait et aux questions mixtes de fait et de droit est la norme de l'erreur manifeste et déterminante : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Ward c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 CSC 43, [2021] 3 R.C.S. 176, par. 24-25.

[30] La question de savoir s'il y a eu abus de procédure est une question de droit. C'est donc la norme de contrôle de la décision correcte qui s'applique.

B. *Délai excessif en droit administratif*

(1) Introduction

[31] Les décideurs administratifs tranchent régulièrement des questions qui touchent les droits, les privilèges et les intérêts des gens. Dans l'arrêt *Vavilov*, par. 4, notre Cour a reconnu le rôle important que jouent les décideurs administratifs :

Ce domaine du droit touche des questions fondamentales pour notre ordre juridique et constitutionnel et tente d'assurer la bonne marche des rapports entre les décideurs administratifs, les cours de justice et les membres de notre société. Parallèlement au droit, le rôle du processus décisionnel administratif au Canada a connu sa propre évolution.

2022 SCC 29 (CanLII)

countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

Aujourd'hui, l'administration d'innombrables organismes publics et régimes de réglementation est confiée par la loi à des délégataires ayant un pouvoir décisionnel. Le nombre, la diversité et l'importance des affaires dont sont saisis ces délégataires font du processus décisionnel administratif l'une des principales manifestations du pouvoir de l'État dans la vie de la population canadienne.

[32] Legislatures delegate authority to administrative decision makers because of their proximity and responsiveness to stakeholders, their ability to render decisions promptly, flexibly and efficiently, and their ability to provide simplified and streamlined proceedings that can promote access to justice: *Vavilov*, at para. 29.

[32] Les législateurs délèguent des pouvoirs aux décideurs administratifs en raison de la proximité des décideurs et des parties intéressées ainsi que de la réceptivité des décideurs envers ces dernières; de la capacité des décideurs de trancher de manière rapide, souple et efficace; et de leur faculté d'alléger et de simplifier la procédure et de favoriser ainsi l'accès à la justice : *Vavilov*, par. 29.

(2) <u>The Doctrine of Abuse of Process</u>

(2) <u>La doctrine de l'abus de procédure</u>

[33] The doctrine of abuse of process is rooted in a court's inherent and residual discretion to prevent abuse of its process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 39; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 612; P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243, at p. 243. The doctrine was recognized in *R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 135-37, where the Court drew from Dubin J.A. in *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.), at p. 329, where he stated that

[33] La doctrine de l'abus de procédure tire ses origines du pouvoir discrétionnaire résiduel inhérent que possèdent les tribunaux judicaires d'empêcher les abus de procédure : *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 35; *Behn c. Moulton Contracting Ltd.*, 2013 CSC 26, [2013] 2 R.C.S. 227, par. 39; *R. c. Power*, [1994] 1 R.C.S. 601, p. 612; P. M. Perell, « A Survey of Abuse of Process », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation 2007* (2007), 243, p. 243. Cette doctrine a été reconnue par notre Cour dans *R. c. Jewitt*, [1985] 2 R.C.S. 128, p. 135-137, où la Cour a cité les propos du juge Dubin, qui avait déclaré ce qui suit dans l'affaire *Regina c. Young* (1984), 40 C.R. (3d) 289 (C.A. Ont.), p. 329 :

> there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie <u>the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings</u>. [Emphasis added; p. 135.]

> [TRADUCTION] [L]e juge du procès a un pouvoir discrétionnaire résiduel de suspendre l'instance lorsque forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent <u>le sens du franc-jeu et de la décence qu'a la société, ainsi que d'empêcher l'abus des procédures de la cour par une procédure oppressive ou vexatoire</u>. [Je souligne; p. 135.]

[34] Abuse of process is a broad concept that applies in various contexts: *C.U.P.E.*, at para. 36; *Behn*, at para. 39. In criminal proceedings, unfair or oppressive treatment of an accused can constitute an abuse of the court's process and warrant judicial intervention: *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983,

[34] L'abus de procédure est un vaste concept, qui s'applique dans des contextes variés : *S.C.F.P.*, par. 36; *Behn*, par. 39. En matière criminelle, le traitement injuste ou oppressif infligé à un accusé peut constituer un abus des procédures d'une cour de justice et justifier une intervention judiciaire : *R. c. Cawthorne*, 2016

2022 SCC 29 (CanLII)

at para. 25, citing *Power*, at pp. 612-15; *Jewitt*, at pp. 136-37; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 59. In civil matters, it can warrant granting a motion to strike pleadings or to preclude relitigation of an issue: see *Behn*; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), rev'd 2002 SCC 63, [2002] 3 S.C.R. 307.

[35] It is also characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel: *Behn*, at para. 40; *C.U.P.E.*, at paras. 37-38. In *Behn*, at para. 40, LeBel J. referred with approval to Goudge J.A., dissenting, in *Canam Enterprises Inc.* (C.A.), where Goudge J.A. explained that the doctrine of abuse of process

> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. [Emphasis added; para. 55.]

Such flexibility is important in the administrative law context, given the wide variety of circumstances in which delegated authority is exercised.

[36] The primary focus is the integrity of courts' adjudicative functions, and less on the interests of parties: *C.U.P.E.*, at para. 43; *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667; *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007. The proper administration of justice and ensuring fairness are central to the doctrine: *Behn*, at para. 41; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at paras. 24-25 and 31. It aims to prevent unfairness by precluding "abuse of the decision-making process": *Figliola*, at para. 34, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 20.

CSC 32, [2016] 1 R.C.S. 983, par. 25, citant *Power*, p. 612-615; *Jewitt*, p. 136-137; *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 59. En matière civile, un abus de procédure peut justifier l'octroi d'une requête en radiation ou d'une requête visant à empêcher qu'une question soit débattue à nouveau : voir *Behn*; *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), inf. par 2002 CSC 63, [2002] 3 R.C.S. 307.

[35] La doctrine de l'abus de procédure se caractérise également par sa souplesse. Contrairement aux concepts de chose jugée et de préclusion découlant d'une question déjà tranchée, elle ne s'encombre pas d'exigences particulières : *Behn*, par. 40; *S.C.F.P.*, par. 37-38. Dans l'arrêt *Behn*, par. 40, le juge LeBel s'est reporté, en les approuvant, aux explications suivantes concernant la doctrine de l'abus de procédure formulées par le juge Goudge, en dissidence, dans l'arrêt *Canam Enterprises Inc.* (C.A.) :

> [TRADUCTION] [Cette doctrine] met en jeu le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait d'une autre façon pour effet de discréditer l'administration de la justice. Cette doctrine souple ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité. [Je souligne; par. 55.]

Une telle souplesse est importante en droit administratif, compte tenu de la grande variété des circonstances dans lesquelles des pouvoirs délégués sont exercés.

[36] La doctrine met davantage l'accent sur l'intégrité du processus décisionnel judiciaire que sur l'intérêt des parties : *S.C.F.P.*, par. 43; *R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667; *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007. La bonne administration de la justice et la protection de l'équité se trouvent au cœur de la doctrine : *Behn*, par. 41; *Colombie-Britannique (Workers' Compensation Board) c. Figliola*, 2011 CSC 52, [2011] 3 R.C.S. 422, par. 24-25 et 31. Celle-ci vise à prévenir l'iniquité en empêchant « les recours abusifs » : *Figliola*, par. 34, se référant à *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, par. 20.

2022 SCC 29 (CanLII)

[37] Such considerations underlie the courts' concern with inordinate delay in the administrative context.

(3) Abuse of Process in Administrative Proceedings

[38] In administrative proceedings, abuse of process is a question of procedural fairness: *Blencoe*, at paras. 105-7 and 121; G. Régimbald, *Canadian Administrative Law* (3rd ed. 2021), at pp. 344-50; P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at pp. 766-67). This Court dealt with abuse of process as it relates to administrative delay in *Blencoe*. Our Court recognized that decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay.

[39] Mr. Blencoe, a former British Columbia Cabinet Minister, was accused by several women of sexual harassment. They filed complaints with the then British Columbia Council of Human Rights. Hearings were scheduled more than 30 months after the initial complaints were filed. Mr. Blencoe applied to have the proceedings stayed on the basis of abuse of process. While this Court declined to do so, it described circumstances when a stay could be ordered.

[40] The Court explained two ways in which delay may constitute an abuse of process.

[41] The first concerns hearing fairness. The fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable or evidence has been lost: *Blencoe*, at para. 102; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 9:57.

[37] Ce sont de telles considérations qui sous-tendent la préoccupation des tribunaux judiciaires à l'égard des délais excessifs en contexte administratif.

(3) Abus de procédure dans les instances administratives

[38] Dans le contexte de procédures administratives, l'abus de procédure est une question d'équité procédurale : *Blencoe*, par. 105-107 et 121; G. Régimbald, *Canadian Administrative Law* (3e éd. 2021), p. 344-350; P. Garant, avec la collaboration de P. Garant et J. Garant, *Droit administratif* (7e éd. 2017), p. 766-767. Dans l'arrêt *Blencoe*, notre Cour s'est penchée sur la question de l'abus de procédure relativement aux délais administratifs. Notre Cour a reconnu que les décideurs administratifs possèdent, corollairement à leur devoir d'agir équitablement, le pouvoir d'examiner les allégations de délai abusif.

[39] Monsieur Blencoe, un ancien ministre au sein du gouvernement de la Colombie-Britannique, a été accusé de harcèlement sexuel par plusieurs femmes. Ces dernières ont déposé des plaintes auprès de l'organisme connu alors sous le nom de British Columbia Council of Human Rights. Les audiences ont été fixées plus de 30 mois après le dépôt des plaintes initiales. Monsieur Blencoe a demandé l'arrêt des procédures pour cause d'abus de procédure. Bien que notre Cour ait refusé de le faire, elle a décrit les circonstances dans lesquelles un arrêt des procédures pourrait être ordonné.

[40] La Cour a expliqué deux situations dans lesquelles le délai en cause peut constituer un abus de procédure.

[41] La première concerne l'équité de l'audience. L'équité de l'audience peut être compromise lorsque le délai en cause nuit à la capacité d'une partie de répondre à la plainte portée contre elle, notamment parce que des souvenirs se sont estompés, des témoins essentiels ne sont pas disponibles ou des éléments de preuve ont été perdus : *Blencoe*, par. 102; D. J. M. Brown et J. M. Evans, avec l'aide de D. Fairlie, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), § 9:57.

2022 SCC 29 (CanLII)

[42] This is not what is in issue in this appeal. Rather, the Court is concerned with a second category of abuse of process. Even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay: *Blencoe*, at paras. 122 and 132.

[43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.

[44] The minority reasons in *Blencoe* concluded that there was an abuse of process, although the appropriate remedy was not a stay but rather an order for an expedited hearing and costs. In my view, the two sets of reasons in *Blencoe* can be read as complementing each other and expressing a coherent set of principles. The majority reasons set a higher threshold only for an abuse of process requiring a stay, and accepted that lesser remedies continue to be available where a stay is not warranted. With respect to when a stay of proceedings is warranted, the minority reasons recognized that a threshold of "shocking abuse" is necessary to justify a stay of proceedings (para. 155). Moreover, the minority reasons set a lower threshold for an abuse of process which might call for a lesser remedy, such as an order for an expedited hearing or costs.

[42] Ce n'est pas ce qui est en litige dans le présent pourvoi. La Cour est plutôt saisie d'une affaire correspondant à la deuxième catégorie d'abus de procédure. Même dans les cas où il n'y pas d'atteinte à l'équité de l'audience, il peut y avoir abus de procédure si un préjudice important a été causé en raison d'un délai excessif : *Blencoe*, par. 122 et 132.

[43] L'arrêt *Blencoe* établit une analyse à trois volets pour déterminer si un délai qui ne porte pas atteinte à l'équité de l'audience constitue néanmoins un abus de procédure. Premièrement, le délai en cause doit être excessif. Deuxièmement, ce délai doit avoir directement causé un préjudice important. Lorsque ces deux conditions sont réunies, le tribunal judiciaire ou administratif procède à une dernière évaluation afin de déterminer si le délai constitue un abus de procédure. Un délai constituera un abus de procédure s'il est manifestement injuste envers une partie ou s'il déconsidère d'une autre manière l'administration de la justice : *Behn*, par. 40-41.

[44] Dans l'arrêt *Blencoe*, les juges minoritaires ont conclu à l'existence d'un abus de procédure, statuant toutefois que la réparation appropriée n'était pas un arrêt des procédures, mais plutôt une ordonnance intimant la tenue d'une audience accélérée et l'adjudication de dépens. À mon avis, les motifs de la minorité ainsi que ceux de la majorité dans *Blencoe* peuvent être considérés comme complémentaires et comme ayant pour effet d'énoncer un ensemble cohérent de principes. Les juges majoritaires ont fixé un seuil plus élevé à atteindre, mais uniquement à l'égard des abus de procédure requérant un arrêt des procédures, et ils ont accepté que l'octroi de réparations moindres demeure possible dans les cas où l'arrêt des procédures n'est pas justifié. Pour ce qui est de la situation justifiant l'octroi d'un arrêt des procédures, les juges minoritaires ont reconnu que le seuil devant être atteint est l'existence d'un délai représentant un « abus scandaleux » : par. 155. En outre, les juges minoritaires ont fixé un seuil moins élevé à l'égard des abus de procédure susceptibles de requérir une réparation moindre, telle qu'une ordonnance intimant la tenue d'une audience accélérée ou l'adjudication de dépens.

2022 SCC 29 (CanLII)

(4) Calls to "*Jordanize*" *Blencoe*

[45] The Court received submissions to the effect that since *Blencoe*, it has become more active in addressing institutional delays in criminal proceedings: see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Mr. Abrametz and some of the interveners argue the *Blencoe* test needs to be revisited to bring it into conformity with contemporary approaches to delay. Mr. Abrametz refers to the "culture of complacency" in the criminal justice system addressed in *Jordan*: R.F., at paras. 88-104. Without asking for the direct adoption of the *Jordan* framework in administrative law, Mr. Abrametz sought to have this Court recognize inordinate delay as prejudicial in and of itself.

[46] Inordinate delay in administrative proceedings, as in other legal proceedings, is contrary to the interests of society. Decisions by administrative decision makers need to be rendered promptly and efficiently. Administrative delay undermines a key purpose for which such decision-making authority was delegated — expeditious and efficient decision-making.

[47] However, there are important reasons why *Jordan* does not apply to administrative proceedings. *Jordan* deals with the right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. No such *Charter* right applies to administrative proceedings. As such, there is no constitutional right outside the criminal context to be "tried" within a reasonable time.

[48] There are fundamental differences between criminal and administrative proceedings: *Blencoe*, at paras. 88-96. A human rights body's investigation is aimed at determining what took place and seeks to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is to eradicate discrimination, rather than to punish an offender:

(4) Appels à appliquer l'approche de *Jordan* à *Blencoe*

[45] La Cour a reçu des observations selon lesquelles, depuis l'arrêt *Blencoe*, elle est intervenue de manière plus active à l'égard des délais institutionnels en matière criminelle : voir *R. c. Jordan*, 2016 CSC 27, [2016] 1 R.C.S. 631. Maître Abrametz et certains intervenants soutiennent que le critère énoncé dans l'arrêt *Blencoe* doit être revu pour le rendre conforme aux approches contemporaines en matière de délais. Maître Abrametz fait état de la [TRADUCTION] « culture de complaisance » au sein du système de justice criminelle examinée dans l'arrêt *Jordan* : m.i., par. 88-104. Sans solliciter l'adoption pure et simple en droit administratif du cadre établi dans *Jordan*, Me Abrametz demande à notre Cour de reconnaître qu'un délai excessif est en soi préjudiciable.

[46] L'existence de délais excessifs dans des procédures administratives, tout comme dans d'autres procédures juridiques, va à l'encontre des intérêts de la société. Il est nécessaire que les décideurs administratifs rendent leurs décisions promptement et efficacement. Les délais en matière de justice administrative compromettent la réalisation d'un objectif fondamental de la délégation de pouvoirs décisionnels à ces organismes — un processus décisionnel rapide et efficient.

[47] Cependant, il y a d'importantes raisons pour lesquelles l'arrêt *Jordan* ne s'applique pas aux procédures administratives. Cet arrêt porte sur le droit d'être jugé dans un délai raisonnable garanti à l'al. 11b) de la *Charte canadienne des droits et libertés*. Aucun droit de la sorte garanti par la *Charte* ne s'applique aux procédures administratives. Par conséquent, il n'existe pas de droit constitutionnel d'être « jugé » dans un délai raisonnable en dehors du contexte de procédures criminelles.

[48] Il existe des différences fondamentales entre les procédures criminelles et les procédures administratives : *Blencoe*, par. 88-96. Les enquêtes menées par les commissions des droits de la personne visent à déterminer ce qui s'est passé et à régler la situation selon une procédure non contradictoire. L'objectif des procédures en matière de droits de la personne

2022 SCC 29 (CanLII)

Blencoe, at paras. 94 and 126. Similar distinctions can be drawn between disciplinary and criminal matters. While the former are intended to regulate professional conduct within a limited private sphere of activity, the latter is intended to maintain public order and welfare for the broad public: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 560.

[49] I will now deal more fully with the application of the doctrine of abuse of process to administrative delays.

(5) First Requirement: Whether the Delay Is Inordinate

[50] That a process took considerable time does not in itself amount to inordinate delay. Rather, one must consider the time in light of the circumstances of the case (Brown and Evans, at § 9:57-9:58; R. W. Macaulay, J. L. H. Sprague and L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), at § 16:81; *Blencoe*, at para. 122). A process that seems lengthy may be justified *on the basis of fairness*.

[51] In determining whether delay is inordinate, the court or tribunal should consider the following contextual factors: (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case. These factors are not exhaustive, such that additional contextual factors can be considered in a particular case.

(a) *The Nature and Purpose of the Proceedings*

(i) Introduction

[52] Many public bodies and regulatory agencies have been entrusted with decision-making authority as statutory delegates: *Vavilov*, at paras. 4 and 88. Their decisions vary in complexity and significance. Sometimes they involve technical considerations. Other times, common sense and an understanding of the practicalities of ordinary life suffice: *Vavilov*, at

est d'éradiquer la discrimination, et non de punir un contrevenant : *Blencoe*, par. 94 et 126. Des distinctions semblables peuvent être établies entre les procédures disciplinaires et les procédures criminelles. Alors que les premières visent à réglementer la conduite professionnelle dans une sphère d'activité privée et limitée, les secondes visent à maintenir l'ordre et le bien-être publics au profit de l'ensemble de la population : *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, p. 560.

[49] Je vais maintenant examiner plus en détail l'application de la doctrine de l'abus de procédure aux délais administratifs.

(5) Première condition : un délai excessif

[50] Le fait qu'un processus a demandé un temps considérable ne constitue pas en soi un délai excessif. Il faut plutôt considérer la période en question à la lumière des circonstances de l'affaire (Brown et Evans, § 9:57 et 9:58; R. W. Macaulay, J. L. H. Sprague et L. Sossin, *Practice and Procedure Before Administrative Tribunals* (feuilles mobiles), § 16:81; *Blencoe*, par. 122). Un processus qui semble long peut être justifié *pour des raisons d'équité*.

[51] Pour déterminer si un délai est excessif, le tribunal judiciaire ou administratif doit tenir compte des facteurs contextuels suivants : a) la nature et l'objet des procédures, b) la longueur et les causes du délai, et c) la complexité des faits de l'affaire et des questions en litige. Comme il ne s'agit pas d'une liste exhaustive, d'autres facteurs contextuels peuvent être pris en considération dans une affaire donnée.

a) *La nature et l'objet des procédures*

(i) Introduction

[52] Bon nombre d'organismes publics et d'agences de réglementation se sont vus déléguer des pouvoirs décisionnels par voie législative : *Vavilov*, par. 4 et 88. Leurs décisions varient en complexité et en importance. Elles impliquent parfois des considérations d'ordre technique. Dans d'autres cas, le bon sens et une compréhension des réalités pratiques de la vie

2022 SCC 29 (CanLII)

para. 88. Of necessity, time requirements inherent to each of these kinds of proceedings will vary.

(ii) Disciplinary Proceedings

[53] The purposes of disciplinary bodies are to protect the public, to regulate the profession and to preserve public confidence in the profession: *The Legal Profession Act, 1990*, ss. 3.1 and 3.2; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513, at para. 36; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 16; *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500, at para. 17; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at pp. 887-88; *Wigglesworth*, at p. 560; G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (loose-leaf), at § 26:1. The client or patient is often in a vulnerable position in the professional relationship: *Pharmascience Inc.*, at para. 36; *Fortin*, at para. 17. The public places great trust in the advice and services of professionals: *Pharmascience Inc.*, at para. 36.

[54] Disciplinary proceedings are neither civil nor criminal, but rather *sui generis*: MacKenzie, at § 26:2; *Béliveau v. Barreau du Québec* (1992), 101 D.L.R. (4th) 324 (Qc C.A.). They maintain discipline within a limited sphere of private activity. Thus, as stated before, they differ from criminal matters, which are of a public nature, intended to promote order and welfare within a public sphere of activity: *Wigglesworth*, at p. 560; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 45.

[55] In disciplinary proceedings, inordinate delay can be harmful to members of professional bodies, complainants and the public in general. Allegations of misconduct against a member can weigh heavily on that person. They can overshadow his or her professional reputation, career and personal life. Anxiety and stress caused by the uncertainty of the outcome and the stigma attached to outstanding complaints are

ordinaire suffisent : *Vavilov*, par. 88. Forcément, les délais inhérents à chacun de ces types de procédures varieront.

(ii) Procédures disciplinaires

[53] Les organismes disciplinaires ont pour objectifs de protéger le public, de réglementer leur profession respective et de préserver la confiance du public envers ces professions : *The Legal Profession Act, 1990*, art. 3.1 et 3.2; *Pharmascience Inc. c. Binet*, 2006 CSC 48, [2006] 2 R.C.S. 513, par. 36; *Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17, par. 16; *Fortin c. Chrétien*, 2001 CSC 45, [2001] 2 R.C.S. 500, par. 17; *Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 887-888; *Wigglesworth*, p. 560; G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (feuilles mobiles), § 26:1. Le client ou le patient d'un professionnel est souvent dans une position de vulnérabilité dans sa relation avec celui-ci : *Pharmascience Inc.*, par. 36; *Fortin*, par. 17. Le public accorde une grande confiance aux conseils et aux services des professionnels : *Pharmascience Inc.*, par. 36.

[54] Les procédures disciplinaires ne sont ni des instances civiles ni des instances criminelles, mais plutôt des procédures *sui generis* : MacKenzie, § 26:2; *Béliveau c. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822 (C.A.). Elles visent à maintenir la discipline au sein d'une sphère d'activité privée et limitée. En conséquence, comme je l'ai expliqué précédemment, elles diffèrent des instances criminelles, qui sont de nature publique et visent à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique : *Wigglesworth*, p. 560; *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392, par. 45.

[55] Dans le cadre de procédures disciplinaires, un délai excessif peut être préjudiciable aux membres des organismes professionnels, aux personnes plaignantes et au public en général. Des allégations d'inconduite formulées contre un membre peuvent avoir de lourdes conséquences pour cette personne. Elles peuvent entacher sa réputation professionnelle, menacer sa carrière et nuire à sa vie personnelle. L'angoisse et

2022 SCC 29 (CanLII)

good reasons to investigate and prosecute in a timely way. Disciplinary bodies have a duty to deal fairly with members whose livelihood and reputation are affected by such proceedings: MacKenzie, at § 26:1.

le stress causés par l'incertitude quant à l'issue de telles procédures ainsi que la stigmatisation liée à des plaintes non résolues représentent de bonnes raisons d'enquêter et de poursuivre dans les meilleurs délais. Les organismes disciplinaires ont l'obligation de traiter équitablement les membres dont le gagne-pain et la réputation sont touchés par de telles procédures : MacKenzie, § 26:1.

[56] Complainants, whether patients or clients, benefit from having their case proceed promptly, so that they can be heard and move on to put the matter behind them. Finally, the public at large expects professionals guilty of misconduct to be effectively regulated and properly sanctioned. Given their role to protect the public from harmful professional conduct, disciplinary bodies must ensure that the public's concerns are addressed on a timely basis: *Wachtler v. College of Physicians and Surgeons (Alta.)*, 2009 ABCA 130, 448 A.R. 317, at paras. 46-47.

[56] Les personnes qui portent plainte, qu'il s'agisse de patients ou de clients, ont avantage à ce que leur affaire soit traitée rapidement, afin qu'elles puissent être entendues et passer à autre chose. Enfin, le public en général s'attend à ce que les professionnels qui sont coupables d'inconduite soient assujettis à une réglementation efficace et fassent l'objet de sanctions appropriées. Comme les organismes disciplinaires ont pour rôle de protéger le public contre des comportements professionnels préjudiciables, ils doivent veiller à répondre dans les meilleurs délais aux préoccupations du public : *Wachtler c. College of Physicians and Surgeons (Alta.)*, 2009 ABCA 130, 448 A.R. 317, par. 46-47.

(b) *The Length and Causes of the Delay*

b) *La longueur et les causes du délai*

[57] When an applicant submits that inordinate delay amounts to an abuse of process, courts and tribunals are called on first to ascertain the length and causes of the delay: *Blencoe*, at para. 122.

[57] Lorsqu'une partie demanderesse soutient qu'un délai excessif constitue un abus de procédure, les tribunaux judiciaires et administratifs doivent d'abord établir la longueur et les causes du délai : *Blencoe*, par. 122.

[58] The duty to be fair is relevant at all stages of administrative proceedings, including the investigative stage: D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (7th ed. 2020), at p. 285; Garant, at pp. 655-57; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; see, for example, *Blencoe*, at para. 123. When assessing the actual time period of delay, the starting point should be when the administrative decision maker's obligations, as well as the interests of the public and the parties in a timely process are engaged. It should end when the

[58] L'obligation d'équité est pertinente à toutes les étapes des procédures administratives, y compris à l'étape de l'enquête : D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (7e éd. 2020), p. 285; Garant, p. 655-657; *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; voir, p. ex., *Blencoe*, par. 123. Aux fins de détermination de la longueur véritable d'un délai, le point de départ est le moment où entrent en jeu les obligations du décideur administratif ainsi que l'intérêt du public et des parties à un processus se

2022 SCC 29 (CanLII)

proceeding is completed, including the time taken to render a decision.

déroulant dans les meilleurs délais. Le point final est le moment où la procédure est terminée, ce qui inclut le temps pris pour rendre la décision.

[59] As noted, a lengthy delay is not *per se* inordinate; it may be justifiable when considered in context. For instance, a case will sometimes involve parallel criminal and administrative proceedings. Some disciplinary proceedings involve allegations of conduct that may be criminal, such as sexual misconduct, fraud and obstruction of justice: MacKenzie, at § 26:5. In some circumstances, disciplinary bodies will proceed while the criminal proceeding are outstanding. In other circumstances, suspension of the disciplinary proceedings to await the conclusion of criminal proceedings can be justified. This can be consistent with procedural fairness and not constitute an abuse of process, even if the delay that results is lengthy.

[59] Comme je l'ai mentionné plus tôt, un long délai n'est pas en soi excessif; il peut être justifiable eu égard au contexte. Par exemple, il arrive parfois qu'une affaire donne lieu à des procédures criminelles et administratives parallèles. Certaines procédures disciplinaires reprochent des conduites qui peuvent être criminelles, telles des allégations d'inconduite sexuelle, de fraude ou d'entrave à la justice : MacKenzie, § 26:5. Dans certaines circonstances, les organismes disciplinaires vont de l'avant alors que des procédures criminelles sont en cours. Dans d'autres circonstances, il peut au contraire être justifié de suspendre les procédures disciplinaires en attendant la conclusion des procédures criminelles. Une telle suspension peut être conforme à l'équité procédurale et ne pas constituer un abus de procédure, même si le délai qui en résulte est long.

[60] In *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420 (leave to appeal refused, [2013] 2 S.C.R. xii), for example, allegations against the member involved multiple complainants who were likely to be called as similar fact witnesses in criminal proceedings. The College monitored progress of the criminal proceedings and proceeded to investigate when the criminal charges were stayed. This added to the time for the disciplinary process. However, as the Court of Appeal concluded, it would have been impractical and unfair to the member for the College to pursue disciplinary proceedings arising from the allegations of misconduct against him without waiting for the criminal proceedings to be resolved: para. 245.

[60] Par exemple, dans l'arrêt *Sazant c. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420 (autorisation d'appel refusée, [2013] 2 R.C.S. xii), les allégations formulées contre le membre concernaient plusieurs personnes plaignantes qui étaient susceptibles d'être appelées comme témoins de faits similaires dans le cadre de procédures criminelles. L'Ordre des médecins et chirurgiens de l'Ontario a suivi le déroulement des procédures criminelles et a procédé à une enquête une fois qu'un arrêt des procédures a été ordonné relativement aux accusations criminelles. Cela a eu pour effet d'allonger le processus disciplinaire. Cependant, comme a conclu la Cour d'appel, il aurait été irréaliste et inéquitable envers le membre que l'Ordre poursuive les procédures disciplinaires découlant des allégations d'inconduite criminelles formulées contre lui sans attendre que les procédures criminelles aient été résolues : par. 245.

[61] Besides considering the duration of the delay, the court or tribunal should consider the causes of the delay. This includes whether the applicant contributed to or waived parts of the delay: *Blencoe*, at para. 122.

[61] En plus de tenir compte de la longueur du délai, le tribunal judiciaire ou administratif doit également prendre en considération les causes du délai. Cela inclut la question de savoir si la partie demanderesse a contribué au délai ou renoncé à certaines parties de celui-ci : *Blencoe*, par. 122.

2022 SCC 29 (CanLII)

[62] If the delay was caused by the party who complains of that delay, it *cannot* amount to an abuse of process: *Blencoe*, at para. 125; *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221, 39 B.C.L.R. (6th) 87, at para. 50; *Camara v. Canada*, 2015 FCA 43, 91 Admin. L.R. (5th) 13, at paras. 13-14. Nor will there be unfairness if the delay is an inherent part of a fair process.

[63] Delay can be waived. This can be explicit or implicit. Thus, if the applicant asked for suspension of the proceedings, or did not object to a suspension of proceedings while other investigations proceeded and acted in a way that unequivocally suggests they acquiesced to such delay, it can constitute a waiver: *Diaz-Rodriguez*, at para. 51.

[64] Finally, whether the administrative body used its resources efficiently should be considered in the analysis of inordinate delay. That said, insufficient agency resources cannot excuse inordinate delay in any case: *Blencoe*, at para. 135. Administrative tribunals have a duty to devote adequate resources to ensure the integrity of the process: see *Hennig v. Institute of Chartered Accountants (Alta.)*, 2008 ABCA 241, 433 A.R. 221, at para. 31.

[65] In sum, the requirements of procedural fairness sometimes slow the pace at which the proceedings progress. Whether the resulting delays are justified will depend on the circumstances of each case.

(c) *The Complexity of the Facts and Issues in the Case*

[66] The complexity of the facts and issues in a case will affect the time required to decide the matter. For example, sexual abuse allegations might entail difficult and time-consuming investigations. By contrast, large numbers of documents do not necessarily entail complexity, especially in a routine case dealing with issues in which the tribunal has experience. Assessing

[62] Si le délai a été causé par la partie qui se plaint de celui-ci, le délai *ne peut pas* constituer un abus de procédure : *Blencoe*, par. 125; *Diaz-Rodriguez c. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221, 39 B.C.L.R. (6th) 87, par. 50; *Camara c. Canada*, 2015 CAF 43, par. 13-14 (CanLII). Le délai ne sera pas non plus inéquitable s'il représente un aspect inhérent à un processus équitable.

[63] Il est possible de renoncer à un délai, que ce soit de manière explicite ou implicite. Par conséquent, si la partie demanderesse requiert la suspension des procédures ou qu'elle ne s'y est pas opposée en attendant que d'autres enquêtes soient menées et qu'elle a agi d'une manière indiquant sans équivoque qu'elle a acquiescé à un tel délai, cela peut constituer une renonciation : *Diaz-Rodriguez*, par. 51.

[64] Enfin, la question de savoir si l'organisme administratif a utilisé ses ressources efficacement doit être considérée lors de l'analyse du délai excessif. Cela dit, le fait que l'organisme dispose de ressources insuffisantes ne saurait jamais justifier un délai excessif : *Blencoe*, par. 135. Les tribunaux administratifs ont l'obligation de consacrer les ressources adéquates afin d'assurer l'intégrité du processus : voir *Hennig c. Institute of Chartered Accountants (Alta.)*, 2008 ABCA 241, 433 A.R. 221, par. 31.

[65] En résumé, les exigences en matière d'équité procédurale ralentissent parfois le rythme auquel se déroulent les procédures. La question de savoir si les délais qui en découlent sont justifiés dépendra des circonstances de chaque affaire.

c) *La complexité des faits de l'affaire et des questions en litige*

[66] La complexité des faits d'une affaire et des questions en litige aura une incidence sur le temps requis pour trancher cette affaire. Par exemple, des allégations d'agression sexuelle pourraient entraîner des enquêtes longues et difficiles. Par contraste, une grande quantité de documents n'est pas nécessairement synonyme de complexité, particulièrement dans

2022 SCC 29 (CanLII)

inordinate delay must account for the wide range of contexts in the administrative system.

le cas d'une affaire courante concernant des questions à l'égard desquelles le tribunal possède de l'expérience. Pour déterminer si un délai est excessif ou non, il faut tenir compte de la grande variété de contextes qui caractérise le système de justice administrative.

(6) Second Requirement: Significant Prejudice

(6) Deuxième condition : un préjudice important

[67] The requirement for significant prejudice is grounded in the foundations of the doctrine of abuse of process in administrative law. If delay alone was sufficient to lead to an abuse of process, it would be "tantamount to imposing a judicially created limitation period": *Blencoe*, at para. 101. It is only where there is *detriment* to an individual that a court or a tribunal will conclude that there has been an abuse of process: *Blencoe*, at para. 109; *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), 1994 CarswellBC 2980 (WL); *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 27 B.C.L.R. (3d) 34 (S.C.); *Misra v. College of Physicians & Surgeons of Saskatchewan*, (1988), 52 D.L.R. 477 (Sask. C.A.). Furthermore, in some cases, delay by itself may be beneficial to the affected party. For example, if the affected party is facing the penalty of disbarment, delay in the administrative process might be welcomed by the affected party, insofar as it enables him or her to continue practicing. These are some of the reasons why the doctrine of abuse of process as it relates to administrative delay requires proof of significant prejudice.

[67] La condition requérant l'existence d'un préjudice important découle des fondements de la doctrine de l'abus de procédure en droit administratif. Si le délai suffisait à lui seul pour entraîner un abus de procédure, cela « reviendrait à imposer une prescription d'origine judiciaire » : *Blencoe*, par. 101. Ce n'est que lorsque le délai est au *détriment* de la partie touchée qu'un tribunal judiciaire ou administratif conclura à l'abus de procédure : *Blencoe*, par. 109; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), 1994 CarswellBC 2980 (WL); *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 27 B.C.L.R. (3d) 34 (C.S.); *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (C.A. Sask.). En outre, il arrive parfois que le délai soit lui-même bénéfique pour la partie touchée. Par exemple, si celle-ci est passible de radiation du barreau, elle pourrait accueillir favorablement les délais dans le déroulement des procédures administratives, dans la mesure où ils lui permettent de continuer à exercer. Voilà quelques-unes des raisons pour lesquelles, en ce qui concerne les délais administratifs, la doctrine de l'abus de procédure exige la preuve d'un préjudice important.

[68] The reality is that an investigation or proceeding against an individual tends to disrupt his or her life. This was so in *Blencoe*, where the majority acknowledged that Mr. Blencoe and his family had suffered prejudice from the moment that sexual harassment allegations against him were made public. The Court concluded, however, that such prejudice could not be said to result directly from the delay in the human rights proceedings, but rather it resulted from the fact that such proceedings were undertaken: para. 133. It is the prejudice caused by inordinate

[68] La réalité est qu'une enquête ou des procédures visant une personne tendent à perturber sa vie. C'était le cas dans l'affaire *Blencoe*, dans laquelle les juges majoritaires ont reconnu que M. Blencoe et sa famille avaient subi un préjudice dès que les allégations de harcèlement sexuel formulées contre lui avaient été rendues publiques. La Cour a toutefois conclu qu'on ne pouvait pas dire que ce préjudice résultait directement du délai qui avait caractérisé les procédures en matière de droits de la personne. Il découlait plutôt du fait que de telles procédures avaient été engagées :

2022 SCC 29 (CanLII)

delay that is relevant to the abuse of process analysis. That said, prejudice caused by the investigation of or proceedings against an individual can be exacerbated by inordinate delay. That is to be taken into account: paras. 68-73 and 133.

par. 133. C'est le préjudice causé par le délai excessif qui est pertinent dans l'analyse relative à l'abus de procédure. Cela dit, le préjudice causé à une personne par l'enquête ou les procédures dont elle fait l'objet peut être exacerbé par un délai excessif. Cela doit être pris en compte : par. 68-73 et 133.

[69] Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention, especially given technological developments, the speed at which information can travel today and how easy it is to access.

[69] L'existence ou non d'un préjudice est une question de fait. Par exemple, il peut s'agir d'un préjudice psychologique important, d'une réputation entachée, d'une vie familiale perturbée ou encore de la perte d'un emploi ou d'occasions d'affaires. Le préjudice peut également prendre la forme d'une attention médiatique prolongée et envahissante, particulièrement en raison des progrès technologiques, de la vitesse à laquelle l'information peut circuler de nos jours et de la facilité avec laquelle il est possible d'y accéder.

[70] In *Misra*, a doctor was suspended from practice for almost six years, while the College of Physicians and Surgeons chose to wait for years for the completion of criminal proceedings against him before proceeding with the disciplinary process. The criminal proceedings were eventually abandoned. Dr. Misra's reputation had suffered; he had been unable to practice his profession; his professional prospects were diminished.

[70] Dans l'arrêt *Misra*, un médecin s'est vu suspendre son droit de pratiquer pendant presque six ans, parce que l'ordre des médecins et chirurgiens concerné avait décidé d'attendre pendant des années la fin des procédures criminelles engagées contre lui avant de poursuivre le processus disciplinaire. Les procédures criminelles ont finalement été abandonnées. La réputation du Dr Misra avait été entachée, il avait été incapable d'exercer sa profession et ses perspectives professionnelles avaient été réduites.

[71] In *Investment Dealers Association of Canada v. MacBain*, 2007 SKCA 70, 299 Sask. R. 122, lengthy delays exacerbated the harm to the applicant's reputation by publicity from a disciplinary investigation. Profits from his business collapsed, then recovered to some degree as publicity around the initial investigation faded, only to be threatened again after the negative publicity around his business was revived years later when the notices of hearing were finally issued: paras. 40-41; see also *Financial and Consumer Services Commission v. Emond*, 2020 NBCA 42. This is the type of significant prejudice contemplated in *Blencoe*.

[71] Dans l'affaire *Investment Dealers Association of Canada c. MacBain*, 2007 SKCA 70, 299 Sask. R. 122, les longs délais ont exacerbé le préjudice causé à la réputation du demandeur par la publicité découlant de l'enquête disciplinaire. Les profits tirés de son entreprise ont chuté, puis se sont rétablis jusqu'à un certain point à mesure que la publicité entourant la première enquête s'est estompée, mais ils ont été menacés à nouveau après que la publicité négative entourant son entreprise ait recommencé des années plus tard, quand les avis d'audience ont fini par être diffusés : par. 40-41; voir aussi *Commission des services financiers et des services aux consommateurs c. Emond*, 2020 NBCA 42. Voilà le genre de préjudice important envisagé dans l'arrêt *Blencoe*.

2022 SCC 29 (CanLII)

(7) Conclusion: A Final Assessment

[72] The test for whether delay amounts to an abuse of process has three steps. First, the delay must be inordinate. This is determined on an assessment of the context overall. Second, the delay must have caused significant prejudice. When these two requirements are met, the court or tribunal is to conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.

[73] When an abuse of process is found, several remedies are available.

C. *Remedies*

(1) Introduction to Remedies for Abuse of Process

[74] Courts and tribunals must be mindful as to appropriate remedies in the various contexts in which abuse of process can occur: *Blencoe*, at para. 117; *O'Connor*, at para. 66, per L'Heureux-Dubé J., writing for a unanimous Court on this point. In this judgment, I will address the main remedies. The list that follows is not intended to be exhaustive.

[75] Remedies for abuse of process can serve several purposes. They can compensate the applicant for the prejudice caused by the delay. They can serve as an incentive for the decision maker to address any problems of systemic delay. Remedies can also express the court or the tribunal's concern relating to delay in the administrative system.

[76] As noted, the doctrine of abuse of process is broad; it can usefully be appreciated on a spectrum: see, in criminal matters, *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 107. Various remedies are available, up to and including a permanent stay

(7) Conclusion : une évaluation finale

[72] L'analyse permettant de déterminer si un délai constitue un abus de procédure comporte trois volets. Premièrement, le délai doit être excessif. Pour déterminer si un délai est excessif, il faut évaluer le contexte dans son ensemble. Deuxièmement, le délai doit avoir causé un préjudice important. Lorsque ces deux conditions sont réunies, le tribunal judiciaire ou administratif doit procéder à une évaluation finale afin de déterminer si l'abus de procédure est établi. L'abus de procédure sera établi si le délai est manifestement injuste envers la partie aux procédures ou s'il déconsidère d'une autre manière l'administration de la justice : *Behn*, par. 40-41.

[73] Lorsqu'un abus de procédure a été établi, plusieurs réparations peuvent être accordées.

C. *Réparations*

(1) Introduction aux réparations en cas d'abus de procédure

[74] Les tribunaux judiciaires et administratifs doivent examiner attentivement les réparations qui sont appropriées dans les divers contextes susceptibles de donner lieu à un abus de procédure : *Blencoe*, par. 117; *O'Connor*, par. 66, la juge L'Heureux-Dubé, qui exprimait l'opinion unanime de la Cour sur ce point. Dans le présent jugement, je vais examiner les principales réparations. La liste qui suit ne se veut pas exhaustive.

[75] Les réparations accordées en cas d'abus de procédure peuvent viser différents objectifs. Elles peuvent indemniser la partie demanderesse du préjudice que lui a causé le délai. Elles peuvent inciter le décideur à s'attaquer à des problèmes de délai systémique. Elles peuvent aussi exprimer les préoccupations du tribunal judiciaire ou administratif concerné à l'égard des délais dans le système de justice administrative.

[76] Comme je l'ai mentionné précédemment, la doctrine de l'abus de procédure est un vaste concept, et il peut être utile de l'examiner selon une échelle de gravité : voir, en matière criminelle, *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 107. Diverses

2022 SCC 29 (CanLII)

of proceedings. However, when this high threshold is not met, when there is inordinate delay and resulting prejudice, but it is "not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency" (*Regan*, at para. 107), then other remedies are available.

formes de réparation peuvent être accordées, pouvant aller jusqu'à l'arrêt des procédures de façon permanente. Cependant, lorsque le seuil élevé requis pour donner ouverture à cette réparation n'est pas atteint, c'est-à-dire lorsqu'il y a eu un délai excessif et qu'il en a résulté un préjudice, mais que l'abus « ne serait pas important au point qu'une procédure engagée dans son sillage puisse, en soi, choquer le sens de l'équité et de la décence de la société » (*Regan*, par. 107), alors d'autres réparations existent.

[77] Before addressing various remedies for delay amounting to abuse of process, I would make two preliminary points.

[77] Avant d'examiner les diverses réparations susceptibles d'être accordées en cas de délai constituant un abus de procédure, j'aimerais formuler deux remarques préliminaires.

(a) *Internal tribunal procedure*

a) *Les procédures internes des tribunaux administratifs*

[78] Addressing delay is an obligation on all parties. As soon as delay becomes a concern, the affected party should seek to use all available procedures to move matters forward. The tribunal may often have internal procedures for dealing with delay; the party complaining of delay should avail itself of these. Even if there are no such procedures, the affected party should raise the issue of delay on the record, by means such as correspondence or oral submissions.

[78] La recherche de solutions aux délais est une obligation qui incombe à toutes les parties. Dès qu'un délai devient préoccupant, la partie concernée devrait s'efforcer de recourir à toutes les procédures à sa disposition pour faire progresser les choses. Il arrive souvent que les tribunaux administratifs disposent de procédures internes pour remédier aux délais, et la partie qui se plaint d'un délai devrait s'en prévaloir. Même en l'absence de telles procédures, la partie concernée devrait faire consigner au dossier sa préoccupation à l'égard des délais, par exemple par voie de correspondance ou d'observations orales.

[79] In most cases, the affected party should avail itself of the tribunal procedures first. If the affected party does not act in a timely manner to raise concerns about delay, this may be considered in determining the relevant remedy. That said, in considering whether an affected party has sought to move matters forward, one has to be mindful of practical impediments to doing so: see, for example, *Wachtler*, at para. 44. There may be exceptional cases where the affected party may ask the courts to step in, in accordance with the existing rules.

[79] Dans la plupart des cas, la partie concernée devrait d'abord se prévaloir des procédures du tribunal administratif. Si elle n'agit pas en temps opportun pour exprimer ses préoccupations quant aux délais, cela peut être pris en compte dans la détermination de la réparation appropriée. Cela dit, pour décider si une partie concernée a tenté de faire progresser les choses, il faut être conscient des obstacles pratiques qui pourraient l'empêcher de le faire : voir, p. ex., *Wachtler*, par. 44. Il peut survenir des cas exceptionnels où la partie concernée peut demander aux tribunaux judiciaires d'intervenir, conformément aux règles existantes.

2022 SCC 29 (CanLII)

(b) *Mandamus*

[80] *Mandamus* can be sought to compel administrative decision makers to carry out their duties and, in so doing, to limit delay in administrative proceedings: *Blencoe*, at para. 150. A party who believes he or she is facing undue delay can seek such a remedy, or an order for an expedited hearing, even before an abuse of process exists, rather than "waiting in the weeds" in the hopes of obtaining a stay at some future point: *Blencoe*, at para. 182. *Mandamus* may also be ordered as a remedy for an abuse of process if one is found.

[81] My comments here do not intend to change any of the standards applicable for obtaining an order of *mandamus* generally. They merely affirm that it may also be an appropriate tool to prevent and address abuse of process.

[82] Also, if used at the right moment, the remedy of an expedited hearing can protect the interests of all parties: *Blencoe*, at para. 182; D. J. Mullan and D. Harrington, "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002), 27 *Queen's L.J.* 879, at pp. 908-9.

(2) Stay of Proceedings

[83] A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final"; the process will be permanently stayed: *Regan*, at para. 53. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should be granted only in the "clearest of cases", when the abuse falls at the high end of the spectrum of seriousness: *Blencoe*, at para. 120, citing *Power*, at p. 616.

[84] The decision whether to grant a stay involves a balancing of public interests. On one hand, the

b) *Le mandamus*

[80] Une ordonnance de *mandamus* peut être demandée afin de contraindre les décideurs administratifs à s'acquitter de leurs obligations et, ce faisant, à limiter les délais dans le déroulement des procédures administratives : *Blencoe*, par. 150. La partie qui se croit victime d'un délai injustifié peut demander une telle réparation, ou une ordonnance intimant la tenue d'une audience accélérée, même avant qu'un abus de procédure n'existe, plutôt que [TRADUCTION] « d'attendre en silence » dans l'espoir d'obtenir un arrêt des procédures à un moment ultérieur : *Blencoe*, par. 182. Une ordonnance de *mandamus* peut également être rendue afin de remédier à un abus de procédure dont l'existence a été constatée.

[81] Les remarques que je formule en l'espèce ne visent pas à modifier quelque norme applicable au prononcé d'une ordonnance de *mandamus* en général. Elles confirment simplement qu'une telle ordonnance peut constituer un autre moyen approprié de prévenir un abus de procédure et d'y remédier.

[82] De plus, si elle est utilisée au bon moment, la réparation que représente la tenue d'une audience accélérée peut protéger les intérêts de toutes les parties : *Blencoe*, par. 182; D. J. Mullan et D. Harrington, « The *Charter* and Administrative Decision-Making : The Dampening Effects of *Blencoe* » (2002), 27 *Queen's L.J.* 879, p. 908-909.

(2) L'arrêt des procédures

[83] L'arrêt des procédures est l'ultime réparation en cas d'abus de procédure. Elle est dite « ultime » parce que « définitive »; le processus sera arrêté de façon permanente : *Regan*, par. 53. Cela signifie, en matière disciplinaire, que des accusations ne seront pas examinées, que des plaintes ne seront pas entendues et que le public ne sera pas protégé. Vu ces conséquences, l'arrêt des procédures ne devrait être accordé que dans les « cas les plus manifestes », soit lorsque l'abus se situe à l'extrémité supérieure de l'échelle de gravité : *Blencoe*, par. 120, citant *Power*, p. 616.

[84] La décision d'accorder ou non un arrêt des procédures implique la mise en balance d'intérêts

2022 SCC 29 (CanLII)

public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On the other hand, the public has an interest in the resolution of administrative cases on the merits. A balance must be struck between the public interest in a *fair administrative process untainted by abuse* and the competing public interest in having the *complaint decided on its merits*: *Blencoe*, at paras. 118-21 and 154; *Conway*, at p. 1667; *Robertson v. British Columbia (Commissioner, Teachers Act)*, 2014 BCCA 331, 64 B.C.L.R. (5th) 258, at paras. 78-80; *Diaz-Rodriguez*, at paras. 71-73; *Law Society of Upper Canada v. Abbott*, 2017 ONCA 525, 139 O.R. (3d) 290, at paras. 61-63 (leave to appeal refused, [2018] 1 S.C.R. v).

publics. D'une part, le public a intérêt à s'assurer qu'un tribunal administratif constitué pour le protéger suit une procédure équitable et exempte d'abus de procédure. D'autre part, le public a intérêt à ce que les instances administratives soient décidées au fond. Un juste équilibre doit être établi entre l'intérêt du public à ce qu'il existe un *processus administratif équitable et exempt d'abus de procédure* et son intérêt opposé à ce que les *plaintes soient décidées au fond* : *Blencoe*, par. 118-121 et 154; *Conway*, p. 1667; *Robertson c. British Columbia (Commissioner, Teachers Act)*, 2014 BCCA 331, 64 B.C.L.R. (5th) 258, par. 78-80; *Diaz-Rodriguez*, par. 71-73; *Law Society of Upper Canada c. Abbott*, 2017 ONCA 525, 139 O.R. (3d) 290, par. 61-63 (autorisation d'appel refusée, [2018] 1 R.C.S. v).

[85] When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is *yes*, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public's interest in the proper administration of justice.

[85] En présence d'une instance qui a donné lieu à un abus de procédure, le tribunal judiciaire ou administratif doit se poser la question suivante : Continuer les procédures serait-il plus préjudiciable à l'intérêt public que les arrêter de façon permanente? Si la réponse est *oui*, alors l'arrêt des procédures devrait être ordonné. Dans le cas contraire, la demande d'arrêt des procédures devrait être rejetée. Dans le cadre de cette analyse, le tribunal judiciaire ou administratif peut se demander s'il est possible de recourir à d'autres réparations, moins radicales que l'arrêt des procédures, qui protégeraient adéquatement l'intérêt du public dans la bonne administration de la justice.

[86] A stay will be more difficult to obtain where the charges are more serious. For example, in *Diaz-Rodriguez*, a police officer faced disciplinary proceedings because he used a police baton to repeatedly strike a young man on the head. He also attempted, after the fact, to lay (apparently) unfounded charges, including assaulting a police officer; being intoxicated in a public place; and causing a disturbance: para. 72. The Court of Appeal concluded that in this context, the public interest in fairness in the administrative process did not outweigh the public interest in having the matter proceed to a resolution on its merits: para. 73 (see also: *Robertson*, at paras. 79-80; *R. (J.) v. College of Psychologists (British Columbia)* (1995), 33 Admin. L.R. (2d) 174 (B.C.S.C.), at para. 10). The same was also true in *Sazant*, in which Dr. Sazant faced allegations of sexual misconduct against children.

[86] L'arrêt des procédures sera plus difficile à obtenir en cas de graves accusations. Par exemple, dans l'affaire *Diaz-Rodriguez*, un policier faisait l'objet de procédures disciplinaires, parce qu'il avait frappé plusieurs fois à la tête un jeune homme au moyen d'un bâton de police. Après-coup, le policier avait également tenté de porter des accusations (apparemment) non fondées, notamment de voies de fait contre un agent de la paix, d'ivresse dans un lieu public et de tapage : par. 72. La Cour d'appel a conclu que, dans ce contexte, l'intérêt du public dans l'équité du processus administratif ne l'emportait pas sur son intérêt dans la tenue d'une audience au fond : par. 73 (voir aussi : *Robertson*, par. 79-80; *R. (J.) c. College of Psychologists (British Columbia)* (1995), 33 Admin. L.R. (2d) 174 (C.S. C.-B.), par. 10). Il en était de même dans l'affaire *Sazant*, où le Dr Sazant

2022 SCC 29 (CanLII)

There was a strong public interest in having the case considered on the merits, despite the length of the delay: para. 248.

[87] Even if rare, stays of proceedings are sometimes warranted. An example is *MacBain* where the charge against an investment dealer did not involve complex factual or legal issues, and he did not contribute to or waive the delay. As well, the Investment Dealers Association failed to provide an explanation for the delay (three years and eight months). When the Court of Appeal heard the case, almost seven years had passed since the commencement of the investigation. Moreover, the member was seriously affected, his business declined greatly, and his personal life was adversely impacted: para. 41.

[88] Finally, in the present case, the Court of Appeal considered that the absence of complainants was relevant in the weighing of competing interests; in effect, the absence of complainants favoured for a stay: paras. 209-10 (CanLII). I cannot agree. The *absence* of a complainant is a neutral factor. The public at large expects a professional who is guilty of misconduct to be effectively regulated and properly sanctioned. A professional misconduct hearing involves more than the interests of those affected; rather one needs to consider "the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies": *Adams v. Law Society of Alberta*, 2000 ABCA 240, 266 A.R. 157, at para. 6.

(3) Other Remedies: Reduction in Sanction and Costs

[89] When an abuse of process is established, but the abuse is not such that a stay of proceedings is warranted, other remedies may be appropriate: *Blencoe*, at para. 117; Brown and Evans, at § 9:60.

faisait l'objet d'allégations d'inconduite sexuelle envers des enfants. Il y avait un fort intérêt public à ce que l'affaire soit examinée au fond, malgré la longueur du délai : par. 248.

[87] Bien que cela soit rare, un arrêt des procédures est parfois justifié. Un exemple d'une telle situation est l'affaire *MacBain*, dans laquelle l'accusation portée contre un courtier en valeurs mobilières ne soulevait pas de questions de fait ou de droit complexes, et le défendeur n'avait ni contribué ni renoncé au délai. De plus, l'Association canadienne des courtiers en valeurs mobilières n'avait pas fourni d'explications pour justifier le délai (trois ans et huit mois). Lorsque la Cour d'appel a entendu l'affaire, presque sept ans s'étaient écoulés depuis le début de l'enquête. En outre, le membre concerné avait été sérieusement affecté, son entreprise avait considérablement décliné et sa vie personnelle avait été bouleversée : par. 41.

[88] Enfin, en l'espèce, la Cour d'appel a considéré que l'absence de personnes plaignantes était un facteur pertinent dans la mise en balance des intérêts opposés, de sorte que l'absence de personnes plaignantes militait effectivement en faveur d'un arrêt des procédures : par. 209-210 (CanLII). Je ne suis pas d'accord. L'*absence* de personnes plaignantes est un facteur neutre. Le public en général s'attend à ce que les professionnels qui se rendent coupables d'inconduites soient réglementés de manière effective et fassent l'objet de sanctions appropriées. L'audition d'une plainte d'inconduite professionnelle déborde les seuls intérêts des personnes touchées; il faut plutôt tenir compte de [TRADUCTION] « l'incidence de l'inconduite de l'individu en cause à la fois sur le client concerné et sur la profession en question en général. Cette dimension publique revêt une importance cruciale relativement à la mission des organismes disciplinaires professionnels » : *Adams c. Law Society of Alberta*, 2000 ABCA 240, 266 A.R. 157, par. 6.

(3) Autres réparations : la réduction de la sanction et l'adjudication de dépens

[89] Lorsqu'un abus de procédure est établi, mais que l'abus n'est pas tel qu'un arrêt des procédures est justifié, d'autres réparations peuvent être appropriées : *Blencoe*, par. 117; Brown et Evans, § 9:60.

2022 SCC 29 (CanLII)

[90] The threshold to grant such remedies will be lower than that required for a stay. While proof of significant prejudice is required to establish an abuse of process, the remedies ordered may vary according to the degree of prejudice. A high degree of prejudice may justify a stay. Lesser, but nevertheless significant prejudice, could justify other remedies. In such cases, the public interest can be properly served by continuation of the proceedings, while the applicant receives some compensation for the abuse that he or she suffered.

[90] Le seuil à atteindre pour obtenir de telles réparations est moins élevé que celui requis pour obtenir un arrêt des procédures. Bien que la preuve d'un préjudice important soit nécessaire afin d'établir l'existence d'un abus de procédure, la réparation ordonnée peut varier en fonction du degré de préjudice constaté. Un degré élevé de préjudice peut justifier un arrêt des procédures, alors qu'un préjudice de degré moindre, mais néanmoins important, pourrait justifier d'autres réparations. Dans de tels cas, l'intérêt public peut être adéquatement servi par la continuation des procédures, tout en s'assurant que la partie demanderesse reçoit une certaine forme de compensation pour l'abus dont elle a souffert.

[91] In the context of a disciplinary tribunal, I will address two further remedies: a reduction in sanction and/or costs.

[91] Dans le contexte des tribunaux disciplinaires, je vais examiner deux autres réparations : la réduction de la sanction et/ou l'adjudication de dépens.

(a) *Reduction in Sanction*

a) *La réduction de la sanction*

[92] When a member is found guilty of professional misconduct, the tribunal must determine the appropriate sanction.

[92] Lorsqu'un membre est reconnu coupable d'inconduite professionnelle, le tribunal doit déterminer la sanction qu'il convient d'infliger.

[93] As noted, the Law Society's disciplinary process has as its purposes the protection of the public, regulation of the profession and preservation of public confidence in the legal profession. These purposes are relevant to deciding the sanction to be imposed.

[93] Comme je l'ai mentionné précédemment, le processus disciplinaire du Barreau a pour objectifs de protéger le public, de réglementer la profession et de préserver la confiance du public envers la profession juridique. Ces objectifs sont pertinents afin de déterminer la sanction devant être infligée.

[94] A wide range of penalties is possible, from a reprimand to a lifetime revocation of a licence to practice. Various factors, including the presence of an abuse of process, can be considered when determining the appropriate sanction (see J. T. Casey, *The Regulation of Professions in Canada* (loose-leaf), at § 14:3; J. G. Villeneuve et al., *Précis de droit professionnel* (2007), at pp. 246-49; MacKenzie, at § 26:18). Since *Blencoe*, numerous tribunals and courts have taken abuse of process into account as an attenuating factor in deciding an appropriate sanction.

[94] Un large éventail de sanctions sont possibles, allant de la réprimande à la révocation permanente du permis d'exercice. Divers facteurs, incluant la présence d'un abus de procédure, peuvent être pris en considération dans la détermination de la sanction appropriée (voir J. T. Casey, *The Regulation of Professions in Canada* (feuilles mobiles), § 14:3; J. G. Villeneuve et autres, *Précis de droit professionnel* (2007), p. 246-249; MacKenzie, § 26:18). Depuis l'arrêt *Blencoe*, de nombreux tribunaux judiciaires et administratifs ont pris en compte l'abus de procédure comme facteur atténuant dans la détermination de la sanction appropriée.

2022 SCC 29 (CanLII)

[95] *Wachtler* provides an example of how delay can be a factor in determining what disciplinary sanctions should be imposed. The Court of Appeal reduced the member's penalty given the length of the proceedings. The member had received a penalty including a three-month suspension and a costs award against him following disciplinary proceedings by the College of Physicians and Surgeons: paras. 9-10. The Court of Appeal found that the College had failed to properly consider the lengthy delay in the case. The Court of Appeal concluded that although the member had shown that he suffered some prejudice, he was unable to demonstrate that the prejudice was such as would justify a stay: para. 36. Instead, the Court of Appeal reduced the sentence to a one-month suspension (which had already been served) and set aside the costs award: paras. 45-46 and 49.

[95] L'arrêt *Wachtler* offre un exemple de la manière dont le délai peut constituer un facteur dans la détermination des sanctions disciplinaires à infliger. Dans cette affaire, la Cour d'appel a réduit la sanction infligée au membre en cause en raison de la durée des procédures. Au terme des procédures disciplinaires engagées contre lui par l'ordre des médecins et chirurgiens, le membre s'était vu infliger une sanction comportant une suspension de trois mois et une condamnation à verser des dépens : par. 9-10. La Cour d'appel a conclu que l'ordre des médecins et chirurgiens n'avait pas tenu compte adéquatement du long délai dans cette affaire. Elle a également conclu que, bien que le membre ait établi qu'il avait subi un certain préjudice, il avait été incapable de démontrer que ce préjudice était tel qu'un arrêt des procédures était justifié : par. 36. La Cour d'appel a plutôt réduit la sanction à une suspension d'un mois (que le membre avait déjà purgée) et annulé la condamnation à verser des dépens : par. 45-46 et 49.

[96] The threshold for a reduction in the sanction will be particularly high when the presumptive penalty is licence revocation. Given the gravity of the misconduct generally required for such a penalty to be imposed, setting it aside might imperil public confidence in the administration of justice, rather than enhance it.

[96] Le seuil à atteindre pour obtenir la réduction de la sanction sera particulièrement élevé lorsque la sanction présumée est la révocation du permis. Vu la gravité du type d'inconduite habituellement requise pour justifier l'infliction de cette sanction, écarter celle-ci pourrait compromettre la confiance du public dans l'administration de la justice plutôt que la renforcer.

[97] For example, in *Abbott*, the Court of Appeal dealt with a lawyer who had engaged in professional misconduct where licence revocation was the presumptive penalty, as he had knowingly participated in mortgage fraud: para. 17. The Hearing Division of the Law Society Tribunal revoked the lawyer's licence to practice. Given the lengthy delay in the proceedings, the Appeal Division of the Law Society Tribunal reversed this decision, set aside the penalty of licence revocation and substituted a two-year suspension. The Divisional Court dismissed the appeal from the Appeal Division. The Court of Appeal allowed the appeal and reinstated the penalty of licence revocation: see paras. 88-90 and 98.

[97] Par exemple, dans l'arrêt *Abbott*, la Cour d'appel était saisie d'une affaire dans laquelle un avocat avait commis une inconduite professionnelle à l'égard de laquelle la sanction présumée était la révocation du permis, car il avait sciemment participé à une fraude hypothécaire : par. 17. La Section de première instance du Tribunal du Barreau a révoqué le permis d'exercice de l'avocat. Compte tenu du long délai qui s'était écoulé, la Section d'appel du Tribunal du Barreau a infirmé cette décision et a remplacé la révocation du permis par une suspension de deux ans. La Cour divisionnaire a rejeté l'appel de cette décision. La Cour d'appel a accueilli l'appel de cette décision et a rétabli la sanction de révocation du permis : par. 88-90 et 98.

2022 SCC 29 (CanLII)

[98] As noted, abuse of process can be viewed on a spectrum. To convert a presumptive licence revocation into a lesser penalty requires a significant abuse of process, one at the high end of the spectrum. Moreover, under no circumstances should the adjustment of the penalty undermine the purposes of the disciplinary process, notably the protection of the public and its confidence in the administration of justice. For these reasons, a remedy that substitutes a licence revocation for a lesser penalty will generally be as difficult to receive as a stay. Both may equally undermine a professional body's responsibility to regulate the profession.

(b) *Costs*

[99] Courts faced with applications for review of administrative delay have the discretion to set aside an order of costs against a party or to order costs against the administrative agency. This can be done in the exercise of the court's discretion relating to costs. As *Blencoe* illustrates, even where inordinate delay does not amount to abuse of process, it may still justify an award of costs against the agency: para. 136.

(4) Conclusion

[100] A stay of proceedings, a reduction in sanction, or variation of an award of costs are possible remedies. This is not an exhaustive list. Various tribunals may be empowered by their enabling statutes to grant other remedies. They should not hesitate to use such tools to combat inordinate delay amounting to an abuse of process.

V. Summary

[101] Where delay has not affected the fairness of a hearing, the test to determine if the delay amounts to an abuse of process has three steps:

[98] Comme il a été souligné plus tôt, l'abus de procédure peut être examiné selon une échelle de gravité. Pour qu'une sanction moins sévère puisse être substituée à la révocation présumée d'un permis, il faut être en présence d'un abus de procédure important, à l'extrémité supérieure de l'échelle de gravité. Qui plus est, en aucune circonstance l'ajustement de la sanction ne devrait avoir pour effet de compromettre les objectifs du processus disciplinaire, notamment la protection du public et la confiance de celui-ci dans l'administration de la justice. Pour ces raisons, il sera généralement tout aussi difficile d'obtenir une réparation substituant une sanction moins sévère à la révocation d'un permis que d'obtenir un arrêt des procédures. Ces deux réparations peuvent tout autant nuire à la responsabilité des organismes professionnels de réglementer la profession.

b) *L'adjudication de dépens*

[99] Les tribunaux judiciaires saisis de demandes de contrôle de délais administratifs ont le pouvoir discrétionnaire d'annuler une ordonnance condamnant une partie aux dépens ou d'ordonner que l'organisme administratif soit condamné aux dépens. Ils peuvent le faire dans l'exercice de leur pouvoir discrétionnaire relatif aux dépens. Comme le montre l'arrêt *Blencoe*, même dans les cas où le délai excessif n'équivaut pas à un abus de procédure, il peut tout de même justifier la condamnation de l'organisme aux dépens : par. 136.

(4) Conclusion

[100] L'arrêt des procédures, la réduction de la sanction ou la modification d'une ordonnance relative aux dépens représentent autant de possibles réparations. Il ne s'agit pas d'une liste exhaustive. Divers tribunaux disposent, en vertu de leur loi habilitante, du pouvoir d'accorder d'autres réparations. Ils ne devraient pas hésiter à se prévaloir de tels pouvoirs pour remédier à un délai excessif constituant un abus de procédure.

V. Résumé

[101] Dans les cas où un délai n'a pas eu d'incidence sur l'équité d'une audience, l'analyse permettant de déterminer si ce délai constitue un abus de procédure comporte trois volets :

2022 SCC 29 (CanLII)

1. First, the delay must be inordinate. This is determined on an assessment of the context overall, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case; and
2. Second, the delay itself must have caused significant prejudice;
3. When these two requirements are met, the court or tribunal should conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to a party to the litigation or in some other way brings the administration of justice into disrepute.

[102] When an abuse of process is found, various remedies are available. In rare cases, where going ahead with the proceeding results in more harm to the public interest than if the proceedings were halted, a permanent stay of proceedings will be justified. When this threshold is not met, other remedies exist, including reduction of sanction and a variation in any award of costs.

VI. Application to the Present Case

[103] The Hearing Committee found that the delay did not amount to an abuse of process given the complexity of the case, the scale of the investigation and the delay that could be attributed directly to Mr. Abrametz's conduct. The Hearing Committee also concluded that Mr. Abrametz failed to demonstrate that he suffered significant prejudice from the delay.

[104] The Court of Appeal substituted its own views with respect to the foregoing, and concluded that there had been an abuse of process such that a stay was warranted.

[105] The Court of Appeal did not err in identifying the applicable standard of review: paras. 71-75. However, it failed to apply it properly. Deference should have been accorded to the Hearing Committee as to its findings of fact and of mixed fact and law. It was not. Instead, the Court of Appeal made its own

1. Premièrement, le délai doit être excessif. Cette détermination se fait en appréciant le contexte dans son ensemble, y compris la nature et l'objet des procédures, la longueur et les causes du délai ainsi que la complexité des faits de l'affaire et des questions en litige.
2. Deuxièmement, le délai lui-même doit avoir causé un préjudice important.
3. Lorsque ces deux conditions sont réunies, le tribunal judiciaire ou administratif doit procéder à une évaluation finale afin de déterminer si l'abus de procédure a été établi. L'abus de procédure est établi si le délai est manifestement injuste envers une partie ou s'il déconsidère d'une autre manière l'administration de la justice.

[102] Lorsqu'un abus de procédure a été établi, diverses réparations peuvent être accordées. Dans de rares cas où continuer les procédures serait plus préjudiciable à l'intérêt public que les arrêter de façon permanente, l'arrêt des procédures sera justifié. Lorsque ce seuil n'est pas atteint, il existe d'autres réparations possibles, notamment la réduction de la sanction et la modification de quelque ordonnance relative aux dépens.

VI. Application à l'espèce

[103] Le Comité d'audition a conclu que le délai en cause ne constituait pas un abus de procédure vu la complexité de l'affaire, l'étendue de l'enquête et la portion du délai qui pouvait être attribuée directement à la conduite de Me Abrametz. Le Comité a également conclu que ce dernier n'avait pas démontré que le délai lui avait causé un préjudice important.

[104] La Cour d'appel a substitué ses propres conclusions à celles susmentionnées, et elle a jugé qu'il y avait eu un abus de procédure justifiant un arrêt des procédures.

[105] La Cour d'appel n'a pas commis d'erreur dans la détermination de la norme de contrôle applicable : par. 71-75. Toutefois, elle n'a pas appliqué cette norme correctement. Elle aurait dû faire montre de déférence à l'égard des conclusions de fait et des conclusions mixtes de fait et de droit tirées par le

2022 SCC 29 (CanLII)

findings of fact. With respect, this was not open to them.

[106] Regarding the remedy, the Court of Appeal purported to stay the proceedings; however, while it set aside the penalty and costs award imposed by the penalty decision, it allowed the findings of professional misconduct to stand: para. 217. This unusual result is more akin to a reduction in sanction, rather than a stay. Nonetheless, such an order could only have been made if there was an abuse of process in Mr. Abrametz's case. The three-step test I have previously described to determine if delay amounts to an abuse of process applies. As I will explain, none of the requirements were met.

A. *The Delay Was Long, But Not Inordinate*

[107] The audit started on December 4, 2012. The Hearing Committee heard the disciplinary matter between May and September of 2017, and rendered the conduct decision on January 10, 2018. Mr. Abrametz applied for a stay of proceedings on July 13, 2018, that is after the conduct decision, but before the Penalty Hearing was scheduled. The Penalty Hearing took place on September 18, 2018. In the same hearing, the Hearing Committee dealt with the application for a stay. The stay decision was rendered on November 9, 2018.

[108] From the start of the audit in December 4, 2012, to the stay decision, on November 9, 2018, about 71 months passed. This delay gives rise to serious concern. However, considered contextually, the delay was not inordinate.

[109] The Hearing Committee found that the delay in preparing the report was reasonable. In so doing it had regard to the complexity of the case and the scale of the investigation: at paras. 357 and 364 (CanLII). Further it found that the delay was caused largely by Mr. Abrametz; it noted that 14 ½ months

Comité d'audition. Elle ne l'a pas fait, tirant plutôt ses propres conclusions de fait. Avec égards, il ne lui était pas loisible de le faire.

[106] Pour ce qui est de la réparation, la Cour d'appel entendait arrêter les procédures; cependant, bien qu'elle ait annulé la sanction et la condamnation à verser des dépens prévue par la décision relative à la sanction, elle a laissé intactes les conclusions d'inconduite professionnelle : par. 217. Ce résultat inhabituel s'apparente davantage à une réduction de la sanction qu'à un arrêt des procédures. Néanmoins, une telle ordonnance pouvait uniquement être rendue s'il y avait eu abus de procédure dans le cas de Me Abrametz. L'analyse à trois volets que j'ai décrite précédemment pour déterminer si un délai constitue un abus de procédure s'applique en l'espèce. Comme je vais l'expliquer, aucune des conditions n'était remplie.

A. *Le délai a été long, mais pas excessif*

[107] La vérification a commencé le 4 décembre 2012. Le Comité d'audition a instruit l'affaire disciplinaire de mai à septembre 2017, et il a rendu la décision relative à la conduite professionnelle le 10 janvier 2018. Maître Abrametz a demandé l'arrêt des procédures le 13 juillet 2018, soit après que la décision relative à la conduite professionnelle a été rendue, mais avant que la date de l'audience sur la sanction ait été fixée. L'audience sur la sanction a eu lieu le 18 septembre 2018. Le Comité d'audition a examiné la demande d'arrêt des procédures lors de cette audience. La décision relative à l'arrêt des procédures a été rendue le 9 novembre 2018.

[108] Du début de la vérification, le 4 décembre 2012, jusqu'à la décision relative à l'arrêt des procédures, le 9 novembre 2018, il s'est écoulé environ 71 mois. Ce délai suscite d'importantes préoccupations. Toutefois, considéré dans son contexte, il n'était pas excessif.

[109] Le Comité d'audition a conclu que la partie du délai liée à la préparation du rapport était raisonnable. Pour tirer cette conclusion, il a tenu compte de la complexité de l'affaire et de l'ampleur de l'enquête : par. 357 et 364 (CanLII). Le Comité d'audition a également conclu que cette partie du délai avait

2022 SCC 29 (CanLII)

of delay were attributable to Mr. Abrametz or his counsel's unavailability: para. 360. It also considered Mr. Abrametz's application to put proceedings on hold pending a different matter before the Court of Queen's Bench, as well as Mr. Abrametz's complaint against Mr. Huber, the Law Society's disciplinary counsel, as contributing to delay: paras. 360-61.

dans une large mesure été causée par Me Abrametz; le Comité a souligné qu'une période de 14 ½ mois était attribuable à l'indisponibilité de Me Abrametz ou de son avocat : par. 360. De plus, il a jugé que la demande de Me Abrametz sollicitant la suspension des procédures en attendant l'issue d'une instance distincte devant la Cour du Banc de la Reine, ainsi que la plainte déposée par Me Abrametz contre Me Huber, l'avocat du Barreau en matière disciplinaire, avaient contribué au délai : par. 360-361.

[110] While the Court of Appeal acknowledged that it should defer to the Hearing Committee's findings of fact, it proceeded to do otherwise, on the basis that the Committee has made a series of palpable and overriding errors.

[110] Bien que la Cour d'appel ait reconnu qu'elle devait faire montre de déférence à l'égard des conclusions de fait du Comité d'audition, elle a décidé d'agir autrement, au motif que le Comité avait commis une série d'erreurs manifestes et déterminantes.

[111] The Court of Appeal concluded that the Hearing Committee committed such errors of fact both as to the scale and complexity of the investigation. In arriving at this conclusion, the Court of Appeal reviewed in detail the evidence presented before the Hearing Committee. The court acknowledged that the auditor, Mr. Allen, described his investigation as "considerable" and said it was "exceptionally difficult" and that he produced a final report of more than a thousand pages. However, it concluded that "volume and complexity are not the same". It found that there is little evidence of what Mr. Allen did during certain periods. The court determined that Mr. Allen should have finished his report by June 2013 based on the draft report (specifically its page count), the lack of "particulars" of what Mr. Allen did other than complete his trust report, and Mr. Huber's time records: paras. 182-88.

[111] La Cour d'appel a conclu que le Comité d'audition avait commis des erreurs factuelles, à la fois quant à l'ampleur et à la complexité de l'enquête. Pour parvenir à cette conclusion, la Cour d'appel a examiné en détail la preuve présentée au Comité d'audition. Elle a reconnu que le vérificateur, M. Allen, avait dit de son enquête qu'elle était [TRADUCTION] « considérable » et « exceptionnellement difficile », et que ce dernier avait produit un rapport définitif de plus de mille pages. Cependant, la Cour d'appel a néanmoins conclu que [TRADUCTION] « volume et complexité ne sont pas synonymes ». Elle a jugé qu'il y avait peu d'éléments de preuve indiquant ce que M. Allen avait fait pendant certaines périodes. La Cour d'appel a déterminé que M. Allen aurait dû terminer son rapport au plus tard en juin 2013, en se fondant sur le rapport préliminaire préparé par celui-ci (plus précisément le nombre de pages de ce rapport), sur l'absence de [TRADUCTION] « détails » sur ce que M. Allen avait fait à part terminer son rapport sur les comptes en fiducie, ainsi que sur des relevés de temps de Me Huber : par. 182-188.

[112] The Court of Appeal further proceeded to make its own findings by analyzing the evidence and, based on this, characterizing each time period so as to determine the time it considered to be undue delay.

[112] La Cour d'appel a ensuite tiré ses propres conclusions en analysant la preuve et, sur la base de celle-ci, en caractérisant chaque période afin de déterminer celles qu'elle considérait comme des délais injustifiés.

[113] One must ask, under a deferential standard of review, is this what appellate courts are called on

[113] Une question se pose : Est-ce bien là le rôle qui incombe aux cours d'appel dans l'application d'une

2022 SCC 29 (CanLII)

to do? The "primary role" of the Hearing Committee was "to weigh and assess voluminous quantities of evidence": *Housen*, at para. 18. An appellate court is not free to interfere with factual conclusions merely because it disagrees with the weight to be assigned to the underlying evidence: para. 23; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Hydro-Québec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *Hydro-Québec*, at para. 33; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33.

norme de contrôle commandant la déférence? Le « rôle principal » du Comité d'audition était « d'apprécier et de soupeser d'abondantes quantités d'éléments de preuve » : *Housen*, par. 18. Une cour d'appel n'est pas libre de modifier des conclusions factuelles simplement parce qu'elle n'est pas d'accord avec le poids à attribuer aux éléments de preuve à la base de la conclusion : par. 23; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352; *Hydro-Québec c. Matta*, 2020 CSC 37, [2020] 3 R.C.S. 595, par. 33. Une erreur est *manifeste* lorsqu'elle relève de l'évidence et qu'il n'est pas nécessaire de réexaminer toute la preuve pour s'en apercevoir; elle est *déterminante* lorsqu'elle a influencé la décision : *Hydro-Québec*, par. 33; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401, par. 55-56 et 69-70; *Salomon c. Matte-Thompson*, 2019 CSC 14, [2019] 1 R.C.S. 729, par. 33.

[114] The Court of Appeal departed from its proper role when it substituted its own findings of fact, notably on the scale and the complexity of the investigation. The Hearing Committee's conclusions were grounded in the evidence before it, in particular, the affidavit of the auditor of the Law Society, Mr. Allen. The Court of Appeal gave no deference to the Hearing Committee's findings, and simply reweighed this evidence and substituted its own findings.

[114] Lorsqu'elle a substitué ses propres conclusions de fait à celles du Comité d'audition, notamment concernant l'ampleur et la complexité de l'enquête, la Cour d'appel s'est écartée du rôle qui est le sien. Les conclusions du Comité d'audition étaient fondées sur la preuve dont il disposait, en particulier sur l'affidavit du vérificateur du Barreau, M. Allen. La Cour d'appel n'a fait montre d'aucune déférence à l'égard des conclusions du Comité d'audition; elle a simplement apprécié de nouveau cette preuve et substitué ses propres conclusions à celles du Comité.

[115] The Court of Appeal found that there were errors in the Hearing Committee's conclusions regarding the delay attributable to Mr. Abrametz: para. 193. However, the Hearing Committee's finding that, at a certain point, Mr. Abrametz stopped cooperating in the investigation was supported by uncontroverted evidence. There was no proper basis for the Court of Appeal to contradict the Hearing Committee's attribution of certain delays to Mr. Abrametz.

[115] La Cour d'appel a conclu que le Comité d'audition avait commis des erreurs dans ses conclusions concernant le délai attribuable à Me Abrametz : par. 193. Cependant, la conclusion du Comité d'audition selon laquelle Me Abrametz avait, à un certain moment, cessé de coopérer à l'enquête était appuyée par des éléments de preuve non contredits. Il n'existait aucun fondement valable justifiant la Cour d'appel d'annuler l'attribution par le Comité d'audition de certains délais à Me Abrametz.

[116] In short, applying the standard of palpable and overriding error, there was no proper basis for the Court of Appeal to set aside the Hearing Committee's findings that the delay was not inordinate.

[116] Bref, suivant la norme de l'erreur manifeste et déterminante, il n'existait aucun fondement valable justifiant la Cour d'appel d'écarter les conclusions du Comité d'audition selon lesquelles le délai n'était pas excessif.

2022 SCC 29 (CanLII)

B. *There Was No Significant Prejudice to Mr. Abrametz*

[117] Mr. Abrametz identified four types of prejudice that he said were caused by the delay: the media attention; the practice conditions; the impact on his health; and the impact on his family and employees. The Hearing Committee concluded that none of these claims, individually or cumulatively, amounted to significant prejudice that was caused by the delay. The Court of Appeal disagreed; it concluded that Mr. Abrametz suffered significant prejudice.

(1) Media Attention

[118] The Hearing Committee accepted that Mr. Abrametz's reputation suffered as a result of media attention, but concluded that he had failed to demonstrate that this arose from the delay rather than the fact that he was subject to investigation and prosecution. The adverse publicity occurred over a short period early in 2018. The Hearing Committee found that the hearing gave rise to media attention, rather than the period of the investigation which preceded it.

[119] The Court of Appeal concluded that the Hearing Committee erred by failing to consider that Mr. Abrametz practiced under a cloud of suspicion for more than four years. It considered, in particular, that members of the bar and Mr. Abrametz's staff knew that he was being investigated and was practicing under supervision as a result of misconduct allegations. This was so because the Law Society publishes information relating to disciplinary proceedings on its website.

[120] With respect, the issue is not whether the proceedings were disclosed as they were, but whether Mr. Abrametz suffered significant prejudice from such disclosure. The Hearing Committee found he suffered "some degree of stress", but not significant prejudice: para. 335. In all this, no palpable and overriding error

B. *Absence de préjudice important causé à Me Abrametz*

[117] Maître Abrametz a relevé quatre types de préjudices qui, soutenait-il, lui ont été causés par le délai : l'attention médiatique dont il a fait l'objet, les conditions assujettissant l'exercice de sa profession, les répercussions sur sa santé et les conséquences sur sa famille et son personnel. Le Comité d'audition a conclu qu'aucune de ces prétentions, individuellement ou cumulativement, ne constituait un préjudice important causé par le délai. La Cour d'appel a exprimé son désaccord avec cette conclusion; elle jugé que Me Abrametz avait subi un préjudice important.

(1) L'attention médiatique

[118] Le Comité d'audition a admis que la réputation de Me Abrametz avait souffert par suite de l'attention médiatique dont il a fait l'objet, mais a conclu que ce dernier n'avait pas démontré que ce préjudice découlait du délai plutôt que du fait qu'il faisait l'objet d'une enquête et d'une poursuite. La publicité défavorable était survenue durant une courte période au début de 2018. Le Comité d'audition a conclu que c'était l'audience, et non l'enquête qui l'avait précédée, qui avait suscité l'attention des médias.

[119] La Cour d'appel a conclu que le Comité d'audition a fait erreur en ne tenant pas compte du fait que Me Abrametz a exercé sa profession pendant plus de quatre ans alors que des soupçons pesaient sur lui. La Cour d'appel a estimé, en particulier, que les membres du Barreau et les employés de Me Abrametz savaient qu'il faisait l'objet d'une enquête et qu'il exerçait le droit sous supervision en raison d'allégations d'inconduite. Ces faits étaient connus parce que le Barreau publie sur son site Web de l'information concernant les procédures disciplinaires.

[120] Avec égards, la question n'est pas de savoir si les procédures ont été divulguées comme elles l'ont été, mais plutôt de savoir si Me Abrametz a subi un préjudice important par suite de cette divulgation. Le Comité d'audition a conclu qu'il avait subi [TRADUCTION] « un certain degré stress », mais non

2022 SCC 29 (CanLII)

was identified that warranted the Court of Appeal's substitution of its own view.

un préjudice important : par. 335. Dans l'ensemble, aucune erreur manifeste et déterminante justifiant la substitution par la Cour d'appel de sa propre conclusion à celle du Comité d'audition n'a été relevée.

(2) Practice Conditions

(2) Les conditions assujettissant l'exercice de sa profession

[121] Regarding the practice conditions, the Hearing Committee did not accept Mr. Abrametz's submission that these caused him significant prejudice; the Hearing Committee did so based on the fact that Mr. Abrametz consented to the conditions, they were not overly restrictive of his practice and they were consistent with the Law Society's mandate to protect the public. It also noted that most of the allegations against Mr. Abrametz were determined to be well founded. The Hearing Committee held that Mr. Abrametz had been unable to provide evidence that he suffered from the conditions in the five years before the disciplinary hearing. He had not argued that the practice conditions impacted his billings or his caseload or the time typically required by him to process his files. Thus, he had provided no evidence that the practice conditions significantly impacted the viability or profitability of his practice.

[121] En ce qui a trait aux conditions assujettissant l'exercice par Me Abrametz de sa profession, le Comité d'audition n'a pas retenu la prétention de Me Abrametz selon laquelle ces conditions lui avaient causé un préjudice important, étant donné que ce dernier avait consenti aux conditions en question, que celles-ci n'étaient pas indûment restrictives et qu'elles concordaient bien avec la mission de protection du public du Barreau. Le Comité d'audition a en outre souligné que la plupart des allégations formulées contre Me Abrametz avaient été jugées fondées. Le Comité a conclu que Me Abrametz avait été incapable de démontrer que les conditions lui avaient causé un préjudice au cours des cinq années précédant l'audience disciplinaire. Maître Abrametz n'avait pas plaidé que les conditions assujettissant l'exercice de sa profession avaient eu une incidence sur son chiffre d'affaires, sa clientèle ou le temps dont il a généralement besoin pour travailler à ses dossiers. Par conséquent, il n'avait présenté aucune preuve indiquant que ces conditions avaient eu des répercussions importantes sur la viabilité ou la rentabilité de son cabinet.

[122] The Court of Appeal took the view that neither Mr. Abrametz's consent to the conditions nor the fact that he was found guilty of most of the charges were relevant. However, the court failed to address the core of the Hearing Committee's analysis on this point, which turned on the lack of evidence of any prejudice resulting from the conditions. Mr. Abrametz was not suspended and he continued to practice until the hearing. Thus, the Court of Appeal failed to set out a proper basis for interfering with the finding that Mr. Abrametz did not suffer significant prejudice from the conditions on his practice.

[122] La Cour d'appel a estimé que ni le fait que Me Abrametz avait consenti aux conditions en question, ni le fait que ce dernier avait été reconnu coupable de la plupart des accusations n'étaient pertinents. Toutefois, la cour a omis de se pencher sur l'aspect central de l'analyse du Comité d'audition sur ce point, qui reposait sur l'absence de preuve de quelque préjudice résultant des conditions d'exercice imposées à Me Abrametz. Ce dernier n'a pas été suspendu, et il a continué d'exercer jusqu'à l'audience. En conséquence, la Cour d'appel n'a pas exposé de fondement valable pour justifier sa décision d'intervenir à l'égard de la conclusion selon laquelle Me Abrametz n'avait pas subi un préjudice important en raison des conditions assujettissant l'exercice de sa profession.

2022 SCC 29 (CanLII)

(3) The Impact on Mr. Abrametz's Health, Family and Employees

[123] The Hearing Committee was not persuaded that the minor medical condition complained of by Mr. Abrametz and the stress experienced by his family and employees were connected to the delay. Here again, no palpable and overriding error was identified that would justify the Court of Appeal's substitution of its own views.

(4) Conclusion on the Requirement of Significant Prejudice

[124] It was not shown that the Hearing Committee committed any palpable and overriding error when it concluded that Mr. Abrametz failed to demonstrate any significant prejudice. The Court of Appeal erred by interfering with its findings of fact and findings of mixed fact and law. Even if one could view the remedy ordered by the Court of Appeal as a reduction in sanction, and although the threshold to grant such remedy is lower than that required for a stay, proof of significant prejudice is nonetheless required as part of the three-step test to establish an abuse of process. There was no such proof in this case.

C. *Conclusion on Abuse of Process*

[125] Since the Hearing Committee has not been shown to have erred in its finding that there was no inordinate delay or significant prejudice to Mr. Abrametz, there is no basis to set aside its conclusion that there was no abuse of process in this case. Consequently, it is not necessary to proceed to the next step and consider what remedy should be ordered.

[126] Notwithstanding the foregoing, the actions of the Law Society were not above reproach. The Law Society is entrusted with self-regulation of the profession, and by extension an aspect of the rule of law. The Law Society should be keenly aware of the importance of justice being done in a timely way; it should make every effort to safeguard procedural

(3) Les répercussions sur la santé de Me Abrametz, sur sa famille et sur son personnel

[123] Le Comité d'audition n'était pas convaincu que le problème de santé mineur dont se plaignait Me Abrametz ainsi que le stress vécu par sa famille et son personnel étaient liés au délai. Ici encore, aucune erreur manifeste et déterminante justifiant la substitution par la Cour d'appel de ses propres conclusions à celles du Comité d'audition n'a été relevée.

(4) Conclusion sur la condition requérant un préjudice important

[124] Il n'a pas été établi que le Comité d'audition a commis une erreur manifeste et déterminante lorsqu'il a conclu que Me Abrametz n'avait pas démontré qu'il avait subi un préjudice important. La Cour d'appel a erré en modifiant les conclusions de fait et les conclusions mixtes de fait et de droit tirées par le Comité d'audition. Même si la réparation ordonnée par la Cour d'appel pouvait être considérée comme une réduction de la sanction, et bien que le seuil à atteindre pour obtenir cette réparation soit inférieur à celui exigé à l'égard d'un arrêt des procédures, la preuve d'un préjudice important est néanmoins requise dans le cadre de l'analyse à trois volets applicable pour déterminer s'il y a eu abus de procédure. Aucune preuve à cet effet n'a été présentée en l'espèce.

C. *Conclusion sur l'abus de procédure*

[125] Comme il n'a pas été démontré que le Comité d'audition a commis une erreur en concluant à l'absence de délai excessif ou de préjudice important subi par Me Abrametz, rien ne justifie d'annuler sa conclusion selon laquelle il n'y a pas eu abus de procédure en l'espèce. Par conséquent, il n'est pas nécessaire de procéder au volet suivant et de se demander quelle réparation devrait être ordonnée.

[126] Malgré ce qui précède, les actions du Barreau n'étaient pas irréprochables. Le Barreau s'est vu confier la responsabilité de veiller à l'autoréglementation de la profession, et par extension d'un aspect de la primauté du droit. Il devrait être pleinement conscient de l'importance que justice soit rendue en temps opportun; et il devrait déployer tous les

2022 SCC 29 (CanLII)

fairness. In all this, the Law Society should set an example for its own members.

VII. Conclusion

[127] I would allow the appeal, set aside the judgment of the Court of Appeal and remit the matter to the Court of Appeal to address the outstanding grounds of appeal. Costs are awarded to the Law Society in this Court and in the Court of Appeal.

The following are the reasons delivered by

CÔTÉ J. (dissenting) —

I. Overview

[128] I have had the opportunity to read the reasons of my colleague Rowe J. I disagree with the majority's disposition of this appeal. In my view, the delay in these proceedings amounted to an abuse of process, and the Saskatchewan Court of Appeal did not err in quashing the penalty for professional misconduct imposed on the respondent, Peter V. Abrametz (2020 SKCA 81). My disagreement with the majority, however, also extends to the legal principles governing the assessment of inordinate delay in administrative proceedings.

[129] Without referring to any precedents on procedural fairness review, my colleague relies on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, for the proposition that appellate standards of review apply in the present case. Yet our Court's jurisprudence is clear: the question of whether an administrative decision maker has complied with its duty of fairness is subject to the standard of correctness — regardless of the existence of an appeal mechanism. I see no reason to revisit this well-established starting point.

[130] Nor do I agree with the majority's reframing of the test for whether administrative delay amounts to an abuse of process. This Court recognized in *Blencoe*

efforts requis pour protéger l'équité procédurale. En ce sens, le Barreau devrait donner l'exemple à ses propres membres.

VII. Conclusion

[127] Je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel et de lui renvoyer l'affaire pour qu'elle examine les moyens d'appel restants. Le Barreau a droit aux dépens devant notre Cour et la Cour d'appel.

Version française des motifs rendus par

LA JUGE CÔTÉ (dissidente) —

I. Aperçu

[128] J'ai eu l'occasion de lire les motifs de mon collègue le juge Rowe. Je suis en désaccord avec le dispositif des juges majoritaires. À mon avis, le délai en l'espèce constituait un abus de procédure, et la Cour d'appel de la Saskatchewan n'a pas commis d'erreur en annulant la sanction pour inconduite professionnelle infligée à l'intimé, Peter V. Abrametz (2020 SKCA 81). Toutefois, mon désaccord avec les juges majoritaires concerne aussi les principes juridiques régissant l'appréciation du délai excessif dans les procédures administratives.

[129] Sans mentionner quelque précédent que ce soit sur le contrôle de l'équité procédurale, mon collègue se fonde sur l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, pour appuyer la thèse selon laquelle il faut recourir aux normes de contrôle applicables en l'appel dans ce pourvoi. Pourtant, la jurisprudence de notre Cour est claire : la question de savoir si un décideur administratif s'est acquitté de son obligation d'équité est soumise à la norme de la décision correcte — sans égard à l'existence d'un mécanisme d'appel. Je ne vois aucune raison de revenir sur ce point de départ bien établi.

[130] Je suis également en désaccord avec la reformulation, par les juges majoritaires, du test pour déterminer si un délai administratif constitue un

2022 SCC 29 (CanLII)

v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307, that inordinate delay — on its own — is a breach of procedural fairness and thus abusive. An applicant need not demonstrate "significant prejudice" for unfair conduct to constitute an abuse of process; this requirement applies only where a stay of proceedings is sought.

abus de procédure. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, notre Cour a reconnu qu'un délai excessif — à lui seul — porte atteinte à l'équité procédurale, et qu'il est de ce fait abusif. Il n'est pas nécessaire que le demandeur fasse la preuve d'un « préjudice important » pour qu'une conduite inéquitable constitue un abus de procédure; cette exigence s'applique uniquement lorsque l'arrêt des procédures est demandé.

[131] The case law on abuse of process confirms that this common law doctrine focuses on the integrity of the justice system rather than the particular interests of litigants. Inordinate delay, I stress, risks bringing the administration of justice into disrepute. For this reason alone, courts must sanction it whenever it is brought to their attention. They possess a wide range of remedial tools — including declarations, costs, orders for an expedited hearing, reductions in penalty, and stays of proceedings — to grant relief that is proportionate to the abuse of process. In determining the appropriate remedy, courts must consider the length, causes, and effects of delay as well as the public interest.

[131] La jurisprudence relative à l'abus de procédure confirme que cette doctrine de common law met l'accent sur l'intégrité du système de justice plutôt que sur les intérêts particuliers des parties à une instance. Un délai excessif, je le souligne, risque de déconsidérer l'administration de la justice. Pour cette seule raison, les tribunaux doivent sanctionner de tels délais chaque fois qu'ils sont portés à leur attention. Les tribunaux disposent d'un vaste éventail de mesures de redressement — notamment les jugements déclaratoires, l'adjudication de dépens, les ordonnances enjoignant de tenir une audience accélérée, les réductions de peine et les arrêts des procédures — afin d'accorder une réparation qui soit proportionnelle à l'abus de procédure. Dans le choix de la réparation appropriée, les tribunaux doivent prendre en compte la durée, les causes et les effets du délai, ainsi que l'intérêt public.

[132] Applying this framework to the case at bar, I agree with the analysis of the Court of Appeal. The appellant, the Law Society of Saskatchewan, subjected Mr. Abrametz to disciplinary proceedings spanning a period of more than 6 years, 32 ½ months of which remain unexplained. The delay grossly exceeded the inherent time requirements of this case; it is plainly inordinate and, as a result, abusive. This undue delay caused serious prejudice to Mr. Abrametz and also affected his employees, all of whom experienced additional stress from the unjustified extension of the proceedings.

[132] Appliquant ce cadre d'analyse au présent pourvoi, je souscris à l'analyse de la Cour d'appel. L'appelante, la Law Society of Saskatchewan (« Barreau »), a soumis Me Abrametz à des procédures disciplinaires qui ont duré plus de 6 ans, dont 32 ½ mois demeurent inexpliqués. Le délai a largement dépassé le temps intrinsèquement requis par cette affaire; il est manifestement excessif, et par le fait même abusif. Ce délai injustifié a causé un préjudice important à Me Abrametz et a aussi affecté ses employés, qui ont tous vécu du stress supplémentaire en raison de la prolongation injustifiée des procédures.

[133] In these circumstances, the Court of Appeal rightly sanctioned the Law Society's abuse of process by ordering that the penalty for Mr. Abrametz's professional misconduct be set aside. I would accordingly dismiss the appeal.

[133] Dans ces circonstances, c'est à bon droit que la Cour d'appel a sanctionné l'abus de procédure du Barreau en ordonnant l'annulation de la sanction infligée pour l'inconduite professionnelle de Me Abrametz. Je suis donc d'avis de rejeter le pourvoi.

2022 SCC 29 (CanLII)

II. Abuse of Process and Inordinate Delay in Administrative Proceedings

[134] I begin my analysis by discussing the framework for assessing abuse of process resulting from inordinate delay in administrative proceedings. I do so because the standard of review depends on the parameters of the test for abuse of process arising from administrative delay. Here, the majority posits that the final assessment of whether delay constitutes an abuse of process is a question of law subject to correctness review, but that findings made with respect to the "requirements" of this test, including inordinate delay, are entitled to deference. Yet as I explain, the doctrine of abuse of process is unencumbered by specific requirements at common law. Inordinate delay is one of the manifestations of abusive conduct that undermines the integrity of the justice system. Therefore, the test for abuse of process arising from administrative delay is based entirely on the "inordinate delay" standard, the application of which is a question of law.

[135] To be more specific, the majority purportedly relies on *Blencoe* in articulating a three-step test for determining whether delay in administrative proceedings amounts to an abuse of process. The test begins with two requirements: inordinate delay and significant prejudice caused by the delay. Where both requirements are met, there is a final step at which the court must assess whether the delay amounts to an abuse of process because it is manifestly unfair to a party or otherwise brings the administration of justice into disrepute.

[136] With respect, I am of the view that this framework rests on a mistaken understanding of the doctrine of abuse of process. Under the majority's approach, even inordinate delay that directly causes significant prejudice is not *per se* abusive, as the last step of its test indicates. Not only is this proposition doctrinally flawed, but it results in an unduly elevated standard that is disproportionate to the remedies available for abusive delay, which range from a mere declaration to a stay of proceedings. Simply put, the majority's

II. L'abus de procédure et le délai excessif en droit administratif

[134] Je commence mon analyse en discutant du cadre applicable pour évaluer l'abus de procédure résultant d'un délai administratif excessif. Je procède de la sorte parce que la norme de contrôle dépend des paramètres du test pour déterminer s'il y a abus de procédure découlant d'un délai administratif. En l'espèce, les juges majoritaires affirment que l'évaluation finale du caractère abusif ou non du délai est une question de droit assujettie à la norme de la décision correcte, mais que les conclusions tirées à l'égard des « exigences » de ce test, y compris le délai excessif, commandent la déférence. Pourtant, comme je l'explique, la doctrine de l'abus de procédure n'est encombrée d'aucune exigence spécifique en common law. Le délai excessif est l'une des manifestations de la conduite abusive qui mine l'intégrité du système de justice. Par conséquent, le test pour déterminer s'il y a abus de procédure découlant d'un délai administratif est fondé entièrement sur la norme du « délai excessif », dont l'application est une question de droit.

[135] Plus précisément, les juges majoritaires affirment se fonder sur l'arrêt *Blencoe* en formulant un test à trois volets pour déterminer si le délai dans des procédures administratives constitue un abus de procédure. L'analyse a pour point de départ deux exigences : le délai excessif et le préjudice important causé par le délai. Lorsqu'il est satisfait à ces deux exigences, le dernier volet requiert du tribunal qu'il examine si le délai équivaut à un abus de procédure parce qu'il est manifestement injuste envers une partie ou qu'il a autrement pour effet de déconsidérer l'administration de la justice.

[136] Avec égards, je suis d'avis que ce cadre d'analyse repose sur une compréhension erronée de la doctrine de l'abus de procédure. Suivant l'approche adoptée par les juges majoritaires, même le délai excessif qui cause directement un préjudice important n'est pas en soi abusif, comme l'indique le dernier volet de leur analyse. Non seulement cette proposition est-elle viciée sur le plan théorique, mais elle crée une norme indûment élevée qui est disproportionnée par rapport aux réparations disponibles en cas de délai

2022 SCC 29 (CanLII)

test is so onerous that it invites complacency in administrative proceedings.

[137] This Court rightly recognized in *Blencoe* that inordinate delay — on its own — is a breach of the duty of fairness. In my view, courts should distance themselves from such procedural unfairness by calling it what it is: an abuse of process. Prejudice is not a necessary condition for delay to be inordinate, although it may contribute to such a finding. Evidence of prejudice, I add, remains highly significant at the remedial stage, since the remedy must be proportionate to the abuse of process. This is consistent with the central principle laid down by the majority in *Blencoe* — namely that courts may grant a stay of proceedings only in the "clearest of cases", where the applicant has demonstrated significant prejudice arising from inordinate administrative delay.

A. *Doctrine of Abuse of Process at Common Law*

[138] The doctrine of abuse of process "has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process" (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 39; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35). This common law doctrine "is used in a variety of legal contexts" (*Toronto v. C.U.P.E.*, at para. 36; see also *Behn*, at para. 39). Moreover, the analysis of abuse of process at common law "dovetail[s]" with that of the procedural rights guaranteed in the *Canadian Charter of Rights and Freedoms* (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 50; see also *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 71). The remedies for abuse of process at common law may, however, diverge from those available under s. 24(1) of the *Charter* (*O'Connor*, at para. 68).

abusif, réparations qui vont du simple jugement déclaratoire à l'arrêt des procédures. En somme, l'analyse des juges majoritaires est si exigeante qu'elle invite à la complaisance dans les procédures administratives.

[137] Dans l'arrêt *Blencoe*, notre Cour a reconnu à juste titre que le délai excessif — à lui seul — est un manquement à l'obligation d'équité. À mon avis, les tribunaux doivent dénoncer une telle iniquité procédurale en l'appelant par son nom : un abus de procédure. Le préjudice n'est pas une condition nécessaire pour que le délai soit considéré comme excessif, bien qu'il puisse contribuer à une telle conclusion. J'ajoute que la preuve d'un préjudice demeure fort pertinente au stade de la réparation, puisque celle-ci doit être proportionnelle à l'abus de procédure. Cette démarche est compatible avec le principe fondamental qu'ont établi les juges majoritaires dans l'arrêt *Blencoe* — soit que les tribunaux ne peuvent ordonner l'arrêt des procédures que dans les « cas les plus manifestes », où le demandeur a prouvé l'existence d'un préjudice important découlant d'un délai administratif excessif.

A. *La doctrine de l'abus de procédure en common law*

[138] La doctrine de l'abus de procédure « émane du pouvoir discrétionnaire résiduel inhérent que possèdent les juges d'empêcher que les procédures du tribunal soient utilisées abusivement » (*Behn c. Moulton Contracting Ltd.*, 2013 CSC 26, [2013] 2 R.C.S. 227, par. 39; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 35). Cette doctrine de common law « s'applique dans des contextes juridiques divers » (*Toronto c. S.C.F.P.*, par. 36; voir aussi *Behn*, par. 39). Qui plus est, l'analyse de l'abus de procédure en common law et celle des droits procéduraux garantis par la *Charte canadienne des droits et libertés* « se rejoignent » (*R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 50; voir aussi *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 71). Cependant, les réparations accordées pour l'abus de procédure en common law peuvent diverger de celles pouvant être accordées en vertu du par. 24(1) de la *Charte* (*O'Connor*, par. 68).

2022 SCC 29 (CanLII)

[139] The doctrine of abuse of process "is characterized by its flexibility" and "is unencumbered by specific requirements" (*Behn*, at para. 40; see also *Toronto v. C.U.P.E.*, at para. 42). The test for abuse of process — in all of its applications — is whether the impugned conduct affects adjudicative fairness or would otherwise bring the administration of justice into disrepute (*Blencoe*, at para. 115; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at para. 106; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 68; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 49-50; *O'Connor*, at paras. 60-64; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31; *Regan*, at para. 49; *Behn*, at para. 39; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at paras. 36-40; *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). In sum, an abuse of process may arise from two often interrelated categories: adjudicative unfairness and harm to the integrity of the justice system.

[140] Abuse of process must be disentangled analytically from a stay of proceedings, which is but one of the remedies available at common law to redress abusive conduct (*Regan*, at para. 53; *Blencoe*, at para. 117; see also S. Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015), 71 *S.C.L.R.* (2d) 415, at pp. 425-29; F. Lowery, "Abuse of Process: The Need for Structure" (2014), 20 *Auckland U. L. Rev.* 223, at pp. 234 et seq.). It is crucial to draw this distinction because the threshold for demonstrating abusive conduct is much lower than the one for obtaining a stay of proceedings.

[141] This Court has established stringent requirements for granting a stay of proceedings due to the "drastic" nature of this remedy (*Regan*, at para. 53). It is only in the "clearest of cases" that courts may stay proceedings (*O'Connor*, at paras. 68 and 82; *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 52; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 59; *Blencoe*, at para. 118; *Regan*, at para. 53; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 17; *Babos*,

[139] La doctrine de l'abus de procédure « se caractérise par sa souplesse » et « ne s'encombre pas d'exigences particulières » (*Behn*, par. 40; voir aussi *Toronto c. S.C.F.P.*, par. 42). Le test pour déterminer s'il y a abus de procédure — dans tous les cas d'application possibles — consiste à se demander si la conduite contestée affecte l'équité juridictionnelle ou déconsidère autrement l'administration de la justice (*Blencoe*, par. 115; *Canada (Citoyenneté et Immigration) c. Harkat*, 2014 CSC 37, [2014] 2 R.C.S. 33, par. 106; *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566, par. 68; *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 49-50; *O'Connor*, par. 60-64; *R. c. Babos*, 2014 CSC 16, [2014] 1 R.C.S. 309, par. 31; *Regan*, par. 49; *Behn*, par. 39; *États-Unis d'Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587, par. 36-40; *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007; *R. c. Power*, [1994] 1 R.C.S. 601, p. 616). En somme, un abus de procédure peut découler de deux sources souvent interreliées : l'iniquité du processus juridictionnel et l'atteinte à l'intégrité du système de justice.

[140] Sur le plan analytique, il faut dissocier l'abus de procédure de l'arrêt des procédures, lequel ne représente qu'une des mesures de redressement pouvant être accordées en common law pour remédier à la conduite abusive (*Regan*, par. 53; *Blencoe*, par. 117; voir aussi S. Coughlan, « Threading Together Abuse of Process and Exclusion of Evidence : How it Became Possible to Rebuke Mr. Big » (2015), 71 *S.C.L.R.* (2d) 415, p. 425-429; F. Lowery, « Abuse of Process : The Need for Structure » (2014), 20 *Auckland U. L. Rev.* 223, p. 234 et suiv.). Il est essentiel de faire cette distinction, car le seuil à atteindre pour démontrer qu'il y a eu conduite abusive est beaucoup moins élevé que celui applicable à l'arrêt des procédures.

[141] Notre Cour a établi des exigences rigoureuses pour accorder l'arrêt des procédures, étant donné la nature « draconien[ne] » de cette réparation (*Regan*, par. 53). Ce n'est que dans les « cas les plus manifestes » que les tribunaux peuvent rendre une ordonnance en ce sens (*O'Connor*, par. 68 et 82; *R. c. Carosella*, [1997] 1 R.C.S. 80, par. 52; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, par. 59; *Blencoe*, par. 118; *Regan*, par. 53; *R. c. Nasogaluak*, 2010

2022 SCC 29 (CanLII)

at para. 31; *R. v. Sullivan*, 2022 SCCC 19, [2022] 1 S.C.R. 460, at para. 95). An applicant must satisfy the following test to obtain a stay:

(1) there must be prejudice to the fairness of the trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;

(2) there must be no alternative remedy capable of redressing the prejudice; and

(3) where it is unclear whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits (*Sullivan*, at para. 95; *Babos*, at para. 32; *Regan*, at paras. 54-57; *Tobiass*, at paras. 90-92; *O'Connor*, at paras. 75-82).

This test also applies to abusive delay in administrative proceedings, as indicated by Bastarache J.'s references to the "clearest of cases" threshold in *Blencoe*, at paras. 118 and 120.

[142] With respect, I am of the view that the majority's reasons conflate the doctrine of abuse of process with the test for stays of proceedings, which are only a subset of the remedies that courts may order to sanction abusive conduct. The majority thus fails to distinguish between, on the one hand, the test for whether conduct amounts to an abuse of process and, on the other hand, the test for whether a stay of proceedings is warranted in the circumstances (*O'Connor*, at para. 72). The former is flexible and unencumbered by particular requirements; the court must simply determine whether the impugned conduct undermines adjudicative fairness or the integrity of the justice system. The latter establishes an onerous threshold that is met only in the clearest of cases, where the applicant satisfies specific, stringent requirements.

CSC 6, [2010] 1 R.C.S. 206, par. 17; *Babos*, par. 31; *R. c. Sullivan*, 2022 CSC 19, [2022] 1 R.C.S. 460, par. 95). Un demandeur doit satisfaire au test suivant pour obtenir l'arrêt des procédures :

(1) il doit y avoir une atteinte à l'équité du procès ou à l'intégrité du système de justice qui sera révélée, perpétuée ou aggravée par le procès ou par son issue;

(2) il ne doit y avoir aucune autre réparation susceptible de remédier à l'atteinte;

(3) s'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, comme le fait de dénoncer la conduite répréhensible et de préserver l'intégrité du système de justice, et l'intérêt que représente pour la société un jugement définitif statuant sur le fond (*Sullivan*, par. 95; *Babos*, par. 32; *Regan*, par. 54-57; *Tobiass*, par. 90-92; *O'Connor*, par. 75-82).

Ce test s'applique également au délai abusif dans des procédures administratives, comme l'indiquent les mentions du seuil des « cas les plus manifestes » par le juge Bastarache dans l'arrêt *Blencoe*, par. 118 et 120.

[142] Avec égards, je suis d'avis que les motifs des juges majoritaires confondent la doctrine de l'abus de procédure avec l'analyse applicable aux arrêts des procédures, qui ne sont qu'un sous-ensemble des réparations que les tribunaux peuvent ordonner pour sanctionner une conduite abusive. Mes collègues majoritaires ne font donc pas la distinction entre, d'une part, le test pour déterminer si la conduite constitue un abus de procédure et, d'autre part, celui pour juger si un arrêt des procédures est justifié dans les circonstances (*O'Connor*, par. 72). Le premier test est souple et n'est encombré d'aucune exigence particulière; le tribunal n'a qu'à déterminer si la conduite contestée mine l'équité juridictionnelle ou l'intégrité du système de justice. Le second test établit un seuil élevé qui n'est atteint que dans les cas les plus manifestes, lorsque le demandeur satisfait à des exigences particulières rigoureuses.

2022 SCC 29 (CanLII)

[143] One final point concerning abuse of process is in order. This common law doctrine has always focused on the *integrity of the justice system* rather than the interests of particular litigants, as Arbour J. underscored in *Toronto v. C.U.P.E.*, at para. 43:

> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle. [Emphasis added.]

Stated differently, the doctrine of abuse of process "transcends the interests of litigants and focuses on the integrity of the entire system" (*Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149, at para. 12 (emphasis added); see also *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43, at para. 16).

[144] In other words, courts must condemn conduct that, if left unsanctioned, would "leave the impression that the justice system condones conduct that offends society's sense of fair play and decency" (*Babos*, at para. 35; see also *Toronto v. C.U.P.E.*, at para. 43). This is the primary concern addressed by the doctrine of abuse of process at common law, and it is independent of any prejudice suffered by litigants subject to such abusive conduct.

B. *Abusive Delay in Administrative Proceedings*

(1) Overview of the *Blencoe* Framework

[145] This Court's decision in *Blencoe* was a significant jurisprudential step in addressing the issue

[143] Une dernière observation s'impose à propos de l'abus de procédure. Cette doctrine de common law a toujours mis l'accent sur l'*intégrité du système de justice* plutôt que sur les intérêts des parties à une instance en particulier, comme l'a souligné la juge Arbour dans l'arrêt *Toronto c. S.C.F.P.*, par. 43 :

> Dans tous ses cas d'application, la doctrine de l'abus de procédure vise essentiellement à préserver l'intégrité de la fonction judiciaire. Qu'elle ait pour effet de priver le ministère public du droit de continuer la poursuite à cause de délais inacceptables (voir *Blencoe*, précité), ou d'empêcher une partie civile de faire appel aux tribunaux à mauvais escient (voir *Hunter*, précité, et *Demeter*, précité), l'accent est mis davantage sur l'intégrité du processus décisionnel judiciaire comme fonction de l'administration de la justice que sur l'intérêt des parties. Dans une affaire comme la présente espèce, c'est cette préoccupation qui commande d'interdire la remise en cause, plus que toute perception d'injustice envers une partie qui serait de nouveau appelée à faire la preuve de ses prétentions, par exemple. Cela compris, il est plus facile d'établir les paramètres de la doctrine et de définir les principes applicables à l'exercice du pouvoir discrétionnaire. [Je souligne.]

En d'autres termes, la doctrine de l'abus de procédure « transcende les intérêts des parties et s'attache à l'intégrité du système » (*Ontario c. S.E.E.F.P.O.*, 2003 CSC 64, [2003] 3 R.C.S. 149, par. 12 (je souligne); voir aussi *A.I.E.S.T., local de scène n° 56 c. Société de la Place des Arts de Montréal*, 2004 CSC 2, [2004] 1 R.C.S. 43, par. 16).

[144] Autrement dit, les tribunaux doivent condamner une conduite qui, à défaut d'être sanctionnée, « donnera[it] l'impression que le système de justice cautionne une conduite heurtant le sens du franc-jeu et de la décence qu'a la société » (*Babos*, par. 35; voir aussi *Toronto c. S.C.F.P.*, par. 43). Tel est l'objet premier de la doctrine de l'abus de procédure en common law, lequel est indépendant de tout préjudice subi par les parties qui ont fait l'objet de la conduite abusive.

B. *Les délais abusifs en droit administratif*

(1) Aperçu du cadre d'analyse de l'arrêt *Blencoe*

[145] L'arrêt *Blencoe* de notre Cour a marqué une étape jurisprudentielle importante quant à l'analyse

2022 SCC 29 (CanLII)

of delay in administrative proceedings. In that case, Bastarache J., writing for a five-judge majority, and LeBel J., dissenting in part, both recognized that inordinate administrative delay amounts to an abuse of process, even when the hearing is not unfair to the applicant. Bastarache and LeBel JJ. further agreed that courts possess multiple remedial options to sanction abusive delay under administrative law principles. In my view, their opinions broadly complement each other, and their teachings should be reaffirmed in the present case.

de la question des délais en matière administrative. Dans cet arrêt, le juge Bastarache, s'exprimant pour une majorité de cinq juges, et le juge LeBel, dissident en partie, ont tous deux reconnu qu'un délai administratif excessif constitue un abus de procédure, même lorsque l'audience n'est pas inéquitable à l'égard du demandeur. Les juges Bastarache et LeBel ont également convenu que les tribunaux disposent de plusieurs mesures de redressement pour sanctionner les délais abusifs en application des principes du droit administratif. À mon avis, leurs opinions sont largement complémentaires et il y a lieu de réaffirmer leurs enseignements en l'espèce.

[146] As the following passage makes clear, Bastarache J.'s majority opinion focused on the high threshold to be met for an applicant to obtain a stay of proceedings — the only remedy sought by the applicant in that case:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period. In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay. [Emphasis added; citations omitted; para. 101.]

Relying on the jurisprudence on stays of proceedings, Bastarache J. reaffirmed that the "power [to order a stay] can be exercised only in the 'clearest of cases'" (para. 118). I note that the guidance provided by Bastarache J. concerning the "clearest of cases" threshold for obtaining a *stay of proceedings* corresponds precisely to the test for *abuse of process* laid down by the majority in this case.

[147] The threshold for obtaining a stay of proceedings set out in *Blencoe* may be summarized as follows. First, the delay must be "unreasonable or inordinate" so as to constitute a breach of the duty of fairness (para. 121). Bastarache J. stressed that "[t]here is no

[146] Comme l'indique clairement le passage qui suit, l'opinion majoritaire du juge Bastarache mettait l'accent sur le seuil exigeant qu'un demandeur doit atteindre pour obtenir un arrêt des procédures — la seule réparation sollicitée par le demandeur dans cette affaire :

> Selon moi, le droit administratif offre des réparations appropriées en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Mettre fin aux procédures simplement en raison du délai écoulé reviendrait à imposer une prescription d'origine judiciaire. En droit administratif, il faut prouver qu'un délai inacceptable a causé un préjudice important. [Je souligne; références omises; par. 101.]

S'appuyant sur la jurisprudence en matière d'arrêts des procédures, le juge Bastarache a réaffirmé que le « pouvoir [d'ordonner un arrêt des procédures] ne peut être exercé que dans les "cas les plus manifestes" » (par. 118). Je souligne que les précisions du juge Bastarache quant au seuil des « cas les plus manifestes » pour obtenir un *arrêt des procédures* correspondent précisément au test pour déterminer s'il y a *abus de procédure* établi par les juges majoritaires en l'espèce.

[147] Le seuil établi dans l'arrêt *Blencoe* pour obtenir un arrêt des procédures peut être résumé comme suit. Premièrement, le délai doit être « déraisonnable ou excessif » de sorte qu'il y a un manquement à l'obligation d'agir équitablement (par. 121). Le juge

2022 SCC 29 (CanLII)

abuse of process by delay *per se*" (para. 121); the delay must be "clearly unacceptable" in the circumstances of the case (para. 115). To determine whether the delay is inordinate, the court must undertake a contextual assessment of "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case" (para. 122). Second, the delay must "have directly caused a significant prejudice" (para. 115). Where both requirements are met, the court must consider whether the public interest favours halting the proceedings (para. 120).

Bastarache a souligné que « [l]e délai ne constitue pas en soi un abus de procédure » (par. 121); il doit être « manifestement inacceptable » dans les circonstances de l'affaire (par. 115). Pour juger si le délai est excessif, le tribunal doit entreprendre une évaluation contextuelle de « la nature de l'affaire et de sa complexité, des faits et des questions en litige, de l'objet et de la nature des procédures, de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai, et d'autres circonstances de l'affaire » (par. 122). Deuxièmement, le délai doit « avoir directement causé un préjudice important » (par. 115). Lorsqu'il est satisfait à ces deux exigences, le tribunal doit se demander si l'intérêt du public milite en faveur de l'arrêt des procédures (par. 120).

[148] LeBel J., for his part, took a more holistic approach to abuse of process arising from inordinate delay in administrative proceedings. While he noted that "[w]hoever asks for a stay of proceedings carries a heavy burden" (para. 180), he focused on the "lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings" (para. 155). Indeed, LeBel J. stressed that inordinate delay is a breach of procedural fairness and thus abusive. He discussed three possible remedies for abusive delay in administrative proceedings: a stay of proceedings, an order for an expedited hearing, and costs (para. 179).

[148] Pour sa part, le juge LeBel a adopté une méthode plus holistique à l'égard de l'abus de procédure découlant des délais excessifs en matière administrative. Bien qu'il ait souligné que « [q]uiconque demande l'arrêt des procédures assume un lourd fardeau » (par. 180), il a mis l'accent sur « le critère moins rigoureux du délai déraisonnable qui pourrait justifier une forme quelconque d'intervention judiciaire et d'autres réparations moins radicales que l'arrêt des procédures administratives » (par. 155). En effet, le juge LeBel a souligné qu'un délai excessif constitue une atteinte à l'équité procédurale et est par le fait même abusif. Il a examiné trois réparations pouvant être ordonnées en cas de délai abusif en matière administrative : l'arrêt des procédures, l'ordonnance enjoignant de tenir une audience accélérée et l'adjudication de dépens (par. 179).

[149] Under LeBel J.'s approach, the court must first balance three contextual factors (as opposed to requirements) in assessing whether the delay is inordinate, at para. 160:

(1) the time taken compared to the inherent time requirements of the matter . . .;

(2) the causes of delay beyond the inherent time requirements of the matter . . .; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms

[149] Suivant la méthode préconisée par le juge LeBel, le tribunal doit d'abord apprécier trois facteurs contextuels (par opposition à des exigences) dans l'évaluation de la question de savoir si le délai est excessif (par. 160) :

(1) le délai écoulé par rapport au délai inhérent à l'affaire [. . .];

(2) les causes de la prolongation du délai inhérent à l'affaire [. . .];

(3) l'incidence du délai, considérée comme englobant le préjudice sur le plan de la preuve et les autres atteintes

2022 SCC 29 (CanLII)

> to the lives of real people impacted by the ongoing delay. [Emphasis deleted.]

Where the court concludes that the delay is inordinate, it must turn its attention to the appropriate remedy in the circumstances. The selection of the remedy requires the court to weigh the three contextual factors listed above as well as other competing interests — including those of the community and, where applicable, of other private litigants (para. 178).

(2) Inordinate Delay Is Abusive — Irrespective of Prejudice

[150] As noted above, *Toronto v. C.U.P.E.* confirms that inordinate delay in administrative proceedings belongs to the category of abusive conduct that undermines the integrity of the administration of justice — regardless of its effects on the interests of litigants (para. 43). It follows that courts may condemn administrative delay as abusive even where there is no evidence of prejudice. However, prejudice remains a highly significant consideration in determining the appropriate remedy.

[151] The majority in this case proffers two reasons for its position that "significant prejudice" is required for an abuse of process to arise from administrative delay. Its first justification is that sanctioning abuse of process in the absence of significant prejudice would be "tantamount to imposing a judicially created limitation period" (para. 67, citing *Blencoe*, at para. 101, where Bastarache J. referred to stays of proceedings only). With respect, this assertion is plainly wrong, and it is symptomatic of the conflation of abuse of process with the remedy of a stay of proceedings. Far from establishing a limitation period, alternative remedies *allow* the claim to proceed but *condemn* state conduct that undermines the integrity of the justice system. Indeed, I cannot help but mention the irony in the proposition that LeBel J.'s proposed remedy for abusive delay in *Blencoe* — an order for an expedited hearing — is akin to a statutory limitation period.

> à l'existence des personnes touchées par le délai qui s'écoule. [Soulignement omis.]

Lorsque le tribunal conclut que le délai est excessif, il doit porter son attention sur la réparation appropriée dans les circonstances. Le choix de la réparation oblige le tribunal à apprécier les trois facteurs contextuels énumérés précédemment ainsi que d'autres intérêts opposés — y compris ceux de la collectivité et, le cas échéant, d'autres justiciables (par. 178).

(2) Les délais excessifs sont abusifs — sans égard au préjudice

[150] Comme je l'ai mentionné précédemment, l'arrêt *Toronto c. S.C.F.P.* confirme que les délais excessifs en matière administrative appartiennent à une catégorie de conduite abusive qui mine l'intégrité de l'administration de la justice — sans égard à leurs effets sur les intérêts des parties (par. 43). Il s'ensuit que les tribunaux peuvent condamner les délais administratifs comme abusifs, et ce, même s'il n'y a aucune preuve de préjudice. Le préjudice demeure néanmoins une considération très importante dans le choix de la réparation appropriée.

[151] Les juges majoritaires en l'espèce invoquent deux raisons au soutien de leur position selon laquelle il doit y avoir un « préjudice important » pour qu'un abus de procédure découle d'un délai administratif. Leur première justification est que la sanction d'un abus de procédure en l'absence d'un préjudice important « reviendrait à imposer une prescription d'origine judiciaire » (par. 67, citant *Blencoe*, par. 101, où le juge Bastarache ne parlait que de l'arrêt des procédures). Avec égards, cette affirmation est tout à fait erronée et témoigne de la confusion entre la doctrine de l'abus de procédure et la réparation qu'est l'arrêt des procédures. Loin d'établir un délai de prescription, les autres réparations *permettent* à la demande d'aller de l'avant, mais *condamnent* la conduite de l'État qui mine l'intégrité du système de justice. De fait, je ne puis m'empêcher de mentionner l'ironie de la proposition selon laquelle la réparation pour délai excessif proposée par le juge LeBel dans l'arrêt *Blencoe* — une ordonnance enjoignant de tenir une audience accélérée — s'apparente à un délai de prescription imposée par la loi.

2022 SCC 29 (CanLII)

[152] I am troubled, to say the least, by the second justification offered by the majority — namely that "delay by itself may be beneficial to the affected party. For example, if the affected party is facing the penalty of disbarment, delay in the administrative process might be welcomed by the affected party, insofar as it enables him or her to continue practicing" (para. 67). It is trite law that professional bodies bear the onus of proving the misconduct of persons subject to their jurisdiction. Those who have done nothing wrong will not "benefit" from administrative delay, even if they are allowed to maintain their practice. It is thus improper for courts to consider the unproven "benefits" flowing from administrative delay, since to do so assumes that applicants are guilty of the disciplinary charges brought against them.

[153] In any event, the additional stress caused by inordinately long administrative proceedings may very well be prejudicial, regardless of whether the applicant prevails on the merits. I reiterate that professional bodies, like other administrative decision makers, owe a *duty* of fairness to professionals subject to disciplinary proceedings. The existence and scope of this duty are independent of the outcome of the adjudication. Inordinate delay — in *all* cases — is procedurally unfair and thus abusive.

(3) Remedies at Common Law

[154] Where the applicant has demonstrated that the delay is inordinate, the next step in the analysis is for the court to determine the appropriate remedy in the circumstances. Courts possess an extensive arsenal of remedial tools to sanction and redress abusive conduct, ranging from a declaration to a stay of proceedings. The choice of remedy for an abuse of process — be it at common law or under s. 24(1) of the *Charter* — falls within the trial judge's discretion (*Tobiass*, at para. 87; *Regan*, at para. 117; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51; *R. v. Bellusci*, 2012 SCC 44, [2012]

[152] Je suis troublée, c'est le moins qu'on puisse dire, par la deuxième justification donnée par les juges majoritaires — soit qu'il « arrive parfois que le délai soit lui-même bénéfique pour la partie touchée. Par exemple, si celle-ci est passible de radiation du Barreau, elle pourrait accueillir favorablement les délais dans le déroulement des procédures administratives, dans la mesure où ils lui permettent de continuer à exercer » (par. 67). Il est de jurisprudence constante que les ordres professionnels ont le fardeau de prouver l'inconduite des personnes assujetties à leur compétence. Ceux et celles qui n'ont rien à se reprocher ne tirent aucun « bénéfice » d'un délai administratif, et ce, même s'ils sont autorisés à continuer à exercer leur profession. Par conséquent, les tribunaux ne sont pas justifiés de prendre en compte les « bénéfices » non prouvés du délai administratif, car une telle approche présume que les demandeurs sont coupables des accusations disciplinaires portées contre eux.

[153] Quoi qu'il en soit, le stress supplémentaire engendré par des procédures administratives excessivement longues peut fort bien s'avérer préjudiciable, sans égard à la décision sur le fond. Je répète que les ordres professionnels, à l'instar des autres décideurs administratifs, ont une *obligation* d'agir équitablement envers les professionnels qui font l'objet de procédures disciplinaires. L'existence et la portée de cette obligation sont indépendantes de l'issue de l'instance. Les délais excessifs — dans *tous* les cas — sont inéquitables sur le plan procédural, et par le fait même abusifs.

(3) Réparations en common law

[154] Lorsque le demandeur a établi que le délai est excessif, l'étape suivante de l'analyse du tribunal consiste à déterminer la réparation appropriée dans les circonstances. Les tribunaux disposent d'un vaste arsenal de mesures de redressement pour sanctionner et réparer la conduite abusive, allant du jugement déclaratoire à l'arrêt des procédures. Le choix de la réparation pour un abus de procédure — que ce soit en common law ou en vertu du par. 24(1) de la *Charte* — relève du pouvoir discrétionnaire du juge de première instance (*Tobiass*, par. 87; *Regan*, par. 117; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651,

2022 SCC 29 (CanLII)

2 S.C.R. 509, at paras. 17-18; *Babos*, at para. 48). As noted above, applicants must satisfy a specific test to obtain a stay of proceedings, but other remedies are not subject to that test.

par. 15 et 51; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 17-18; *Babos*, par. 48). Rappelons que les demandeurs doivent satisfaire à un test spécifique pour obtenir l'arrêt des procédures, mais que les autres réparations n'y sont pas assujetties.

[155] Originally, a stay of proceedings was seen as the only remedy available for an abuse of process at common law (see, e.g., L'Heureux-Dubé J.'s *obiter dictum* in *O'Connor*, at para. 68). However, in *Blencoe*, Bastarache J. rightly noted that there is "no support for the notion that a stay is the only remedy available in administrative law proceedings", and he stressed that "[o]ther remedies are available", without elaborating on them (para. 117). In the context of inordinate delay, LeBel J. mentioned orders for costs and orders for an expedited hearing as alternative remedies.

[155] À l'origine, l'arrêt des procédures était considéré comme la seule réparation possible en common law pour un abus de procédure (voir, p. ex., le commentaire incident de la juge L'Heureux-Dubé dans l'arrêt *O'Connor*, par. 68). Cependant, dans l'arrêt *Blencoe*, le juge Bastarache a noté à juste titre que « rien ne justifie l'idée que l'arrêt des procédures est la seule réparation possible dans des procédures en matière de droit administratif », et il a souligné que « [d]'autres réparations peuvent être accordées », sans toutefois préciser lesquelles (par. 117). Dans le contexte des délais excessifs, le juge LeBel a pour sa part mentionné l'adjudication de dépens et l'ordonnance enjoignant de tenir une audience accélérée comme mesures de réparation possibles.

[156] There exist other remedial options at common law to redress abusive administrative delay, including reductions in sanction, orders for the exclusion of evidence, and declarations. Traditional prerogative writs such as *mandamus* may of course complement these remedies. In short, courts have a wide discretion to grant remedies for abusive conduct that account for the circumstances of each case.

[156] Il existe d'autres possibilités de réparations en common law pour remédier aux délais administratifs abusifs, notamment les réductions de sanction, les ordonnances d'exclusion de la preuve et les jugements déclaratoires. Les brefs de prérogative traditionnels tels que le *mandamus*, peuvent, bien entendu, compléter ces mesures de redressement. En somme, les tribunaux disposent d'un large pouvoir discrétionnaire afin d'accorder des réparations pour conduite abusive qui tiennent compte des circonstances de chaque affaire.

[157] The guiding principle in determining the appropriate remedy is proportionality. LeBel J.'s approach in *Blencoe* requires courts to consider the nature and magnitude of the prejudice as primary factors — alongside the length and causes of the delay — in selecting a remedy proportionate to the abuse of process. As mandated by *Blencoe*, the applicant must demonstrate "significant prejudice" to obtain a stay of proceedings for inordinate delay in the administrative law context (para. 101), but this standard does not apply to alternative remedies.

[157] Le principe directeur pour déterminer la réparation appropriée est la proportionnalité. La méthode adoptée par le juge LeBel dans l'arrêt *Blencoe* exige des tribunaux qu'ils prennent en considération la nature et l'ampleur du préjudice en tant que facteurs principaux — parallèlement à la durée et aux causes du délai — dans le choix d'une réparation proportionnelle à l'abus de procédure. Comme l'exige l'arrêt *Blencoe*, le demandeur doit faire la preuve d'un « préjudice important » afin d'obtenir un arrêt des procédures pour délai administratif excessif (par. 101). Cette exigence ne s'applique toutefois pas aux autres réparations.

2022 SCC 29 (CanLII)

[158] Under LeBel J.'s approach, prejudice remains an integral part of the analysis in that it dictates the proper judicial response to the abuse of process. The absence of any prejudice entails that, in certain cases, a declaration of abuse of process may be the only appropriate redress. Although less drastic than other remedies, declaratory relief allows the judiciary to distance itself from abusive conduct and to deter administrative decision makers from ignoring delays in subsequent proceedings (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 37).

[159] In the final analysis, this approach avoids the unfortunate inference that courts condone inordinate delay where the applicant fails to meet the high threshold of "significant prejudice". I echo LeBel J.'s vehement criticism of avoidable delays in *Blencoe*: "Unreasonable delay in administrative proceedings is illegal under administrative law" (para. 162 (emphasis added)). In my view, it is incumbent on courts to condemn such conduct as an abuse of process whenever it is brought to their attention.

III. Standard of Review

A. *Inconsistency With Khela*

[160] The majority purports to "clarify" the standard of review applicable to questions of procedural fairness in a statutory appeal. It does so, however, without meaningfully considering *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 — the governing authority on this point of law — or any other case relating to the duty of procedural fairness. I see no reason to revisit the foundations of *Khela*.

[161] In *Khela*, LeBel J. unambiguously confirmed for a unanimous court that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'" (para. 79; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43, referring to

[158] Suivant l'approche du juge LeBel, le préjudice demeure une partie intégrante de l'analyse en ce qu'il dicte la mesure judiciaire qu'il convient de prendre à l'égard de l'abus de procédure. En cas d'absence de préjudice, il se peut que la seule réparation appropriée soit un jugement déclarant qu'il y a eu abus de procédure. Bien que moins draconien que d'autres réparations, le jugement déclaratoire permet aux tribunaux de dénoncer une conduite abusive et de dissuader les décideurs administratifs de faire fi des délais dans des instances subséquentes (*Vancouver (Ville) c. Ward*, 2010 CSC 27, [2010] 2 R.C.S. 28, par. 37).

[159] En dernière analyse, cette méthode permet d'éviter de tirer la conclusion fâcheuse que les tribunaux cautionnent les délais excessifs lorsque le préjudice subi par le demandeur n'atteint pas le seuil élevé du « préjudice important ». Je fais écho à la critique vigoureuse des délais évitables formulée par le juge LeBel dans l'arrêt *Blencoe* : « En droit administratif, le délai déraisonnable dans des procédures administratives est illégal » (par. 162 (je souligne)). À mon avis, il incombe aux tribunaux de condamner une telle conduite en la qualifiant d'abus de procédure chaque fois qu'elle est portée à leur attention.

III. Norme de contrôle

A. *Incompatibilité avec l'arrêt Khela*

[160] Les juges majoritaires prétendent « clarifier » la norme de contrôle applicable aux questions d'équité procédurale dans le cas des appels prévus par la loi. Or, ils le font sans véritablement prendre en compte l'arrêt *Établissement de Mission c. Khela*, 2014 CSC 24, [2014] 1 R.C.S. 502 — qui fait autorité sur ce point de droit — ou tout autre arrêt relatif à l'obligation de respecter l'équité procédurale. Je ne vois aucune raison de revenir sur les fondements de l'arrêt *Khela*.

[161] Dans l'arrêt *Khela*, au nom d'une Cour unanime, le juge LeBel a confirmé sans équivoque que « la norme applicable à la question de savoir si la décision a été prise dans le respect de l'équité procédurale sera toujours celle de la "décision correcte" » (par. 79; voir aussi *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 43,

2022 SCC 29 (CanLII)

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 100; *Toronto v. C.U.P.E.*, at para. 15 (applying the correctness standard to the issue of abuse of process); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 55-62 (applying the reasonableness standard to the "substantive aspects" of the decision only)). Moreover, the framework articulated by this Court for assessing questions of procedural fairness applies irrespective of any appeal mechanism, although the existence of appeal rights is a relevant consideration in determining the content of the common law duty of fairness (*Baker*, at para. 24).

renvoyant à *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539, par. 100; *Toronto c. S.C.F.P.*, par. 15 (appliquant la norme de la décision correcte à la question de l'abus de procédure); *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 55-62 (appliquant la norme de la décision raisonnable uniquement aux « éléments de fond » de la décision)). Qui plus est, le cadre d'analyse formulé par notre Cour pour l'examen des questions d'équité procédurale s'applique sans égard à quelque mécanisme d'appel que ce soit, bien que l'existence de droits d'appel soit une considération pertinente pour déterminer la teneur de l'obligation d'équité en common law (*Baker*, par. 24).

[162] Despite this clear statement in *Khela*, the majority asserts that "where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review" (para. 27). This is so, in its view, because of this Court's categorical direction in *Vavilov* that appeals are to be decided according to appellate standards of review.

[162] Malgré cette affirmation non équivoque de l'arrêt *Khela*, les juges majoritaires soutiennent que « lorsque des questions d'équité procédurale sont examinées dans le cadre d'un mécanisme d'appel prévu par la loi, elles sont soumises aux normes de contrôle en matière d'appel » (par. 27). Il en est ainsi, à leur avis, en raison de la directive catégorique de notre Cour, dans l'arrêt *Vavilov*, suivant lequel il faut trancher l'appel de telles questions selon les normes de contrôle applicables en appel.

[163] But the assertion on which the majority relies was made in the context of *substantive* review — in which the presumptive standard of review is reasonableness, by contrast with *Khela*. Indeed, the passages of *Vavilov* cited by my colleague (paras. 27-28) established the principle that "[the legislature] may direct that <u>derogation from the presumption of reasonableness review</u> is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards" (*Vavilov*, at para. 33 (emphasis added); see also para. 36).

[163] Or, l'affirmation sur laquelle s'appuient les juges majoritaires s'inscrivait dans un contexte de contrôle judiciaire *sur le fond* — dans lequel la norme de la décision raisonnable se présume — contrairement à l'arrêt *Khela*. De fait, les passages de l'arrêt *Vavilov* cités par mon collègue (par. 27-28) ont établi le principe que « le législateur peut indiquer qu'une <u>dérogation à la présomption de contrôle selon la norme de la décision raisonnable</u> est de mise en prévoyant un mécanisme d'appel à l'encontre d'un décideur administratif devant une cour de justice, ce qui dénote que les normes générales en matière d'appel trouvent application » (*Vavilov*, par. 33 (je souligne); voir aussi par. 36).

[164] With respect, the mere reference to *Vavilov* — a judgment that was rendered in a different context and that excluded procedural fairness review from its purview — does not suffice to oust *Khela* and other directly applicable precedents. Indeed, in *Vavilov*,

[164] Avec égards, le seul renvoi à l'arrêt *Vavilov* — un jugement qui a été rendu dans un contexte différent et qui a exclu l'équité procédurale de son champ d'application — ne suffit pas pour écarter l'arrêt *Khela* et d'autres précédents directement applicables.

2022 SCC 29 (CanLII)

at para. 23, this Court expressly excluded issues of procedural fairness from the framework developed in that case — and rightly so. The central "conceptual basis" for the presumption of reasonableness review in the *Vavilov* framework is "respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute" (para. 26). Moreover, "the consideration of expertise is folded into the new starting point . . ., namely the presumption of reasonableness review" (para. 58). Neither of these considerations applies where procedural fairness is in issue.

En effet, au par. 23 de l'arrêt *Vavilov*, notre Cour a expressément exclu — à juste titre — les questions d'équité procédurale du cadre d'analyse élaboré dans cet arrêt. Le principal « fondement conceptuel » de la présomption d'application de la norme de contrôle de la décision raisonnable dans le cadre d'analyse énoncé dans l'arrêt *Vavilov* est le « respect du choix d'organisation institutionnelle du législateur consistant à déléguer certaines questions à des décideurs non judiciaires par voie législative » (par. 26). Qui plus est, « la prise en compte de l'expertise est incorporée au nouveau point de départ [. . .], à savoir la présomption d'application de la norme de la décision raisonnable » (par. 58). Ni l'une ni l'autre de ces considérations ne s'appliquent lorsque l'équité procédurale est en cause.

[165] First, the duty of procedural fairness exists independently of statutorily confined administrative regimes. It is a "general common law principle" incrementally developed by courts over multiple decades of jurisprudence (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; see also *Khela*, at para. 82; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 38; *Dunsmuir*, at para. 87; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 22; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at paras. 18-22; *Baker*, at paras. 20-28; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 669; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311).

[165] Premièrement, l'obligation d'équité procédurale existe indépendamment des régimes administratifs dont la portée et l'application sont circonscrites par la loi. Il s'agit d'un « principe général de *common law* » qui a été graduellement élaboré dans la jurisprudence au fil de plusieurs décennies (*Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653; voir aussi *Khela*, par. 82; *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504, par. 38; *Dunsmuir*, par. 87; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, 2001 CSC 41, [2001] 2 R.C.S. 281, par. 22; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 18-22; *Baker*, par. 20-28; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, p. 669; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Kane c. Conseil d'administration (Université de la Colombie-Britannique)*, [1980] 1 R.C.S. 1105; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311).

[166] The legislature's delegation of authority to make decisions within a given administrative regime has little to do with the question of whether the process conforms to fairness requirements at common law, or whether such requirements have been ousted expressly or by necessary implication by the enabling statute (see *Baker*, at paras. 21-28; *Ocean Port*, at para. 22).

[166] La délégation par le législateur d'un pouvoir décisionnel dans le cadre d'un régime administratif donné a peu à voir avec la question de savoir si le processus respecte les exigences d'équité en common law, ou encore si ces exigences ont été écartées expressément ou par déduction nécessaire par la loi habilitante (voir *Baker*, par. 21-28; *Ocean*

2022 SCC 29 (CanLII)

Using *Baker* as a concrete example, I reject the proposition that an immigration officer empowered by the *Immigration Act*, R.S.C. 1985, c. I-2, to make administrative decisions was entitled to deference from a court applying the common law test for impartiality. In that case, L'Heureux-Dubé J. rightly circumscribed the scope of deference to the "substantive aspects" of the decision (paras. 55 and 62).

Port, par. 22). Prenant l'arrêt *Baker* comme exemple concret, je rejette la proposition selon laquelle un agent d'immigration habilité par la *Loi sur l'immigration*, L.R.C. 1985, c. I-2, à prendre des décisions administratives avait droit à la déférence d'une cour de révision appliquant le test de common law relatif à l'impartialité. Dans cette affaire, c'est à bon droit que la juge L'Heureux-Dubé a circonscrit la portée de la déférence aux « éléments de fond » de la décision (par. 55 et 62).

[167] In my view, deference to substantive decisions presupposes that the administrative process is fair and thus subject to review by courts on a correctness standard. The proposition that procedural fairness underlies reasonableness review is ingrained in the *Vavilov* framework itself. This Court emphasized in *Vavilov* that "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (para. 83). Consequently, courts cannot accord deference to an administrative decision maker who fails to give reasons in circumstances where doing so is required at common law. The same reasoning applies to other types of procedural unfairness as well.

[167] À mon avis, la déférence à l'égard des décisions de fond présuppose que le processus administratif est équitable et est donc susceptible d'être contrôlé par les tribunaux suivant la norme de la décision correcte. La proposition suivant laquelle l'équité procédurale sous-tend le contrôle en fonction de la norme de la décision raisonnable est profondément enracinée dans le cadre d'analyse de l'arrêt *Vavilov* lui-même. Dans cet arrêt, notre Cour a souligné que « le contrôle en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision » (par. 83). En conséquence, les tribunaux ne sauraient faire preuve de déférence à l'égard d'un décideur administratif qui ne motive pas sa décision dans des circonstances où la common law exige de fournir des motifs. Le même raisonnement s'applique aux autres types d'iniquité procédurale.

[168] Second, the application of common law principles falls squarely within the expertise of the judiciary. For example, this Court stressed in *Toronto v. C.U.P.E.* that abuse of process in the context of relitigation "is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to [it]" (para. 15; see also *C.U.P.E. v. Ontario*, at para. 100: "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions."). Likewise, this Court's reasoning in *Dunsmuir* indicates that courts must have the last word on the application of the duty of fairness, at para. 84:

[168] Deuxièmement, l'application des principes de common law relève clairement de l'expertise des tribunaux judiciaires. Par exemple, dans l'arrêt *Toronto c. S.C.F.P.*, notre Cour a souligné que l'abus de procédure dans le contexte de la remise en cause « échappe clairement au domaine d'expertise des arbitres du travail qui peuvent devoir y faire appel » (par. 15; voir aussi *S.C.F.P. c. Ontario*, par. 100 : « Il appartient aux tribunaux judiciaires et non au ministre de donner une réponse juridique aux questions d'équité procédurale. »). De même, il ressort du raisonnement de notre Cour dans l'arrêt *Dunsmuir* que les tribunaux doivent avoir le dernier mot en ce qui concerne l'application de l'obligation d'équité, au par. 84 :

We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where

Rien ne s'oppose à ce que l'arbitre saisi d'un grief examine une question touchant à l'obligation d'équité en droit public

2022 SCC 29 (CanLII)

such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

lorsqu'une telle obligation existe. Cela ressortit clairement à son mandat de régler le grief. Toutefois, comme nous le verrons plus loin, il convient d'abord de définir la nature du lien d'emploi et le droit applicable. Lorsque, comme en l'espèce, le lien est contractuel, l'obligation d'équité en droit public ne saurait jouer dans le règlement du grief.

[169] The standard of correctness must remain the starting point of the analysis in the context of procedural fairness review. The majority's reliance on the existence of an appeal mechanism as the determinative factor undermines *Khela*, as it overlooks this starting point. Admittedly, the majority's approach usually leads to the same result where the enabling statute establishes an appeal mechanism. Since procedural fairness is a legal standard, the assessment of whether an administrative decision maker complied with this duty is a question of law subject to correctness review on appeal (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *R. v. Dussault*, 2022 SCC 16, [2022] 1 S.C.R. 306, at para. 26; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 23; *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326, at para. 68).

[169] La norme de la décision correcte doit demeurer le point de départ de l'analyse dans le contexte du contrôle de l'équité procédurale. Le recours par les juges majoritaires à l'existence d'un mécanisme d'appel comme facteur déterminant mine les fondements de l'arrêt *Khela*, car une telle approche fait abstraction de ce point de départ. Certes, la méthode qu'appliquent les juges majoritaires mène habituellement au même résultat lorsque la loi habilitante établit un mécanisme d'appel. Puisque l'équité procédurale est une norme juridique, l'examen du respect de cette obligation est une question de droit assujettie en appel au contrôle selon la norme de la décision correcte (*R. c. Shepherd*, 2009 CSC 35, [2009] 2 R.C.S. 527, par. 20; *R. c. Dussault*, 2022 CSC 16, [2022] 1 R.C.S. 306, par. 26; *R. c. Le*, 2019 CSC 34, [2019] 2 R.C.S. 692, par. 23; *R. c. Katigbak*, 2011 CSC 48, [2011] 3 R.C.S. 326, par. 68).

[170] Nevertheless, the present case illustrates that appellate standards of review significantly diverge from *Khela* when it comes to remedial issues. I explained above that the choice of remedy for abuse of process is discretionary. It is well established in this Court's jurisprudence that "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice", and that "where a trial judge exercises her or his discretion, that decision cannot be replaced simply because the appellate court has a different assessment of the facts" (*Regan*, at para. 117, quoting *Tobiass*, at para. 87; see also *Bjelland*, at para. 15; *Bellusci*, at paras. 17-18; *Babos*, at para. 48). This deferential approach is a far cry from the one adopted in this Court's precedents on the duty of fairness at common law.

[170] Cela dit, le présent pourvoi illustre que les normes de contrôle applicables en appel s'écartent considérablement de l'arrêt *Khela* en ce qui concerne les questions de réparation. J'ai expliqué précédemment que le choix de la réparation pour abus de procédure relève de la discrétion du décideur de première instance. Il est bien établi dans la jurisprudence de notre Cour qu'« une cour d'appel ne sera justifiée d'intervenir dans l'exercice du pouvoir discrétionnaire d'un juge de première instance que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice », et que « lorsqu'un juge du procès exerce son pouvoir discrétionnaire, la cour d'appel ne peut y substituer sa propre décision uniquement parce qu'elle arrive à une appréciation différente des faits » (*Regan*, par. 117, citant *Tobiass*, par. 87; voir aussi *Bjelland*, par. 15; *Bellusci*, par. 17-18; *Babos*, par. 48). Cette approche empreinte de déférence diffère considérablement de celle adoptée dans les précédents de notre Cour portant sur l'obligation d'équité en common law.

2022 SCC 29 (CanLII)

B. *Standard of Review Applicable to Questions of Procedural Fairness*

[171] I acknowledge the need to clarify the framework for determining the standard of review applicable to questions of procedural fairness. Multiple judges and authors have underscored the untenable uncertainty plaguing the jurisprudence on procedural fairness review (see, e.g., *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366, at paras. 67-71, per Stratas J.A. (describing the state of the law as a "jurisprudential muddle"); D. McKee, "The Standard of Review for Questions of Procedural Fairness" (2016), 41 *Queen's L.J.* 355). While clarifications are warranted, I believe this Court should draw on its existing jurisprudence to articulate a principled approach.

[172] The governing authority on procedural fairness review, as mentioned above, is *Khela*. In that case, LeBel J. confirmed that the question of whether an administrative body has complied with its duty of procedural fairness is, in principle, subject to correctness review (para. 79). Nevertheless, legislatures may — within constitutional bounds — oust the common law and specify the applicable standard of review by statute (*Khosa*, at para. 18; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-33; *Vavilov*, at paras. 34-35; *Dunsmuir*, at paras. 30-31; see, e.g., *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58(2)(b)).

[173] I now turn to the passages in this Court's jurisprudence that, according to some judges and authors, have muddled the analysis of the standard of review applicable to questions of procedural fairness. The first source of uncertainty flows from the remark in *Khela* that the decision maker was "entitled to a margin of deference" and to "[s]ome deference" on specific points, at para. 89:

> Section 27(3) [of the *Corrections and Conditional Release Act*] authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten

B. *La norme de contrôle applicable aux questions d'équité procédurale*

[171] Je reconnais le besoin de clarifier le cadre d'analyse guidant le choix de la norme de contrôle applicable aux questions d'équité procédurale. Bon nombre de juges et d'auteurs ont souligné l'incertitude intenable qui accable la jurisprudence portant sur le contrôle de l'équité procédurale (voir, p. ex., *Bergeron c. Canada (Procureur général)*, 2015 CAF 160, par. 67-71 (CanLII), motifs du juge Stratas (décrivant l'état du droit comme une « jurisprudence confuse »); D. McKee, « The Standard of Review for Questions of Procedural Fairness » (2016), 41 *Queen's L.J.* 355). Bien que des clarifications s'imposent, je crois que notre Cour doit s'inspirer de sa jurisprudence pour définir une approche fondée sur des principes.

[172] Comme je l'ai mentionné précédemment, c'est l'arrêt *Khela* qui fait autorité sur le contrôle de l'équité procédurale. Dans ce jugement, le juge LeBel a confirmé que la question de savoir si un organisme administratif a agi équitablement est, en principe, soumise à la norme de la décision correcte (par. 79). Néanmoins, le législateur peut — dans les limites prévues par la Constitution — écarter l'application de la common law et préciser, par un texte de loi, la norme de contrôle applicable (*Khosa*, par. 18; *R. c. Owen*, 2003 CSC 33, [2003] 1 R.C.S. 779, par. 31-33; *Vavilov*, par. 34-35; *Dunsmuir*, par. 30-31; voir, p. ex., *Administrative Tribunals Act*, S.B.C. 2004, c. 45, al. 58(2)(b)).

[173] Je me penche maintenant sur les passages de la jurisprudence de notre Cour qui, selon certains juges et auteurs, ont semé la confusion dans l'analyse de la norme de contrôle applicable aux questions d'équité procédurale. La première source d'incertitude découle des remarques dans l'arrêt *Khela* selon lesquelles il fallait « dans une certaine mesure, faire preuve de déférence » et « faire preuve d'une certaine déférence » envers le décideur sur certains points en particulier, au par. 89 :

> Aux termes du par. 27(3) [de la *Loi sur le système correctionnel et la mise en liberté sous condition*], le commissaire peut refuser la communication de renseignements s'il a des « motifs raisonnables de croire » que la

2022 SCC 29 (CanLII)

the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful. [Emphasis added.]

communication de ces renseignements pourrait mettre en danger la sécurité du pénitencier, la sécurité d'une personne, ou pourrait compromettre la tenue d'une enquête. Le commissaire, ou son représentant, est le mieux en mesure de décider si ce risque pourrait effectivement se concrétiser. Par conséquent, il faut, dans une certaine mesure, faire preuve de déférence sur ce point envers le commissaire ou le directeur. De même, ces derniers sont mieux en mesure de déterminer la fiabilité de certaines sources ou de certains informateurs. Par conséquent, il faut, sur ce point également, faire preuve d'une certaine déférence. Toutefois, si le par. 27(3) n'est pas invoqué et que certains renseignements ne sont pas communiqués, la déférence ne sera pas justifiée et la décision sera inéquitable sur le plan procédural et, par conséquent, illégale. [Je souligne.]

[174] This passage illustrates two important propositions from *Khela*. First, the content of the duty of fairness may be determined by statute, subject to constitutional limitations. The provision at issue in *Khela*, s. 27(3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, derogates from the general common law right to information in the context of decisions on matters such as inmate transfers, but the Court recognized that this provision does not eliminate the constitutionally-protected right to *habeas corpus*. Second, administrative decision makers are entitled to deference regarding their underlying findings of fact. The Court adopted a deferential approach to the highly contextual assessments of risk and reliability upon which decisions under s. 27(3) depend.

[174] Ce passage illustre deux enseignements importants de l'arrêt *Khela*. Premièrement, la teneur de l'obligation d'équité peut être déterminée par un texte de loi, sous réserve du respect de la Constitution. La disposition en cause dans l'arrêt *Khela*, soit le par. 27(3) de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, c. 20, déroge au droit général à l'information en common law dans le contexte de décisions sur des questions comme les transfèrements de détenus, mais la Cour a reconnu que cette disposition n'éliminait pas le droit constitutionnel à l'*habeas corpus*. Deuxièmement, les conclusions de fait sous-tendant la décision administrative commandent la déférence. En effet, la Cour a fait preuve de déférence à l'égard des évaluations éminemment contextuelles du risque et de la fiabilité dont dépendent les décisions prises en application du par. 27(3).

[175] Although the Court emphasized in *Khela* that compliance with the duty of fairness is a question of law, it reaffirmed the longstanding principle that courts cannot establish fairness requirements in a vacuum: ". . . the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at paras. 74-75; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 231; *Dunsmuir*, at para. 79). Accordingly, where the administrative decision maker has made factual determinations with

[175] Bien que la Cour ait souligné dans l'arrêt *Khela* que le respect de l'obligation d'équité est une question de droit, elle a réaffirmé le principe bien établi selon lequel les tribunaux ne peuvent pas établir les exigences d'équité dans l'abstrait : « . . . la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas » (*Knight*, p. 682; *Baker*, par. 21; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, 2002 CSC 11, [2002] 1 R.C.S. 249, par. 74-75; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 231; *Dunsmuir*, par. 79). Par conséquent, lorsque le décideur administratif a tiré des conclusions

2022 SCC 29 (CanLII)

respect to the underlying context, such findings are entitled to deference. Institutional constraints on the administrative decision maker are also important contextual factors (see *Baker*, at para. 27).

de fait à l'égard du contexte sous-jacent, ces conclusions commandent la déférence. Les contraintes institutionnelles auxquelles est soumis le décideur administratif sont elles aussi des facteurs contextuels importants (voir *Baker*, par. 27).

[176] The second source of uncertainty flows from this Court's statement in *VIA Rail Canada Inc.*, that "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process" (para. 231; see also *Baker*, at para. 27). In my view, this assertion may be reconciled with more recent jurisprudence and remains good law.

[176] La deuxième source d'incertitude découle de l'affirmation de notre Cour dans l'arrêt *VIA Rail Canada Inc.* selon laquelle « [i]l faut faire montre d'une grande déférence à l'égard des décisions procédurales d'un tribunal qui a le pouvoir de contrôler sa propre procédure » (par. 231; voir aussi *Baker*, par. 27). Selon moi, cette affirmation peut être conciliée avec la jurisprudence plus récente et demeure valable.

[177] Indeed, *Khela* mandates only that the question of compliance with the duty of procedural fairness be subject to the correctness standard; all procedural rulings falling *within the bounds of fairness* are entitled to deference. For example, while an opportunity for a party to make submissions may be required at common law in a given context, the administrative decision maker might opt for a hearing, written submissions, or both. Where all three options satisfy the duty of fairness, the reviewing court should not substitute its view for that of the administrative decision maker concerning the most appropriate procedure.

[177] En effet, l'arrêt *Khela* exige simplement que la question de la conformité à l'obligation d'équité procédurale soit soumise à la norme de la décision correcte; toutes les décisions d'ordre procédural qui se situent *dans les limites de l'équité* commandent la déférence. Par exemple, lorsque la common law exige qu'une partie ait l'occasion de présenter des observations dans un certain contexte, le décideur administratif peut choisir de tenir une audience, de recevoir des observations par écrit ou les deux. Lorsque les trois possibilités respectent l'obligation d'équité, la cour de révision doit s'abstenir de substituer son opinion à celle du décideur administratif concernant la procédure la plus appropriée.

[178] As this Court stated in *Moreau-Bérubé*, "[e]valuating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (para. 74). J. M. Evans, writing extrajudicially, has rightly emphasized that "the duty of fairness connotes a legally imposed minimum, not optimal, standard of procedural propriety" ("Fair's Fair: Judging Administrative Procedures" (2015), 28 *C.J.A.L.P.* 111, at p. 121 (emphasis deleted)). Consequently, the reviewing court's role is not to dictate the "correct" or most "fair" procedure in the circumstances, but rather to ensure that minimum fairness requirements are met.

[178] Comme notre Cour l'a affirmé dans l'arrêt *Moreau-Bérubé*, « [p]our vérifier si un tribunal administratif a respecté l'équité procédurale ou l'obligation d'équité, il faut établir quelles sont les procédures et les garanties requises dans un cas particulier » (par. 74). Dans un article de doctrine, J. M. Evans a souligné à juste titre que [TRADUCTION] « l'obligation d'équité évoque une norme de légitimité procédurale juridiquement imposée minimale, plutôt qu'optimale » (« Fair's Fair : Judging Administrative Procedures » (2015), 28 *R.C.D.A.P.* 111, p. 121 (italique omis)). Par conséquent, le rôle de la cour de révision n'est pas de dicter la procédure « correcte » ou la plus « juste » dans les circonstances, mais de veiller à ce que les normes minimales d'équité soient respectées.

2022 SCC 29 (CanLII)

[179] This Court's jurisprudence on procedural fairness review may thus be synthesized as follows. The reviewing court must apply the correctness standard to questions of compliance with the duty of procedural fairness as defined by the common law or by statute. The requirements of fairness are context-dependent, and deference is owed to the administrative decision maker's underlying findings of fact. In reviewing procedural issues, the court's role is to determine whether the proceedings comport with *minimum* fairness requirements in a particular situation. Stated differently, the court must refrain from dictating what it considers to be the optimal procedure among the options that meet this standard.

[179] La jurisprudence de notre Cour sur le contrôle de l'équité procédurale peut donc être résumée comme suit. La cour de révision doit appliquer la norme de la décision correcte aux questions de respect de l'obligation d'équité procédurale définie par la common law ou par la loi. Les exigences de l'équité dépendent du contexte, et il faut faire preuve de déférence à l'égard des conclusions de fait sous-jacentes du décideur administratif. Dans son examen des questions procédurales, le tribunal a pour rôle de déterminer si les procédures respectent des exigences *minimales* d'équité dans une situation particulière. En d'autres termes, le tribunal doit s'abstenir de dicter ce qu'il considère être la procédure optimale parmi les possibilités qui satisfont à ce critère.

C. *Standard of Review in the Context of Inordinate Administrative Delay*

C. *La norme de contrôle dans le contexte du délai administratif excessif*

[180] Applying appellate standards of review, the majority asserts that for questions of procedural fairness and abuse of process in a statutory appeal "the applicable standard of review is correctness" because "[w]hether there has been an abuse of process is a question of law" (para. 30). I agree with this conclusion (albeit for different reasons), but I cannot subscribe to the majority's articulation of the standard of review in the context of inordinate administrative delay.

[180] Se référant aux normes de contrôle applicables en appel, les juges majoritaires affirment que « [c]'est [. . .] la norme de contrôle de la décision correcte qui s'applique » aux questions d'équité procédurale et d'abus de procédure dans le cas des appels prévus par la loi parce que « [l]a question de savoir s'il y a eu abus de procédure est une question de droit » (par. 30). Je suis d'accord avec cette conclusion (quoique pour des motifs différents), mais je ne puis souscrire à la façon dont les juges majoritaires conçoivent la norme de contrôle dans le contexte du délai administratif excessif.

[181] According to the majority, the standard of palpable and overriding error applies to the two requirements of its test, namely inordinate delay and significant prejudice. The third step of the test, which requires the court to "conduct a final assessment as to whether abuse of process is established" (para. 101), is subject to the standard of correctness.

[181] Selon les juges majoritaires, la norme de l'erreur manifeste et dominante s'applique aux deux exigences de leur test, à savoir le délai excessif et le préjudice important. Le troisième volet de l'analyse, qui oblige le tribunal à « procéder à une évaluation finale afin de déterminer si l'abus de procédure a été établi » (par. 101), est assujetti au contrôle selon la norme de la décision correcte.

[182] I disagree with the position that courts owe deference to an administrative decision maker's conclusion on whether delay is inordinate. As discussed above, inordinate delay constitutes an abuse of process on its own; it *is* the legal standard against which an administrative body's conduct is measured.

[182] Je ne partage pas l'opinion selon laquelle les tribunaux doivent faire preuve de déférence à l'égard de la conclusion d'un décideur administratif sur le caractère excessif ou non du délai. Comme nous l'avons vu précédemment, le délai excessif constitue à lui seul un abus de procédure; il *est* la

2022 SCC 29 (CanLII)

I reiterate that the application of a legal standard to the facts is a question of law subject to correctness review (*Shepherd*, at para. 20; *Dussault*, at para. 26; *Le*, at para. 23; *Katigbak*, at para. 68).

norme juridique à l'aune de laquelle la conduite de l'organisme administratif est évaluée. Je le répète, l'application aux faits d'une norme juridique est une question de droit assujettie au contrôle selon la norme de la décision correcte (*Shepherd*, par. 20; *Dussault*, par. 26; *Le*, par. 23; *Katigbak*, par. 68).

[183] My conclusion is buttressed by the jurisprudence on the right to be tried within a reasonable time under s. 11(b) of the *Charter*. In *R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5, at para. 2, this Court endorsed the Ontario Court of Appeal's formulation of the standard of review applicable to s. 11(b) rulings: "Deference is owed to a trial judge's underlying findings of fact. Characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness" (*R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, at para. 40). Moreover, it is noteworthy that both Mr. Abrametz and the Law Society invoked *R. v. Virk*, 2021 BCCA 58, 403 C.C.C. (3d) 492, in which the British Columbia Court of Appeal similarly held that the standard of correctness applies to a trial judge's conclusion on the unreasonableness of delay (paras. 23-24).

[183] Ma conclusion est renforcée par la jurisprudence sur le droit d'être jugé dans un délai raisonnable que garantit l'al. 11b) de la *Charte*. Dans l'arrêt *R. c. Yusuf*, 2021 SCC 2, [2021] 1 R.C.S. 5, par. 2, notre Cour a fait sienne la formulation de la norme de contrôle applicable aux décisions fondées sur cette disposition mise de l'avant par la Cour d'appel de l'Ontario : [TRADUCTION] « Il faut faire preuve de déférence à l'égard des conclusions de fait sous-jacentes du juge de première instance. Les qualifications des délais et la décision finale quant à savoir s'il y a eu délai déraisonnable sont susceptibles de contrôle selon la norme de la décision correcte » (*R. c. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, par. 40). De plus, il convient de souligner que tant Me Abrametz que le Barreau ont invoqué l'arrêt *R. c. Virk*, 2021 BCCA 58, 403 C.C.C. (3d) 492, dans lequel la Cour d'appel de la Colombie-Britannique a également statué que la norme de la décision correcte s'applique à la conclusion du juge de première instance sur le caractère déraisonnable du délai (par. 23-24).

[184] Although the remedies for them differ, unreasonable delay at common law and unreasonable delay under s. 11(b) are conceptually equivalent; they represent the same manifestation of an abuse of process. Given that unreasonable delay is a question of law in criminal proceedings, the same must be true in the context of administrative proceedings. As L'Heureux-Dubé J. concluded in *O'Connor*, "there is no real utility in maintaining two distinct analytic regimes" for abuse of process at common law and abusive conduct contrary to the *Charter* (para. 71). Here, and with respect, the majority's application of a deferential standard of review to the requirement of inordinate delay creates unwarranted incoherence in the law.

[184] Bien que les réparations diffèrent selon le cas à l'étude, le délai déraisonnable en common law et le délai déraisonnable en application de l'al. 11b) s'équivalent sur le plan théorique; ils représentent tous les deux la même manifestation d'un abus de procédure. Puisque le délai déraisonnable est une question de droit en matière criminelle, il doit en aller de même en matière administrative. Comme l'a conclu la juge L'Heureux-Dubé dans l'arrêt *O'Connor*, « il n'est plus réellement utile de maintenir deux régimes d'analyse distincts » pour l'abus de procédure en common law, d'une part, et la conduite abusive contrevenant à la *Charte*, d'autre part (par. 71). En l'espèce, avec égards, l'application par les juges majoritaires d'une norme de contrôle empreinte de déférence pour l'analyse de l'exigence du délai excessif crée une incohérence injustifiée dans le droit.

2022 SCC 29 (CanLII)

[185] Therefore, I would articulate the standard of review for assessing delay in administrative proceedings as follows. The reviewing court owes deference to the administrative decision maker's underlying findings of fact — notably on the length, causes, and effects of the delay. The characterization of periods of delay, the conclusion on whether the delay is inordinate, and the remedy for abuse of process are all subject to correctness review.

IV. Application

[186] In discussing the delay in this case, the majority acknowledges that "the actions of the Law Society were not above reproach" (para. 126). With respect, this is a major understatement.

[187] I conclude without hesitation that the magnitude of the undue delay in this case, which amounted to 32 ½ months in total, meets the "clearly unacceptable" threshold established in *Blencoe* (para. 115). This inordinate delay caused stress and related health issues to Mr. Abrametz, who was also subject to intrusive conditions for maintaining his legal practice. His employees were adversely affected as well by these unjustifiably long proceedings.

[188] In my view, the length of the unexplained delay and the extent of the prejudice it caused require a correspondingly serious remedy. I conclude that the Court of Appeal rightly ordered that the penalty imposed on Mr. Abrametz be set aside. His disbarment would not serve the public interest.

A. *Inordinate Delay*

[189] The Law Society initiated its audit investigation of Mr. Abrametz in December 2012. The Law Society's auditor, Mr. Allen, completed a trust report about 23 months later, in October 2014. Almost a full year elapsed before the Law Society issued a formal complaint against Mr. Abrametz in October 2015. The parties litigated certain procedural matters before the commencement of the hearing in May 2017. The penalty decision rendered by the Law Society's Hearing

[185] En conséquence, je formulerais la norme de contrôle pour l'appréciation du délai en matière administrative comme suit. La cour de révision doit faire preuve de déférence à l'égard des conclusions de fait sous-jacentes du décideur administratif — notamment pour ce qui est de la durée, des causes et des effets du délai. Par contre, la qualification des délais, la conclusion sur le caractère excessif ou non du délai et la réparation pour abus de procédure sont toutes susceptibles de contrôle selon la norme de la décision correcte.

IV. Application

[186] En discutant du délai en l'espèce, les juges majoritaires reconnaissent que « les actions du Barreau n'étaient pas irréprochables » (par. 126). Avec égards, il s'agit d'un euphémisme.

[187] Je conclus sans hésitation que la durée du délai injustifié en l'espèce, qui s'élève à 32 ½ mois au total, atteint le seuil du délai « manifestement inacceptable » fixé dans l'arrêt *Blencoe* (par. 115). Ce délai excessif a causé du stress et des problèmes de santé connexes à Me Abrametz, dont la pratique du droit a par ailleurs fait l'objet de conditions intrusives. Ses employés ont souffert eux aussi de ces procédures d'une durée injustifiable.

[188] À mon avis, la durée du délai inexpliqué et l'ampleur du préjudice qu'il a causé doivent donner lieu à une réparation d'un sérieux correspondant. Je conclus que la Cour d'appel a ordonné à bon droit l'annulation de la sanction infligée à Me Abrametz. Sa radiation du tableau de l'ordre ne servirait pas l'intérêt public.

A. *Le délai excessif*

[189] Le Barreau a entrepris son enquête de vérification de Me Abrametz en décembre 2012. Le vérificateur du Barreau, M. Allen, a produit un rapport sur les comptes en fiducie environ 23 mois plus tard, en octobre 2014. Presque une année complète s'est écoulée avant que le Barreau dépose une plainte officielle contre Me Abrametz, en octobre 2015. Les parties ont plaidé certaines questions de procédure avant le début de l'audience en mai 2017. La décision

2022 SCC 29 (CanLII)

Committee in January 2019 brought the disciplinary proceedings to an end. By then, the proceedings had been going on for approximately 73 months — or just over 6 years since the beginning of the investigation.

[190] In my view, the delay was plainly inordinate in the circumstances, and I say this regardless of the standard of review. The Law Society failed to provide justifications for several lengthy gaps, particularly at the investigatory stage, where most of the undue delay occurred. Cumulatively, the periods of unexplained delay are "clearly unacceptable" and thus inordinate within the meaning of *Blencoe*.

[191] In its brief analysis of delay, the Hearing Committee made only findings of a general nature: the investigation was complex and extensive; Mr. Abrametz cooperated with Mr. Allen initially but ceased to do so in May 2015; and around 14 months of delay were attributable to the unavailability of Mr. Abrametz's counsel. The Hearing Committee did not determine the inherent time requirements of any step in the proceedings, nor did it address the substantial gaps in the investigation in particular.

[192] Given the blatantly excessive delay in this case, it was incumbent on the Hearing Committee to carefully assess the justifications for the time taken at each key step of the investigation. It merely referred to the affidavit of Mr. Huber, counsel for the Law Society. But neither this affidavit nor the rest of the record discloses any reasonable justifications for the gaps in the proceedings.

[193] I disagree with the majority's assertion that "[t]he Court of Appeal departed from its proper role" in assessing whether the delay was inordinate (para. 114). In the absence of a thorough analysis by the Hearing Committee, the Court of Appeal rightfully made an independent assessment of the periods of delay at every key step of the proceedings. While the Hearing Committee's findings of fact are entitled to deference, I reiterate that the characterization of periods of delay and the overall conclusion on whether

relative à la sanction rendue par le Comité d'audition du Barreau en janvier 2019 a mis un terme aux procédures disciplinaires. À cette date, les procédures étaient en cours depuis environ 73 mois — soit un peu plus de 6 ans depuis le début de l'enquête.

[190] À mon avis, le délai était manifestement excessif dans les circonstances, et ce, sans égard à la norme de contrôle. Le Barreau n'a pas justifié plusieurs longs délais, particulièrement au stade de l'enquête, pendant laquelle la plus grande part du délai injustifié s'est écoulée. Cumulativement, les périodes de délai inexpliqué sont « manifestement inacceptables » et donc excessives au sens de l'arrêt *Blencoe*.

[191] Dans sa brève analyse du délai, le Comité d'audition n'a tiré que des conclusions de nature générale, soit que : l'enquête était complexe et poussée; Me Abrametz avait d'abord collaboré avec M. Allen, mais avait cessé de le faire en mai 2015; et environ 14 mois du délai total étaient attribuables à l'indisponibilité de l'avocat de Me Abrametz. Le Comité d'audition n'a pas déterminé le délai inhérent de quelque étape que ce soit des procédures. Il ne s'est pas non plus penché sur le laps de temps important entre les mesures prises dans l'enquête en cause.

[192] Comme le délai était manifestement excessif en l'espèce, il incombait au Comité d'audition d'évaluer soigneusement les justifications données en ce qui concerne le délai écoulé à chacune des étapes clés de l'enquête. Il s'est contenté de mentionner l'affidavit de Me Huber, l'avocat du Barreau. Or, ni cet affidavit ni le reste du dossier ne justifie convenablement les délais dans les procédures.

[193] Je suis en désaccord avec l'affirmation des juges majoritaires selon laquelle « la Cour d'appel s'est écartée du rôle qui est le sien » en se demandant si le délai était excessif (par. 114). Faute d'une analyse exhaustive par le Comité d'audition, c'est à bon droit que la Cour d'appel a fait une évaluation indépendante des délais à chacune des étapes clés des procédures. Bien que les conclusions de fait du Comité d'audition commandent la déférence, je répète que la qualification des délais et la conclusion globale sur la question de

2022 SCC 29 (CanLII)

the delay was inordinate are subject to the standard of correctness.

[194] After carefully reviewing the record, I substantially agree with the Court of Appeal's meticulous analysis, and I accept its conclusion that 32 ½ months of delay in the proceedings were unjustified. This case is not a close call. I agree with the Court of Appeal that "[t]his delay did not marginally overshoot what might have been considered appropriate. . . . [I]t so grossly exceeded the inherent requirements of this case as to be 'clearly unacceptable' within the meaning of *Blencoe*" (para. 197 (CanLII)).

[195] Given the Court of Appeal's thorough analysis, it is unnecessary to review each step of the proceedings in detail. I nonetheless address below the relevance of the Hearing Committee's findings on the complexity of the investigation and on Mr. Abrametz's lack of cooperation.

(1) Complexity of the Investigation

[196] The complexity of the investigation cannot account for the Law Society's inactivity between the beginning of the audit investigation and the issuance of the formal complaint, the period during which most of the unexplained delay occurred.

[197] The proceedings started on the right track. In February 2013, only two months into the investigation, the Law Society's Conduct Investigation Committee ("CIC") issued a notice of intention to interim suspend Mr. Abrametz based on the information he had self-reported. This notice referred to all the charges of which Mr. Abrametz was eventually found guilty, almost six years later. Moreover, as early as March 2013, Mr. Allen completed a draft trust report that, according to the Court of Appeal, already contained most of the content and attachments that were used in the final trust report (para. 188). The same month, after negotiating with the CIC, Mr. Abrametz signed an undertaking allowing him to maintain his legal practice under stringent conditions.

savoir si le délai était excessif sont susceptibles de contrôle selon la norme de la décision correcte.

[194] Après avoir soigneusement examiné la preuve au dossier, je souscris pour l'essentiel à l'analyse méticuleuse de la Cour d'appel, et je fais mienne sa conclusion selon laquelle le délai de 32 ½ mois dans les procédures en cause était injustifié. Il ne s'agit pas d'un cas limite. Je partage l'opinion de la Cour d'appel selon laquelle [TRADUCTION] « [c]e délai n'a pas dépassé de peu ce qui aurait pu être considéré comme approprié. [. . .] [I]l a dépassé de façon si flagrante le délai inhérent de la présente affaire qu'il est "manifestement inacceptable" au sens de l'arrêt *Blencoe* » (par. 197 (CanLII)).

[195] Étant donné l'analyse approfondie faite par la Cour d'appel, il est inutile d'examiner chaque étape des procédures en détail. Je vais néanmoins me pencher, ci-après, sur la pertinence des conclusions du Comité d'audition quant à la complexité de l'enquête et au manque de collaboration de Me Abrametz.

(1) La complexité de l'enquête

[196] La complexité de l'enquête ne saurait expliquer l'inactivité du Barreau entre le début de l'enquête de vérification et le dépôt de la plainte officielle, soit la période pendant laquelle s'est écoulée la plus grande part du délai inexpliqué.

[197] Les procédures ont débuté sur la bonne voie. En février 2013, seulement deux mois après le début de l'enquête, le Conduct Investigation Committee (« CIC ») du Barreau a publié un avis d'intention de suspendre provisoirement Me Abrametz sur la foi des renseignements que celui-ci avait lui-même fournis. Cet avis faisait état de toutes les accusations dont Me Abrametz sera déclaré coupable presque six ans plus tard. Qui plus est, dès mars 2013, M. Allen a produit un projet de rapport sur les comptes en fiducie qui, selon la Cour d'appel, renfermait déjà l'essentiel du contenu et des annexes qui ont été utilisés dans le rapport définitif sur les comptes en fiducie (par. 188). Le même mois, après avoir négocié avec le CIC, Me Abrametz a signé un engagement lui permettant de continuer à pratiquer le droit à des conditions strictes.

2022 SCC 29 (CanLII)

[198] The final trust report, however, was completed by Mr. Allen no less than a year and a half later, in October 2014. The record contains scant evidence of any work done by Mr. Allen during that 19-month period, as the Court of Appeal pointed out: there are no "particulars of when Mr. Allen spent . . . time" reviewing client files and other documents, nor is there any "evidence of what he did in 2014, other than the bare fact that he completed his final trust report on October 30, 2014" (para. 19). Given the deficient explanations offered by the Law Society, the Court of Appeal did not err in finding 15 months of unexplained delay between the draft and the final trust report.

[198] Cependant, le rapport définitif sur les comptes en fiducie a été produit par M. Allen pas moins d'un an et demi plus tard, en octobre 2014. Comme l'a signalé la Cour d'appel, le dossier ne renferme qu'une preuve ténue du travail qu'aurait effectué M. Allen au cours de cette période de 19 mois : il n'y a pas de [TRADUCTION] « détails indiquant quand M. Allen a consacré [. . .] du temps » à l'examen des dossiers des clients et d'autres documents, et il n'y a pas non plus de « preuve de ce qu'il a fait en 2014, autre que le simple fait qu'il a produit son rapport sur les comptes en fiducie définitif le 30 octobre 2014 » (par. 19). Considérant les explications déficientes données par le Barreau, la Cour d'appel n'a commis aucune erreur en concluant à l'existence d'un délai inexpliqué de 15 mois entre le projet de rapport et le rapport définitif sur les comptes en fiducie.

[199] Similarly, after the completion of the trust report, the Law Society inexplicably took an additional 12 months to issue the formal complaint against Mr. Abrametz in October 2015. The formal complaint, I observe, merely reiterated the charges specified in a report prepared by the CIC — the draft of which was reasonably complete by March 2015, or 4 ½ months after the trust report. Yet from that point, the Law Society took over 7 months to issue the formal complaint, a four-page document that substantially reproduced the content of its draft report. Mr. Huber's time records, unsurprisingly, reveal that he worked only a few hours per month on this file during that period. In this context, the Court of Appeal's conclusion that there were 6 months of undue delay between the trust report and the formal complaint seems inevitable.

[199] De même, après l'achèvement du rapport sur les comptes en fiducie, le Barreau a inexplicablement eu besoin de 12 mois additionnels pour déposer la plainte officielle contre Me Abrametz, en octobre 2015. Je constate que la plainte officielle ne faisait que répéter les accusations énoncées dans un rapport rédigé par le CIC — dont le projet avait été raisonnablement complété en mars 2015, soit 4 ½ mois après le rapport sur les comptes en fiducie. Pourtant, à compter de ce moment, le Barreau a mis plus de 7 mois avant de déposer la plainte officielle, un document de 4 pages qui reproduisait pour l'essentiel le contenu de son projet de rapport. Sans surprise, les rapports d'emploi du temps de Me Huber révèlent qu'il n'avait travaillé que quelques heures par mois sur ce dossier pendant cette période. Dans ce contexte, la conclusion de la Cour d'appel qu'il y a eu 6 mois de délai injustifié entre le rapport sur les comptes en fiducie et la plainte officielle va de soi.

[200] To recap, by the time the Law Society issued the formal complaint, the investigation had already been plagued by 21 months of undue delay. It is not worthwhile to examine the other steps of the proceedings in detail. Much of the subsequent undue delay may be attributed to the lack of direction in the investigation and, in particular, the undue focus on Mr. Abrametz's alleged tax evasion.

[200] En bref, au moment où le Barreau a déposé la plainte officielle, l'enquête était déjà entachée d'un délai injustifié de 21 mois. Il est inutile d'examiner en détail les autres étapes des procédures. Une part importante du délai injustifié subséquent peut être attribuée à l'absence de direction dans l'enquête et, en particulier, à l'accent indu mis sur la fraude fiscale que le Barreau reprochait à Me Abrametz.

2022 SCC 29 (CanLII)

[201] As early as October 2013, Mr. Allen became aware of the tax issue, but his progress was stalled by Mr. Abrametz's refusal to disclose his financial records the following month. As the Court of Appeal explained, "a decision was made to focus on the tax issue — which the [Law Society] had allowed to languish since . . . October 2013 — rather than expeditiously moving the other charges forward at the same time" (para. 190). The Law Society inexplicably waited until September 2015 to bring an application under s. 63 of *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, to obtain the financial records sought by Mr. Allen two years earlier.

[202] Simply put, the time and resources dedicated to the tax issue — which was far more complex than the charges for conduct unbecoming a lawyer — derailed the proceedings. This emphasis was misplaced because the charges laid out in the formal complaint sufficed to have Mr. Abrametz disbarred. Had the Law Society focused on swiftly bringing these charges from the outset, the investigation and prosecution could have proceeded within a reasonable timeframe. The harm had already been done by the time the Law Society communicated its decision to bifurcate the proceedings in July 2015.

(2) Cooperation

[203] The Hearing Committee noted that "[w]hile the Member initially cooperated with the investigation, that cooperation ceased in May of 2015" (2018 SKLSS 8, at para. 357 (CanLII)). This finding relates to Mr. Abrametz's resistance to disclosing his tax records — which was evident as early as October 2013, when he refused to respond to Mr. Allen's tax-related questions. In all other matters, Mr. Abrametz *was* cooperative. I further note that the bulk of the unexplained delay occurred prior to May 2015.

[204] In any event, this finding rests on a mistaken interpretation of *The Legal Profession Act, 1990*. The Law Society was *required* by law to make an application under s. 63 to obtain the financial records

[201] Dès octobre 2013, M. Allen avait pris connaissance de la question fiscale, mais sa démarche a été retardée par le refus de Me Abrametz de communiquer ses documents financiers le mois suivant. Comme l'a expliqué la Cour d'appel, [TRADUCTION] « on a pris la décision de se concentrer sur la question fiscale — que le [Barreau] avait laissé traîner en longueur depuis [. . .] octobre 2013 — plutôt que de faire avancer avec célérité les autres accusations simultanément » (par. 190). Le Barreau a inexplicablement attendu jusqu'en septembre 2015 avant de présenter une demande fondée sur l'art. 63 de la *Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, en vue d'obtenir les documents financiers que M. Allen avait cherché à obtenir deux ans plus tôt.

[202] Pour dire les choses simplement, le temps et les ressources consacrés à la question fiscale — qui était beaucoup plus complexe que les accusations de conduite indigne d'un avocat — ont fait dérailler les procédures. L'accent mis sur cette question était injustifié, puisque les accusations portées dans la plainte officielle auraient suffi à obtenir la radiation de Me Abrametz du tableau de l'ordre. Si le Barreau s'était concentré sur ces accusations en premier lieu, l'enquête et la poursuite auraient pu suivre leur cours dans un délai raisonnable. Le tort avait déjà été causé au moment où le Barreau a communiqué sa décision de scinder les procédures en juillet 2015.

(2) La collaboration

[203] Le Comité d'audition a constaté que [TRADUCTION] « [b]ien que le membre ait d'abord collaboré à l'enquête, cette collaboration a cessé en mai 2015 » (2018 SKLSS 8, par. 357 (CanLII)). Cette conclusion a trait à la réticence de Me Abrametz de communiquer ses documents fiscaux — réticence qui était évidente dès octobre 2013, lorsqu'il a refusé de répondre aux questions de M. Allen en matière fiscale. Relativement à toutes les autres questions, Me Abrametz *était* coopératif. Je souligne par ailleurs que la plus grande part du délai inexpliqué s'est déroulée avant mai 2015.

[204] Quoi qu'il en soit, cette conclusion repose sur une interprétation erronée de la *Legal Profession Act, 1990*. Le Barreau était *tenu* par la loi de présenter une demande fondée sur l'art. 63 pour obtenir les

2022 SCC 29 (CanLII)

that Mr. Abrametz refused to disclose. Characterizing Mr. Abrametz as "uncooperative" for reasonably opposing the disclosure of his personal financial records would effectively nullify this procedural protection.

[205] It is noteworthy that the Law Society attempted to obtain the same financial records by issuing subpoenas to Mr. Abrametz and his accountants under s. 39 of *The Legal Profession Act, 1990*. The Court of Queen's Bench quashed these subpoenas as an abuse of process, holding that the Law Society was improperly seeking to discover documents by circumventing the s. 63 process and related hearing. The need for judicial oversight implies that Mr. Abrametz justifiably opposed the production of his financial records. Given the ambiguity that surrounded the scope of the Law Society's investigatory powers prior to adjudication, it was an error to conclude that Mr. Abrametz was uncooperative.

[206] Not only did the Law Society commit an abuse of process by improperly issuing subpoenas, but it also made a frivolous submission in defending its decision to do so. The Law Society argued that Mr. Abrametz did not have standing to challenge the subpoenas served on his accountants for the production of his personal financial records. Needless to say, conduct of this nature is not conducive to the efficient and timely progression of disciplinary proceedings.

B. *Prejudice*

[207] The Hearing Committee found that the prejudice in this case did not meet the threshold for obtaining a stay of proceedings. I would not interfere with this finding, although I note that the prejudice was far from negligible. Regarding causation, however, the Hearing Committee erred in asserting that there was no causal connection between the unexplained delay and the prejudice.

documents financiers que Me Abrametz refusait de communiquer. Qualifier Me Abrametz de [TRADUCTION] « peu coopératif » pour son opposition valable à la communication de ses documents financiers personnels aurait pour effet de supprimer cette protection procédurale.

[205] Il convient de noter que le Barreau avait tenté d'obtenir les mêmes documents financiers en délivrant des assignations à Me Abrametz et à ses comptables aux termes de l'art. 39 de la *Legal Profession Act, 1990*. La Cour du Banc de la Reine a annulé ces assignations pour cause d'abus de procédure. Elle a statué que le Barreau tentait indûment d'obtenir la communication de documents en contournant le processus prévu à l'art. 63 et l'audience connexe. Or, la nécessité de recourir à ce processus judiciaire implique que l'opposition de Me Abrametz à la production de ses documents financiers était justifiée. Considérant l'ambiguïté qui entourait la portée des pouvoirs d'enquête du Barreau, il était erroné de conclure que Me Abrametz avait été peu coopératif.

[206] Non seulement le Barreau a-t-il commis un abus de procédure en délivrant indûment des assignations, mais il a aussi formulé un argument frivole en défendant sa décision d'agir de la sorte. En effet, le Barreau a fait valoir que Me Abrametz n'avait pas la qualité voulue pour agir afin de contester les assignations signifiées à ses comptables en vue de la production de ses documents financiers personnels. Il va sans dire qu'une conduite de cette nature ne favorise pas la progression efficace et rapide de procédures disciplinaires.

B. *Le préjudice*

[207] Le Comité d'audition a conclu que le préjudice en l'espèce n'atteignait pas le seuil requis pour justifier un arrêt des procédures. Je ne modifierais pas cette conclusion, même si je constate que le préjudice fut loin d'être négligeable. Toutefois, le Comité d'audition a eu tort d'affirmer qu'il n'y avait aucun lien de causalité entre le délai inexpliqué et le préjudice.

2022 SCC 29 (CanLII)

(1) Nature and Magnitude

[208] The most detrimental effect of the delay was the stress suffered by Mr. Abrametz and his employees. Mr. Abrametz was monitored for high blood pressure resulting from this stress. Importantly, the Hearing Committee considered this prejudice only in analyzing Mr. Abrametz's claim under s. 7 of the *Charter*. I note that the requirements in the s. 7 context are demonstrably higher than the "significant prejudice" threshold for obtaining a stay of proceedings. Indeed, the majority in *Blencoe* stressed that "anxiety, stress and stigma" do not engage the liberty and security interests protected by s. 7 (para. 97). Nonetheless, it also recognized that "significant psychological harm to a person, or . . . stigma to a person's reputation" caused by inordinate delay may warrant a stay of proceedings (para. 115).

[209] Therefore, it is important to bear in mind that the Hearing Committee's characterization of the prejudice in this case reflected an onerous *Charter* standard that Mr. Abrametz did not have to satisfy under the *Blencoe* framework. The Hearing Committee's findings that Mr. Abrametz suffered "some degree of stress" and that he had a related "minor medical condition" (paras. 335 and 337) were understandable in discussing s. 7 of the *Charter*. But such detrimental effects must be taken seriously in assessing the magnitude of the prejudice pursuant to administrative law principles. Moreover, the Hearing Committee acknowledged that Mr. Abrametz's employees experienced stress throughout the proceedings (para. 338; A.R., vol. I, at p. 352).

[210] Read contextually, the Hearing Committee's assessment of the prejudice does not preclude the conclusion that the detrimental effects suffered by Mr. Abrametz and his employees were serious, even if they were not so significant as to justify a stay of proceedings. In my view, this is the only reasonable interpretation of the circumstances: a sword of Damocles hung over Mr. Abrametz's professional

(1) La nature et l'ampleur du préjudice

[208] L'effet le plus néfaste du délai a été le stress subi par Me Abrametz et ses employés. Maître Abrametz a été surveillé pour l'hypertension artérielle résultant de ce stress. Fait important, le Comité d'audition n'a pris en compte ce préjudice que dans son analyse de la demande de Me Abrametz fondée sur l'art. 7 de la *Charte*. Je souligne qu'il est sensiblement plus difficile de satisfaire aux exigences applicables dans le contexte de l'art. 7 que d'atteindre le seuil du « préjudice important » pour obtenir un arrêt des procédures. En effet, dans l'arrêt *Blencoe*, les juges majoritaires ont souligné que « [l']angoisse, [le] stress [et la] stigmatisation » ne font pas entrer en jeu les droits à la liberté et à la sécurité protégés par l'art. 7 (par. 97). Néanmoins, ils ont également reconnu qu'« un préjudice psychologique important à une personne ou [une atteinte à] sa réputation » causés par un délai excessif peuvent justifier un arrêt des procédures (par. 115).

[209] Par conséquent, il importe de garder à l'esprit que la qualification du préjudice par le Comité d'audition était le reflet d'un seuil onéreux dicté par la *Charte*, seuil que Me Abrametz n'avait pas à atteindre suivant le cadre d'analyse défini par l'arrêt *Blencoe*. Les conclusions du Comité d'audition selon lesquelles Me Abrametz avait subi [TRADUCTION] « un certain degré de stress » et qu'il avait un « problème [connexe] de santé mineur » (par. 335 et 337) étaient compréhensibles dans le cadre d'une analyse fondée sur l'art. 7 de la *Charte*. Des effets aussi néfastes doivent toutefois être pris au sérieux dans l'évaluation de l'ampleur du préjudice au regard des principes du droit administratif. Qui plus est, le Comité d'audition a reconnu que les employés de Me Abrametz avaient vécu du stress tout au long des procédures (par. 338; d.a., vol. I, p. 352).

[210] Interprétée dans son contexte, l'évaluation du préjudice qu'a faite le Comité d'audition n'empêche pas de conclure que les effets néfastes subis par Me Abrametz et ses employés étaient sérieux, et ce, même s'ils ne l'étaient pas suffisamment pour justifier un arrêt des procédures. À mon avis, il s'agit là de la seule interprétation raisonnable des circonstances : une épée de Damoclès était suspendue au-dessus de

2022 SCC 29 (CanLII)

career for several years — and unduly so for a period of 32 ½ months. This inordinate delay also affected his employees, who worked in precarious circumstances far longer than necessary.

la carrière professionnelle de Me Abrametz pendant plusieurs années, et ce, de façon injustifiée pendant 32 ½ mois. Ce délai excessif a en outre eu une incidence sur ses employés, qui ont travaillé dans des circonstances précaires beaucoup plus longtemps qu'il n'était nécessaire.

[211] The intrusive conditions imposed by the Law Society on Mr. Abrametz's legal practice constituted an additional form of prejudice, albeit a less serious one. The Hearing Committee erred in considering the fact that "the majority of the allegations lodged against the Member were determined by this Hearing Committee to be well founded" (para. 352). This remark worryingly suggests that the Hearing Committee's analysis of prejudice might have been tainted by its conclusions on Mr. Abrametz's guilt. To reiterate, professional bodies owe a duty of fairness to all persons subject to their proceedings — including those in breach of their professional obligations. Inordinate delay is abusive, irrespective of the outcome of the proceedings.

[211] Les conditions intrusives qu'a imposées le Barreau sur la pratique du droit de Me Abrametz constituaient une forme supplémentaire de préjudice, quoique moins sérieux. Le Comité d'audition a eu tort de prendre en compte le fait qu'il [TRADUCTION] « a conclu que la plupart des allégations portées contre le membre étaient bien fondées » (par. 352). Cette remarque laisse entendre de façon troublante que l'analyse du préjudice qu'a faite le Comité d'audition a pu être viciée par ses conclusions à propos de la culpabilité de Me Abrametz. Je le répète, les ordres professionnels ont une obligation d'agir équitablement envers toutes les personnes qui font l'objet de procédures disciplinaires — y compris celles qui ont manqué à leurs obligations professionnelles. Les délais excessifs sont abusifs, sans égard à l'issue des procédures.

[212] Unlike the Court of Appeal, I am not taking account of the reputational harm suffered by Mr. Abrametz. There is no reviewable error in the Hearing Committee's finding that this harm was caused by the hearing itself rather than by the delay. The Hearing Committee noted that "[t]he Member has not pointed to any publicity, adverse or otherwise, of the proceedings between 2013 and 2018. The publicity occurred over a short period of time early in 2018" (para. 350). With respect, the Court of Appeal erred in interfering with this finding.

[212] Contrairement à la Cour d'appel, je ne prends pas en compte le tort causé à la réputation de Me Abrametz. La conclusion du Comité d'audition selon laquelle ce tort avait été causé par l'audience elle-même, plutôt que par le délai, n'est entachée d'aucune erreur susceptible de révision. Le Comité d'audition a souligné que [TRADUCTION] « [l]e membre n'a signalé aucune publicité, négative ou autre, des procédures entre 2013 et 2018. Il n'a été question publiquement de ces dernières que sur une courte période, au début de 2018 » (par. 350). Avec égards, la Cour d'appel a eu tort de modifier cette conclusion.

(2) Causation

(2) La causalité

[213] I part ways with the Hearing Committee on the assessment of causation in respect of the stress experienced by Mr. Abrametz and his employees. In the Hearing Committee's view, there was no causal link between the delay and these detrimental effects. However, this conclusion flowed from the application of an erroneous legal standard of causation. The Hearing Committee stated that it had to be "satisfied

[213] Je diverge d'opinion avec le Comité d'audition en ce qui concerne l'analyse de la causalité à l'égard du stress vécu par Me Abrametz et ses employés. De l'avis du Comité d'audition, il n'y avait aucun lien de causalité entre le délai et ces effets néfastes. Cette conclusion découlait toutefois de l'application d'un critère juridique de causalité erroné. Le Comité d'audition a affirmé qu'il devait être [TRADUCTION]

2022 SCC 29 (CanLII)

that any delay in the investigation or hearing process is the contributing cause to the harm that the Member may have experienced due to the stress" (para. 336 (emphasis added)).

[214] Although deference applies to findings on causation, it is wrong *in law* to suggest that prejudice must have a single contributing cause. Indeed, the Hearing Committee effectively applied a "but for" causation test. Yet this Court stated in *Blencoe* that causation is established where delay is "a contributing cause" (para. 68 (emphasis added)). In that case, Bastarache J. assumed, without deciding, that the delay had "exacerbated" the stigma suffered, although he expressed doubt about whether reputational damage could depend on the duration of the proceedings (para. 71). LeBel J., for his part, acknowledged that "delay was not the only cause" of the prejudice, but he concluded that the delay had "contributed significantly to its aggravation" (para. 177).

[215] Even if we adopt Bastarache J.'s approach to causation in *Blencoe*, the nature of the prejudice in this case is not akin to reputational damage. Reputation "is quickly ruined and difficult to re-establish" (*Blencoe*, at para. 71), whereas the effects of stress are *continuous*, and thus directly dependent on the duration of the proceedings. Common sense dictates that an unjustified delay of 32 ½ months in career-altering proceedings would, at minimum, be a contributing cause of the stress experienced by the affected person. The Hearing Committee's findings on the lack of causation thus cannot stand.

[216] I note, once more, that the outcome of disciplinary proceedings cannot inform the assessment of prejudice and causation. In this case, the proceedings were not the original cause of the prejudice. Nevertheless, the unexplained delay undoubtedly contributed to the detrimental effects suffered by Mr. Abrametz and his employees by unduly extending the proceedings by 32 ½ months.

« convaincu que tout délai touchant le processus d'enquête ou d'audition est la cause du préjudice que le membre a pu subir en raison du stress » (par. 336 (je souligne)).

[214] Bien que les conclusions en matière de causalité commandent la déférence, il est erroné *en droit* de prétendre que le préjudice doit être causé par un seul facteur. Or, le Comité d'audition a effectivement appliqué un test de la causalité fondée sur un « facteur déterminant ». Pourtant, dans l'arrêt *Blencoe*, notre Cour a affirmé que la causalité est établie lorsque le délai est « un "facteur qui a contribué" au préjudice » (par. 68 (je souligne)). Dans cette cause, le juge Bastarache a tenu pour acquis, sans en décider, que le délai avait « aggravé » la stigmatisation subie, bien qu'il ait dit douter que le tort causé à la réputation puisse dépendre de la durée des procédures (par. 71). Pour sa part, le juge LeBel a reconnu que « le délai [. . .] n'a pas été la seule cause » du préjudice, mais il a conclu qu'il « [avait] beaucoup contribué à son aggravation » (par. 177).

[215] Même si nous adoptons la démarche suivie par le juge Bastarache en matière de causalité dans l'arrêt *Blencoe*, la nature du préjudice en l'espèce ne s'apparente pas au tort causé à la réputation. Celle-ci « peut être ternie rapidement, mais elle est difficile à rétablir » (*Blencoe*, par. 71), tandis que les effets du stress sont *continus*, et donc directement tributaires de la durée des procédures. Il va de soi qu'un délai injustifié de 32 ½ mois dans des procédures qui bouleversent une carrière serait, à tout le moins, un facteur ayant contribué au stress vécu par l'intéressé. Par conséquent, les conclusions du Comité d'audition en ce qui concerne l'absence de causalité ne sauraient être maintenues.

[216] Je rappelle que l'issue de procédures disciplinaires ne doit pas guider l'analyse du préjudice et de la causalité. En l'espèce, les procédures n'étaient pas la cause initiale du préjudice. Néanmoins, le délai inexpliqué a indubitablement contribué aux effets néfastes subis par Me Abrametz et par ses employés en prolongeant indûment les procédures de 32 ½ mois.

2022 SCC 29 (CanLII)

C. *Remedy*

[217] As a preliminary matter, I emphasize that the Court of Appeal did *not* grant a stay of proceedings, despite its characterization of the remedy it ordered:

> For these reasons, I would allow the appeal on the ground that the Hearing Committee erred by dismissing Mr. Abrametz's application to stay the proceedings as a result of undue delay constituting an abuse of process. The [Law Society] proceedings which were commenced by the Formal Complaint are stayed. In the result, the penalty and costs award imposed by the Penalty Decision are set aside. The findings of professional misconduct stand. [Emphasis added; para. 217.]

A stay of proceedings — the "ultimate remedy" (*Tobiass*, at para. 86) — annuls the disposition as well as the legal and factual bases on which it rests. By maintaining Mr. Abrametz's convictions, the Court of Appeal effectively quashed the penalty rather than staying the proceedings.

[218] Given the nature of the remedy at issue, I will not address the test articulated by this Court for determining whether proceedings should be stayed (see above, at para. 141). Instead, my analysis focuses on the justifications for setting aside Mr. Abrametz's penalty. I am of the view that the Court of Appeal ordered the correct remedy in the circumstances of this case.

[219] The guiding principle in selecting the remedy for an abuse of process is proportionality. Courts have multiple remedial options at their disposal, ranging from a declaration to a stay of proceedings. The remedy must be proportionate to the severity of the abusive conduct, having regard to the length of the unexplained delay and the nature and magnitude of the prejudice it caused. Considerations relating to the public interest complement this contextual analysis.

[220] In this case, the length of the inordinate delay militates in favour of a strong remedy. Simply put, the

C. *La réparation*

[217] À titre préliminaire, je souligne que la Cour d'appel *n'a pas* accordé un arrêt des procédures, malgré sa qualification de la réparation qu'elle a ordonnée :

> [TRADUCTION] Pour ces motifs, je suis d'avis d'accueillir l'appel, vu que le Comité d'audition a eu tort de rejeter la demande de Me Abrametz en arrêt des procédures fondée sur le délai injustifié qui a constitué un abus de procédure. Les procédures [du Barreau] qui ont été introduites par la plainte officielle sont suspendues. Par conséquent, la sanction et la condamnation aux dépens infligées par la décision relative à la sanction sont annulées. Les conclusions d'inconduite professionnelle sont maintenues. [Je souligne; par. 217.]

Un arrêt des procédures — l'« ultime réparation » (*Tobiass*, par. 86) — annule le dispositif ainsi que les fondements juridiques et factuels sur lesquels il repose. En maintenant les déclarations de culpabilité de Me Abrametz, la Cour d'appel a effectivement annulé la sanction, plutôt que prononcé l'arrêt des procédures.

[218] Vu la nature de la réparation en cause, je ne me pencherai pas sur le test formulé par notre Cour pour déterminer s'il y a lieu de prononcer un arrêt des procédures (voir le par. 141 des présents motifs). Mon analyse porte plutôt sur les justifications de l'annulation de la sanction infligée à Me Abrametz. Je suis d'avis que la Cour d'appel a ordonné la bonne réparation dans les circonstances de l'espèce.

[219] Le principe directeur dans le choix de la réparation en cas d'abus de procédure est la proportionnalité. Les tribunaux peuvent choisir parmi plusieurs réparations possibles, allant du jugement déclaratoire à l'arrêt des procédures. La réparation doit être proportionnelle à la gravité de la conduite abusive, eu égard à la durée du délai inexpliqué ainsi qu'à la nature et à l'ampleur du préjudice qu'elle a causé. Des considérations liées à l'intérêt public complètent cette analyse contextuelle.

[220] En l'espèce, la durée du délai excessif milite en faveur d'une réparation robuste. Pour dire les

2022 SCC 29 (CanLII)

Law Society demonstrably failed to comply with its duty of procedural fairness toward Mr. Abrametz. The periods of unexplained delay substantially exceeded the inherent time requirements of the case and are "clearly unacceptable" within the meaning of *Blencoe*. In my view, courts should not hesitate to condemn such procedural unfairness. Accordingly, the remedy of setting aside the penalty is apposite because it signals to the Law Society — and to administrative bodies more generally — that unacceptable delay brings the administration of justice into disrepute.

[221] The prejudice in this case does not meet the high threshold required for a stay of proceedings, but it is far from negligible. For an unexplained period of 32 ½ months, Mr. Abrametz and his employees experienced undue stress arising from these career-altering disciplinary proceedings. Mr. Abrametz was monitored for high blood pressure, a medical condition attributable to these stressful circumstances. He was also subject to intrusive conditions in order to maintain his legal practice. These prejudicial effects, taken together, are serious.

[222] Overall, the nature and magnitude of the prejudice, considered in light of the length of the unexplained delay, warrant a correspondingly serious remedy, if perhaps not a stay. This factor thus supports the quashing of the penalty imposed by the Hearing Committee.

[223] Finally, the public interest would not be served by maintaining the penalty imposed by the Law Society on Mr. Abrametz. It is true that he was found guilty of serious breaches of his professional obligations. However, multiple considerations convince me that the protection of the public does not require Mr. Abrametz's disbarment at this point. The Law Society took swift action to impose stringent conditions on his legal practice in order to prevent further misconduct. He was closely monitored by the Law Society for over four years — during which time his conduct was exemplary, according to the Hearing Committee (para. 395). Prior to the misconduct investigated by the Law Society, Mr. Abrametz was a longstanding practitioner with no disciplinary

choses simplement, le Barreau a clairement manqué à son obligation d'équité procédurale envers Me Abrametz. Les périodes de délai inexpliqué ont considérablement dépassé les délais inhérents de l'affaire et sont « manifestement inacceptables » au sens de l'arrêt *Blencoe*. À mon avis, les tribunaux ne doivent pas hésiter à condamner une telle iniquité procédurale. Par conséquent, la réparation qui consiste à annuler la sanction est appropriée, car elle signale au Barreau — et plus généralement aux organismes administratifs — que les délais inacceptables déconsidèrent l'administration de la justice.

[221] Le préjudice en l'espèce n'atteint pas le seuil nécessaire pour justifier un arrêt des procédures, mais il est loin d'être négligeable. Pendant une période inexpliquée de 32 ½ mois, Me Abrametz et ses employés ont vécu un stress indu découlant de ces procédures disciplinaires susceptibles de bouleverser sa carrière. Maître Abrametz a été surveillé pour l'hypertension artérielle, un problème médical attribuable à ces circonstances stressantes. Il a également été soumis à des conditions intrusives afin de continuer à pratiquer le droit. Pris ensemble, ces effets préjudiciables sont sérieux.

[222] Globalement, la nature et l'ampleur du préjudice, considérées à la lumière de la durée du délai inexpliqué, justifient une réparation d'un sérieux correspondant, sans toutefois justifier un arrêt des procédures. Ce facteur appuie donc l'annulation de la sanction infligée par le Comité d'audition.

[223] Enfin, l'intérêt public ne serait pas servi en maintenant la sanction qu'a infligée le Barreau à Me Abrametz. Il est vrai que ce dernier a été déclaré coupable de manquements graves à ses obligations professionnelles. Toutefois, de multiples considérations me convainquent que la protection du public n'exige pas la radiation de Me Abrametz du tableau de l'ordre à ce stade-ci. Le Barreau a rapidement fixé des conditions strictes à sa pratique du droit de manière à empêcher que Me Abrametz ne se rende coupable d'autres inconduites. Il a été étroitement surveillé par le Barreau pendant plus de quatre ans — période pendant laquelle sa conduite a été jugée exemplaire par le Comité d'audition (par. 395). Avant l'inconduite qui a fait l'objet de l'enquête du Barreau,

2022 SCC 29 (CanLII)

record. Additionally, I note that none of his clients complained of his actions.

[224] In short, Mr. Abrametz has already paid a hefty price for his misconduct, and he has proved that his practice is no longer a matter of concern for the protection of the public. The remedy ordered by the Court of Appeal does not annul the proceedings or their outcome, as a stay would. The consequences of staying the proceedings would be much more serious: "Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact" (*Regan*, at para. 53). Here, the allegations of professional misconduct were debated at a public hearing that attracted media attention. The Hearing Committee's findings of guilt stand — as does the stigma flowing from them. These convictions leave an indelible mark on Mr. Abrametz's disciplinary record, which may be accessed by members of the public at their convenience. In this context, the justifications for punishing Mr. Abrametz no longer hold; the penalty of disbarment would not be in the public interest.

V. Conclusion

[225] No less than 6 years elapsed between the beginning of the Law Society's audit investigation and its penalty decision, 32 ½ months of which were unjustified. This inordinate delay caused serious prejudice to Mr. Abrametz and his employees. In these circumstances, the Court of Appeal correctly sanctioned this abuse of process by ordering that the penalty for professional misconduct — but not the convictions themselves — be set aside.

[226] For these reasons, I would dismiss the appeal.

Me Abrametz était un praticien de longue date sans dossier disciplinaire. Je note en outre qu'aucun de ses clients ne s'est plaint de ses actions.

[224] En somme, Me Abrametz a déjà payé un prix élevé pour son inconduite, et il a prouvé que sa pratique n'était plus préoccupante eu égard à la protection du public. La réparation ordonnée par la Cour d'appel n'annule pas les procédures ou leur issue, comme l'aurait fait un arrêt des procédures. Les conséquences de cette dernière réparation seraient beaucoup plus graves : « Les accusations suspendues ne pourr[aient] jamais faire l'objet de poursuites; la présumée victime ne sera[it] jamais capable de se faire entendre en justice; la société sera[it] privée à jamais de la possibilité de faire trancher l'affaire par le juge des faits » (*Regan*, par. 53). En l'espèce, les allégations d'inconduite professionnelle ont été débattues lors d'une audience publique qui a attiré l'attention des médias. Les déclarations de culpabilité prononcées par le Comité d'audition sont maintenues — tout comme l'opprobre qui en découle. Ces déclarations de culpabilité laissent une marque indélébile sur le dossier disciplinaire de Me Abrametz, auquel les membres du public ont accès à leur guise. Dans ce contexte, les justifications de punir Me Abrametz ne tiennent plus; la sanction de la radiation du tableau de l'ordre ne serait pas dans l'intérêt public.

V. Conclusion

[225] Pas moins de 6 ans se sont écoulés entre le début de l'enquête de vérification par le Barreau et sa décision relative à la sanction, dont 32 ½ mois étaient injustifiés. Ce délai excessif a causé un préjudice sérieux à Me Abrametz et à ses employés. Dans ces circonstances, c'est à bon droit que la Cour d'appel a sévi contre cet abus de procédure en ordonnant que la sanction pour inconduite professionnelle — mais non les déclarations de culpabilité elles-mêmes — soit annulée.

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

2022 SCC 29 (CanLII)

Appeal allowed, CÔTÉ J. *dissenting.*

Solicitors for the appellant: Caza Saikaley, Ottawa; University of Ottawa, Ottawa.

Solicitors for the respondent: McDougall Gauley, Regina.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

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

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener the Law Society of Alberta: Field, Edmonton.

Solicitor for the intervener the Law Society of Manitoba: Law Society of Manitoba, Winnipeg.

Solicitors for the interveners the College of Physicians and Surgeons of Ontario, the College of Nurses of Ontario, the Ontario College of Pharmacists and the Royal College of Dental Surgeons of Ontario: College of Physicians and Surgeons of Ontario, Toronto; Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Alberta Securities Commission and the British Columbia Securities Commission: Alberta Securities Commission, Calgary; British Columbia Securities Commission, Vancouver.

Pourvoi accueilli, la juge CÔTÉ *est dissidente.*

Procureurs de l'appelante : Caza Saikaley, Ottawa; Université d'Ottawa, Ottawa.

Procureurs de l'intimé : McDougall Gauley, Regina.

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

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

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

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenante Law Society of Alberta : Field, Edmonton.

Procureur de l'intervenante la Société du Barreau du Manitoba : Société du Barreau du Manitoba, Winnipeg.

Procureurs des intervenants l'Ordre des médecins et chirurgiens de l'Ontario, l'Ordre des infirmières et infirmiers de l'Ontario, l'Ordre des pharmaciens de l'Ontario et l'Ordre royal des chirurgiens dentistes de l'Ontario : Ordre des médecins et chirurgiens de l'Ontario, Toronto; Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : Borden Ladner Gervais, Ottawa.

Procureurs des intervenantes Alberta Securities Commission et British Columbia Securities Commission : Alberta Securities Commission, Calgary; British Columbia Securities Commission, Vancouver.

2022 SCC 29 (CanLII)

Solicitor for the intervener Barreau du Québec: Barreau du Québec, Montréal.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: University of Toronto, Toronto; Downtown Legal Services, Toronto.

Procureur de l'intervenant le Barreau du Québec : Barreau du Québec, Montréal.

Procureurs de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés : University of Toronto, Toronto; Downtown Legal Services, Toronto.

2022 SCC 29 (CanLII)

TAB 35

Marchand, a minor by his litigation guardian Marchand v. The Public General Hospital Society of Chatham et al.*

[Indexed as: Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham]

51 O.R. (3d) 97
[2000] O.J. No. 4428
Docket No. C25915

Court of Appeal for Ontario
Laskin, Goudge and Sharpe JJ.A.
November 27, 2000

* Application for leave to appeal to the Supreme Court of Canada was dismissed September 27, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28379. S.C.C. Bulletin, 2001, p. 1685.

Courts -- Judges -- Bias -- Reasonable apprehension of bias -- Conduct of trial -- Plaintiffs appealing dismissal of action -- Plaintiffs arguing that trial judge's failure to restrain unprofessional and uncivil conduct by defence counsel establishing unfair trial and reasonable apprehension of bias -- Informed and reasonable observer looking realistically at trial would not have apprehended bias or unfair adjudication.

Evidence -- Use of discovery evidence at trial -- Correcting answers given on examination for discovery -- Difference between formal and informal admissions.

Evidence -- Experts -- Expert's reports -- Evidentiary rulings at trial -- Experts may not testify about new matters not touched on in expert's report delivered before trial -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 31.09, 53.03(1).

2000 CanLII 16946 (ON CA)

Evidence -- Experts -- Expert's reports -- Hearsay evidence -- Foundational facts -- Proof of foundational facts for expert's opinion normally going to weight and not admissibility of evidence -- Trial judge, however, not erring in ruling that expert's opinion lacking probative value where party's undertaking to prove foundational facts not satisfied.

The plaintiff JM was delivered by a Caesarean section performed on his mother, the plaintiff BM, by the defendant Dr. A at the defendant The Public General Hospital Society of Chatham ("the Hospital"). JM was born profoundly disabled. He and his parents sued Dr. A, the Hospital and three nurses for negligence. After a 165-day trial marked by rancour and hostility between counsel for the parties, the plaintiffs' action was dismissed. The plaintiffs appealed on the grounds that: (1) Granger J., the trial judge, erred in failing to find that the defendants were negligent in not properly monitoring BM and for not delivering JM earlier; (2) they did not receive a fair trial because of the trial judge's erroneous and one-sided evidentiary rulings; and (3) in failing to restrain the conduct of defence counsel, the trial judge's conduct of the trial raised a reasonable apprehension of bias.

Held, the appeal should be dismissed without costs, but the trial judgment should be varied to take account of the defendants' undertaking not to pursue the cost of the trial.

There was ample evidence to support the finding that the injuries were not caused by any act or omission of the defendants but were caused by a sudden rupture of the placenta resulting in cataclysmic oxygen deprivation. The evidentiary rulings did not support the plaintiffs' contention that they were denied the opportunity to fairly present their case, nor did these rulings create a reasonable apprehension of bias. The rulings reflected a sincere and diligent effort to conduct a fair trial. Virtually all the rulings were correct. The few errors were inconsequential and, even viewed cumulatively, did not result in any significant prejudice. Reviewing each impugned evidentiary ruling individually, this appeal failed because: (1) The trial judge did not err in ruling that Dr.

2000 CanLII 16946 (ON CA)

Fields, an expert witness called by the plaintiffs, could not be questioned about bradycardia (abnormally slow heart rate) because testimony about this topic was contrary to rule 53.03(1) of the Rules of Civil Procedure, which requires a party to serve an expert's report setting out the "substance" of the expert's proposed testimony. The "substance" requirement must be determined in light of the purpose of the rule, which is to facilitate trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. An expert may not testify about matters that open up a new field not touched upon by the report. In any event, even if the trial judge erred in his interpretation of rule 53.03, there was no prejudice because the evidence about bradycardia went to causation and Dr. Fields was not qualified to give expert evidence about causation. (2) In light of his ruling about the substance of Dr. Fields' report, the trial judge did not act improperly in refusing the plaintiffs' request for an adjournment, and this denial did not cause any injustice. (3) The trial judge did not err in denying leave to permit Dr. Silver, an expert witness who had been called by the plaintiffs, to testify about matters in a second report that described a new theory of causation. Had this testimony been admitted, the defendants' right to a full and fair defence would have been impaired because they would have been denied the right to cross-examine Dr. Manning, an expert already called by the plaintiffs. Re-calling Dr. Manning would have resulted in undue delay. (4) The trial judge did not err in ruling that the evidence of Ms. Kelly, a home care expert, and of Ms. Staub, an expert about future care costs, lacked probative value, when with respect to the foundational facts underlying their respective opinions, these witnesses intended to rely on videos filed at trial rather than the medical reports referred to in their written reports. In having these witnesses proceed in this way, the plaintiffs were in breach of an undertaking and were refusing to provide the factual foundation of the opinions. Although normally proof of foundational facts goes to the weight and not the admissibility of the opinion, it was open to the trial judge to conclude that the observations and conclusions could not be established in any way other than by adducing the medical reports containing those observations and conclusions. (5) The trial

2000 CanLII 16946 (ON CA)

judge did not err in allowing Dr. A to correct his discovery evidence that JM showed oligohydramnios at birth. Dr. A's discovery answer was not a formal admission, which cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made, and it was always open to explain his answer in testimony. Although under rule 31.09, a party shall forthwith advise that the answer to a question was incorrect, the impact of corrections is a matter to be decided by the trial judge and the combined effect of rules 31.09 and 53.08 is that a trial judge must grant leave to introduce the evidence unless to do so would cause prejudice that could not be overcome by an adjournment or costs. (6) The trial judge did not err in restricting the cross-examinations of certain defendants to preclude opinio evidence about the conduct of other defendants. The impugned questioning went beyond the witnesses' involvement in the events of the case. (7) Although the trial judge did err in his ruling about the plaintiffs' cross-examination of the defendant Colebrook by ruling that the plaintiffs were precluded from contradicting her on her discovery evidence that they had themselves had read into the record, no prejudice flowed from that ruling. (8) There was no basis to interfere with the trial judge's ruling prohibiting the use of demonstrative evidence, which is a matter of discretion. (9) In view of the pleadings, there was an adversity of interest between the co-defendants, and the trial judge correctly ruled that Dr. A had a right to cross-examine a witness called by the co-defendants. (10) There was no merit in the submissions that the trial judge erred or was inconsistent in his rulings favouring the defendants with respect to the evidence of Drs. Tithecott, Smith and Eyman.

The trial judge's conduct of the trial did not raise a reasonable apprehension of judicial bias. The most serious of six categories of alleged judicial misconduct was that the trial judge refused to restrain defence counsel's repeated attacks on plaintiffs' counsel's integrity and competence, which attacks included repeated accusations of manipulating evidence; of deliberately misinforming witnesses and feeding them answers; of deliberately flouting, subverting and ignoring the rules of practice; and of showing contempt for the trial judge and his rulings. The record supported the plaintiffs'

2000 CanLII 16946 (ON CA)

contentions and showed that the degree of trust between counsel had vanished, replaced by a level of rancour and hostility, rarely, if ever, seen in an Ontario courtroom. Although the conduct was not all one-sided, defence counsel was mostly responsible for conduct that by any reasonable standards of civility was unacceptable for any counsel, let alone senior counsel. That the conduct was unacceptable was candidly ackn owledged. The issue for the appeal, however, was what impact this conduct had on the fairness of the trial. The question was whether an informed person viewing the matter realistically would conclude that the way the trial judge dealt with defence counsel attacks on plaintiffs' counsel created a reasonable apprehension of bias and thus deprived the plaintiffs of a fair trial. The answer to this question was negative. First, the trial judge did not remain silent. Second, the failure of the trial judge to do more to restrain defence counsel does not automatically indicate judicial bias. Nothing in the record or in the trial judge's reasons suggested that he condoned the conduct or lent the weight of his office to the defence position. An informed and reasonable observer looking realistically at the trial unfolding would not apprehend bias or unfair adjudication. Third, and admittedly less importantly, most of the attacks occurred during motions and not during the presentation of evidence.

Turning to the other categories of alleged judicial misconduct, while several examples of defence counsel's treatment of the plaintiff BM showed counsel in an unflattering light, none of the examples suggested judicial bias. In making interventions, the trial judge did not act improperly so as to prevent the plaintiffs from fairly presenting their case. There was no merit in the suggestion of misconduct because the trial judge spoke to defence counsel in the absence of plaintiffs' counsel about scheduling. There was nothing in the trial judge's remarks to substantiate the allegation that he unfairly criticized plaintiffs' counsel and there was nothing inappropriate in his reasons for judgment that showed antipathy to the plaintiff BM. Finally, the totality of the plaintiffs' complaints did not establish a reasonable apprehension of bias.

2000 CanLII 16946 (ON CA)

Cases referred to

Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman (1997), 14 C.P.C. (4th) 152 (Ont. Gen. Div.); Bachalo v. Robson (1995), 101 Man. R. (2d) 316, 35 C.P.C. (3d) 230 (Q.B.); Burke v. Gauthier (1987), 24 C.P.C. (2d) 281 (Ont. H.C.J.); Capital Distributing Co. v. Blakey (1997), 33 O.R. (3d) 58, 147 D.L.R. (4th) 372, 10 C.P.C. (4th) 109 (Gen. Div.); Christoyiannis (Litigation guardian of) v. Benoit, [1998] O.J. No. 5200 (Gen. Div.); Collins v. Belgian Dry Cleaners, Dyers and Furriers Ltd., [1952] 1 D.L.R. 712, 4 W.W.R. (N.S.) 241 (Sask. C.A.); Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115; Draper v. Jacklyn, [1970] S.C.R. 92, 9 D.L.R. (3d) 264; Graat v. R., [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267, 45 N.R. 451, 2 C.C.C. (3d) 365, 31 C.R. (3d) 289, 18 M.V.R. 287 (sub nom. R. v. Gratt); Iler v. Beaudet [1971] 3 O.R. 644 (Co. Ct.); Machado v. Pratt & Whitney Canada Inc. (1993), 17 C.P.C. (3d) 340 (Ont. Master); Majcenic v. Natale, [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.); McEachrane v. Children's Aid Society of Essex (County) (1986), 10 C.P.C. (2d) 265 (Ont. H.C.J.); Ollet v. Bristol Aerojet Ltd., [1979] 3 All E.R. 544 (Q.B.); Quantrill v. Alcan-Colony Contracting Co. (1978), 18 O.R. (2d) 333 (C.A.); R. v. Abbey, [1982] 2 S.C.R. 24, 39 B.C.L.R. 201, 138 D.L.R. (3d) 202, 43 N.R. 30, [1983] 1 W.W.R. 251, 68 C.C.C. (2d) 394, 29 C.R. (3d) 193; R. v. Grosse (1996), 29 O.R. (3d) 785, 107 C.C.C. (3d) 97, 19 M.V.R. (3d) 197 (C.A.) [Leave to appeal to S.C.C. refused (1997), 209 N.R. 400n]; R. v. Lavallee, [1990] 1 S.C.R. 852, 67 Man. R. (2d) 1, 108 N.R. 321, [1990] 4 W.W.R. 1, 55 C.C.C. (3d) 97, 76 C.R. (3d) 329; R. v. S. (R.D.), [1997] 3 S.C.R. 484, 161 N.S.R. (2d) 241, 151 D.L.R. (4th) 193, 218 N.R. 1, 477 A.P.R. 241, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1; R. v. Scardino (1991), 46 O.A.C. 209, 6 C.R. (4th) 146 (C.A.); Shipman v. Antoniadis (1975), 8 O.R. (2d) 449, 58 D.L.R. (3d) 321 (C.A.); Thorogood v. Bowden (1978), 21 O.R. (2d) 385, 89 D.L.R. (3d) 604 (C.A.); Wade v. Sisters of Saint Joseph of the Diocese of London (1976), 2 C.P.C. 37 (Ont. H.C.J.)

Statutes referred to

Evidence Act, R.S.O. 1990, c. E.23, s. 52, as am. by S.O. 1998,

2000 CanLII 16946 (ON CA)

c. 18, Sch. G, s. 50

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 31.07, 31.09, 31.11, 51.05, 53.03, 53.08

Rules of Professional Conduct, Rule 10

Authorities referred to

Holmested and Gale, Ontario Judicature Act and Rules of Practice (Scarborough, Ont.: Carswell, 1983), p. 1767
Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2d ed. (Toronto: Butterworths, 1999), pp. 940, 1051-53
Watson and Perkins, Holmested and Watson: Ontario Civil Procedure (Toronto: Carswell, 1984), 3125, 3126

APPEAL from a judgment dismissing an action for negligence against a doctor, three nurses and a hospital.

Barry A. Percival, Q.C., Martin Wunder, Q.C., and Ronald D. Davis, for appellants.
Joshua Liswood and Kathryn M. Frelick, for respondents, The Public General Hospital Society of Chatham, A. Olson, P. Colebrook and M. Want.
W. Niels F. Ortved and J. Thomas Curry, for respondent, G. Asher.

[1] BY THE COURT: -- In July 1990, Barbra and Allen Marchand were expecting their first child. Barbra's pregnancy had been relatively uneventful. However, by July 10 she was 16 days beyond her due date and her obstetrician, Dr. G. Asher, arranged for her to be induced the next day at the Public General Hospital in Chatham.

[2] Mrs. Marchand was admitted to the Hospital at 1:05 a.m. on July 11. At 8:32 that morning her son Joel was delivered by

2000 CanLII 16946 (ON CA)

emergency Caesarean section performed by Dr. Asher.

[3] Tragically, Joel was born profoundly disabled. He suffered asphyxia as a fetus with the result that the cells in the cortex of his brain were destroyed. He cannot walk or talk and will be entirely dependent on others for his care throughout his life.

[4] In this action Joel and his parents sued Dr. Asher, the Hospital and three of the Hospital nurses, claiming that their negligence caused Joel's condition.

[5] The trial began on October 18, 1993. It was anticipated to run for six to eight weeks. In the end it took 165 court days to complete. The trial was characterized by an extraordinary level of rancour and hostility on the part of counsel, all of whom were, regrettably, senior members of the bar of Ontario. It was not a trial of which the administration of justice can be proud.

[6] On October 7, 1996, Granger J. released his reasons for judgment dismissing the action. This is the appeal by Joel and his parents from that decision.

[7] The appellants make three broad attacks on the trial judgment.

[8] First, the appellants argue that the trial judge erred in declining to find that the respondents were negligent in not properly monitoring Mrs. Marchand's pregnancy and in not delivering Joel earlier.

[9] Second, the appellants argue that they did not receive a fair trial because of the erroneous and one-sided evidentiary rulings made by the trial judge.

[10] Third, the appellants argue that the trial judge's conduct of the trial raised a reasonable apprehension of bias towards them. They submit that the trial judge failed to restrain or control the unprofessional conduct of defence counsel throughout the entire trial.

2000 CanLII 16946 (ON CA)

[11] We will deal with each of these issues in turn.

I. WERE THE RESPONDENTS NEGLIGENT?

[12] In this court the appellants relied on a series of acts and omissions by Dr. Asher and the Hospital nurses, which they argued were negligent and which they claimed led to Joel's tragedy. These acts and omissions all relate to the final stages of Mrs. Marchand's pregnancy as it stretched beyond her due date into its forty-first and forty-second weeks.

[13] The appellants described the four components of this "cumulative negligence" as follows:

(a) failing to instruct Mrs. Marchand about the importance of fetal kick count as an indicator of fetal health;

(b) improperly administering and interpreting the non-stress test given to Mrs. Marchand on July 5;

(c) thereafter failing to retest, monitor, or induce Mrs. Marchand; and

(d) failing to attach a fetal heart monitor once Mrs. Marchand was admitted to the hospital on July 11.

[14] At trial, Granger J. considered and rejected each of these arguments.

[15] The appellants also challenge the finding made by the trial judge that the tragedy which befell Joel was caused not by any act or omission of the respondents, but by a sudden abruption or rupture of the placenta pulling away from the uterine wall. The trial judge found that this began without warning at about 7:40 a.m. on July 11, resulting in cataclysmic oxygen deprivation to Joel's brain before his birth some 50 minutes later. On appeal the appellants raised no allegations of negligence relating to the treatment of Joel from 7:40 a.m. onwards.

2000 CanLII 16946 (ON CA)

[16] We did not find it necessary to call on the respondents to respond to any of these arguments. There was ample evidence before the trial judge to support both his finding that none of the acts of negligence had been established and his determination of the cause of the tragedy that befell Joel. Nonetheless, we will briefly review each of the arguments.

1. Allegations of "Cumulative Negligence"

[17] First, the appellants allege that Dr. Asher was negligent in failing to advise Mrs. Marchand of the significance of reduced fetal movement as her pregnancy went beyond term. However, the trial judge found as a fact that Dr. Asher did indeed have a complete discussion with her concerning fetal movement. Equally important, the trial judge found that Mrs. Marchand reported no significant reduction in fetal movement to Dr. Asher and that any reduction she experienced was a natural consequence of the fetus entering the birth canal and therefore of no moment. These findings are amply supported in the evidence and ought not to be disturbed.

[18] Second, the appellants allege negligence in connection with the non-stress test ("NST") administered to Mrs. Marchand on July 5 to determine the health of her fetus. They say that Nurse Olson was negligent in administering the NST and in interpreting the results to show a healthy fetus, and that Dr. Asher was negligent in failing to review the results himself or failing to have them reviewed by another professional.

[19] Again, however, the findings of the trial judge are to the contrary and are well founded in the evidence. He found that Nurse Olson administered the test properly. Indeed there was no evidence to the contrary. The trial judge also found that she was correct in interpreting the results of the test to indicate a healthy fetus, a conclusion which accorded with the predominant view of the expert witnesses called at trial. While several of the appellants' experts found the test results raised a suspicion, the trial judge correctly concluded that even this could render Nurse Olson's conclusion no more than an error in judgment falling short of negligence. Finally, although the trial judge found that Dr. Asher should have

2000 CanLII 16946 (ON CA)

reviewed the NST results himself, he also found that the doctor would have reached the same conclusion as Nurse Olson (which he found to be the correct conclusion) that the test result was normal. Therefore, the course of Mrs. Marchand's pregnancy would not have changed had Dr. Asher reviewed the NST results himself.

[20] The appellants' third allegation of negligence is that Dr. Asher fell below the required standard of care in failing to intervene in Mrs. Marchand's pregnancy until July 10, when he scheduled an induction for the next day.

[21] In addressing this argument the trial judge conducted a careful review of the expert evidence on standard of care called by both sides. He was careful to address himself to the standard required of obstetricians practising in Ontario in July and August 1990. He concluded on the basis of ample evidence that where, as here, the pregnancy was normal and there was no indication of fetal distress, it was entirely acceptable practice to do without serial anti-natal monitoring and to schedule the induction when Dr. Asher did. There is no basis to interfere with that conclusion.

[22] Finally, the appellants allege negligence in the failure of nursing staff to attach a fetal heart monitor to Mrs. Marchand following her admission to the Hospital at 1:05 a.m. on July 11. Nurse Colebrook did not do this but monitored the fetal heart rate intermittently with the use of a stethoscope. That monitoring detected no abnormality before 7:40 a.m.

[23] Once again the trial judge carefully reviewed and considered the expert evidence. He concluded that in the circumstances the nursing decision to monitor the fetal heart rate by stethoscope rather than by attaching a fetal heart monitor met an acceptable standard of care. This was particularly so given that the monitoring results indicated that the fetus was not in distress before 7:40 a.m. The record amply supports this finding and we would not interfere with it.

[24] In summary, the trial judge concluded that none of the components of the cumulative negligence advanced by the

2000 CanLII 16946 (ON CA)

appellants were made out on the evidence. In our view, this conclusion is unassailable.

2. Causation

[25] The appellants also attack the finding of causation made by the trial judge. He rejected their assertion at trial that Joel's asphyxia was due to a long slow deterioration of the placenta, which could have been detected by proper care. Rather, he found that the fetus was assaulted by a sudden placental abruption, which commenced without warning about 7:40 a.m. and which resulted in critical oxygen deprivation to the fetus until Joel was delivered at 8:32 a.m.

[26] Here, as well, the finding of the trial judge is well supported in the evidence. It cannot be said in any way to be unreasonable. The trial judge carefully reviewed the evidence. He recognized that much of the evidence describing an abruption came from Dr. Asher himself. There was also, however, significant corroborating evidence, particularly the testing of the relevant blood gases. That clinical evidence supported the conclusion that an acute event, which had its onset at about 7:40 a.m. and evolved rapidly thereafter, caused Joel's profound injuries.

[27] The conclusion about what happened to Joel was carefully drawn after a review of all the evidence. It is a reasonable conclusion, which we must accept. A severe spontaneous placental abruption, not anything done by the respondents, caused this tragedy.

II. DID THE APPELLANTS RECEIVE A FAIR TRIAL?

[28] The appellants submit that, taken cumulatively, a number of evidentiary rulings by the trial judge as well as the trial judge's uneven application of his evidentiary rulings (a) denied the appellants the opportunity fairly to present their case or, (b) created a reasonable apprehension of bias on the part of the trial judge. In their factum, the appellants submit that the impugned rulings "distorted the trial process", "impaired any reasonable attempt to achieve justice" and

2000 CanLII 16946 (ON CA)

"negated the Marchands' right to present their case fully". The appellants made similar oral submissions.

[29] We do not understand the appellants to say that any one of the evidentiary rulings, standing on its own, would be sufficient to warrant interference by this court. Rather, it is their position that we must consider whether the overall, cumulative effect of these rulings denied the appellants a fair trial. We will review each impugned ruling individually to assess whether the cumulative complaint the appellants advance has any substance.

A. Evidentiary Rulings

1. Ruling limiting expert evidence to the "substance" of the report

[30] During the examination-in-chief of Dr. Fields, an expert witness called by the appellants, their counsel asked about indications of late decelerations on the NST strip. Counsel for the respondents objected on two grounds: first, rule 31.07(1), which prevents a party from introducing information at trial where he or she has refused to furnish the information on discovery; and second, rule 53.03(1), which requires a party to serve an expert's report setting out the substance of the expert's proposed testimony. On examination for discovery, counsel for the respondents had asked that the location of late decelerations be identified on the NST strip. Appellants' counsel refused to provide that information. Although the appellants filed a report from Dr. Fields, the report merely described the NST strip as abnormal and suspicious.

[31] The trial judge ruled that the appellants had failed to comply with both rules 31.07 and 53.03. However, applying rule 53.08, the trial judge allowed Dr. Fields to testify about indications of late decelerations on the NST strip on the ground that counsel for the respondents would have sufficient time to prepare their cross-examination of Dr. Fields. In making this ruling, he cautioned counsel for the appellants (and to a lesser extent counsel for the respondents) that, at some point, attempts to examine experts on matters outside

2000 CanLII 16946 (ON CA)

their reports would cause prejudice to the other side requiring the exclusion of testimony.

[32] The appellants' counsel proceeded to examine Dr. Fields extensively on the NST strip. He then began to examine Dr. Fields on the relationship between oxygen deprivation and fetal reserve, and specifically about bradycardia (abnormally slow heart rate). Counsel for the respondents objected on the ground that the concept of bradycardia appeared nowhere in Dr. Fields' report. The appellants' counsel argued that the report dealt with the standard of care in treating an overdue mother, and that the questions went to signs of fetal distress some hours before the delivery. The trial judge ruled that the appellants' counsel could not pursue the "bradycardia" line of questioning because Dr. Fields' report made no mention of when fetal distress was determined.

[33] The appellants submit that Dr. Fields should have been permitted to explain what bradycardia means because bradycardia is a sign of fetal distress, and fetal distress appeared in the report. They contend that the trial judge erred in adopting an unduly narrow construction of rule 53.03, specifically with respect to the phrase "the substance of his or her proposed testimony". In particular, the appellants submit that the trial judge erred in equating "substance" with "summary". Indeed, in their factum, the appellants submit that "the Marchands' expert witnesses were constrained to testifying verbatim from the contents of their reports". It is the appellants' submission that this ruling set an erroneously high standard for what is required in an expert report and impeded the presentation of their case.

[34] Rule 53.03 governs expert opinion evidence. At the time of trial, rule 53.03 provided:

> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than ten 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.

2000 CanLII 16946 (ON CA)

> (2) No expert witness may testify, except with leave of the trial judge, unless subrule (1) has been complied with. [See Note 1 at end of document]

Unless a party has fully complied with the requirements set out in rule 53.03(1), an expert witness called by that party may not testify except with leave.

[35] This court considered the meaning of the "substance" of the proposed testimony of an expert in Thorogood v. Bowden (1978), 21 O.R. (2d) 385, 89 D.L.R. (3d) 604 (C.A.). A medical expert retained by the plaintiff in a personal injury action submitted a report indicating that the injuries would manifest in more intensive symptoms later in life. At trial, the plaintiff's medical expert gave evidence about the possibility of arthritis and the future need for an artificial hip. On appeal, the defendant argued that the trial judge ought to have declared a mistrial, as the matters raised by the expert had not been included in his medical reports. The court dismissed the appeal. Lacourcire J.A., writing for the majority, reasoned as follows at p. 386 O.R.:

> We interpret the law with respect to medical reports to be that a medical expert is not to be narrowly confined and limited to the precise contents of his report, but he has a right to explain and amplify. What was done here, in our view, . . . was to expand on what was latent in the medical report, and it did not open a new field. In our view, the trial Judge properly concluded that there was no prejudicial surprise here and, therefore, exercised his discretion and properly refused to declare a mistrial.

[36] Thorogood was applied in Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman (1997), 14 C.P.C. (4th) 152 (Ont. Gen. Div.). The plaintiff alleged, among other things, that the solicitors were negligent and caused the plaintiff damages in connection with a condominium project. The plaintiff called a lawyer to give expert opinion evidence in the area of condominium development. During examination in-chief, the witness opined that a clause

2000 CanLII 16946 (ON CA)

in an agreement might be void. The defendants objected to this line of questioning on the ground that it went beyond the expert's report. Quinn J. ruled that the expert could not testify about the validity of the clause, as that opinion was not stated in his report. Quinn J. relied on Thorogood and found, at p. 157, that the impugned questioning entered a new field:

> The opinion [by the expert], as to the voidness of the price-escalation clause, creates a discrete instance of solicitors' negligence: one which had never before been raised by the plaintiff. In other words, it opens up a new field. It is neither touched upon nor latent in the report of [the expert]. Therefore, the report does not contain "the substance" of the "proposed testimony" on the issue of voidness, as required by subrule 53.03(1).

See also Iler v. Beaudet, [1971] 3 O.R. 644 (Co. Ct.); McEachrane v. Children's Aid Society of Essex (County) (1986), 10 C.P.C. (2d) 265 (Ont. H.C.J.).

[37] Ollet v. Bristol Aerojet Ltd., [1979] 3 All E.R. 544 (Q.B.) dealt with an action for personal injuries suffered in connection with some machinery. An expert witness filed a report merely setting out a factual description of the machine and the alleged circumstances in which the accident happened. Ackner J. considered the English equivalent of rule 53.03 and found that the report failed to comply with the requirement that the parties exchange the substance of the expert's proposed testimony. He interpreted the term "substance" in light of the function of expert evidence, stating at p. 544:

> . . . An expert, unlike other witnesses, is allowed, because of his special qualifications and/or experience, to give opinion evidence. It is for his opinion evidence that he is called, not for a factual description of the machine or the circumstances of the accident, although that is often necessary in order to explain and/or justify his conclusions. When the substance of the expert's report is to be provided, that means precisely what it says, both the substance of the factual description of the machine and/or the circumstances

2000 CanLII 16946 (ON CA)

of the accident and his expert opinion in relation to that accident, which is the very justification for calling him.

[38] 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.

[39] We are unable to conclude that the trial judge erred in his ruling. Although we do not have a copy of his report, it appears from the transcripts that Dr. Fields' report merely stated his conclusion that the appropriate standard of care was to attach a fetal heart monitor on admission to indicate fetal distress at the earliest possible point. Dr. Fields' report did not refer to bradycardia, did not state the point at which fetal distress was determined, and did not deal with the "reserve capacity" that the fetus might have had.

[40] Moreover, the trial judge had ruled that Dr. Fields had expertise only with regard to the standard of care in Michigan. Dr. Fields' report dealt with the topic of fetal distress in connection with his opinion on the standard of care. The appellants' counsel, however, sought to elicit from Dr. Fields, through the bradycardia questions, evidence going to causation. Thus, the bradycardia evidence was directed to an issue not addressed in the report. Accordingly, even if the trial judge erred in his interpretation of rule 53.03, no prejudice arises from that error as Dr. Fields had not been qualified to give expert evidence about causation.

2000 CanLII 16946 (ON CA)

2. Denial of request for adjournment

[41] In the light of the trial judge's ruling restricting Dr. Fields to the "substance" of his report, the appellants requested an adjournment for a "couple of weeks" to obtain supplementary reports from other witnesses they intended to call to give expert evidence. In particular, the appellants sought to obtain a supplementary report from Dr. Silver, whose original report was less than one page and dealt only with the issue of abruption. Counsel for the respondents opposed the request, arguing that the appellants were seeking an opportunity to "re-do the liability case", and that if the request was allowed, the respondents were entitled to a further examination for discovery.

[42] The trial judge refused the appellants' request for an adjournment. He clarified the effect of his ruling concerning Dr. Fields' report, stating that it "is not a general ruling throughout the trial. It does not apply to all the reports. It only replies to the evidence that I heard from Dr. Fields yesterday and the way the evidence was developed." The trial judge emphasized the need to proceed with the trial, noting that counsel for the respondents would be entitled to a further examination for discovery if the experts were allowed to file further reports, thus unduly delaying the completion of the case.

[43] Although the appellants did not specifically address the reasons why the denial of their request for an adjournment was in error, they submit that the Fields ruling required them to revisit every report submitted by their liability experts. The denial of an adjournment, they say, prevented them from fully and fairly presenting their case.

[44] In our view, the trial judge did not act improperly in refusing to grant the request for an adjournment. The trial judge made it clear that the Fields ruling applied only to Dr. Fields, and that he would deal with issues concerning the adequacy of other expert reports as they arose. The trial judge emphasized the need to continue with the trial. This need was

2000 CanLII 16946 (ON CA)

properly emphasized, given that: the parties were then several weeks into the trial; there had been substantial discovery prior to the trial; and the filing of additional reports would necessitate further examinations for discovery, thus prolonging the trial. The denial of an adjournment did not cause any injustice in this case.

3. Ruling preventing Dr. Silver from testifying on her second report

[45] The appellants called Dr. Silver, a pathologist at the Toronto Hospital for Sick Children, as an expert witness. Dr. Silver had prepared a report dated April 22, 1993. Following the Fields ruling, the appellants obtained a further report from Dr. Silver. Dr. Silver's second report was served on November 24, 1993. The respondents were not advised of the substance of Dr. Silver's additional evidence before being served with this report. The respondents objected to Dr. Silver testifying on matters raised in the second report on the grounds that: (a) the second report set out a new theory of causation; and (b) allowing Dr. Silver to testify in accordance with the second report would cause prejudice to the respondents as Dr. Manning, an expert in fetal medicine called by the appellants, had already testified and the respondents would be denied the opportunity to cross-examine him on the new theory.

[46] The trial judge ruled that he would not grant leave for Dr. Silver to give evidence about matters set out in the second report. The trial judge described the first report of Dr. Silver, which stated that the presence of meconium within the fetal membrane provided evidence of fetal distress, as extremely short. In contrast, the second report was over three pages long, and largely devoted to explaining the reasons for Dr. Silver's opinion about why a placental abruption could not have resulted in severe birth asphyxiation.

[47] The trial judge commented on the two reports as follows:

. . . I simply do not accept the argument that the report of April 22nd, 1993 would allow Dr. Silver to give the evidence as set out in her report dated November 23, 1993. Mr. Wunder

2000 CanLII 16946 (ON CA)

is attempting to do with Dr. Silver exactly what I had ruled he could not do with Dr. Fields, which is, to just state a conclusion in a report and attempt to explain in the evidence the reason for the conclusion. The reason should be in the report so opposing counsel will know such reasoning and can test it by cross-examining other expert witnesses.

[48] The trial judge then considered whether rule 53.08 obliged him to grant leave for Dr. Silver to give evidence as proposed. The trial judge agreed that the respondents would suffer prejudice if Dr. Silver was allowed to give the proposed testimony. Dr. Manning had completed his testimony, and the respondents would be unable to cross-examine Dr. Manning on Dr. Silver's second report. Accordingly, the respondents' right to a full and fair defence would be impaired. The trial judge found that requiring Dr. Manning to return for further cross-examination would result in undue delay. Given these considerations, the trial judge refused to grant leave.

[49] We do not agree that the trial judge erred in denying leave to permit Dr. Silver to testify about matters in her second report for three reasons.

[50] First, the appellants sought to elicit Dr. Silver's opinion that severe birth asphyxiation could not have resulted from an abruption. The first report did not deal with abruption; this report concerned the presence of meconium as an indication of fetal distress. Accordingly, testimony on abruption would certainly "open up a new field" not covered in the first report.

[51] Second, the trial judge found that the respondents would be prejudiced as they had been unable to cross-examine Dr. Manning about Dr. Silver's second report and that requiring Dr. Manning to re-attend would cause undue delay. This was a matter within the discretion of the trial judge and we see no basis to interfere.

[52] Third, Dr. Silver, ultimately, did testify about her opinion that an abruption was not the cause of Joel Marchand's injuries.

2000 CanLII 16946 (ON CA)

[53] We add that the appellants could have avoided the very problem they encountered with respect to the evidence of Dr. Silver. They had gone to trial on a one-page report from a witness they considered important and should not have been surprised when it proved inadequate. When it did, they took no steps to advise the respondents to expect the amplified report they had asked Dr. Silver to prepare.

4. "Foundational facts" rulings

[54] On November 4, 1993, the appellants entered as Exhibit 47 ("Ex. 47") a report written by two home care experts, Ms. Kelly and Ms. Snell, dated August 19, 1993. Ex. 47 listed various source documents, including numerous reports from medical practitioners involved in the care of Joel Marchand. Counsel for Dr. Asher stated that he understood the appellants to be undertaking to call the authors of Ex. 47 and also to prove the source documents. The trial judge responded that the appellants would have to produce their source documents. The appellants' counsel gave no indication that he would not prove the source documents.

[55] On November 24, 1993, the appellants served a letter advising that Ms. Kelly and Ms. Snell would no longer be relying on the medical reports referred to in Ex. 47; instead, the two witnesses would be relying on videos filed at trial. The respondents objected to Ms. Kelly giving opinion evidence on a basis other than the medical reports. The respondents' counsel argued that the appellants had undertaken to prove the medical opinions contained in these reports. The respondents' counsel further argued that Ms. Kelly's evidence was of no probative value as there was no admissible evidence proving the factual foundation of her opinion.

[56] The trial judge accepted the respondents' submissions and ruled that Ms. Kelly's opinion lacked probative value unless the appellants proved the facts on which she based her opinion (the "foundational facts ruling"). The trial judge acknowledged that the appellants might prove Joel's disability in a number of ways, but noted that "if [Ms. Kelly's] opinion

2000 CanLII 16946 (ON CA)

is based on the opinions of doctors then the plaintiff must attempt to prove the opinions of such doctors. . .". The trial judge also found that the appellants' counsel's refusal to prove the medical reports referred to in Ex. 47 breached an implied undertaking to prove the opinions of the medical doctors referred to in Ex. 47.

[57] Given the breach of this implied undertaking, the trial judge stated that he did "not intend to give Ex. 47 any weight whatsoever". As the respondents did have notice of the substance of Ms. Kelly's evidence, the trial judge was prepared to allow Ms. Kelly to testify. However, he stated that he would insist that all of the facts on which Ms. Kelly relied be proved by some admissible evidence before he would permit Ms. Kelly to state her opinion.

[58] A similar issue arose later on May 19, 1994. The appellants proposed to call Ms. Staub to give opinion evidence regarding the future care costs for Joel Marchand. Ms. Staub had written a report dated September 13, 1993, which had been filed as an exhibit on an implied undertaking that the appellants would prove the facts on which the report was based. The respondents objected to Ms. Staub being allowed to give evidence on the ground that the appellants had failed to prove the foundational facts. The appellants' counsel suggested that the earlier foundational facts ruling was unclear, and submitted that the foundational facts ruling allowed him to prove the foundational facts upon which Mr. Staub's opinion was based in a manner different than that set out in her written report. The trial judge reiterated that the effect of the foundational facts ruling was that if a report was based on the reports of doctors, the opinion of the doctors must be proven.

[59] The trial judge also referred to an earlier ruling requiring counsel to file a list of the expert witnesses they intended to call or whose reports would be filed under s. 52 of the Ontario Evidence Act, R.S.O. 1990, c. E.23. He also ruled that before an expert could testify a voir dire be held in order to determine the facts or opinions that the expert relied on in forming his or her opinion.

2000 CanLII 16946 (ON CA)

[60] In R. v. Lavallee, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97, the Supreme Court of Canada reviewed the circumstances in which expert opinion evidence may be admitted, notwithstanding that the opinion is based upon hearsay evidence. Wilson J. reviewed the Supreme Court's prior decision in R. v. Abbey, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394, and at pp. 127-28 C.C.C. [p. 893 S.C.R.] interpreted Abbey as standing for the following propositions:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.

4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

Thus, Lavallee establishes that an expert opinion based upon hearsay will be admissible; however, the weight to be attached to that opinion is an issue.

[61] Wilson J. clarified the fourth proposition, and rejected the proposition that every fact relied upon by the expert must be independently proven before any weight could be attached to an expert opinion. She stated at pp. 130-31 C.C.C. [pp. 896-97 S.C.R.]:

> . . . Abbey does not, in my view, provide any authority for that proposition. The court's conclusion in that case was that the trial judge erred in treating as proven the facts upon which the psychiatrist relied in formulating his opinion. The solution was an appropriate charge to the jury, not an effective withdrawal of the evidence. In my view, as long as there is some admissible evidence to establish the

2000 CanLII 16946 (ON CA)

foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

. . . . .

Where the factual basis of an expert's opinion is a mlange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

[62] Sopinka J., in a concurring judgment, noted that the principles underlying Abbey give rise to a contradiction: an expert opinion based entirely on hearsay will be admissible, but will be entitled to no weight. He provided the following resolution at pp. 132-33 C.C.C. [p. 899-900 S.C.R.]:

The resolution of the contradiction inherent in Abbey, and the answer to the criticism Abbey has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in City of St. John), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in Abbey.)

In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this court has taken to the analysis of hearsay evidence in general, exemplified in Ares v. Venner (1970), 14 D.L.R. (3d) 4 [(S.C.C.)]. In R. v.

2000 CanLII 16946 (ON CA)

> Jordan (1984), 11 C.C.C. (3d) 565 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that Abbey does not apply in such circumstances: see also R. v. Zundel (1987), 31 C.C.C. (3d) 97 at p. 146 (Ont. C.A.), where the court recognized an expert opinion based upon evidence ". . . of a general nature which is widely used and acknowledged as reliable by experts in that field".
>
> 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 to 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. . . .

(Parallel citations omitted)

[63] This court considered the weight to be given to an expert opinion based solely upon hearsay evidence in R. v. Scardino (1991), 6 C.R. (4th) 146, 46 O.A.C. 209 (C.A.). The accused appealed from his conviction for second degree murder. At trial, the accused led expert evidence from a psychiatrist, who testified that the accused suffered from a psychiatric disorder that would have prevented him from appreciating the nature and quality of his acts. Among the evidence relied upon by the expert in forming his opinion was a factual account of the events recounted by the accused. The trial judge instructed the jury that these matters had not been established in evidence, and thus the "degree to which [the expert's] opinion is dependent upon those statements attributed to the accused is of no weight . . .". Finlayson J.A. found that the trial judge had not erred in her charge to the jury, stating at p. 153 C.R.

2000 CanLII 16946 (ON CA)

that "[a]n expert's opinion is admissible in evidence, notwithstanding the absence of proof in some areas relied upon by the expert. However, the weight to be given to the opinion in such cases is diminished, sometimes to the point where the opinion can be given no weight at all." This general proposition was reaffirmed by this court in R. v. Grosse (1996), 29 O.R. (3d) 785, 107 C.C.C. (3d) 97 (C.A.), where this court indicated that an expert opinion based entirely upon inadmissible evidence would itself be entitled to no weight and therefore could not be accepted by the trial judge.

[64] It is clear from the Supreme Court's decision in Lavallee that proof of foundational facts goes to the weight to be accorded to the opinion rather than its admissibility. It follows that, taken in isolation, the appellants' unwillingness to prove in evidence the medical reports upon which they had relied was not a sufficient reason to preclude Ms. Kelly and Ms. Staub from testifying.

[65] The trial judge based his refusal to admit the evidence on his finding that the evidence would have no weight. Ordinarily, this is not the appropriate approach. The question of weight can only be assessed at the close of a party's case; it cannot be assessed prior to an expert witness giving testimony. Further, it is not the law that a party must prove the identical factual foundation relied upon by an expert in formulating an opinion. Indeed, the Supreme Court clearly rejected that proposition in Lavallee.

[66] However, it appears to us that the issues in the case at bar were more complex. The appellants sought to rely upon videotapes as the foundation for the opinions of Ms. Kelly and Ms. Staub rather than the medical reports that served as the basis for the Kelly and Staub reports. The trial judge characterized the matter as an attempt by the appellants to rely upon a different set of facts from the facts that served as a basis for the experts' reports.

[67] While a party might prove the same set of facts from alternative sources, it must also be the case that a party cannot rely upon a different set of facts. This proposition is

2000 CanLII 16946 (ON CA)

merely a variation of the basic rule articulated in Lavallee: insofar as a party fails to prove those facts relied upon by an expert in forming his or her opinion, the expert opinion will be entitled to little or no weight.

[68] We are not persuaded that, in light of all the factors before the trial judge, he erred in his approach to the problem he faced. The foundational facts ruling has to be considered in the context of a long and difficult trial and in relation to the trial judge's efforts to manage that trial in an efficient manner. The appellants were in breach of an undertaking and were refusing to prove in evidence the factual foundation of the opinion. It was open to the trial judge to conclude that the observations and conclusions could not be established in any way other than by adducing the medical reports containing those observations and conclusions. The videotapes could only provide evidence of Joel Marchand's present capabilities; they could say nothing about Joel Marchand's future development. The appellants' refusal to prove the medical reports provided a sufficient basis for the trial judge to conclude that the experts' opinions would be entitled to no weight. Given the protracted nature of the tri al and the explicit position taken by the appellants as to what they would and would not prove, we would not interfere with the trial judge's decision not to hear evidence that would be given no weight.

[69] Even if the trial judge did err, the error resulted in no substantial wrong or miscarriage of justice. The opinions of Ms. Kelly and Ms. Staub were entitled to little or no weight, given that the factual foundations of their reports had not been proved in evidence. Even if the trial judge had heard the proposed testimony, he could not have accepted it. Finally, this evidence pertained only to damages and would have had no impact on the trial judge's liability findings.

5. Ruling allowing the respondents to correct Dr. Asher's discovery admission

[70] On examination for discovery, the appellants' counsel asked Dr. Asher a number of questions relating to his observations of amniotic fluid during Mrs. Marchand's Caesarean

2000 CanLII 16946 (ON CA)

section. The relevant questions and answers are reproduced below. The most important is Q. 596 and Dr. Asher's "admission" of oligohydramnios.

594 Q. Am I correct that at birth this child was observed to suffer the symptoms of oligohydramnios?

A. At birth there was very little amniotic fluid.

595 Q. So am I correct, that's a diagnosis of oligohydramnios?

A. That is the diagnosis, but you said symptoms, didn't you?

596 Q. Sorry. Am I correct this child showed oligohydramnios at birth?

A. Yes.

. . . . .

792 Q. . . . May I take it there was some amniotic fluid?

A. Yes.

793 Q. You have told me very little?

A. I said scant I believe.

. . . . .

801 Q. Would you describe the amount of amniotic fluid? Your report says "very little". You told me today, "scant". Are you able to give me some graphic description of how much? Just a couple of drops . . .

A. No, it would be approximately 300 c.c.'s.

802 Q. And what would the normal amount be?

A. It would be as much as 800 c.c.

2000 CanLII 16946 (ON CA)

. . . . .

810 Q. Am I correct, your record -- your Operative Record does not disclose that there was 300 c.c.'s of amniotic fluid?

A. No, that's a recollection.

811 Q. Okay, so I suggest to you that it could have been 150.

A. You can suggest what you want. My recollection is approximately 300 c.c.'s.

812 Q. No, you're the one who is testifying and yes, I can suggest what I want as long as it's not irresponsible . . .

A. Yes.

813 Q. . . . and I just want . . .

A. Well, I think it's a little -- 150 is a big difference at that level.

814 Q. I understand. Could it have been 200, sir?

A. It wasn't measured so I can't tell you absolutely.

815 Q. So we can't be absolute about the 300.

A. No.

816 Q. And so I suggest to you it could have been 200.

A. No.

817 Q. You think it was more than that.

A. Yes.

[71] After the trial had commenced, counsel for the

2000 CanLII 16946 (ON CA)

respondents sent the appellants' counsel a letter correcting a number of the answers given by Dr. Asher on discovery, and withdrawing the "admission" of oligohydramnios. The corrections relevant for present purposes are as follows:

596 Q. Sorry. Am I correct this child showed oligohydramnios at birth?

A. There was no oligohydramnios at birth. For a 42-week gestation the amniotic fluid would normally be approximately 250 to 300 cc.

. . . . .

801 Q. You reported very little, you told me today scant. Are you able to give me some graphic description of how much, just a couple of drops?

A. No, it would be approximately 300 cc.

802 Q. And what would the normal amount be?

A. An amniotic fluid volume of 800 cc's would be normal for approximately 40 weeks gestation.

[72] The appellants' counsel objected to the trial judge granting leave for Dr. Asher to correct the answers that he gave on discovery. The appellants argued that they relied on Dr. Asher's "admission" of oligohydramnios and would be prejudiced in the presentation of their case if Dr. Asher changed his admission. The appellants' counsel submitted that Rule 31.09(1) requires a party to correct any incorrect or incomplete answers "forthwith", and that the respondents had failed to comply with this requirement. The appellants' counsel also argued that Dr. Asher's corrections would have affected the examination in-chief of Dr. Manning (who had finished testifying) and would affect the examination in-chief of Dr. Johnson (who had been sent a number of Dr. Asher's discovery answers for consideration).

[73] The trial judge reserved his ruling, but did observe

2000 CanLII 16946 (ON CA)

that Dr. Asher's discovery answers would in any event have been subject to clarification by him either on examination-in-chief or on cross-examination. He also noted that, even if the corrections were allowed, the appellants' counsel would be able to cross-examine Dr. Asher extensively on any putative mistake. The trial judge did not make an explicit ruling allowing Dr. Asher to correct his answer on discovery, but he did allow the trial to proceed on the basis that Dr. Asher was free to testify that there was no oligohydramnios.

[74] On cross-examination, Dr. Asher gave the following explanation of his discovery answers and of his corrections:

> A. I was under the mistaken idea that 800 cc of amniotic fluid was, was normal for 42 weeks, and I was actually thinking of a term pregnancy which was 40 weeks, or a pregnancy at the due date which was 40 weeks as -- and actually that's -- the average volume at 40 weeks would be 800 cc, the average volume at 42 weeks would be somewhere between 250 and 300 cc.

[75] The appellants submit that the trial judge erred in allowing the respondents to correct the admission made by Dr. Asher during his examination for discovery and that prejudice inevitably flowed as the appellants' case was premised on an admission of oligohydramnios. The appellants also submit that they suffered prejudice in being required to cross-examine Dr. Asher on his admission and then the subsequent correction.

[76] In our view, the trial judge committed no error in permitting Dr. Asher to correct his discovery evidence for three reasons.

[77] First, Dr. Asher's original discovery answer was not a formal admission. As such, it was always open to him to explain his discovery answer in his testimony. In Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2d ed. (Toronto: Butterworths, 1999) at pp. 1051-53, the authors distinguish between formal and informal admissions. A formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in

2000 CanLII 16946 (ON CA)

whose favour it was made. The Law of Evidence states at pp. 1051-52 that a formal admission may be made in the following ways:

> (1) by a statement in the pleadings or by failure to deliver pleadings; (2) by an agreed statement of facts filed at the trial; (3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by opposing counsel with the intention that the statements be relied on by the judge; (4) by a letter written by a party's solicitor prior to trial; or (5) by a reply or failure to reply to a request to admit facts.

In contrast, an informal admission does not bind the party making it, if it is overcome by other evidence. That is, a party making an informal admission may later lead evidence to reveal the circumstances under which the admission was made in order to reduce its prejudicial effect.

[78] Dr. Asher's original discovery answer does not constitute a formal admission in the sense described in The Law of Evidence. We note as well that rule 51.05, governing the withdrawal of admissions requiring leave of the court, does not apply to an admission made on examination for discovery.

> 51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 [failure to respond to a request to admit] or an admission in a pleading may be withdrawn on consent or with leave of the court.

See G.D. Watson and C. Perkins, Holmested and Watson: Ontario Civil Procedure (Toronto: Carswell, 1984) at 3126.

[79] Second, rule 31.09 outlines a party's obligations with respect to information obtained subsequent to an examination for discovery. At the time of trial, rule 31.09 provided:

> 31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the

2000 CanLII 16946 (ON CA)

examination,

(a) was incorrect or incomplete when made; or

(b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party.

(2) Where a party provides information in writing under subrule (1),

(a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and

(b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery.

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2)(b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

(b) not favourable to the party's case, the court may make such order as is just.

[80] Holmested and Watson, supra, describe at 3125 the obligation under rule 31.09 as an ongoing duty to correct and complete the answers given. In general, parties are entitled to correct their discovery answers. The impact of corrections is a matter to be decided by the trial judge, who is entitled to examine both the original and the amended answers: See Machado v. Pratt & Whitney Canada Inc. (1993), 17 C.P.C. (3d) 340 (Ont. Master); Capital Distributing Co. v. Blakey (1997), 33 O.R. (3d) 58, 147 D.L.R. (4th) 372 (Gen. Div.).

2000 CanLII 16946 (ON CA)

[81] Third is the combined effect of rules 31.09 and 53.08. Subrule 31.09(3)(a) provides that, where a party has failed to correct a discovery answer "forthwith", the party may not introduce the evidence except with leave. As noted above in the discussion of the ruling with respect to Dr. Silver, subrule 53.08(d) provides that, where evidence is admissible only with leave under subrule 31.09(3), the trial judge shall grant leave unless to do so will cause prejudice or undue delay. Accordingly, notwithstanding non-compliance with subrule 31.09(3), a trial judge must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs.

[82] With respect to the correction, subrule 31.09(2)(a) provides that a correction "may" be treated as forming part of the original examination. As there was no ruling on the correction, it is unclear whether the correction was, in fact, treated in that manner.

[83] There are circumstances in which a party will not be permitted to correct their discovery answers. In Burke v. Gauthier (1987), 24 C.P.C. (2d) 281 (Ont. H.C.J.), a personal injury action, the plaintiff sought to adduce evidence that his physical condition had substantially changed since his examination for discovery. The plaintiff had given no notice of the new evidence, and the respondents objected to its admission. Campbell J. began by describing the purpose of rule 31.09 at p. 285:

> The purpose of the provision is obvious. The parties prepare for trial on the basis of the evidence given at the discoveries. They assume that the answers given on discovery continue to be correct and complete, unless they are given information to the contrary. They figure out what they have to meet, decide how to prepare their own case, what investigations if any to undertake, what witnesses to call, what instructions to seek, and what kind of settlement might be reasonable, on the basis of the evidence given at the discoveries. If that evidence changes then there is a different case to meet. If the changes are not brought to the attention of the adverse party before trial he has no time or

2000 CanLII 16946 (ON CA)

> opportunity to investigate and prepare and consider the need for fresh medical examination and must meet a case different from the one that his opponent has led him to expect.

Campbell J. found that the new evidence changed the nature of the case the respondents had to meet. In considering whether to grant leave, he found that the plaintiff was well aware of the change, and that he had made no attempt to bring the new evidence to the defendant's attention. Accordingly, Campbell J. declined to grant leave. See also Bachalo v. Robson (1995), 35 C.P.C. (3d) 230, 101 Man. R. (2d) 316 (Q.B.).

[84] The present case is distinguishable. The respondents did not put forward a different case at trial. Dr. Asher testified, both on discovery and on cross-examination, that there were approximately 300 c.c. of amniotic fluid. The respondents led evidence at trial that indicated 300 c.c. of amniotic fluid did not constitute oligohydramnios for a pregnancy of 42 weeks. Dr. Asher's original discovery answer, that he thought the "child showed oligohydramnios at birth", even if not corrected or explained, did not require the trial judge to find that there was oligohydramnios. There was ample evidence before the trial judge for him to find, as he did, that there was no oligohydramnios at birth.

[85] Accordingly, we do not accept the argument that the appellants were prejudiced by this ruling. The discovery answer did not amount to a formal admission. Even if the trial judge had not allowed Dr. Asher to correct his discovery answers, Dr. Asher was still entitled to give a different answer at trial and explain the reason for the change in his evidence. The trial judge was entitled to decide which version he accepted. The original discovery answers, the corrected answers, and Dr. Asher's explanations were all before the trial judge. The trial judge was entitled to weigh the differing answers and the explanation in deciding the matter. It is clear from his reasons that he accepted Dr. Asher's explanation and the corrected discovery answer. In our view, it was open to the trial judge to reach this conclusion, and there appears to be no basis to interfere with his ruling on this matter.

2000 CanLII 16946 (ON CA)

[86] We see no error in the manner in which this issue was dealt with by the trial judge.

6. Ruling restricting the cross-examinations of defendants to elicit opinion evidence

[87] The appellants discontinued their action against three respondents -- Nurse Brown-Davidson, Nurse Kroeker and Dr. Awad -- on the condition that they be available at trial for cross-examination. The appellants attempted to lead opinion evidence from these witnesses. On appeal the appellants complained about their inability to lead opinion evidence from Dr. Awad.

[88] The trial judge ruled that the appellants were required to comply with rule 53.03 if they intended to elicit opinion evidence from Dr. Awad. As no rule 53.03 reports had been filed, the appellants were required to seek leave of the court. The trial judge further noted that he was required to give leave unless prejudice would result.

[89] Dr. Awad was the pathologist involved in the treatment of Joel Marchand. The respondents objected to counsel for the appellants leading any opinion evidence from Dr. Awad that was not covered by the reports he had prepared as a treating physician. The trial judge ruled that, unless notice was given or leave was granted, Dr. Awad would not be permitted to give independent opinion evidence concerning the conduct of others, or to express his opinion on the cause of Joel's condition. However, the trial judge stated that there could be no objection to Dr. Awad giving opinion evidence concerning his own reports, provided such evidence was limited to his involvement in the matter.

[90] As the cross-examination proceeded, this ruling was applied to limit the right of the appellants to cross-examine Dr. Awad on his opinion of the nature of the abruption, if any, that had occurred. Before this court, the respondents do not attempt to support this ruling. The respondents conceded before us that as Dr. Awad was a treating physician, this was a permissible line of questioning, and that the trial judge erred

2000 CanLII 16946 (ON CA)

in his ruling on the point. In our view, this error did not result in any significant prejudice to the appellants. The appellants presented their own evidence on the nature of the abruption. The trial judge fully considered the appellants' theory and we are not satisfied that Dr. Awad's evidence would have made any difference.

[91] Appellants' counsel sought to cross-examine Nurse Olson with respect to her opinion about the conduct of other respondents -- Nurse Colebrook and Nurse Want -- regarding the use of a fetal heart monitor on July 11, 1991. The respondents objected, arguing that the questions called for inadmissible opinion evidence, and that the respondent could not be qualified as an expert for the purpose of giving opinion evidence.

[92] The trial judge ruled that appellants' counsel was "not entitled to ask Nurse Olson, a party defendant, her opinion concerning the conduct of other defendants". Accordingly, he restricted appellants' counsel to cross-examining Nurse Olson regarding events on July 5, 1991, when she administered the NST to Mrs. Marchand. The trial judge relied on the proposition that a plaintiff cannot on discovery ask one defendant about the conduct of another defendant, and concluded that "if such questions cannot be asked on an examination for discovery I fail to see how such questions can be asked at trial." He then provided the following rationale for his ruling:

> A defendant takes the witness box to defend his or her actions as set out in the pleadings, not to give opinion evidence on issues between the plaintiff and other respondents. The opinion of Nurse Olson on issues between herself and the plaintiffs is relevant to the pleaded issues. Here Mr. Wunder proposes to ask Nurse Olson her opinion on issues which are not pleaded between herself and the plaintiffs.

[93] There is support for the proposition that on an examination for discovery a party cannot obtain an expert opinion from the opposite party about the conduct of another party to the action: See Wade v. Sisters of Saint Joseph of the

2000 CanLII 16946 (ON CA)

Diocese of London (1976), 2 C.P.C. 37 (Ont. H.C.J.); Christoyiannis (Litigation guardian of) v. Benoit, [1998] O.J. No. 5200 (Gen. Div.). As the scope of examination for discovery is wider than cross-examination, as a matter of logic, the proposition ought to apply equally to cross-examination.

[94] Nurse Olson was not qualified as an expert at trial. Like Dr. Awad, Nurse Olson was called to testify about her own involvement in the case. It is necessary, then, to regard Nurse Olson as a lay witness for the purpose of assessing the trial judge's ruling.

[95] As a general proposition, lay witnesses may not testify as to their opinion. However, in R. v. Graat, [1982] 2 S.C.R. 819 at pp. 835-37, 2 C.C.C. (3d) 365 at pp. 378-79, Dickson J. noted that the "line between 'fact' and 'opinion' is not clear". As such, he found "no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived." He stated at p. 379 C.C.C. [p. 837 S.C.R.] that a lay witness would be permitted to give opinion evidence in the following circumstances:

I accept the following passage from Cross on Evidence as a good statement of the law as to the cases in which non-expert opinion is admissible (at p. 448):

> When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. . . .

[96] The rationale for admitting opinion evidence in such circumstances is that "it may be difficult for the witness to narrate his factual observations individually." Thus, witnesses are allowed to state their opinions because they "had an opportunity for personal observation", and "were in a position to give the court real help".

2000 CanLII 16946 (ON CA)

[97] The impugned line of questioning went beyond Nurse Olson's personal involvement in the case. She was asked for her opinion on the conduct of other respondents. Nurse Olson was not being asked to state an opinion in order "more accurately to express the facts [she] perceived". The proposed testimony fell outside of the basis for admissibility set out in Graat, supra, and, in our view, was properly disallowed.

7. Rulings preventing impeachment of witnesses on read-ins

[98] Nurse Colebrook was asked a number of questions on examination for discovery about her ability to reach Mrs. Marchand's cervix during her vaginal examination on admission to hospital. Nurse Colebrook stated that she was unable to reach Mrs. Marchand's cervix because it was posterior. She also stated that Mrs. Marchand was tense. These questions and answers were read in as part of the appellants' case.

[99] On cross-examination, counsel for the appellants suggested that Nurse Colebrook was unable to reach Mrs. Marchand's cervix because Mrs. Marchand was tense and not because her cervix was posterior. Nurse Colebrook testified that while Mrs. Marchand was in fact tense, she could not reach her cervix because it was posterior. Counsel for the respondents objected to this line of questioning on the ground that appellants' counsel was attempting to contradict the answers he had read in from Nurse Colebrook's discovery.

[100] The trial judge acknowledged that rule 31.11(4) entitled appellants' counsel to rebut discovery evidence read into the record, but interpreted the rule to mean "that such contradiction must be through another witness or by other admissible evidence apart from the evidence of the defendant who was examined for discovery." He ruled as follows:

> In my view the evidence read into the record cannot be contradicted by cross-examining the author of the statement that was read into the record in an attempt to discredit the very evidence which [counsel] made part of the plaintiff's case.

2000 CanLII 16946 (ON CA)

[101] Rule 31.11 governs the use of examination for discovery at trial. The relevant portions of rule 31.11 provide as follows:

> 31.11 (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,
>
> (a) the adverse party; or
>
> (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.
>
> . . . . .
>
> (4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

[102] It is clear from the wording of rule 31.11 that a party may read any part of an adverse party's examination for discovery into evidence as part of his or her own case. Moreover, it is also clear that that party is entitled to rebut that evidence by introducing any other admissible evidence. In their discussion of the predecessor to rule 31.11, Holmested and Gale, Ontario Judicature Act and Rules of Practice (Scarborough: Carswell, 1983) at p. 1767, affirm this last proposition:

> If a party, as part of his own case, puts in evidence unfavourable to him from the discovery of the opposite party and does not contradict it, he may be bound by it, but he may contradict that which is unfavourable by other evidence and in the circumstances of the particular case may accept or

2000 CanLII 16946 (ON CA)

> reject such portions as he shall see fit, including the evidence given on discovery. . . . There is no general rule that a party putting in discovery is bound by the answers. If a party, as part of his own case, puts in unfavourable evidence from the discovery of an opposite party, he may contradict it by other evidence . . .

[103] There appears to be no case directly deciding whether a party is entitled to contradict discovery answers read into evidence during cross-examination of the declarant. This is hardly surprising as, for obvious tactical reasons, it will be rare for a party to read in an answer and then seek to impeach the declarant on that very answer.

[104] The wording of rule 31.11(4) does not limit a party's right to rebut discovery answers. Rule 31.11(4) states that a party "may rebut that evidence by introducing any other admissible evidence" [emphasis added]. The words "that evidence" refer to the discovery answers read into evidence. In our view, the words "any other admissible evidence" must refer to any evidence other than the discovery answers read into evidence. We can see no reason in principle to prevent a party from attempting to contradict an adverse party's discovery answers by cross-examining the adverse party.

[105] In our view, the trial judge erred in ruling that appellants' counsel could not attempt to contradict Nurse Colebrook's discovery answers by cross-examining her on those answers. However, it is also our view that no prejudice flowed from the trial judge's erroneous ruling. Counsel objected only after the question was asked and Nurse Colebrook reiterated what she had said on discovery. It is highly unlikely that further cross-examination would have elicited evidence helpful to the appellants.

[106] The real source of prejudice, if any, to the appellants was the tactical decision to read in the answers that Nurse Colebrook gave on discovery. Having read those answers in, the appellants risked that a finding would be made unless they could contradict those answers by other evidence. It was unlikely, as a practical matter, that those answers could have

2000 CanLII 16946 (ON CA)

been effectively contradicted by cross-examining the declarant. Justice Gordon's comment in Collins v. Belgian Dry Cleaners, Dyers and Furriers Ltd., [1952] 1 D.L.R. 712, 4 W.W.R. (N.S.) 241 at p. 244 (Sask. C.A.) is apposite:

> It is perfectly true that . . . a party has been permitted to adduce evidence contradicting parts of the examination for discovery of his opponent put in at the trial. I still cannot understand why counsel still persist in tendering in evidence questions and answers from their opponent's examination for discovery which are diametrically opposed to their client's contention.

8. Ruling prohibiting demonstrative evidence

[107] In the course of his examination in-chief of Dr. Fields, appellants' counsel sought to refer the witness to an enlargement of the test strip produced by the NST administered on July 5, 1990. Counsel for Dr. Asher objected to its use on the grounds that (a) the enlargement was of poor quality and omitted essential details, and (b) the observations that Dr. Fields might make about the enlargement would likely differ from the observations the defendant nurses could make about the originals. Counsel for the nurses and the hospital endorsed those objections, and made the further objection that (c) Dr. Fields was precluded from testifying about the NST strip by the trial judge's ruling limiting Dr. Fields' testimony.

[108] The trial judge ruled that Dr. Fields could comment on the original NST strip, or a copy the same size as the original, but that he could not comment on the enlargement. The rationale for the ruling was that the respondent nurses did not have the enlargement, and that it would not assist the court if Dr. Fields were able to observe something on the enlargement not observable from the original.

[109] It is well established that a decision whether to admit demonstrative evidence is within the discretion of the trial judge: see Draper v. Jacklyn, [1970] S.C.R. 92, 9 D.L.R. (3d) 264 and Shipman v. Antoniadis (1975), 8 O.R. (2d) 449, 58 D.L.R. (3d) 321 (C.A.). We see no basis for interfering with

2000 CanLII 16946 (ON CA)

the trial judge's ruling.

[110] In any event, the ruling could not have affected the outcome of the trial. The original NST strip was already before the court. Dr. Fields was permitted to comment on the original NST strip and the appellants were not prevented from adducing evidence on the matter. This was not a case where a party sought to enter demonstrative evidence to assist a jury in their fact-finding function. The trial was being heard by judge alone, and the trial judge had a copy of the NST strip before him.

9. Ruling permitting cross-examination of Mrs. Kwolek

[111] Mrs. Kwolek, a registered nurse, was called by counsel for the respondent nurses and the hospital as an expert witness. The appellants objected to counsel for Dr. Asher cross-examining witnesses called by counsel for the other respondents on the ground that there was a similarity of interest between the respondent nurses, the hospital, and Dr. Asher.

[112] The trial judge ruled that counsel for Dr. Asher had the right to cross-examine Mrs. Kwolek. He stated that paras. 14 and 27 of the statement of claim were a complete answer to the objection, as the statement of claim pleaded that the medical respondents -- i.e., Dr. Asher -- were responsible for the conduct of the nurses.

[113] The right to confront and interrogate an adverse witness is regarded as a fundamental right of parties to a trial. However, in certain circumstances a party will not be permitted to put leading questions in cross-examination to a witness called by an adverse party. The Law of Evidence sets out these circumstances at p. 940:

> . . . In cases where there are co-defendants with similar interests who have pleaded separately and are represented by different counsel, a trial judge has a discretion to refuse to allow counsel for one defendant to cross-examine a co-defendant's witnesses. If, however, the interests of the

2000 CanLII 16946 (ON CA)

parties are not similar, separate counsel are usually allowed to cross-examine a co-defendant or that co-defendant's witnesses.

[114] It is necessary, then, to determine whether the respondent nurses were adverse in interest to Dr. Asher.

[115] The statement of claim pleads that the respondent doctors were responsible for the conduct of the nurses. The doctors would undoubtedly seek to establish that they were not negligent; rather, any negligence was the sole responsibility of the nurses. The nurses would undoubtedly seek to establish that they were not negligent and that any negligence was the sole responsibility of the doctors. Accordingly, based upon the appellants' statement of claim, the respondent nurses and Dr. Asher were adverse in interest.

[116] In their statement of defence, the nurses denied that the doctors were responsible for their conduct, and denied that they were negligent. The nurses stated that they had no knowledge of the negligence alleged to have been committed by the doctors. The hospital and nurses crossclaimed against the medical respondents, and relied upon the allegations contained in the appellants' statement of claim. Similarly, the medical respondents, in their statement of defence, denied all allegations contained in the statement of claim, and crossclaimed against the hospital and nurses.

[117] In view of the pleadings, the trial judge properly concluded that there was an adversity of interest and he properly allowed counsel for Dr. Asher to cross-examine Nurse Kwolek.

B. Uneven Application of Evidentiary Rulings

[118] The appellants submit that the uneven application of certain evidentiary rulings provides further indication of bias on the part of the trial judge.

1. Ruling relating to Dr. Tithecott

2000 CanLII 16946 (ON CA)

[119] The respondents called Dr. Tithecott, a treating physician, as a witness. Dr. Tithecott was asked questions regarding the cord gases, and the inferences he drew from them for the purpose of resuscitating Joel Marchand. He was also asked about the significance of the "marked metabolic acidosis" that Joel Marchand's cord gases displayed. Dr. Tithecott testified that the acidosis "indicated to me that the child had suffered a severe event a short time before delivery". Counsel for the appellants objected on the grounds that (a) Dr. Tithecott was being asked to give opinion evidence, (b) no notice of that opinion had been given to the appellants, (c) counsel for the respondents was obliged to comply with rule 53.03, and (d) Dr. Tithecott ought to be confined to the "four corners of his report". Appellants' counsel was particularly concerned about Dr. Tithecott giving evidence about the timing of the severe event.

[120] The trial judge allowed the examination to proceed. The appellants contend that this ruling is inconsistent with the Awad ruling. Like Dr. Awad, Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, insofar as Dr. Tithecott was testifying about the facts of his own involvement, or the opinions that went to the exercise of his judgment, rule 53.03 was not engaged. We have found that the trial judge erred in applying rule 53.03 to limit the cross-examination of Dr. Awad. However, it is our view that a number of factors distinguish the situation with respect to Dr. Tithecott sufficiently to explain any difference in the manner the trial judge dealt with his evidence. The appellants had substantial notice of this area of questioning by way of: Dr. Tithecott's examinations for discovery, his responses to requests to admit, and the report that he made contemporaneously with his examination of Joel Marchand. Another distinguishing point i s that the trial judge took into account the appellants' right of reply in assessing whether there was any prejudice. In our view, there is no merit to the submission that the trial judge's ruling on this issue indicates bias or an unwillingness to apply the same standard to the respondents as he had applied to the appellants.

2. Rulings relating to Dr. Smith

2000 CanLII 16946 (ON CA)

[121] The appellants complain of two rulings with respect to Dr. Smith. Dr. Smith prepared three reports. The first ruling concerned his third report, filed by the respondents 10 months before Dr. Smith testified, and some four months after Dr. Manning had testified. The report dealt with different blood gas orders. The trial judge ruled that Dr. Smith could testify about his third report. The second ruling permitted counsel for Dr. Asher to ask Dr. Smith to comment on testimony given by Dr. Whyte in cross-examination. The first ruling is said to be inconsistent with the Silver ruling and the second with the Fields ruling.

[122] In our view, there is no merit to these submissions. The trial judge distinguished the Silver ruling on several grounds. It became apparent that appellants' counsel was aware that there were two different blood gas orders and could have raised the matter with Dr. Manning. Accordingly, the trial judge ruled that he was not taken by surprise and that Dr. Smith could give evidence about the contents of the third report. The trial judge also differentiated the Silver ruling from the present situation, noting that Dr. Smith's third report was delivered 10 months before the defence started. Moreover, even if something new was raised by the defence it could be addressed through the appellants' right of reply.

[123] The second ruling concerning Dr. Smith was also correct. It is well established that an expert witness can be asked to comment on the opinion of another expert: see Quantrill v. Alcan-Colony Contracting Co. (1978), 18 O.R. (2d) 333 (C.A.).

3. Ruling relating to Dr. Eyman

[124] Dr. Eyman was called by the respondent, Dr. Asher, to give expert evidence on the issue of Joel Marchand's life expectancy. Dr. Eyman had prepared two reports on the issue of damages. The first report was dated November 12, 1993 and was prepared on the basis of materials sent to Dr. Eyman by the respondents. The second report was dated May 5, 1994 and was prepared after Dr. Eyman attended a physical examination of

2000 CanLII 16946 (ON CA)

Joel Marchand conducted by two other physicians, and viewed four hours of videotapes of Joel Marchand. The second report was based upon Dr. Eyman's own observations and the observations of the two other physicians.

[125] During the voir dire on the foundational facts issue, Dr. Eyman was asked what materials he was sent and what materials he relied upon. He could not recall precisely what materials he relied upon. The appellants submitted that, in accordance with the foundational facts ruling, the respondents were required to prove all the documents Dr. Eyman had been given. The trial judge rejected this argument.

[126] The trial judge differentiated his ruling with respect to Dr. Eyman from his rulings with respect to Ms. Kelly and Ms. Staub. He characterized his rulings with respect to Ms. Kelly and Ms. Staub as a response to the appellants' attempts to rely upon a different set of facts from those relied upon by Ms. Kelly and Ms. Staub. In contrast, his ruling with respect to Dr. Eyman was based on the respondents having proven the same set of facts relied upon by Dr. Eyman, albeit through different means.

[127] Dr. Eyman's reports appeared to be based on factual observations; for example, whether Joel Marchand could crawl. Observations of this nature would be capable of proof through various sources. It appears to us that in the Eyman ruling, the trial judge characterized the appellants' position concerning Ms. Kelly's and Ms. Staub's reports as an attempt to rely upon "X, Y, Z" rather than "A, B, C" where the experts had relied upon "A, B, C" in preparing their reports. We have already found that to the extent the trial judge limited the right of the appellants to establish the same foundational facts relied on by Ms. Kelly and Ms. Staub through different means, he erred. However, as the Eyman ruling indicates, the trial judge was endeavouring to be consistent. If he erred in the application of the Kelly and Staub rulings, any error he committed falls well short of an indication of bias or a predisposition to favour the respondents.

C. Conclusion on the Evidentiary Rulings

2000 CanLII 16946 (ON CA)

[128] We conclude that the evidentiary rulings of the trial judge and the manner in which they were applied do not support the contention that the appellants were denied the opportunity to fairly present their case, nor did these rulings create a reasonable apprehension of bias on the part of the trial judge. The trial judge's rulings were carefully considered and reflect, in our view, a sincere and diligent effort to conduct a fair trial. We have concluded that virtually all of the impugned rulings were correctly decided. The very few errors we have identified were inconsequential and even viewed cumulatively did not result in any significant prejudice to the appellants. Accordingly, this ground of appeal is dismissed.

III. DID THE TRIAL JUDGE'S CONDUCT OF THE TRIAL RAISE A REASONABLE APPREHENSION OF BIAS?

[129] The appellants' main contention on the appeal is that the trial judge's conduct of the trial raised a reasonable apprehension of bias towards them. They submit that throughout the trial defence counsel were insulting, hostile, discourteous and rude to their counsel, Mr. Wunder, and indeed to Mrs. Marchand, and yet the trial judge condoned this behaviour, never restraining or controlling it. The appellants submit that, by itself, the trial judge's refusal to restrain defence counsel raises a reasonable apprehension of bias. The appellants also submit that the trial judge showed hostility to Mr. Wunder, that he interfered in Mr. and Mrs. Marchand's presentation of the case, and that, in his reasons, he unfairly judged the credibility of Mrs. Marchand. All of this conduct, the appellants contend, further supports their claim of judicial bias.

[130] The trial judge's conduct, which the appellants submit cumulatively amounts to judicial bias, can conveniently be discussed under the following six categories, of which the first is by far the most serious:

(1) the trial judge refused to restrain defence counsel's repeated attacks on Mr. Wunder's integrity and competence;

2000 CanLII 16946 (ON CA)

(2) the trial judge refused to control defence counsel's inappropriate treatment of Mrs. Marchand;

(3) the trial judge prevented the appellants from fairly presenting their case by his one-sided interventions;

(4) the trial judge on one occasion talked with defence counsel in the absence of appellants' counsel;

(5) the trial judge unfairly criticized Mr. Wunder; and

(6) the trial judge showed antipathy to Mrs. Marchand in his reasons for judgment.

[131] Before considering this ground of appeal, we will briefly review the principles that apply to a claim of judicial bias. These principles, now well established, have recently been summarized by the Supreme Court of Canada in R. v. S. (R.D.), [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353. They are as follows:

1. All adjudicative tribunals owe a duty of fairness to the parties who appear before them. The scope of the duty and the rigour with which the duty is applied vary with the nature of the tribunal. Courts, however, should be held to the highest standards of impartiality.

2. Impartiality reflects a state of mind in which the judge is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias reflects a state of mind that is closed or predisposed to a particular result on material issues.

3. "Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair." (at p. 524 S.C.R.)

4. The test for bias contains a twofold objective standard: the

2000 CanLII 16946 (ON CA)

person considering the alleged bias must be reasonable and informed; and the apprehension of bias must itself be reasonable. In the words of de Grandpr J. in Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716, approved of by the Supreme Court of Canada in S. (R.D.), supra:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."

5. The party alleging bias has the onus of proving it on the balance of probabilities.

6. Prejudgment of the merits, prejudgment of credibility, excessive and one-sided interventions with counsel or in the examination of witnesses and the reasons themselves may show bias. The court must decide whether the relevant considerations taken together give rise to a reasonable apprehension of bias.

7. The threshold for a finding of actual or apprehended bias is high. Courts presume that judges will carry out their oath of office. Thus, to make out an allegation of judicial bias requires cogent evidence. Suspicion is not enough. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice.

8. Nonetheless, if the judge's words or conduct give rise to a reasonable apprehension of bias, it colours the entire trial and cannot be cured by the correctness of the subsequent decision. Therefore, on appeal, a finding of actual or apprehended bias will ordinarily result in a new trial.

[132] The respondents deny that either the words or the

2000 CanLII 16946 (ON CA)

conduct of the trial judge gave rise to a reasonable apprehension of bias. They submit, in the alternative, that the appellants waived their right to claim judicial bias and should be precluded from doing so on appeal. In support of their submission on waiver, they say that an allegation of bias should be raised at the first available opportunity, and that instead the appellants waited until 19 months after the completion of the evidence and three months after the release of the reasons for judgment. They also point out that the appellants opposed four mistrial motions brought by the defence during the trial and that the appellants insisted the trial judge hear their own motion for a mistrial (because of the alleged perjury of a witness) even while their motion to recuse the trial judge for bias was pending. [See Note 2 at end of document] It is unnecessary for us to consider this alternative submission of waiver in the light of our conclusion that the appellants' claim of judicial bias fails on its merits.

[133] We therefore turn to the appellants' allegation of judicial bias, applying the legal principles we summarized to the six categories of bias raised by the appellants.

1. The Trial Judge Refused to Restrain Defence Counsel's Repeated Attacks on Mr. Wunder's Integrity and Competence

[134] This is the appellants' main submission in support of their allegation of judicial bias. They submit that throughout the 165 days of trial, defence counsel repeatedly accused their counsel, Mr. Wunder, of manipulating evidence; of deliberately misinforming witnesses and feeding them answers through objections during cross-examination; of deliberately flouting, subverting and ignoring the rules of practice; and of showing contempt for the trial judge and his rulings. They contend that the trial judge failed to restrain defence counsel's repeated attacks on Mr. Wunder's integrity and competence, and by not restraining it, the trial judge condoned it and lent the weight of his office to the defence position. Thus, the appellants argue that the trial judge's failure to restrain defence counsel's attacks on Mr. Wunder gave rise to apprehended bias.

[135] The record shows that from early on in the trial, any

2000 CanLII 16946 (ON CA)

degree of trust between Mr. Wunder, on the one hand, and Mr. Tait, counsel for Dr. Asher, and Mr. Liswood, counsel for the hospital and nurses, on the other, had completely vanished, to be replaced by a level of rancour and hostility rarely, if ever, seen in an Ontario courtroom. The record also amply supports the appellants' contention that Mr. Tait repeatedly attacked Mr. Wunder's integrity and competence. Comments about counsel that have no place in any courtroom infected this trial from start to finish. The following examples should adequately give the flavour of what took place.

[136] Mr. Tait accused Mr. Wunder of "a complete lack of integrity"; of cheating and intentionally defying the rules of practice; of using the right to object to cross-examination "to suggest answers to every witness who has come into this courtroom"; of abuses of the Rules of Civil Procedure; of using and abusing solicitor-client privilege as a "mask for deception", to "conceal misconduct", "as a manipulative device", "to conceal the devices by which the evidence of witnesses is manipulated" and as a "shield for deceit"; of "manipulating" the evidence and facts; of deliberately misinforming an expert witness; of "flatly lying" to the court; of deliberately misleading the court, showing contempt for the court, defying and deceiving the court about the evidence of Dr. Whyte; of "trickery" and "sleight of hand"; and of committing an outrage on the court. Mr. Tait told the trial judge that he (Mr. Tait) [was] wrong to assume Mr. Wunder was competent and would comply with the Rules of Civil Procedure, and he ev en suggested that Mrs. Marchand made a mistake in choosing Mr. Wunder as her counsel.

[137] The following two passages typify the tenor of Mr. Tait's verbal attacks on Mr. Wunder:

> I don't want to leave today . . . without at least indicating to Your Honour, the sense of total outrage, that a deceitful, legal mind could possibly invent so preposterous a distortion of the judicial process; a complete violation of every principle of Ashmore that he has so freely adopted.
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> . . . . .

2000 CanLII 16946 (ON CA)

> This is a profound disgrace. I invite Your Honour to reread Ashmore tonight and I invite you to tell Mr. Wunder to take this argument to the Court of Appeal if he wishes, but it will not be heard in this court.
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> . . . . .
>
> It wasn't for me to say that I disagreed with the ruling. We accept it and we went on. But to come forward with this kind of scurrilous manipulation, of which -- of what, for Mr. Wunder was essentially a break, a break that he so genuinely didn't expect that he invited you to rule last week.
>
> . . . This is scurrilous and this is disgraceful and I ask Your Honour not to countenance it.
>
> . . . . .
>
> Mr. Wunder has abused the rules of practice and his obligations as counsel in respect of this particular witness at every turn. And the rules of practice and the relief they provide for honest counsel are not there as an excuse to permit unchecked grossly improper manipulation of the whole litigation process.

[138] Mr. Tait was not alone in his criticisms of Mr. Wunder. Mr. Liswood, too, maligned the appellants' counsel. He accused Mr. Wunder of manipulating, abusing and making a mockery of the judicial system; of using the Rules of Civil Procedure as an "excuse to permit unchecked grossly improper manipulation of the whole litigation process"; of "flagrantly subverting" the Rules of Civil Procedure; of "suppressing" facts and information from the defence; of "contrivance and manipulation" in the delivery of expert reports; of continually withdrawing from his commitments; and of violating Rule 10 of the Rules of Professional Conduct by knowingly attempting to deceive the court and by knowingly misstating the contents of documents.

[139] We do not intend to suggest that this conduct was all one-sided. On occasion, Mr. Wunder acted in a similar way. But

2000 CanLII 16946 (ON CA)

Mr. Tait and Mr. Liswood must accept most of the responsibility for conduct that by any reasonable standards of civility was unacceptable for any counsel, let alone senior counsel who should know better.

[140] In this court, Mr. Ortved and Mr. Curry, who acted for Dr. Asher, made no attempt to defend Mr. Tait's conduct or to substantiate any of Mr. Tait's many allegations against Mr. Wunder. Instead, they candidly acknowledged that Mr. Tait's conduct toward Mr. Wunder had fallen below an acceptable standard. Mr. Liswood also acknowledged that his own conduct at trial had been unacceptable. We have little doubt that the appellants must have found the repeated maligning of their counsel unsettling, to say the least.

[141] The unprofessional conduct of counsel is a matter for the Law Society of Upper Canada. The issue before us, however, centres not on the conduct of counsel but its impact on the fairness of the trial. Our focus centres on the conduct of the trial judge. The question we must answer is whether an informed person viewing the matter realistically would conclude that the way the trial judge dealt with defence counsel's attacks on Mr. Wunder created a reasonable apprehension of bias and thus deprived the appellants of a fair trial. We are not persuaded that the trial judge's conduct supports a finding of bias.

[142] There are three answers to the appellants' submission that a reasonable apprehension of bias arises from the trial judge's refusal to restrain or control defence counsel. First, the trial judge did not remain silent about counsel's conduct. He intervened in the trial. On the fifteenth day of the trial, November 16, 1993, Mr. Tait accused Mr. Wunder of manipulating the schedule of witnesses to give one of the appellants' experts, Dr. Fields, time to repair his evidence. Mr. Wunder objected to this characterization of his conduct. The trial judge responded:

> Look, he says a lot of things and you say a lot of things. I do not pay a whole lot of attention to what you are saying on those matters. Now, let us just proceed with this.

2000 CanLII 16946 (ON CA)

[143] The following day, Mr. Tait protested that in his 27 years of practice he had "never been so badly treated by any other counsel". He added that he had "never met the equal of Mr. Wunder for ignoring his obligations". This time, the trial judge replied at length, in an attempt to change the atmosphere of the trial. He urged counsel to stop their "interminable fighting" and he emphasized the need for civility in the courtroom:

> Let me say this that it struck me last night as I reflected upon what I considered to be a rather lengthy day. We had some rather strenuous debates about certain matters that we should never lose sight of why we are here. It strikes me that what we are here to do is to try this issue fairly, make sure we try it fairly to all parties, and to achieve that there has to be full and complete disclosure. Having practiced in those days when you did not make disclosure unless you had to, I know what it is like. But those are not what we are doing today. These cases are far too complex for that.
>
> I am also struck, as I read in the latest issue of the Canadian Lawyer, somebody was interviewing the former Attorney General, Ian Scott, and he said that the only thing that makes litigation is good manners. Somehow there's a lack of manners in this trial and I do not suggest to point a finger at anyone. I think it is important, we are going to be here for another few weeks. We are into our fifth week and there is no reason why we cannot all act like gentlemen in the courtroom. We can stop sniping at each other. If anybody thinks that there has been prejudice as a result of a lack of disclosure, they can politely argue strenuously, but politely argue rule 53.08 and 31.07, all deal with the matter. If anybody thinks that as a result of the lack of disclosure that they have been prejudiced and they want an adjournment, I am going to grant it. I make it abundantly clear right now that I am going to do my utmost to make sure that this matter is fairly dealt with. We have a plaintiff here who is entit led to have her action heard before this court. She wants to have it heard whether she is right or wrong. We will not know until the case, but she will have heard, and so will Dr.

2000 CanLII 16946 (ON CA)

Asher and so will the nurses. They are entitled to that. So I just urge you all, let us get along. Let us try and move along with this case. It is going to be long enough without this interminable fighting.

. . . . .

Let us move on but let us not conduct ourselves in a manner in which it really does not place the legal profession in a good light. We have a tough enough issue as it is to try now. Let us move forward.

[144] Unfortunately, the trial judge's exemplary words seemed to have had little effect. Soon after, Mr. Tait again disparaged Mr. Wunder's ability:

. . . Mr. Wunder is a counsel who lectures the profession and writes books about trial preparation. He's a senior counsel. He's entitled to style himself a Queen's Counsel and while I have a dim view as to his appreciation of the contents of the Rules of Practice, that is no excuse for adjourning a trial.

[145] The appellants complain that though the trial judge's intervention on November 17, 1993 was salutary, after that day and indeed for the rest of the trial, the trial judge never tried to restrain defence counsel. This complaint is not entirely correct because on February 9, 1994, during an interchange with Mr. Percival (acting for Mr. Wunder on a motion), the trial judge again commented on counsel's conduct:

Mr. Percival: I am sorry, I wish I could be more helpful to you on that issue, but as I said, I felt that that was the address because I saw, I thought to a certain extent there was some very, I thought, intemperate and rather strong language utilized by Mr. Liswood, condemning the conduct of Mr. . . .

The Court: There has been a lot of strong language in this trial . . .

Mr. Percival: Well, I'm not going to try to get into it.

2000 CanLII 16946 (ON CA)

The Court: . . . Mr. Percival on both sides, and I keep reminding counsel of what the former Attorney General said, that only good manners makes litigation bearable.

Mr. Percival: I understand.

The Court: And that falls on deaf ears from time to time in this trial.

Mr. Percival: And I know that this has been a very difficult trial. I've seen some of the transcripts. I certainly have not had the opportunity to do it all, and as I said to you before, this has been a very difficult case I think for everybody, quite apart from your Honour.

[146] Although the appellants say that the trial judge should have done more, his observations both in November 1993 and in February 1994 at least show that he was not oblivious to what was taking place and that he tried to control counsel's conduct.

[147] Second, the failure of the trial judge to do more to restrain or control defence counsel does not automatically indicate judicial bias. We recognize that other trial judges might well have dealt with the acrimony in the courtroom differently, and perhaps more effectively. This trial judge chose to be relatively passive, indeed, probably too passive. He was well aware of the acrimony and chose largely to ignore [it].

[148] Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is [a] shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves. Unfortunately, we have no doubt that the failure to satisfactorily discharge this responsibility in this case tarnished the reputation of the administration of justice. This case underlines the importance being given by leaders of the bench and bar to improving civility in the courtroom.

2000 CanLII 16946 (ON CA)

[149] However for this court, the question must be whether in light of what went on in the courtroom there was a reasonable apprehension of bias on the part of the trial judge, thus depriving the appellants of a fair trial. Nothing in the trial record or in the trial judge's reasons suggests that he condoned defence counsel's conduct or lent the weight of his office to the defence position. A review of the transcripts establishes that counsel's conduct had no effect on the trial judge's efforts to fairly judge the case before him. The trial judge's reasons are thorough and present a fair and balanced consideration of all the contentious issues in the trial. In short, we do not think that an informed and reasonable observer looking realistically at the trial unfolding would apprehend from the trial judge's conduct that he was biased, or unfair in adjudicating this case.

[150] Third, and admittedly a less important answer to the appellants' submission, is that most of the acrimonious language and most of the attacks on Mr. Wunder occurred during submissions on motions, not during the presentation of evidence. This, in our view, is one reason why defence counsel's conduct had no impact on the appellants' fair presentation of their case.

[151] To conclude this ground of appeal, although we deplore the conduct of defence counsel, the appellants have not shown that the way the trial judge dealt with defence counsel's attacks on Mr. Wunder gave rise to a reasonable apprehension of bias.

2. The Trial Judge Refused to Control Defence Counsel's Inappropriate Treatment of Mrs. Marchand

[152] The appellants submit that defence counsel's conduct towards Mrs. Marchand was inappropriate and went unchecked by the trial judge. The appellants rely on five examples of inappropriate conduct. The first two examples show defence counsel in an unflattering light. However, none of the examples suggest judicial bias. We will deal briefly with each of them:

2000 CanLII 16946 (ON CA)

(a) During Mrs. Marchand's first day of testimony, Mr. Tait commented to Mr. Liswood, "She's a liar." This unfortunate comment was said loud enough for Mrs. Marchand to hear it and loud enough for the court reporter to record it. However, the trial judge did not hear the comment and, once apprised of it, he neither condoned nor accepted it.

(b) The appellants submit that Mr. Tait and Mr. Liswood taunted Mrs. Marchand with deprecating facial expressions from the counsel table. The record suggests that defence counsel rolled their eyes, smiled and laughed out loud during parts of Mrs. Marchand's cross-examination. Defence counsel's conduct again was unprofessional but, in our view, did not affect the fairness of the trial.

(c) The appellants contend that Mr. Tait taunted Mr. and Mrs. Marchand by gratuitously reminding them again and again that their son Joel had almost no brain tissue. We find no merit in this contention. Throughout the trial, Mr. Tait accepted that Joel Marchand had suffered a tragic injury. In our view, neither the phrasing nor the tone nor the content of his cross-examination of Mr. and Mrs. Marchand was objectionable. The issues in the case required the defence to explore Joel's brain function, his ability to see and whether he could play with a computer. As the trial judge pointed out to Mrs. Marchand, questioning on these issues was relevant to Joel's life expectancy and to the appellants' damages claim. The absence of any objection to this questioning from the appellants' counsel is perhaps the best evidence that the cross-examination was not unfair.

(d) The appellants also submit that on cross-examination defence counsel harassed Mrs. Marchand for being unable to remember her last menstrual period in September 1989. The defence undoubtedly conducted a tough, aggressive cross-examination but, in our view, not a harassing cross-examination. Joel's expected due date and its relationship to Mrs. Marchand's menstrual period was an important issue at trial, and Mrs. Marchand had previously given five different answers about when her last menstrual

2000 CanLII 16946 (ON CA)

period occurred. Again, Mr. Wunder did not object either to the tone or to the length of the cross-examination on this issue. In a trial where both sides made frequent objections and interjections, the lack of an objection on this issue is a good indicator that this complaint now made has little substance.

(e) Finally, the appellants submit that defence counsel insulted and belittled Mrs. Marchand during their cross-examination of her. As we have said, the cross-examination was at times aggressive, apparently even loud. But we do not consider it to have been unfair. Mr. Wunder did at one point ask the trial judge to ask Mr. Tait to "keep his tone down and not be rude to the witness". The trial judge refused, commenting that he did not think Mr. Tait had been rude but that if Mrs. Marchand was being intimidated he would intervene. In the light of this observation and our review of the entire cross-examination of Mrs. Marchand, we cannot find anything in the words or the conduct of the trial judge that would reasonably suggest that he was biased.

3. The Trial Judge Prevented the Appellants from Fairly Presenting Their Case by His One-Sided Interventions

[153] The appellants submit that the trial judge intervened excessively during Mr. Wunder's cross-examination of witnesses and by doing so, prevented the appellants from fairly presenting their case. Before discussing the interventions the appellants rely on, we will briefly review the legal principles that apply to this submission.

[154] A trial judge is not required to sit mute and listen to evidence without commenting or interjecting. A trial judge has the right, indeed the duty, to intervene to clarify and understand the evidence or to control the trial, provided that in intervening, the trial judge does not interfere with the fair presentation of the evidence and does not prejudge the issues in dispute or the credibility of the witnesses. The limits on the trial judge's right to intervene were concisely set out by Evans J.A. in Majcenic v. Natale, [1968] 1 O.R. 189

2000 CanLII 16946 (ON CA)

at p. 203, 66 D.L.R. (2d) 50 (C.A.):

> . . . I can appreciate that on occasion it is not only desirable but necessary that the trial Judge question the witnesses for the purpose of clarification of the evidence and I do not consider that he is solely an umpire or arbitrator in the proceedings. There is a limit however to the intervention and when the intervention is of such a nature that it impels one to conclude that the trial Judge is directing examination or cross-examination in such a manner as to constitute possible injustice to either party, then such intervention becomes interference and is improper.

[155] The appellants submit that the trial judge in this case crossed the permissible limits of intervention. We disagree. The appellants gave several examples of what they claimed were one-sided interventions by the trial judge during Mr. Wunder's cross-examination. These examples were put forward to show that the trial judge unfairly intervened to articulate a defence position or that he disrupted the appellants' presentation to a degree that raised a reasonable apprehension of bias. We will review the most salient examples, most of which were not objected to at the time and none of which, in our view, supports the appellants' submissions.

[156] The appellants point to an intervention by the trial judge during the cross-examination of Dr. Asher. Mr. Wunder was trying to impeach Dr. Asher on his discovery evidence, and defence counsel objected that Mr. Wunder had not done so properly. The trial judge intervened, appropriately, to point out that Mr. Wunder had not covered the topic on Dr. Asher's discovery:

> The Court: But you did not ask.
>
> Mr. Wunder: I'm sorry, sir?
>
> The Court: You did not ask him, how much did you take out after.
>
> Mr. Wunder: Well . . .

2000 CanLII 16946 (ON CA)

The Court: I think the important point is, Mr. Wunder, you said, "You didn't tell me this on discovery."

Mr. Wunder: Yes, sir.

The Court: And he did tell you about taking them about after and I do not appreciate you suggesting to a witness that "you don't tell me something on discovery" when he does in fact tell you something on discovery.

Mr. Wunder: Your Honour, well -- you are the final arbiter of that, as to whether or not it's . . .

The Court: No, but you were -- you were suggesting to this witness that this evidence about him taking the clots out of the uterus was brand new evidence which you had never heard of before.

[157] Mr. Wunder eventually accepted that he had not adequately dealt with the topic on discovery when he said: "And I guess I can be faulted for not asking you in greater detail the quantity or how it was removed."

[158] The appellants also point to an incident that arose during an argument over the late disclosure of Dr. Kirsch's medical records. Defence counsel suggested an adverse inference might be drawn on a particular point. Mr. Wunder questioned what the adverse inference might be. Instead of allowing defence counsel to answer, the trial judge responded:

The Court: Well, suppose that the adverse inference he proposes to advance is that I find as a fact that Barbra suffered severe pain.

Mr. Wunder: If that is my friend's position, if you articulate it adequately I would like to hear it from him.

Mr. Liswood: Joe, may I . . .

Mr. Wunder: Excuse me, wait, could I have Mr. Colangelo

2000 CanLII 16946 (ON CA)

-- I'd like to know from Mr. Colangelo . . .

The Court: Well, he would extend that I would think. On his argument he would extend it that that would alter the opinions of Dr. Fields, Manning, Johnson. He would say the same thing with regard to the use of the hands and scooting.

Mr. Wunder: I would just like my friend to articulate what adverse inference that he is talking about so that I can meet the argument, sir, and appreciate his argument.

The Court: Well, I am not absolutely sure that he has to because what he is saying is that that is a possibility and he says that I cannot deal with that until we get to the end of the trial.

Mr. Wunder: I understand, sir. He did not complete the sentence. He is going to argue an adverse inference. I would like to know what adverse inference, that's all, from him.

The Court: Well, he is going to argue it at some later date.

[159] In our view, the trial judge did not act improperly in intervening to set out the defence position. This was probably done with a view to moving the trial along. Moreover, counsel for all the parties fully argued whether an adverse inference should have been drawn without any inappropriate intervention by the trial judge.

[160] The appellants also point to an intervention by the trial judge during Mr. Tait's cross-examination of the appellants' expert, Dr. Fields, on his qualifications to give opinion evidence. Mr. Wunder objected to the questioning and the trial judge responded:

Mr. Wunder: Your Honour, aren't all these questions really designed to go to a matter of weight? The doctor is really qualified to give opinion evidence.

The Court: I suspect that I may hear some argument as to the ability of this witness, or whether or not I should allow

2000 CanLII 16946 (ON CA)

this witness to give expert evidence as to the standard of care which might be expected in Ontario if he is not familiar with it. He makes a bald statement. He makes a bald statement as I understand it. I am only anticipating what I think Mr. Tait might say, that he makes a bald statement that the standard of practice is the same.

Mr. Wunder: Well, the . . .

The Court: That is quite a different question than saying that he does not have expertise.

Mr. Wunder: Expertise evidence is expert evidence received by courts without regard to geographical barriers, and often . . .

The Court: Well, let us let Mr. Tait press on and we will come back to you, Mr. Wunder, when we argue this whole issue.

Mr. Wunder: Thank you, sir.

The trial judge's comments are innocuous and no possible apprehension of bias can arise from them, particularly because the trial judge permitted Dr. Fields to give expert evidence.

[161] Finally, the appellants submit that the trial judge especially interfered with their presentation of the case during the cross-examination of Dr. Asher on his withdrawal of the admission of oligohydramnios. A lengthy argument took place during this cross-examination, much of it over an excerpt from a textbook on obstetrics. During the argument, covering 44 pages of transcript, the trial judge intervened many times and put a few questions to the witness. However, as we read these pages, the trial judge was simply trying to control, as he was entitled to do, a heated exchange between counsel. As well, the few questions the trial judge asked were not obviously helpful to the defence.

[162] The appellants cite other examples from Mr. Wunder's cross-examination, which they say also demonstrate that the

2000 CanLII 16946 (ON CA)

trial judge's interventions were one-sided. We do not think that individually or collectively these other examples support the appellants' claim of judicial bias. The trial judge intervened when needed in order to try to control this difficult trial and to understand the evidence, including intervening during defence counsel's cross-examination.

4. The Trial Judge Spoke with Defence Counsel in the Absence of Mr. Wunder

[163] On one occasion in April 1995, respondents' counsel telephoned the trial judge to find out whether he would sit two days previously scheduled as non-sitting days to accommodate an out-of-town witness. Mr. Wunder was not party to the call, apparently because he was ill and was home recovering. The appellants now contend that the trial judge exhibited bias by speaking to respondents' counsel alone.

[164] We see no merit in this contention. The telephone call was limited to scheduling. Moreover, it was disclosed immediately to Mr. Wunder in writing and the next day in open court. Mr. Wunder accepted the trial judge's explanation for the telephone call.

5. The Trial Judge Unfairly Criticized Mr. Wunder

[165] The appellants submit that not only did defence counsel unfairly criticize their counsel, so too did the trial judge. The contend that the trial judge showed "a deeply critical attitude, perhaps outright hostility" toward Mr. Wunder. In our view, the trial record does not substantiate this contention. We will refer briefly to the two examples relied on by the appellants during oral argument to show that their contention has no merit.

[166] The appellants pointed to an exchange between the trial judge and Mr. Wunder over the contents of expert reports, which took place during the examination-in-chief of the appellants' expert, Dr. Geisler. The exchange was as follows:

Mr. Wunder: Your Honour, I cannot believe that my friends'

2000 CanLII 16946 (ON CA)

cross-examination is limited to and dependent upon what is in the plaintiff's reports. I just can't believe it. Surely they bring much more to this trial than that and surely they can't complain that they chose not to cross-examine people on issues that relate clearly to life expectancy.

The Court: Now wait a second. Let me get something straight, Mr. Wunder. If I am defending a case and I have your medical reports which identifies the areas that your experts are going to talk on or give evidence on or render opinions on, why would I venture into areas that could be just a mine field, to discuss with the doctor when I know that your other experts are allowed to give evidence about those matters?

Mr. Wunder: Because under our jurisprudence every expert is allowed to expand on his report.

The Court: Well because you see -- where you and I are parting company is that you want to play by the rule -- sort of the ambush rules as your experts get in the box . . .

Mr. Wunder: I resent that remark, Your Honour.

The Court: Well, you know, that is what it is coming down to.

Mr. Wunder: That's what my friends have persuaded you it's coming down to, sir.

The Court: No, they have not persuaded me of anything, Mr. Wunder. I will make up my own mind.

We see nothing unfairly critical in the trial judge's comments, which indeed reflect our views on the issue being debated.

[167] The appellants also rely on an exchange between the trial judge and Mr. Wunder over the "Colebrook ruling", which took place during the cross-examination of Dr. Asher. The relevant part of what was a rather innocuous exchange is as follows:

The Court: You keep saying burdened with the ruling in

2000 CanLII 16946 (ON CA)

Colebrook. I am satisfied that the ruling, the Colebrook Number Two Ruling is correct. You say burdened with it. I would have thought you would have known that. Maybe you did not know that principle.

Mr. Wunder: I certainly didn't, Your Honour.

The Court: Well, there you go.

Mr. Wunder: If I may continue my representations to Your Honour. Here is a statement by you and by me. One, that I didn't want to be taken to vouch for the truthfulness of what Dr. Asher says and I wanted to be able to challenge his credibility. So that was clearly stated on the record. And secondly, you assuring me that I would be able to cross-examine him on that correction, as you said, almost forever. Now . . .

The Court: And you have got that right.

Mr. Wunder: I'm sorry, Your Honour. When someone has a right to cross-examine, Your Honour, you recall from Sopinka, where they lead the simplest fact, one can cross-examine on all issues and I want -- I want to exercise that right. We've been on that before. Do you need the reference from Sopinka, sir?

The Court: No. I know what Sopinka says.

Mr. Wunder: I'm sure you do, sir.

The Court: But you are talking about having read something into the record, making it part of the plaintiff's case, and then are you entitled to cross-examine the author of that statement that you read into the record to prove that it is not true? You and I seem to part company on that. You seem to think that you can. I have said that you cannot.

Again, we find nothing unfair in the trial judge's observations, and certainly none of his observations reflect any animosity or hostility toward Mr. Wunder.

2000 CanLII 16946 (ON CA)

[168] As we have said before, the trial judge presided over a long and difficult trial, marked by open hostility and lack of trust among counsel, and by frequent interruptions by all counsel to the flow of evidence. The trial judge cannot be criticized, let alone be found guilty of judicial bias, for his occasional mild rebuke to counsel. We add that those occasional rebukes were quite evenly distributed throughout the trial and among all trial counsel. The appellants' claim that the trial judge showed "outright hostility" to Mr. Wunder is not substantiated on this record. In sharp contrast to this claim, the trial judge praised Mr. Wunder's dedication to his clients' case, in a ruling on June 3, 1994 dismissing a defence motion to refer Mr. Wunder's conduct to the Official Guardian for review:

> I assume that Mr. Liswood and Mr. Colangelo are suggesting that Mr. Wunder who acts on behalf of the Litigation Guardian, is not protecting the best interests of Joel Marchand and accordingly his conduct of this action on behalf of Joel Marchand required review by the Official Guardian.
>
> This trial commenced on October 18th, 1993 and I am told that as of this day, the court has been convened approximately 90 days and the Plaintiffs' case is not complete. I am doubtful that the Plaintiffs' case will be completed by the end of June 1994. Mr. Wunder has appeared at trial on all of the days that court has been convened and although I have not agreed with all of his submissions or the manner in which parts of the Plaintiffs' case has been presented, it would be unfair of me prior to hearing all of the evidence to second guess Mr. Wunder on the presentation of the Plaintiffs' case. Mr. Wunder has been a dedicated counsel who has attempted to present his clients' case in a manner which he feels is most favourable to his client. It would be wrong for me at this time in this trial to say that Mr. Wunder has not acted in the best interests of his clients. In my opinion, the actions of Mr. Wunder in this trial indicate that he perceives that his strategy in presenting his clients' case is in the best interests of his clients and at the end of the trial when I have heard all of the evidence, he may be right.

2000 CanLII 16946 (ON CA)

Mr. Wunder enjoys an exceedingly high reputation in the person injury field in Ontario and I must take his reputation of excellence into account when I consider the Motion of the Respondents to have this matter referred to the Official Guardian for review. There is absolutely no doubt in my mind that Mr. Wunder has dedicated himself to the presentation of this action and the suggestion that his conduct of this action should be reviewed by the Office of the Official Guardian is totally unfounded and is not warranted in this action. I want the record to indicate that although I have not agreed with many of the submissions of Mr. Wunder, and have ruled against him on some occasions in this trial, I see no reason to alter my views that Mr. Wunder is attempting to act in the best interests of his clients and perceives that his actions are in the best interests of his clients.

6. The Trial Judge Showed Antipathy to Mrs. Marchand in His Reasons for Judgment

[169] The appellants submit that the trial judge's reasons reflect his antipathy towards Mrs. Marchand. They argue that the trial judge rejected her evidence except where it bolstered the respondents' defence abruption theory and that he suggested in his reasons Mrs. Marchand "sought success in this case in priority to Joel's well-being". The appellants gave three examples of the trial judge's alleged antipathy. We will briefly review each example. None of them supports the appellants' submission.

[170] First, the appellants point to the trial judge's discussion of Joel's life expectancy. In that discussion, the trial judge expressed reservations about Mrs. Marchand's beliefs concerning her son's abilities and her reaction to professional advice for Joel's care.

[171] The trial judge thoroughly considered the question of Joel's life expectancy, devoting nearly 200 pages of his reasons to it. He praised Mrs. Marchand as a devoted, loving and caring mother who was trying to do the best for her son. The trial judge, however, was concerned about the divergence

2000 CanLII 16946 (ON CA)

between Mrs. Marchand's evidence and the expert evidence, especially on the key issue of Joel's mobility. On that issue, everyone accepted the importance of the evidence of Dr. Richard Eyman, a defence expert in epidemiology and biostatistics, who had developed a scale to predict life expectancy based on physical skills. In assessing Joel's mobility, the trial judge took into account the optimistic beliefs expressed by Mrs. Marchand and two of her friends, and compared them with the 41/2 hours of videotapes of Joel, the evidence of Joel's physiotherapist and the evidence of a doctor who participated in the defence medical (examination of Joel).

[172] The trial judge concluded that he could find no acceptable evidence that Joel could crawl, scoot or roll, which are key Eyman criteria. The trial judge was concerned that the appellants' efforts to suggest otherwise had their genesis in the Eyman criteria, a concern that was heightened by the apparently overstated information Mr. and Mrs. Marchand gave to Dr. MacGregor, who assessed Joel's mobility just before trial. The beliefs that Mrs. Marchand maintained about Joel's ability are entirely understandable, but the trial judge was entitled to discount those beliefs when they clashed with the expert evidence. In our view, the trial judge's unwillingness to accept Mrs. Marchand's evidence on Joel's mobility does not reflect antipathy toward her but a fair weighing of all the evidence presented to him.

[173] The second example that the appellants rely on is the trial judge's finding on reduced fetal movements. The appellants argued at trial that Dr. Asher was negligent because he failed to tell Mrs. Marchand to count her baby's movements. This argument could succeed only if the evidence showed a significant reduction in fetal movements. There was no such evidence. The trial judge accepted Mrs. Marchand's testimony that some reduction in fetal movements had occurred but he did not elevate her testimony to support a finding of significant reduction. This does not substantiate a claim of bias.

[174] Finally, the appellants complain that the trial judge accepted Dr. Kirsch's evidence about a discussion he had with Mrs. Marchand after Joel was born. Dr. Kirsch said that during

2000 CanLII 16946 (ON CA)

an office assessment Mrs. Marchand told him that at the time of abruption she had suffered pain concurrently with a fall in the fetal heart rate. This evidence was adverse to Mrs. Marchand's interests and she was not asked about it in examination-in-chief or in re-examination. Nonetheless, the trial judge accepted Dr. Kirsch's evidence. Doing so cannot be equated with antipathy towards Mrs. Marchand.

[175] Overall, we are satisfied that the evidence reasonably supports the trial judge's findings of credibility. Mrs. Marchand overstated her evidence, albeit understandably, and the trial judge was justified in concluding that her evidence did not withstand scrutiny.

7. The Cumulative Effect

[176] The appellants submit that the trial judge's conduct, as described in the six categories above, cumulatively amounts to judicial bias. We reject this submission.

[177] We have dealt with the appellants' submissions relating to individual complaints in each of the six categories and found that none of the conduct complained about established judicial bias. However, the principles in S. (R.D.) call for a consideration of the cumulative effect of the allegations of bias. For this reason, we must consider whether the totality of the appellants' complaints gives rise to a reasonable apprehension of bias. We do not think that they do.

[178] In our opinion the relentless acrimony between counsel in this complex and lengthy case did not prevent the trial judge from conducting and judging the case fairly and thoroughly. We are satisfied that a reasonably informed person, observing the trial judge's conduct during the entire trial and reading his reasons for judgment, would have no difficulty in concluding that he remained impartial and that he demonstrated no actual or apprehended bias.

[179] We therefore also dismiss this ground of appeal.

IV. COSTS

2000 CanLII 16946 (ON CA)

[180] The trial judge awarded the respondents their party-and-party costs of the trial, which he fixed in the total amount of $2,154,447.85 ($1,233,791.25 payable to Dr. Asher and $920,656.60 payable to the other respondents). The trial judge ordered that O.H.I.P. pay a small portion of those costs and the appellants the remainder. He also dismissed a defence motion to have Mr. Wunder pay 70% of the cost award.

[181] The appellants appeal the costs order. They submit that we should deny the respondents their costs of the trial even if we dismiss the appellants' appeal. In their factums filed on appeal, the respondents sought to maintain the trial judge's costs award. In oral argument, however, counsel for all respondents undertook not to pursue the appellants for the costs of the trial and stated that the respondents were not seeking costs of this appeal. In light of this concession and the tragic event that led to this case we think it appropriate to vary the costs order at trial to provide that the appellants have no obligation for the respondents' costs.

V. CONCLUSION

[182] For the foregoing reasons, paras. 2 and 3 of the judgment at trial are set aside, to be replaced by an order that the dismissal of the action is without costs. This appeal is dismissed without costs.

Order accordingly.

Notes

Note 1: Rule 53.03 has since been amended to require earlier service of the report, and to allow supplementary reports.

Note 2: The trial judge dismissed both of the appellant's motions.

2000 CanLII 16946 (ON CA)

TAB 36

RODERICK McLEAN.....APPELLANT;

AND

BENJAMIN BRADLEY .....RESPONDENT.

1878
*Feb'y. 6, 7.
June 4.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Absent and absconding debtors Act of Nova Scotia, Ch. 97, Rev. St. of N. S.—Attachment—Demurrer—Conversion by Sheriff—Corporation, sale by—Justification under Order of Court—Seal.

One *H.* instituted proceedings against the *L. C. M. Company*, the officers of which resided in the *United States*, but which did business in *Nova Scotia*, and, on the 25th May, 1872, caused a Writ of Attachment to be issued out of the Supreme Court at *Amherst*, under the absent and absconding debtors Act of *Nova Scotia*, (1) directed to the Appellant, the High Sheriff of the County of *Cumberland*. Under this Writ, the Appellant seized certain chattels, as being the chattels of the said Company. On the 12th November, 1872, an order was issued out of the said Court, directing the Appellant to sell, and the Appellant did sell said chattels as being of a perishable nature. On the 11th December, 1874, a discontinuance was filed in the said cause by *H.* On the 30th May, 1876, the Respondent commenced an action against the Appellant for the conversion of the chattels in question, contending that the Company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated July 5th, 1867, "signed on behalf of the Company," by one "*Hawley*, agent." To this memorandum a seal was affixed which did not purport to be the seal of the Company. The Appellant pleaded to the Declaration, that he did not convert; goods not Plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by *H.*, and that he had seized and sold the goods as the goods of the Company, in obedience to the attachment and order issued in said proceedings. The Respondent replied, setting up the dis-

*PRESENT:—Sir William Buell Richards, Knt., C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

1878 CanLII 22 (SCC)

1878

McLEAN
v.
BRADLEY.

continuance. The Appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that being bound to obey the order of the Court, he could not be affected by the discontinuance. At the trial a verdict of $500 damages was rendered for Respondent. The Appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The Court below refused to set aside the verdict and gave judgment for Plaintiff on the demurrer.

Held,—That the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the Defendant on the demurrer.

Ritchie, J., dissented, on the ground that the seizing under the attachment, and not the sale, constituted the conversion; that there was sufficient evidence to show that the chattels in question had been transferred by the Company to Respondent, and that under Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*, the sale of the chattels did not require to be under the corporate seal of the Company.

Per *Strong*, J.: The sale, and not the seizure, was the conversion complained of, and to this the order of the Court was a sufficient answer. *Semble*, a mere taking of the goods of a third person under a *mesne* attachment against a Defendant to keep them *in medio* until the termination of the action is not a conversion.

Per *Henry*, J.: The order for sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the Respondent, but the evidence failed to show a sale by the Company to the Respondent. Such a sale would require to be under the corporate seal of the Company, and did not come within the meaning of Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*.

THIS was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, giving judgment on demurrer in favour of the Plaintiff (Respondent), and discharging a rule *nisi*, granted to the Defendant (Appellant), to set aside the verdict for the Plaintiff.

The *Lawrence Coal Mining Company*, a body corpo-

(1) Ch. 97 Revised Statutes of Nova Scotia, 4th Series.

1878 CanLII 22 (SCC)

rate, incorporated out of *Nova Scotia*, in the State of *Massachusetts*, in the *United States of America*, under the Joint Stock Companies Act of *Nova Scotia*, commenced coal mining operations in 1862 on a colliery property at or near river *Hebert*, in the County of *Cumberland*, in the Province of *Nova Scotia*, purchased from one *George Hibbard*, and continued to work the same until 1865, when the Company became hopelessly insolvent. *Hibbard*, the former owner, who resided on the spot, continued from the outset to be a Director, and was the only resident Director in *Nova Scotia*, and was Managing Director from 1862 up to the spring of 1867, excepting only one season in 1864, and as such had charge of all the property of the Company. He also attended all the annual meetings of the Company held at *Boston*.

To enable the Company to carry on its operations, the Company, through *Hibbard* as Managing Director, obtained from *Bradley* a loan of $10,000, for which *Hibbard*, as Managing Director, gave a note or notes and a warrant to confess to *Bradley*, the Respondent, on which judgment was entered up by *Bradley* for $10,022.75, for principal and interest, on the 11th September, 1865. In 1866 the real and personal property was advertized for sale under Respondent's judgment, and the real estate was sold to him for $3,975, leaving $6,025 still due; the personal property was not sold, and remained on the premises until July, 1867, when *Hawley*, as agent of the Company, transferred it to Respondent, who, in consideration of the transfer, gave up notes and claims for about $1,500. *Hawley*, at the same time, gave the following memorandum of sale (filed in the case as exhibit A):—

"RIVER HEBERT, CUMBERLAND COUNTY,

"NOVA SCOTIA, July 5th, 1867.

"Know all men by these presents, that *Benjamin*

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

Bradley, of *Boston*, Commonwealth of *Massachusetts*, *United States of America*, has this day purchased through *T. R. Hawley*, authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, *Ezra C. Dillingham*.

"Signed on behalf of the Company by

"T. R. HAWLEY, Agent, (Seal).

"Signed in behalf of *Benjamin Bradley*, the purchaser, by

"EZRA C. DILLINGHAM, (Seal)."

Witness: { GEORGE MOFFAT, (Seal).
NATHAN J. HOEY, (Seal).
JESSE E. HOEY, His x Mark. (Seal).

There was no seal to this document purporting to be the seal of the Company, nor had any resolution been passed by the shareholders authorizing a sale by *Hawley*, but at an adjourned meeting of the Company, held on the 26th February, 1866, it had been, on motion, voted that Messrs. *Hawley*, *W. G. Howe* and *Alden*, should be and were thereby authorized to sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms as in their judgment would be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of said Company, and if the amount of such sale exceeded the debts the balance to be paid *pro rata* among the stockholders.

From the date of the sale, *Bradley*, and others claiming under him as proprietors, employed an agent to take care of the property, and paid all taxes and expenses connected with it. The mem. of sale was delivered by *Hawley* to *Alden*, who acted as Secretary of the Company.

1878 CanLII 22 (SCC)

No meetings of the Company were held subsequent to that of the 26th February, 1866, until December 30 and 31, 1874, when the Company, being still largely indebted to Respondent on his judgment, by a resolution unanimously adopted by the shareholders present, further resolved that all the interest of the Company in the mining lease of the Company be transferred to Respondent.

On the 25th May, 1872, *Hibbard*, who claimed $1,760 from the Company, brought an action against the Company, and caused a writ of attachment to be issued out of the Supreme Court at *Amherst*, under the absent or absconding debtors Act of *Nova Scotia* (1), directed to the Appellant, as High Sheriff of the County of *Cumberland*, requiring him to seize, and in obedience to the writ the Appellant did seize, certain chattels as being the chattels of the said Company.

On the 12th November, 1872, an order was issued out of the said Court, directing the Sheriff to sell the said chattels, as being of a perishable nature within the meaning of sec. 6, of the last mentioned Act ; and they were sold by the Sheriff.

On the 11th December, 1874, a discontinuance of the cause "and all proceedings thereunder," was entered in the action brought by *Hibbard* against the Company.

On the 30th May, 1876, the Respondent, contending that the chattels in question were his property, commenced an action of trover against the Appellant, the Sheriff, for the conversion of the said chattels.

The Appellant pleaded to the declaration :—1st. That he did not convert. 2nd. That goods were not the property of the Plaintiff. 3rd. Not possessed. And 4th. A special plea of justification setting forth the proceedings by *Hibbard*, against the *Lawrence Coal Mining Com-*

(1) Rev. Stat. *Nova Scotia*, 4th series, ch. 97.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

pany, and that the Defendant, as Sheriff, under the said writ of attachment, and the said order made in such proceedings, seized and sold the chattels in question as and being the chattels of the Company.

The Plaintiff replied to the fourth plea, that after the proceedings aforesaid the said proceedings were discontinued.

The Defendant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale in the fourth plea mentioned.

He also demurred to the replication, on the ground that, being bound to act in obedience to the order of the Court, he could not be affected by a discontinuance of a suit under which property was sold.

The Plaintiff joined in demurrer.

The issues of fact were tried at *Amherst* on the 16th October, 1876, before the Chief Justice, Sir *William Young*, and a jury, when a verdict was rendered for the Respondent for five hundred dollars damages.

The Appellant obtained a rule *nisi* to set aside the verdict, and the said rule *nisi* and the demurrer were argued together.

The Court below, after argument, gave judgment refusing to set aside the verdict, and, on the 2nd April, 1877, a rule was made ordering that the rule *nisi* be discharged with costs, and that the Plaintiff have judgment of the demurrer with costs.

The Appellant, thereupon, appealed to the Supreme Court of *Canada*.

Mr. *Gormully*, for Appellant:—

The Respondent claims title to the chattels in question by a transfer or conveyance thereof from the *Lawrence Coal Mining Company*. If once admitted to be the property of the Company, they must so remain until divested. The principal question is whether

1878 CanLII 22 (SCC)

there was an actual sale of the goods; whether exhibit A had the effect of transferring the chattels to *Bradley*; I contend it had not. That document must operate either as a contract or conveyance. If it operates as a contract, it must be regarded as a contract under seal, or as a simple contract. It is not binding on the Company, because it does not purport to bind them, and because the seal affixed is not the corporate seal of the Company, which was necessary, there having been evidence of the existence of one. Sec. 15, ch. 87, *Rev. Stat., N. S.*, 3rd series, only establishes as a rule of statute law what was formally a rule of common law. It has been held that as to personalty a corporation could sell it, but whether they could do so, except under seal, is another question.

The Statute says: "Acts within the scope of their charter." This sale, purporting to convey all the property, and showing an intention to abandon the object for which the Company was incorporated, should have been under seal.

Hawley never was duly authorized. There never was a meeting respecting the sale, and no evidence of that concerted action which was necessary.

D'Arcy v. *The Tamar, Kit Hill and Callington Railway Co.* (1); *Ridley* v. *Plymo Grinding Co.* (2). There is no evidence that the Company delegated their power; and further, if they did delegate it, they had no right to do so. The last delegation of authority is to *Hawley*, *Howe* and *Alden*—and this was a power which must have been exercised by all three, and was not a power which could be delegated. The Respondent was bound to know what was being done. *Exparte Brown* (3).

The transaction was a fraudulent one as against the

(1) L. R. 2 Ex. 158. (2) 2 Ex. 711.
(3) 19 Beav. 97.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

statute of *Elizabeth* (1), there was no change of possession, and this was a document which should have been registered under the statute.

The learned counsel then proceeded to argue that the learned judge who tried the action had improperly admitted evidence and had misdirected the jury; and that as to the demurrer, the Appellants fourth plea was good in law, and replication bad because it admits and does not sufficiently avoid the plea.

Mr. *Haliburton*, Q. C., for Respondent:—

The Company became indebted to *Bradley* for an advance of $10,000. In 1865, they find themselves insolvent. *Hibbard*, from whom the Company purchased their mine, was the only director resident in *Nova Scotia*, and was the only person up to this date who had any benefit from the Company. He attended all the meetings and was familiar with all that was done. In 1865, meetings were called, but nothing was done, and at last *Bradley* enters up judgment and issues execution. He unwisely allowed the matter to stand over to save Sheriffs' fees, and a conveyance became necessary from the Company. Five days after the sale of the personal property, *Hibbard* renders an account, showing $25 due him. The Company set off against that the rent, and considered they had paid every body; they supposed all claims were paid both in *Canada* and the *United States*. The Company authorized *Hawley* to go to *Nova Scotia* to sell the property.

[RITCHIE, J.:—Will you show us from the evidence that he was authorized by the Company?]

There is no one at present claiming the property except *Bradley*. The Company did not claim it, nor any shareholder or director on behalf of the Company.

[THE CHIEF JUSTICE:—A question has been raised

(1) Twyne's case 1 Coke 80; 1 Sm. L. C. 1.

1878 CanLII 22 (SCC)

which seems important. This property was sold by order of the Court as perishable property. How can the Sheriff be held responsible for selling this specific property under the order of the Court?]

I am prepared to show that the Sheriff, under the circumstances, was not justified in selling.

Where there is a seal, the seal must be presumed to be the seal of the Company. *Ontario Salt Co.* v. *Merchants Salt Co. (limited)* (1).

[RITCHIE, J.:—Where is the evidence that *Hawley* had any right to use the seal of the Company?]

It is to be presumed he had the right.

[RITCHIE, J.:—What evidence raises this presumption?]

The Company took this man's money, which was the consideration for the sale.

[RITCHIE, J.:—If you can show that this party was professing to act for the Company and entered into this sale, and afterwards the Company had known of the facts and received the money, you will have good evidence that the sale was the sale of the Company.]

In 1874 a general meeting of the Company was called, and it is to be presumed the Company ratified the action of Mr. *Hawley*. When proceedings have been manifestly illegal between a Company and an individual, and the Company choose to continue these dealings, that is a ratification by the Company of such dealings.

[HENRY, J.:—The difficulty seems to me to be that there were no meetings, and no Company.]

It is to be presumed all necessary by-laws were passed to continue the Company, and the meeting of 1874 was a ratification of what was done before.

The transfer purporting to be signed and sealed by *R. Hawley*, as their agent, was given to the Secretary of

(1) 18 Grant 555; Rev. Stat. Nova Scotia, 3rd. series, ch. 87, s. 1.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

the Company, and was never repudiated by them, and *Bradley* continued thenceforth to be in undisputed possession of the property and paid taxes on it, and employed an agent to take charge of it.

Even though the Company could not contract directly except under seal, yet they could without the corporate seal appoint an agent, whose acts and contracts within the scope of his authority were binding on the Company. 3 *P. Wms.* 419. 1 *Fonb.*, 305 ; *Phil.* Ed , n. o. *Abbott's* Dig. of Law of Corporations (1).

The sale was not *ultra vires*, but was a lawful means of making the most of the assets of the Company to discharge its liabilities. *Featherstonehaugh* v. *Lee Moor Porcelain Clay Co.* (2) ; *Burrell* on assignments, 36.

The promises and engagements of a Company may as well be implied from its acts and the acts of its agent as if it were an individual. *Abbott's* Dig. of Law of Corporations (3).

In a case like the present the law presumes *omnia rite acta* and, unless the contrary appears, that all necessary by-laws and resolutions have been passed necessary for the validity or ratification of the acts performed by the Company's agent. *Field* on Corporations (4).

The Company, after notice to it of sale by *Hawley*, did, by their acquiescence for so many years in the possession of Respondent of the personal property sold to him, by their accepting therefor notes, &c., to the amount of $1,500, and by their unanimous vote in 1874 in further satisfaction of the balance due Respondent, that the lease of the mine should be transferred to him, ratify and confirm the sale of the personal property to Respondent by *Hawley*, as their agent ; and it must be assumed that all necessary by-laws and resolutions had been passed and adopted to ratify and confirm the sale

(1) Pp. 5 and 6.
(2) 35 L. J. N. S. 84.
(3) 578, S. 96-8, 579 S. 100-5.
(4) P. 287 & 296.

1878 CanLII 22 (SCC)

by *Hawley*, as agent of the Company. To enforce an executory contract against a corporation it may be necessary to show that it was by deed: but where the corporation has acted upon an *executed contract*, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe dem. Pennington* v. *Taniere* (1); *Wilson* v. *Miers* (2); *Royal British Bank* v. *Turquand* (3); *Reuter* v. *Electric Tel. Co.* (4); *Australian Steam Navigation Co.* v. *Marzetti et al* (5); *Crook* v. *Corporation of Seaford* (6); *Buffalo and Lake Huron Railway Co.* v. *Whitehead* (in appeal) (7); *Brewster* v. *The Canada Co.* (8); *Mayor of Stafford* v. *Till* (9); *Angel & Ames* on Corporations (10); *Bigelow* on Estoppel (11).

If any question could be raised as to the power of the Company to sell, or the agency of *Hawley*, or as to the validity of the sale by him, or as to the ratification of such agency, or of such sale by the Company, it is settled by the provisions of the *Nova Scotian* Act respecting factors and agents. *Rev. Stat. Nova Scotia*, Fourth Series, App. 63, secs. 1—10.

The Respondent further contends that Appellant's plea of justification is bad in substance, for the following reasons:—

Because it appears by it that the attachment under the *Nova Scotian* Act respecting absent or absconding debtors, was issued against "a body corporate doing business in *Nova Scotia*," the said Act not extending to such a company, but only to companies "incorporated

(1) 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49.
(2) 10 C. B. N.S. 367.
(3) 6 E. & B. 331.
(4) 6 E. & B. 347.
(5) 24 L. J. Exch. 273.
(6) L. R. 6. ch. App. 554.
(7) 8 Grant 157.
(8) 4 Grant 443.
(9) 4 Bing. 75.
(10) P. 172.
(11) 477, 447 N. 2.

1878 CanLII 22 (SCC)

1080

1878
McLEAN
v.
BRADLEY.

out of the Province and doing business by an agent within the Province." *Rev. Stat. Nova Scotia*, Fourth Series, ch. 97.

Because, even if sec. 6 of the said Act refers to such foreign companies doing business in *Nova Scotia*, it does not appear that the goods in question were exhibited to the Sheriff as the goods of the Company, nor does it appear that they were valued by two sworn appraisers, or that the amount of appraisement was endorsed on writ of attachment, or that the Sheriff levied on such part of the goods as would be sufficient to refund the sum so sworn to, &c.

Because, if sec. 7 is also applicable to such foreign companies, it does not appear that notice of such assessment was given to the agent of the Company, or that the three days were allowed him to find security; nor does it appear that the prothonotary had any power to issue the order for sale in consequence of the absence of a judge. *Rex.* v. *Croke* (1).

Because the plea of justification does not show that the Sheriff has made a return of the writ of attachment, without which he cannot be allowed to justify in such a case. Rev. Stat. Third Series, ch. 40, s. 13. *Rowland* v. *Veale* (2); *Cheaseley* v. *Barnes* (3); *Freeman* v. *Bluett* (4); *Williams* v. *Babbitt* (5); also, American cases cited in 2 *Greenleaf* on Ev., 597.

And Respondent further contends:—That as it is only service of summons on the agent of a foreign company doing business in the Province by an agent, which the statute says "gives jurisdiction to the Court," and as it appears that the summons was served on the agent of Respondent, and not of the company, the Court had no jurisdiction, and the writ of attachment and order

(1) 1 Cowp. 30.
(2) 1 Cowp. 20.
(3) 10 East 81.
(4) 1 Salk. 409, Ld. Ray. 633.
(5) 14 Gray 141.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

for sale, and all proceedings thereunder, were null and void; that a Court of law has in itself no inherent power or right to order perishable goods seized under attachment to be sold, *La Rochelle* v. *Piche et al* (1); and that sec. 6 and 7 of Absent or Absconding Debtors Act does not extend to foreign companies doing business in the Province by an agent, and the Court has no power to order a sale of their property under the said Act, and that all proceedings for a sale of such property are therefore null and void. "When the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against the above mentioned parties without any regard to the precept or process, and in this case it is not necessary to obey one who is not judge of the cause." *Broom*, L. M. 90, *Taylor* v. *Clemson* (2). *Factum a judice, quod ad officium jure non pertinet, ratum non est.* "A plea of justification by a constable acting under the warrant of a justice will accordingly be bad, if it does not show that the justice had jurisdiction over the subject matter upon which it is granted." *Taylor* v. *Clemson* (3); *Broom's Prac.* (4); *Broom*, L. M. (5).

As to evidence necessary in support of defence, see *Crocker* on Sheriffs (6).

Mr. *Gormully* in reply:—

RITCHIE, J.:—

1878.
*June 4.

This was an action brought against the Sheriff of the County of *Cumberland* for converting to his own use Plaintiff's goods. Defendant, as such Sheriff, levied on these goods under an attachment. There is a provision in the Act under which these goods were seized, giving

(1) 1 L. C. Jur. 158.
(2) 2 Q. B. 1034.
(3) 2 Q. B. 1031.
(4) 667 et seq.
(5) 95, 96.
(6) P. 867.

* The Chief Justice was absent when judgment was delivered.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

power to the Court to order perishable goods to be sold (1). The Court did in this case order the goods to be sold, and they were sold, and after such sale all the proceedings under the attachment appears to have been discontinued. If the Sheriff had properly taken the goods in the first instance, and if they were legally in his hands, and he sold them under the order of the Court, I think that order would protect him; but, in this case, in my opinion, the conversion of the goods took place when the Sheriff levied on them. The evidence shows the goods originally belonged to the *St. Lawrence Coal Mining Company*, the officers of which were domiciled in *New York*. The Company appears to have failed in its operations, and all their property in *Nova Scotia* was disposed of, except that now in question, and all debts in that Province, except $28, appear to have been settled, leaving a large debt due to the Plaintiff, who had been connected with the Company, and for which he held the promissory notes of the Company. The Supreme Court of *Nova Scotia* held there was evidence of a sale of these goods; and there appears to me to have been ample evidence for the consideration of the jury of a *bonâ fide* sale, for a valuable consideration, by the officers of the Company to the Plaintiff, for the purpose of discharging the lawful indebtedness of the Company. I think this was within the legislative power given to incorporated companies under ch. 53, sec. 15, *N. S.* Acts, which makes acts performed within the scope of their charter, or acts creating them, valid, notwithstanding they may not be done under, or authenticated by, the seal of the Company, if such an authentication was needed, but which, I think, was, in this case, wholly unnecessary (1).

The Company having in the due course of its busi-

(1) Sec. 6, ch. 97 Rev. Stats. N. S., 4th Series.

1878 CanLII 22 (SCC)

ness become indebted to the Plaintiff, I can see no reason why it might not as well pay that liability by a sale and delivery of personal property to their creditor in discharge thereof, as by handing him the amount in money, or selling the property to third parties, and handing over the proceeds to the creditor.

With reference to the conversion, I think the very circumstance of Defendant's levying on the goods, and subsequently selling them, was a clear conversion. There was not, it is true, evidence that the goods were on the levy moved, but it is clear the Sheriff did levy on them, and it is equally clear that the Court ordered the goods, thus in his hands and under his control, to be sold, as being in his possession under the levy, and that they were so sold.

The definition of a conversion, as given by the editor of *Bacon's* abridgment "Trover" (B), is this:—

The action being founded upon a conjunct right of property and possession, any act of the Defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the Defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of Plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

I think when a Sheriff levies on property he does take possession of it, as against the party, and does convert it. If he exercises control in defiance of the party who had the right, there is a conversion, and he may be sued for the conversion, and, as said by *Alderson*, B., in *Fouldes* v. *Willoughby* (1),

For this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.

(1) 8 M. & W. 548.

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

I think the Plaintiff's right of action did not commence at the time of the sale, but so soon as the Sheriff levied upon the goods, and so exercised a claim and dominion over them adverse to the Plaintiff and inconsistent with his general right of dominion.

Under these circumstances, I think the Plaintiff has made out his case, viz.: that the Company, by its officers, was competent to sell the goods in question, that there was evidence to establish the sale of the goods to the Plaintiff, and of a conversion by the Defendant. I state this with hesitancy, only because the views of my learned brethren are at variance with the conclusion at which I have arrived.

1878 CanLII 22 (SCC)

STRONG, J.:—

The conversion complained of by the declaration was the sale, not the seizure or taking of the goods. The 4th plea justifies the sale under the order of the Court, and avers that to have been the act complained of in the declaration. The Plaintiff is therefore confined to the sale as the conversion for which he sues. If he wanted to insist on the taking as constituting a conversion he should have new assigned. I should doubt, however, if a mere taking of the goods of a third person under a mesne attachment against a Defendant, to keep them *in medio* until the termination of the action, is a conversion. A conversion is defined to be a taking of chattels with an intent to deprive the Plaintiff of his property in them, or with an intent to destroy them or change their nature. Taking under a mesne attachment does not, like taking under a writ of *fieri facias* with intent to sell, imply any such intention. But, be that as it may, the conversion here must, on the pleadings, be taken to be the sale. Now, this sale was under an order of the Court, and was the act of the Court, not the act of the

Sheriff. It was not the case of a writ of execution or attachment being placed in the Sheriff's hands against the goods of A, and a seizure under it of the goods of B, which the exigency of the writ did not warrant; but these specific goods being already in the Sheriff's hands, having been seized under the attachment, the Court orders them to be sold. The Sheriff is, therefore, protected by the order for sale. The issue, it is true, on this line of pleading, is narrowed to this: Was the discontinuance after or before the sale? It appears that the sale took place on the 7th November, 1866, and that there was no discontinuance until December 11th, 1874. The issue on the rejoinder to the replication to the plea of justification ought, therefore, to have been found for the Defendant. But it was proper to consider, whether the plea did disclose a good justification, since there would be no use in granting a new trial if in point of law the Sheriff could not justify. As regards the other point argued, there can, in my judgment, be no doubt that the Company was one to which the Rev. Stats. p. 8, (4th Series), ch. 97, was applicable. I am, therefore, of opinion that the verdict ought to have been set aside with costs, and a new trial ordered.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

The points to be decided in this case are in an action of trover, brought by the Respondent against the Appellant, who, as Sheriff of the County of *Cumberland*, sold certain chattel property claimed by the Respondent to belong to him to recover its value.

To the charge of conversion in the Respondent's writ the Appellant pleaded:—

1st. That he did not convert to his own use the Plaintiff's goods, as in the writ alleged.

1878 CanLII 22 (SCC)

1878

McLEAN
v.
BRADLEY.

2nd. That the goods were not the property of the Plaintiff.

3rd. That the Plaintiff was not possessed, nor was he entitled to the possession of the said goods.

And by a fourth plea, he justifies the taking of the goods, as and being the goods of the *Lawrence Coal Mining Company*, under a writ of attachment at the suit of one *George Hibbard*, against the said *Lawrence Coal Mining Company*, directed to him as Sheriff of the County of *Cumberland;* and the subsequent sale thereof under an order issued by the Supreme Court and signed by *A. S. Blenkhorn*, Esquire, Prothonotary of the said Court at *Amherst* in the said County of *Cumberland*, whereby he was ordered and required, amongst other things, as such Sheriff, as aforesaid, to put up and sell the said goods at public auction to respond the judgment which might be obtained. The Plaintiff replied to the latter plea:—

That after the proceedings in the plea mentioned, taken by the said *George Hibbard*, the suit instituted by the said *George Hibbard* against the *Lawrence Coal Mining Company* was discontinued by him, and the attachment and all proceeding thereunder were thereby abandoned; which said discontinuance is on the fyles of this honorable court.

To that replication the Appellant rejoined, first, that the said cause was not discontinued, and second:—

That the said discontinuance was not filed until after the goods in said writ mentioned were sold under the order in his said plea mentioned, and the proceeds applied as therein mentioned.

On the trial of the issues of fact, leave was given to the Appellant to demur to the replication of the Respondent, which he did, and therein says that the Plaintiff's replication is bad in substance, inasmuch as the Sheriff is justified by his writ of attachment and order for sale, and was bound to execute it:—

That the act of the Plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, cannot and does not affect his justification, as pleaded.

1878 CanLII 22 (SCC)

Marginal note on the demurrer :—

Matter of law to be argued—that the Sheriff, being bound to act in obedience to the order of the Court, cannot be affected by a discontinuance of a suit under which property was sold.

Joinder in demurrer by Respondent. Under the charge of the learned Chief Justice of *Nova Scotia*, before whom the cause was tried in October, 1876, the jury found a verdict for the Plaintiff for $500, and a rule *nisi* was granted to set it aside on the following grounds :—

1st. That the verdict was against law and evidence.

2nd. That the learned Chief Justice misdirected the jury.

3rd. That evidence was improperly received.

4th. That evidence was improperly rejected, and

5th. That there was no sufficient evidence of the conversion of the goods.

This rule and the demurrer were argued before the whole Court at *Halifax*, and by a majority of the Court the rule *nisi* was discharged with costs, and a judgment on the demurrer given in favor of the Respondent.

In the majority judgment, the fourth plea is pronounced bad, and a doubt expressed as to the sufficiency of the replication to it. Hence the judgment on the demurrer. The appeal to this Court is from that judgment on all the points, both as to the facts and the law.

I will first deal with the demurrer. I would not question the correctness of the judgment if the fourth plea is defective, but I don't think it is.

To decide that point, we must first consider the nature of the position held by the Appellant when he received the order for the sale of the goods. He had previously levied on the goods under the attachment, but had not removed them. Section 6, ch. 97 of the *Revised Statutes of Nova Scotia*, entitled : "Of suits against absent and absconding debtors," provides that :—

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

Where the goods consist of stock, or are shown by affidavit to be of a perishable nature, and the agent shall not, within three days after notice of the appraisement, give security for their value, a judge, or a prothonotary of the county, in his absence, may, at his discretion, cause the same to be sold at public auction, and the proceeds thereof shall be retained by the Sheriff, or paid into Court, to respond the judgment.

The prothonotary of the county made an order under the provisions of that section, and directed to the Sheriff, to sell the said goods under the terms thereof.

On receipt of that order it was the Sheriff's duty to execute it. He could have been compelled by legal and summary means to do it, and would also be answerable to the Plaintiff in that suit for any resulting loss or damage to the goods, in case he eventually obtained judgment. So far, therefore, as the conversion *by the sale*, the order to sell the specific goods would be a complete justification and the plea to that extent is a sufficient answer.

If the plea admitted the goods were the property of the Plaintiff it would have been bad; but, on the contrary, it alleges them to have been, when levied upon, the goods of the *Lawrence Coal Mining Company*, and that, with the other allegations contained in it, forms a perfect answer to the writ; and, as a whole, is consequently a good plea The Respondent virtually says:—they were not the Plantiff's goods, but those of the *Lawrence Coal Mining Company*, and I, as Sheriff, levied upon them under the attachment, and subsequently sold them.

A special plea of justification is only necessary where goods of one party are taken out of the possession of another, and is only necessary as a justification for interfering with the possession. If goods are not taken out of the possession of the Plaintiff the right is tried by a simple denial of ownership. The justification in this case would only be necessary in case the goods in

1878 CanLII 22 (SCC)

question, were, when taken, in contemplation of law, in the possession of the Respondent.

The replication to the plea is bad, for the simple reason that the Respondent could not, by any possibility, be affected by any subsequent act of the Plaintiff in regard to the discontinuance of the suit. I think, therefore, the judgment on the demurrer must be in favor of the Appellant.

Under that ruling the judgment on the facts submitted to the jury should also be for him, if the order for sale would be a justification to the officer for the original levy on the goods, as well as for the sale, even had they been the property of the Respondent; but, as it is not, the result must be affected by the question as to the ownership of the goods when the levy was made. If, then, they were not the Respondent's, he cannot recover; but the whole case, as far as the rule *nisi* for a new trial goes, depends altogether on the settlement of that question. The property, as admitted by both parties, was that of the *Lawrence Coal Mining Company* up to the date of the transfer claimed by the Respondent. Did he, then, obtain the property in the goods by the document signed by "*J. W. Hawley*, agent." If not, he had no property in them. In determining that point we must see if, in the first place, *Hawley* had sufficient authority to divest the Company of the ownership. The alleged transfer is signed by him on the 5th of July, 1867. He, the Respondent, and others were appointed Directors of the Company on the 18th of January, 1865, *for one year* from that date. No subsequent appointment of Directors was ever made, and there is no provision to be found anywhere, as far as the evidence goes, as is sometimes the case in respect of public officers, that the Directors should hold office till others were appointed in their place. There may have been such a provision in the

1878 CanLII 22 (SCC)

1878
McLEAN
v.
BRADLEY.

by-laws of the Company, but evidence of it is wanting. On the 18th of January, 1866, the Directors ceased to be so; and, as such, could not collectively or individually bind the Company. Resolutions of the stockholders were passed in April and December, 1865, authorizing certain Directors named, to sell on certain conditions the real and personal property of the Company; but *Hawley* was not one of them. On the 26th of February, 1866, at a meeting of the stockholders, a resolution was passed authorizing Messrs. *Hawley*, *W. G. Howe* and *Alden*:—

> To sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms, as in *their* judgment will be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of the said Company, and if the amount of such sale exceeds the debts, the balance to be paid *pro rata* among the stockholders.

No one will pretend for a moment that *Hawley* alone had power to make the sale to the Respondent, which the document signed by him purports to have been made. The delegated power by the Company was to *three*, and the *three* were to exercise *their judgment* in regard to it; and besides, none of them, nor the three together, had power to give any portion of the property *in payment of any particular debt*. It was to be sold for cash, and that paid into the hands of the Treasurer. The Respondent was himself a Director; and was quite aware, no doubt, of the nature of the authority given to *Hawley*, *Howe* and *Alden*, and is concluded thereby. There is no evidence of any ratification of the sale by the Company. In fact, there was but one meeting of the Company after that of February, 1866, and that was in 1874, which appears to have been called for the purpose of authorizing a transfer of the lease of the mines to the Respondent, which was done; and that only.

1878 CanLII 22 (SCC)

Some oral evidence was offered of the authority of *Hawley* to sell the personal property; but it was objected to and cannot be received for the obvious reason that no meeting had ever considered the subject. In the absence, then, of legitimate evidence, and when considering, too, that if any Directors existed at the time of the transfer, the Respondent was one, and could not become a purchaser through a sale by the Directors, he having with them a fiduciary authority to sell, if any such existed, I must say I can see no authority for the transfer to bind the Company, even if it had been made in the name of the Company and under its seal.

The instrument in question does not purport to be a transfer by the Company. It contains no words making a transfer. It only says baldly that the Respondent *has purchased* through *T. R. Hawley*, authorized to sell the same, the property mentioned in the schedule. A mere naked purchase, without evidence of any consideration given, or any delivery of the property, will not pass it. I cannot think the instrument of any more value than a letter to some person would have been, containing the same substance. It does not say who owned the property, or by whom he was authorized to sell it, and it is signed by "*T. R. Hawley*, agent." Agent of whom? It discloses no consideration or terms for the purchase. No consideration is shown either by, or *dehors*, the instrument by any one present at the alleged purchase. I will not say a *written* transfer was absolutely necessary, but I am of opinion the document *per se* is insufficient to make it. There is no other evidence of it; for neither of the parties to the transfer, *Hawley* and *Dillingham*, or any of the witnesses to it, or any other person present, was examined; and there is, therefore, no legal evidence of it. *Alden's* hearsay evidence upon this point, objected to at the trial, cannot be received.

The Respondent, in his evidence, says:—

1878 CanLII 22 (SCC)

1878

McLEAN v. BRADLEY.

Alden, Dillingham, Hawley and *Wentworth*, were all creditors of the Company, and were the four interested with me in the transfer of the personal property—

under his honorary obligation. Thus, then, was *Hawley* undertaking to act as the agent of the Company to convey, with the assistance of *Dillingham*, the property of the Company to the Respondent for his, *Hawley's*, *Dillingham's* and *Wentworth's* benefit. Surely the Company, at any time, could repudiate such a transfer; and, if void, as against the Company, it must be so as against a creditor of the Company, as *Hibbard* appears to have been.

And, now, in conclusion, as to the seal. I have carefully examined all the authorities, and have had no difficulty in arriving at the conclusion that, in the absence of statutory enactment, the contract in question could only be valid under the seal of the Company.

By the registry of the articles of association in evidence, this Company was incorporated, not as a trading company, but :—

For the special purpose of opening and working mines and veins, or deposits of coal and oils in the River *Hebert* Settlement, * * * and the exporting and making sale thereof, and of constructing and operating railways, tramways, or plank roads, necessary for transporting the said coal, when mined, to tide water, and for the purpose of constructing piers, docks and buildings necessary for carrying on said business, and of doing all other business which may be lawfully undertaken and connected therewith.

This is not, then, a "trading" Company, and therefore rules as to buying and selling stocks in trade will not apply to it.

The "selling" contemplated by this Company was to be of coal and oil, not the houses, buildings, or plant. The intention was to keep the latter as means to enable the Company to carry out the intentions of the charter.

The intention is clear and obvious, and I cannot strain words declaring, as do those of section 15, chap. 53 of the *Revised Statutes of Nova Scotia*, that :—

1878 CanLII 22 (SCC)

The acts of incorporated companies performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by the seal of such corporations,

to mean that a company may, without seal, sell and dispose of their whole property, and thereby wind up the company. Such a power is certainly, to my mind, not given by the section just quoted; for that section clearly has reference, as to this Company, to acts done "in the opening and working mines, &c." and the exporting and making sale of "coal and oil, &c." It, in fact, only applies to a *going* Company, and cannot be applied to the expiring flicker, or final sale of the houses, plant, &c., of a bankrupt company. For the reasons given, I think, the rule for the discharge of the rule *nisi* herein should itself be discharged and the said rule *nisi* made absolute with costs.

Appeal allowed with costs, and new trial ordered with costs in the Conrt below.

Solicitor for Appellant: *Charles T. Townshend.*

Solicitor for Respondent: *W. Inglis Moffat.*

1878 CanLII 22 (SCC)

TAB 37

Court of Appeal
Menzies v. Harlos
Date: 1989-06-13

R.P. Gibbons, for appellant.

H.J. Grey, Q.C., for respondents.

(Vancouver No. CA007017)

June 13, 1989. The judgment of the court was delivered by

[1] ESSON J.A.:- On 16th December 1988 we delivered judgment [[1989] B.C.W.L.D. 384] dismissing the plaintiff's appeal from the judgment at trial. That judgment has not yet been entered. The plaintiff now applies for a rehearing or reconsideration, seeking a full reargument of the appeal. The principal basis for the application is the assertion that our reasons dealt with the main factual issues so unsatisfactorily as to indicate a lack of grasp of those issues and, in effect, a failure to deal with them.

[2] The plaintiff's claim is based on alleged medical malpractice by the defendants, who were two of a number of physicians who examined and treated him over a long period of time ending in 1984 when an acoustic neuroma was diagnosed and removed. It is common ground that the neuroma had developed to the stage that it showed symptoms by 1972.

[3] Dr. Harlos was the plaintiff's general practitioner from 1967 to 1983. Dr. Devlin is an internist who saw the plaintiff only once, when he was referred for an assessment in 1980. Had the neuroma been discovered and removed at an early stage, the operation would have been a relatively straightforward matter which would have had few, if any, permanent consequences. By 1984 it had grown very large and the permanent consequences of the surgery required to remove it, including some brain damage, are serious.

[4] After a seven-day trial in October 1986, McKenzie J. reserved judgment and delivered reasons for judgment totalling 67 pages in December 1986 [[1987] B.C.W.L.D. 060]. He found neither defendant to have been in breach of his duty of care. The appeal was heard on 1st and 2nd June 1988. The judgment dismissing the appeal was that of Craig J.A., with Taggart J.A. and I concurring.

1989 CanLII 2760 (BC CA)

[5] The submissions on appeal on behalf of the appellant, which were presented with great force and ability, concentrated on one principal point in respect of each defendant. In respect of Dr Harlos, that was an episode in October 1977. While Dr. Harlos was away, his locum, Dr. Stevens saw Mr. Menzies, suspected an acoustic neuroma and sent the patient for x-ray examination. On his return, Dr. Harlos saw a note from Dr. Stevens but decided to pursue the matter no further. In particular, he did not refer the plaintiff to an ear, nose and throat ("E.N.T.") specialist, as Dr. Stevens had apparently considered doing. That specialty is the one most closely related to the problem which afflicted the plaintiff, and such a referral at that time might well have brought it to light. On three occasions in 1972 and 1973, Dr. Harlos referred the plaintiff to Dr. Banno who is an E.N.T. specialist. Dr. Banno reported the symptoms described by the plaintiff were caused by "left eustachian tube blockage" and "left neurosensory hearing loss with tinnitus". Dr Banno said there was no treatment for the condition. Dr. Banno was originally a defendant in the action, but was dropped from it before trial because the action against him was statute barred.

[6] In respect of Dr. Devlin, the attack is based upon his failure, in the course of an extensive examination, to inquire whether the plaintiff had suffered any hearing problem, which he had. Had Dr. Devlin learned that fact, it likely would have led him to a diagnosis of acoustic neuroma, which was one of the conditions which he suspected as a possible cause of the symptoms he did detect.

[7] Reduced to its simplest form, the submission in respect of Dr. Harlos was that a reference to an E.N.T. specialist was so clearly indicated that his failure to make that reference must lead to the conclusion that he failed in his duty of care. Similarly, the submission in respect of Dr. Devlin is that the failure to ask about hearing problems inevitably leads to a conclusion of negligence. The trial judge considered those submissions, as he considered many other issues in the case. In each instance, he concluded (not in these words) that the submissions rested on a "counsel of perfection" standard and that he could not conclude that the omission by Dr. Harlos to refer, or that of Dr. Devlin to ask the question, was actionable negligence.

1989 CanLII 2760 (BC CA)

[8] In the appellant's brief on this application, these grounds were put forward as the basis for granting a new hearing:

1. The judgment is contrary to the apparent position of this court, as stated during the hearing;

2. The decision fails to focus on the central issues involved in the appeal; and

3. The decision contains inaccurate references with respect to evidence and fails to make reference to important pieces of evidence.

[9] The first point was linked in oral argument with much emphasis upon the fact that judgment was pronounced more than six months after the conclusion of the hearing. The suggestion is that at least two members of the court had demonstrated a proper understanding of the appellant's case during oral argument but, because of the inordinate delay in dealing with the case, had forgotten what it was about. That suggestion demonstrates a regrettable lack of understanding of the significance of comments from the bench during argument, and of the nature of the court's approach to deciding a difficult case.

[10] During the course of hearing of the appeal, there were many indications that the court was favourably inclined to the appellant's case. Counsel for the respondent faced some heavy weather in advancing his submissions on behalf of the judgment under appeal. Counsel for the appellant could properly take some comfort from that. But no counsel should, unless he hears from the bench that it does not need to hear him further or words to that effect, delude himself into thinking that comments or questions during argument necessarily foreshadow the outcome. Often it turns out that they do. There are cases in which judgment is reserved although all members of the court have a clear view of what the result should be. This was very far from being such a case. We left the bench not knowing what the outcome should be, and knowing that many hours of reading and study would be needed in order to come to a firm conclusion.

[11] This may be an appropriate point at which to say something about the burden which the appellant had to discharge on this appeal. The issues were almost entirely

1989 CanLII 2760 (BC CA)

factual. It therefore could not be enough to satisfy us that there had been error by the trial judge - it was necessary to demonstrate that his decision was affected by palpable and overriding error. Those strong words, sometimes called the "Kathy K. rule", have been repeated so often in recent years that they may have tended to lose their impact. But, as we have been reminded many times by the Supreme Court of Canada, they establish a test which cannot often be met, one which sometimes requires appellate judges to dismiss an appeal notwithstanding their own view of the "rightness" of the decision, and which forbids them from retrying the case.

1989 CanLII 2760 (BC CA)

[12] In some cases the "Kathy K. rule" simplifies the task of the appellate court. Those are cases in which it becomes manifest during oral argument that the appellant is seeking to have the court retry the case, and that there is no basis for seriously considering allowing the appeal. But where the court is in doubt at the end of the hearing, the rule imposes a heavy burden of work. In those cases, of which this was one, the members of court must read and analyze virtually the whole of a voluminous record. That work precedes the drafting of reasons but to a large extent continues throughout the drafting process. When a draft has been produced, the other members of the court must make their own analysis which may be reflected in separate reasons or may result in basic agreement although often, as was the case here, with extensive suggestions for revisions. As the process goes on the case which the court was inclined to favour during the hearing may come to appear less impressive. Whatever the outcome, the process takes time. We prefer to take less time than was taken here and generally succeed in that, but feel bound to take as much time as is needed.

[13] The submissions on behalf of the appellant on the first ground betrayed some loss of objectivity on the part of counsel, most markedly when he suggested there was "some kind of bias" shown against his client because his evidence on a crucial factual issue had not been accepted by the trial judge as reliable. In my view, there was no proper basis shown for that suggestion. I turn now to the more substantial questions raised by the second and third points.

[14] The application is almost unprecedented in that it seeks a reconsideration of a decision on the ground that it is wrong. It is not unusual for an application to vary to be

made and granted where the basis of the application is a demonstrable oversight or error in a particular aspect. An example in the area of fact is an error in calculation in relation to damages. An example in the area of law is reliance on a statute which has been repealed. It is a fundamentally different matter to allow a full reargument of issues which have been argued and decided - to, as it were, allow a second kick at the cat. That approach seems to be widely used by many American appellate courts but has not generally been part of the tradition of courts in this country or elsewhere in the Commonwealth.

1989 CanLII 2760 (BC CA)

[15] Mr. Gibbons submits that the court should be willing to hear reargument because there is, in respect of a case like this, almost no prospect of leave to appeal being granted by the Supreme Court of Canada. Until 1975 there was an appeal as of right and, even after leave to appeal became a requirement, a significant number of civil cases got leave. The suggestion that rehearings should be more frequently permitted in light of present circumstances may find some support in the fact that the Supreme Court of Canada, after it became the court of final resort for Canada, occasionally granted applications for rehearing. In *Poole v. R.,* [1968] S.C.R. 381, 64 W.W.R. 225, 3 C.R.N.S. 213, 3 C.C.C. 257, 68 D.L.R. (2d) 449 [B.C.], the rehearing was granted because the question of jurisdiction upon which the majority had founded its decision had not been argued on the hearing. In *Toronto v. Loblaw Groceterias Co.,* [1972] S.C.R. 600 at 624, 27 D.L.R. (3d) 512n, the rehearing was in respect of a number of asserted errors in the majority reasons.

[16] On the other hand, it does not appear from the reported cases that any provincial appellate court has adopted a different rule than the stringent one which has applied in the past. The only cases which have come to my attention in which the matter has been considered from that viewpoint are in the Saskatchewan Court of Appeal. They are:

[17] *Storey v. Zazelenchuk* (1985), 40 Sask. R. 241 (C.A.);

[18] *Armco Can. Ltd. v. P.C.L. Const. Ltd.,* [1987] 2 W.W.R. 289, 43 R.P.R. 174, 33 D.L.R. (4th) 621, 52 Sask. R. 100 (C.A.).

[19] In *Storey v. Zazelenchuk,* a case of a petition under the Controverted Elections Act, the petitioner who had lost at trial and who had lost on appeal on an equal division of the four judges who gave judgment (the fifth judge having retired before judgment), applied for

a rehearing on the ground that the issues of law were a matter of public importance and that the uncertainty created by the division in the Court of Appeal should be removed by a majority judgment. All seven members of the court sat on the application which, by a majority of five to two, was dismissed. The rule applied, based on an older line of Saskatchewan cases, was that the court will reconsider its judgment only in special or unusual circumstances of a kind which, the majority held, were not found in that case. Cameron and Tallis JJ.A. dissented.

[20] In *Armco v. P.C.L* the unsuccessful respondent applied for a rehearing on the ground that the majority judgment had failed to consider and apply several decisions of the Supreme Court of Canada and other appellate courts and that there were special or unusual circumstances to warrant a rehearing because of the effect of the judgment on the construction industry. The application was refused. Tallis and Cameron JJ.A., who had dissented in *Storey v. Zazelenchuk,* considered themselves bound by that decision to find that the test of "special or unusual circumstances" had not been met. Wakeling J.A. dissented. His judgment is of particular interest for the reasons which he gave for holding that the court should no longer view "special circumstances" in the same way as had been done in the earlier cases. At pp. 632-33 he said:

> Expediency, resulting from a much enlarged work-load, demands that most cases be heard in this court before three judges, which means the issue is determined on the basis of two opinions. No litigant has an absolute right of further appeal to the Supreme Court of Canada, but only those who obtain leave. The Supreme Court has stated it is no longer a court for the correction of error and will only take those cases which involve points of significant national interest. In the foreseeable future, most of the Supreme Court cases will be *Canadian Charter of Rights and Freedoms* related and for all intents and purposes, this court has become a court of last resort for the residents of Saskatchewan.
>
> This change of circumstances warrants a change in this court's view of its obligation to litigants. Where once this court could have reasonable assurance its important decisions would be subject to a further review and detailed consideration by the leading legal minds of the land, there is now no such assurance. This must surely mean this court has an added responsibility to be sure its judgments represent the view of the court and not just a panel thereof. It is unacceptable, to the extent that something can be done about it, that the final result of anyone's case might be dependent, in the final analysis, on a matter as haphazard as the makeup of the appellate panel.

1989 CanLII 2760 (BC CA)

> It seems to me that those who have so long praised the development of the common law, have seen in it the growth of a system which has been devised by forward-thinking and often venturesome minds of the judiciary. They have managed to work with law based on precedent and yet over the centuries develop a body of law capable of adapting to changing social and economic conditions. I cannot believe that it is sufficient for this court to accept its new role as a court of last resort without doing all that it reasonably can to see that the judgments it produces are correct, and to this end when a reasonable doubt of correctness is established they will be reheard so the final result will represent the view of the court and not merely a three-member panel thereof.

[21] I have quoted those passages because they put very clearly the case for taking a more liberal approach than in the past to permit reargument. Clearly, if that approach is to be taken, it must be taken cautiously to avoid the danger of opening the floodgates and immersing the court in a flood of new work which, in the end, may serve mainly to add to the already intolerable cost and delay of litigation.

[22] For the purposes of deciding this application, I am prepared to accept that the scope for reargument should be wider than in the past. Without attempting to state a definitive rule, I approach the matter on the basis that if it appears that the court overlooked or misapprehended the evidence in a significant respect, and that a risk of miscarriage of justice ensued, there should be a rehearing.

[23] However wide the limits on this discretion, I would not exercise it in this case. The reasons did focus on the points raised by the appellant, but not, as the argument tended to do, to the exclusion of the whole body of evidence. I cannot find that the reasons, to any significant degree, included any inaccurate references to evidence. Undoubtedly, they failed to refer to many aspects of it. To refer to everything would require reasons of intolerable length but it does not follow that all the evidence was not considered. It is the proper role of counsel to pick out those aspects which best support his case and to urge that they be interpreted as best supports that case. Some of the matters upon which the appellant's case rested proved, on analysis, not be as clear and conclusive as they were made to appear during the submissions. An example of such matters may help to illustrate the point.

[24] The case asserted against Dr. Harlos was that the only conclusion at which he could arrive, based on the plaintiff's symptoms, was that he was suffering from an acoustic

1989 CanLII 2760 (BC CA)

neuroma. One of the passages in the evidence of Dr. Harlos cited to us was this exchange at transcript, vol. II, p. 279, lines 33-40:

> Q. What other conditions may have caused the symptoms? A. Of 1977?
>
> Q. Well, all right, just deal with Dr. Stevens up to then, yes? A. Well, we really - I didn't really know at the time what was causing the symptoms. It could have been a self-limited flu-like illness or it could have been an anxiety attack.

[25] The symptoms of which the plaintiff was complaining were "woozy, dizzy spells, blacking out, losing balance". Dr. Harlos said that it could not be explained at that time on the basis of an acoustic neuroma but that a possible explanation would be "anxiety".

[26] This was in examination in chief. Earlier in his examination in chief, he said that he and Dr. Stevens had concluded, "that he [Menzies] did not have an acoustic neuroma".

[27] In cross-examination at T2/337, lines 23-38, he conceded that he was not an expert in acoustic neuroma and that Dr. Stevens was not an expert in this field. Mr. Gibbons asked why he did not refer the plaintiff to someone who was an expert in making such a diagnosis. Dr. Harlos replied that he had referred Menzies on three occasions to a competent E.N.T. specialist who had seen the plaintiff on three occasions and had reported that his hearing problem was probably vascular. He said, also, at line 32, that the attacks were in retrospect "far apart and the other symptoms were vague and not indicative of an acoustic neuroma and more over we had had at this time two sets of x-rays showing no change in the internal auditory meatus and therefore we were reassured that in all probability he did not have acoustic neuroma."

[28] Mr. Gibbons then referred Dr. Harlos to his examination for discovery. He asked whether Dr. Harlos in October 1977 had considered that the plaintiff Menzies might have acoustic neuroma. Dr. Harlos replied, "Yes, it was a possibility." The next question Mr. Gibbons put to him was, "It was more than a possibility was it not? It was the obvious conclusion from these symptoms was it not?" Dr. Harlos replied, "No."

[29] Mr. Gibbons pursued this subject in his examination for discovery. He asked, "What else could it be with those symptoms? What else - what other type of disease condition - is associated with those symptoms?" Dr. Harlos replied (p. 338/33), "Anxiety would be number one, the deafness, partial deafness of some other cause." Mr. Gibbons then

1989 CanLII 2760 (BC CA)

asked Dr. Harlos whether anxiety, having regard to his knowledge of the plaintiff, was something that he would reasonably expect as the cause of these symptoms. Dr. Harlos replied, "I think it could be reasonably expected."

[30] The evidence on this issue was voluminous. For every aspect of it which seems unfavourable to the plaintiff, his counsel can point to several which are favourable. The same was true of the other allegations against Dr. Harlos. As against Dr. Devlin, the evidence was less voluminous but, again, was not all one way in relation to the crucial issue whether his failure to inquire about hearing difficulties was so clearly a breach of sound practice as to necessarily import negligence. In each case, the trial judge interpreted the evidence, in light of all he had heard, as not leading to a conclusion of liability. That is what Mr. Justice Craig referred to when he said in the last paragraph of his reasons:

> While I think that there was a basis for a contrary conclusion in this case, I think, also, that having regard to the evidence which the trial judge accepted, there was ample evidence upon which he could justify the conclusion to which he came.

[31] As against both defendants, the question was whether, in failing to find what was there to be found, they had failed in their duty of care. In the end, we had to conclude that what was in issue here was the interpretation of the evidence as a whole and that we could identify no palpable and overriding error. The issue on appeal was not unlike that raised by the plaintiff in this court in *Taylor v. R.,* where the majority of this court, in a judgment reported at 21 B.C.L.R. 155, 112 D.L.R. (3d) 297, held that the trial judge had erred in failing to find the defendant Ankenman to have been negligent. The trial judgment was restored by the Supreme Court of Canada in very brief reasons reported at (sub nom. *Jaegli Ent. Ltd. v. Taylor)* [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4 (sub nom. *Taylor v. Ankenman).*

[32] I cannot say that a differently constituted division, rehearing this case, would not come to a different conclusion but that cannot be the test. I am not persuaded that we overlooked matters of significance, much less that we did so in any way that would justify granting the unusual remedy of a rehearing.

[33] I would dismiss the application.

1989 CanLII 2760 (BC CA)

Application dismissed.

1989 CanLII 2760 (BC CA)

TAB 38

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLean v. Law Society of British Columbia,* 2017 BCSC 1713

Date: 20170911
Docket: S175785
Registry: Vancouver

2017 BCSC 1713 (CanLII)

Between:

Kevin McLean

Petitioner

And:

Law Society of British Columbia

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Appearing on his own behalf:	Kevin McLean
Counsel for the Respondent:	Geoffrey B. Gomery, Q.C. Julia K. Lockhart
Place and Date of Hearing:	Vancouver, B.C. September 6, 2017
Place and Date of Judgment:	Vancouver, B.C. September 11, 2017

[1] **THE COURT:** Mr. McLean, who is disbarred as a lawyer, has brought a petition against the Law Society. The petition was preceded by four actions Mr. McLean brought against the Law Society. Mr. McLean discontinued the first two actions, Justice Grauer stayed the third, and Justices Pearlman and Bowden stayed the fourth.

[2] Justice Grauer provided the following background in *McLean v. Law Society of British Columbia*, 2017 BCSC 987, at para. 1:

> The plaintiff, Mr. McLean, is a former lawyer who was called to the bar in August 2010. His practice did not go smoothly. By October 2012 he had attracted the attention of the Discipline Committee of the Law Society of British Columbia, which authorized a conduct review. In 2013 he was subject to a period of administrative suspension for failing to provide accounting reports, and a panel of three benchers placed administrative conditions on his practice in January 2014. Ultimately, at the end of 2014, Mr. McLean allowed his membership in the Law Society to lapse, and on June 29, 2015, a hearing panel formally ordered him disbarred as ungovernable.

[3] Costs have been ordered against Mr. McLean in favour of the Law Society and fines have been levied against Mr. McLean by the Law Society. All of those obligations are the subject of entered orders in this Court. Mr. McLean has paid none of them. The total he owes is $65,371. Of that, the fines comprise $16,500 and the costs $48,871. Some of the costs are court costs; others are Law Society hearing costs. The following is a list of the eight costs orders and fines:

(a) $5,155.92 stated in a costs certificate dated June 2, 2017 arising from first action (S145607) Mr. McLean brought against the Law Society and its employees, which he discontinued;

(b) $3,618.27 stated in a costs certificate dated June 2, 2017 arising from second action (S148231) Mr. McLean brought against the Law Society and its employees, which he discontinued;

(c) $11,969.76 stated in a costs certificate dated May 23, 2017 arising from the Law Society's successful appeal (CA43059) of various summary judgment applications in the third action Mr. McLean brought against the Law Society and its employees;

2017 BCSC 1713 (CanLII)

(d) $10,130 (including a fine of $6,500) arising from the Law Society's discipline process in 2015 LSBC 06, registered as a judgment in S167374 on August 12, 2016;

(e) $6,785 arising from the Law Society's discipline process in 2015 LSBC 30, registered as a judgment in L170081 on March 8, 2017;

(f) $25,912.50 (including a $10,000 fine) arising from the Law Society's discipline process in 2015 LSBC 47, registered as a judgment in L-170082 on March 8, 2017;

(g) $1,300 arising from the Law Society's discipline process in 2016 LSBC 04, registered as a judgment in L170080 on March 8, 2017; and

(h) $500 stated in an order dated July 5, 2017 representing costs payable on application brought by the Law Society in the fourth action (S173987) Mr. McLean brought against the Law Society and its employees.

[4] Mr. McLean scheduled his petition to be heard September 22, 2017. As he has done in the past in his litigation with the Law Society, Mr. McLean set the hearing date without conferring with counsel for the Law Society. He estimated that his petition could be argued in 50 minutes. It is 73 pages long. Law Society counsel estimates the petition will occupy two hearing days. The latter estimate is the more reliable.

[5] In its application, filed August 17, 2017, the Law Society seeks the following three orders plus costs:

1. An order that the petitioner pay certificates of judgment and cost orders totaling $65,371.45 to the respondent and <u>post $8,100 as security</u> for the respondent's costs in this proceeding;
2. Until the petitioner satisfies the outstanding certificates of judgment and cost orders and posts the security described in the preceding paragraph, an order that the <u>petition be stayed</u>;
3. In the alternative to orders 1 and 2, an order <u>adjourning the hearing</u> of the petition set for September 22, 2017 to a date convenient to counsel for the respondent based on a time estimate of two days . . .

[Emphasis added.]

2017 BCSC 1713 (CanLII)

[6] There is no defence against Mr. McLean's obligation to pay $65,371. Impecuniosity would not negate those obligations. In any event Mr. McLean has not given any evidence about whatever may be his impecuniosity.

[7] There is no need for a further order to enforce Mr. McLean's payment obligations listed above. Those obligations remain outstanding ongoing.

[8] Before addressing the other relief the Law Society seeks, I set out some of the relevant case authority. The following passage is often cited when security for costs is sought against an individual rather than a company. It is at para. 27 in *Han v. Cho*, 2008 BCSC 1229:

> The onus is on the applicant to establish that he or she will be unable to recover costs (*Bronson #1* at para. 45). The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[9] The court exercises its inherent jurisdiction in deciding whether to order security for costs against an individual. See *Gichuru v. Pallai*, 2014 BCSC 2330.

[10] I noted earlier that Mr. McLean has not said whether he is impecunious. All that is certain is that he has paid none of the costs or fines he owes to the Law Society. He has taken no steps toward doing so.

[11] In *Wang v. British Columbia Medical Association*, 2011 BCSC 1659, Justice Dickson, as she then was, granted a stay order against Dr. Wang until she paid an outstanding costs order so as to prevent an abuse of the court's process. On the facts before her, Justice Dickson did not also order security for costs.

[12] Finally, I refer again to *Gichuru v. Pallai*, cited above, which was decided by Justice Fenlon, as she then was. Her Ladyship ordered security for costs, with a stay pending the posting of security, because the individual plaintiff had failed to pay

2017 BCSC 1713 (CanLII)

costs previously ordered against him. Leave to appeal Justice Fenlon's order was denied and the denial of leave was sustained by a three member division of the Court of Appeal. See 2015 BCCA 81 and 2015 BCCA 189.

[13] The authorities cited above, and the other cases to which I was referred, demonstrate the Court's broad discretion associated with the relief the Law Society seeks.

[14] In my view, Mr. McLean, who elects to keep his capacity to pay costs to himself, and who has incurred a substantial list of unpaid court costs, should be ordered to post security before taking the Law Society into court yet again. That is particularly so where, as here, the plaintiff has demonstrated no willingness or attempt to make any of the payments which have been ordered. The Law Society's requested order for security for costs is granted.

[15] The hearing of the petition is stayed until Mr. McLean posts security in a form satisfactory to the registrar and until he pays the court costs owing, which are those listed in subparagraphs (a), (b), (c) and (h), quoted above at para. 3 of these reasons. I will not stop Mr. McLean from working with counsel for the Law Society in the meantime to schedule two days for the hearing of the petition. The resulting hearing date will be one for which both sides are available. However, the posting of the security for costs in satisfactory form, and the payment of the costs listed in the four subparagraphs I have listed above in this paragraph of my reasons, need to be completed 30 days before the scheduled hearing date for the petition. If they are not, the hearing will be adjourned and not reset until they are.

[16] I turn now to an application Mr. McLean brought before me. He sought a declaration that Law Society Rule 3-5.01 is *ultra vires* the Law Society as being unauthorized by the parent statute. Rule 3-5.01 reads as follows:

> **Failure to produce records on complaint investigation**
>
> **3-5.01**(1) Subject to subrules (2) and (3), a lawyer who is required under Rule 3-5 or 4-43 to produce and permit the copying of files, documents and other records, provide information or attend an interview and answer

2017 BCSC 1713 (CanLII)

> questions and who fails or refuses to do so is suspended until he or she has complied with the requirement to the satisfaction of the Executive Director.
>
> (2) When there are special circumstances, the Discipline Committee may, in its discretion, order that
>
> (a) a lawyer not be suspended under subrule (1), or
>
> (b) a suspension under this Rule be delayed for a specified period of time.
>
> (3) At least 7 days before a suspension under this Rule can take effect, the Executive Director must deliver to the lawyer notice of the following:
>
> (a) the date on which the suspension will take effect;
>
> (b) the reasons for the suspension;
>
> (c) the means by which the lawyer may apply to the Discipline Committee for an order under subrule (2) and the deadline for making such an application before the suspension is to take effect.

[17] Mr. McLean argues that Rule 3-5.01 is not authorized by s. 26.01 of the *Legal Profession Act*. He may be right, but the Law Society does not defend the authority for Rule 3-5.01 as coming from s. 26.01. The Law Society instead relies on ss. 3, 11, 26, 36, and 37.1, and particularly I believe s. 26, as the authorizing sections. From my review of those sections, the Law Society appears to be right, particularly when the sections are read with the Supreme Court of Canada's decision in *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras. 9, 20–22, 27–33, and 41. If I were to decide the question of *vires* in these reasons, my decision would probably be against Mr. McLean.

[18] If it was not for a procedural problem preventing the statutory analysis at this stage, I would quote here and proceed to analyze the sections from the statute both sides have referred to me. The procedural problem is this. The declaratory relief Mr. McLean seeks here is a part of the relief he seeks, and a part of the full argument to be developed, in the petition itself. The petition was not scheduled before me on its merits, and the request for the declaration could not be argued in this interlocutory hearing except, if at all, by consent, which was not given. I therefore do not grant or deny the declaratory relief Mr. McLean seeks. (These reasons should not be construed as containing a substantive ruling on the question of *vires* for Rule 3-5.01. That issue remains outstanding.)

2017 BCSC 1713 (CanLII)

[19] Finally, before me, Mr. McLean asked for an order that the Law Society either destroy or give to him the forensically made copy it has of Mr. McLean's computer hard drive containing his documents relevant to the disputes he has or has had with the Law Society. Mr. McLean has the original hard drive in his possession. He alleges that the order pursuant to which the Law Society obtained the original hard drive and made the copy is an unauthorized order. Time did not permit that point to be developed in argument before me. Had there been enough time, the Petitioner would have run into the same procedural problem seen above regarding Rule 3-5.01.

[20] The Law Society replies, therefore, that the seizure order is presumptively sound at this stage, and that two of the four actions Mr. McLean commenced against the Law Society are only stayed and not dismissed. It adds that Mr. McLean is hopeful that the stay will be lifted at least for the third action. The Law Society, I note, is not investigating Mr. McLean at present, due no doubt in part to his current status as a disbarred former member.

[21] I order as follows. The Law Society will continue to hold the copy of the hard drive. It will not use documents from the hard drive in any ongoing proceeding with Mr. McLean without Mr. McLean's permission or a further order of this Court. If there comes a stage when Mr. McLean states in writing that all present or further claims by him against the Law Society are at an end, and that he will not apply for readmission, the Law Society will destroy the copy of the hard drive, or return it to Mr. McLean, as he elects.

[22] Costs of the applications before me are to the Law Society in any event of the cause, but are not payable forthwith.

"MACINTOSH J."

2017 BCSC 1713 (CanLII)

TAB 39

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLean v. Law Society of British Columbia,* 2015 BCSC 1431

Date: 20150813
Docket: S1410056
Registry: Vancouver

Between:

Kevin A. McLean

Plaintiff

And

Law Society of British Columbia, Alison Kirby, John Nalleweg, Larry Dirk, Kieron Grady, Erin Milz, Mark Bussanich, Deborah Armour, Howie Caldwell, Phil Riddell, Justice Management Ltd., John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, John Doe #6, John Doe #7, John Doe #8, John Doe #9. Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, Jane Doe #6, Jane Doe #7, Jane Doe #8, Jane Doe #9, Jane Doe #10, Jane Doe #11, Jane Doe #12

Defendants

- and -

Docket: S145607
Registry: Vancouver

Between:

Kevin A. McLean

Plaintiff

And

Law Society of British Columbia, Alison Kirby, John Nalleweg, Larry Dirk, Brenda Adlem, Howie Caldwell Stephen O'Neill and Dadhmehr Naimi

Defendants

2015 BCSC 1431 (CanLII)

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

In Chambers

Appearing on own behalf:	K.A. McLean
Counsel for the defendants:	G.B. Gomery, Q.C. J.V. Payne
Place and Date of Hearing:	Vancouver, B.C. May 28 and 29, 2015
Place and Date of Judgment:	Vancouver, B.C. August 13, 2015

2015 BCSC 1431 (CanLII)

2015 BCSC 1431 (CanLII)

Introduction

[1] The plaintiff, Kevin McLean is a former practicing member of the defendant, Law Society of British Columbia (the "Law Society"). He has commenced an action against the Law Society as well as a number its employees, alleging various claims that he says arose as a result on investigations and regulatory proceedings conducted by the Law Society against him.

[2] On May 27, 2014, the defendant, Philip Riddell, a Bencher of the Law Society, made an order pursuant to Rule 4-43 of the *Law Society Rules* (the "impugned order") that an investigation be made of the plaintiff's books, records and accounts, and those of his professional law corporation. In June 2014, investigators designated by the Law Society attended at Mr. McLean's office for the purpose of carrying out the investigation under Rule 4-43. During the course of their attendance, the investigator made copies of records.

[3] The parties brought a number of applications which were heard on May 28-29, 2015. The plaintiff applies for orders granting him leave to file a further amended notice of civil claim, and striking paragraphs of the amended response.

[4] The plaintiff also seeks a declaration that the Law Society exceeded its jurisdiction when Mr. Riddell made the impugned order, and an order setting aside the impugned order. As well, the plaintiff seeks orders that the documents seized by the defendants as a result of the impugned order be returned to him; that he is not required to produce his personal cell phone for copying; and restraining the defendants from attempting to enter his personal residence. The plaintiff's application for orders that various non-parties produce documents was adjourned generally.

[5] The defendants apply for orders dismissing the action against Alison Kirby, John Nalleweg, Kieron Grady, Eva Milz, Mark Bussanich, Deborah Armour, Howie

Caldwell, and Mr. Riddell. As well, they apply to strike a number of paragraphs of the notice of civil claim.

[6] I will deal with each application separately.

The plaintiff's application to further amend the amended notice of civil claim and strike paragraphs of the defendants' amended response to civil claim

[7] The plaintiff applies for an order granting leave to file a further amended notice of civil claim. The defendants opposed the proposed amendments on the basis that they violate the rules governing pleadings, including the requirements relating to material facts, particulars and the prohibition against pleadings which disclose no reasonable claim.

[8] The issue is whether the proposed amendments should be allowed. For the following reasons, I conclude that many of the proposed amendments should not be allowed because they are not proper pleadings.

Applicable Law

[9] Rule 6-1 of the *Supreme Court Civil Rules* (the "*SCCR*") allows a party to amend a pleading at any time with leave of the court.

[10] Leave should be granted to amend pleadings when the amendments are necessary to determine the real issues between the parties and to secure the speedy, just and inexpensive determination of the case on its merits. Amendments should be allowed unless the opposite party can demonstrate either prejudice or that the amendments will be useless: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550, at para. 34 (C.A.).

[11] Proposed amendments should be considered on the same basis that an application to strike existing pleadings: *McNaughton v. Baker*(1988), 25 B.C.L.R. (2d) 17 (C.A.)

2015 BCSC 1431 (CanLII)

[12] The applicable portions of Rule 9-5 of the *SCCR*, which deals with striking pleadings, provide:

> (1)At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> **Admissibility of evidence**
>
> (2)No evidence is admissible on an application under subrule (1) (a).

[13] In opposing the application to amend the pleadings, the defendants rely primarily on Rule 9-5(1)(a) and (b).

[14] The test for striking out a pleading as disclosing no reasonable claim or defence was set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 980:

> … assuming that the facts as stated in the statement of claim can be proved, it is 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[15] In *R. v. Imperial Tobacco Canada*, 2011 SCC 42, at paras. 21-22, the court reiterated that a claim or defence will only be struck if it is plain and obvious, assuming the facts pleaded are true, that the pleadings disclose no cause of action or defence, stating:

2015 BCSC 1431 (CanLII)

> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[16] The following portion of Rule 3-1 of the *SCCR* sets out the requirements for a notice of civil claim:

> (2)A notice of civil claim must do the following:
>
> > (a) set out a concise statement of the material facts giving rise to the claim;
> >
> > (b) set out the relief sought by the plaintiff against each named defendant;
> >
> > (c) set out a concise summary of the legal basis for the relief sought…

Analysis

The plaintiff's application to file a further amended notice of civil claim

[17] The proposed further amended notice of civil claim is a very long document. The plaintiff asserts that the purpose of the proposed amendments is to plead the material facts relating to the following:

- A working paper prepared for the Law Society dealing with the copying of electronic records entitled "Report of the Mirror Imaging Working Group: Forensic Copying of Computer Records" which is defined as "The LSBC's Forensic Copy Paper";

- Further agreements between the defendants and other parties to circumvent the *Legal Professions Act*, S.B.C. 1998, c. 9, the Law Society Rules, and/or the case of *Gardner v. Law Society (British*

2015 BCSC 1431 (CanLII)

Columbia), 1990 B.C.L.R. (2d) 122 (S.C.), aff'd (1991), 61 B.C.L.R. (2d) 219 (C.A.);

- The fact the agreement between the defendants was not in a specific form, does not need to be a binding contract;
- The issue of consent; and
- The impugned *Law Society Rules*.

[18] The defendants do not oppose the following proposed amendments to the notice of civil claim:

- Part 1, paragraphs 45 and 62;
- Part 2; and
- Part 3.

[19] However, the defendants opposed a number of the proposed amendments in Part 1 on the basis they are not material facts. I agree that the proposed amendments objected to contain irrelevant facts, arguments of law, and evidence.

[20] For example, the proposed amendment to paragraph 1 is underlined below and is not a proper pleading:

> 1. The Plaintiff, Kevin A. McLean, is a barrister and solicitor, a Chartered investment manager, and businessman residing in Vancouver, British Columbia. Mr. McLean entered into a practice supervision agreement (the "PSA") with Mr. Robert King on January 29, 2014. Mr. King was engaged to assist Mr. McLean with overall supervision of the 74 files he maintained as a sole practitioner <u>in the same fashion that lawyers use senior counsel at law firms.</u>

[21] Having reviewed the further amended notice of civil claim, and considered the submissions and case law provided, the following proposed amendments to Part 1 of the amended notice of civil claim are not granted:

2015 BCSC 1431 (CanLII)

- Paragraph 1. As noted above, the proposed amendment to paragraph 1 contains irrelevant facts and is not a proper pleading;

- Paragraphs 2 ggg. to iii. These proposed amendments do not plead material facts but evidence;

- Paragraph 49. The proposed amendments are unclear. The plaintiff has already alleged that the investigators entered his office without consent and the proposed amendments do not add anything.

- Paragraphs 71 - 72. The proposed amendments are extremely lengthy and contain evidence and legal argument, including quotations from case law and the LSBC Forensic Copy Paper. The proposed amendments to paragraphs 71 and 72 are not proper pleadings.

- Paragraph 73. The proposed amendments does not set out material facts. Rather the proposed amendments set out the laws the plaintiff alleges the defendants broke. The amended notice of civil claim already sets out that the defendants entered into an agreement to extricate the plaintiff from the practice of law unlawfully, and in contravention of the *Legal Professions Act*. The proposed amendments stating that the particulars of the conspiracy are circumventing and breaching the requirements of statutes and case law, are not proper particulars or pleadings.

- Paragraph 74. The proposed amendment is legal argument.

[22] In my view, the proposed amendments to paragraphs 71 -74 are prolix and violate Rule 3-1(2) of the *SCCR* which requires that a pleading set out a concise statement of the material facts giving rise to the claim, but not the evidence by which the facts are to be proved. The proposed amendments in paragraphs 71-74 are

2015 BCSC 1431 (CanLII)

structured in a confusing way and do not identify the material facts the plaintiff is relying to prove the causes of action he alleges.

[23] Accordingly, the plaintiff is granted to leave to amend paragraphs 46 and 62 in Part 1, Part 2 and Part 3 as set out in the proposed further amended notice of civil claim appended to the plaintiff's application. The plaintiff's application to amend paragraphs 1, 2 ggg. - iii., 49, and 71-74 of the amended notice of civil claim is dismissed.

The plaintiff's application to strike portion of the defendants' response

[24] As stated earlier, the plaintiff applies to strike portions of the defendants' amended response to civil claim. Although in his application the plaintiff sought orders striking a number of paragraphs, at the hearing he only sought an order striking paragraph 10(f) on the basis that it was an inconsistent pleading.

[25] As noted in *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5, at para. 25, inconsistent allegations may be considered an abuse of process and struck on that basis.

[26] Paragraph 10(f) of the defendants' amended response to the civil claim provides:

> Having regard to the information and concerns that led to the making of the Rule 4-43 order and consistently with the LSBC's standard practice in such cases, Mr. Bussanich and the LSBC considered it important that the plaintiff only become aware of the order upon the commencement of the investigation by the investigators' attending at his office to take possession of copies of the plaintiff's documents, to avoid any risk of tampering or alteration by the plaintiff.

[27] The plaintiff argues that this paragraph is inconsistent with paragraph 10(h) which provides:

> When the investigators attend at the plaintiff's office on June 3, 2014, they were initially asked to wait in the reception area. On arriving and learning that they were present, the plaintiff left by a back door to avoid meeting them. A person apparently in charge of the office then invited the investigators to wait

2015 BCSC 1431 (CanLII)

> in the plaintiff's office and they did so. They did not review or copy any documents on this occasion and they left at the close of business.

[28] Although the plaintiff argues the paragraphs are inconsistent, it is unclear as to how they are inconsistent. The plaintiff asserts that pleading that the Law Society's usual standard is to only inform a member of an order when they attend at his office to take possession of copies of the documents, and then plead that they did not take documents until he gave permission is inconsistent. However, in my view there is nothing inconsistent in the two paragraphs such that paragraph 10(f) should be struck on the basis that is an abuse of process. The issue of whether or not the investigators had permission to enter the plaintiff's officer, and whether he gave them permission to take documents are live issues.

[29] Accordingly, the plaintiff's application to strike paragraph 10(f) of the defendants' amended response to civil claim is dismissed.

The defendant's application to dismiss the action against the personal defendants, or, alternatively, strike portions of the amended notice of civil claim

[30] The personal defendants other than Lawrence Dirk apply for summary judgment under Rule 9-6 of the *SCCR* to dismiss the action against them. As well, they take the position that the action against them should be dismissed because the amended notice of civil claim fails to state a reasonable cause of action against them.

[31] In the alternative, the defendants say that various paragraphs of the amended notice of civil claim should be struck under Rule 9-5(1) of the *SCCR* on the basis they are unnecessary, scandalous, frivolous, or fail to state reasonable claims.

[32] The plaintiff opposes the dismissal of the actions against the personal defendants on the basis that it is premature. The plaintiff says that neither document discovery nor examinations for discovery have been completed. The plaintiff asserts that the defendants have misconceived the depth and breadth of the conspiracy

2015 BCSC 1431 (CanLII)

pleas. The plaintiff argues that the malice behind many of the actions taken by the Law Society against him is self-evident in the affidavit materials, and it will be necessary to conduct documentary discovery to determine the extent of the malice.

Applicable Law

[33] The defendants apply pursuant to Rules 9-5 and 9-6 of the *SCCR* to have portions of the amended notice of civil claim struck, and the claims against the personal defendants dismissed. They say other portions of the amended notice of civil claim should be struck because it is not proper pleadings but rather argument.

[34] I already set out the applicable portions of Rule 9-5 of the *SCCR* and the test to be applied. As noted, Rule 9-5(1)(a) does not apply when there is a factual dispute.

[35] Rule 9-6 of the *SCCR* provides:

> (1) In this rule:
>
> > **"answering party"** , in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;
> >
> > **"claiming party"** means a party who filed an originating pleading.
>
> …
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
> >
> > (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
> >
> > (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
> >
> > (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

2015 BCSC 1431 (CanLII)

[36] Rule 9-6(4) and (5) allows for dismissal when the court is satisfied there is no genuine issue for trial. Rule 9-6 is not available when there are disputed facts on the pleadings.

[37] In *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2011 BCSC 628, rev'd on other grounds, 2012 BCCA 491, the chamber's judge considered the scope of Rule 9-6 and noted there is no ability to weigh evidence, assess credibility or draw inferences against the party defending the application when determining whether there is a genuine issue for trial. The Court of Appeal approved of the proposition that an issue of law should only be decided under Rule 9-6 if the judge is satisfied there is no real dispute about the material facts and the issue of law is well settled by authoritative jurisprudence. Rule 9-7 is better suited for deciding novel points of law because there will be a more complete record. See also *4 Corners Properties Ltd. v. Boffo Developments* (Smithe) Ltd., 2013 BCSC 1926, at paras. 20-24.

[38] The defendants advance a number of arguments, including that the pleadings do not provide the level of particularity required when pleading conspiracy, relying on *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*., [1993] B.C.J. No. 2958 (C.A.); and *Watson v. Bank of America Corporation,* 2014 BCSC 532.

[39] *Can-Dive* lists the elements of conspiracy that must be proven at para. 5 as follows:

> 1. an agreement between two or more persons;
>
> 2. concerted action taken pursuant to the agreement;
>
> 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> (ii)if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.

2015 BCSC 1431 (CanLII)

[40] In *Watson*, the defendants made similar arguments in relation to the level of the detail needed to properly plead the tort of conspiracy. The court noted at para. 141-142:

> [141] As a result, the defendants claim that the pleadings are deficient for failing to disclose, among other particulars, the identity of every party to the conspiracy and their relationships, the date(s) of any alleged agreements, and the specific acts of each defendant.
>
> [142] I do not consider *Can-Dive* to impose those requirements so strictly. They represent an ideal. The Court's conclusion in *Can-Dive* was that pleadings must be *as specific as possible*. The very nature of a claim in conspiracy resists particularization at the early stages (*North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993, (Div. Ct.) at para. 22). It may often not be possible to provide particulars as specific as the date of an agreement in a conspiracy case. Given the nature of conspiracy claims, it would be perverse if the failure to plead a specific date was fatal to a claim that otherwise was not bound to fail.

Analysis

[41] In this case, the plaintiff alleges the pre-dominant purpose of the conspiracy is to harm him by making his continued practice of law impossible, including by conducting an illegal search of his office, and defaming him. As noted earlier, the amended notice of civil claim is a long document and contains irrelevant evidence and legal argument. The material facts are difficult to discern. However, the thrust of the plaintiff's complaint against the personal defendants is that they knowingly agreed to harm the plaintiff by conducting an investigation of his practice of law, including a search of his office, when they knew the impugned order under Rule 4-43 was unlawful and did not give them the authority to do so.

[42] In paragraph 73 of the amended notice of civil claim, the plaintiff refers to the Law Society Rule 4-43, and then sets out the allegations regarding the conspiracy as follows:

> In 2012, the LSBC Defendants entered into an agreement to extricate the Plaintiff from the practice of law without lawful reason and in contravention of the *Legal Profession Act* (the "Conspiracy Objective"). The particulars of the agreement were as follows:
>
> a) extricate the plaintiff from the practice of law;

2015 BCSC 1431 (CanLII)

> b) demoralize the Plaintiff about practicing law;
>
> c) making the practice of law excessively expensive for the Plaintiff;
>
> d) humiliate him through the Unlawful Search and Seizure;
>
> e) make the Plaintiff subject to a litany of expenses, legal fees;
>
> f) make the Plaintiff subject to embarrassment through continued and excessive mailings to his office despite an agreement to the contrary;
>
> g) batter him in public;
>
> h) touch him without consent in public;
>
> i) defaming him to third parties; and
>
> j) other particulars to be provided during the discovery process and at trial.
>
> The parties that were eventually party and privy to the Conspiracy Agreement included the following people:
>
> k) The LSBC Defendants; and
>
> l) others that will become known after these LSBC Defendants unlawfully refuse to attend their appointments for discoveries.
>
> (collectively, the "Conspirators")
>
> The Conspirators to the Conspiracy Agreement had a predominant purpose to injure the Plaintiff (the "Injurious Conspiracy").
>
> The Conspirators to the Conspiracy Agreement used unlawful means that injured the Plaintiff and the Conspirators knew that the unlawful means would injure the Plaintiff (the "Unlawful Conspiracy").
>
> The Injurious Conspiracy and Unlawful Conspiracy caused damage to the Plaintiff (collectively, the "Conspiracies").

[43] The personal defendants include employees of the Law Society, Mr. Dirk who is an investigator, and Mr. Riddell. The claims against them are that they conspired to injure the plaintiff and to circumvent the *Legal Profession Act.*

[44] The plaintiff asserts that Mr. Riddell knowingly made an unlawful decision when he made the impugned order pursuant to the Law Society Rule 4-43 for an investigation of the books, records and accounts of the plaintiff and his law practice. The plaintiff alleges the defendant Mr. Dirk committed battery against him during the course of carrying out the investigation.

2015 BCSC 1431 (CanLII)

[45] Ms. Kirby, Ms. Berger and Mr. Nallaweg are staff lawyers with the Law Society. The plaintiff alleges that Ms. Kirby and Mr. Nallaweg defamed the plaintiff and made false statements about him. The plaintiff alleges Mr. Berger made false accusations against him. Two staff lawyers employed by the Law Society, Brenda Adlem and Erin Berger are not named as defendants but are referred to the in the amended notice of civil claim as participating in the conspiracy.

[46] Ms. Milz is a chartered professional accountant employed by the Law Society who was the team leader in respect of a trust compliance audit of the plaintiff's books and records. She attended the plaintiff's law office between April 23 and 30, 2013, to conduct a follow-up compliance audit and field work. The plaintiff alleges Ms. Milz defamed and threatened him during the course of the investigation.

[47] The allegations against Mr. Bussanich and Mr. Grady are that they did not carry out their duties during the disciplinary process properly and thereby injured the plaintiff. The allegation against Ms. Armour is that she incited the conspirators and the Law Society's agents to enter the plaintiff's office during the investigation.

[48] The personal defendants, along with Ms. Adlem and Ms. Berger, have all sworn affidavits denying the allegations that they conspired to injure the plaintiff. All of them have deposed they did not enter into a conspiracy to injure the plaintiff or contravene the *Legal Professions Act*. As well, each of them have deposed that they are not a party of vendetta against the plaintiff and do not have any malice towards him, and that all of their conduct regarding the plaintiff has been for the purpose of carrying out their jobs or duties to the Law Society.

[49] The plaintiff relies on three affidavits in response, two he swore and the other by Amy Diaz, a legal administrative assistant, who assisted the plaintiff with various tasks from time to time.

2015 BCSC 1431 (CanLII)

[50] In his 5th affidavit, the plaintiff deposes that he does not believe the personal defendants are telling the truth in certain circumstances, that their evidence is unclear and equivocal, and that he has requested particulars of the evidence.

[51] As well, he sets out some of the evidence he will be relying on to establish the claims pleaded, including that Ms. Milz defamed him to others, Mr. Dirk battered him and stalked him, Mr. Grady proceeded with a hearing when he knew the plaintiff could not attend, and Ms. Kirby and Mr. Nalleweg made false or defamatory statements about him.

[52] The plaintiff's 6th affidavit and Ms. Diaz's affidavit deal with the investigators' attendance at his office. Ms. Diaz deposes that when she asked for the plaintiff's keys which had been left in his office, one of the investigators told her "No. Nothing leaves this office", and then asked her for her name. Ms. Diaz relayed the information to the plaintiff.

[53] The plaintiff argues the personal defendants knew their actions were illegal in contravention of s. 37 of the *Legal Professions Act*, which required that the Law Society obtain a search warrant prior to conducting a search of his office. The plaintiff asserts that the personal defendants knew that conducting such a search pursuant to a Law Society rule was illegal. As well, the plaintiff argues that the personal defendants knew that the hearing was being conducted based on information gained from the illegal search and seizure of his documents. The plaintiff also argues that he was battered and harassed by some of the personal defendants as part of the conspiracy to injure him and prevent him from practicing law by intimidation.

[54] The defendants assert that the plaintiff's affidavits do not contain evidence which substantiates his conspiracy claim. They point to the fact that the individual defendants have all comprehensively and unequivocally denied the fact they participated in a conspiracy.

2015 BCSC 1431 (CanLII)

[55] However, the defendants have applied under Rule 9-5 and Rule 9-6 of the *SCCR*. As noted earlier, if there is a dispute on the facts the issue cannot be determined under those rules. Having reviewed the pleadings and the affidavits I agree it is premature to determine the issue of whether the individual defendants entered into an agreement to extricate the plaintiff from the practice of law without lawful reason and in contravention of the *Legal Professions Act*. There is a dispute raised by the pleadings as to whether the individual defendants agreed to conspire against the plaintiff. Although the defendants have all deposed they did not conspire against the plaintiff to injure him, the plaintiff alleges they did, and points to certain facts he will be relying upon.

[56] As noted earlier, in considering whether a reasonable claim is alleged under Rule 9-5 of the *SCCR*, the court must consider the issue on the basis that the facts as alleged are true: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92.

[57] The issue of whether the personal defendants agreed to knowingly use unlawful means, with the predominant purpose to injure the plaintiff cannot be decided on disputed facts.

[58] The defendants argue that the claims in defamation against the personal defendants in the course of their duties in the regulatory matters are bound to fail because of the privilege afforded to communications made for the purpose of carrying out ones duty as a lawyer for a regulatory body, relying of *Schut v. Magee*, 2003 BCCA 417; *Hamouth v. Edwards & Angell*, 2005 BCCA 172, at para. 39; and *D'Mello v. Law Society of Upper Canada*, 2014 ONCA 912.

[59] From *Hamouth* and *D'Mello* it is clear that lawyers are entitled to the protection of absolute privilege when they are performing duties for their client during a quasi-judicial proceeding. Absolute privilege applies to communications made by lawyers in the course of their investigations.

2015 BCSC 1431 (CanLII)

[60] As a result, I find that the plaintiff's claims against Ms. Armour, Ms. Berger, Ms. Kirby, and Mr. Nalleweg that they filed false submissions, made false accusations, or defamed him in the course of the investigative and disciplinary proceeding cannot stand.

[61] The defendants also argue that the personal defendants are immune from liability in this action pursuant to s. 86(1) of the *Legal Professions Act* which provides:

> (1) No action for damages lies against a person, for anything done or not done in good faith while acting or purporting to act on behalf of the society or the foundation under this Act.

[62] As well, they argue that the individual defendants are immune from liability pursuant to s. 1 of the *Disciplinary Authority Protection Act*, R.S.B.C.1996, c. 98, and that the Law Society and Mr. Riddell are protected by s. 56 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[63] However, those provisions do not provide immunity if a person acts maliciously or in bad faith. Here, the plaintiff alleges the personal defendants knowingly acted unlawfully. If the plaintiff is able to prove the personal defendants were knowingly acting unlawfully, or in bad faith, or maliciously, the sections of the acts relied on by the defendants would not provide immunity. In my view, that issue cannot be determined pursuant to Rule 9-6 of the *SCCR* because there is disputed evidence.

[64] For the reasons set out, I am of the view that the defendants' application to strike the claims against the personal defendants should be dismissed as premature.

[65] I turn to the defendants' alternative submission that portions of the amended notice of civil claim should be struck as disclosing no reasonable cause of action.

[66] I agree there are portions of the amended notice of civil claim that should be struck. They are as follows:

2015 BCSC 1431 (CanLII)

- Paragraphs 3, 4 and 51 which refer to prospective plaintiffs.

- The references to Ms. Adlem and Ms. Berger in paragraphs 8-9 and 132-134. Neither are named as defendants and their conduct is not relevant to any of the allegations in the amended notice of civil claim.

- The following paragraphs should be struck on the basis that they contain irrelevant evidence - paragraphs 49, 50, 57, 59, 117, and 124-126;

- The portion of paragraph 73 commencing "On or about 2011, the Plaintiff's former partner at a law firm, Mr. Varty, reported him to the LSBC after he decided to leave the said firm" to the sentence commencing with "In 2012, the LSBC Defendants entered into an agreement to extricate the plaintiff from practice of law" on the basis that it is irrelevant evidence;

- Paragraphs 40 and 72 of Part 1 and paragraphs 14 and 15 of Part 3 on the basis that they contain legal argument; and

- The portions of paragraphs 6, 7, and 10 of part 1 that allege the personal defendants defamed the plaintiff or communicated about him in a malicious manner.

The plaintiff's application for a declaration that the Law Society exceeded its jurisdiction in making the impugned order, and an order setting it aside

[67] The plaintiff seeks a declaration that the Law Society exceeded its jurisdiction when Mr. Riddell made the impugned order, and an order setting it aside. As well, the plaintiff seeks a number of other orders, including a mandatory injunction compelling the defendants to return the documents seized during the search of his office and computer, an order that the plaintiff is not required to produce his personal cell phone for copying by the Law Society, and that the defendants are restrained from attempting to enter his residence. The plaintiff applies pursuant to Rules 1-3, 8,

2015 BCSC 1431 (CanLII)

9-5, 9-6, 14-1 and 22 of the *SCCR*. As well, the plaintiff relies on the *Legal Professions Act*.

[68] The defendants oppose the plaintiff's application. The defendants submit this is the plaintiff's second application for judgment pursuant to Rules 9-5 and 9-6 of the *SCCR* on a legal point pertaining to the purported invalidity of the Law Society Rule 4-43 and the impugned order and is duplicative. The defendants point to the fact that the first application was dismissed.

[69] The defendants argue that the case the plaintiff is relying on to renew his legal argument in regards to the impugned rule, namely *Gardner v. Law Society of British Columbia,* does not have application as it dealt with an earlier statute. The defendants take the position that the Law Society Rule 4-43 is clearly authorized by ss. 36 and 37.1 of the *Legal Professions Act*, and that is a full answer to the plaintiff's legal argument.

[70] As well, the defendants submit that the plaintiff's application must fail because there are facts in dispute. They point to the earlier judgment in which it was found that there was a dispute as to whether the plaintiff consented to the search of his office and electronic devices.

Applicable Law

[71] The rules that the plaintiff relies on in this application are Rules 9-5 and 9-6 of the *SCCR*. As noted earlier, Rule 9-6 is not available when there are disputed facts on the pleadings. While evidence can be considered under Rule 9-6 in determining whether there is evidence to support a claim, the evidence cannot be weighed.

[72] The Law Society's authority to conduct investigations of its members comes from the *Legal Professions Act*. The applicable provisions of the *Legal Professions Act* provide:

> **36** The benchers may make rules to do any of the following:

2015 BCSC 1431 (CanLII)

(a) establish a discipline committee and delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee;

(b) authorize an investigation of the books, records and accounts of a lawyer if there is reason to believe that the lawyer may have committed any misconduct, conduct unbecoming a lawyer or a breach of this Act or the rules;

(c) authorize an examination of the books, records and accounts of a lawyer or law firm;

(d) require a lawyer or law firm to cooperate with an investigation or examination under paragraph (b) or (c), including producing records and other evidence and providing explanations on request;

(e) require a lawyer or articled student to appear before the benchers, a committee or other body to discuss the conduct or competence of the lawyer or articled student;

(e.1) require a representative of a law firm to appear before the benchers, a committee or other body to discuss the conduct of the law firm;

(f) authorize the ordering of a hearing into the conduct or competence of a lawyer or an articled student, or the conduct of a law firm, by issuing a citation;

(g) authorize the rescission of a citation;

(h) permit the benchers to summarily suspend or disbar a lawyer convicted of an offence that was proceeded with by way of indictment or convicted in another jurisdiction of an offence that, in the opinion of the benchers, is equivalent to an offence that may be proceeded with by way of indictment;

(i) establish a process for the protection of the privacy and the severing, destruction or return of personal, business or other records that are unrelated to an investigation or examination and that, in error or incidentally, form part of

(i) the books, records or accounts of a lawyer, an articled student or a law firm authorized to be investigated or examined under a rule made under paragraph (b) or section 26, or

(ii) files or other records that are seized in accordance with an order of the Supreme Court under section 37.

Search and seizure

37 (1) The society may apply to the Supreme Court for an order that the files or other records, wherever located, of or relating to a lawyer or articled student be seized from the person named in the order, if there are reasonable grounds to believe that a lawyer or articled student may have committed or will commit any

(a) misconduct,

(b) conduct unbecoming a lawyer, or

2015 BCSC 1431 (CanLII)

(c) breach of this Act or the rules.

(2) An application under subsection (1) may be made without notice to anyone or on such notice as the judge requires.

(3) If the application under subsection (1) is in relation to the conduct of an articled student, the order may be made in respect of the books, accounts, files or other records of the student's principal or the principal's firm.

(4) In an application under subsection (1), the person making the application must state on oath or affirmation the grounds for believing the matter referred to in subsection (1) and the grounds for believing that the seizure will produce evidence relevant to that matter.

(5) In an order under subsection (1), the court may

(a) designate the person who will conduct the seizure and authorize that person to conduct it,

(b) state the time and place where the seizure will take place, and

(c) give any other directions that are necessary to carry out the seizure.

Personal records in investigation or seizure

37.1 In conducting an investigation or examination of books, records or accounts under section 26 or rules made under section 36 (b) or in the seizure of files or other records in accordance with an order of the Supreme Court under section 37, the society may collect personal information unrelated to the investigation or examination that, in error or incidentally, is contained in those books, accounts, files or records, but the society must, subject to rules made under section 36 (i),

(a) return that personal information if and as soon as practicable, or

(b) destroy that personal information.

[73] The *Interpretation Act*, R.S.B.C.1996, c. 238, provides in s. 29:

29. In an enactment:

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

[74] Law Society Rule 4-43 provides:

4-43 (1) If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records of the lawyer or former lawyer.

2015 BCSC 1431 (CanLII)

> (1.1) When electronic records have been produced or copied pursuant to an order under this Rule, the lawyer concerned may request that a specific record be excluded from the investigation on the basis that it contains personal information that is not relevant to the investigation.
>
> (1.2) The lawyer must make a request under subrule (1.1) in writing to a person designated under subrule (2) within 7 days of receiving a copy of the order under this Rule.
>
> (1.3) An order under this Rule that permits the production or copying of electronic records must provide for a method of evaluating and adjudicating exclusion requests made under subrule (1.1).
>
> (1.4) A request under subrule (1.1) must be refused unless the records in question are retained in a system of storage of electronic records that permits the segregation of personal information in a practical manner in order to comply with the request.
>
> (2) When an order is made under subrule (1),
>
> > (a) the Executive Director must designate one or more persons to conduct the investigation, and
> >
> > (b) the lawyer or former lawyer concerned must
> >
> > > (i) immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,
> > >
> > > (ii) provide any explanations that the persons designated under paragraph (a) require for the purpose of the investigation,
> > >
> > > (iii) assist the persons designated under paragraph (a) to access, in a comprehensible form, records in the lawyer's possession or control that may contain information related to the lawyer's practice by providing all information necessary for that purpose, including but not limited to
> > >
> > > > (A) passwords, and
> > > >
> > > > (B) encryption keys, and
> > >
> > > (iv) not alter, delete, destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.

[75] In *Gardner*, the chamber's judge dealt with an application for a declaration that the Discipline Committee of the Law Society had exceeded its jurisdiction in ordering the suspension of the petitioner from practicing law and ordering a "spot" audit. During the spot audit, an investigator appointed by the Law Society conducted

2015 BCSC 1431 (CanLII)

an extensive review of the petitioner's professional and personal papers located in his law office and in his accountant's office. The documents inspected and photocopied included personal records, unrelated to the petitioner's professional activities as a barrister and solicitor, including documents related to private companies controlled by him. The chamber's judge reviewed the provisions of the former *Legal Profession Act*, and found that there was no jurisdiction under the Act to allow the Discipline Committee to order the form of audit undertaken. The applicable sections provided:

> 40.(1) Where the chairman of the discipline committee or, in his absence, a member of the executive committee, has reasonable grounds to believe that a member, former member or articled student
>
> > (a) has contravened this Act or a rule made under it, or
> >
> > (b) has conducted himself in a manner that could result in a determination being made under section 45(1)(b) or (c), he may apply, ex parte or on notice as the judge requires, to a judge of the Supreme Court for an order that
> >
> > (c) the books and accounts of the member or former member be audited, and
> >
> > (d) the files or other records of or relating to the member or former member be seized from the person named in the order.
>
> (2) Where the application under subsection (1) is in relation to the conduct of an articled student, the order may be made in respect of the books, accounts, files or other records of the member or firm to whom the student is articled.
>
> (3) In an application under subsection (1), the person making the application shall state on oath,
>
> > (a) his grounds for believing the matter referred to in subsection (1)(a) or (b), or
> >
> > (b) where the application is for an order under subsection (1)(d), his grounds for believing that the seizure will produce evidence relevant to a matter referred to in subsection (1)(a) or (b).
>
> (4) In an order under subsection (1), the court may
>
> > (a) designate the person who will conduct the audit, inspection or seizure and authorize him to conduct it,
> >
> > (b) state the time and place where the audit or seizure will take place,
> >
> > and

2015 BCSC 1431 (CanLII)

> (c) give any other directions that are necessary to carry out the audit or seizure.
>
> 41.(1) The discipline committee may inquire into the conduct or competence of a member, former member or articled student.
>
> (2) The discipline committee may make or authorize a preliminary investigation into the conduct or competence of any of the persons referred to in subsection (1) and may order that the person produce for inspection files or other records relative to his practice that are within his possession or power.
>
> (3) An inquiry under subsection (1) shall be by hearing commenced by the issue of a citation to the respondent at the direction of (a) the chairman of the discipline committee, or (b) any 3 benchers.
>
> (4) At a hearing of a citation, the committee may, where it considers it necessary for the effective conduct of the inquiry,
>
> (a) compel the respondent to give evidence under oath, and
>
> (b) order the respondent to produce all files and records that are in his possession or power that are relevant to the matters raised in the citation.
>
> …

[76] The chamber's judge did not accede to an argument that the authority came from the bencher's resolution delegating their authority to the Standing Discipline Committee to order spot audits. The chamber's judge found as follows:

> [31] In my view, such power cannot properly be delegated to the Discipline Committee which considered this matter and ordered the "spot audit". Section 40 of the Act dealing with "Powers of Chairman of Discipline Committee" reads, in part, as follows:
>
> "40. (1) Where the chairman of the discipline committee or, in his absence, a member of the executive committee, has reasonable grounds to believe that a member, former member or articled student
>
> (b) has conducted himself in a manner that could result in a determination being made under section 45 (1)(b) or (c),
>
> he may apply, ex parte or on notice as the judge requires, to a judge of the Supreme Court for an order that
>
> (c) the books and accounts of the member or former member be audited, and
>
> …"
>
> [32] Pursuant to the alleged delegated power, the requirements of Section 40 with regard to ordering that the books and account of a member be audited would be circumvented. In this perspective, I am in agreement with the submission of Mr. Braidwood that in purporting to delegate their power to

2015 BCSC 1431 (CanLII)

> audit the books and accounts of a member, the Benchers are seeking to enlarge the narrower powers expressly contemplated and specifically reserved for the judicial functions performed by the Discipline Committee.

[77] The chamber's judge's decision in *Gardner* was upheld by the Court of Appeal. In that decision, the Court of Appeal noted at para. 14, the provisions of the *Legal Profession Act* which conferred power on the benchers provided:

> 24. (1) The benchers may govern and administer the affairs of the society.
>
> (2) Without limiting subsection (1), the benchers may
>
> (a) establish committees, determine the duties of those committees and delegate authority to them,
>
> (b) order the audit of the books and accounts of a member or a former member…

[78] The Court of Appeal found that there were two disciplinary committees, one created under s. 39 of the *Act*, and the other created by the bencher's under s. 24, which was regulatory in contradistinction to disciplinary. Only the statutory disciplinary committee could enquire into the conduct or competency of a member, and require the member to produce for inspection files or other records relating to his or her practice. The Court of Appeal found that the scope of the material the Law Society sought could only be seized from the member under s. 40(1)(d) of the *Act*, and only if authorized by a judge of the Supreme Court of British Columbia. In finding the Law Society did not have jurisdiction to authorize a search and seizure order under s. 24 of the *Act*, the Court stated:

> It is not open to the benchers to vest in a discipline committee of their own creation powers specifically granted to the Statutory Discipline Committee or, under s. 40, to a specified individual and to the Court. The benchers' powers are, in a general sense, limited to the regulatory, administrative, and management aspects of the Law Society's affairs.

[79] It is clear from *Gardner*, that the Law Society and its employees' authority to conduct investigations of its members must be rooted in its statutory power, and the Law Society cannot create rules or regulations that grant it more power than the enabling statute.

2015 BCSC 1431 (CanLII)

Analysis

[80] As noted earlier, the defendants point to the earlier application by the plaintiff and submit he is simply rearguing that application. However, in the plaintiff's earlier application he sought judgment on the issue of whether the defendants breached his *Charter* rights. As stated in the judgment, the jurisprudence establishes that alleged *Charter* violations should not be determined in the absence of a proper evidentiary record. Courts should be reluctant to engage in *Charter* analyses in a factual vacuum. Each case must be considered on its own facts, or lack of facts. In the earlier application, it was found that there was not a proper evidentiary basis on which to determine whether there had been a *Charter* violation of the plaintiff's rights.

[81] The defendants argue that *Gardner* does not apply to this case because the earlier version of the *Legal Profession Act* was completely revised by the current statute. In enacting the current *Act*, the Legislature removed various statutory directions as to the Law Society's committee structure and internal operations and expanded the benchers' rule-making powers. The defendants submit that s. 40 of the previous *Act* is analogous to s. 36 of the current *Legal Professions Act*. Rule 4-43 is found in Part 4 of the *Law Society Rules* dealing with discipline. The defendants say that Rule 4-43 authorizes a search and seizure, with a member's consent. As noted earlier, the defendants take the position that Rule 4-43 is authorized by ss. 36 and 37.1 of the current statute.

[82] In my opinion, the language of Rule 4-43 does not appear to grant powers to the Law Society beyond what the *Legal Professions Act* allows, as was the case in *Gardner*. Section 36 of the *Legal Professions Act* provides that the benchers may make rules to establish a discipline committee, delegate authority to the committee, and authorize an investigation and examination of the books, records and accounts of a lawyer if there is reason to believe that the lawyer may have committed any misconduct, conduct unbecoming a lawyer or a breach of the Act or the rules. Rule 4-43 provides that the chair of the discipline committee can order an investigation of

2015 BCSC 1431 (CanLII)

the books and records, including electronic records, of a lawyer if he reasonably believes the lawyer or former lawyer may have committed a discipline violation. As noted, s. 29 of the *Interpretation Act* provides that in an enactment, such as the *Legal Profession Act*, the term "record" includes books, letters, papers and anything on which information is stored whether graphic, electronic or otherwise.

[83] To the extent the plaintiff alleges the defendants did not as a matter of fact comply with the *Legal Professions Act*, and specifically the requirement that searches and seizures of a law office require an order of the court absent his permission, that factual determination cannot be made in this application given the disputed evidence.

[84] In my view, the fact the *Legal Professions Act* has been revised is not an answer to the issues raised on this application, which is did the plaintiff consent to the Law Society and its investigators entering and searching his law office and computer and copying documents. As conceded by the defendants, the Law Society does not have the authority pursuant to s. 36 of the Legal Professions Act and Law Society Rule 4-43 to search a member's law office and computer, and copy documents without his consent.

[85] On this application, the plaintiff argues that he did not give consent to the search of his office and computer, and copying documents. The defendants take the position the plaintiff consented to the Law Society searching his office and computer, and copying documents.

[86] This factual dispute cannot be resolved on this application. As stated earlier, on a summary judgment application pursuant to Rule 9-6 of the *SCCR* factual disputes are not determined and evidence is not weighed. Accordingly, the plaintiff's applications for a declaration that the Law Society exceeded its jurisdiction when Mr. Riddell made the impugned order and an order setting it aside are dismissed. As well, the corollary orders the plaintiff seeks, including a mandatory injunction

2015 BCSC 1431 (CanLII)

compelling the defendants to return the documents seized during the search of his office and computer are also dismissed.

[87] The plaintiff also applies for orders that the Law Society be restrained from requesting that he provide his personal cell phone for inspection and copying and entering his residence to inspect his documents. The plaintiff argues that the s. 36 of the *Legal Professions Act* and the Law Society Rule 4-43 does not give the Law Society the jurisdiction to make an order which would allow them seize his personal phone and enter his residence.

[88] The impugned order made pursuant to Rule 4-43 provides:

> 1. Pursuant to Law Society Rule 4-43, I order that an investigation be made of the books, records and accounts of Kevin A. McLean and Kevin A. McLean Law Corporation.
>
> 2. I direct Kevin A. McLean and Kevin A. McLean Law Corporation to:
>
> > a. immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,
> >
> > …
> >
> > c. assist the Executive Director or designate to access, in a comprehensible form, records in the possession or control of Kevin A. McLean and Kevin A. McLean Law Corporation that may contain information related to the practice of Kevin A. McLean by providing all information necessary for that purpose, including but not limited to
> >
> > > i. passwords, and
> > >
> > > ii. Encryption keys.
>
> 3. Kevin A. McLean and Kevin A. McLean Law Corporation must not alter, delete destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.
>
> 4. This order extends to all electronic records and process set out in the Attachment to this Order will be followed.

[89] The attachment to the order indicates that Rules 3-5(6) and 3-5(6.1) of the *Law Society Rules* apply. In my view, Rule 3-5.01(1) is also relevant. Those rules provide:

2015 BCSC 1431 (CanLII)

> 3-5(6) A lawyer must cooperate fully in an investigation under this Division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director
>
> (a) to the complaint, and
>
> (b) to all requests made by the Executive Director in the course of an investigation.
>
> (6.1) When conducting an investigation of a complaint, the Executive Director may
>
> (a) require production of files, documents and other records for examination or copying,
>
> (b) require a lawyer to
>
> (i) attend an interview,
>
> (ii) answer questions and provide information relating to matters under investigation, or
>
> (iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,
>
> (c) enter the business premises of a lawyer
>
> (i) during business hours, or
>
> (ii) at another time by agreement with the lawyer.
>
> 3-5.01 (1) Subject to subrules (2) and (3), a lawyer who is required under Rule 3-5 *[Investigation of complaints]* or 4-43 *[Investigation of books and accounts]* to produce and permit the copying of files, documents and other records, provide information or attend an interview and answer questions and who fails or refuses to do so is suspended until he or she has complied with the requirement to the satisfaction of the Executive Director.

[90] In my opinion, s. 36 of the *Legal Professions Act* and the Law Society Rule 4-43 do not authorize the Law Society to search the personal cell phone of a member or enter his or her personal residence. Rule 4-43 provides that an investigation of the books, records and accounts of the lawyer and law firm may be ordered. Rule 3-5(6.1) provides that the Executive Director may enter the business premises of a lawyer during business hours.

[91] The fact that s. 36 of the Law Society Act and Rule 4-43 authorizes an investigation of a member's books, records and accounts, does not in my view, allow the Law Society to enter into a member's residence, or seize his personal phone, or

2015 BCSC 1431 (CanLII)

suspend him for failing to comply with a request for those items. Section 37 of the *Legal Professions Act* provides that the Law Society may apply to the Supreme Court for an order to seize files or records of or relating to lawyer, wherever located, if there are reasonable grounds to believe the lawyer committed misconduct, conduct unbecoming a lawyer, or any breach of the Act or the rules. In my opinion, the Law Society is required to apply under that provision if it wants to seize records or files of the plaintiff located in locations other than his law office, such as on his personal phone or in his residence.

[92] The plaintiff asserts that the defendant Law Society has suspended him for not complying with the Rule 4-43 order by failing to provide them with his personal cell phone or access to his home. In my view, insofar as the Law Society is utilizing the Rule 4-43 order to require that the plaintiff produce his personal cell phone or to allow entry into his residence, it does not have the jurisdiction to do so.

[93] Accordingly, I am of the view it is appropriate to grant the orders sought in paragraphs 7 and 8 of the May 13, 2015 application. I am making the following orders:

1. The plaintiff is not required to produce his personal phone to the Law Society pursuant to the Rule 4-43 order, and

2. Restraining the Law Society from entering or attempting to enter the plaintiff's residence pursuant to that order.

[94] Nothing in these orders precludes the Law Society applying for an order pursuant to s. 37 of the *Legal Professions Act*.

[95] As set out earlier, the orders sought in paragraphs 1-6 and 9-11 in the plaintiff's application filed May 13, 2015, cannot be determined in light of the disputes in the evidence regarding whether the plaintiff consented to the search of his office and computer and copying of documents, and whether the personal defendants committed the tort of conspiracy. Issues relating to whether and what

2015 BCSC 1431 (CanLII)

documents seized as a result of the impugned order should be returned cannot be dealt with until the issue of whether or not the plaintiff consented to the search and copying is determined. As a result, paragraphs 1-6, and paragraphs 9-11 of the plaintiff's May 13, 2015 application are dismissed.

Costs

[96] Given the divided success on the applications the plaintiff and the defendants will bear their own costs.

"Gerow, J."

2015 BCSC 1431 (CanLII)

TAB 40

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLean v. Law Society of British Columbia,* 2017 BCSC 987

Date: 20170615
Docket: S1410056
Registry: Vancouver

2017 BCSC 987 (CanLII)

Between:

Kevin A. McLean

Plaintiff

And:

Law Society of British Columbia, Alison Kirby, John Nalleweg, Larry Dirk, Kieron Grady, Erin Milz, Mark Bussanich, Debrah Armour, Howie Caldwell, Phil Riddell John Doe #1, John Doe #2 John Doe #3 John Doe #4 John Doe #5 John Doe #6 John Doe #7 John Doe #8 John Doe #9, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, Jane Doe #6, Jane Doe #7, Jane Doe #8, Jane Doe #9, Jane Doe #10, Jane Doe #11, Jane Doe #12

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

The Plaintiff on his own behalf:	Kevin A. McLean
Counsel for the Defendants:	Geoffrey B. Gomery, Q.C. Julia K. Lockhart
Place and Date of Hearing:	Vancouver, B.C. May 31-June 1, 2017
Place and Date of Judgment:	Vancouver, B.C. June 15, 2017

Table of Contents

	Paragraph Range
1.0 INTRODUCTION	[1] - [6]
2.0 PREVIOUS APPLICATIONS	[7] - [15]
3.0 BACKGROUND	[16] - [55]
3.1 How the investigation order was made	[16] - [32]
3.2 How the investigation order was executed	[33] - [55]
4.0 DISCUSSION	[56] - [110]
4.1 The summary judgment applications	[57] - [96]
4.1.1 Overview	[57] - [64]
4.1.2 Mr. McLean's application for summary judgment	[65] - [89]
4.1.3 The Law Society's application for summary judgment	[90] - [96]
4.2 The interlocutory applications	[97] - [110]
5.0 CONCLUSION	[111] - [116]

2017 BCSC 987 (CanLII)

1.0 INTRODUCTION

[1] The plaintiff, Mr. McLean, is a former lawyer who was called to the bar in August 2010. His practice did not go smoothly. By October 2012 he had attracted the attention of the Discipline Committee of the Law Society of British Columbia, which authorized a conduct review. In 2013 he was subject to a period of administrative suspension for failing to provide accounting reports, and a panel of three benchers placed administrative conditions on his practice in January 2014. Ultimately, at the end of 2014, Mr. McLean allowed his membership in the Law Society to lapse, and on June 29, 2015, a hearing panel formally ordered him disbarred as ungovernable.

[2] In this action, Mr. McLean sues the Law Society, a bencher who was Chair of the Discipline Committee (Mr. Riddell), and a number of individuals who were employees or agents of the Law Society. He claims damages and seeks a number of declarations. As against the personal defendants, his claim is advanced primarily on the basis of an alleged conspiracy to commit unlawful acts aimed at him with a view to "extricating" him from the practice of law. Other torts are also alleged.

[3] Mr. McLean does not challenge his disbarment in this proceeding. What he does challenge is the lawfulness of an administrative order that Mr. Riddell made on May 27, 2014. That order (the "investigation order" or "Rule 4-43 order"), made under what was then Law Society Rule 4-43, authorized a forensic investigation of Mr. McLean's books and records. Mr. McLean asserts that the investigation order was made in violation of the principles of administrative law, and that what followed was an unreasonable search and seizure that breached his rights under section 8 of the *Charter of Rights and Freedoms* and his privacy rights under the *Privacy Act*, RSBC 1996, c 373. This, in Mr. McLean's submission, gives rise to the unlawfulness that supports the claim of conspiracy.

[4] Before me are two applications for summary judgment pursuant to Rule 9-6. The defendants seek judgment dismissing the claim against all of the personal defendants other than Larry Dirk (the claim against Mr. Dirk is pleaded in battery,

2017 BCSC 987 (CanLII)

and is distinct from the conspiracy claim against the other personal defendants). Mr. McLean seeks judgment for damages to be assessed and for the following relief:

- an order setting aside the investigation order (called by Mr. McLean the "limitless seizure order");
- an order that the investigation order is void;
- a declaration that Mr. Riddell was required to issue reasons for the investigation order;
- a declaration that Mr. Riddell was in a conflict of interest by granting the investigation order on the recommendation of "his counsel, Mark Bussanich, barrister and solicitor of the [Law Society]";
- a declaration that Mr. McLean's alleged consent on June 4, 2014, was vitiated by misrepresentations, duress and/or coercion by some of the Law Society defendants;
- a declaration that Mr. McLean's alleged consent on June 4, 2014, has been withdrawn and revoked and that the copies of documents and other records obtained under the investigation order must be returned; and
- costs.

[5] In addition, Mr. McLean applies for interlocutory orders relating to documents and the provision of information. Additional interlocutory applications brought by Mr. McLean and a further application by the defendants for judgment dismissing the entire action by way of summary trial (Rule 9-7) did not proceed to a hearing.

[6] For the reasons that follow, I conclude that Mr. McLean's application for summary judgment must be dismissed, and that the defendants are entitled to a dismissal of Mr. McLean's claims against the personal defendants other than Mr. Dirk.

2017 BCSC 987 (CanLII)

2.0 PREVIOUS APPLICATIONS

[7] There have been a number of previous applications in this action. In *McLean v Law Society of British Columbia*, 2015 BCSC 661 ("*McLean SC #1*") Madam Justice Gerow dismissed an application by Mr. McLean for judgment on the issue of whether the defendants breached his charter rights, which application was brought pursuant to Rules 9-4, 9-5 or 9-6. The judge noted that there was a factual dispute concerning whether Mr. McLean consented to the search of his office and electronic devices, and the copying of his documents, and accordingly the question could not be decided under the rules that Mr. McLean invoked.

[8] In *McLean v Law Society of British Columbia*, 2015 BCSC 1431 ("*McLean SC #2*"), Gerow J. considered applications by both sides, including competing applications for summary judgment (Rule 9-6).

[9] Mr. McLean sought an order declaring that the Law Society exceeded its jurisdiction when it made the impugned investigation order. Once again, Gerow J. observed that since she could not resolve the factual dispute of whether the plaintiff consented to what the Law Society did, the plaintiff's application had to be dismissed. As noted above, Mr. McLean now seeks declarations that his alleged consent was vitiated and/or withdrawn.

[10] Mr. McLean also sought orders restraining the Law Society from requesting that he provide his personal cell phone for inspection and copying, and from entering his personal residence to inspect documents. Madam Justice Gerow granted those orders, concluding that such activity was not authorized under either the *Legal Profession Act*, SBC 1998, c 9, or Rule 4-43.

[11] In addition, the defendants had sought an order for the same relief as they now seek: judgment dismissing the claim against all the personal defendants (except Mr. Dirk). That was also dismissed as premature. Madam Justice Gerow did, however, dismiss Mr. McLean's claims against the defendants Deborah Armour, Allison Kirby and John Nalleweg for defamation and other misconduct.

2017 BCSC 987 (CanLII)

[12] The defendants appealed. Mr. McLean did not.

[13] In *McLean v Law Society of British Columbia*, 2016 BCCA 368 ("*McLean CA*"), the Court of Appeal made a number of rulings. It set aside the orders of Gerow J. declaring that Mr. McLean is not required to produce his personal phone to the Law Society pursuant to the Rule 4-43 order and restraining the Law Society from entering or attempting to enter his residence pursuant to that order, on the ground that there was no evidence that either action was likely to be taken; it declined, however, to resolve the issues concerning limits on the locations from which the Law Society may properly obtain records and documents of the member:

> [24] However, in my view, we should not resolve these issues in this case. Inherent in the issue is a challenge to the order made by the Disciplinary Committee which, as I earlier observed, is an issue usually challenged by judicial review pursuant to the *Judicial Review Procedure Act*. There is much to the Law Society's submission that the process used by Mr. McLean has had the effect of end-running the proper procedure in administrative law. However, the Law Society did not raise this point in the Supreme Court and so we do not have the benefit of the judge's conclusions on its procedural objection. Bringing a challenge to an exercise of a statutory power by the correct procedure is not purely cosmetic or simply a matter of form. The questions asked by a court reviewing a decision of an administrative body are different than the questions asked by a court interpreting legislation *ab initio*. Most frequently the decision of a decision maker subject to judicial review, including as to the meaning of its home statute, will be assessed on a standard of reasonableness whereas a court interpreting legislation must be correct. Further, judicial review allows a court to factor into its conclusion the concept of the decision maker's expertise.
>
> [25] In my view given my earlier conclusion that the injunction and declaration must be set aside in any event, this is not a case in which this court should wade into the interpretation of the *Legal Profession Act* and the *Law Society Rules*, absent the issue being first considered by judicial review.
>
> [26] Further, I am not satisfied that the necessary factual underpinnings are before us to admit of a definitive answer to the administrative law challenges to the May 27, 2014 order and Rule 4-43. It seems to me that there may have been a failure by all parties to distinguish, in their submissions, the difference between a right to investigate, which includes the right to demand all documents or records related to the law practice wherever they be, and the right to enter and search particular premises. If so, that question must be dealt with in the right case brought in the procedurally correct manner. Accordingly, I would not endorse the reasons of the judge on the issue of the scope of the Law Society's powers of investigation under Rule 4-43, and leave those questions to a different case.

2017 BCSC 987 (CanLII)

[14] The Court of Appeal also set aside Gerow J.'s dismissal of the Law Society's summary judgment application and remitted it to the trial court for reconsideration. I am about to undertake that reconsideration, together with consideration of Mr. McLean's renewed summary judgment application.

[15] In so doing, I note the following passage from *McLean CA*:

> [35] The appellants contend that the judge misdirected herself in her application of Rule 9-6 by reasoning that the factual dispute in the pleadings precluded summary judgment in favour of the appellants. They say, rather, that although the judge was not allowed to weigh the evidence (that being a matter for a trial, summary or otherwise), she was required to consider "whether the plaintiff's contradictory allegations had sufficient support in the evidence he relied upon to found … a genuine triable issue", and relying upon *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, and *Canada v. Lameman*, 2008 SCC 14, they say the pleadings should carry no weight in this assessment.
>
> [36] In my respectful view, the judge erred in principle in saying the rule was not available when there are disputed facts in the pleadings and in declining to consider the evidence on the Rule 9-6 application. In *Lameman*, the Supreme Court of Canada explained the importance of the summary judgment rule. This Rule has advantages to the administration of justice that are different from those provided by a summary trial such as we have long had in British Columbia. The court said:
>
>> 10 This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
>>
>> 11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.*, (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331,

2017 BCSC 987 (CanLII)

> aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[37] In *Century Services Inc. v. LeRoy*, 2015 BCCA 120, we said concerning the differences between Rule 9-5 and 9-6:

> [32] Century Services sought summary judgment pursuant to Rule 9-6, ... In making this submission it relies upon *Skybridge* … I do not consider, as a general approach, that it is helpful to conflate the various rules. Rule 9-6 is a rule distinct from Rule 9-5; a challenge to pleadings is effected by Rule 9-5, whereas Rule 9-6 allows for the summary determination of a claim in a procedure that engages evidence but does not assume the character of a summary trial.
>
> [33] The different character of the rules for summary judgment and striking pleadings was described well by Mr. Justice Low in *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149:
>
>> [9] Rules 9-5 and 9-6 are quite different. The former is an attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. It raises a matter of law only. The latter is an assertion that the claim or the defence is factually without merit. It raises an issue of fact only or, at most, an issue of mixed fact and law, unless under subrule (5)(c) the court determines that "the only genuine issue is an issue of law", in which case it "may determine the question [of law] and pronounce judgment accordingly."
>>
>> [10] Rule 9-5 is concerned only with the sufficiency of pleadings. ... An order striking a pleading could not be the basis for a *res judicata* defence in subsequent proceedings.
>>
>> [11] Rule 9-6 permits an application for summary judgment, either allowing a claim in whole or in part or dismissing a claim in whole or in part. It is clear that the result sought by the application would support a future pleading of *res judicata*.

[38] With these passages in mind, I conclude that the judge applied the wrong test in her paragraphs 36, 55 and 71 in speaking of Rule 9-6. She did

2017 BCSC 987 (CanLII)

> not ask whether Mr. McLean, in the words of *Lameman* and consistent with Rule 9-6, "put [his] best foot forward" with respect to the existence of material facts. It is clear from *Lameman* that he cannot rely upon mere allegations in his notice of civil claim to answer the evidence of the other side.

3.0 BACKGROUND

3.1 How the investigation order was made

[16] By the time the investigation order was made in May 2014, Mr. McLean had, as I mentioned, been subject to a period of administrative suspension, and administrative conditions had been placed on his practice. A compliance audit was scheduled to begin on May 21, 2013, but was delayed at Mr. McLean's request to June 18, 2013. The compliance audit could not be completed at that time, and delays in following it up occurred as a result of Mr. McLean's lack of responses to requests for further information. Further difficulties resulted in a temporary suspension of Mr. McLean effective November 20, 2013. This suspension was lifted on January 29, 2014 when Mr. McLean provided most of the requested information.

[17] On April 22, 2014, the defendant Eva Milz (misnamed in the style of cause as "Erin Milz"), a chartered professional accountant employed by the Law Society in its Trust Assurance Department, attended at Mr. McLean's office to continue the compliance audit follow-up. She contemporaneously received an email from Mr. McLean requesting the audit to be rescheduled as his accountant was ill. By return email, Ms. Milz advised that she would proceed with whatever books and records were available, but Mr. McLean replied that no books and records were available because they were with the accountant.

[18] Ms. Milz returned the following day to commence the follow-up visit, and was provided a workstation with Mr. McLean's records strewn across it. Most of the records required for the compliance audit were not provided. It therefore could not be completed.

[19] On May 13, 2014, this Milz prepared a memorandum setting out a history of what had occurred, the concerns arising from the audit that had been undertaken to date, and a reference to the missing records.

2017 BCSC 987 (CanLII)

[20] The Trust Assurance Department then referred Mr. McLean to the Professional Conduct Department because of concerns that he was not maintaining accounting records as required, and because the records he did provide revealed numerous accounting deficiencies and concerns. In these circumstances, on May 23, 2014, the defendant Mark Bussanich, a staff lawyer employed by the Law Society in its Professional Conduct Department, prepared a memorandum to the defendant Phil Riddell, Chair of the Law Society's Discipline Committee, pursuant to Rule 4-43 of the Law Society Rules.

[21] That rule has since been renumbered as Rule 4-55, but I will refer to it as Rule 4-43. It provided:

> **4-43**(1) If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records of the lawyer or former lawyer.
>
> (1.1) When electronic records have been produced or copied pursuant to an order under this rule, the lawyer concerned may request that a specific record be excluded from the investigation on the basis that it contains personal information that is not relevant to the investigation.
>
> (1.2) The lawyer must make a request under subrule (1.1) in writing to a person designated under subrule (2) within 7 days of receiving a copy of the order under this rule.
>
> (1.3) An order under this rule that permits the production or copying of electronic records must provide for a method of evaluating and adjudicating exclusion requests made under subrule (1.1).
>
> (1.4) A request under subrule (1.1) must be refused unless the records in question are retained in a system of storage of electronic records that permits the segregation of personal information in a practical manner in order to comply with the request.
>
> (2) When an order is made under subrule (1),
>
> (a) the Executive Director must designate one or more persons to conduct the investigation, and
>
> (b) the lawyer or former lawyer concerned must
>
> (i) immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,
>
> (ii) provide any explanations that the persons designated under paragraph (a) require for the purpose of the investigation,

2017 BCSC 987 (CanLII)

> (iii) assist the persons designated under paragraph (a) to access, in a comprehensible form, records in the lawyer's possession or control that may contain information related to the lawyer's practice by providing all information necessary for that purpose, including but not limited to
>
> (A) passwords, and
>
> (B) encryption keys, and
>
> (iv) not alter, delete, destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.

2017 BCSC 987 (CanLII)

[22] As we have seen, in para 26 of its reasons in *McLean CA*, the Court of Appeal commented upon what it conceived had been:

> …a failure by all parties to distinguish, in their submissions, the difference between a right to investigate, which includes the right to demand all documents or records related to the law practice wherever they be, and the right to enter and search particular premises.

[23] I observe that Rule 4-43 authorizes the Chair of the Discipline Committee to order an investigation of a lawyer's books, records and accounts, and obliges the lawyer to cooperate. It does not authorize search and seizure in the absence of the lawyer's consent or a court order obtained under section 37 of the *Legal Profession Act*. Hence the importance of the question of consent in this case.

[24] In his memorandum, Mr. Bussanich set out a summary of the complaint (potential discipline violations included: failing to maintain accounting records in compliance with the rules; withdrawing funds from trust without proper authorizations; withdrawing funds from trust via mechanisms not allowed by the rules; and failing to report and correct trust shortages). This was followed by a history of Mr. McLean's professional conduct record.

[25] Mr. Bussanich then recommended the making of an investigation order under Rule 4-43 for the investigation of books, records and accounts of Mr. McLean and his Law Corporation, including all electronic records.

[26] This recommendation was followed by Mr. Bussanich's review of the facts and evidence concerning what had occurred in relation to the compliance audit that began in June 2013 and was as yet incomplete, and a recitation of the deficiencies and concerns found by Ms. Milz.

[27] Mr. Bussanich followed this with his analysis concerning the application of the rule:

> Before making an Order under Rule 4-43(1) of the Law Society Rules, the Chair of the Discipline Committee must reasonably believe that Mr. McLean may have committed a discipline violation (the "Threshold"). If the Threshold is met, the Chair must consider whether it is desirable for the Order to include all electronic records.
>
> *The Threshold Question*
>
> Based on the information available from the [Trust Assurance Department's] Referral, there is evidence of multiple possible breaches of 16 Rules, many of which are serious. In addition, if substantiated, the breaches of the *BC Code* provisions may constitute professional misconduct. The state of Mr. McLean's books and records has left many unanswered questions. Collectively, the deficiencies and concerns identified through the compliance audit signify a pattern of non-compliance with trust accounting rules. The rules are in place to protect clients and the public generally. Without a detailed forensic examination of Mr. McLean's books and records, the Law Society is unable to determine the extent to which his clients, and other members of the public, are at risk.

[28] Mr. Bussanich next discussed whether the order should extend to all electronic records, noting among other things that many of the bank transactions were performed electronically, the scant paper files did not explain the flow of funds, and Mr. McLean had indicated to Ms. Milz that his practice was primarily paperless.

[29] Finally, Mr. Bussanich discussed prior instances in which a Rule 4-43 order was granted, and attached his proposed draft form of order. The terms of the order, set out below, tracked the language of the rule.

[30] Mr. Riddell reviewed Mr. Bussanich's materials and granted the investigation order in the form requested on May 27, 2014.

[31] The memorandum from Mr. Bussanich to Mr. Riddell was not made under oath or affirmation, while Mr. Riddell made the order without first hearing from

2017 BCSC 987 (CanLII)

Mr. McLean, and gave no reasons for his decision to grant the order. Mr. McLean asserts that these are serious defects that, in accordance with the principles of administrative law, rendered the process unfair and unlawful.

[32] Attached to and forming part of the investigation order were lengthy explanatory notes that, among other things, advised the member to retain and instruct counsel, provided information concerning forensic copying including the copying of electronic records, set out the process for the making of exclusion requests, and detailed the member's obligations. For present purposes, I set out only the order itself:

THE LAW SOCIETY OF BRITISH COLUMBIA

ORDER (RULE 4-43)

TO: Kevin A. McLean and Kevin A. McLean Law Corporation

AND TO: Executive Director and designate

FROM: Phil Riddell, Chair of the Discipline Committee

DATE: May 27, 2014

RE: Investigation of Kevin A. McLean and Kevin A. McLean Law Corporation;
Member No. 508317

1. Pursuant to Law Society Rule 4-43, I order that an investigation be made of the books, records and accounts of Kevin A. McLean and Kevin A. McLean Law Corporation, including all electronic records of Kevin A. McLean and Kevin A. McLean Law Corporation.

2. I direct Kevin A. McLean and Kevin A. McLean Law Corporation to:

a. immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,

b. provide any explanations that the Executive Director or designate requires for the purpose of the investigation,

c. assist the Executive Director or designate to access, in comprehensible form, records in the possession or control of the Kevin A. McLean and Kevin A. McLean Law Corporation that may contain information related to the practice of the Kevin A. McLean by providing all information necessary for that purpose, including but not limited to

i. passwords, and
ii. encryption keys.

2017 BCSC 987 (CanLII)

> 3. Kevin A. McLean and Kevin A. McLean Law Corporation must not alter, delete, destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.
>
> 4. This Order extends to all electronic records and the progress set out in the Attachment to this Order will be followed.
>
> "Phil Riddell"
> Chair, Discipline Committee

3.2 How the investigation order was executed

[33] The investigation order and notes were to be delivered to Mr. McLean by letter dated May 29, 2014, which listed the persons designated to carry out the investigation. Those persons included Mr. Bussanich, David McCartney, an investigator employed by the Law Society, and Andrea Chan and Wendy Ho, forensic accountants employed by the Law Society.

[34] Mr. Bussanich directed Mr. McCartney, Ms. Chan and Ms. Ho to attend at Mr. McLean's office on June 3, 2014, to serve him with the investigation order and the letter of May 29, 2014, and to commence the investigation authorized by the order.

[35] Mr. McCartney, Ms. Chan and Ms. Ho arrived at about 10:00 a.m. on June 3, 2014. They were told by the office manager, Peggy Chapman, that Mr. McLean was not in the office. Mr. McCartney advised Mr. Bussanich that Mr. McLean was not there, and at 10:01 a.m., Mr. Bussanich emailed Mr. McLean to advise him of the order. He attached a copy of the letter of May 29, 2014, and the investigation order itself. Mr. Bussanich also advised that the designated representatives of the Law Society were at Mr. McLean's office, and that Mr. McLean was required to attend immediately to comply with these obligations; failure to cooperate could result significant in consequences, including a referral to the Discipline Committee.

[36] In the meantime, Mr. McCartney, Ms. Chan and Ms. Ho sat in the waiting area by reception. While they waited, Mr. McLean and his practice supervisor, Robert King (whose identities were not then known to the Law Society representatives but were confirmed by Mr. McLean), entered the office and spoke to

2017 BCSC 987 (CanLII)

the receptionist. One, whom the receptionist later indicated to Mr. McCartney had been Mr. McLean, then walked quickly down the hall.

[37] Very shortly thereafter, Ms. Chapman told Mr. McCartney that Mr. McLean was back, and was in his office. She led them to Mr. McLean's office, but it was empty. Ms. Chapman told them that they could wait for Mr. McLean in his office. They did so. During the time that they waited in the office, they depose that they did not open any drawers or attempt to access the computer.

[38] At about 1:15 p.m., an event occurred that is subject to a dispute in the evidence.

[39] According to Mr. McCartney and Ms. Chan, Ms. Chapman came into the office with a woman who said her name was Amy Diaz. Ms. Diaz said that she wanted to pick up Mr. McLean's keys and one or two cheques from his trust chequebook. Ms. Chapman opened the drawers in Mr. McLean's desk to look for his trust cheque book, and found it. Ms. Chan said that Ms. Chapman could give Ms. Diaz one sheet from the cheque book (two cheques and their stubs) but not the entire book. Mr. McCartney gave Ms. Diaz two cheques and recorded the numbers. Ms. Diaz then left. She did not take Mr. McLean's keys, which were on the desk.

[40] In a typed affidavit amended in handwriting, affirmed May 26, 2015, Ms. Diaz deposes that she has been an assistant to various lawyers including Mr. McLean, and that Mr. McLean came to the office where she was employed to meet with herself and one Mr. Yehia. Mr. McLean was quite agitated as he explained to Ms. Diaz that:

> …the LSBC was in his office without his consent, he needed his keys but he wished to avoid confrontation. He asked if I could do it and I agreed to do so.

The question of whether Mr. McLean consented to the investigation is, of course, very much an issue. The existence of that factual dispute was the basis upon which Gerow J. ruled that Mr. McLean's previous applications for summary judgment could not be resolved.

2017 BCSC 987 (CanLII)

[41] Ms. Diaz then states [handwritten portions in italics]:

> When I arrived at Mr. McLean's office, I remember that there were two or three people in the office and ~~a woman~~ *someone* in Mr. McLean's chair at his computer, and I asked words to the effect, "I am Kevin's ~~legal assistant~~ *more friend*. May I please have his keys?" She replied with words to this effect, "No, nothing leaves this office. What is your name?" I gave my name and left.

[42] Ms. Diaz said nothing about trust cheques. Mr. McLean argues that this demonstrates that the Law Society, through Mr. McCartney, Ms. Chan and Ms. Ho, had seized control of his office without his consent.

[43] Mr. McLean did not return, and Mr. McCartney, Ms. Chan and Ms. Ho left later in the afternoon without having reviewed or seized any records or information.

[44] Mr. McLean does not deny that Ms. Chapman showed the Law Society representatives into his office and told them they could wait there, but deposes that he did not consent to the Law Society entering his private office. He states that when he came into the office that morning of June 3, 2014, and learned that the Law Society was there and demanding to meet with him immediately, he told his receptionist that he was occupied with other meetings and did not have time. The receptionist mentioned something about them having an order, and Mr. McLean replied that they could send it to him for review. He went into his office and left his keys on his desk, expecting that no one would enter his office while he was away. He then left to attend a scheduled meeting with Mr. Yehia. While he was at that meeting, he learned from Mr. King that there were individuals sitting in his office, which he was shocked to learn. That is why he sent Ms. Diaz over to get his keys.

[45] At 9:27 p.m. on the evening of June 3, Mr. McLean emailed Mr. Bussanich:

> Hello Mr. Bussanich:
>
> I was in scheduled meetings throughout the day.
>
> I understand that the investigators had access to my office all day so I trust you had my full cooperation.
>
> I was assaulted and battered by Mr. Dirk yesterday so I do not feel comfortable being in the process [*sic*] of any investigators of the LS BC.

2017 BCSC 987 (CanLII)

> The matter is now one of civil litigation and the police process.
>
> I have provided all of my books and records to the LS BC during the audit process.
>
> My office is kept in paperless form and I understand that they had access to all of that information today.
>
> I am very perplexed why you did not contact me to simply set up a time. Please explain.
>
> …

[46] At 10:07 a.m. the following morning, June 4, Mr. McLean emailed Mr. Bussanich again:

> Dear Mr. Bussanich:
>
> I am away from the office but I am not sure the nature of the complaint.
>
> The office is wide open for the staff to investigate. I have left it open for them to investigate at their discretion.
>
> The password to the computer is revenge99.
>
> I am informed that the investigators did NOT come this morning and have not entered the office.
>
> I have made certain that the office is available for the rest of the week and I have cancelled my meetings in the office.
>
> They are entitled to make copies of any documents that they wish to and use my printer.
>
> I am cooperating fully with the investigation.
>
> I was informed that they were in the office for the balance of the day yesterday.
>
> If there are any accounting documents or explanations, the investigators can contact [my accountant].
>
> I have my hard copy files at the office.
>
> They can copy any and all documents from my hard drive and Dropbox, with all of the files, as they are available to them.
>
> I object to any complaint that you have lodged as they have had full access.
>
> I will be making an exclusion request to certain contents which will be delivered to them at the end of the day.
>
> If the investigators choose not to attend the office, then I reserve the right to bring this correspondence to the attention of any panel or court with respect to this alleged complaint.
>
> …

2017 BCSC 987 (CanLII)

[47] At 10:12 a.m. Mr. McLean re-sent that email stating:

> Further to the below, I checked my hard drive and CPU's this morning and it is clear that they have gone through files so any complaint is vigorously denied.
>
> Further, I did not receive any requests from you and there was full access to all of my files.
>
> I would be happy to discuss via phone but I would prefer that you email in the interim so that this is a matter of documentary record.

I observe at this point that the Law Society denies that it had gone through any files, hard drive or CPUs before that morning. There is no sworn evidence to the contrary.

[48] Mr. McLean followed this up with another email at 10:15 a.m.:

> I am away from the office in a settlement meeting that I have instructed the reception to allow the LSBC full access to the office.
>
> I will check periodically to see if they have arrived in the office.
>
> If they chose [*sic*] not to do so, I will seek your confirmation and/or an affidavit from a member of the office that they chose not to do so.
>
> Once again, if you need anything, please email and will provide any document that is requested.

[49] Mr. Bussanich instructed his team that they now had consent, and so Mr. McCartney, Ms. Chan and Ms. Ho proceeded with their investigation. They were joined by Colin Cree of eForensic Services Ltd. Mr. McCartney arranged for Mr. Cree to make a forensic copy of Mr. McLean's hard drive, which took some time.

[50] As we have seen, the investigation order, through its explanatory notes, provided for an exclusion process by which Mr. McLean could request that the certain documents captured by the investigation, including documents contained in the forensic copy of his computer hard drive, be excluded from the Law Society's review. Mr. McLean invoked that process in relation to his Dropbox and cell phone, and other communications, on the ground that they were personal or privileged. The Law Society did not agree with this claim, noting that Mr. McLean had not provided access to his mobile device in any event, and that a claim of privilege covered only communications between Mr. McLean and his own counsel. Ultimately, Mr. McLean

2017 BCSC 987 (CanLII)

exercised his right to appoint a lawyer to adjudicate his exclusion request, and selected Robert Deane of the law firm Borden Ladner Gervais for this purpose.

[51] Mr. Deane received no submissions from Mr. McLean and observed that he could deal only with records that had been obtained by the Law Society and of which copy images had been created. Information or records could be excluded only if they were personal in nature, clearly not relevant to the Law Society's investigation, and clearly not relevant to the Law Society's broader mandate to regulate the legal profession in the public interest.

[52] While able to conclude that Mr. McLean had not discharged the evidentiary burden on him, Mr. Deane went on to say this:

> 68. While the foregoing analysis is sufficient to dispose of the Exclusion Request, the unusual circumstances of this proceeding have caused me significant concern. Privacy interests are to be protected, together with, of course, the legitimate privilege interests, if any, of the member. The member's personal circumstances, as disclosed in the record before me and assuming the facts related in the correspondence from the member to be true, are concerning.
>
> 69. For this reason, and with some misgivings, I elected to review the records contained in the Office Forensic Copies or the Bookkeeper Forensic Copies. I did so in order to attempt to determine whether there were any records which appeared, on their face, to be indisputably (a) personal in nature (as opposed to law practice-related); (b) clearly not relevant to the Law Society's investigation; and (c) clearly not relevant to the Law Society's broader mandate to regulate the legal profession in the public interest. I also attempted to identify records that were privileged in favour of the member. I was, of course, significantly hampered because I had no submissions or evidence from the member to assist me.
>
> …
>
> 74. Doing the best I could with the limited assistance made available to me, I did not identify any records that would properly be excluded from the scope of the Rule 4-43 Order.

[53] Accordingly, Mr. Deane dismissed Mr. McLean's exclusion request.

[54] In Mr. McLean's submission, by taking the step of reviewing the records, Mr. Deane effectively committed an unlawful search and seizure of those records on behalf of the Law Society without Mr. McLean's consent, and in breach of his privacy

2017 BCSC 987 (CanLII)

rights. As I find that submission to be utterly devoid of merit, I propose to deal with it right away.

[55] On the evidence before me, it is clear that Mr. Deane was acting as an independent adjudicator selected by Mr. McLean. As such, his actions are protected by absolute privilege and in any event cannot be attributed to the Law Society. Moreover, his review of the record was a reasonable course of action taken in Mr. McLean's interest and necessitated by Mr. McLean's failure to assist him with any submissions or guidance. It represented the only chance Mr. McLean had of obtaining an exclusion order. I need say no more about it.

2017 BCSC 987 (CanLII)

4.0 DISCUSSION

[56] Mr. McLean combined his submissions in response to the defendants' application for summary judgment with his submissions in support of his own application for summary judgment. I will therefore consider those two applications before proceeding to deal with Mr. McLean's documents and information applications.

4.1 <u>The summary judgment applications</u>

4.1.1 *Overview*

[57] There is no dispute as to the law governing summary judgment applications brought under Rule 9-6 of the *Supreme Court Civil Rules*. I am not confined to the pleadings as I would be under Rule 9-5(1)(a), but I may not weigh evidence as I could in a summary trial application under Rule 9-7. As the Court of Appeal noted in the passage quoted above from *McLean CA*, each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried, and bears the evidentiary burden accordingly. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts.

[58] On its application to dismiss the conspiracy claim against the personal defendants other than Mr. Dirk, the Law Society has led evidence from each of those

defendants denying any conspiracy, any intention to injure the plaintiff, any concerted action, and any malice or bad faith. The Law Society contends that in response, Mr. McLean has failed to put "his best foot forward" and has led no evidence to refute this evidence. The Law Society then relies on the following statutory provisions:

[59] In the *Legal Profession Act*:

> 86(1) No action for damages lies against a person, for anything done or not done in good faith while acting or purporting to act on behalf of the Society or the foundation under this Act.

[60] In the *Disciplinary Authority Protection Act*, RSBC 1996, c 98:

> 1. If,
>
> (a) by an Act a corporation is established as having one of its purposes the regulation of the profession or occupation practised or carried on by members of the corporation, and
>
> (b) disciplinary powers over the members of the corporation in respect of their conduct in the profession or occupation regulated are conferred by the Act on the corporation, or on any body of its members, or on any official or member of the corporation,
>
> no liability is incurred by the corporation, or by any body of the members, or by any official or member of the corporation, or by any person retained his counsel, solicitor or agent by the corporation for any act or thing done in the exercise of the disciplinary powers conferred or in doing any act or thing in preparation for the exercise of those powers, unless the act or thing is done maliciously and without reasonable and probable cause.

[61] In the *Administrative Tribunals Act*, SBC 2004, c 45:

> 56(1) In this section, "decision-maker" includes a tribunal member, adjudicator, or registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.
>
> (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted
>
> (a) in the performance or intended performance of any duty under an enactment governing an application, or
>
> (b) in the exercise or intended exercise of any power under an enactment governing an application.

2017 BCSC 987 (CanLII)

> (3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

[62] In response, and in support of his own application for judgment, Mr. McLean relies upon the "unlawful means" branch of the tort of conspiracy, although he has pleaded both branches. He points to evidence he has obtained on discovery and in documents that, he asserts, establish that the investigation order was unlawful, from which it follows that he was subjected to unlawful search and seizure given his denial of consent. From the undisputed evidence of acts directed towards the plaintiff that involved unlawful conduct, he argues, it can be inferred that the personal defendants, all of whom were involved in the process in one way or another, acted in concert. Since they knowingly breached the common law, Mr. McLean asserts, there can be no immunity under the legislation upon which the Law Society relies. Therefore, he submits, the court can give judgment in his favour with damages to be assessed, and can make the declarations he seeks.

[63] The Law Society defendants respond to Mr. McLean's application on several levels. First and foremost, they maintain that he has invoked the wrong procedure. As suggested by the Court of Appeal, he should be seeking judicial review of the investigation order, not advancing (at least at this stage) an action for damages, including a claim for declaratory relief that is properly the subject of administrative law.

[64] In these circumstances, I turn first to consider Mr. McLean's application. I will then discuss the Law Society's application before turning to the interlocutory matters.

4.1.2 *Mr. McLean's application for summary judgment*

[65] As I see it, and as the Court of Appeal intimated, it is important to distinguish between the different questions that arise from Mr. McLean's claim.

2017 BCSC 987 (CanLII)

[66] The first question is whether the Law Society exceeded its statutory jurisdiction when it granted the investigation order; in other words, was the order *ultra vires* the Law Society? If so, it must be set aside.

[67] The second question is whether, assuming that it had jurisdiction to grant the order, the Law Society nevertheless acted improperly in the manner in which it granted the order, giving rise to procedural unfairness, so that the order must be set aside and, presumably, remitted to the Chair of the Discipline Committee. On this aspect, Mr. McLean relies upon: the failure of Mr. Riddell to give reasons for his decision to grant the order; the absence of information under oath to support the decision; the fact that the order was granted without notice to Mr. McLean; the absence of procedural safeguards (such as would, for instance, be available in an application for an *Anton Pillar* order, to which Mr. McLean likens the investigation order); and the conflict of interest that arises from what Mr. McLean terms a solicitor-client relationship that existed between Mr. Bussanich and Mr. Riddell.

[68] If either of those two questions were resolved in favour of Mr. McLean, then it would follow that the steps taken by the Law Society in carrying out the order were unlawful. The question of consent becomes immaterial.

[69] The third question is whether, assuming that the Law Society had jurisdiction to grant the order and did not act improperly in doing so, the Law Society nevertheless carried out the order in a manner that constitutes an unreasonable search and seizure. This turns primarily on the question of consent.

[70] The third question is one that could indeed be the subject of a civil action for damages, but I am satisfied that it is not one that can be decided on this application. This is because I would be obliged to weigh the evidence concerning whether and to what extent Mr. McLean consented to the investigation of his records and the copying of his computer contents.

[71] Mr. McLean submits that the evidence has evolved since the hearings before Gerow J. It is now clear, he argues, that any consent he gave on June 4, 2014,

2017 BCSC 987 (CanLII)

could not have been informed consent and that in any event he did not consent to the effective seizure of his office on June 3, 2014, whatever Ms. Chapman might have said to Mr. McCartney, Ms. Chan and Ms. Ho.

[72] As to informed consent, he points out, for instance, that he was never informed that if he consented, information over which he wished to assert privilege or irrelevance would nevertheless be reviewed by the Law Society, as it was when Mr. Deane looked at it in the course of considering his exception application. I see no merit in that position, for reasons previously discussed. As another example, he complains that he was not informed that he could and should consult counsel, and was not given time to do so. He also maintains that he was coerced into consenting because of the threat of disciplinary action if he failed to cooperate.

[73] The fact remains that there is a conflict in the evidence given what Mr. McLean now says in relation to consent, what he said in his emails on June 3 and 4, 2014, what Ms. Diaz says, and what Mr. McCartney, Ms. Chan and Ms. Ho say about the events that transpired on those two days. As well, the explanatory notes that accompanied the order did include the recommendation to obtain independent legal advice. To what extent Mr. McLean paid any attention to that is not clear. In my view, resolution of these conflicts would require at least the ability to weigh the evidence contained in the affidavits, and very possibly cross examination on those affidavits. That is not possible on an application for summary judgment.

[74] Turning to the first two questions, I agree with counsel for the Law Society that these must properly be resolved on an application for judicial review brought by petition under the *Judicial Review Procedure Act*. This is because these questions focus on the validity of the investigation order and the lawfulness of the Law Society's exercise of its regulatory powers.

[75] It is tempting to resolve them here. The authority of the Law Society to grant an investigation order under Rule 4-43, pursuant to section 36 of the *Legal Profession Act*, seems clear. The defects of which Mr. McLean complains appear to me to be misconceived. He seeks to treat the process as though Mr. Riddell were

2017 BCSC 987 (CanLII)

adjudicating a dispute between two parties, which is not the case. But I conclude that this is not the proceeding in which these issues should properly be decided.

[76] It will be recalled that in *McLean CA* at paras 23-26, the Court of Appeal declined to resolve issues of the scope of the Law Society Discipline Committee's authority under Rule 4-43 and the meaning of its order on the ground that this was an issue usually challenged by judicial review, but which had not been raised in the court below. The court concluded that the question must be dealt with in the right case brought in the procedurally correct manner. This is because "the questions asked by a court reviewing a decision of an administrative body are different from the questions asked by a court interpreting legislation *ab initio*". It is not a matter of mere form. It is a matter of substance.

[77] Thus in *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342 at para 58, the Court of Appeal held that a claim that an authority acted contrary to the duty of fairness is properly a matter for judicial review, not a tort claim: "a civil claim is not the appropriate forum for a court to consider the process of an administrative decision maker". The claim was therefore considered to be an abuse of process.

[78] Similarly, in *Willow v Chong*, 2013 BCSC 1083 at para 40, Madam Justice Fisher held that it was improper to pursue in an action for damages a claim related to the fairness of the process and the basis for the decisions and actions taken by the administrative body. This was so even though the plaintiff claimed damages, which are not available in applications for judicial review. Madam Justice Fisher noted that the essential complaint stemmed from dissatisfaction with the conduct and the decisions of an administrative agency, just as in *Cimaco*, when the claims were reduced to their essence, they fundamentally rested on the assertion that the authority was wrong in its conclusion.

[79] In my view, the same can be said of this case. Even though Mr. McLean claims damages for breach of his *Charter* rights and his privacy rights, and in tort, his claim fundamentally rests on the assertions that the investigation order was *ultra*

2017 BCSC 987 (CanLII)

vires the Law Society and was made in a manner that breached the decision-maker's duty of fairness. Indeed his claim for damages for the tort of conspiracy, as he framed it before me, rests entirely on the asserted unlawfulness of the investigation order. Hence the relief Mr. McLean seeks in the form of a declaration that the investigation order is void and an order setting it aside. These would constitute an order for *certiorari*, which the *Judicial Review Procedure Act*, RSBC 1996, c 241, requires be brought by petition.

[80] Mr. McLean submits that the court has the power to deal with issues concerning the exercise or purported exercise of a statutory power summarily within the context of an action, relying on section 13 of the *Judicial Review Procedure Act*:

> **13**(1) On the application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the exercise, refusal to exercise or proposed or purported exercise of a statutory power be disposed of summarily, as if it were an application for judicial review.
>
> (2) Subsection (1) applies whether or not the proceeding for a declaration or injunction includes a claim for other relief.

[81] This section undoubtedly gives the court some procedural leeway in certain contexts. In my view, it does not apply to this context where the essential claim is for prerogative relief in the nature of *certiorari* because of administrative law defects. To hold otherwise would make nonsense of the comments of the Court of Appeal in *McLean CA*, and in *Cimaco*. What section 13 contemplates is a properly constituted civil action in which a declaration or injunction is sought that could raise an issue about the exercise of a statutory power. It does not contemplate an improperly constituted civil action that *turns* on the issues of the validity and exercise of a statutory power.

[82] Mr. McLean then argues that he could not pursue judicial review of the investigation order because (1) Mr. Riddell gave no reasons for his decision, and (2) Mr. McLean was provided with no record that would allow him to consider whether review was justified until after he commenced the action.

2017 BCSC 987 (CanLII)

[83] With respect to the first point, Mr. McLean cites *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 for the proposition that "where there are no reasons, there is nothing to review". That is not, however, quite what the Supreme Court of Canada said. What Justice Abella, for the Court, said was this:

> [22] It is true that the breach of the duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonable analysis.
>
> [Underlining added; italics original.]

[84] It is important to understand that the context for that comment was a discussion about the standard of review, not whether a decision was properly the subject of judicial review. In this case, whether the circumstances required reasons is one of the bases upon which Mr. McLean challenges the decision. It is not a basis for side-stepping the process of judicial review.

[85] As to the second point, I see no merit to it. If Mr. McLean was able to start an action challenging the validity of the order without having seen the record, there was nothing to stop him from commencing a petition for judicial review in the same circumstances.

[86] I note further in this regard that Mr. McLean was cited for failing to comply with the investigation order, having not provided all of the records the investigators requested. A hearing panel found him guilty of professional misconduct, levelled a fine and ordered Mr. McLean to pay costs. Mr. McLean did not exercise his statutory right of appeal from this decision, which of course depended upon the validity of the investigation order. One would have expected a direct challenge to that validity in the context of that proceeding, rather than a collateral attack in this action.

[87] Mr. McLean then asserts that the Law Society is in essence estopped from raising this procedural argument because it "attorned" to the procedure he followed

2017 BCSC 987 (CanLII)

in this case by pleading in response to his notice of civil claim, and consenting to amendments, rather than filing a jurisdictional objection. Indeed, as the Court of Appeal observed in *McLean CA*, the Law Society had not raised this issue in the applications before Gerow J.

[88] I agree with the Law Society that this submission misses the point. The Law Society does not argue that the court lacks jurisdiction over the parties and their dispute. Some of Mr. McLean's claims, such as his claim for damages for conspiracy, could only be advanced in a civil action. But the court's jurisdiction to grant relief in the nature of judicial review ought property to be exercised in accordance with the requirements of the *Judicial Review Procedure Act*. The claim for damages will have to await that proceeding. The procedure to be followed has substantive legal implications as the Court of Appeal observed. Moreover, any failure by the Law Society to raise this point earlier cannot saddle the court with having to determine an issue by an improper procedure.

[89] It follows that Mr. McLean's application for summary judgment must be dismissed.

4.1.3 *The Law Society's application for summary judgment*

[90] For the reasons just discussed, this is not the appropriate procedure for determining whether, as Mr. McLean contends, the Law Society's actions were unlawful. The question here is whether I can conclude that on the record before me, the Law Society has satisfied the burden upon it of demonstrating in relation to the claim against the personal defendants other than Mr. Dirk that as to a material fact, there is no genuine issue requiring trial (see *McLean CA* at para 36).

[91] In this regard, it is open to me to draw inferences from the evidence so long as those inferences are strongly supported by undisputed facts.

[92] The personal defendants other than Mr. Dirk have denied any concerted action, any intent to injure the plaintiff, any malice, and any bad faith. How has Mr. McLean countered this? He argues that I should infer malice or bad faith

2017 BCSC 987 (CanLII)

because of the alleged unlawfulness of the conduct. I do not find any such inference to be supported, strongly or otherwise, by the undisputed facts. For instance, I can find no possible basis for inferring that any of the personal defendants acted maliciously or in bad faith because Phil Riddell wrongly failed to give reasons for his decision, which is one of the bases of unlawfulness alleged, or because Mr. Bussanich did not give his memorandum to Mr. Riddell under oath. Acting in error or in excess of jurisdiction, if that be assumed, does not give rise to an inference of malice or bad faith.

[93] Similarly, there is no evidence of concerted action. Mr. McLean relies on *Shaw v Lewis*, 1948 CarswellBC 23, [1948] 1 WWR 627 (BCCA), for the proposition that no more need be shown than two or more people involved in an unlawful act. In my view, it does not support that position. As O'Halloran JA noted at para 13 (CarswellBC), "in civil law the conspiracy agreement must be carried into execution". Different defendants played different roles, but I can find no basis upon which I could infer that they agreed to act together in a manner that was unlawful and which was carried to execution, or that there is even a question that they might have done so. Mr. McLean offers, for instance, no evidence or history from which I could infer a motive that might lead professionals of otherwise blameless reputation to take such steps, or which would lead me to conclude that their conduct required closer examination. The evidence does not give any air of reality to his allegations.

[94] It might be possible to infer that those persons who attended Mr. McLean's office on June 3 and 4 acted in concert in a manner that may prove to have been unlawful, but those persons are not defendants and had nothing to do with the granting of the order; in any event, there is no basis upon which malice or bad faith could be inferred against them.

[95] In these circumstances, I conclude that all of the personal defendants (other than Mr. Dirk) are entitled to the protection of section 86 of the *Legal Profession Act* and section 1 of the *Disciplinary Authority Protection Act*. Mr. Riddell is also entitled to the protection of section 56 of the *Administrative Tribunals Act*.

2017 BCSC 987 (CanLII)

[96] It follows that Mr. McLean's claims against those defendants must be dismissed. This leaves standing, of course, his claim in battery against Mr. Dirk, and his claim against the Law Society for damages for breach of his *Charter* and privacy rights. If those claims are to be resolved summarily, it must be by way of summary trial, not summary judgment, and the questions of administrative law must first be determined by the proper procedure.

4.2 The interlocutory applications

[97] Mr. McLean's first application for an order requiring the Law Society to provide information and documents relating to an alleged "fraud investigation" he believes it is conducting into him. This investigation purportedly led investigators to attend two times in the fall of 2016 upon a beauty shop in North Vancouver where Mr. McLean had had his address for service. According to the business operator, these persons, who were otherwise unidentified, purported to be from the Law Society and said they needed to speak with Mr. McLean immediately because they were investigating him for fraud.

[98] The Law Society had only recently received details of this evidence, and had denied in a letter to Mr. McLean that it was carrying on any such investigation. For completeness, I directed the Law Society to file an affidavit to that effect. The Law Society has now done so, filing an affidavit from Deborah Armour sworn June 7, 2017. Ms. Armour, who is the Law Society's Chief Legal Officer, deposes that the Law Society did not undertake any fraud investigation concerning the plaintiff in the fall of 2016, and did not retain investigators to investigate Mr. McLean for fraud in 2016 or any other time.

[99] Quite apart from Ms. Armour's affidavit, the evidence filed in support of the application is less than compelling, and I do not accept it as establishing any such investigation by the Law Society. Moreover, although the applications seeks information, it is akin to an injunction, and it is difficult to see how it fits into the parameters of this proceeding, which concerns the actions of the Law Society in June 2014 in relation to the granting and execution of a Rule 4-43 order.

2017 BCSC 987 (CanLII)

[100] The application is dismissed.

[101] The second application is for a better description of a group of documents listed under Part IV of the Law Society's very extensive list of documents over which the Law Society claims privilege. The Law Society's list of privileged documents alone is more than 600 pages long and includes much detail. The documents in question, however, are not fully described. One group, from Schedule "C" ("Solicitor- Client Privilege"), consists of a considerable number of documents described as attachments to a privileged opinion from Mr. Bussanich to the Chair of the Discipline Committee. Apart from the word "attachment", they are described only by document number and date. I am assured by counsel for the Law Society that, to the extent any of these attachments is not independently privileged, that is, by reason other than its inclusion as an attachment to Mr. Bussanich's opinion, it has been separately listed and disclosed. I accept that assurance.

[102] The second group, on Schedule "F", consists of a large number of documents under the heading "Tribunal Privilege". Once again, their description is limited to document number and date. The List of Documents defines "Tribunal Privilege" as:

> …documents prepared by or for the purposes of the Law Society's hearing panels and a panel of benchers convened in connection with applications concerning the plaintiff pursuant to Law Society Rule 3-7.1, including correspondence among the hearing panels and their counsel and staff, draft decisions, working papers, notes, draft communications to the parties, draft orders, and draft notices.

[103] The Law Society submits that further description of these documents would, by their nature, compromise the claim of privilege.

[104] With respect to the group of "attachments", the Law Society asserts that disclosing the subject matter of those documents would reveal what had been provided in support of the opinion, and therefore disclose information from which the nature of complaints could be discerned.

[105] With respect to the "Tribunal Privilege" documents, the Law Society again submits that the Tribunal privilege would be compromised by further description.

2017 BCSC 987 (CanLII)

[106] In assessing the listing of privileged documents, it is always necessary to balance the appropriate protection of the privilege with sufficient disclosure to allow the opposing party to consider whether a challenge to the claim of privilege is warranted.

[107] In the particular circumstances of this case, I conclude that a proper balancing of those interests does not require the Law Society to provide more detailed descriptions. I come to this conclusion because of the nature of the privilege asserted and the type of documents covered by that assertion.

[108] In relation to the opinion attachments, it is of course open to Mr. McLean to challenge the assertion of privilege over the opinion, and that document is appropriately described. The assertion of privilege over the attachments must stand or fall with the status of the opinion. If the opinion is privileged, then the attachments, *qua* attachments, are clearly privileged as well no matter what they are. It follows in my view that further disclosure that would threaten to vitiate the privilege is not warranted.

[109] Similarly, the description of the documents covered by the claim of Tribunal Privilege is clear, as quoted above. Further assignment of those categories to the particular documents listed would add nothing. If Mr. McLean seeks to challenge, for instance, the claim of privilege over “correspondence among the hearing panels and their counsel and staff”, or “draft communications to the parties”, he can do so without needing to know which specific documents of which date come under each heading, at the risk of compromising the claim of privilege.

[110] Accordingly, this application, too, is dismissed.

5.0 CONCLUSION

[111] Mr. McLean’s application for summary judgment against the defendants, with damages to be assessed, is dismissed.

2017 BCSC 987 (CanLII)

[112] The defendants' application for summary judgment dismissing the claim as against the personal defendant's other than Mr. Dirk is allowed. The claim is accordingly dismissed as against the defendants Alison Kirby, John Nalleweg, Kieron Grady, Eva Milz, Mark Bussanich, Deborah Armour, Howie Caldwell and Philip Riddell.

[113] Mr. McLean's two interlocutory applications are also dismissed.

[114] Two claims remain standing: Mr. McLean's claim against Mr. Dirk for damages for battery and assault, and his claim against the Law Society challenging the lawfulness of the investigation order, and claiming damages for unreasonable search and seizure and breach of privacy rights.

[115] As I indicated in dismissing Mr. McLean's application for summary judgment, his challenge to the lawfulness of the making and execution of the investigation order must be decided under the *Judicial Review Procedure Act* through a petition for judicial review. Until that has taken place, or until further order of the court, this action is stayed.

[116] The defendants are entitled to their costs.

"GRAUER, J."

2017 BCSC 987 (CanLII)

TAB 41

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLean v. Law Society of British Columbia,* 2017 BCSC 1713

Date: 20170911
Docket: S175785
Registry: Vancouver

2017 BCSC 1713 (CanLII)

Between:

Kevin McLean

Petitioner

And:

Law Society of British Columbia

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Appearing on his own behalf:	Kevin McLean
Counsel for the Respondent:	Geoffrey B. Gomery, Q.C. Julia K. Lockhart
Place and Date of Hearing:	Vancouver, B.C. September 6, 2017
Place and Date of Judgment:	Vancouver, B.C. September 11, 2017

[1] **THE COURT:** Mr. McLean, who is disbarred as a lawyer, has brought a petition against the Law Society. The petition was preceded by four actions Mr. McLean brought against the Law Society. Mr. McLean discontinued the first two actions, Justice Grauer stayed the third, and Justices Pearlman and Bowden stayed the fourth.

[2] Justice Grauer provided the following background in *McLean v. Law Society of British Columbia*, 2017 BCSC 987, at para. 1:

> The plaintiff, Mr. McLean, is a former lawyer who was called to the bar in August 2010. His practice did not go smoothly. By October 2012 he had attracted the attention of the Discipline Committee of the Law Society of British Columbia, which authorized a conduct review. In 2013 he was subject to a period of administrative suspension for failing to provide accounting reports, and a panel of three benchers placed administrative conditions on his practice in January 2014. Ultimately, at the end of 2014, Mr. McLean allowed his membership in the Law Society to lapse, and on June 29, 2015, a hearing panel formally ordered him disbarred as ungovernable.

[3] Costs have been ordered against Mr. McLean in favour of the Law Society and fines have been levied against Mr. McLean by the Law Society. All of those obligations are the subject of entered orders in this Court. Mr. McLean has paid none of them. The total he owes is $65,371. Of that, the fines comprise $16,500 and the costs $48,871. Some of the costs are court costs; others are Law Society hearing costs. The following is a list of the eight costs orders and fines:

(a) $5,155.92 stated in a costs certificate dated June 2, 2017 arising from first action (S145607) Mr. McLean brought against the Law Society and its employees, which he discontinued;

(b) $3,618.27 stated in a costs certificate dated June 2, 2017 arising from second action (S148231) Mr. McLean brought against the Law Society and its employees, which he discontinued;

(c) $11,969.76 stated in a costs certificate dated May 23, 2017 arising from the Law Society's successful appeal (CA43059) of various summary judgment applications in the third action Mr. McLean brought against the Law Society and its employees;

2017 BCSC 1713 (CanLII)

(d) $10,130 (including a fine of $6,500) arising from the Law Society's discipline process in 2015 LSBC 06, registered as a judgment in S167374 on August 12, 2016;

(e) $6,785 arising from the Law Society's discipline process in 2015 LSBC 30, registered as a judgment in L170081 on March 8, 2017;

(f) $25,912.50 (including a $10,000 fine) arising from the Law Society's discipline process in 2015 LSBC 47, registered as a judgment in L-170082 on March 8, 2017;

(g) $1,300 arising from the Law Society's discipline process in 2016 LSBC 04, registered as a judgment in L170080 on March 8, 2017; and

(h) $500 stated in an order dated July 5, 2017 representing costs payable on application brought by the Law Society in the fourth action (S173987) Mr. McLean brought against the Law Society and its employees.

[4] Mr. McLean scheduled his petition to be heard September 22, 2017. As he has done in the past in his litigation with the Law Society, Mr. McLean set the hearing date without conferring with counsel for the Law Society. He estimated that his petition could be argued in 50 minutes. It is 73 pages long. Law Society counsel estimates the petition will occupy two hearing days. The latter estimate is the more reliable.

[5] In its application, filed August 17, 2017, the Law Society seeks the following three orders plus costs:

1. An order that the petitioner pay certificates of judgment and cost orders totaling $65,371.45 to the respondent and <u>post $8,100 as security</u> for the respondent's costs in this proceeding;
2. Until the petitioner satisfies the outstanding certificates of judgment and cost orders and posts the security described in the preceding paragraph, an order that the <u>petition be stayed</u>;
3. In the alternative to orders 1 and 2, an order <u>adjourning the hearing</u> of the petition set for September 22, 2017 to a date convenient to counsel for the respondent based on a time estimate of two days . . .

[Emphasis added.]

2017 BCSC 1713 (CanLII)

[6] There is no defence against Mr. McLean's obligation to pay $65,371. Impecuniosity would not negate those obligations. In any event Mr. McLean has not given any evidence about whatever may be his impecuniosity.

[7] There is no need for a further order to enforce Mr. McLean's payment obligations listed above. Those obligations remain outstanding ongoing.

[8] Before addressing the other relief the Law Society seeks, I set out some of the relevant case authority. The following passage is often cited when security for costs is sought against an individual rather than a company. It is at para. 27 in *Han v. Cho*, 2008 BCSC 1229:

> The onus is on the applicant to establish that he or she will be unable to recover costs (*Bronson #1* at para. 45). The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[9] The court exercises its inherent jurisdiction in deciding whether to order security for costs against an individual. See *Gichuru v. Pallai*, 2014 BCSC 2330.

[10] I noted earlier that Mr. McLean has not said whether he is impecunious. All that is certain is that he has paid none of the costs or fines he owes to the Law Society. He has taken no steps toward doing so.

[11] In *Wang v. British Columbia Medical Association*, 2011 BCSC 1659, Justice Dickson, as she then was, granted a stay order against Dr. Wang until she paid an outstanding costs order so as to prevent an abuse of the court's process. On the facts before her, Justice Dickson did not also order security for costs.

[12] Finally, I refer again to *Gichuru v. Pallai*, cited above, which was decided by Justice Fenlon, as she then was. Her Ladyship ordered security for costs, with a stay pending the posting of security, because the individual plaintiff had failed to pay

2017 BCSC 1713 (CanLII)

costs previously ordered against him. Leave to appeal Justice Fenlon's order was denied and the denial of leave was sustained by a three member division of the Court of Appeal. See 2015 BCCA 81 and 2015 BCCA 189.

[13] The authorities cited above, and the other cases to which I was referred, demonstrate the Court's broad discretion associated with the relief the Law Society seeks.

[14] In my view, Mr. McLean, who elects to keep his capacity to pay costs to himself, and who has incurred a substantial list of unpaid court costs, should be ordered to post security before taking the Law Society into court yet again. That is particularly so where, as here, the plaintiff has demonstrated no willingness or attempt to make any of the payments which have been ordered. The Law Society's requested order for security for costs is granted.

[15] The hearing of the petition is stayed until Mr. McLean posts security in a form satisfactory to the registrar and until he pays the court costs owing, which are those listed in subparagraphs (a), (b), (c) and (h), quoted above at para. 3 of these reasons. I will not stop Mr. McLean from working with counsel for the Law Society in the meantime to schedule two days for the hearing of the petition. The resulting hearing date will be one for which both sides are available. However, the posting of the security for costs in satisfactory form, and the payment of the costs listed in the four subparagraphs I have listed above in this paragraph of my reasons, need to be completed 30 days before the scheduled hearing date for the petition. If they are not, the hearing will be adjourned and not reset until they are.

[16] I turn now to an application Mr. McLean brought before me. He sought a declaration that Law Society Rule 3-5.01 is *ultra vires* the Law Society as being unauthorized by the parent statute. Rule 3-5.01 reads as follows:

> **Failure to produce records on complaint investigation**
>
> **3-5.01**(1) Subject to subrules (2) and (3), a lawyer who is required under Rule 3-5 or 4-43 to produce and permit the copying of files, documents and other records, provide information or attend an interview and answer

2017 BCSC 1713 (CanLII)

> questions and who fails or refuses to do so is suspended until he or she has complied with the requirement to the satisfaction of the Executive Director.
>
> (2) When there are special circumstances, the Discipline Committee may, in its discretion, order that
>
> (a) a lawyer not be suspended under subrule (1), or
>
> (b) a suspension under this Rule be delayed for a specified period of time.
>
> (3) At least 7 days before a suspension under this Rule can take effect, the Executive Director must deliver to the lawyer notice of the following:
>
> (a) the date on which the suspension will take effect;
>
> (b) the reasons for the suspension;
>
> (c) the means by which the lawyer may apply to the Discipline Committee for an order under subrule (2) and the deadline for making such an application before the suspension is to take effect.

[17] Mr. McLean argues that Rule 3-5.01 is not authorized by s. 26.01 of the *Legal Profession Act*. He may be right, but the Law Society does not defend the authority for Rule 3-5.01 as coming from s. 26.01. The Law Society instead relies on ss. 3, 11, 26, 36, and 37.1, and particularly I believe s. 26, as the authorizing sections. From my review of those sections, the Law Society appears to be right, particularly when the sections are read with the Supreme Court of Canada's decision in *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras. 9, 20–22, 27–33, and 41. If I were to decide the question of *vires* in these reasons, my decision would probably be against Mr. McLean.

[18] If it was not for a procedural problem preventing the statutory analysis at this stage, I would quote here and proceed to analyze the sections from the statute both sides have referred to me. The procedural problem is this. The declaratory relief Mr. McLean seeks here is a part of the relief he seeks, and a part of the full argument to be developed, in the petition itself. The petition was not scheduled before me on its merits, and the request for the declaration could not be argued in this interlocutory hearing except, if at all, by consent, which was not given. I therefore do not grant or deny the declaratory relief Mr. McLean seeks. (These reasons should not be construed as containing a substantive ruling on the question of *vires* for Rule 3-5.01. That issue remains outstanding.)

2017 BCSC 1713 (CanLII)

[19] Finally, before me, Mr. McLean asked for an order that the Law Society either destroy or give to him the forensically made copy it has of Mr. McLean's computer hard drive containing his documents relevant to the disputes he has or has had with the Law Society. Mr. McLean has the original hard drive in his possession. He alleges that the order pursuant to which the Law Society obtained the original hard drive and made the copy is an unauthorized order. Time did not permit that point to be developed in argument before me. Had there been enough time, the Petitioner would have run into the same procedural problem seen above regarding Rule 3-5.01.

[20] The Law Society replies, therefore, that the seizure order is presumptively sound at this stage, and that two of the four actions Mr. McLean commenced against the Law Society are only stayed and not dismissed. It adds that Mr. McLean is hopeful that the stay will be lifted at least for the third action. The Law Society, I note, is not investigating Mr. McLean at present, due no doubt in part to his current status as a disbarred former member.

[21] I order as follows. The Law Society will continue to hold the copy of the hard drive. It will not use documents from the hard drive in any ongoing proceeding with Mr. McLean without Mr. McLean's permission or a further order of this Court. If there comes a stage when Mr. McLean states in writing that all present or further claims by him against the Law Society are at an end, and that he will not apply for readmission, the Law Society will destroy the copy of the hard drive, or return it to Mr. McLean, as he elects.

[22] Costs of the applications before me are to the Law Society in any event of the cause, but are not payable forthwith.

"MACINTOSH J."

2017 BCSC 1713 (CanLII)

TAB 42

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McLean v. British Columbia (Attorney General),* 2019 BCCA 133

Date: 20190403
Docket: CA45786

Between:

Kevin A. McLean

Appellant
(Petitioner)

And

Attorney General of British Columbia

Respondent
(Respondent)

Before: The Honourable Mr. Justice Tysoe
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2018 (*McLean v. British Columbia (Attorney General)*, 2018 BCSC 2052, Vancouver Docket S1711429).

Oral Reasons for Judgment

No one appearing on behalf of the Appellant

Counsel for the Respondent: S.A. Bevan

Place and Date of Hearing: Vancouver, British Columbia
April 3, 2019

Place and Date of Judgment: Vancouver, British Columbia
April 3, 2019

2019 BCCA 133 (CanLII)

Summary:

Application by the respondent to dismiss appeal on the basis that it was not brought within the time period stipulated by s. 14 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, and applications by the appellant for various forms of relief. Held: the respondent's application is dismissed. The notice of appeal was not served within the appeal period and, in addition, the faxing of the notice of appeal to the fax number included in the respondent's address for service in the response to petition did not constitute proper service. The respondent's notice of motion was not a nullity because it was filed in the Victoria Registry when the application was scheduled to be heard in Vancouver. However, it was not in the interests of justice to dismiss the appeal at this stage. With respect to the appellant's applications, the Registrar did not act without jurisdiction in declining to set a date for the hearing of the appeal pending the outcome of the respondent's application. It was either unnecessary or inappropriate to deal with the remainder of the appellant's applications.

2019 BCCA 133 (CanLII)

[1] **TYSOE J.A.**: The parties have filed competing applications in this appeal. The Attorney General has filed an application for an order that the appeal be dismissed on the basis that the notice of appeal was not served within the 30-day time period stipulated in s. 14 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 and that, therefore, the appeal has not been properly brought. Mr. McLean has filed an application seeking various forms of relief, including a declaration that the Attorney General's notice of motion is a nullity and declarations regarding the setting of the appeal for hearing. Mr. McLean has filed a second application for an order that the appeal be heard by way of written submissions.

[2] Mr. McLean did not appear in person at today's hearing, but he did file written submissions. He did not advise the registry that he wanted to appear but was unable to attend. In the circumstances, I concluded that it was appropriate to deal with the applications, and I heard oral submissions by counsel for the Attorney General and took into account the written submissions filed by Mr. McLean.

[3] The order which Mr. McLean wishes to appeal was made by Justice DeWitt-Van Oosten on November 22, 2018, dismissing his petition to have various provisions of the *Legal Profession Act*, S.B.C. 1998, c. 9, declared unconstitutional.

[4] The 30-day period under s. 14 of the *Court of Appeal Act*, with a two-day extension pursuant to s. 25.5 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, ran from November 23 to December 24. Mr. McLean filed the notice of appeal on December 14. There is no evidence that the notice of appeal was served on the Attorney General by December 24, and the evidence indicates that Mr. McLean faxed a copy of the notice of appeal on Christmas morning to the fax number which the Attorney General had included as an address for service in the response to petition filed in the Supreme Court.

[5] A notice of appearance was filed on behalf of the Attorney General on January 4, 2019. The Attorney General's counsel wrote to Mr. McLean on January 29, 2019 taking the position that the appeal had not been properly brought and advising that Mr. McLean needed to obtain an extension of time if he wished to pursue the appeal. In the meantime, Mr. McLean had faxed and delivered to the Ministry of Attorney General the appeal record, appeal book and his factum.

[6] On February 5, Mr. McLean filed a certificate of readiness with the Court. On February 6, counsel for the Attorney General filed his notice of motion in the Victoria Registry of the Court returnable February 20 at the Vancouver Law Courts.

[7] On or about February 8, Mr. McLean faxed a notice of hearing to the Associate Registrar requesting a hearing date of February 20. After consulting with the Registrar, the Associate Registrar declined to set a date for the hearing of the appeal until the Attorney General's application was dealt with.

[8] On February 14, Mr. McLean filed the first of his notices of motion returnable April 3.

[9] The Attorney General's application came on for hearing in chambers on February 20 before Justice Stromberg-Stein. As Mr. McLean had written on February 19 that he was not available on February 20, Stromberg-Stein J.A. adjourned the application to April 3 and suspended the time for the filing of the Attorney General's factum until further order of the Court.

2019 BCCA 133 (CanLII)

[10] One of the forms of relief sought by Mr. McLean is that his first motion be heard prior to the Attorney General's motion. In my view, it is not necessary or in the interests of judicial economy to deal with all of the orders and declarations requested in his first motion, but there are two aspects of the motion that I do consider it appropriate to address before dealing with the Attorney General's motion.

[11] The first aspect is the request for a declaration that the Registrar did not have the authority to refuse Mr. McLean's notice of hearing. Mr. McLean relies in this regard on the decision in *R. v. Verma*, 2016 BCCA 307. In that case, the Court held that the Registrar had erred in refusing to accept an application for leave to appeal on the basis that the appellant was seeking to bring an interlocutory appeal in a criminal matter and the Court does not have jurisdiction to entertain such an appeal. The Court ruled that the Registrar does not have authority to decide whether a matter is within the Court's jurisdiction.

[12] In my opinion, *Verma* is distinguishable from the present circumstances and is of no assistance to Mr. McLean. Here, the Registrar exercised his discretion to decline to accept a notice of hearing because a legitimate question had been raised as to whether the appeal had been properly brought. In my view, the Registrar did not err in his exercise of discretion because, if the appeal was not properly brought, it would be inappropriate to have the appeal set down for hearing. The Registrar did not make a determination that the Court lacked jurisdiction to entertain the appeal, and he simply directed that the appeal should not be set down for hearing until the Court decided whether the appeal had been properly brought.

[13] The second aspect of Mr. McLean's notice of motion I will address before dealing with the Attorney General's motion is his request for a declaration that the Attorney General's motion is a nullity because it was filed in the Victoria Registry when the notice of appeal was filed in the Vancouver Registry and the application was to be heard in Vancouver. He relies in this regard on the British Columbia Court of Appeal Practice Note, *Preferred Filing Registry* (Civil & Criminal Practice Note, 19 September 2011), which states that all relevant matters for chamber applications

2019 BCCA 133 (CanLII)

set to be heard in Vancouver are to be filed in Vancouver in order to avoid delays in the materials being transferred from other registries. In my view, this Practice Note does not have the same force as the *Court of Appeal Rules*, which defines the word "file" to mean "file with the registrar in a registry of the court". The Victoria Registry is "a registry of the court", and the filing of the Attorney General's notice of motion complied with the *Court of Appeal Rules*. Non-compliance with the Practice Note does not render the notice of motion a nullity.

[14] I now turn to the Attorney General's application for an order for the dismissal of the appeal on the basis that this appeal has not been properly brought because the notice of appeal was not served on the Attorney General within the period set out in s. 14 of the *Court of Appeal Act* as extended by the operation of the *Interpretation Act*. Mr. McLean disputes the fact that the notice of appeal was not properly served.

[15] There are two aspects to the issue of service. The first is whether the fax transmitting the notice of appeal was received within the appeal period. The order of DeWitt-Van Oosten J. was made on November 22 and, with the two-day extension pursuant to the *Interpretation Act*, the appeal period expired on December 24. The cover sheet for the fax sent by Mr. McLean, as attached to an affidavit of a legal assistant in the Legal Services Branch of the Ministry of Attorney General, states that it was sent at 9:35 a.m. Eastern Standard Time on December 25 and the header shows the time of 6:34 a.m. (presumably Pacific Standard Time) on December 25. Mr. McLean has not filed an affidavit to contradict this evidence and, as a result, there is no basis to accede to his request to cross-examine the legal assistant who swore the affidavit. I conclude that the notice of appeal was not served prior to the expiry of the appeal period.

[16] The second aspect in relation to service is the fact that the notice of appeal was faxed to the Legal Services Branch. Rule 39(1) of the *Court of Appeal Rules* requires that a notice of appeal be served personally on the respondent or on the solicitor of record in the court appealed from. Rule 39(4)(c), which permits service by fax to the fax number included in the party's address for service, does not apply

2019 BCCA 133 (CanLII)

to Mr. McLean's faxing of the notice of appeal because the Rule only becomes operative after the respondent has filed in the registry of this Court a document containing an address for service which includes a fax number. Contrary to Mr. McLean's assertions, R. 39(4) does not permit service of a notice of appeal by faxing it to the fax number included in the address for service in a document filed in the Supreme Court. As a result, even if the notice of appeal had been faxed within the appeal period, it would not have constituted proper service. Indeed, the notice of appeal has still not been served on the Attorney General.

[17] As the notice of appeal was not served within the appeal period and no extension has been obtained, it is necessary to consider whether the appeal should be dismissed. The leading authority with respect to an application to dismiss an appeal for failure to file and serve the notice of appeal in a timely fashion is *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.). At 259-260, Justice Seaton stated that the Court should consider the following five questions, which are the same as the questions to be considered on an extension of time application:

1) Was there a *bona fide* intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension?
4) Is there merit in the appeal?; and
5) Is it in the interest of justice that an extension be granted?

[18] As Justice Lambert clarified at 261, the fifth question is the overriding question and embraces the first four questions. In the context of an application to dismiss an appeal, the overriding question is whether it is in the interests of justice to dismiss the appeal.

[19] Justice Seaton endorsed the view that extensions of time are generally granted when the delay is short and the delay was due to an error by the solicitor. He also observed that there is a greater willingness to grant an extension of time for service than the time for filing.

2019 BCCA 133 (CanLII)

[20] Considering the above factors in these circumstances, it is my conclusion that it would not be in the interests of justice to dismiss the appeal at this stage. Accordingly, I dismiss the Attorney General's application with costs in the cause of the appeal.

[21] Although I have dismissed the Attorney General's application, it does not follow that the appeal may now be set for hearing. In the absence of an order extending the time to bring the appeal, the appeal has not been properly brought and it would not be appropriate to set such an appeal for hearing. Similarly, as the appeal has not yet been properly brought, it is not appropriate to deal with Mr. McLean's second application for an order that the appeal be heard by way of written submissions or to deal with any of the remaining aspects of Mr. McLean's first application that did not need to be decided in connection with the Attorney General's application.

[22] Although I believe I have jurisdiction to extend the time to bring the appeal in conjunction with the Attorney General's application without a formal extension application (which appears to have been done in *Davies*), I decline to do so in the present circumstances, including the facts that the Attorney General gave Mr. McLean notice that he should apply for an extension and that Mr. McLean is not present to address ancillary matters.

[23] Counsel for the Attorney General suggested that I give Mr. McLean a deadline of May 10 to obtain an extension of time. I do not think it would be appropriate for me to make a conditional type of order, but I will observe that it would be in the interests of Mr. McLean to act with all due dispatch because any further delay will undoubtedly be taken into account when a justice considers his application for the extension of time. The Attorney General may file another application for the dismissal of the appeal if he is of the view that Mr. McLean has not acted with suitable dispatch.

2019 BCCA 133 (CanLII)

[24] Finally, nothing I have said should be construed as an order ending the suspension of the time for the filing of the Attorney General's factum ordered by Stromberg-Stein J.A. on February 20.

"The Honourable Mr. Justice Tysoe"

2019 BCCA 133 (CanLII)

TAB 43

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McNeil v. Elizabeth Fry Society of Greater Vancouver,* 2023 BCCA 231

Date: 20230531
Docket: CA48800

Between:

Nicole McNeil

Appellant
(Petitioner)

And

Elizabeth Fry Society of Greater Vancouver and Director of the Residential Tenancy Branch

Respondents
(Respondents)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 13, 2022 (*McNeil v. Elizabeth Fry Society of Greater Vancouver*, 2022 BCSC 2174, Vancouver Docket S223355).

Oral Reasons for Judgment

Counsel for the Appellant:	D. Sabelli S. Khazei
Counsel for the Respondent, Elizabeth Fry Society of Greater Vancouver:	S. Boucher
Counsel for the Respondent, Director of the Residential Tenancy Branch (via videoconference):	C. Bant
Counsel for the Proposed Intervener, British Columbia Civil Liberties Association:	J. Riddle C. Kanigan
Counsel for the Proposed Intervener, Pivot Legal Society and Our Homes Can't Wait:	S. Akyianu L. Watson

2023 BCCA 231 (CanLII)

Place and Date of Hearing:	Vancouver, British Columbia May 30, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2023

2023 BCCA 231 (CanLII)

Summary:

The underlying appeal concerns a judicial review of an arbitrator's decision holding that the exemption from the Residential Tenancy Act, S.B.C. 2002, c. 78 [*RTA*] *for transitional housing applies to a social housing facility operated by the respondent. Two applicants (the British Columbia Civil Liberties Association and a coalition of Pivot Legal Society and Our Homes Can't Wait) sought intervener status. Held: Both applicants are granted leave to intervene and make submissions to the extent indicated in these reasons. The underlying appeal concerns a public law issue with broader implications for low-income tenants in similar circumstances to the appellant. The applicants' proposed submissions on s. 7 Charter values, and Canada's domestic and international housing commitments raise new issues and would impermissibly expand the scope of the appeal. However, the BCCLA's submissions on legal uncertainty in RTB decisions on the definition of transitional housing would assist the Court. The applicants both made similar submissions on interpreting the RTA in light of its purpose of protecting tenants, and the impacts of weakened tenancy protection on precariously housed people given the current housing crisis. These will also assist the Court, provided the interveners do not duplicate each other's submissions.*

FISHER J.A.:

[1] The British Columbia Civil Liberties Association (BCCLA), Pivot Legal Society (Pivot) and Our Homes Can't Wait (OHCW) apply for leave to intervene in this appeal, which concerns the applicability of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*] to a social housing facility operated by the respondent, the Elizabeth Fry Society. The appellant, Nicole McNeil, resides in the facility. An arbitrator in the Residential Tenancy Branch (RTB) dismissed a complaint made by the appellant on the basis that the facility is exempt from the requirements of the *RTA* as transitional housing. This appeal is from the order of Justice Gomery dismissing the appellant's petition for judicial review of the arbitrator's decision.

[2] The appellant consents to both applications. The respondent opposes the applications, submitting that none of the proposed interveners meet the criteria for public interest participation.

Background

[3] The Elizabeth Fry Society operates Mazarine Lodge under a contract with the B.C. Housing Management Commission (BC Housing). I will refer to this contract as

2023 BCCA 231 (CanLII)

the Operating Agreement. The operations are subsidised by the provincial government as part of a program to provide “rapid, safe and affordable housing” as well as support services for those facing homelessness.

[4] The appellant occupies a room at Mazarine Lodge and receives two meals a day in a cafeteria. She is a member of the population the Lodge is intended to serve. She is signatory to a program agreement which states the accommodation is not covered by the *RTA* and the purpose of her participation in the program is to provide her with supportive housing services to enable her “to move onto independent living as soon as possible” (the Program Agreement).

[5] This matter went before the RTB on a complaint by the appellant and others about some of the rules established at the Lodge.

[6] An arbitrator, as a delegate of the Director of the RTB, concluded that the appellant’s accommodation at Mazarine Lodge was “transitional housing” under s. 4(f) of the *RTA*, as defined in s. 1(2) of the *Residential Tenancy Regulation*, B.C. Reg. 477/2003, and therefore exempt from the *RTA*. Section 1(2) of the *Regulation* provides:

> For the purposes of section 4(f) of the Act [*what the Act does not apply to*], “transitional housing” means living accommodation that is provided
>
> (a) on a temporary basis,
>
> (b) by a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation, and
>
> (c) together with programs intended to assist tenants to become better able to live independently.

[7] The arbitrator rejected submissions that the accommodation was “supportive housing” as defined in the Residential Tenancy Policy Guideline 46, which is subject to the *RTA*. She found the Program Agreement signed by the appellant demonstrated that the Mazarine Lodge was provided to her on a temporary basis, the respondent received funding from the BC government for the purpose of

2023 BCCA 231 (CanLII)

providing the accommodation, and the purpose of the Lodge as described in the Operating Agreement was consistent with the *Regulation*.

[8] The arbitrator rejected an abuse of process argument by the appellant that the respondent could not take the position that the *RTA* did not apply when it had previously invoked eviction procedures administered by the RTB. The arbitrator found the Society had done this only for a limited number of occupants for the purpose of seeking a "peaceful, compromised resolution" in those matters.

[9] Justice Gomery, applying the standard of patent unreasonableness under s. 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, concluded it was open to the arbitrator to find that the requirements of the definition of transitional housing in s. 1(2) of the *Regulation* were satisfied in the circumstances. He also concluded the arbitrator's rejection of the abuse of process argument was not patently unreasonable, and dismissed the appellant's petition.

Issues on appeal

[10] The appellant will submit in this appeal that Justice Gomery erred by concluding that the RTB decision was not patently unreasonable and did not amount to an abuse of process. More particularly, she says the judge erred in:

a) finding that the Program Agreement demonstrated the mutual intentions of the parties and established the basis on which the Elizabeth Fry Society provided living accommodation to her;

b) finding that her intentions to eventually vacate Mazarine Lodge were relevant to whether her accommodation was provided on a temporary basis;

c) finding that Mazarine Lodge was provided on a temporary basis despite the absence of a fixed end date;

d) failing to properly grapple with her argument regarding the arbitrator's failure to apply the principles of contractual interpretation;

2023 BCCA 231 (CanLII)

e) finding the arbitrator was not required to give weight to relevant evidence that she was not provided with a transition plan; and

f) finding that the arbitrator's decision did not amount to an abuse of process.

2023 BCCA 231 (CanLII)

The proposed interveners

[11] Both proposed interveners seek to intervene in the public interest.

[12] The BCCLA is a well-known non-profit society that advocates to defend, sustain and promote civil liberties and human rights throughout British Columbia and Canada. It regularly engages in advocacy with governments about eradicating homelessness and emphasizing the importance of stable housing. It has acted as intervener in numerous cases dealing with housing and *Charter* rights.

[13] Pivot is a non-profit legal advocacy organization located in Vancouver's Downtown Eastside. Its work focuses on systemic legal issues faced by marginalized people, including those who are unhoused or precariously unhoused. It currently runs five different but interrelated campaigns, one of which concerns homelessness.

[14] OHCW is a community-based advocacy coalition governed by allied organizations (including Pivot) and individuals directly impacted by housing precarity and homelessness. OHCW advocates for the improvement of housing conditions and tenancy rights for unhoused and precariously housed people, including low-income tenants.

The test for granting intervention

[15] Section 30(f) of the *Court of Appeal Act*, S.B.C 2021, c. 6 provides that a justice may grant leave to intervene in an appeal. Pursuant to Rule 61 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 "[a] person, other than a party, interested in an appeal may apply to a justice for leave to intervene".

[16] As confirmed by Justice Newbury in *Linkletter v. Proctorio, Incorporated*, 2022 BCCA 313 (Chambers), the substantive considerations applicable to intervener applications under the new *Court of Appeal Rules* remain the same as under the previous R. 36 of the *Court of Appeal Rules*, B.C. Reg. 297/2001.

[17] A justice's discretion to grant intervener status is governed by the following principles, set out in *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191 at para. 5 (Chambers):

> a) the applicant must have a direct interest in the matter; or
>
> b) the applicant must have a public interest in a public law issue in question; and
>
> c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

[18] The factors to consider for applications to intervene in the public interest are set out in numerous cases, including *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers):

> a) Does the proposed intervener have a broad representative base?
>
> b) Does the case legitimately engage the proposed intervener's interests in the public law issue raised on appeal?
>
> c) Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?
>
> d) Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

[19] While an intervener's submission may support one party's position, the intervener's role is not to support the position of a party. Rather, its role is to make principled submissions on pertinent points of law. It is not to expand the scope of the litigation between the parties. Repetition is to be avoided and the appeal must remain focused on the issues raised by the parties: see *Snaw-Naw-As First Nation v. Canada (Attorney General)*, 2021 BCCA 89 at para. 22 (Chambers) and the cases cited therein; *Friedmann v. MacGarvie*, 2012 BCCA 109 (Chambers) at para. 28; *J.P. v. British Columbia (Children and Family Development)*, 2016 BCCA 124 (Chambers) at paras. 5–6.

2023 BCCA 231 (CanLII)

[20] In allowing persons to intervene on appeals on a public interest basis, the Court is attempting to ensure that important points of view are not overlooked: *Equustek Solutions Inc. v. Google Inc.,* 2014 BCCA 448 at para. 8 (Chambers).

Submissions

BCCLA

[21] The BCCLA submits it has a broad representative base, expertise in statutory interpretation and civil liberties, and a legitimate interest in "ensuring the *RTA* is interpreted in a way that advances civil liberties interests and protects the rights of vulnerable communities". It has intervened in important cases involving the constitutionality and interpretation of legislation affecting the rights of people experiencing homelessness.

[22] The BCCLA intends to take no position on the outcome of the appeal and proposes to make four submissions that focus on the interpretation of s. 4(f) of the *RTA* and s. 1(2) of the *Regulation*:

1) There is significant uncertainty in the law over the RTB's interpretation and application of the criteria in s. 1(2) of the *Regulation*. The BCCLA will summarize this and emphasize the need for certainty in a law that affects a vulnerable group of people who rely on affordable housing spaces;

2) The onus of establishing an exemption from the *RTA* should be on the housing provider seeking to opt out of that regulatory framework and the court should have particular regard for the need to interpret "transitional housing" in a manner consistent with the *RTA*'s purpose to remedy power imbalances and protect tenants;

3) The precarity of rental housing and the current housing crisis support a narrow interpretation of the term "temporary" in s. 1(2)(a) of the *Regulation* and of the funding criterion in s. 1(2)(b); and

2023 BCCA 231 (CanLII)

4) To the extent there is any ambiguity in the criteria in s. 1(2), s. 7 *Charter* values support a narrow interpretation of the term “transitional housing”.

Pivot and OHCW

[23] Pivot and OHCW submit they have a shared public interest in the issues raised on this appeal and apply for leave to jointly intervene. Together, they say they have a broad representative base, an indirect but significant interest in the public law issues raised in this appeal and in the development and application of tenancy law, and will provide a unique and different perspective that will not expand the scope of the appeal.

[24] They say the question of whether the *RTA* applies to the kind of housing at issue in this appeal will have a broad impact on marginalized people, including their own clients and members, many who have been displaced as a result of restrictive housing policies, substandard housing, and evictions.

[25] If they are granted leave to appeal, Pivot and OHCW propose to make three submissions:

1) The term “temporary” in s. 1(2)(a) of the *Regulation* must be interpreted in a contextual manner consistent with Canada’s national and international housing policies and commitments regarding the right to adequate housing;

2) The interpretation of the *RTA* should account for the relevant social context of chronic homelessness and the imbalance of power inherent in landlord-tenant relationships, which make a strict contractual interpretation inappropriate for the agreement at issue; and

3) The Court’s analysis should account for the impact of weakened tenancy protections on low-income tenants and the accessibility of such housing for people at risk of eviction from tent cities and other public spaces.

2023 BCCA 231 (CanLII)

Respondent

[26] The respondent submits that the issues in this appeal do not raise a public law issue in which the BCCLA, Pivot or OHCW have a genuine interest, as it involves the narrow question of an arbitrator's application of the definition of "transitional housing" in s. 1(2) of the *Regulation* on the facts before her, which attracts a patently unreasonable standard of review on judicial review. In this respect, the respondent emphasizes that the Court's role is not to interpret the legislation but rather to review the reasons of the arbitrator.

[27] The respondent submits that the BCCLA has largely acted as an intervener in cases in which the *Charter* was at issue and does not have a genuine interest in this matter just because it has an interest in the rights of vulnerable communities and alleges a *Charter* issue. It further submits that the points raised by all applicants have either been addressed by the parties, can be addressed by the parties or impermissibly widen the scope of the appeal.

[28] The respondent also says that both interveners take a position on whether the arbitrator's reasons are patently unreasonable, and this is not the proper role of an intervener.

Application

[29] It is not disputed that the BCCLA, Pivot and OHCW each have a broad representative base. At issue is whether (1) this appeal raises a public law issue in which the applicants have a legitimate interest, (2) the applicants have a unique perspective that will assist the Court, and (3) the applicants seek to expand the scope of the appeal.

1. Public law issue

[30] This appeal stems from an arbitrator's interpretation of an exemption provision in the *RTA* that impacts people who receive transitional housing. While the scope of this appeal is governed largely by the fact that it arises from a judicial review of an administrative decision that is subject to a patently unreasonable

2023 BCCA 231 (CanLII)

standard of review, it does in my view raise public law issues. The scope of these issues is relevant to the question of whether the applicants have a legitimate interest in them, and whether their submissions will assist the Court or expand the *lis* between the parties.

[31] As instructed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 on a reasonableness review, it is not the role of the reviewing judge, or of this Court, to undertake a *de novo* analysis of a statutory provision or measure the decision maker's interpretation against the one the court would have reached: *Vavilov* at para. 116. Rather a reviewing court is to take a "reasons first" approach that starts with how the decision maker arrived at their interpretation, in order to determine whether it was defensible in light of the interpretive constraints imposed by law: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 41. As Justice Rowe, for the majority in *Canada Post Corp.* stated:

> [42] Where the meaning of a statutory provision is in dispute, the administrative decision maker must demonstrate in their reasons that they were alive to the "essential elements" of statutory interpretation: "the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision" (*Vavilov*, at para. 120). Because those who draft statutes expect that the statute's meaning will be discerned by looking to the text, context and purpose, a reasonable interpretation must have regard to these elements — whether it is the court or an administrative decision maker tasked with the interpretative exercise (*Vavilov*, at para. 118). In addition to being harmonious with the text, context and purpose, a reasonable interpretation should conform to any interpretative constraints in the governing statutory scheme, as well as interpretative rules arising from other sources of law.

[32] In her interpretation of s. 1(2) of the *Regulation*, the arbitrator referred to a Residential Tenancy Policy Guideline regarding "transitional housing" and "supportive housing", the Program Agreement, the Operating Agreement, and a considerable amount of evidence, both documentary and testamentary. Her conclusion that the accommodation constituted transitional housing was based on numerous findings of fact, including the terms of the Program Agreement and Operating Agreement and the nature of the programs offered by the respondent.

2023 BCCA 231 (CanLII)

[33] The chambers judge, applying the “reasons first” approach discussed above, found the arbitrator’s reasoning leading to her conclusion that the accommodation was provided on a temporary basis to be “rational and defensible in light of the constraints imposed by the evidence and governing legislation”: at para. 33. He also found the arbitrator’s conclusions that the second and third criteria for transitional housing under the *Regulation* had been established were not patently unreasonable.

[34] The issues in this appeal, as articulated by the appellant in her factum, stem primarily from the arbitrator’s findings of fact. However, embedded in the grounds of appeal are questions related to “the interpretive constraints imposed by law”. These questions include whether s. 5 of the *RTA*, which prohibits parties from contracting out of the legislation, as well as provisions in the Policy Guideline that incorporate s. 5, were properly considered by the arbitrator, and whether the Program Agreement could properly determine the intentions of the parties where there is unequal bargaining power between them or properly establish the basis on which the respondent provided accommodation to the appellant. The appellant also asserts errors by the arbitrator in failing to consider the harsh consequences of exclusion from the *RTA* and failing to apply the principles of contractual interpretation in interpreting the Operating Agreement.

[35] In my view, the public law issue here concerns the impact of the arbitrator’s interpretation of s. 1(2) of the *Regulation* and the *RTA* and the scope of the RTB’s jurisdiction on a vulnerable population that accesses housing similar to the Mazarine Lodge. While the appellant’s complaints stem from rules imposed by the respondent regarding guests, others may be vulnerable to more severe consequences of exclusion from the *RTA*, such as eviction without notice. I therefore accept, for the purpose of these applications, that the question of what constitutes transitional housing under the legislation impacts a vulnerable population of individuals in various ways.

2023 BCCA 231 (CanLII)

2. Unique perspective that will assist the Court and the scope of the appeal

[36] I will first address the respondent's argument that both applicants have taken a position in this appeal that supports the appellant. I agree that their positions align with that of the appellant but I am satisfied that they both understand the distinction between supporting one party's position and making principled submissions on matters relevant to the issue on appeal.

BCCLA

[37] In my view, the BCCLA is an experienced intervener with a legitimate interest in the public law issue as I have defined it. I am satisfied that it is able to bring a unique and different perspective that will assist the Court but only with respect to the following submissions, which I have refined: (1) there is a need for clarity of a law that affects a vulnerable population, and uncertainty has resulted from the RTB's inconsistent interpretation and application of the criteria in s. 1(2) of the *Regulation*; and (2) "transitional housing" should be interpreted in a manner consistent with the *RTA*'s remedial purpose of protecting tenants, and considered in the broader context of the housing crisis which has been recognized by this Court.

[38] With respect to the first submission, the BCCLA's proposal to summarize the uncertainty in the law arising from decisions of the RTB may be useful. While the parties have addressed some of these decisions in their factums, neither do so for the purpose of demonstrating legal uncertainty. I have narrowed the second submission to exclude the onus of establishing an exemption, as the arbitrator's reasons indicate that she placed the onus on the respondent to provide sufficient evidence to establish the criteria in s. 1(2) of the *Regulation*, and neither party has raised this as an issue. And again, I understand that the appellant has made arguments in her factum about unequal bargaining power, but in a context specific to her circumstances and unconscionability in relation to the Program Agreement. The BCCLA's approach is on a broader basis and grounded in the principles of statutory interpretation.

2023 BCCA 231 (CanLII)

[39] I have limited the BCCLA's third submission by subsuming its essential aspect in the second submission and on the basis that it relies only on judicial precedent rather than evidence. The appellant has argued that the consequences of being excluded from the *RTA* are significant for her but I am satisfied that the BCCLA will provide a broader perspective of the consequences for other vulnerable individuals in the context of the housing crisis.

[40] I am not satisfied that the submission about *Charter* values will assist the Court. Although this is arguably an interpretative rule arising from another source of law, it was not raised before the arbitrator or the chambers judge. As this Court stated in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 47, "it is generally considered that a judge should not find a decision to be patently unreasonable based on a submission the Tribunal never heard. It is even less desirable that an appellate court should consider, for the first time, a submission neither made to the judge nor made to the tribunal." While there may be exceptions to this approach, this argument expands the scope beyond what I consider appropriate in the context of this appeal.

Pivot/OHCW

[41] Pivot and OHCW also have legitimate interests in the public law issues raised in this appeal as a result of their advocacy for unhoused and precariously housed individuals. However, in my view, their proposed submissions either raise new issues that are beyond the scope of this appeal, are duplicative of the submissions of the BCCLA or are adequately addressed by the parties.

[42] The first proposed submission that the interpretation of "temporary" in s. 1(2)(a) of the *Regulation* must be consistent with Canada's national and international housing policies and commitments was again not raised below and is an expansion of the issues in this appeal. It also raises the question of evidence that is not in the record. This is not a case like *Garcia v. Tahoe Resources Inc*., 2016 BCCA 320 or *Araya v. Nevsun Resources Ltd*., 2017 BCCA 402, where the issues on appeal concerned aspects of international law.

2023 BCCA 231 (CanLII)

[43] The second and third submissions advocating an interpretation that accounts for the relevant social context of chronic homelessness, the imbalance of power inherent in landlord-tenant relationships, and the impact of weakened tenancy protections and access to housing on low-income tenants are duplicative of the second submission of the BCCLA as I have articulated it. I recognize, however, that there are aspects to this argument, such as the disproportionate impact on certain marginalized groups within the broader vulnerable population, on which Pivot and OHCW have a perspective unique from that of the BCCLA.

[44] Therefore, I am prepared to grant leave for Pivot and OHCW to intervene to make a submission that "transitional housing" as defined in s. 1(2) of the *Regulation* should be interpreted in a manner that accounts for the imbalance of power inherent in landlord-tenant relationships, the impact of weakened tenancy protections and access to housing on low-income tenants, and the broader context of the housing crisis which has been recognized by this Court.

[45] I have narrowed this submission to exclude an argument that the Court must consider the policy rationale that has informed the constitutional right to shelter in public spaces overnight as I consider this to expand the scope of this appeal beyond permissible limits.

Summary and conclusion

[46] The public law issue raised in this appeal concerns the impact on a vulnerable population that accesses housing similar to the Mazarine Lodge, arising from the arbitrator's interpretation of s. 1(2) of the *Regulation* and the *RTA* and the scope of the RTB's jurisdiction

[47] The application of the BCCLA for leave to intervene is granted, limited to the following submissions:

> (1) there is a need for clarity of a law that affects a vulnerable population, and uncertainty has resulted from the RTB's inconsistent interpretation and application of the criteria in s. 1(2) of the *Regulation*; and

2023 BCCA 231 (CanLII)

(2) "transitional housing" should be interpreted in a manner consistent with the *RTA*'s remedial purpose of protecting tenants, and considered in the broader context of the housing crisis which has been recognized by this Court.

[48] The application of Pivot and OHCW jointly for leave to intervene is granted, but limited to the submission that "transitional housing" as defined in s. 1(2) of the *Regulation* should be interpreted in a manner that accounts for the imbalance of power inherent in landlord-tenant relationships, the impact of weakened tenancy protections and access to housing on low-income tenants, and the broader context of the housing crisis which has been recognized by this Court.

[49] As I have indicated, there is duplication in the submissions of each applicant and provisions must be made to avoid repetitive arguments. I consider the applicants to be in the best position to decide how to do this and I therefore direct that they do so.

[50] Leave is therefore granted on the following terms, given that I have narrowed the issues:

1. The BCCLA may file a factum of not more than 6 pages;

2. Pivot and OHCW may file a factum of not more than 3 pages;

2. The respondent may file a reply factum to that of the BCCLA of not more than 3 pages and to that of Pivot/OHCW of not more than 2 pages; and

4. No costs will be awarded for or against BCCLA or Pivot/OHCW in respect of this application or the appeal itself.

[51] It will be for the division hearing this appeal to determine if oral submissions will be permitted and, if so, for what duration.

"The Honourable Madam Justice Fisher"

2023 BCCA 231 (CanLII)

TAB 44

Her Majesty The Queen *Appellant*;

and

Robert Miller *Respondent.*

File No.: 17333.

1984: October 12; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Prerogative writs — Habeas corpus — Jurisdiction — Superior courts — Inmate confined in a special handling unit — Application for habeas corpus and certiorari in aid in a superior court — Whether a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus to determine the validity of an inmate's confinement in a special handling unit of a federal penitentiary — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 18.

Prerogative writs — Habeas corpus — Availability of remedy — Inmate confined in a special handling unit following a disturbance in a federal penitentiary — Whether habeas corpus lies to challenge the validity of a particular form of confinement in a penitentiary.

Prerogative writs — Habeas corpus — Procedure — Affidavit evidence — Whether affidavit evidence admissible on habeas corpus application to show jurisdictional error.

Following a disturbance in the penitentiary, respondent inmate was transferred to another institution and placed in administrative segregation in a "Special Handling Unit". This unit was reserved for particularly dangerous inmates and was characterized by a more restrictive confinement and the loss of several privileges or amenities enjoyed by the general inmate population. Respondent was advised that he had been placed there because of his participation in the disturbance, but was never given any opportunity to confront the evidence, if any, of his involvement in the incident. Respondent's application for *habeas corpus* with *certiorari* in aid was dismissed by the Ontario Supreme Court. The Court of Appeal allowed respondent's appeal and returned the matter to the High Court to determine the issue on the merits. This appeal is to determine (1) whether a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* against a federal board, commission or other tribunal despite the exclusive jurisdiction in

Sa Majesté La Reine *Appelante*;

et

Robert Miller *Intimé.*

N° du greffe: 17333.

1984: 12 octobre; 1985: 19 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Lamer, Wilson et Le Dain.

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

Brefs de prérogative — Habeas corpus — Compétence — Cours supérieures — Détenu incarcéré dans une unité spéciale de détention — Demande d'habeas corpus avec certiorari auxiliaire présentée à une cour supérieure — Une cour supérieure provinciale est-elle compétente pour délivrer un certiorari auxiliaire d'un habeas corpus pour déterminer la validité de l'incarcération d'un détenu dans une unité spéciale de détention d'un pénitencier fédéral? — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 18.

Brefs de prérogative — Habeas corpus — Possibilité d'exercer ce recours — Détenu incarcéré dans une unité spéciale de détention par suite d'un incident dans un pénitencier fédéral — Peut-on recourir à l'habeas corpus pour contester la validité d'une forme particulière d'incarcération dans un pénitencier?

Brefs de prérogative — Habeas corpus — Procédure — Preuve par affidavit — Admissibilité d'une preuve par affidavit pour établir une erreur de compétence dans le cadre d'une demande d'habeas corpus.

À la suite d'un incident dans un pénitencier, le détenu intimé a été transféré à un autre établissement où on l'a mis en ségrégation administrative dans une «unité spéciale de détention». Cette unité est réservée aux détenus particulièrement dangereux. La détention y est plus sévère et entraîne la privation de plusieurs privilèges ou agréments dont jouit la population carcérale générale. On a fait savoir à l'intimé qu'il y avait été placé en raison de sa participation à l'incident en question, mais il n'a jamais eu la possibilité de réfuter la preuve, si preuve il y avait, de cette participation. La demande de l'*habeas corpus* avec *certiorari* auxiliaire présentée par l'intimé a été rejetée par la Cour suprême de l'Ontario. La Cour d'appel a accueilli son appel et renvoyé l'affaire à la Haute Cour pour qu'elle tranche le litige sur le fond. Le présent pourvoi vise à déterminer (1) si, nonobstant la compétence exclusive en matière de *certiorari* que l'art. 18 de la *Loi sur la Cour fédérale* confère à la Cour fédérale du Canada, une cour supérieure provin-

1985 CanLII 22 (SCC)

respect of *certiorari* of the Federal Court of Canada under s. 18 of the *Federal Court Act*; (2) whether, on an application for *habeas corpus* alone, a court may consider affidavit evidence to determine whether a detention is unlawful by reason of an absence or excess of jurisdiction; and (3) whether *habeas corpus* will lie to determine the validity of confinement in a special handling unit, and if such confinement is found to be unlawful, to secure the release of the inmate into the general population of the institution.

Held: The appeal should be dismissed.

(1) A provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* notwithstanding s. 18 of the *Federal Court Act*. The provisions of the *Federal Court Act* indicate a clear intention on the part of Parliament to leave the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to *habeas corpus*. This omission was not an oversight but a well considered decision. Considering the importance of *certiorari* in aid to the effectiveness of *habeas corpus*, a remedy included as a guaranteed right in s. 2(*c*)(ii) of the *Canadian Bill of Rights* and s. 10(*c*) of the *Canadian Charter of Rights and Freedoms*, it cannot have been intended that the reference to *certiorari* in s. 18 should have the effect of undermining or weakening the *habeas corpus* jurisdiction of the provincial superior courts by the exclusion or denial of *certiorari* in aid. To avoid such a construction, it is possible to conclude that, because of the association in that section of *certiorari* with the other prerogative and extraordinary remedies, the reference to *certiorari* in s. 18 is to the independent remedy of *certiorari* to quash the decision of an inferior tribunal and not to *certiorari* as an ancillary procedure used to serve an essentially evidentiary purpose. Indeed, it is unlikely that Parliament intended to confer an exclusive jurisdiction to issue *certiorari* in aid when it had clearly withheld the jurisdiction to issue *habeas corpus*.

(2) It is well established that affidavit evidence is admissible on *certiorari* to show jurisdictional error. Subject to the limitation arising from the conclusive character of the records of courts of superior or general common law jurisdiction, a court may also on an

ciale peut délivrer contre un office, une commission ou un autre tribunal fédéral un *habeas corpus* avec *certiorari* auxiliaire; (2) si un tribunal saisi d'une demande d'*habeas corpus* simple peut tenir compte d'une preuve par affidavit pour déterminer si une détention est illégale pour défaut ou excès de compétence; et (3) si l'on peut recourir à l'*habeas corpus* pour déterminer la validité d'une incarcération dans une unité spéciale de détention et, dans l'hypothèse où cette incarcération serait jugée illégale, pour obtenir la réintégration du détenu dans la population générale de l'établissement.

Arrêt: Le pourvoi est rejeté.

(1) Une cour supérieure provinciale a compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus* nonobstant l'art. 18 de la *Loi sur la Cour fédérale*. Les dispositions de la *Loi sur la Cour fédérale* traduisent une intention claire chez le législateur de laisser aux cours supérieures provinciales la compétence pour vérifier par voie d'*habeas corpus* la validité d'une détention imposée par les autorités fédérales. Bien que l'art. 18 confère une compétence exclusive et très générale pour contrôler les décisions d'autorités fédérales par le moyen des recours de prérogative et des recours extraordinaires, lesquels sont expressément mentionnés, toute mention de l'*habeas corpus* a été délibérément omise. Or, cette omission n'est pas un oubli mais le résultat d'une décision bien pesée. Compte tenu de l'importance du *certiorari* auxiliaire pour l'efficacité de l'*habeas corpus*, recours auquel le sous-al. 2*c*)(ii) de la *Déclaration canadienne des droits* et l'al. 10*c*) de la *Charte canadienne des droits et libertés* reconnaissent le statut de droit garanti, on n'a pas pu vouloir que la mention du *certiorari* à l'art. 18 ait pour effet de miner ou d'affaiblir la compétence des cours supérieures provinciales en matière d'*habeas corpus* en excluant ou en refusant le *certiorari* auxiliaire. Pour éviter une telle interprétation, il est possible de conclure, étant donné qu'à l'art. 18 le *certiorari* fait partie d'une énumération des recours de prérogative et des recours extraordinaires, qu'il est alors question du recours indépendant en *certiorari* pour l'annulation d'une décision d'un tribunal d'instance inférieure et non pas du *certiorari* en tant que procédure auxiliaire servant essentiellement à établir la preuve. En fait, puisqu'il n'a manifestement pas donné compétence pour délivrer un bref d'*habeas corpus*, il est peu probable que le législateur ait voulu conférer une compétence exclusive pour délivrer un *certiorari* auxiliaire.

(2) Il est bien établi que, dans le cas d'une demande de *certiorari*, une preuve par affidavit est admissible pour établir une erreur de compétence. Sous réserve de la restriction qui résulte du caractère concluant des dossiers de cours de juridiction supérieure ou de juridic-

1985 CanLII 22 (SCC)

application for *habeas corpus* without *certiorari* in aid consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction. The proposition that this Court was limited on *habeas corpus* to an examination of the warrant of committal in determining whether there had been a jurisdictional error goes beyond the true basis of the Court's jurisprudence on this question.

(3) *Habeas corpus* lies to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. Confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. There is no reason in principle, in view of the nature and role of *habeas corpus*, why that remedy should not be available to challenge the validity of such a distinct form of detention in which the actual physical constraint, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

Cases Cited

Mitchell v. The Queen, [1976] 2 S.C.R. 570; *Re Shumiatcher*, [1962] S.C.R. 38; *Re Trepanier* (1885), 12 S.C.R. 111; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Re Sproule* (1886), 12 S.C.R. 140, considered; *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, rev'd [1985] 2 S.C.R. 643; *Re Morin and Yeomans* (1982), 1 C.C.C. (3d) 438, [1982] C.A. 464, rev'd [1985] 2 S.C.R. 662; *Ex parte McCaud*, [1965] 1 C.C.C. 168; *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453; *R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.*, [1974] 2 All E.R. 643; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Ex parte Macdonald* (1896), 27 S.C.R. 683; *Re Henderson*, [1930] S.C.R. 45; *Schtraks v. Government of Israel*, [1964] A.C. 556; *Ex parte*

tion générale en *common law*, une cour saisie d'une demande d'*habeas corpus* sans *certiorari* auxiliaire peut aussi examiner une preuve par affidavit ou toute autre preuve extrinsèque pour déterminer s'il y a eu défaut ou excès de compétence. La proposition selon laquelle cette Cour en matière d'*habeas corpus* doit se limiter à un examen du mandat de dépôt pour déterminer s'il y a eu défaut ou excès de compétence, s'éloigne du fondement véritable de la jurisprudence de la Cour sur cette question.

(3) On peut recourir à l'*habeas corpus* pour déterminer la validité d'une forme particulière de détention dans un pénitencier quoique la même question puisse être déterminée par voie de *certiorari* en Cour fédérale. La portée du recours à l'*habeas corpus* doit d'abord être examinée en fonction de son propre fondement, indépendamment des problèmes que peuvent poser le partage ou le chevauchement des compétences. L'importance générale de ce recours comme moyen traditionnel pour contester les privations de liberté est telle que son développement et son adaptation rationnels aux réalités modernes de la détention en milieu carcéral ne doivent pas être compromis par des craintes de conflit de compétence. L'incarcération dans une unité spéciale de détention ou en ségrégation administrative constitue une forme de détention qui est tout à fait distincte de celle imposée à la population carcérale générale. Il s'agit en fait d'une nouvelle détention qui est censée avoir son propre fondement juridique. Aucune raison valable fondée sur la nature et le rôle de l'*habeas corpus* ne s'oppose à ce qu'on y ait recours pour contester la validité de cette forme distincte de détention dans laquelle la contrainte physique réelle, par opposition à la simple perte de certains privilèges, est plus restrictive ou sévère que cela est normalement le cas dans un établissement carcéral.

Jurisprudence

Arrêts examinés: *Mitchell c. La Reine*, [1976] 2 R.C.S. 570; *Re Shumiatcher*, [1962] R.C.S. 38; *Re Trepanier* (1885), 12 R.C.S. 111; *Goldhar v. The Queen*, [1960] R.C.S. 431; *Re Sproule* (1886), 12 R.C.S. 140; arrêts mentionnés: *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, infirmé [1985] 2 R.C.S. 643; *Morin c. Comité national chargé de l'examen des cas d'U.S.D. (Unité spéciale de détention)*, [1982] C.A. 464, 1 C.C.C. (3d) 438, infirmé [1985] 2 R.C.S. 662; *Ex parte McCaud*, [1965] 1 C.C.C. 168; *Howarth c. Commission nationale des libérations conditionnelles*, [1976] 1 R.C.S. 453; *R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.*, [1974] 2 All E.R. 643; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S.

1985 CanLII 22 (SCC)

Rogers (1843), 7 Jur. 992; *R. v. Governor of Wandsworth Prison; ex parte Silverman* (1952), 96 *Sol. J.* 853; *Berrouard v. The Queen*, S.C. Longueuil, No. 505-01-001299-789, November 30, 1981; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Stevenson v. Florant*, [1927] A.C. 211, aff'g [1925] S.C.R. 532; *Dugal v. Lefebvre*, [1934] S.C.R. 501; *Re Cadeddu* (1982), 4 C.C.C. (3d) 97; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135; *Re Frejd* (1910), 22 O.L.R. 566; *Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 303; *McNally v. Hill*, 293 U.S. 131 (1934); *Jones v. Cunningham*, 371 U.S. 236 (1963); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Johnson v. Avery*, 393 U.S. 483 (1969); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Coffin v. Reichard*, 143 F.2d 443 (1944); *McCollum v. Miller*, 695 F.2d 1044 (1982); *Krist v. Ricketts*, 504 F.2d 887 (1974); *Bryant v. Harris*, 465 F.2d 365 (1972); *Dawson v. Smith*, 719 F.2d 896 (1983); *Streeter v. Hopper*, 618 F.2d 1178 (1980), referred to.

602; *Ex parte Macdonald* (1896), 27 R.C.S. 683; *Re Henderson*, [1930] R.C.S. 45; *Schtraks v. Government of Israel*, [1964] A.C. 556; *Ex parte Rogers* (1843), 7 Jur. 992; *R. v. Governor of Wandsworth Prison; ex parte Silverman* (1952), 96 *Sol. J.* 853; *Berrouard c. La Reine*, C.S. Longueuil, n° 505-01-001299-789, 30 novembre 1981; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *Stevenson v. Florant*, [1927] A.C. 211, conf. [1925] R.C.S. 532; *Dugal v. Lefebvre*, [1934] R.C.S. 501; *Re Cadeddu* (1982), 4 C.C.C. (3d) 97; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135; *Re Frejd* (1910), 22 O.L.R. 566; *Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 303; *McNally v. Hill*, 293 U.S. 131 (1934); *Jones v. Cunningham*, 371 U.S. 236 (1963); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Johnson v. Avery*, 393 U.S. 483 (1969); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Coffin v. Reichard*, 143 F.2d 443 (1944); *McCollum v. Miller*, 695 F.2d 1044 (1982); *Krist v. Ricketts*, 504 F.2d 887 (1974); *Bryant v. Harris*, 465 F.2d 365 (1972); *Dawson v. Smith*, 719 F.2d 896 (1983); *Streeter v. Hopper*, 618 F.2d 1178 (1980).

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*c*)(iii).
Canadian Charter of Rights and Freedoms, s. 10(*c*).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2 "federal board, Commission or other tribunal", 17(5), 18.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 10*c*).
Déclaration canadienne des droits, S.R.C. 1970, app. III, art. 2*c*)(iii).
Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 2 «office, commission ou autre tribunal fédéral», 17(5), 18.

Authors Cited

Cromwell, T. "Habeas Corpus and Correctional Law" (1977), 3 *Queen's L.J.* 295.
Note. "Developments in the Law—Federal Habeas Corpus", 83 *Harv. L.R.* 1038 (1970).
Sharpe, R. J. "Habeas Corpus in Canada" (1975), 2 *Dalhousie L.J.* 241.
Sharpe, R. J. *The Law of Habeas Corpus*, Oxford, Clarendon Press, 1976.

Doctrine citée

Cromwell, T. «Habeas Corpus and Correctional Law» (1977), 3 *Queen's L.J.* 295.
Note. «Developments in the Law—Federal Habeas Corpus», 83 *Harv. L.R.* 1038 (1970).
Sharpe, R. J. «Habeas Corpus in Canada» (1975), 2 *Dalhousie L.J.* 241.
Sharpe, R. J. *The Law of Habeas Corpus*, Oxford, Clarendon Press, 1976.

APPEAL from a judgment of the Ontario Court of Appeal (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, allowing respondent's appeal from a judgment of Steele J.[1], dismissing his application for *habeas corpus* with *certiorari* in aid. Appeal dismissed.

[1] Summarized at (1982), 7 W.C.B. 294.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, qui a accueilli l'appel de l'intimé à l'encontre d'un jugement du juge Steele[1], qui avait rejeté sa demande d'*habeas corpus* avec *certiorari* auxiliaire: Pourvoi rejeté.

[1] Résumé à (1982), 7 W.C.B. 294.

1985 CanLII 22 (SCC)

R. W. Hubbard, for the appellant.

Fergus J. O'Connor, for the respondent.

The judgment of the Court was delivered by

LE DAIN J.—This appeal raises the question whether, having regard to the role of *habeas corpus* and the exclusive jurisdiction of the Federal Court of Canada under s. 18 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, in respect of *certiorari* against any federal board, commission or other tribunal, a provincial superior court has jurisdiction by way of *habeas corpus* with *certiorari* in aid to determine the validity of the confinement of an inmate of a federal penitentiary in a "special handling unit", a particularly restrictive form of segregated detention, and if such confinement be found unlawful, to order his release into association with the general inmate population of the penitentiary.

The appeal is by leave of this Court from the judgment of the Ontario Court of Appeal on August 25, 1982 allowing an appeal from the judgment of Steele J. of the Supreme Court of Ontario on March 5, 1982, which dismissed the respondent's application for *habeas corpus* with *certiorari* in aid to determine the validity of his confinement in the Special Handling Unit of Millhaven Institution, a federal penitentiary, on the ground that the Court lacked jurisdiction to issue *certiorari* in aid of *habeas corpus* because of the exclusive jurisdiction of the Federal Court in respect of *certiorari* against a federal board, commission or other tribunal and on the further ground that on *habeas corpus* alone the Court was precluded by the jurisdiction of the Federal Court from considering anything but the warrants of committal, which were regular on their face and had not been challenged.

I

According to the respondent's affidavit in support of his application for *habeas corpus* with

R. W. Hubbard, pour l'appelante.

Fergus J. O'Connor, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE LE DAIN—Ce pourvoi soulève la question de savoir si, compte tenu du rôle de l'*habeas corpus* et de la compétence exclusive pour délivrer un *certiorari* contre tout office, toute commission ou tout autre tribunal fédéral conférée à la Cour fédérale du Canada par l'art. 18 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e Supp.), chap. 10, une cour supérieure provinciale peut, par voie d'*habeas corpus* avec *certiorari* auxiliaire, statuer sur la validité de l'incarcération d'un détenu dans une «unité spéciale de détention» d'un pénitencier fédéral, une forme particulièrement sévère de ségrégation et, dans l'hypothèse où elle juge illégal ce type d'incarcération, si cette cour supérieure provinciale peut ordonner la réintégration du détenu dans la population carcérale générale du pénitencier.

Ce pourvoi, autorisé par cette Cour, attaque l'arrêt en date du 25 août 1982 de la Cour d'appel de l'Ontario, qui a accueilli un appel d'une décision datée du 5 mars 1982 dans laquelle le juge Steele de la Cour suprême de l'Ontario a rejeté la demande d'*habeas corpus* avec *certiorari* auxiliaire présentée par l'intimé pour que soit déterminée la validité de son incarcération dans l'unité spéciale de détention de l'établissement de Millhaven, un pénitencier fédéral. La demande a été rejetée d'abord pour le motif que la cour n'avait pas compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus* parce qu'il appartenait exclusivement à la Cour fédérale d'accorder un *certiorari* contre un office, une commission ou un autre tribunal fédéral et, ensuite, parce que, en ce qui concerne l'*habeas corpus* simple, la compétence de la Cour fédérale empêchait la cour d'examiner autre chose que les mandats de dépôt, lesquels étaient réguliers en apparence et n'avaient fait l'objet d'aucune contestation.

I

D'après l'affidavit produit par l'intimé à l'appui de sa demande d'*habeas corpus* avec *certiorari*

1985 CanLII 22 (SCC)

certiorari in aid, he was an inmate in Matsqui Penitentiary on June 2, 1981 when a "disturbance" occurred in the dining area where he was employed. He claimed that he was not in the dining area at the time and that he was not responsible in any way for the disturbance. He was, nevertheless, placed in administrative segregation in Matsqui on June 5th and in segregation in Kent Institution and Millhaven, to which he was subsequently transferred, on July 11th and July 23rd respectively. On July 29, 1981 he was placed in the Special Handling Unit at Millhaven.

Confinement in a special handling unit is reserved for particularly dangerous inmates, as indicated by s. 5 of Commissioner's Directive 274 of December 1, 1980, which defines "Special Handling Unit" as follows: " 'Special Handling Unit' (SHU) is a facility established to deal exclusively with inmates who, in addition to requiring maximum security, have been identified as being particularly dangerous." According to the Directive, a special handling unit program of confinement consists of four phases, the first of which is a period of assessment in administrative segregation. According to the respondent's affidavit, which describes the nature of the confinement in the various phases in considerable detail, in the first phase consisting of administrative segregation the inmate is cut off from all association with other inmates and is confined to his cell for all but one hour of the day. In subsequent phases of the program limited association with other inmates and somewhat longer periods outside the cell are permitted, but speaking generally, it may be said that confinement in a special handling unit is a significantly more restrictive form of detention than the normal one in a penitentiary, involving the loss or denial of several privileges or amenities enjoyed by the general inmate population.

According to the respondent's affidavit, he was advised by letter about two weeks after he was placed in the Special Handling Unit that he had been put there because of his involvement in the disturbance at Matsqui and specifically because he had broken windows in the kitchen and had manufactured an explosive device. The respondent states

auxiliaire, il était détenu au pénitencier de Matsqui. Le 2 juin 1981 il s'est produit un «incident» dans la cantine où il travaillait. Il a déclaré qu'il ne s'y trouvait pas au moment en question et qu'il n'avait en aucune façon provoqué l'incident. Quoi qu'il en soit, il a été mis en ségrégation administrative à Matsqui le 5 juin et en ségrégation d'abord à l'établissement Kent puis à Millhaven, où il a été transféré dans le premier cas le 11 juillet et dans le second cas le 23 juillet. Le 29 juillet 1981, on l'a placé dans l'unité spéciale de détention de Millhaven.

L'incarcération dans une unité spéciale de détention est réservée aux détenus particulièrement dangereux; c'est ce qui ressort de l'art. 5 de la directive du commissaire n° 274 du 1er décembre 1980, qui donne à l'expression «Unité spéciale de détention» la définition suivante: « «Unité spéciale de détention» (USD) désigne une installation destinée exclusivement aux détenus qui, tout en répondant aux critères de sécurité maximale, sont reconnus comme particulièrement dangereux». Suivant la directive, le programme d'incarcération dans une unité spéciale comporte quatre phases. La première consiste en une période de ségrégation administrative au cours de laquelle on procède à une évaluation. D'après l'affidavit de l'intimé, qui contient une description très détaillée de la nature de l'incarcération à chacune des différentes étapes, à cette première phase le détenu est isolé de tous les autres détenus et doit garder sa cellule vingt-trois heures par jour. Les phases subséquentes du programme permettent des contacts limités avec d'autres détenus et des périodes un peu plus longues à l'extérieur de la cellule mais, en règle générale, l'incarcération dans une unité spéciale est nettement plus sévère que la normale dans un pénitencier en ce sens qu'il y a privation de plusieurs privilèges ou agréments dont jouit la population carcérale générale.

Il ressort de l'affidavit de l'intimé qu'environ deux semaines après sa mise en unité spéciale de détention il a reçu une lettre portant qu'il y avait été placé en raison de sa participation à l'incident de Matsqui et, en particulier, parce qu'il avait cassé des fenêtres de la cuisine et qu'il avait fabriqué un engin explosif. L'intimé affirme qu'il n'a

1985 CanLII 22 (SCC)

that he was never given an opportunity to confront the evidence, if any, of his involvement in the incident at Matsqui on which the decision to confine him in the Special Handling Unit was based. He was never charged with a disciplinary offence arising out of that incident nor was any criminal charge laid against him. He was not given a psychological examination, and there was nothing in his background or in the nature of the offences of which he was convicted to suggest that he was a particularly dangerous inmate. In October 1981 he attended a hearing of the National Special Handling Unit Review Committee, but he was not informed of the evidence against him nor given any opportunity to meet it. He was told that he could only secure his release from the Special Handling Unit into normal association with the general population of the penitentiary by good behaviour. In the respondent's submission there was no basis nor justification whatever for placing him in the Special Handling Unit.

In his application for *habeas corpus* with *certiorari* in aid the respondent contended that confinement in the Special Handling Unit at Millhaven is not authorized by statute or regulation and is therefore unlawful, and further or alternatively, that his confinement in the Special Handling Unit was carried out in a manner that denied him procedural fairness. The respondent conceded that he was lawfully required to be detained in a penitentiary. His mandatory supervision release date was July 3, 1983, and we were informed at the hearing of the appeal that he had been released.

The unanimous judgment of the Court of Appeal (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, allowing the appeal from the judgment of Steele J. and referring the matter back to the High Court for determination of the merits was delivered by Cory J.A., with whom Martin and Goodman JJ.A. concurred. In his reasons for judgment Cory J.A. addressed three issues in the following order: (a) whether *habeas corpus* will lie to determine the validity of confinement in a spe-

jamais eu la possibilité de réfuter la preuve, si preuve il y avait, de sa participation à l'incident en question, preuve sur laquelle a été fondée la décision de l'incarcérer dans l'unité spéciale de détention. Il n'a jamais par suite de l'incident été accusé d'une infraction à la discipline et aucune accusation criminelle n'a été portée contre lui. On ne lui a pas fait subir d'examen psychologique et ni ses antécédents ni la nature des infractions dont il a été reconnu coupable ne portent à croire qu'il était particulièrement dangereux. En octobre 1981 il a comparu devant le Comité national chargé de l'examen des cas d'unité spéciale de détention, mais on ne l'a pas informé de la preuve produite contre lui pas plus qu'on ne lui a donné la possibilité d'y répondre. On lui a dit que ce n'était que par une bonne conduite qu'il pouvait obtenir sa libération de l'unité spéciale de détention et sa réintégration dans la population générale du pénitencier. L'intimé soutient que la décision de le placer dans l'unité spéciale de détention était complètement injustifiée.

Dans sa demande d'*habeas corpus* avec *certiorari* auxiliaire, l'intimé fait valoir que ni la loi ni son règlement d'application n'autorisent l'incarcération dans l'unité spéciale de détention de Millhaven et qu'il s'agit donc d'une détention illégale. Il allègue en outre ou subsidiairement que son incarcération dans l'unité spéciale a été effectuée d'une façon non conforme à l'équité dans la procédure. L'intimé reconnaît toutefois qu'il devait, aux termes de la loi, être détenu dans un pénitencier. Sa libération sous surveillance obligatoire était fixée au 3 juillet 1983 et on nous a appris au cours de l'audience en cette Cour qu'elle a eu lieu comme prévu.

L'arrêt unanime de la Cour d'appel (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, accueillant l'appel de la décision du juge Steele et renvoyant l'affaire à la Haute Cour pour qu'elle statue sur le fond, a été rendu par le juge Cory, à l'avis duquel les juges Martin et Goodman ont souscrit. Dans ses motifs de jugement, le juge Cory a examiné dans l'ordre les trois questions suivantes: a) celle de savoir si l'on peut recourir à l'*habeas corpus* pour déterminer la validité d'une incarcération

1985 CanLII 22 (SCC)

cial handling unit, and if such confinement is found to be unlawful, to secure the release of the inmate into the general population of the institution; (b) whether, on an application for *habeas corpus* alone, a court may consider affidavit evidence to determine whether a detention is unlawful by reason of an absence or excess of jurisdiction; and (c) whether a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* against a federal board, commission or other tribunal despite the exclusive jurisdiction in respect of *certiorari* of the Federal Court of Canada under s. 18 of the *Federal Court Act*. The Court of Appeal gave an affirmative answer to each of these questions. The appellant directs its attack chiefly against the Court's conclusions on the first and third questions, which are the principal issues in the appeal. The Court of Appeal appears to have treated the second question as an alternative issue, which it may or may not be necessary to deal with in this appeal.

There are two other appeals involving some or all of these issues which were heard at the same time as this appeal: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; and *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662. The judgment of the British Columbia Court of Appeal in *Cardinal*, which is reported at (1982), 67 C.C.C. (2d) 252 (*sub nom. Re Cardinal and Oswald and The Queen*), and the judgment of the Quebec Court of Appeal in *Morin*, which is reported at [1982] C.A. 464 (*sub nom. Morin c. Comité national de l'examen des cas d'U.S.D. (Unité spéciale de détention)*) and (1982), 1 C.C.C. (3d) 438 (*sub nom. Re Morin and Yeomans*), were both rendered before the judgment of the Ontario Court of Appeal in the case at bar. In *Cardinal* the British Columbia Court of Appeal came to the same conclusions as the Ontario Court of Appeal on the three questions of jurisdiction considered by it. Indeed, Cory J.A. relied particularly on the reasoning of Anderson J.A. in the British Columbia Court of Appeal on these issues. In addition, however, the Court of Appeal in *Cardinal* dealt with the merits of the contention that there had been a breach of the duty to act fairly in the manner in which the

dans une unité spéciale de détention et, dans l'hypothèse où cette incarcération serait jugée illégale, pour obtenir la réintégration du détenu dans la population générale de l'établissement; b) celle de savoir si un tribunal saisi d'une demande d'*habeas corpus* simple peut examiner une preuve par affidavit pour décider si une détention est illégale pour défaut ou excès de compétence; et c) celle de savoir si, nonobstant la compétence exclusive en matière de *certiorari* que l'art. 18 de la *Loi sur la Cour fédérale* confère à la Cour fédérale du Canada, une cour supérieure provinciale peut délivrer contre un office, une commission ou un autre tribunal fédéral un *certiorari* auxiliaire d'un *habeas corpus*. La Cour d'appel a répondu à chacune de ces questions par l'affirmative. L'appelante attaque surtout les conclusions de la Cour d'appel sur la première et la troisième questions, qui sont les questions principales devant nous. La Cour d'appel paraît avoir considéré la deuxième question comme une question subsidiaire et il n'est pas clair s'il sera nécessaire de l'aborder ici.

Deux autres pourvois portant sur l'ensemble ou une partie de ces questions ont été entendus en même temps que celui-ci; il s'agit de *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, et *Morin c. Comité national chargé de l'examen des cas d'unité spéciale de détention*, [1985] 2 R.C.S. 662. L'arrêt *Cardinal* de la Cour d'appel de la Colombie-Britannique, publié à (1982), 67 C.C.C. (2d) 252 (*sub nom. Re Cardinal and Oswald and The Queen*), et l'arrêt *Morin* de la Cour d'appel du Québec, publié à [1982] C.A. 464 (*sub nom. Morin c. Comité national de l'examen des cas d'U.S.D. (Unité spéciale de détention)*) et (1982), 1 C.C.C. (3d) 438 (*sub nom. Re Morin and Yeomans*), ont tous les deux été rendus antérieurement à l'arrêt de la Cour d'appel de l'Ontario dans la présente affaire. Dans l'arrêt *Cardinal*, la Cour d'appel de la Colombie-Britannique est arrivée aux mêmes conclusions que la Cour d'appel de l'Ontario sur les trois questions relatives à la compétence qu'elle a examinées. De fait, sur ces questions-là, le juge Cory s'est appuyé particulièrement sur le raisonnement du juge Anderson de la Cour d'appel de la Colombie-Britannique. Toutefois, dans l'arrêt *Cardinal*, la Cour d'appel a examiné aussi le bien-fondé de l'argument selon lequel

1985 CanLII 22 (SCC)

administrative dissociation or segregation of the appellant had been imposed or continued, and it was from the disposition of the appeal on this issue, rather than on the issues of the court's jurisdiction, as in the case at bar, that the appeal was brought to this Court. For this reason the issues of jurisdiction on which both Courts of Appeal came to the same conclusions will be dealt with first in this appeal. In *Morin*, where the appellant sought by an application for *habeas corpus* without *certiorari* in aid to challenge his confinement in a special handling unit, the main issue appears to be the one that is common to the three appeals—whether, having regard to the judicial review jurisdiction of the Federal Court, *habeas corpus* should lie to review the validity of such confinement.

II

The question whether a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention imposed by federal authority arises, as has been indicated, because of the terms of s. 18 of the *Federal Court Act*, which confers on the Trial Division of the Federal Court of Canada an exclusive original jurisdiction to issue *certiorari* against any federal board, commission or other tribunal. Section 18 reads as follows:

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Section 2 of the *Federal Court Act* defines "federal board, commission or other tribunal" as follows:

la manière dont on avait imposé ou maintenu la ségrégation ou l'isolement administratifs de l'appelant constituait une violation de l'obligation d'agir équitablement, et le pourvoi devant cette Cour attaquait la conclusion de la Cour d'appel sur cette question plutôt que, comme c'est le cas en l'espèce, ses conclusions sur les questions de compétence. Pour cette raison, les questions de compétence, sur lesquelles les deux cours d'appel sont arrivées aux mêmes conclusions, seront examinées d'abord dans le présent pourvoi. Dans l'arrêt *Morin*, où l'appelant a tenté par voie de demande d'*habeas corpus* sans *certiorari* auxiliaire de contester son incarcération dans une unité spéciale de détention, la question principale qui paraît être commune à chacun des trois appels, était de savoir si, compte tenu de la compétence de la Cour fédérale en matière de contrôle judiciaire, l'*habeas corpus* permet d'examiner la validité d'une telle incarcération.

II

Comme nous l'avons déjà vu, la question de savoir si une cour supérieure provinciale peut délivrer un *habeas corpus* avec *certiorari* auxiliaire pour examiner la validité d'une détention imposée par les autorités fédérales se pose en raison de l'art. 18 de la *Loi sur la Cour fédérale*, qui investit la Division de première instance de la Cour fédérale du Canada d'une compétence exclusive en première instance pour délivrer un *certiorari* contre tout office, toute commission ou tout autre tribunal fédéral. L'article 18 est ainsi rédigé:

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

L'article 2 de la *Loi sur la Cour fédérale* définit ainsi l'expression «office, commission ou autre tribunal fédéral»:

1985 CanLII 22 (SCC)

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

It is not disputed that the decision to place the respondent in the Special Handling Unit at Millhaven was the decision of a federal board, commission or tribunal within the meaning of s. 2 of the Act.

Courts which have had to consider this issue of jurisdiction have been confronted by the conflicting opinions on it of members of this Court in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570. Steele J. based his conclusion on this issue on the opinion of Ritchie J. in *Mitchell*. The Ontario Court of Appeal, as did the British Columbia Court of Appeal in *Cardinal*, followed the contrary opinion of Laskin C.J. in that case.

In *Mitchell*, the appellant sought, by an application for *habeas corpus* with *certiorari* in aid, to challenge the validity of his detention following the suspension and revocation of his parole by the National Parole Board. He raised several grounds of alleged jurisdictional error related to the proceedings and decisions of the Board which he supported by affidavit evidence. A majority of this Court dismissed his appeal, finding that his detention was not invalid by reason of absence or excess of jurisdiction. The issue of the availability of *certiorari* in aid arose because the Manitoba Court of Queen's Bench had issued a writ of *habeas corpus* to determine the validity of the detention, but the order had not included relief in the nature of *certiorari* in aid. Although, as Ritchie J. observed, the sufficiency of the order of the Manitoba Court of Queen's Bench had not been challenged below, opinion were nevertheless expressed in this Court on the jurisdiction of a provincial superior court to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention imposed by federal authority. Ritchie J. was

«office, commission ou autre tribunal fédéral» désigne un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de la *Loi constitutionnelle de 1867*.

Il n'est pas contesté que la décision de placer l'intimé dans l'unité spéciale de détention de Millhaven a été prise par un office, une commission ou un tribunal fédéral au sens de l'art. 2 de la Loi.

Les cours qui ont eu à se pencher sur cette question de compétence ont buté contre les opinions contradictoires exprimées par les juges de cette Cour dans l'arrêt *Mitchell c. La Reine*, [1976] 2 R.C.S. 570. La conclusion du juge Steele sur cette question se fonde sur l'opinion du juge Ritchie dans l'arrêt *Mitchell*. Cependant, la Cour d'appel de l'Ontario, tout comme la Cour d'appel de la Colombie-Britannique dans l'arrêt *Cardinal*, a suivi l'opinion opposée du juge en chef Laskin.

Dans l'affaire *Mitchell*, l'appelant a essayé, par une demande d'*habeas corpus* avec *certiorari* auxiliaire, de contester la validité de sa détention à la suite de la suspension et de la révocation de sa libération conditionnelle par la Commission nationale des libérations conditionnelles. Il a soulevé, affidavits à l'appui, plusieurs erreurs de compétence dont les procédures et les décisions de la Commission auraient été entachées. Cette Cour à la majorité a rejeté son pourvoi, concluant que sa détention n'était pas invalide pour défaut ou excès de compétence. La question de la possibilité d'obtenir un *certiorari* auxiliaire s'est posée parce que la Cour du Banc de la Reine du Manitoba avait délivré un bref d'*habeas corpus* pour qu'il soit statué sur la validité de la détention, mais l'ordonnance n'avait pas été assortie d'un redressement de la nature d'un *certiorari* auxiliaire. Quoique, comme l'a fait remarquer le juge Ritchie, on n'ait pas contesté en Cour d'appel le caractère adéquat de l'ordonnance de la Cour du Banc de la Reine du Manitoba, des opinions ont été exprimées en cette Cour sur la compétence d'une cour supérieure

1985 CanLII 22 (SCC)

first of all of the view, which may be assumed to have been that of a majority of the Court, that *certiorari* would not lie in any event because the decisions of the National Parole Board suspending and revoking the appellant's parole were not decisions of a judicial or quasi-judicial nature amenable to *certiorari*. In support of this conclusion he cited the decisions of this Court in *Ex parte McCaud*, [1965] 1 C.C.C. 168, and *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453. Speaking for himself and three other members of the full Court (Judson, Pigeon and Beetz JJ.), he was also of the opinion, however, that the jurisdiction of a provincial superior court to issue *certiorari* in aid of *habeas corpus* against a federal board had been removed by s. 18 of the *Federal Court Act*. The other members of the Court (Martland and de Grandpré JJ.) who agreed that the appeal should be dismissed did not express an opinion on this issue. Laskin C.J., who would have allowed the appeal, held that *certiorari* was not confined in its application to decisions of a judicial or quasi-judicial nature, citing *R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.*, [1974] 2 All E.R. 643, as indicating the wider application of the remedy, and that s. 18 of the *Federal Court Act* had not removed the jurisdiction of a provincial superior court to issue *certiorari* in aid of *habeas corpus* against a federal board, commission or tribunal. The opinion of Laskin C.J. on this question of jurisdiction was concurred in by Dickson J., as he then was. Spence J., who agreed in separate reasons that the appeal should be allowed, does not appear to have addressed this issue.

It is, of course, clear since the decision of this Court in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, that *certiorari* is not confined to decisions required to be

provinciale pour délivrer un *habeas corpus* avec *certiorari* auxiliaire aux fins d'examiner la validité d'une détention imposée par les autorités fédérales. Le juge Ritchie a estimé tout d'abord, et on peut supposer que c'était là l'opinion de la majorité en cette Cour, qu'en tout état de cause on ne pouvait recourir au *certiorari* parce que les décisions de la Commission nationale des libérations conditionnelles qui suspendaient et révoquaient la libération conditionnelle de l'appelant n'étaient pas des décisions judiciaires ou quasi judiciaires qui pouvaient en conséquence faire l'objet d'un *certiorari*. À l'appui de cette conclusion le juge Ritchie a cité les arrêts de cette Cour *Ex parte McCaud*, [1965] 1 C.C.C. 168, et *Howarth c. Commission nationale des libérations conditionnelles*, [1976] 1 R.C.S. 453. Parlant pour lui-même et au nom de trois juges (les juges Judson, Pigeon et Beetz) de la Cour siégeant au complet, le juge Ritchie a cependant estimé que l'art. 18 de la *Loi sur la Cour fédérale* avait aboli la compétence d'une cour supérieure provinciale pour délivrer contre un office fédéral un *habeas corpus* avec *certiorari* auxiliaire. Quant aux juges Martland et de Grandpré, qui étaient également d'avis que le pourvoi devait être rejeté, ils n'ont pas exprimé d'opinion sur ce point. Le juge en chef Laskin, qui aurait accueilli le pourvoi, a conclu que le recours au *certiorari* ne se limite pas à des décisions de caractère judiciaire ou quasi judiciaire et il a invoqué l'arrêt *R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.*, [1974] 2 All E.R. 643, à l'appui de la portée plus large du recours. Il a conclu en outre que l'art. 18 de la *Loi sur la Cour fédérale* n'avait pas retiré aux cours supérieures provinciales la compétence pour délivrer contre un office, une commission ou un autre tribunal fédéral un *certiorari* auxiliaire d'un *habeas corpus*. Le juge Dickson, maintenant Juge en chef, a partagé l'avis du juge en chef Laskin sur la question de la compétence. Dans ses motifs distincts, le juge Spence conclut qu'il y aurait lieu d'accueillir le pourvoi, mais il ne paraît pas s'être penché sur cette question.

Certes, il est bien établi depuis l'arrêt de cette Cour *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, que le recours au *certiorari* ne se limite pas aux décisions

1985 CanLII 22 (SCC)

made on a judicial or quasi-judicial basis, but that it applies, in the words of Dickson J., as he then was, at pp. 622-23, "wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person".

On the question of jurisdiction to issue *certiorari* in aid of *habeas corpus* I am in respectful agreement with the conclusion of Laskin C.J. in *Mitchell*, essentially for the reasons given by him, which I understand to be the importance of making the *habeas corpus* jurisdiction of the provincial superior courts an effective one and the distinction between *certiorari* to quash and *certiorari* in aid, regarded as a procedural or evidentiary device to make *habeas corpus* more effective. With reference to this distinction Laskin C.J. said at p. 578:

> It is quite clear to me that there is a marked difference between *certiorari*, used to quash a conviction or an order by its own strength, and *certiorari* in aid of *habeas corpus* to make the latter remedy more effective by requiring production of the record of proceedings for that purpose.

One must approach this issue, I think, from the same point of departure as was adopted by Laskin C.J.—that the provisions of the *Federal Court Act* indicate a clear intention on the part of Parliament to leave the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 of the *Federal Court Act* confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to *habeas corpus*. That this was not an oversight but a well considered decision is indicated by s. 17(5) of the Act, which expressly confers exclusive jurisdiction on the Federal Court with respect to an application for *habeas corpus* by a member of the Canadian Forces serving outside Canada. I agree with Laskin C.J. that because of its importance as a safeguard of the liberty of the subject *habeas corpus* jurisdiction can only be affected by express

soumises à un processus judiciaire ou quasi judiciaire, mais que, comme l'a dit le juge Dickson, maintenant Juge en chef, aux pp. 622 et 623, il y a lieu à *certiorari* «chaque fois qu'un organisme public a le pouvoir de trancher une question touchant aux droits, intérêts, biens, privilèges ou libertés d'une personne».

Sur la question de la compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus*, je souscris respectueusement à la conclusion du juge en chef Laskin dans l'arrêt *Mitchell* et ce, essentiellement pour les raisons données par celui-ci qui, si je comprends bien, s'est fondé sur l'importance de rendre efficace la compétence en matière d'*habeas corpus* des cours supérieures provinciales et sur la distinction qui existe entre le *certiorari* aux fins d'annulation et le *certiorari* auxiliaire, ce dernier étant un outil de procédure ou de preuve conçu pour accroître l'efficacité de l'*habeas corpus*. Voici ce que le juge en chef Laskin dit au sujet de cette distinction à la p. 578:

> Il me paraît très clair qu'il y a une différence marquée entre le *certiorari* auquel on a recours comme procédure permettant directement l'annulation d'une condamnation ou d'une ordonnance et le *certiorari* auxiliaire d'un *habeas corpus* visant à rendre ce dernier plus efficace en exigeant, à cette fin, la communication du dossier.

À mon avis, il faut aborder cette question de la même manière que l'a fait le juge en chef Laskin, c'est-à-dire prendre pour point de départ que les dispositions de la *Loi sur la Cour fédérale* traduisent l'intention manifeste du législateur de laisser aux cours supérieures provinciales la compétence en matière d'*habeas corpus* pour vérifier la validité d'une détention imposée par les autorités fédérales. Bien que l'art. 18 de la *Loi sur la Cour fédérale* confère une compétence exclusive et très générale pour contrôler les décisions des autorités fédérales au moyen des brefs de prérogative et des recours extraordinaires, lesquels sont expressément mentionnés, toute mention de l'*habeas corpus* a été délibérément omise. Qu'il s'agisse là non pas d'un oubli mais d'une décision bien pesée ressort du par. 17(5) de la Loi, qui investit expressément la Cour fédérale d'une compétence exclusive relativement à une demande d'*habeas corpus* présentée par un membre des Forces canadiennes en service à l'étranger. D'accord avec le juge en chef Laskin,

1985 CanLII 22 (SCC)

words. One may think of reasons why it was thought advisable to leave the *habeas corpus* jurisdiction with respect to federal authorities with the provincial superior courts, including the importance of the local accessibility of this remedy. The important thing, as I see it, is that the decision to create this exception to the exclusive review jurisdiction of the Federal Court, with whatever problems arising from concurrent or overlapping jurisdiction it might cause, is really determinative of the question of jurisdiction to issue *certiorari* in aid. There can be no doubt that *certiorari* in aid is important, if not essential, to the effectiveness of *habeas corpus*. This was emphasized by both Anderson J.A., with whom the other members of the British Columbia Court of Appeal agreed on this issue in *Cardinal*, and by Cory J.A. in the case at bar. In many cases it may not be possible for a court to determine whether there has been an absence or excess of jurisdiction if the record of the tribunal which imposed or authorized the detention is not brought before it. The importance of *habeas corpus* itself, and by implication the importance of maintaining it as a fully effective remedy is, as Laskin C.J. observed, given particular emphasis by its inclusion as a guaranteed right in s. 2(*c*)(iii) of the *Canadian Bill of Rights*. To this recognition may now be added the constitutional guarantee of the right to *habeas corpus* in s. 10(*c*) of the *Canadian Charter of Rights and Freedoms*. Because of the clear intention to leave the *habeas corpus* jurisdiction over federal authorities with the provincial superior courts and the importance of *certiorari* in aid to the effectiveness of *habeas corpus*, it cannot, in my opinion, have been intended that the reference to *certiorari* in s. 18 of the *Federal Court Act* should have the effect of undermining or weakening the *habeas corpus* jurisdiction of the provincial superior courts by the exclusion or denial of *certiorari* in aid. Certainly such a construction is to be avoided if at all possible. It can be avoided by application of the distinction emphasized by Laskin C.J. between *certiorari* as an independent and separate mode of review having as its object to quash the decision of an inferior tribunal and *certiorari* as an ancillary procedure used to serve an essentially evidentiary purpose. A very full discussion of this

j'estime qu'en raison de son importance à titre de protection de la liberté individuelle, la compétence en matière d'*habeas corpus* ne saurait être modifiée que par des termes explicites. On peut penser à plusieurs raisons, y compris l'importance de voir à ce qu'il soit possible d'obtenir ce recours à l'échelon local, pour lesquelles on a jugé bon de laisser aux cours supérieures provinciales la compétence pour délivrer un *habeas corpus* contre des autorités fédérales. L'élément capital, à mon sens, est ceci: ce qui tranche en réalité la question de la compétence pour délivrer un *certiorari* auxiliaire est la décision de créer, avec tout ce que cela risque d'engendrer comme problèmes de partage ou de chevauchement de compétences, cette exception à la compétence exclusive de la Cour fédérale en matière de contrôle judiciaire. Il ne fait pas de doute que le *certiorari* auxiliaire est important, sinon essentiel, pour rendre l'*habeas corpus* efficace. C'est ce qu'ont souligné à la fois le juge Anderson, à l'avis duquel les autres membres de la Cour d'appel de la Colombie-Britannique se sont rangés sur cette question dans l'arrêt *Cardinal*, et le juge Cory dans la présente affaire. Dans bien des cas il peut être impossible à une cour de se prononcer sur l'absence ou l'excès de compétence si l'on ne produit pas le dossier du tribunal qui a ordonné ou autorisé la détention. Comme l'a fait remarquer le juge en chef Laskin, l'importance de l'*habeas corpus* lui-même et, par suite, l'importance de son maintien à titre de recours complètement efficace, ressortent particulièrement du fait que c'est un droit garanti inclus dans le sous-al. 2*c*)(iii) de la *Déclaration canadienne des droits*. À cette reconnaissance s'ajoute maintenant la garantie constitutionnelle du droit à l'*habeas corpus* énoncée à l'al. 10*c*) de la *Charte canadienne des droits et libertés*. En raison de l'intention manifeste de laisser aux cours supérieures provinciales la compétence en matière d'*habeas corpus* à l'égard des autorités fédérales et en raison de l'importance du *certiorari* auxiliaire pour rendre l'*habeas corpus* efficace, on n'a pas pu, selon moi, vouloir que la mention du *certiorari* à l'art. 18 de la *Loi sur la Cour fédérale* ait pour effet de miner ou d'affaiblir, par l'exclusion ou le refus du *certiorari* auxiliaire, la compétence des cours supérieures provinciales en matière d'*habeas corpus*. Indu-

1985 CanLII 22 (SCC)

distinction, with reference to many of the decisions in which it has been noted and applied, is to be found in Cromwell, "Habeas Corpus and Correctional Law" (1977), 3 *Queen's L.J.* 295 at pp. 320-23. Applying the distinction to the reference to *certiorari* in s. 18 of the *Federal Court Act*, it is reasonable to conclude, because of the association in that section of *certiorari* with the other prerogative and extraordinary remedies, that the reference is to the independent remedy of *certiorari* to quash. It is unlikely that Parliament intended to confer an exclusive jurisdiction to issue *certiorari* in aid when it had clearly withheld the jurisdiction to issue *habeas corpus*. For these reasons I conclude that a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the *Federal Court Act*, and that accordingly the Ontario Court of Appeal did not err in concluding as it did on this issue.

III

In view of this conclusion on the question of jurisdiction to issue *certiorari* in aid of *habeas corpus* it may not be strictly necessary to deal with the question which was treated as an alternative issue by the British Columbia Court of Appeal in *Cardinal* and by the Ontario Court of Appeal in the case at bar—whether on *habeas corpus* without *certiorari* in aid a court may consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction. It is well established that affidavit evidence is admissible on *certiorari* to show jurisdictional error. Both courts of appeal were led, however, by

bitablement, une telle interprétation est autant que possible à éviter. On peut l'éviter en appliquant la distinction, sur laquelle a insisté le juge en chef Laskin, entre le *certiorari* en tant que méthode de contrôle indépendante et distincte dont l'objet est l'annulation d'une décision d'un tribunal inférieur, et le *certiorari* en tant que procédure auxiliaire servant essentiellement à établir une preuve. On trouve dans Cromwell, «Habeas Corpus and Correctional Law» (1977), 3 *Queen's L.J.* 295, aux pp. 320 à 323, une analyse très détaillée de cette distinction, où l'on se réfère à un bon nombre de décisions où la distinction a été mentionnée et appliquée. Si on l'applique au *certiorari* visé à l'art. 18 de la *Loi sur la Cour fédérale*, il est raisonnable de conclure, étant donné que dans cet article le *certiorari* fait partie d'une énumération des brefs de prérogative et des recours extraordinaires, qu'il s'agit du recours indépendant en *certiorari* pour l'annulation d'une décision. Il est peu probable que le législateur ait voulu conférer une compétence exclusive pour délivrer un *certiorari* auxiliaire puisqu'il n'a manifestement pas donné compétence pour délivrer un bref d'*habeas corpus*. Pour ces raisons j'estime qu'une cour supérieure provinciale a compétence pour délivrer un *habeas corpus* avec *certiorari* auxiliaire aux fins d'examiner la validité d'une détention autorisée ou ordonnée par un office, une commission ou un autre tribunal fédéral au sens de l'art. 2 de la *Loi sur la Cour fédérale* et que, par conséquent, la conclusion de la Cour d'appel de l'Ontario sur ce point n'est pas entachée d'erreur.

III

Vu cette conclusion sur la question de la compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus*, il peut ne pas être strictement nécessaire d'étudier la question, qui a été traitée comme une question subsidiaire par la Cour d'appel de la Colombie-Britannique dans l'affaire *Cardinal* et par la Cour d'appel de l'Ontario dans la présente affaire; il s'agit de la question de savoir si, dans le cas d'une demande d'*habeas corpus* sans *certiorari* auxiliaire, une cour peut prendre en considération un affidavit ou d'autre preuve extrinsèque afin de déterminer s'il y a eu défaut ou excès de compétence. Il est bien établi que, dans le cas

1985 CanLII 22 (SCC)

their analysis of this question to reach a conclusion on it at variance with that of Ritchie J. in *Mitchell*, without much explicit consideration of the jurisprudence of this Court on which the opinion of Ritchie J. purported to be based. Moreover, this question may well be an issue in the *Morin* appeal. For these reasons it is probably desirable that it be dealt with here in order to remove the uncertainty which now necessarily exists concerning it.

d'une demande de *certiorari*, une preuve par affidavit est admissible pour établir une erreur de compétence. Toutefois, l'analyse de cette question qu'ont entreprise les deux cours d'appel les a amenées à une conclusion différente de celle du juge Ritchie dans l'arrêt *Mitchell*, sans qu'elles aient examiné très explicitement la jurisprudence de cette Cour sur laquelle devait reposer l'opinion du juge Ritchie. D'autre part, il se peut bien que la même question soit soulevée par le pourvoi formé dans l'affaire *Morin*. C'est pourquoi il est probablement souhaitable de la traiter ici pour écarter l'incertitude qui, nécessairement, règne maintenant à son égard.

In *Mitchell*, affidavit evidence was introduced in support of the appellant's contention that he was arrested without the previous issue of a warrant of suspension by the National Parole Board, as required by s. 16(1) of the *Parole Act*, R.S.C. 1970, c. P-2; that he was not informed of the reason for his arrest, as required by s. 2(*c*)(i) of the *Canadian Bill of Rights*; and that he was not afforded an opportunity to be heard on the suspension or revocation of his parole, as required by s. 2(*e*) of the *Canadian Bill of Rights*. These were clearly jurisdictional issues. Ritchie J. held that on the application for *habeas corpus* the Court was confined to the consideration of what appeared on the face of the following documents: the warrant of committal purporting to be based on the suspension of the appellant's parole; the warrant of apprehension issued by the Board upon revocation of the appellant's parole; and the warrant of committal based on the revocation and the warrant of apprehension. He said, with reference to these documents, at p. 590:

Dans l'affaire *Mitchell*, on a produit un affidavit à l'appui de l'argument de l'appelant qu'on l'avait arrêté sans que la Commission nationale des libérations conditionnelles ait au préalable lancé un mandat de suspension conformément au par. 16(1) de la *Loi sur la libération conditionnelle de détenus*, S.R.C. 1970, chap. P-2; qu'on ne l'avait pas informé des motifs de son arrestation comme l'exige le sous-al. 2*c*)(i) de la *Déclaration canadienne des droits*; et que, contrairement à l'al. 2*e*) de la *Déclaration canadienne des droits*, on ne lui avait pas donné la possibilité d'être entendu relativement à la suspension ou à la révocation de sa libération conditionnelle. Visiblement, ces questions se rapportaient à la compétence. Le juge Ritchie a conclu que la cour saisie de la demande d'*habeas corpus* devait s'en tenir à l'examen de ce qui se dégageait de la lecture des documents suivants: le mandat de dépôt, censément fondé sur la suspension de la libération conditionnelle de l'appelant; le mandat d'arrestation lancé par la Commission à la suite de la révocation de la libération conditionnelle de l'appelant; et le mandat de dépôt fondé sur la révocation et sur le mandat d'arrestation. À la page 590, le juge Ritchie dit relativement à ces documents:

> On the return of the writ before him, Chief Justice Dewar was confined to a consideration of the facts disclosed on the face of the documents relating to the cause of the taking and detaining of the said Fred Mitchell.

> Au rapport du bref, le juge en chef Dewar devait se limiter à l'examen des faits apparaissant à la lecture des documents concernant la cause de l'arrestation et de la détention dudit Fred Mitchell.

and further with reference to this question, he said at p. 594:

Puis, sur le même sujet, il ajoute, à la p. 594:

1985 CanLII 22 (SCC)

As I have pointed out, Chief Justice Dewar in the hearing before him on the return of the writ of *habeas corpus*, was confined to a consideration of the facts contained on the face of the warrants then produced, and in my view the statements made in the appellant's affidavits were not properly before him and it is apparent from his reasons for judgment that he did not take them into consideration. The law in this regard is set out in the judgment of Judson J. in *Re Shumiatcher*, [1962] S.C.R. 38, an application for *habeas corpus* in which, after having reviewed the relevant cases and having observed that the jurisdiction of this Court was concurrent with that of the judges of the superior Courts of the Provinces in matters of *habeas corpus*, he went on to say:

> My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to—the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

In *Re Shumiatcher*, [1962] S.C.R. 38, the relevant issue was whether the Court could look at certain solemn declarations which the applicant for *habeas corpus* was charged with having induced a person to make, knowing them to be false, and thereby being a party, by virtue of s. 22(1) of the *Criminal Code*, to the offence defined by s. 114 (now s. 122). The application for *habeas corpus* challenged the validity of the committal for trial on the ground that the person making the solemn declarations was not a person permitted, authorized or required by law to make them, within the meaning of s. 114. The solemn declarations made reference to a statement of claim. Judson J. framed the issue as follows at p. 45:

> This brings me to the question of what use may be made of this material on a motion for habeas corpus before a judge of this Court.
>
> The Crown's submission is that I am limited to looking at the warrant of committal and that I cannot look at these declarations and the statement of claim any more than I can look at the evidence—seven or eight volumes of it—given on the preliminary hearing.

Comme je l'ai signalé, le juge en chef Dewar, lors de l'audition sur le rapport du bref d'*habeas corpus*, devait s'en tenir à l'examen des faits apparaissant à la lecture des mandats alors produits, et, à mon avis, les affirmations de l'appelant contenues dans les déclarations sous serment ne lui étaient pas présentées de façon régulière et il appert de ses motifs de jugement qu'il ne les a pas prises en considération. Le juge Judson a indiqué dans l'arrêt *In re Shumiatcher*, [1962] R.C.S. 38, le principe juridique en cette matière. Il s'agissait d'une requête en *habeas corpus* et, après avoir examiné les arrêts pertinents et fait remarquer que la juridiction de cette Cour était concurrente avec celle des juges de la Cour supérieure des provinces en matière d'*habeas corpus*, le juge Judson continuait en disant:

> [TRADUCTION] Ma compétence se limite à l'examen du mandat de dépôt et des autres documents que j'ai mentionnés—les engagements souscrits et l'ordonnance du juge Hogarth. Je ne puis examiner la preuve, qu'il s'agisse des notes sténographiques des témoignages à l'enquête préliminaire ou de la preuve qu'on tente d'introduire au moyen d'une déclaration sous serment portant sur une partie de ces témoignages.

Dans l'arrêt *Re Shumiatcher*, [1962] R.C.S. 38, la question pertinente était de savoir si la Cour pouvait examiner certaines déclarations solennelles qu'on accusait le demandeur de l'*habeas corpus* d'avoir incité une personne à faire, sachant qu'elles étaient fausses et devenant ainsi, aux termes du par. 22(1) du *Code criminel*, une partie à l'infraction définie par l'art. 114 (maintenant l'art. 122). La demande d'*habeas corpus* contestait la validité du renvoi à procès au motif que l'auteur des déclarations solennelles n'était pas, au sens de l'art. 114, une personne ayant la permission, l'autorisation ou l'obligation d'après la loi de les faire. Ces déclarations solennelles faisaient mention d'une déclaration introductive d'instance. À la page 45, le juge Judson formule la question en litige de la manière suivante:

> [TRADUCTION] Voilà qui m'amène à la question de l'usage qu'on peut faire de ces documents dans le cadre d'une requête en habeas corpus devant un juge de cette Cour.
>
> La poursuite soutient que je dois me limiter à un examen du mandat de dépôt et que je ne puis tenir compte de ces déclarations ni de la déclaration introductive d'instance pas plus que je ne puis étudier les témoignages, qui remplissent sept ou huit volumes, donnés à l'enquête préliminaire.

1985 CanLII 22 (SCC)

After quoting from the judgments of this Court in *Re Trepanier* (1885), 12 S.C.R. 111, *Ex parte Macdonald* (1896), 27 S.C.R. 683, and *Goldhar v. The Queen*, [1960] S.C.R. 431, with reference to *habeas corpus* against a warrant of committal after conviction, and observing that this Court did not have jurisdiction to issue *certiorari* in aid of *habeas corpus*, Judson J. concluded on this issue as follows at p. 47:

In my opinion the jurisdiction of this Court is similarly limited in an inquiry into a committal for trial. In the absence of power to issue a writ of certiorari in aid of habeas corpus, a judge of this Court has no power to look at the evidence at the preliminary hearing or to receive affidavit evidence relating to it.

My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to—the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

I am founding my reasons on this branch of the case entirely on that principle and I am expressing no opinion on the point on which I heard full argument—whether there does exist, by virtue of provincial legislation, permission to take a declaration of this kind.

In *Goldhar*, the issues raised on the application for *habeas corpus* were the regularity on its face of a Calendar of Sentences as a certificate of the appellant's conviction and the applicable maximum penalty, having regard to a change that had taken place in the law. Fauteux J. (as he then was), with whom Taschereau, Abbott and Judson JJ. concurred, expressed the rationale for the exclusion of extrinsic evidence on an application for *habeas corpus* as follows at p. 439:

The question, which counsel for the appellant admittedly sought to be determined by way of *habeas corpus* proceedings, is stated in the reasons for judgment of other members of the Court. In my view, it is one which would require the consideration of the evidence at trial and which, in this particular case, extends beyond the

Ayant cité des extraits tirés des arrêts de cette Cour *Re Trepanier* (1885), 12 R.C.S. 111, *Ex parte Macdonald* (1896), 27 R.C.S. 683, et *Goldhar v. The Queen*, [1960] R.C.S. 431, relatifs au recours à l'*habeas corpus* pour attaquer un mandat de dépôt lancé à la suite d'une déclaration de culpabilité, et ayant fait remarquer que cette Cour n'avait pas compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus*, le juge Judson, à la p. 47, est arrivé aux conclusions suivantes sur cette question:

[TRADUCTION] À mon avis, la compétence de cette Cour souffre une restriction semblable dans le cas d'une enquête sur un renvoi au procès. À défaut de compétence pour délivrer un certiorari auxiliaire d'un habeas corpus, un juge de cette Cour n'est pas autorisé à examiner les témoignages donnés à l'enquête préliminaire ni à recevoir une preuve par affidavit à son égard.

Ma compétence se limite à un examen du mandat de dépôt et des autres documents dont j'ai fait mention, savoir les engagements souscrits et l'ordonnance du juge Hogarth. Je ne puis étudier aucune preuve, qu'il s'agisse d'une transcription des témoignages donnés à l'enquête préliminaire ou d'une preuve qu'on cherche à introduire par voie d'affidavit identifiant une partie de ces témoignages.

Sur cet aspect de l'affaire, je m'appuie entièrement sur ce principe-là et je n'exprime pas d'opinion sur la question, débattue à fond devant moi, de savoir si la loi provinciale autorise à recevoir ce genre de déclaration.

Dans l'affaire *Goldhar*, la demande d'*habeas corpus* soulevait la question de savoir si une liste de condamnations constituait un certificat en bonne et due forme du verdict de culpabilité rendu contre l'appelant et la question de la peine maximale applicable compte tenu d'une modification qui avait été apportée à la loi. Le juge Fauteux (alors juge puîné), à l'avis duquel les juges Taschereau, Abbott et Judson ont souscrit, a exprimé, à la p. 439, la raison fondamentale de l'exclusion de toute preuve extrinsèque dans le cadre d'une demande d'*habeas corpus*:

[TRADUCTION] La question, que l'avocat de l'appelant reconnaît avoir essayé de faire trancher par voie d'*habeas corpus*, est formulée dans les motifs de jugement des autres membres de la Cour. À mon avis, cette question nécessiterait l'examen de la preuve produite en première instance, ce qui, en l'espèce, dépasse les limites

1985 CanLII 22 (SCC)

scope of matters to be inquired under a similar process. To hold otherwise would be tantamount to convert the writ of *habeas corpus* into a writ of error or an appeal and to confer, upon every one having authority to issue the writ of *habeas corpus*, an appellate jurisdiction over the orders and judgments of even the highest Courts. It is well settled that the functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

I agree with the view that the appellant has been convicted and sentenced by a Court of competent jurisdiction, that the Calendar is a certificate regular on its face that the appellant has been so convicted and sentenced and that, with the material before him, Martland J. rightly dismissed the application for a writ of *habeas corpus*.

The above passage, in my respectful opinion, reflects the true distinction or criterion respecting the consideration of extrinsic evidence on an application for *habeas corpus*—the distinction between issues going to the merits and issues going to jurisdiction. The issues in both *Shumiatcher* and *Goldhar* were clearly issues going to the merits. The same is true of *Re Trepanier*, where the applicant alleged that the convicting magistrate erred on the facts in convicting him. He sought a writ of *habeas corpus* with *certiorari* in aid to bring up the record of the proceedings to ascertain whether there was sufficient evidence to convict. This was clearly an attempt to employ *habeas corpus* to review the merits of a conviction. Ritchie C.J. said at p. 113:

The jurisdiction of the magistrate being unquestionable over the subject-matter of complaint and the person of the prisoner, and there being no ground for alleging that the magistrate acted irregularly or beyond his jurisdiction, and the conviction and warrant being admitted to be regular, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, I have not the slightest hesitation in saying that we cannot go behind the conviction and inquire into the merits of the case by the use of the writ of *habeas corpus*.

des questions pouvant être étudiées dans une telle procédure. Toute autre conclusion reviendrait à transformer le bref d'*habeas corpus* en un bref d'erreur ou en appel et à conférer à toute personne autorisée à délivrer un bref d'*habeas corpus* une compétence d'appel à l'égard des ordonnances et des jugements même des plus hautes instances. Or, il est bien établi qu'un tel bref ne permet pas d'entreprendre davantage qu'une enquête sur la compétence de la cour qui a ordonné la détention et sur la validité apparente de l'ordonnance en question.

Je suis d'accord pour dire que l'appelant a été reconnu coupable et condamné par une cour compétente, que la liste est un certificat en bonne et due forme de la déclaration de culpabilité et de la condamnation de l'appelant et que, compte tenu des documents dont il disposait, c'est à bon droit que le juge Martland a rejeté la demande de bref d'*habeas corpus*.

Le passage que je viens de citer exprime, à mon respectueux avis, la véritable distinction ou le véritable critère en ce qui concerne l'examen d'une preuve extrinsèque dans le cadre d'une demande d'*habeas corpus*; il s'agit de la distinction entre les questions de fond et les questions de compétence. Aussi bien dans l'arrêt *Shumiatcher* que dans l'arrêt *Goldhar* on était manifestement en présence de questions de fond. Il en va de même de l'affaire *Re Trepanier*, où le requérant a allégué que le magistrat qui l'avait déclaré coupable avait commis une erreur quant aux faits. Le requérant a donc demandé un bref d'*habeas corpus* avec *certiorari* auxiliaire qui aurait exigé la production du dossier des procédures afin de déterminer si la preuve était suffisante pour justifier une déclaration de culpabilité. C'était clairement une tentative d'utiliser l'*habeas corpus* pour examiner le bien-fondé d'une déclaration de culpabilité. Le juge en chef Ritchie a dit, à la p. 113:

[TRADUCTION] Le magistrat a incontestablement compétence sur le sujet de la plainte et sur la personne du détenu; l'allégation que le magistrat a agi de façon irrégulière ou qu'il a excédé sa compétence est sans fondement; de plus, on reconnaît la régularité de la déclaration de culpabilité et du mandat, les seuls motifs de contestation étant que le magistrat a commis une erreur quant aux faits et que la preuve ne lui permettait pas de conclure à la culpabilité du détenu. Je n'ai donc aucune hésitation à dire que nous ne pouvons, au moyen d'un bref d'*habeas corpus*, examiner le bien-fondé de la déclaration de culpabilité ni mener une enquête sur le fond de l'affaire.

1985 CanLII 22 (SCC)

In the subsequent case of *Re Sproule* (1886), 12 S.C.R. 140, the issues were jurisdictional but the Court held that extrinsic evidence could not be considered on *habeas corpus* to contradict the record of a superior court that is regular on its face. The conviction and sentence by the court of oyer and terminer and general gaol delivery had been confirmed by the Supreme Court of British Columbia and Ritchie C.J. spoke in terms of the conclusive character of the record of a superior court as follows at p. 191:

> I venture to propound without fear of successful contradiction, that by the law of England and of this Dominion, where the principles of the common law prevail, that if the record of a superior court contains the recital of facts requisite to confer jurisdiction, which the records in this case did, it is conclusive and cannot be contradicted by extrinsic evidence; and if the superior courts have jurisdiction over the subject-matter and the person, as the court of oyer and terminer and general gaol delivery and the Supreme Court of British Columbia had in this case, the records of their judgments and sentences are final and conclusive, unerring verity, and the law will not, in such a case, allow the record to be contradicted.

and he emphasized the distinction in this respect between the records of inferior courts and those of superior courts as follows at p. 193:

> And I venture humbly, and with all respect, to suggest that the difficulty in this case has arisen from a misapprehension of what can, and what cannot, be done under a writ of *habeas corpus*, but more especially from not duly appreciating the distinction between the validity and force of records of courts of inferior, and of courts of superior, jurisdiction, but treating records of superior and inferior courts as being of the same force and effect.

Re Sproule was applied by this Court in *Ex parte Macdonald*, *supra*, and *Re Henderson*, [1930] S.C.R. 45, where there were jurisdictional issues involved, in support of the more general or unqualified proposition that the Court was limited on *habeas corpus* to an examination of the warrant of committal in determining whether there had been an absence or excess of jurisdiction.

L'arrêt subséquent *Re Sproule* (1886), 12 R.C.S. 140, soulevait des questions de compétence, mais la Cour a conclu qu'on ne saurait, dans le cadre d'une demande d'*habeas corpus*, se fonder sur des preuves extrinsèques pour contredire le dossier apparemment régulier d'une cour supérieure. La Cour suprême de la Colombie-Britannique avait confirmé la déclaration de culpabilité et la peine prononcées par la cour d'oyer et terminer et d'évacuation des prisons, et, à la p. 191, le juge en chef Ritchie a parlé du caractère concluant du dossier d'une cour supérieure en ces termes:

> [TRADUCTION] Je suis prêt à soutenir sans crainte de contradiction que, selon le droit d'Angleterre et du Canada, lorsque les principes de *common law* s'appliquent, si le dossier d'une cour supérieure contient l'exposé de faits nécessaire pour qu'il y ait attribution de compétence, ce qui est le cas en l'espèce, ce dossier est concluant et ne saurait être contredit par une preuve extrinsèque; et si les cours supérieures ont compétence sur le sujet et sur la personne, comme l'avaient dans la présente affaire la cour d'oyer et terminer et d'évacuation des prisons et la Cour suprême de la Colombie-Britannique, les dossiers contenant leurs jugements et condamnations sont définitifs et concluants, la vérité absolue, et, cela étant, le dossier ne peut en droit être contredit.

Puis, il a souligné la distinction à cet égard entre les dossiers de cours inférieures et ceux de cours supérieures, disant à ce propos, à la p. 193:

> [TRADUCTION] Et je me permets de suggérer humblement et en toute déférence que la difficulté en l'espèce vient d'une conception erronée de ce qu'on peut et de ce qu'on ne peut pas faire en vertu d'un bref d'*habeas corpus*; mais, plus particulièrement, la difficulté résulte de ce qu'on saisit imparfaitement la différence de validité et d'effet entre les dossiers de cours de juridiction inférieure et ceux de cours de juridiction supérieure, de sorte qu'on considère les deux types de dossiers comme ayant la même validité et le même effet.

Dans les arrêts *Ex parte Macdonald*, précité, et *Re Henderson*, [1930] R.C.S. 45, portant sur des questions de compétence, cette Cour a appliqué l'arrêt *Re Sproule* pour appuyer la proposition plus générale ou absolue selon laquelle la Cour, saisie d'une demande d'*habeas corpus*, doit s'en tenir à un examen du mandat de dépôt en déterminant s'il y a eu défaut ou excès de compétence.

1985 CanLII 22 (SCC)

Thus the true basis of this Court's jurisprudence with respect to the admission or consideration of extrinsic evidence on an application for *habeas corpus* consists of two principles: the principle that extrinsic evidence must not be permitted to convert an application for *habeas corpus* into an appeal on the merits, and the principle that the record of a superior court is conclusive as to the facts on which the court's jurisdiction depends and cannot be contradicted by extrinsic evidence. It has been suggested that the Court was particularly concerned about the first principle when it was exercising an original jurisdiction in respect of *habeas corpus*, and that this may have led to the broad and unqualified expression of the rule respecting the consideration of extrinsic evidence on *habeas corpus* that is to be found in some of its decisions. See Sharpe, *The Law of Habeas Corpus* (1976), p. 51, note 2. With respect to the second principle, I agree with the suggestion in Sharpe, "Habeas Corpus in Canada" (1975), 2 *Dalhousie L.J.* 241 at p. 261, that it should apply only to the records of superior courts or courts of general common law jurisdiction. In *Mitchell*, neither of these principles was applicable. As I have indicated, the grounds of attack were clearly jurisdictional, and the record, dependent as it was on the proceedings and decisions of an inferior tribunal, was not of the character entitled to be treated as conclusive of the facts of jurisdiction. In my respectful opinion, the view expressed in *Mitchell* that the affidavit evidence could not be considered went beyond the true basis of the Court's jurisprudence on this question. In fact, two members of the majority in the result (Martland and de Grandpré JJ.), as well as the minority (Laskin C.J., Spence and Dickson JJ.) did consider the affidavit evidence in deciding whether there had been an absence or excess of jurisdiction in ordering the detention.

As the British Columbia and Ontario Courts of Appeal pointed out in *Cardinal* and in the case at bar, it may only be possible to establish jurisdictional error on *habeas corpus* by affidavit evi-

Il s'ensuit que la jurisprudence de cette Cour concernant l'admission ou l'examen d'une preuve extrinsèque dans le cadre d'une demande d'*habeas corpus* a pour fondement véritable deux principes, savoir: le principe selon lequel il ne faut pas permettre qu'une preuve extrinsèque ait pour effet de transformer une demande d'*habeas corpus* en un appel sur le fond, et le principe selon lequel le dossier d'une cour supérieure est concluant quant aux faits dont dépend sa compétence et ne peut être contredit par une preuve extrinsèque. Il a été dit que le premier principe constituait une préoccupation particulière de la Cour quand elle avait à exercer une compétence de première instance en matière d'*habeas corpus* et que cela explique peut-être pourquoi certains de ses arrêts contiennent une expression de portée large et absolue de la règle relative à l'examen de preuves extrinsèques dans le cas d'une demande d'*habeas corpus*. Voir Sharpe, *The Law of Habeas Corpus* (1976), p. 51, note 2. Pour ce qui est du second principe, je suis d'accord avec Sharpe qui dit dans «Habeas Corpus in Canada» (1975), 2 *Dalhousie L.J.* 241, à la p. 261, qu'il ne doit s'appliquer qu'aux dossiers des cours supérieures ou des cours de juridiction générale en *common law*. Dans l'arrêt *Mitchell*, ni l'un ni l'autre principe ne trouvait application. Comme je l'ai déjà souligné, les moyens invoqués dans cette affaire-là concernaient manifestement la compétence de la cour, et le dossier, puisqu'il dépendait des procédures et des décisions d'un tribunal inférieur, ne pouvait être considéré comme concluant relativement aux faits établissant la compétence. À mon respectueux avis, quand on dit dans l'arrêt *Mitchell* qu'il n'est pas permis d'examiner la preuve par affidavit, on s'éloigne du fondement véritable de la jurisprudence de la Cour sur cette question. En fait, deux des juges majoritaires (les juges Martland et de Grandpré) ainsi que les juges minoritaires (le juge en chef Laskin, les juges Spence et Dickson) ont tenu compte de la preuve par affidavit en décidant s'il y avait eu défaut ou excès de compétence lorsque l'ordonnance de détention avait été rendue.

Comme l'ont souligné la Cour d'appel de la Colombie-Britannique dans l'arrêt *Cardinal* et la Cour d'appel de l'Ontario dans la présente affaire, il est des cas où l'erreur de compétence ne peut

1985 CanLII 22 (SCC)

dence, even where the record is brought up by *certiorari* in aid. This is particularly true of a violation of natural justice or a denial of procedural fairness. This is a compelling reason, in my opinion, for confining the rule against consideration of extrinsic evidence of an application for *habeas corpus* within its proper boundaries.

Support for a broader approach to the admission or consideration of extrinsic evidence on *habeas corpus* to determine issues of jurisdiction may be found in the decision of the House of Lords in *Schtraks v. Government of Israel*, [1964] A.C. 556, which was relied on by the Courts of Appeal in *Cardinal* and the case at bar. There it was held that fresh evidence was admissible on an application for *habeas corpus* to show that the magistrate lacked jurisdiction to make the committal order in an extradition case because the offence was of a political character. Lord Hodson appears to have held in effect that the rule concerning the admission of affidavit evidence on *habeas corpus* is the same as it is on *certiorari*, as suggested by the following passage at pp. 605-06:

> Proceeding by habeas corpus is analogous to that by certiorari to remove a conviction, see Short and Mellor's Crown Practice (1908), p. 319. Affidavits are not admissible to controvert facts found by the judgment of a court of competent jurisdiction, though they may be received to show some extrinsic collateral matter essential to jurisdiction or to show total want or excess of jurisdiction.

I am therefore of the opinion that, subject to the limitation arising from the conclusive character of the records of courts of superior or general common law jurisdiction, a court may on an application for *habeas corpus* without *certiorari* in aid consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction.

être établie au cours d'une demande d'*habeas corpus* que par la preuve par affidavit même lorsque le dossier a pu être produit grâce à un *certiorari* auxiliaire. Cela est particulièrement vrai s'il y a eu violation des principes de justice naturelle ou négation de l'équité dans la procédure. Il s'agit là, selon moi, d'un motif irrésistible de circonscrire dans les limites qui lui sont propres la règle qui s'oppose à l'examen d'une preuve extrinsèque dans une demande d'*habeas corpus*.

L'arrêt de la Chambre des lords *Schtraks v. Government of Israel*, [1964] A.C. 556, sur lequel se sont fondées les cours d'appel dans l'arrêt *Cardinal* et dans la présente affaire, appuie un point de vue plus libéral à l'égard de l'admission ou de l'examen de preuves extrinsèques dans une demande d'*habeas corpus* pour trancher des questions de compétence. Dans cet arrêt on a conclu qu'une nouvelle preuve pouvait être admise relativement à une demande d'*habeas corpus* afin de démontrer que le magistrat n'avait pas compétence pour rendre l'ordonnance d'incarcération dans une affaire d'extradition en raison du caractère politique de l'infraction. Lord Hodson semble avoir conclu en fait que la règle relative à l'admission d'une preuve par affidavit dans le cas d'un *habeas corpus* est la même que celle qui s'applique à une demande de *certiorari*; c'est ce qui ressort de l'extrait suivant aux pp. 605 et 606:

> [TRADUCTION] La procédure par voie d'habeas corpus est comparable à celle par voie de certiorari pour l'annulation d'une déclaration de culpabilité, voir Short and Mellor's Crown Practice (1908), à la p. 319. Les affidavits ne sont pas admissibles pour mettre en doute des conclusions de fait d'un tribunal compétent, bien qu'ils puissent être reçus pour établir un point accessoire extrinsèque qui est essentiel à la compétence ou pour prouver soit un défaut total de compétence soit un excès de compétence.

Je suis donc d'avis que, sous réserve de la restriction qui résulte du caractère concluant des dossiers de cours de juridiction supérieure ou de juridiction générale en *common law*, une cour saisie d'une demande d'*habeas corpus* sans *certiorari* auxiliaire peut examiner une preuve par affidavit ou d'autres preuves extrinsèques pour déterminer s'il y a eu défaut ou excès de compétence.

1985 CanLII 22 (SCC)

IV

I turn to the question whether *habeas corpus* will lie to determine the validity of the confinement of an inmate of a penitentiary in a special handling unit and to obtain his release from such confinement, if it is found to be unlawful, into normal association with the general population of the penitentiary.

This issue turns on the view that one takes of the proper role of *habeas corpus* and the extent to which it should be adapted to the reality of the various forms of confinement or detention within penal institutions. An important policy consideration, in the context of the exclusive review jurisdiction of the Federal Court, is the extent to which the use of *habeas corpus* to determine the validity of a particular form of detention amounts to an indirect assumption of the Federal Court's review jurisdiction with respect to the administrative decisions of federal correctional authorities.

Those who oppose the resort to *habeas corpus* to challenge the validity of a particular form of confinement or detention in a penal institution contend that it fails to meet two essential conditions of the traditional availability of this remedy: (a) that there be a deprivation of liberty; and (b) that what is sought is the complete liberty of the applicant and not merely his or her transfer to another form of detention or restraint of liberty. This view of the traditional role of *habeas corpus* is reflected in the decisions in *Ex parte Rogers* (1843), 7 Jur. 992, and *R. v. Governor of Wandsworth Prison; ex parte Silverman* (1952), 96 *Sol. J.* 853. In *Rogers* a prisoner applied for *habeas corpus* to obtain his release from a part of a prison "where the confinement was stricter and the food more scanty" to the place in the prison where he had been confined before the transfer. In dismissing the application Denman C.J., with whom Williams, Coleridge and Wightman JJ. concurred, said: "It is quite clear that we cannot entertain this application. The object of the writ of habeas corpus is, generally, to restore a person to his liberty, not to pronounce a judgment as to the room or part of a prison in

IV

Voilà qui m'amène à la question de savoir si l'on peut recourir à l'*habeas corpus* pour décider de la validité de l'incarcération d'un détenu dans une unité spéciale de détention d'un pénitencier et, si cette détention est jugée illégale, pour obtenir sa réintégration dans la population générale du pénitencier.

Au cœur de cette question est l'opinion qu'on peut avoir du rôle véritable de l'*habeas corpus* et de la mesure dans laquelle ce recours doit être adapté à la réalité des différents types d'incarcération et de détention qui existent dans les établissements pénitentiaires. Une considération importante de politique générale, dans le contexte de la compétence exclusive de la Cour fédérale en matière de contrôle judiciaire, est la mesure dans laquelle le recours à l'*habeas corpus* pour déterminer la validité d'une forme particulière de détention constitue une appropriation indirecte du pouvoir de contrôle judiciaire de la Cour fédérale à l'égard des décisions administratives des autorités correctionnelles fédérales.

Ceux qui s'opposent au recours à l'*habeas corpus* pour contester la validité d'une forme particulière d'incarcération ou de détention dans un établissement pénitentiaire soutiennent qu'on ne satisfait pas à deux conditions essentielles auxquelles a été traditionnellement soumise l'obtention de ce recours: a) il faut une privation de liberté et b) il faut viser la liberté totale du requérant et non pas simplement son transfert à un autre type de détention ou de privation de liberté. Cette conception du rôle traditionnel de l'*habeas corpus* se manifeste dans les affaires *Ex parte Rogers* (1843), 7 Jur. 992, et *R. v. Governor of Wandsworth Prison*; *ex parte Silverman* (1952), 96 *Sol. J.* 853. Dans l'affaire *Rogers*, un détenu a tenté d'obtenir par voie d'*habeas corpus* son transfert d'une partie d'une prison [TRADUCTION] «où l'incarcération était plus stricte et les repas plus maigres» à l'endroit, dans la même prison, où il avait été détenu auparavant. En rejetant la demande, le juge en chef Denman, à l'avis duquel les juges Williams, Coleridge et Wightman se sont rangés, a dit: [TRADUCTION] «Il est bien évident que nous ne pouvons faire droit à cette demande.

1985 CanLII 22 (SCC)

which a prisoner ought to be confined." In *Silverman*, a prisoner in preventive detention complained that he was not receiving the special treatment which the applicable statute required to be provided, and he sought by an application for *habeas corpus* to be transferred to a place where such treatment was provided. In dismissing the application for *habeas corpus* Hilbery J. is reported to have held that if a writ of *habeas corpus* were issued, "the only question would be whether the applicant should be released or not; and the prison governor's return would state that he was being detained under a sentence of preventive detention, which would be a perfectly good answer".

These cases were relied on by Hugessen A.C.J. (as he then was) in *Berrouard v. The Queen*, an unreported judgment of November 30, 1981, and related unreported decisions (referred to by the Quebec Court of Appeal in *Morin*) in dismissing applications for *habeas corpus* to challenge the validity of confinement in what appears from the expressions used to have been a special handling unit. I quote from an English version of what he said, as reported in *Re Morin and Yeomans* (1982), 1 C.C.C. (3d) 438 at p. 441:

[TRANSLATION] These six motions for *habeas corpus* each raise the same point of law. In each case, the applicant alleges that he is at present serving a sentence and that he has been unjustifiably transferred into a special detention unit, or a special segregation unit.

An essential pre-condition to the granting of the remedy of *habeas corpus* is the privation of the subject's liberty: *Masella v. Langlais* (1955), 112 C.C.C. 1, [1955] 4 D.L.R. 346, [1955] S.C.R. 263. Similarly, in a motion for *habeas corpus*, the principal object of this remedy is the obtaining of liberty for the subject; *R. v. Governor of Wandsworth Prison; Ex p. Silverman* (1952), 96 Sol. Jo. 853 (Queen's Bench Div. Ct., Hilbery, Streatfeild and McNair JJ.); *Ex parte Rogers* (1843), 7 Jur. 992 (Court of Queen's Bench, Denman C.J., Williams, Coleridge and Wightman JJ.). I have read with much interest the judgment of my colleague

Un bref d'habeas corpus a généralement pour objet de rendre à une personne sa liberté et non pas de décider de la pièce ou de la partie d'une prison où un détenu devrait être incarcéré.» Dans l'affaire *Silverman*, un détenu en détention préventive, alléguant qu'il ne recevait pas le traitement spécial exigé par la loi applicable, a cherché au moyen d'une demande d'*habeas corpus* à obtenir son transfert à un endroit où ce traitement était offert. Le juge Hilbery a rejeté la demande d'*habeas corpus*, concluant que, si un bref d'*habeas corpus* était délivré, [TRADUCTION] «la seule question en litige serait celle de l'opportunité de libérer le requérant; et le rapport du directeur de prison préciserait qu'il s'agissait d'une détention préventive, ce qui constituerait une réponse parfaitement valable».

Dans la décision inédite *Berrouard c. La Reine* en date du 30 novembre 1981 et dans des décisions connexes, également inédites, (auxquelles la Cour d'appel du Québec s'est référée dans l'arrêt *Morin*), le juge en chef adjoint Hugessen (maintenant juge de la Cour d'appel fédérale) s'est fondé sur cette jurisprudence pour rejeter des demandes d'*habeas corpus* qui contestaient la validité de l'incarcération dans ce qui paraît, d'après les expressions employées, avoir été une unité spéciale de détention. Je cite ci-après les motifs du juge en chef adjoint Hugessen reproduits dans l'arrêt *Morin c. Comité national chargé de l'examen des cas d'U.S.D. (Unité Spéciale de détention)*, [1982] C.A. 464, à la p. 466:

Ces six requêtes en *habeas corpus* soulèvent toutes et chacune le même point de droit. Dans chaque cas, le requérant allègue qu'il purge actuellement une sentence et qu'il a été injustement transféré dans une unité spéciale de détention ou dans une ségrégation spéciale.

Autant la privation de la liberté du sujet est une pré-condition essentielle au remède d'*habeas corpus* (*Masella* c. *Langlois*, [1955] R.C.S. 263), autant l'obtention éventuelle de cette même liberté doit être le principal objet du remède d'*habeas corpus* (*R.* c. *Governor of Wandsworth Prison*, (1952) 96 Sol. Jo. 853; *Rogers (Ex parte)*, (1843) 7 jur. 992). J'ai lu avec grand intérêt le jugement de mon collègue le juge en chef McEachern, de la Cour suprême de la Colombie-Britannique, dans l'affaire *Oswald* v. *Attorney-general* et *Cardinal* v. *Attorney-general*, jugement inédit en date du 30 décembre 1980. Avec tout le respect que je

1985 CanLII 22 (SCC)

Chief Justice McEachern, of the Supreme Court of British Columbia, in *Cardinal and Oswald v. Attorney-General*, an unreported judgment delivered on December 30, 1980. With all respect which I have for my colleague, I am not in agreement with his position that the writ of *habeas corpus* can be used to modify the conditions of a detention since, even if the writ is granted, the prisoner's detention will continue after the final judgment is delivered. This is also our case.

It accordingly follows that I am in agreement with the decision of my colleague Mr. Justice Jean-Paul Bergeron in the *Morin v. Yeomans* case, an unreported judgment delivered on November 18, 1981.

In *Morin*, which, as I have said, was a case of *habeas corpus* without *certiorari* in aid, Bergeron J. referred to the conclusion of McEachern C.J.S.C. in *Cardinal* that *habeas corpus* would lie to determine the validity of a particular form of detention in a penitentiary and said he could not agree with it. He held that judicial review of the administrative decisions of the federal correctional authorities fell within the exclusive jurisdiction of the Federal Court by way of *certiorari*. In his view, the conditions of detention of a person who was otherwise lawfully imprisoned under a valid warrant of committal could not give rise to *habeas corpus*. In dismissing the appeal from the judgment of Bergeron J., the Quebec Court of Appeal noted that the appellant had taken proceedings by way of *certiorari* in the Federal Court to challenge the validity of his confinement in the Special Handling Unit and that there would therefore be the danger of conflicting judgments if it were held that the superior court had jurisdiction to issue *habeas corpus* to determine the same issue. The Court of Appeal concluded that proceedings to challenge administrative action within federal penitentiaries was within the exclusive jurisdiction of the Federal Court. Thus it would appear that the Superior Court and the Court of Appeal in *Morin* were influenced in the view which they took of the proper application of *habeas corpus* by the implications of a concurrent or overlapping review jurisdiction with respect to the administrative decisions of the federal correctional authorities.

dois à mon collègue, je ne suis pas d'accord avec la prétention que le bref d'*habeas corpus* peut être utilisé pour modifier les conditions d'une détention qui, même si le bref est maintenu, va subsister après le jugement final. C'est notre cas.

Il va sans dire que je suis, en conséquence, d'accord avec la décision de mon collègue l'honorable juge Jean-Paul Bergeron dans l'affaire *Morin* v. *Yeomans*, jugement inédit en date du 18 novembre 1981.

Dans l'arrêt *Morin*, où, je le répète, il s'agissait d'un *habeas corpus* sans *certiorari* auxiliaire, le juge Bergeron fait mention de la conclusion du juge en chef McEachern de la Cour suprême de la Colombie-Britannique dans l'arrêt *Cardinal* selon laquelle on peut recourir à l'*habeas corpus* pour déterminer la validité d'une forme particulière de détention dans un pénitencier et déclare ne pas pouvoir l'accepter. En effet, il a conclu que le contrôle judiciaire des décisions administratives des autorités correctionnelles fédérales doit se faire par voie de *certiorari*, ce qui relève de la compétence exclusive de la Cour fédérale. À son avis, les conditions de détention d'une personne par ailleurs légalement détenue en vertu d'un mandat de dépôt valide ne donnent pas ouverture à *habeas corpus*. En rejetant l'appel de la décision du juge Bergeron, la Cour d'appel du Québec a souligné que l'appelant avait engagé des procédures de *certiorari* devant la Cour fédérale pour contester la validité de son incarcération dans l'unité spéciale de détention et qu'il y avait donc un risque de jugements contradictoires si l'on concluait que la Cour supérieure avait compétence pour délivrer un bref d'*habeas corpus* relativement à la même question. La Cour d'appel a conclu que des procédures visant à contester un acte administratif accompli au sein des pénitenciers fédéraux sont du ressort exclusif de la Cour fédérale. Il paraît donc que, dans l'affaire *Morin*, l'opinion de la Cour supérieure et de la Cour d'appel quant à l'applicabilité de l'*habeas corpus* a été influencée par les conséquences éventuelles d'un partage ou d'un chevauchement de la compétence de contrôle des décisions administratives prises par des autorités correctionnelles fédérales.

1985 CanLII 22 (SCC)

The British Columbia courts in *Cardinal* and the Ontario Court of Appeal in the case at bar applied the notion of a "prison within a prison" in holding that *habeas corpus* would lie to determine the validity of confinement in administrative segregation or a special handling unit, and if such confinement be found unlawful, to order the release of the inmate into the general population of the penitentiary. The concept of a "prison within a prison" is referred to by Sharpe, *The Law of Habeas Corpus* (1976), p. 149, where he speaks in favour of such an application of *habeas corpus*, and by Dickson J., as he then was, in *Martineau, supra*, where, with reference to the decision of the disciplinary board which sentenced the inmate for a disciplinary offence to 15 days in the penitentiary's special corrections unit, he said at p. 622:

> Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.

This statement reflects the perception that a prisoner is not without some rights or residual liberty (see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839) and that there may be significant degrees of deprivation of liberty within a penal institution. The same perception is reflected in the reasons for judgment of McEachern C.J.S.C. and Anderson J.A. in *Cardinal* and Cory J.A. in the case at bar on this issue. In effect, a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty.

Moreover, the principle that *habeas corpus* will lie only to secure the complete liberty of the

Appliquant la notion d'une «prison au sein d'une prison», les cours de la Colombie-Britannique dans l'affaire *Cardinal* ainsi que la Cour d'appel de l'Ontario en l'espèce, ont conclu que l'on peut recourir à l'*habeas corpus* pour déterminer la validité d'une incarcération en ségrégation administrative ou dans une unité spéciale de détention et, si cette incarcération est jugée illégale, pour ordonner la réintégration du détenu dans la population générale du pénitencier. Le concept d'une «prison au sein d'une prison» est mentionné par Sharpe dans *The Law of Habeas Corpus* (1976), à la p. 149, où il préconise l'application de l'*habeas corpus* dans ces situations, et par le juge Dickson (maintenant Juge en chef) dans l'arrêt *Martineau*, précité, à la p. 622, où, relativement à la décision du comité de discipline qui, pour une infraction à la discipline, a condamné le détenu à passer 15 jours à l'unité spéciale de correction du pénitencier, il dit:

> De plus, la décision du comité avait pour effet de priver une personne de sa liberté en l'incarcérant dans une «prison au sein d'une prison». Dans ces circonstances, la justice élémentaire exige une certaine protection dans la procédure. Le principe de la légalité doit régner à l'intérieur des murs d'un pénitencier.

Il ressort de ce passage qu'un détenu continue à jouir de certains droits ou d'une liberté résiduelle (voir aussi l'arrêt *Solosky c. La Reine*, [1980] 1 R.C.S. 821, à la p. 839) et que dans un établissement pénitentiaire il peut y avoir des gradations importantes de privation de liberté. Cette même idée se dégage des motifs de jugement du juge en chef McEachern de la Cour suprême de la Colombie-Britannique et du juge Anderson de la Cour d'appel dans l'affaire *Cardinal* et dans les motifs rédigés par le juge Cory en Cour d'appel dans la présente affaire. De fait, un prisonnier a le droit de ne pas être privé illégalement de la liberté relative ou résiduelle accordée à la population carcérale générale d'un établissement. Toute privation appréciable de cette liberté, comme celle qui résulte du transfert à une unité spéciale de détention, satisfait à la première des exigences traditionnelles pour la délivrance d'un bref d'*habeas corpus*, savoir qu'il y ait eu privation de liberté.

D'autre part, le principe selon lequel on ne peut recourir à l'*habeas corpus* que pour obtenir la

1985 CanLII 22 (SCC)

subject is not invariably reflected in its application. There are applications of *habeas corpus* in Canadian case law which illustrate its use to release a person from a particular form of detention although the person will lawfully remain under some other restraint of liberty. Examples are the use of *habeas corpus* to recover the custody of children (*Stevenson v. Florant*, [1927] A.C. 211, aff'g [1925] S.C.R. 532; *Dugal v. Lefebvre*, [1934] S.C.R. 501); to release a person on parole where the parole has been unlawfully revoked (*Re Cadeddu* (1982), 4 C.C.C. (3d) 97; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135); and to transfer an inmate from an institution in which he has been unlawfully confined to another institution (*Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 303; *Re Frejd* (1910), 22 O.L.R. 566). In all of these cases the effect of *habeas corpus* is to release a person from an unlawful detention, which is the object of the remedy. The use of *habeas corpus* to release a prisoner from an unlawful form of detention within a penitentiary into normal association with the general inmate population of the penitentiary is consistent with these applications of the remedy.

An enlarged approach to the concept of custody for purposes of *habeas corpus* is reflected in American case law. Formerly American courts took the view that *habeas corpus* would only lie where a favourable judgment would result in immediate release from all forms of detention: *McNally v. Hill*, 293 U.S. 131 (1934). Since then the concept of custody has been greatly expanded to permit a wider use of *habeas corpus* for the protection of prisoners' rights. In *Jones v. Cunningham*, 371 U.S. 236 (1963), where *habeas corpus* was held to be available to an applicant who was not in physical custody but on parole, the Court said at p. 243 that *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from

liberté totale du détenu n'est pas toujours respecté dans la pratique. En effet, on trouve dans la jurisprudence canadienne des cas où l'*habeas corpus* a été utilisé pour obtenir la libération d'une personne d'une forme particulière de détention bien que cette personne demeurât légalement sous le coup d'un autre type de privation de liberté. Mentionnons à titre d'exemples, le recours à l'*habeas corpus* pour recouvrer la garde d'enfants (*Stevenson v. Florant*, [1927] A.C. 211, confirmant [1925] R.C.S. 532; *Dugal v. Lefebvre*, [1934] R.C.S. 501); pour obtenir la libération conditionnelle d'une personne dont la libération conditionnelle a été illégalement révoquée (*Re Cadeddu* (1982), 4 C.C.C. (3d) 97; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135); et pour obtenir le transfert à un autre établissement d'une personne illégalement détenue dans un premier établissement (*Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 303; *Re Frejd* (1910), 22 O.L.R. 566). Dans chacun de ces cas l'*habeas corpus* opère la libération d'une personne en détention illégale, ce qui est précisément l'objet du recours. Or, l'utilisation de l'*habeas corpus* pour effectuer la réintégration dans la population carcérale générale du pénitencier d'un détenu soumis à une forme illégale de détention est compatible avec les applications susmentionnées de ce recours.

Un élargissement du concept de la détention aux fins du recours en *habeas corpus* se reflète dans la jurisprudence américaine. Autrefois, les tribunaux américains estimaient que l'on pouvait recourir à l'*habeas corpus* seulement lorsqu'un jugement favorable entraînerait la libération immédiate de toutes les formes de détention: *McNally v. Hill*, 293 U.S. 131 (1934). Depuis lors la portée du concept de la détention a connu un élargissement considérable pour permettre un recours plus large à l'*habeas corpus* pour la protection des droits des détenus. Dans l'affaire *Jones v. Cunningham*, 371 U.S. 236 (1963), où il a été jugé qu'un *habeas corpus* peut être accordé à un requérant qui n'est pas physiquement détenu mais qui est en libération conditionnelle, la cour a dit, à la p. 243, que l'*habeas corpus* n'est pas [TRADUCTION] «maintenant ni n'a jamais été un recours statique, étroit et

1985 CanLII 22 (SCC)

wrongful restraints upon their liberty". In *Peyton v. Rowe*, 391 U.S. 54 (1968), *habeas corpus* was allowed to challenge the validity of a sentence yet to be served. In *Johnson v. Avery*, 393 U.S. 483 (1969), *habeas corpus* was allowed to challenge the validity of a condition of confinement in the form of a prison regulation which limited the access of illiterate inmates to the courts by forbidding their fellow prisoners from serving as jailhouse lawyers. It was held that the unlawful regulations made the custody unlawful. In *Wilwording v. Swenson*, 404 U.S. 249 (1971), the United States Supreme Court reversed the Missouri courts which had held that *habeas corpus* would not lie where the object was not to secure the release of the petitioners from the penitentiary altogether but to challenge their living conditions and disciplinary measures. The Supreme Court affirmed the approach it had adopted in *Johnson v. Avery*. It should be noted, however, that in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), Stewart J., speaking for the majority, expressed himself in terms which might suggest that the question was regarded as still being open. He said at p. 499: "This is not to say that habeas corpus may not also be available to challenge such prison conditions. See *Johnson v. Avery*, 393 U.S. 483, (1969); *Wilwording v. Swenson, supra*, at 251. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. See Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1084 (1970)". The note to which Stewart J. referred approved the approach adopted in the leading case of *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), where it was said at p. 445: "A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law per-

formaliste; sa portée s'est élargie afin qu'il puisse remplir son objet premier—la protection des individus contre l'érosion de leur droit de ne pas voir imposer de restrictions abusives à leur liberté». Dans l'affaire *Peyton v. Rowe*, 391 U.S. 54 (1968), il a été permis de contester par voie d'*habeas corpus* la validité d'une peine qu'on n'avait pas encore commencé à purger. Dans l'affaire *Johnson v. Avery*, 393 U.S. 483 (1969), on a fait droit à une demande d'*habeas corpus* aux fins de contester la légitimité d'une condition d'incarcération, savoir un règlement carcéral qui limitait l'accès des détenus analphabètes aux tribunaux en défendant aux autres détenus de faire office d'avocats. Il a été jugé que le caractère illégal du règlement emportait l'illégalité de la détention. Dans l'arrêt *Wilwording v. Swenson*, 404 U.S. 249 (1971), la Cour suprême des États-Unis a infirmé les décisions des cours du Missouri qui avaient conclu que l'on ne pouvait recourir à l'*habeas corpus* lorsque le but n'était pas d'obtenir la libération totale des requérants du pénitencier, mais de contester leurs conditions de vie et les mesures disciplinaires. La Cour suprême a ainsi confirmé ce qu'elle avait dit dans l'arrêt *Johnson v. Avery*. Il est toutefois à noter que, dans l'arrêt *Preiser v. Rodriguez*, 411 U.S. 475 (1973), le juge Stewart, parlant au nom de la majorité, s'est exprimé en des termes qui pourraient porter à croire que la question était considérée comme encore entière. À la page 499, il dit ce qui suit: [TRADUCTION] «Cela n'écarte pas la possibilité du recours à l'habeas corpus pour contester de telles conditions carcérales. Voir les arrêts *Johnson v. Avery*, 393 U.S. 483 (1969), et *Wilwording v. Swenson*, précité, à la p. 251. Lorsqu'un détenu est soumis à des mesures coercitives additionnelles et inconstitutionnelles au cours de sa détention légale, il est défendable de recourir à l'habeas corpus pour mettre fin aux mesures qui rendent la détention illégale. Voir Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, à la p. 1084 (1970).» La note mentionnée par le juge Stewart approuve la solution retenue dans l'arrêt de principe *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), où l'on peut lire à la p. 445: [TRADUCTION] «Un détenu, quoique légalement incarcéré, a droit à un bref d'habeas corpus lorsqu'on porte atteinte à quelque

1985 CanLII 22 (SCC)

mits." After referring to *Coffin* the note states at pp. 1085-86:

No other circuit purports to follow *Coffin*. Most courts instead believe that habeas jurisdiction is lacking when the petitioner is not asking for the invalidation of a custody imposed by sentence, on the theory that the petitioner is not seeking a present or future release. But this fails to recognize that the lawfulness of a custody depends, not merely upon the legal basis for *some* kind of custody, but upon the lawfulness of the specific type and manner of confinement in question. Where the specific detention abridges federally protected interests—by placing petitioner in the wrong prison, denying him treatment, imposing cruel and unusual punishment, impeding his access to the courts, and so on—it is an unlawful detention and habeas lies to release the petitioner therefrom. It is immaterial that the petitioner might then be placed in a different, lawful custody or that his being sentenced to a term of confinement might itself be lawful. The custody requirement, and the corresponding insistence on discharge from custody, do not prevent habeas corpus from being an appropriate remedy for the review of unlawful prison administration.

Since that note was written the point of view expressed in it has been adopted by federal courts of appeal. See, for example, the following cases recognizing the availability of *habeas corpus* to challenge the validity of various forms of segregated confinement in a prison on the ground of a violation of due process: *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982); *Krist v. Ricketts*, 504 F.2d 887 (5th Cir. 1974); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972); *Dawson v. Smith*, 719 F.2d 896 (7th Cir. 1983); and *Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980).

After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in

droit dont il peut jouir même pendant son incarcération et que cette atteinte rend son emprisonnement plus pénible que cela n'est légalement permis ou qu'elle restreint sa liberté au-delà de ce qui est juridiquement autorisé.» Ayant fait mention de l'arrêt *Coffin*, la note continue aux pp. 1085 et 1086:

[TRADUCTION] Aucun autre circuit ne prétend suivre l'arrêt *Coffin*. Au contraire, la majorité des cours estiment que l'on ne peut recourir à l'habeas corpus lorsque le requérant ne demande pas l'annulation d'une détention imposée par suite d'une condamnation. Cette opinion repose sur ce que le requérant ne demande à être libéré ni immédiatement ni dans l'avenir. Toutefois, en cela on perd de vue que la légalité d'une détention n'est pas fonction uniquement de l'existence d'un fondement juridique pour une détention *quelconque*, mais tient à la légalité du type et du mode précis de détention. Lorsque la détention en question porte atteinte à des droits protégés par des lois fédérales, en ce sens que le requérant est placé dans la mauvaise prison, qu'on lui refuse des soins, qu'on lui impose des peines cruelles et inusitées, qu'on l'empêche d'avoir accès aux tribunaux, etc., il s'agit d'une détention illégale et on peut recourir à l'habeas corpus pour en libérer le requérant. À cet égard, peu importe que le requérant puisse alors être placé dans un type différent de détention qui est légal ou que sa condamnation à une peine d'emprisonnement puisse en soi être légale. L'exigence qu'il y ait détention et la demande de libération formulée en conséquence ne changent rien à l'applicabilité de l'habeas corpus pour contrôler une administration carcérale illégale.

Depuis la rédaction de cette note, le point de vue qu'elle exprime a été adopté par les cours d'appel de circuit fédérales. Voir par exemple les arrêts énumérés ci-après qui reconnaissent la possibilité du recours à l'*habeas corpus* pour contester la validité de différentes formes de détention ségrégative dans une prison pour non-application régulière de la loi: *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982); *Krist v. Ricketts*, 504 F.2d 887 (5th Cir. 1974); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972); *Dawson v. Smith*, 719 F.2d 896 (7th Cir. 1983); et *Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980).

Examen fait des deux façons d'aborder cette question, je suis d'avis que le point de vue à retenir est celui selon lequel il y a lieu à *habeas corpus* pour déterminer la validité d'une forme particu-

1985 CanLII 22 (SCC)

a penitentiary notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. As I have said in connection with the question of jurisdiction to issue *certiorari* in aid of *habeas corpus*, these concerns have their origin in the legislative judgment to leave the *habeas corpus* jurisdiction against federal authorities with the provincial superior courts. There cannot be one definition of the reach of *habeas corpus* in relation to federal authorities and a different one for other authorities. Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*. It is release from that form of detention that is sought. For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and role of *habeas corpus*, why *habeas corpus* should not be available for that purpose. I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

lière de détention dans un pénitencier quoique la même question puisse être tranchée par voie de *certiorari* en Cour fédérale. La portée du recours à l'*habeas corpus* doit d'abord être examinée en fonction de son propre fondement, indépendamment des problèmes que peuvent poser le partage ou le chevauchement des compétences. L'importance générale de ce recours comme moyen traditionnel de contester les privations de liberté est telle que son développement et son adaptation rationnels aux réalités modernes de la détention en milieu carcéral ne doivent pas être compromis par des craintes de conflits de compétence. Comme je l'ai déjà souligné à propos de la compétence pour délivrer un *certiorari* auxiliaire d'un *habeas corpus*, ces préoccupations sont nées de la décision du législateur de laisser aux cours supérieures provinciales la compétence pour délivrer des brefs d'*habeas corpus* contre des autorités fédérales. Or, la portée de l'*habeas corpus* ne peut être définie d'une manière pour le cas des autorités fédérales et d'une autre pour les autres autorités. L'incarcération dans une unité spéciale de détention, ou en ségrégation administrative comme c'était le cas dans l'affaire *Cardinal*, constitue une forme de détention qui est tout à fait distincte de celle imposée à la population carcérale générale. Elle entraîne une diminution importante de la liberté résiduelle du détenu. Il s'agit en fait d'une nouvelle détention qui est censée avoir son propre fondement juridique. C'est cette forme précise de détention ou de privation de liberté qui est contestée par l'*habeas corpus*. C'est la libération de cette forme de détention qu'on demande. Voilà pourquoi je ne vois aucune raison valable fondée sur la nature et le rôle de l'*habeas corpus* pour laquelle il ne devrait pas servir à cette fin. Je ne dis pas qu'on devrait recourir à l'*habeas corpus* pour contester toutes et chacune des conditions d'incarcération dans un pénitencier ou une prison, y compris la perte d'un privilège dont jouit la population carcérale générale. Mais, selon moi, il y a lieu d'y recourir pour contester la validité d'une forme distincte de détention dans laquelle la contrainte physique réelle ou la privation de liberté, par opposition à la simple perte de certains privilèges, est plus restrictive ou sévère que cela est normalement le cas dans un établissement carcéral.

1985 CanLII 22 (SCC)

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitor for the respondent: Fergus J. O'Connor, Kingston.

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

Pourvoi rejeté.

Procureur de l'appelante: R. Tassé, Ottawa.

Procureur de l'intimé: Fergus J. O'Connor, Kingston.

1985 CanLII 22 (SCC)

TAB 45

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Moore v. Cheung,*
2026 BCCA 259

Date: 20260612
Dockets: CA50328; CA51220

Docket: CA50328

Between:

Wayne Moore

Applicant/Appellant
(Petitioner)

And

Kevin Cheung

Respondent
(Respondent)

- and -

Docket: CA51220

Between:

Wayne Moore

Appellant
(Petitioner)

And

Kevin Cheung

Applicant/Respondent
(Respondent)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

On an application to vary: An order of the Court of Appeal for British Columbia, dated April 7, 2026 (*Moore v. Cheung*, Vancouver Dockets CA50328 and CA51220)

- and -

On appeal from: An order of the Supreme Court of British Columbia, dated December 15, 2025 (*Moore v. Cheung*, Vancouver Docket S235747).

2026 BCCA 259 (CanLII)

The Appellant (Applicant in CA50328), appearing in person:	W. Moore
Counsel for the Respondent (Applicant in CA51220):	T. Boyd C.L. Formosa
Place and Date of Hearing:	Vancouver, British Columbia June 4, 2026
Place and Date of Judgment:	Vancouver, British Columbia June 12, 2026

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Abrioux

2026 BCCA 259 (CanLII)

Summary:

This appeal involves two applications: (a) an application to vary an order declining to remove an appeal from the inactive list; and (b) an application to quash a separate but related appeal. HELD: the application to vary is dismissed; the application to quash is allowed. The appeals underlying both applications involve a residential tenancy dispute. The appellant no longer resides in the rental unit. There is no live controversy between the parties and in the particular context of this case, the appeals are moot.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] There are two applications before us: (a) an application to vary an order dismissing an application by the appellant, Wayne Moore, to remove an appeal from the inactive list; and (b) an application by the respondent, Kevin Cheung, to quash a separate (but related) appeal filed by Mr. Moore.

[2] Mr. Moore appeared personally at the application hearing. He said he did not consent to Mr. Cheung's application being heard, he wants to have a lawyer represent him, and the applications require two days of hearing time. He was told the applications would proceed.

[3] Mr. Moore also said Justice Abrioux had a conflict of interest and could not hear the applications, based on a notice of civil claim that Mr. Moore recently filed in the Supreme Court. Effectively, this was a recusal application. He was told we would proceed with the applications and consider that issue in our deliberations. Mr. Moore was not satisfied with these answers and elected to leave the courtroom. Consequently, his position in the applications has been considered based on his written material. We heard brief oral submissions from counsel for Mr. Cheung.

[4] Justice Abrioux has declined to recuse himself. His explanatory reasons have been published separately. A copy of those reasons is attached as an appendix to this judgment.

2026 BCCA 259 (CanLII)

Background

[5] The parties have been involved in a tenancy dispute for several years. I do not consider it necessary to set out the entire history. Instead, I will refer only to those matters most germane to issues properly before us.

[6] Mr. Cheung was Mr. Moore's landlord. In May 2023, he gave Mr. Moore notice ending the tenancy. Mr. Moore disputed the notice under the *Residential Tenancy Act*, S.B.C. 2002, c. 78. In August 2023, an arbitrator dismissed the dispute and granted an order of possession in Mr. Cheung's favour. Mr. Moore applied for reconsideration of the arbitrator's decision; however, the application failed and the possession order was affirmed.

[7] Mr. Moore subsequently sought judicial review in the British Columbia Supreme Court. In December 2024, his petition was dismissed. Consequently, the notice to end tenancy and the possession order remained intact. At this time, Mr. Moore was still living in the rental unit. He had obtained stays of the possession order which allowed him to occupy the unit until completion of the judicial review process.

[8] Mr. Moore appealed the dismissal of the petition (CA50328). In February 2025, a judge of this Court stayed the possession order pending appeal. However, she attached conditions to the stay, including an obligation that Mr. Moore pay rent to Mr. Cheung.

[9] Mr. Moore did not do what was required of him. In April 2025, the stay of the possession order was lifted, and Mr. Cheung enforced the order. Consequently, Mr. Moore has not lived in the rental unit since April 12, 2025.

[10] The appeal from the order dismissing the petition ended up on this Court's inactive list. Mr. Moore applied to remove the appeal from the list. The application was dismissed by Justice Francis on April 7, 2026. That order forms the subject matter of the first application before us.

2026 BCCA 259 (CanLII)

[11] After the petition concluded in the British Columbia Supreme Court and while the appeal in CA50328 was outstanding, Mr. Moore filed an application in the Supreme Court seeking, among other things, leave to amend the petition. The application was dismissed in December 2025. Mr. Moore appealed the dismissal to this Court (CA51220). Mr. Cheung applies to quash the appeal for lack of merit. This is the second application before us.

2026 BCCA 259 (CanLII)

Issues on Appeal

[12] There are two questions to resolve:

a) Did Justice Francis err in dismissing Mr. Moore's application to remove appeal CA50328 from the inactive list?

b) Should appeal CA51220 be quashed for lack of merit?

Discussion

[13] I will address the applications in turn.

Review of the refusal to reinstate (CA50328)

[14] The application to vary the order made by Justice Francis is brought pursuant to s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. As recently explained in *Bryzzhev v. University of British Columbia*, 2026 BCCA 213:

> [13] The standard of review on an application under s. 29 … is highly deferential. The review is not to be treated as a re-hearing. For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7.
>
> [Emphasis added.]

[15] Mr. Moore says the order denying reinstatement reflects several errors. In his written material, Mr. Moore claims: (a) Justice Francis wrongly relied on unproven allegations and misrepresentations advanced by Mr. Cheung's lawyer; (b) she did not give Mr. Moore sufficient opportunity to state his case; (c) she was misled by the "sharp practi[c]e" of the law firm representing Mr. Cheung and "hoodwinked"

by counsel; (d) her decision is the “antithesis of the rule of law and fair treatment”; (e) she ignored the evidence Mr. Moore adduced in support of reinstatement; and (f) she failed to consider collusion between the law firm representing Mr. Cheung and an individual who formerly represented Mr. Moore as an agent in the tenancy proceedings.

[16] Mr. Cheung opposes the application to vary. He says both the appeal from judicial review and the application to vary are moot. Mr. Moore has not lived in the rental unit for more than one year and there is no longer a live controversy between the parties. In addition, Mr. Cheung submits Mr. Moore has not identified an actual error in law, error in principle, or misconception of the facts by Justice Francis that would allow us to interfere with her decision. She conducted a fair and comprehensive review of the application to reinstate, and she made findings that were open to her on the record.

[17] I have read Justice Francis’ reasons, in the context of the record, and I agree with Mr. Cheung that there is no principled basis for varying her order.

[18] After reviewing the history of the underlying proceedings, Justice Francis correctly instructed herself on the legal principles that govern a reinstatement application: at paras. 15–18. Indeed, Mr. Moore does not allege she erred in this regard.

[19] Justice Francis then analyzed the application and made specific findings, including: (a) although Mr. Moore caused the delay which led to the appeal being placed on the inactive list, the delay was not inordinate; (b) however, Mr. Moore did not provide a reasonable explanation for the delay; (c) his factum in the appeal impliedly raises an issue that has some merit (whether the arbitrator held him to a higher evidentiary standard than Mr. Cheung) but there is no longer a live controversy between the parties because the order for possession has been enforced; and (d) there are “no special circumstances that would make it worthwhile to apply scarce judicial resources to these matters”: at para. 30.

2026 BCCA 259 (CanLII)

[20] The application for reinstatement was dismissed primarily because of mootness. With Mr. Moore out of the unit, Justice Francis did not consider reinstatement to be in the interests of justice.

[21] In my view, this was a reasonable conclusion and open to her.

[22] In *Raju v. Red Door Housing Society*, 2025 BCCA 212, this Court dismissed applications to vary three chambers orders that involved a residential tenancy dispute for essentially the same reason. Each of the orders declined to stay a possession order that had been upheld following judicial review in the Supreme Court. By the time the variation applications were heard, the applicant, Ms. Raju, was no longer living in the rental unit. Her applications to vary were dismissed as moot:

> [29] All three of Ms. Raju's applications to vary are moot. The substantive relief she seeks in all three applications is a stay of the Order of Possession, which has already been enforced. In addition, the applications to vary the Abrioux Order and the Grauer Order have been rendered moot by the passage of time. The relief sought in each of those is a stay pending the hearing of the variation applications which, of course, have now been heard. There is no longer a "live controversy" between the parties with respect to the enforcement of the Order of Possession or stays pending review: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 354, 1989 CanLII 123, citing *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69, 1943 CanLII 3; *Tran v. Abbott,* 2018 BCCA 365 at para. 13.
>
> [30] There is a general rule against hearing and deciding moot disputes. One of the rationales for that general rule is judicial economy: given the scarcity of judicial resources and the many live controversies that demand the courts' attention, there must be an element of "social cost in leaving the matter undecided": *Borowski* at 362. Concerns about judicial economy will be addressed where "the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it": *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77 at para. 24 (Chambers), citing *Mapara v. Ferndale Institution*, 2014 BCCA 49 at para. 34. This may be the case where the court's decision will have some practical effect on the rights of the parties even without determining the controversy that gave rise to the action; the matter raises an issue of a brief and recurring nature that might otherwise evade review; or the matter raises an issue of public importance the resolution of which would be in the public interest: *Vancouver Shipyards* at para. 24.

2026 BCCA 259 (CanLII)

> …
>
> [31] Ms. Raju believes the RTB decision was incorrect and that her perspective and evidence have not been given appropriate consideration throughout the process. While Ms. Raju's situation is no doubt difficult, her applications for review must be dismissed as moot.
>
> [32] There is no longer a "live controversy" between the parties with respect to the enforcement of the Order of Possession or the necessity of stays pending a hearing of the applications because the Order of Possession has already been enforced. There are no special circumstances that would make it worthwhile to apply scarce judicial resources to these matters.

[23] As with *Raju*, there is no longer a live controversy between Mr. Moore and Mr. Cheung specific to the rental unit. Setting aside Justice Francis' order, reinstating Mr. Moore's appeal, and allowing him to pursue his challenge to the dismissal of his petition would have no practical effect on the rights of these parties. Mr. Moore cannot go back into the unit. The tenancy relationship between the parties is over and there is no likelihood of reoccurring issues between them relevant to that issue.

[24] Finally, I agree with Justice Francis that this case does not involve special circumstances justifying reinstatement and the use of scarce judicial resources.

[25] Mr. Moore has not identified an unsettled or novel legal issue in his appeal, one that requires appellate clarification or direction for future cases, or an issue that carries broad implications in the residential tenancy context. He has filed a factum in the appeal, alleging the petition judge: (a) "more than likely" ignored his evidence; (b) failed to appreciate that the arbitrator and the reconsideration panel were "incompetent" in finding that he damaged the unit; (c) erred in fact by not concluding there was no evidence in support of the alleged damage; (d) failed to appreciate that Mr. Cheung's allegations were fraudulent; and (e) wrongly reached a legal conclusion without a credible evidentiary foundation. These are case-specific complaints, grounded in Mr. Moore's interpretation of the evidence adduced before the arbitrator and his assessment of its probative value. On the face of it, there is nothing about the case that transcends its four corners. A ruling from this Court is

2026 BCCA 259 (CanLII)

unlikely to carry precedential importance; rather, it will reflect a highly individualized inquiry, unique to the context and the circumstances of the case.

[26] Consistent with the approach taken in *Raju*, I would not vary Justice Francis' order. In my view, Mr. Moore's appeal from the dismissal of his application for judicial review is moot.

[27] I note Justice Francis also dismissed a no fee application by Mr. Moore specific to CA51220. She did so after finding that the second appeal has no prospect of success. Given the conclusion I reach below, it is not necessary to address this aspect of her judgment.

Application to dismiss appeal (CA51220)

[28] The application to quash Mr. Moore's second appeal is brought pursuant to s. 20(1) of the *Court of Appeal Act* and R. 60(1)(c) of the *Court of Appeal Rules*, B.C. Reg. 120/2022. This Court's Registrar directed that the application to quash and the s. 29 review be heard together.

[29] Appeal CA51220 was filed on December 16, 2025. It challenges the dismissal of an application filed by Mr. Moore in the petition proceeding on December 2, 2025. In that application, Mr. Moore sought: (a) an order that his "former agent" return stolen court files; (b) an order that counsel for Mr. Cheung file an order dismissing the petition (it had already been sent to this Court's Registry); (c) costs; (d) punitive damages; (e) leave to add third parties to the petition; (f) leave to file or amend a notice of civil claim and counterclaim (no drafts of these claims were before the court); (g) a waiver of filing fees; (h) an order that a plumbers union and the Lawyers' Insurance Fund pay for a lawyer to represent him in the petition; (i) leave to amend the petition; and (j) a stay of proceedings.

2026 BCCA 259 (CanLII)

[30] The presiding judge did not issue reasons for his dismissal of the application. However, it is apparent from a transcript of the related proceeding that the judge concluded Mr. Moore was not entitled to revisit issues related to the petition because that matter had ended and was under appeal and his other requests required independent proceedings and notice to third parties.

[31] Before us, Mr. Cheung applies to quash the appeal from the post-petition application because Mr. Moore has not identified any legal error by the judge and the appeal is devoid of merit. Mr. Moore has filed a factum in CA51220, but it is effectively the same factum filed in the appeal from judicial review and alleges error specific to the petition judge, not the judge who dismissed the post-petition application.

[32] Mr. Moore sent two letters to this Court's Registrar, parts of which respond to the application to quash. These letters were filed May 6 and May 25, 2026.

[33] In the May 6 letter, Mr. Moore accuses Mr. Cheung's lawyer of acting in bad faith and unilaterally arranging for a quash application with the specific objective of depriving Mr. Moore of his right to be heard. He says matters arising from the tenancy dispute are "tainted with bias and racism". Specific to the second appeal, he says the only reason he returned to the Supreme Court in search of a post-petition remedy was because counsel for Mr. Cheung obstructed his ability to file the order dismissing the petition and doing so was necessary for him to pursue his appeal. He seeks "due process" in the letter and says that if his second appeal fails, it should be because of the merits, not based on a preliminary application to quash. From Mr. Moore's perspective, his second appeal "has a strong leg to stand on".

[34] The May 25 letter repeats some of these accusations. Mr. Moore asks that counsel for Mr. Cheung and his law firm "identify and name the leverage" they have that allows them to "intimidate" Mr. Moore and "expedite … hearing dates without [his] consent". The letter seeks directions on: (a) an emergency stay; (b) orders preserving "assets protection and constitutional and equity rights"; (c) orders preventing "irreparable harm and undue hardship"; and (d) orders granting

2026 BCCA 259 (CanLII)

contractual rights and “enforcement procedures”. Mr. Moore says the application to quash represents an attempt to obstruct justice by pre-empting a hearing of the merits of the appeal based on “scurrilous” allegations.

[35] Justice Francis briefly addressed appeal CA51220 when dismissing Mr. Moore’s application for a no fee order. She concluded the appeal has no prospect of success, stating there was no basis for any of the relief he sought.

[36] I agree with that assessment.

[37] In *Grewal v. Grewal*, 2017 BCCA 261, this Court confirmed we have jurisdiction to quash an appeal that is so devoid of merit or substance that to allow it to continue through the appeal process would amount to an abuse of process: at paras. 15–16.

[38] I appreciate Mr. Moore believes he has not received a fair opportunity to advance either of his appeals, that Mr. Cheung and his counsel are trying to thwart his attempts to obtain a remedy, and that the judges who have decided the tenancy-related issues have either been misled or ignored his evidence. However, I am of the view Mr. Moore’s second appeal should be quashed for substantially the same reason as the first one.

[39] To the extent this appeal seeks to revisit issues raised in the petition proceeding or asks for relief (such as funding) to assist in advancing petition-related issues, there is no longer a live controversy between the parties and the tenancy matter is moot. To the extent this appeal challenges the judge’s decision to not engage on new matters that require independent proceedings, specific to named third parties, I agree with Justice Francis the judge did not have jurisdiction to consider those issues in the context of the petition. Accordingly, he correctly declined to hear them, without prejudice to Mr. Moore to bring a separate action for the return of files that he says are unlawfully held by someone else.

2026 BCCA 259 (CanLII)

Disposition

[40] For the reasons provided, I would dismiss the application to vary the order dismissing Mr. Moore's application to reinstate appeal CA50328 and dismiss that appeal for mootness.

[41] I would also quash appeal CA51220 for mootness and lack of merit.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Abrioux"

2026 BCCA 259 (CanLII)

Appendix A

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Moore v. Cheung,*
2026 BCCA 258

Date: 20260612
Dockets: CA50328; CA51220

Docket: CA50328

Between:

Wayne Moore

Applicant/Appellant
(Petitioner)

And

Kevin Cheung

Respondent
(Respondent)

- and -

Docket: CA51220

Between:

Wayne Moore

Appellant
(Petitioner)

And

Kevin Cheung

Applicant/Respondent
(Respondent)

Before: The Honourable Mr. Justice Abrioux

On an application to vary: An order of the Court of Appeal for British Columbia, dated April 7, 2026 (*Moore v. Cheung*, Vancouver Dockets CA50328 and CA51220)

- and -

2026 BCCA 259 (CanLII)

On appeal from: An order of the Supreme Court of British Columbia, dated December 15, 2025 (*Moore v. Cheung*, Vancouver Docket S235747).

The Appellant (Applicant in CA50328), appearing in person:	W. Moore
Counsel for the Respondent (Applicant in CA51220):	T. Boyd C.L. Formosa
Place and Date of Hearing:	Vancouver, British Columbia June 4, 2026
Place and Date of Judgment:	Vancouver, British Columbia June 12, 2026

2026 BCCA 259 (CanLII)

Summary:

The appellant applied to have the justice recuse himself from the hearing of two applications before the Court, which are described in reasons for judgment indexed as Moore v. Cheung, 2026 BCCA 259. The application is denied.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

[42] The background to the applications which are before this Court are set out in the reasons for judgment of Justice DeWitt-Van Oosten, indexed at 2026 BCCA 259. At the commencement of the proceedings on June 4, 2026, the appellant, Mr. Moore, submitted that I was in a conflict of interest and could not participate in the hearing of the applications because he had named me as a defendant in a notice of civil claim that had recently been filed in the Supreme Court of British Columbia. I viewed Mr. Moore's submission as an application for me to recuse myself. Judgment was reserved on the applications, in part so that I could consider whether I should do so.

[43] It is well established that a recusal application is to be decided by the judge to whom the application is directed.

[44] The notice of civil claim bears a Supreme Court of British Columbia Vancouver docket number S263765 and a filing date of May 20, 2026 (the "NOCC"). I had no knowledge of the NOCC until Mr. Moore brought it to this Court's attention at the appeal hearing on June 4, 2026.

[45] I have now reviewed the NOCC. It names over 50 defendants, including "Quinlan Abrioux Grant Richley Harvey Grewal and the Firm". The allegations relate in part to:

- Mr. Moore allegedly attempting to attend the Union Pension Health and Welfare Meeting in Delta, B.C. on May 4, 2024, and alleging that the actions of those who denied him entry, "constituted criminal mischief, criminal obstruction of justice, defamation, slander, election and pension fraud" and a number of other alleged acts;

2026 BCCA 259 (CanLII)

- the review of certain decisions of the Workers' Compensation Appeal Tribunal; and

- the matters before this Court on these applications.

[46] Although my former firm Quinlan Abrioux ("QA") is named as a defendant, there are no references to QA in the lengthy NOCC.

[47] Mr. Moore has not identified whether he seeks my recusal on the basis of an actual or a reasonable apprehension of bias.

[48] The relevant legal framework was considered in *Walker v. Kierans*, 2024 BCCA 119, in which Justice Voith explained:

> [5] … The narrow issue Ms. Walker raises was recently addressed in *Pereira v. Dexterra Group Inc.*, 2023 BCCA 201:
>
> > [12] The strong presumption that judges act impartially means that a party must meet a high burden to prove that a reasonable apprehension of bias exists. The longstanding test as repeated in *Yukon Francophone School Board* is:
> >
> > > [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
> > >
> > > > ... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]
> > >
> > > (*Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))
> >
> > …
> >
> > [15] As summarized in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 [*Taylor*], the question of whether there is a reasonable apprehension of bias should be considered with the following principles in mind:
> >
> > > a) a judge's impartiality is presumed;

2026 BCCA 259 (CanLII)

> b) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> c) the criterion of disqualification is the reasonable apprehension of bias;
>
> d) the question to be determined is what would an informed reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> e) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think it more likely than not that the judge, whether consciously or unconsciously, not decide fairly;
>
> f) the test requires demonstration of serious grounds on which to base the apprehension; and
>
> g) each case must be examined contextually and the inquiry is fact-specific.
>
> *Taylor* at para. 7, referencing *S.(R.D.)*.

[49] I have no knowledge of any of the matters referred to in the NOCC, with the exception of those relating to these applications, and that knowledge is limited to the record on appeal.

[50] I left QA approximately 14 and a half years ago upon my appointment to the Supreme Court of British Columbia. There is nothing in the NOCC that raises either an actual or a reasonable apprehension of bias on my part. When I consider the NOCC in the context of the legal framework to which I have referred, I conclude that Mr. Moore has not met the burden of establishing that a reasonably informed person would be of the view that I am unable to decide the applications fairly and objectively.

[51] Accordingly, I decline to recuse myself. The application is dismissed.

"The Honourable Mr. Justice Abrioux"

2026 BCCA 259 (CanLII)

TAB 46

Court of Queen's Bench of Alberta

Citation: Mystar Holdings Ltd. v. 247037 Alberta Ltd., 2009 ABQB 480

Date: 20090807
Docket: 0501 10032
Registry: Calgary

2009 ABQB 480 (CanLII)

Between:

Mystar Holdings Ltd. and 106 Alberta Ltd.

Applicants/Defendants

- and -

247037 Alberta Ltd.

Respondent/Plaintiff

Reasons for Judgment
of the
Honourable Mr. Justice C.S. Brooker

I. Introduction

[1] The Applicants, Mystar Holdings Ltd. ("Mystar") and 106 Alberta Ltd. ("106"), have applied under Rule 129(1)(d) of the *Alberta Rules of Court* for an order dismissing the claim of the Respondent Plaintiff, 247037 Alberta Ltd ("247" or "the Respondent"). In the alternative, the Applicants seek an order pursuant to Rule 159 for summary dismissal of 247's claim. For the reasons given below, except for the Northwood Inn claim, the application is dismissed.

II. History

[2] The parties to this action have an interesting history. The corporate shareholdings of 247 are controlled by Ron Plucer and his brother, Samuel Plucer. In 1984 the Plucers became aware of an opportunity to purchase a hotel which was then held by the Edmonton Savings and Credit

Union (the "ESCU"). This hotel would later become the Pointe Inn Hotel (the "Pointe Inn"), which is the property in issue in the underlying action. Subsequently, litigation between the Plucers and ESCU over the purchase of the Pointe Inn ensued and the Plucers sought out Martin Chambers ("Chambers") to act as a consultant to assist with the legalities of the dispute.

[3] Chambers assisted in negotiating a settlement of the ESCU litigation. However, shortly before the settlement was to be finalized, a property owned by Plucer Holdings Ltd., known as the 17th Avenue Inn, was completely destroyed by fire. The 17th Avenue Inn was an integral part of the settlement deal reached in the ESCU litigation. Ultimately, arson was found to be the cause of the fire and the Plucers were examined as suspects in the arson. Samuel Plucer was eventually charged with arson and manslaughter. At trial, he was found not guilty.

[4] Given the circumstances surrounding the fire, the insurer of the 17th Avenue Inn denied coverage. Litigation then ensued. In July 1992, Plucer Holdings Ltd. and 381916 Alberta Ltd. ("381") sued the Royal Insurance Company of Canada and other insurers claiming coverage for property damage and business losses resulting from the destruction of the 17th Avenue Inn (the "Coverage Action").

[5] In July 1994, Samuel Plucer, 247, 381 and others sued the Royal Insurance Company of Canada and other insurers, claiming bad faith for denying insurance coverage for the property damage and business losses caused by the fire (the "Bad Faith Action").

[6] The Coverage Action was settled in 1998 for $2.1 million dollars and the Bad Faith Action was discontinued without costs at the same time.

[7] The Respondent alleges that following the fire, Chambers advised the Plucers that without the 17th Avenue Inn, the settlement with the ESCU would not be finalized. The Respondent further alleges that Chambers advised the Plucers that no bank would lend funds for a property purchase to a person under suspicion of arson and that the Plucers would therefore have to devise another way to settle with ESCU and obtain the Pointe Inn property.

[8] Whatever conversations took place, it is clear that following the fire 247 and Mystar entered into some form of arrangement pertaining to the financing of the Pointe Inn. Mystar is a British Columbia corporation extra provincially registered in Alberta and at the time was owned 50% by Chambers' common law spouse. The nature of this arrangement is in dispute, but I will refer to it loosely as the "Joint Venture" arrangement. According to both parties, following this arrangement Chambers assisted 247 to obtain financing for the acquisition of the Pointe Inn. Chambers arranged a loan from Scott Apartments Ltd. (a company which Chambers controlled) and a mortgage from DWA Holdings Ltd. In 1998 a mortgage was obtained from a third party lender, Montreal Trust Company of Canada ("Montreal Trust"). At this point in time, title to the Pointe Inn was amended, showing Mystar as having a one-half interest in the property.

[9] Following the purchase of the Pointe Inn, a number of payments were made from 247 to Mystar (and apparently certain other entities). The nature of these payments is in dispute and

2009 ABQB 480 (CanLII)

will be discussed in greater detail, below. In any event, the Respondent alleges that in approximately November of 2002, it was informed that Mystar would remove its name from the title to the Pointe Inn. The Respondent further alleges that despite such assurances, in October 2003, Mystar transferred its half interest in the Pointe Inn to the Defendant/Applicant 106, a company owned by the sister of Chambers' common-law wife. While Mystar acknowledges that the transfer was a non-arms length transaction, it maintains that the transfer was made for proper consideration.

[10] The Respondent subsequently filed a Statement of Claim, claiming a 100% interest in the Pointe Inn. It asserts that Mystar no longer had any property interest to convey to 106, given that Mystar had been fully paid and had agreed to remove itself from title. Conversely, the Applicants argue that at the time of transfer, Mystar was the true owner of a 50% interest in the Pointe Inn, by virtue of the Joint Venture agreement.

[11] Consequently, the Applicants bring the current motion seeking an order dismissing the Respondent's claim pursuant to Rule 129(1)(d), or alternatively, an order directing summary dismissal of the Respondent's claim pursuant to Rule 159.

III. Issues

[12] There are two main issues to be determined in deciding the within application, namely:

a. whether the Plaintiff's claim is an abuse of process of this Court; and

b. whether there is no genuine issue for trial.

IV. Analysis

a. Is the Plaintiff’s claim an abuse of process of this Court?

i. The Applicants’ position

[13] The Applicants rely on Rule 129(1)(d) in arguing that the Respondent's action should be dismissed as an abuse of process. Rule 129 provides:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that... (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

[14] The Applicants argue that the current claim constitutes an abuse of process on two different grounds. First, they argue that the Respondent has abused the legal process by adopting a position that is inconsistent with a prior position taken before this Court. Second, they argue that it is an abuse of process for the Respondent to commence an action for the purpose of

2009 ABQB 480 (CanLII)

enforcing the Joint Venture agreement, because the agreement is fraudulent. I shall deal with each of these arguments in turn.

[15] The Applicants' chief claim is that the Amended Statement of Claim is an abuse of process because it adopts a position inconsistent with a position taken during previous legal proceedings. In the current Amended Statement of Claim, 247 claims a full interest in the Pointe Inn. Specifically, para. 23 of the Amended Statement of Claim reads: "247 claims a 100% ownership interest in the Property".

[16] The Applicants argue that this claim is diametrically inconsistent with a claim advanced by 247 in prior proceedings and that it is therefore an abuse of process. A review of prior litigation shows that in the Bad Faith Action, the Statement of Claim read, in part:

> 26. As a result of the foregoing conduct of all or any of the [insurance] Defendants, the Plaintiffs have suffered damages as follows:
>
> > [...]
> >
> > (h) the loss of a one-half interest in the Pointe Inn Hotel which occurred as a direct result of the non-payment of insurance proceeds, the delays and other wrongdoings of the Defendants.

[17] The Applicants argue that the Respondent cannot make an inconsistent claim. That is, the Respondent cannot claim to have lost a one half interest in the Pointe Inn in the Bad Faith Action and later claim to have a 100% interest in the same property in the action against Mystar and 106. The Applicants submit that consistency in the factual and legal position adopted by a party to litigation is a precondition to the proper operation of the legal system and that the adoption of inconsistent positions is an abuse of process under Rule 129. In so arguing they rely, in particular, on *Chevron v. Canada (Executive Director of Indian oil and Gas Canada)*, 2005 ABQB 2, 378 A.R. 306; *Halagan v. Reifel* (25 November 1997), Vancouver C945038 (B.C.S.C); *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.); and *Vanmills Establishment v. Coles* (1992), 8 C.P.C. (3d) 178 (B.C.S.C).

[18] In *Chevron*, the plaintiff (Chevron) commenced an action against the Crown and a number of Native Bands (including the Samson, Louis Bull, Ermineskin and Montana Bands) to recover gas royalties allegedly paid in error. The Crown applied to strike or stay all or part of the counterclaims and third party notices against the Crown filed by the Bands. The Bands had filed Statements of Defence, and Samson, Louis Bull and Montana filed counter-claims and third party notices on the basis that the leases pursuant to which the royalty payments were made were invalid.

[19] Prior to the plaintiff's action, the Samson and Ermineskin Bands had instituted proceedings against the Crown and certain Federal Ministries in the Federal Court of Canada, in an action known as the "Buffalo trial". During the Buffalo trial, Samson's position was

2009 ABQB 480 (CanLII)

predicated on the existence of a valid surrender. The Crown submitted that the Bands' current counterclaims and third party notices constituted an abuse of process in that they were contrary to or inconsistent with the admissions, submissions and evidence that were presented in the course of the Buffalo trial. The issues before the Federal Court were still ongoing when the current application was made.

[20] In staying the duplicative and contrary allegations brought against the Crown, the Court noted, at paras. 39 - 40, that:

> The Crown submits that Samson's attempts to use this action to resile from one of the most fundamental propositions it has adopted in the Buffalo trial - that the Surrender is valid and gives rise to trust duties imposed on the Crown - is an abuse of process. In this court, Chevron will be required to prove a valid lease in order to succeed in its claim. This brings into issue the question of the validity of the Surrender, and the Bands have defended, in part, on the basis that the Surrender is invalid. In the Federal Court action, Samson has requested and obtained admissions from the Crown that in essence establish the validity of the Surrender.
>
> I agree that these are contrary positions on the same issue. In the Buffalo trial, the Crown is exposed to liability in part because of the Surrender. In this case, it is exposed because it is alleged that there is no valid Surrender.

[21] While the Court could not conclude that a decision in the Federal Court action on the issues before it would give rise to issue estoppel relating to the validity of the Surrender, it found that there was a substantial possibility that it may. In ordering a stay of proceedings, the Court concluded, at para. 60, onwards, that:

> 60. What constitutes an abuse of process may vary with the circumstances of each case. I agree with another justice of this court that abuse of process is not a closed category. Adrion v. Canada (Minister of Health) (2003) 12 Alta. L.R. 4th 154 at para. 36. The discretion given to the court under Rule 129 to determine if proceedings are vexatious is broader than a mere determination if a matter is res judicata. While this case involves simultaneous rather than sequential litigation, the comments of the Federal Court in Musqueam Indian Band v. Canada (Minister of Indian Affairs and Northern Development), [1990] 2 F.C. 351 (T.D.) at page 380, adopting the principles expressed in Henderson v. Henderson 67 E.R. 313 at 319 on the law of res judicata, are helpful:
>
>> ... parties are expected to bring forward their whole case and should not be allowed, except in special circumstances, to perpetuate the dispute by discovering new grounds for action. As Lord Shaw stated, if this were permitted, litigation would have no end except where legal ingenuity is exhausted.

2009 ABQB 480 (CanLII)

> I should also subscribe to later views expressed by Lord Denning in the Hunter case, by Lyon J.A. in the Solomon case and by Chief Justice McEachern in the Saskatoon Credit Union case, to the effect that *whether or not a case falls into the complex issue of res judicata or issue estoppel with all of its historical refinements, it should not be allowed to proceed, if to do so, it would constitute an abuse of process*. (emphasis in original)

61. In a more recent case, the British Columbia Court of Appeal considered an appeal of the decision of a chambers judge to strike certain litigation as being an abuse of process under a rule substantially similar to Rule 129: *Chapman v. Canada; Westwick v. Canada* [2003] B.C.J. No. 2742. This litigation involved facts similar to the facts at hand. Lengthy litigation relating to leases of land on the Musqueam Reserve had been concluded in Federal Court and was pending before the Supreme Court of Canada. This litigation was predicated on the validity of such leases. Prior to the release of a decision by the Supreme Court of Canada, new litigation was commenced in the British Columbia Superior Court that challenged the validity of the leases. The chambers judge concluded, [2001] B.C.J. No. 775, that the claims of invalidity of the leases in the new litigation were an abuse of process, stating:

> In my view, to allow these claims to stand would be an affront to the Federal Court, Trial Division, the Federal Court of Appeal and the Supreme Court of Canada. It would be tantamount to the leaseholders saying, "Well, we put you to a lot of time and effort in settling the rent issues from our leases but, even through we proceeded on the basis of the leases being valid, because no specific declaration was made as to their validity, it is now open for us to argue that all the work you did was for nothing because the leases aren't valid anyway." The issues touching on the validity of the leases were issues which could have been raised in the context of the rental litigation. They were not and now they cannot be raised. To do so would be an abuse of process.
>
> [...]

63. In this case, the Federal Court has not yet made a decision that may give rise to questions of res judicata or issue estoppel. However, it is clear to me from the pleadings in both courts and the evidence and position of the Bands put forward in the Buffalo trial that these questions are likely to arise when a decision is rendered. Given this and the prejudice that would be suffered by the Crown in having to pursue expensive and complicated litigation that may well be moot when a decision in the Federal Court action has been rendered, *I find that it would be vexatious and an abuse of the court's process to require the duplicative and contrary allegations against the Crown to continue at this time*. [emphasis added]

2009 ABQB 480 (CanLII)

> 64. It is more appropriate to stay, rather than to strike these allegations, and I do so, with leave to the applicants to reinstate their application to strike once a decision of the Federal Court is available.

[22] In *Halagan* the plaintiff applied to amend his statement of defence and counterclaim. The defendant opposed the application on the grounds that, inter alia, one of the amendments was contrary to the position taken by the plaintiff in opposing the defendant's earlier application for an interlocutory injunction. In dismissing the application, the Court commented that the proposed amendments "smack of inconsistency in more ways than one. They are not merely pleading in the alternative."

[23] During the earlier interlocutory injunction hearing, the plaintiff argued that it was open for the defendant to persuade the Vancouver Stock Exchange not to release certain shares that were the subject of the dispute. However, the plaintiff subsequently attempted to plead (in the proposed amendments) that the defendant's attempts to prevent the shares from being released constituted a breach of a settlement agreement, thus entitling the plaintiff to damages.

[24] The Court commented on the nature of the proposed amendments, at para. 8:

> ...neither pleadings nor any other of the court process are a game to be played according to what appears to be a strategic advantage at the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.

[25] The Court continued, at para. 16 to state:

> However, Bullen and Leake states at page 42 that a party must not in a subsequent pleading make any allegation of fact, raise any new ground, or claim inconsistent with the previous pleading of his.

[26] In *United Australia*, a cheque payable to the appellants was converted in favour of a company called M.F.G. Trust Ltd. and later presented at the respondent bank. The appellants originally claimed against M.F.G. for breach of contract and later against the respondent bank for damages in conversion and in negligence. In the negligence claim the appellants asserted that the dealings of both M.F.G. and the bank, amongst others, had also been negligent. The bank argued that the appellants were unable to waive a claim in tort as against M.F.G. in earlier litigation and then later sue in tort. The original action against M.F.G. had been stayed.

[27] The House of Lords found that the appellant was able to pursue the bank. Of note, Lord Atkin declared, at p. 30 that:

2009 ABQB 480 (CanLII)

> ...if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to chose...To those cases the statement of Lord Blackburn in Scarf v. Jardine applies "where a man has an option to choose one or other of two inconsistent things when once he has made his election it cannot be retracted." In a later passage Lord Blackburn speaks of a man choosing between two remedies: but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above...[footnotes omitted]

[28] In *Vanmills*, the defendant brought an application for an order striking the plaintiffs' statement of claim on the grounds that the claim amounted to an abuse of process. The defendant argued that the plaintiffs were barred from bringing the current action based upon a prior election to pursue an inconsistent right in another action. In an earlier action, one of the plaintiffs had initially sued another defendant (Sigurdson) alleging in part that due to Sigurdson's negligence, he was forced to dispose of both the legal and beneficial interest of certain shares. In the current action against Coles, the plaintiffs plead that the beneficial interest in the shares were never disposed of.

[29] The Court reviewed the distinction between an election between inconsistent rights and an election between alternative remedies. In granting the defendant's application, it held that the Plaintiff was unable to claim in one instance that it had lost the beneficial interest in the shares, and in a second interest that the beneficial interest had been maintained. The plaintiff's election was held to be binding.

[30] Based upon the above authorities, the Applicants submit that once a party files an action or proceeding where a given factual or legal position is made, this constitutes an irrevocable election. The Applicants argue that taking an inconsistent factual or legal position in separate proceedings constitutes an abuse of process of the court. They argue that it is therefore not open for the Respondent to claim to have lost a 50% interest in the Pointe Inn in one action and subsequently claim a 100% interest in the same property in the current action.

[31] In particular, the Applicants argue that in claiming a loss of a 50% interest in the Pointe Inn in the Bad Faith Action, the Respondent explicitly admitted that the Joint Venture was created. Thus, the Respondent is precluded from now arguing that the Joint Venture was merely created "on paper" and that it has a full interest in the Pointe Inn. The Applicants claim that the Respondent is abusing the process of this Court by willfully and dishonestly adopting intrinsically inconsistent factual positions on a subject matter on which it knows the truth.

[32] The Applicants also argue that because the Joint Venture was, in fact, a fraud on the part of the Respondent, commencing an action for the purpose of enforcing a fraud is, in itself, an abuse of process of this Court.

ii. The Respondent's position

2009 ABQB 480 (CanLII)

[33] The Respondent opposes the application for an order dismissing its statement of claim under Rule 129(d) on two grounds. The Respondent claims that the pleadings in question are not in irreconcilable conflict. It also claims that, in any event, inconsistent pleadings of fact do not constitute an abuse of process. Rather, it submits that prior pleadings of fact are evidence to be weighed at trial.

[34] The Respondent's first argument is that it unclear as to whether the pleadings in the current action necessarily conflict with pleadings in the Bad Faith Action. The Respondent submits that when the Bad Faith pleading was made, the Respondent had in fact lost a one-half interest in the Pointe Inn. Thus, the pleadings may not be inconsistent given the alleged change in circumstances whereby the Respondent now claims to hold a full interest in the property.

[35] Second, the Respondent argues that the Applicants misinterpreted the law respecting inconsistent pleadings. It relies, in particular, on *Scarf v. Jardine* (1882), 7 App. Cas. 345 (H.L.) and *National Bank Financial Ltd. v. Potter*, 2005 NSSC 8, 231 N.S.R. (2d) 14, appeal dismissed: 2005 NSCA 139, 238 N.S.R. (2d) 237 (*Mahoney v. National Bank Financial Ltd.*).

[36] In *Scarf* the House of Lords held that a litigant had a cause of action against either a former or a current partnership for an unpaid account, but not against both. The Respondent stresses the fact that the House of Lords spoke of a litigant's election of rights, as opposed to an election of facts.

[37] In *Potter*, three plaintiffs brought actions against the bank in three separate actions. In defence of one of the claims, the bank denied any knowledge of an alleged market manipulation scheme. In subsequent pleadings in another action the bank alleged that there was in fact a market manipulation scheme. The plaintiffs brought a motion to strike portions of the bank's defence on the ground that the bank had filed inconsistent pleadings under Rule 14.25(1) of the *Nova Scotia Civil Procedure Rules* (similar to our Rule 129). In dismissing the motion to strike, the Court drew a distinction between inconsistent rights versus inconsistent allegations, holding, at paras. 23 - 24:

> ... I understand Lord Aiken (sic) in *United Australia v. Barclays Bank Ltd.* to reasonably envisage a situation where a party may not know what the facts are so as to make a choice as to the rights it may pursue. He said at page 30:
>
> > ... if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency no longer his to choose.
>
> 24 In the present case [the bank] is not choosing as between two inconsistent rights but rather is asserting that one of two possible factual situations exist. [The bank] says at this point, and perhaps not until the Court decides what occurred,

2009 ABQB 480 (CanLII)

> does [the bank] *have full knowledge* of the factual situation so as to enable it to assert its rights with certainty.

[38] The Court concluded that on the facts, the bank was simply pleading facts in the alternative. The Nova Scotia Court of Appeal agreed, confirming at para. 18 that the various positions put forth by the bank amounted to nothing more than a pleading in the alternative: 2005 NSCA 139, 238 N.S.R. (2d) 327.

[39] The Respondent submits that the Applicants' misinterpreted and overstated the court's finding in *Vanmills*. The Respondent argues that the relevant principle in this case concerns the election of inconsistent rights, as opposed to the pleading of inconsistent facts, as put forth by the Applicants. The Respondent makes a similar argument with respect to the decision in *United Australia*, stressing that Lord Atkin highlighted the distinction between inconsistent rights and inconsistent allegations. The Respondent argues that it at no time made any inconsistent allegation of rights as between the Bad Faith Action and the current proceedings. As such, it takes the position that it is not precluded from claiming a 100% interest in the Pointe Inn in its' Amended Statement of Claim.

[40] Rather, the Respondent argues that prior pleadings of fact simply constitute evidence to be weighed at trial: *Caviglia v. Tenorio* (1992), 71 B.C.L.R. (2d) 255 (B.C.S.C.); and *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.*, 1998 ABQB 714, 230 A.R. 39.

[41] In addition, the Respondent points out that the Bad Faith Action was never pursued beyond serving of the Notices to Produce and that prior to any document production or examinations for discovery, it was informally stayed pending the determination of the Coverage Action. As noted above, the Coverage Action was settled in 1998 for $ 2.1 million dollars. The Bad Faith Action was discontinued without costs at the same time. The Respondent asserts that no monies were paid in respect of its claim for a loss of one-half of the interest in the Pointe Inn under the Bad Faith Claim.

iii. Findings

[42] The Applicants submit that the correct test on a Rule 129(1)(d) application is whether it is "plain and obvious" that the underlying action is an abuse of process: see *Brewers Distributors Ltd. v. 1145127 Alberta Ltd.*, 2007 ABQB 493. *Brewers Distributors* dealt with whether the plaintiff's claim was an abuse of process due to issue estoppel or because it otherwise amounted to a collateral attack.

[43] The Respondent submits that a party moving to have pleadings stuck under Rule 129 bears a heavy burden, and that the claim advanced must "be hopeless to be struck out"; see *Roasting v. Lee* (1998), 222 A.R. 234 (M.C.). *Roasting* dealt with an application to strike a statement of claim as disclosing no cause of action under Rule 129(1)(a).

2009 ABQB 480 (CanLII)

[44] I agree that an applicant who alleges that certain pleadings constitute an abuse of process bears a heavy burden. I also agree with the Court's comments in *Brewers Distributors* that it must be plain and obvious that the claim amounts to an abuse of process of the court before it can be struck. Our Court of Appeal has confirmed that the onus on a party seeking to strike a claim under Rule 129(d) is "high": *Manson v. Canada (Department of Justice)*, 2006 ABCA 212, 401 A.R. 26, at para. 8.

[45] The Ontario Court of Appeal recently commented on the test for abuse of process in *Niagara North Condominium Corp. No. 125 v. Waddington*, 2007 ONCA 184, which dealt with re-litigation of an identical claim that had been previously dismissed. In discussing the abuse of process doctrine, the Court commented as follows, at para. 21:

> The application judge did not articulate a test for abuse of process. Abuse of process is a doctrine designed to provide a remedy in a variety of situations including a remedy for the unfairness of relitigating the same issue against the same party in circumstances where issue estoppel does not apply. Abuse of process is essentially a fairness doctrine.

[46] I agree with the Ontario Court of Appeal that "abuse of process is essentially a fairness doctrine". The Court must also ask itself whether, in the circumstances, it would be fair to allow the action in question to proceed.

[47] In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, the Supreme Court addressed relitigation of a criminal conviction in a civil forum. In discussing abuse of process, Arbour J., for the majority, stated at para. 37 that the doctrine engages, "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute". She went on to state that the courts have applied the doctrine of abuse of process where allowing the litigation to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."

[48] Keeping the burden of proof faced by the Applicants in mind, I turn now to the merits of the parties' arguments.

[49] In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims. Whether this pronouncement has any application to the facts of this case remains to be determined.

[50] I draw a particular parallel between this application and the application made in the *Vanmills* case. The Respondent argues quite forcefully that the relevant principle in *Vanmills* pertains to the election of inconsistent rights as opposed to the pleading of inconsistent facts. It submits that only once a party has chosen to invoke one right over an alternative inconsistent

2009 ABQB 480 (CanLII)

right, is it bound by any election. The Respondent asserts that it has merely put forward inconsistent facts, as opposed to rights and that inconsistent facts are a matter of evidence.

[51] While it is true that the Court in *Vanmills* spoke of the limitations surrounding an election of rights, it did so in a very broad sense, stating, at para. 10:

> This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that, in the case of inconsistent rights, a plaintiff's irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in Scarf v. Jardine (1882), 7 H.L. (E.) 345 and Ashmore v. Bank of B.N.A. (1913), 13 D.L.R. 73 (B.C.C.A.).

[52] Using this broad concept of rights, can it not be said that 247 elected in its action against its insurers (the Bad Faith Action) to claim that it was forced to dispose of a 50% interest in the Pointe Inn, and, having elected to sue on this basis, cannot now sue the Applicants on the basis that it actually retained a 100% interest in the subject property? Such an analysis is consistent with the concept of election of rights, as articulated in *Vanmills*. Clearly 247 is not merely electing between inconsistent remedies, as discussed in *United Australia*.

[53] I am in agreement with the Court's finding in *Chevron* that in certain circumstances, taking contrary positions on the same issue in separate proceedings may constitute an abuse of process and that "what constitutes an abuse of process may vary with the circumstances of each case": para. 60.

[54] Notwithstanding the Respondent's submission that the above cases do not deal with inconsistent allegations of fact, I find the dicta therein to be of general relevance to the issue before me. Moreover, although the Respondent provided this Court with authorities where inconsistent factual pleadings were allowed, these authorities can be distinguished on the facts.

[55] In *Potter*, the Court allowed a party's inconsistent pleadings to stand. However, the Court went on to state that although the defendant bank had plead inconsistent facts in separate statements of defence, it appeared as though the bank had merely plead such inconsistent facts in the alternative. More importantly, in allowing the inconsistent pleadings, the Court specifically held, at para. 28, that:

> I am not convinced that this point that [the defendant bank] has "full knowledge" so as to know what the true situation was in relation to KHI shares and the alleged

2009 ABQB 480 (CanLII)

> stock manipulation. If a party does not have full knowledge of the circumstances they should not be barred from setting up alternative pleadings.

[56] Indeed, on appeal the Court of Appeal confirmed, at para. 21:

> ... It seemed to be [counsel's] submission that where a party has strong evidence of one position, that party may not plead another position in the alternative. We do not agree. The authorities cited by him do not support his contention and we are aware of no authority that does. There is, of course, ample authority for the proposition that a party may not plead that which it knows to be false, or a sham or wholly fictitious: W.B. Williston, Q.C. and R.J. Rolls, The Law of Civil Procedure, supra at p. 665; Brailsford v. Tobie, [1888] 10 ALT 194 ; J.C. Decaux Pty. Ltd. v. Adshed Street Furniture Pty Ltd. 178 A.L.R. 339 (F.C.A.).

[57] Given the nature of the underlying action, there is nothing to suggest that in the pleadings before me, 247 had anything other than "full knowledge" as to whether it was forced to part with a 50% interest in the Pointe Inn. Clearly 247 would know if it transferred a half interest in the property to Mystar or if it did not. This is not a case where a party should be allowed to plead inconsistent facts based upon imperfect knowledge. The Respondent cannot rely on *Potter* to avoid a claim of abuse of process.

[58] Nor can it rely on *Caviglia* or *Gerling Global*. In *Caviglia*, two causes of action were brought against the defendant driver. The defendant's insurer assumed conduct of both actions. The defendant denied liability in the first action but admitted liability in the second action. The plaintiff in the first action brought an application for summary judgment. The Court held that the admission of liability made in a pleading in one action was admissible against that defendant in the other action.

[59] In *Gerling Global*, an action was commenced in both Alberta and in the United States. The issue was whether certain admissions made in the American action in a statement of uncontested material facts were admissible in evidence in the current application for summary judgment as to the proper law for the policy of insurance. The Alberta Court found that the prior admissions were admissible and granted summary judgment on the issue of forum. The question of issue estoppel pertained directly to the findings of the American Judge, and not to inconsistencies contained in the statement of uncontested material facts.

[60] Although both *Caviglia* and *Gerling Global* confirm that prior pleadings may be evidence to be weighed at trial, neither deals with the consequences of inconsistent pleadings in an application to strike the same as an abuse of process. I do not read either case as stating that when faced with an inconsistent pleading, a party does not have the option of bringing an application to strike the pleading, but is instead limited to entering the pleading as evidence to be used in the subsequent hearing.

2009 ABQB 480 (CanLII)

[61] Finally, I not agree with the Respondent's assertion that the effect of an inconsistent pleading must be somehow "discounted" if the action in which it is plead is not pursued to judgment. The Respondent submits that the loss of the 50% interest claimed in the Bad Faith Claim was not pursued past service of the Notice to Produce and that the claim was subsequently discontinued. The Respondent submits that it therefore made no use of the Court's process to recover this amount. As such, the Respondent submits that it did not obtain any "benefit" on account of these pleadings. In so claiming, it also asserts that it did not use the allegations in the Bad Faith Action to obtain a more favourable settlement in the Coverage Action.

[62] The doctrine of abuse of process assists in promoting the "integrity of the administration of justice". On the facts before me, 247, with full knowledge of the facts, should not be able to advance a claim that is diametrically opposed to its earlier position. In these circumstances, the integrity of the justice system would be no less compromised simply because the initial claim was not followed though to judgment.

[63] This does not mean, as the Respondent suggests, that a factual pleading will forever and irrevocably bind a party in all subsequent pleadings. Rather, it means that, if a party, with full knowledge of the facts (thus distinguishing itself from a *Potter* scenario) chooses to argue irreconcilable facts in its pleadings, and where such pleadings are clearly not made in the alternative, allowing such a party to continue pursuing an incompatible claim may constitute an abuse of process.

[64] Of course, my above conclusion obviously presupposes that the pleadings are, in fact, inconsistent. A review of the Amended Statement of Claim in the present action and the Statement of Claim in the Bad Faith Action does not necessarily show that the positions taken in each are "diametrically inconsistent".

[65] It is clear that in the Bad Faith Action, the Respondent asserted that it had lost a 50% interest in the Pointe Inn. However, in the current action it is unclear as to whether 247 is asserting that is somehow lost and yet retained a 50% interest in the property or if it is stating that it was initially forced to transfer a half interest to Mystar because of its financial circumstances and it is now claiming this interest back, having paid the agreed fee. The former would be an inconsistent position whereas the latter would not. Of note, the Joint Venture agreement was an oral agreement and its terms have never been reduced to writing.

[66] The Applicants submit the Joint Venture agreement was not a "true" joint venture. During his examination for discovery Samuel Plucer supported this submission, advising that the arrangement between Mystar and 247 was not a joint venture in the "true sense of a joint venture". Rather, he stated that the arrangement was portrayed as a joint venture for the purposes of facilitating financing for the purchase of the Pointe Inn. However, he went on to state that as a part of the arrangement, title to the property would be held in both names.

[67] At paragraph 18 of its written submissions, the Applicants argue that:

2009 ABQB 480 (CanLII)

> In the [Bad Faith] Action, 247 sought damages for the loss of a 50% interest in the Pointe Inn Hotel and therefore explicitly recognized and admitted, for the purposes of seeking damages, that a joint venture was created as a result of the conduct of the defendants in the [Bad Faith] Action and that it therefore lost a 50% interest in the Pointe Inn. Having formally taken that factual position, 247 should not be permitted in this action to assert that it never lost that interest or that, instead, it merely obligated itself to pay a $1,000,000 fee to Mr. Chambers.

[68] A review of the Bad Faith Action reveals that 247 makes no allegation in its Statement of Claim that it ever entered into a joint venture ("true" or otherwise). Rather, the Statement of Claim merely pleads that because of the insurers' conduct, 247 lost "a one-half interest in the Pointe Inn Hotel". Consequently, I find that there is no clear inconsistency between the pleadings in the Bad Faith Action and the current pleadings as they pertain to the Joint Venture agreement.

[69] The Applicants argue that because the Joint Venture arrangement was, in essence, a "sham", the positions advanced by the Respondent must therefore be inconsistent. As stated above, this is not necessarily so. While it may be that 247 has asserted the existence of the Joint Venture agreement under which it transferred a 50% interested in the Pointe Inn and then later acknowledged that the Joint Venture agreement was not "true" and that it has always therefore been the owner of an undivided interest in the property, it may also be that 247 is asserting that notwithstanding the actual nature of the Joint Venture agreement, at the end of the day it transferred a 50% interest in the property to Mystar, and now, having repaid Chambers, it wants that interest back. Again, the former would be inconsistent whereas the latter would not.

[70] There is some evidence as to the latter position. I note that in his Affidavit of June 6, 2007, Samuel Plucer deposes as follows, at paras. 3- 4:

> The Defendant/Plaintiff by Counterclaim Mystar Holdings Ltd. ("Mystar") was previously on the title of the Property with 247. *Mystar was on title following an agreement (the "Agreement) that I made on or about January 28, 1993* on behalf of 247 with Martin Chambers...
>
> The Agreement provided that in consideration for Martin Chambers' assistance in helping to restructure and secure financing for 247, 247 would pay Martin Chambers the sum of one million dollars, which payments would be made through Mystar. *I further agreed to transfer a one-half interest in the Property to Mystar, in order to assist in the securing of financing for the Property*; and to provide security for the unpaid fee of one million dollars. A "Joint Venture" was set up on the instructions of martin Chambers, and the one million dollars was to be paid to Martin Chambers through draws by Mystar. Martin Chambers agreed on behalf of Mystar to convey Mystar's registered interest in the property back to 247 following payment of the one million dollar fee. [emphasis added]

[71] As discussed, the Applicants must show that it is "plain and obvious" that the underlying action is an abuse of process. They bear a heavy burden, or a "high" onus in doing so. While I

2009 ABQB 480 (CanLII)

have found that in the circumstances an inconsistent factual pleading may amount to an abuse of process, I do not find that it is "plain and obvious" that the Respondent's pleadings are clearly diametrically opposed. I do not read the current Amended Statement of Claim as asserting that 247 never lost a 50% interest in the property. Thus, I cannot grant the Applicants an order under Rule 129(d) to dismiss the Respondents's claim as an abuse of process based upon irreconcilable pleadings.

[72] The Applicants have also claimed that it would be an abuse process for the Respondent to commence an action for the purpose of enforcing the Joint Venture agreement, as the agreement is fraudulent. I shall deal with the allegations of fraud below, in addressing the Applicants' submissions under Rule 159. For the reasons given below, I cannot grant the Applicants an order under Rule 129(d) to dismiss the Respondents's claim as an abuse of process based upon a fraudulent agreement.

b. Is there a genuine issue for trial?

[73] The Applicants have requested, in the alternative, that this Court order summary dismissal of the Respondent's claims on the grounds that there is no genuine issue for trial and the Respondent's claims are therefore bound to fail. They rely on Rule 159 which states in part:

> (2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> (3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

i. The Applicants' position

[74] The Applicants argue that the Joint Venture agreement is a "sham" and a "fraud". They submit that because the courts will not enforce an agreement that has been tainted with illegality or immorality the Respondents' claim is bound to fail. Thus, they submit that the claim should be struck under Rule 159.

[75] The Applicants claim that 247 structured the arrangement with Mystar to appear as a joint venture agreement for the purpose of defrauding third party lenders. They allege that 247 engaged in a course of conduct intended to give the false impression that it had a 50% partner (Mystar) in order to obtain replacement financing following the fire at the 17th Avenue Inn. In

2009 ABQB 480 (CanLII)

support of this claim they point to the fact that 247 has consistently represented on its tax returns that it had a 50% interest in the Pointe Inn as a joint venture.

[76] The Applicants submit that the Respondent is attempting to have this Court enforce an alleged agreement to commit fraud upon third party lenders in that it intended to give such lenders a false impression that it had a joint venture partner when it in fact had none, and had merely obligated itself to pay a fee to Chambers through Mystar. They claim that because 247 agreed to transfer a 50% interest for a fraudulent purpose, it cannot seek the assistance of this Court to enforce any obligation on the part of Mystar to return this interest.

[77] The Applicants rely on the principle of *ex turpi causa*, or, out of fraud no action arises. In arguing this principle they rely, *inter alia*, on *Singh v. Ali*, [1960] A.C. 167 (P.C.) and *McDonald v. Fellows* (1979), 105 D.L.R. (3d) 434 (A.B.C.A.).

[78] The Court in *McDonald*, in addressing whether a contract offended the Lord's Day Act and was therefore illegal, expressed this principle as follows, starting at para. 20:

> *The first result which flows from this illegality is that neither party has any obligation to perform the purported agreement*. The contract, void at its inception, is considered in law never to have been made at all. The principle is stated in Cheshire & Fifoot's Law of Contract (8th Ed.) at page 339:
>
> > "The general principle, founded on public policy, is that *any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No person can claim any right or remedy whatsoever under an illegal transaction in which he has participated.* Ex turpi causa nonoritur actio. The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether the knowledge comes from the statement of the guilty party or from outside sources. Even the defendant can successfully plead the turpis causa ..."
>
> Subject to some exceptions, to which I shall make reference, neither party may recover from the other anything paid or transferred if in order to succeed he must base his claim upon the illegality or necessarily be bound to disclose the illegality in proving it.[emphasis added]

[79] While the Applicants acknowledged that a number of exceptions to this principle exist, they submit that no such exceptions are applicable in this case. They submit that any gains or losses resulting from an illegal contract must remain where they have fallen, which in this case, is with Mystar/106.

[80] The Applicants claim that only the Respondent committed fraud in that it was the Respondent who represented the existence of the Joint Venture to lenders, mortgage brokers,

2009 ABQB 480 (CanLII)

accountants and the government though various financial statements and documents. For their part, the Applicants take the position, both in their Statement of Defence and more concisely, at para. 28 of their reply brief that:

> It is necessary to note that Mysar/106 denies the existence of any fraud. In particular, Mystar/106 deny that the Pointe Inn Joint Venture is a fraud or a sham designed to give 247's prospective lenders the false impression that 247 had a partner in the ownership of the Pointe Inn Hotel.

ii. The Respondent's position

[81] The Respondent admits that it has represented to the world at large that it operated a joint venture in respect of the Pointe Inn. Samuel Plucer, for the Respondent, has also stated during his examination for discovery that the agreement between 247 and Mystar was not a joint venture "in the true sense of a joint venture". The Respondent admits that the arrangement between the parties was set up to look like a joint venture in order to "disguise the ability to raise long term financing". I note that 247 further submits that one half of the legal title was transferred to Mystar in order to secure a $1 million dollar fee payable to Mystar for its role in arranging financing.

[82] The Respondent's primary argument is that the Joint Venture agreement is neither illegal or fraudulent. It submits that there is nothing illegal in an agreement to transfer a half interest in real property until such time as a consulting fee is paid. Moreover, it submits that none of its lenders have claimed to have been defrauded and that there is no evidence whatsoever that any fraudulent intent with respect to third party lenders was carried through nor that any lender was defrauded or misled.

[83] In the alternative, the Respondent submits that even if the agreement with Mystar is fraudulent, the Court is not required to dismiss its claim. It asserts that there is no absolute rule against the enforcement of any contract touched by illegality. Rather, it submits that in cases involving the enforcement of an illegal contract the closeness of the connection between the illegality and the contract in question must be considered.

[84] In support of the above proposition, the Respondent relies in part on Furmston, Cheshire and Fifoot's *Law of Contract*, 14th ed. (London: Butterworths, 2001) at 429:

> Neither party can recover what he has given to the other under an illegal contract *if in order to substantiate his claim he is driven to disclose the illegality*.
> ...
> The result is that gains and losses remain where they have accrued or fallen. If, for instance, a scheme to defraud X, concocted by A and B, succeeds, and the money is obtained by B, no action for an account or recovery lies at the suit of A...[emphasis added]

2009 ABQB 480 (CanLII)

And at 430:

> A Plaintiff may, however, recover money, chattels or land transferred under an illegal contract to the defendant, if he can frame a cause of action entirely independent of the contract, for in these circumstances he is not compelled to disclose the illegality.

[85] The Respondent also relies upon *Tinsley v. Milligan*, [1994] 1 A.C. 340 (H.L.). In *Tinsley* the plaintiff and defendant purchased a lodging house together and registered it under the plaintiff's name alone so that the defendant could perpetuate social security insurance fraud. They ran the lodging house together as a joint venture until such time as they split up. The plaintiff then made a claim for the whole of the property as it was registered in her name alone, arguing that the defendant was unable to claim any interest as the agreement between the parties to place the property in one name alone was made in order to defraud the social security department. The defendant claimed that the plaintiff held the property in equal shares, in trust.

[86] The majority of the House of Lords held that the defendants' equitable claim did not depend upon the fraud practised on the social secuity department. Rather, it depended only on the presumption of a resulting trust arising from the relationship between the parties and the fact that the defendant contributed to the purchase price. There was no presumption of advancement. The minority view of the House was to "let the estate fall where it lies."

[87] In discussing the effect of illegality of contract on the defendant's claim, Lord Jauncey enunciated three propositions, at 366:

> First, it is trite law that the court will not give its assistance to the enforcement of executory provisions of an unlawful contract whether the illegality is apparent ex facie the document or whether the illegality of purpose of what would otherwise be a lawful contract emerges during the course of the trial...
>
> Second, it is well established that a party is not entitled to rely on his own fraud or illegality in order to assist a claim or rebut a presumption. Thus when money or property has been transferred by a man to his wife or children for the purpose of defrauding creditors and the transferee resists his claim for recovery he cannot be heard to rely on his illegal purpose in order to rebut the presumption of advancement...
>
> Third, it has, however, for some years been recognised that a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is valid and the court will assist the transferee in the protection of his interest provided that he does not require to found on the unlawful agreement...

2009 ABQB 480 (CanLII)

[88] Lord Browne-Wilkinson confirmed the above, holding, at 376 that a claimant "is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction."

[89] The Respondent argues that as per *Tinsley*, it is able to assert its right to the Pointe Inn as it does not have to rely on any illegality in order to substantiate its claim against the Applicants. It submits that proof of the agreement as alleged in no way depends on leading evidence concerning any illegal or fraudulent intention regarding its ability to obtain financing.

[90] In addition, the Respondent asserts that there must be a weighing of both the nature of the wrongful act and the nature of the right asserted: *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22, [2002] 1 S.C.R. 742. It also asserts that there is an insufficient causal link between the participation in a fraudulent act vis-a-vis potential third party lenders and the breach of contract it has alleged: *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

[91] Alternatively, the Respondent argues that even if the agreement between itself and Mystar is sufficiently tainted by illegality or fraud, it would be improper for the Applicants to benefit from the transaction, as they were fully aware of the true nature of the Joint Venture. The Respondent submits that the facts in this case should make it an exception to the *ex turpi cause* rule. In so arguing it relies on *Lapointe v. Messier* (1914), 49 S.C.R. 271.

iii. Findings

[92] Before ruling on the Rule 159 application, I wish to address an evidentiary issue raised by the parties. The parties appeared before me in November of 2008 to argue whether I should admit additional evidence on behalf of the Applicants. The evidence in question is contained in the affidavit of Qing Zhang, a director of 106 and a shareholder of Mystar. It contains a series of letters (most notably the letter of July 14, 2008) addressing the loan agreement between Montreal Trust, 247 and Mystar.

[93] The Applicants submit that the letter in question rebuts the Respondent's argument that there is no evidence of any harm done to a third party lender as a result of any alleged fraudulent conduct.

[94] The test for adducing additional evidence after a hearing was recently set out by this Court in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc*., 2008 ABQB 142, 431 A.R. 240, which dealt with an application to introduce new evidence following an order on a summary judgment motion. There the Court described the test as follows, at paras. 37-38:

> The test in Alberta on an application such as this requires the original trier of fact to review the evidence tendered and the circumstances, and to exercise his or her discretion as to its admissibility on the motion.

2009 ABQB 480 (CanLII)

> Only he or she can fairly judge whether the evidence should be considered, and whether it may have an effect or impact on the previously-rendered decision.

The Court went on to state, at para. 40, that:

> The jurisdiction for a chambers judge or a trial judge to hear further submissions or receive further evidence after the hearing, and even after the issuance of the decision, but before the entry of the formal Order of Judgment, is very broad. It is accurately described as being "unfettered", although cautions are placed on that width to avoid an abuse of the Court's processes but in any event to avoid a miscarriage of justice.

2009 ABQB 480 (CanLII)

[95] I have reviewed Zhang's affidavit and I do not find that the letters contained therein will have any effect or impact on my decision. The letters were authored after the May 2008 hearing and thus constitute evidence that was unavailable to the parties when the matter was heard. However, this is not an instance where refusing to accept the new evidence would result in a miscarriage of justice.

[96] A review of the letters simply reveals that from the Lender's point of view, the question of whether 247 misrepresented its interest in the Pointe Inn remains in dispute. Nor does the correspondence allege any fraud or injury. Rather, the letter states that "the Sub-Servicer and the Lender are unable to come to any conclusions with respect to the allegations contained in the pleadings and the truth and accuracy of the representations and warranties".

[97] In the letter, the Lender states that:

> *Should* the relationship between 247 and Mystar be materially different than as represented to the Lender at the time the Loan Documents and Loan were put in place, the Lender reserves the right to characterize the misrepresentations as a separate "Event of Default". [emphasis added]

[98] The above confirms that the Lender is taking no position as to the nature of the Joint Venture agreement and is merely reserving its right to take any necessary steps under the loan agreement to protect its position. Thus, the letters contained in Zhang's affidavit do not assist the Applicants in proving that there is no genuine issue for trial.

[99] I now address whether or not the Applicants have met the burden for summary judgment. As mentioned, the test to be applied in a summary judgement application is whether or not there is a genuine issue for trial. The court must be satisfied beyond reasonable doubt that no such issue or point of law exists in order to grant judgement: *Allied Signal Inc. v. Dome Petroleum Ltd.* (1991), 122 A.R. 321 (Q.B.) reversed on other grounds (1992), 131 A.R. 134 (C.A.). Similar wording was used by the Supreme Court of Canada in *Papachase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, 292 D.L.R. (4th) 49, where it held that an applicant must demonstrate that there is "no genuine issue of material fact requiring trial". There is no

onus on the Respondent to prove a genuine issue for trial: *Murphy Oil. Co. v. Predator Corp.*, 2004 ABQB 688, 365 A.R. 326.

[100] The bar for an applicant seeking summary judgment is high. As our Court of Appeal in *Diegel v. Diegel*, 2008 ABCA 389 recently confirmed, at para. 2: "a motion for summary judgment has a rigorous test to justify for excluding a trial of issues of fact". The Court continued, at para. 18 to state:

> ...summary judgment has a high standard of proof because to succeed an applicant must show that it is "plain and obvious" or "beyond doubt" that the action will succeed or not succeed as the case may be.

[101] Similar wording was used by the Court of Appeal in *Steele (Next Friend of) v. Burgos*, 2008 ABCA 321, 437 A.R. 295, at para. 11:

> The test on a r. 159(2) application for summary judgment is a high standard as an applicant to succeed must show it is "plain and obvious" or "beyond doubt" that the action will not succeed. If a chambers judge must assess and weigh the evidence to arrive at summary judgment, the test has not been met...

[102] See also *Strategy Summit Ltd. v. Remington Development Corp*, 2009 ABCA 30, where the Court of Appeal reiterated the test that there must be "no genuine issue for trial".

[103] In the current application the Applicants have argued that there is no genuine issue for trial due to the fact that the Joint Venture agreement was entered into for the purpose of defrauding lenders. They state that given the nature of the agreement this Court is unable to grant the Respondent the relief it seeks based on the principle of *ex turpi causa*.

[104] As such, in order for the Applicants' to be successful, they must show that the Joint Venture agreement is indeed illegal or fraudulent and that the Respondent is therefore precluded from relying upon the same to support its claim.

[105] In *Noethe v. Noethe*, [2002] O.J. No. 1513, the Ontario Superior Court of Justice held, at para. 23 that: "a party has a high onus to meet to prove fraud. For a court to grant summary judgment based on allegations of fraud, the evidence of fraud would need to be unequivocal."

[106] I do not find that the Applicants have led unequivocal evidence of fraud. It is difficult to find unequivocal evidence of fraud when the Applicants themselves take the position that the Joint Venture is a genuine legitimate agreement and is in no way a fraud or a sham. The Applicants are not free to argue that the Joint Venture is a fraud and is therefore unenforceable by the courts and in the same breath assert that they deny the existence of any fraud and are therefore properly in possession of a 50% interest in the Pointe Inn. This inconsistency begs the question as to whether the Applicants are alleging illegality so as to avoid their obligations under

2009 ABQB 480 (CanLII)

what they say is a valid contract. The very fact that the Applicants assert an inconsistent position indicates that there may be a genuine issue for trial.

[107] The Applicants submit, at para. 50 of their brief, that in seeking the relief requested in its Amended Statement of Claim, the Respondent plead that the Joint Venture is a fraud. While the Respondent clearly agrees that the Joint Venture was not a "true" joint venture as that term is generally understood, I cannot read its Amended Statement of Claim as pleading fraud. Rather, at para. 9 of the Amended Statement of Claim 247 alleges that:

> ...at Chambers' suggestion, Mystar would be part of a Joint Venture on paper, and would hold half of the title to the Property. Mystar would receive the payments for Chamber's consulting services which would be structured as draws on the Joint Venture....when Chambers was completely paid for his consulting services, he was to sign title to the Property back to 247, and the "Joint Venture" would be at an end.

[108] While this wording signifies an understanding that the agreement between Mystar and 247 was something other than a joint venture, it does not state, nor clearly imply, that the agreement was fraudulent. Therefore the Applicants are unable to rely on an admission of fraud in claiming that "no genuine issue for trial exists". The Applicants have failed to show that it is "plain and obvious" or "beyond doubt" that the action will not succeed based on allegations that the Joint Venture is fraudulent, illegal or somehow tainted with immorality.

[109] Even if there was unequivocal evidence of fraud, it may be that the Respondent can establish its interest in the property without founding the same on the unlawful agreement. The Respondent asserts that one half of the legal title to the Pointe Inn was transferred to Mystar in order to secure a $1 million dollar fee payable to Mystar for its role in arranging financing. If the Respondent is able to successfully argue that it is entitled to a 100% interest in the property based solely on the assertion that Mystar was not only placed on title to "disguise the ability to raise long term financing" but also to provide security for the fee payable to Chambers, it may be able to bring itself under the *Tinsley* exception. If the Respondent can argue its case without relying on any underlying illegality (example, Mystar was put on title in order to secure Chamber's fee, as opposed to Mystar was put on title in order to deceive lenders) it may have an opportunity to advance its claim.

[110] Given my above findings, it is unnecessary to deal with the Respondent's argument that public or "foundational" interests should prevent the half interest in the property from laying with the Applicants.

[111] As it stands, the Applicants have failed to discharge their burden of showing that no genuine trial exists. The motion for summary judgment based upon the illegality of the Joint Venture is dismissed.

2009 ABQB 480 (CanLII)

[112] The Applicants have also argued that the Respondent's claim for set-off is bound to fail and that they are therefore entitled to summary judgment for this portion of the claim. Specifically, the Applicants claim that the "services agreements" which form the basis of the set-off claim were either never entered into or are barred under the *Limitations Act*, R.S.A. 2000, c. L-12.

[113] The Respondent admitted that a number of its set-off claims were 'hopeless' and brought an application to amend its Amended Statement of Claim in this regard by removing paragraph 15 and amending paragraph 17. Thus, I need not deal with any aspects of the set-off claim contained in these paragraphs. The only remaining amount relates to a claim made for the provision of a manager at the Northwoods Inn. The manager in question was provided between 1988 - 1989. The Respondent submits that it is not caught under the *Limitations Act* as it had no reason to believe that payment for Samuel Plucer's services was not forthcoming and that, furthermore, Mystar (through Chambers) continued to acknowledge the debt. The Statement of Claim alleging the provision of such services was filed on July 7, 2005.

[114] The Respondent's evidence of this acknowledgment seemingly consists of Samuel Plucers' recollection that Chambers indicated that Plucer would get his "fair share of the action" from the Northwoods Inn deal. During examinations, Plucer was unable to recall the date on which Chambers most recently promised to given him his "fair share". I do not find that this alleged conversation alone constitutes an acknowledgment of a debt.

[115] Based upon the evidence before me, this claim has been brought outside of the time permitted and must fail by virtue of the *Limitations Act.* The Applicants have shown that there is no genuine issue for trial respecting the claim for services provided in relation to the Northwood Inn. Therefore I am satisfied that summary judgment on this issue should be granted in favour of the Applicants.

[116] Lastly, the Applicants argued that in the event that the Amended Statement of Claim is dismissed, this Court should render a decision on an interlocutory application made in October of 2007 requesting that the Court direct the sale of the Pointe Inn. Given the fact that the Applicants were unsuccessful in having the claim dismissed I need not address this final argument.

V. Conclusion

[117] The Applicants have failed to show that the Respondent's action amounts to an abuse of process of this Court or that that there is no genuine issue for trial in respect of the claim, other than the claim for services provided in relation to the Northwood Inn. With the exception of the Northwood Inn claim, the application is dismissed.

Heard on the 30th day of May and the 28th day of October, 2008.

2009 ABQB 480 (CanLII)

Dated at the City of Calgary, Alberta this 7th day of August, 2009.

C.S. Brooker
J.C.Q.B.A.

Appearances:

Thomas P. O'Leary
Fraser Milner Casgrain LLP
for the Respondent

Ryan Pelletier
McCarthy Tetrault LLP
for the Applicants

Francis Lamer
Shapray Cramer LLP
for the Applicants

2009 ABQB 480 (CanLII)

TAB 47

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *NHK Spring Co., Ltd. v. Cheung,*
2023 BCCA 243

Date: 20230327
Dockets: CA48654; CA48657

Docket: CA48654

Between:

NHK Spring Co., Ltd., NHK International Corporation,
NHK Spring (Thailand) Co., Ltd., and
NAT Peripheral (Hong Kong) Co., Ltd.

Appellants
(Defendants)

And

Tony Cheung, Sylvie de Bellefeuille, and Graeme Honeyman

Respondents
(Plaintiffs)

And

TDK Corporation, SAE Magnetics (HK) Ltd., Headway Technologies, Inc.,
Magnecomp Precision Technology Co., Ltd., Magnecomp Corporation, and
Hutchinson Technology Inc.

Respondents
(Defendants)

- and -

Docket: CA48657

Between:

TDK Corporation, SAE Magnetics (HK) Ltd., Headway Technologies, Inc.,
Magnecomp Precision Technology Co., Ltd., Magnecomp Corporation, and
Hutchinson Technology Inc.

Appellants
(Defendants)

And

Tony Cheung, Sylvie de Bellefeuille, and Graeme Honeyman

Respondents
(Plaintiffs)

And

NHK Spring Co., Ltd., NHK International Corporation,

2023 BCCA 243 (CanLII)

NHK Spring (Thailand) Co., Ltd., and
NAT Peripheral (Hong Kong) Co., Ltd.

Respondents
(Defendants)

2023 BCCA 243 (CanLII)

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 6, 2022 (*Cheung v. NHK Spring Co., Ltd.*, 2022 BCSC 1738, Vancouver Docket S1910612).

Oral Reasons for Judgment

Counsel for the Appellants—CA48654 (via videoconference):	D. Gadsden
Counsel for the Appellants—CA48657:	N. Iatrou K. Booth
Counsel for the Respondents, Tony Cheung, Sylvie de Bellefeuille, and Graeme Honeyman:	M.L. Segal R.L. Coad
Counsel for the Proposed Intervener, Criminal Defence Advocacy Society ("CDAS"):	B. Martland, K.C. E. Holzman
Place and Date of Hearing:	Vancouver, British Columbia March 24, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 27, 2023

Summary:

The Criminal Defence Advocacy Society ("CDAS") applies for an order permitting it to intervene on a public interest basis in this appeal, in which the appellants seek to overturn certification of a class action alleging harm to Canadians arising from an international price-fixing conspiracy contrary to s. 45 of the Competition Act, to make submissions on the proper interpretation of s. 6(2) of the Criminal Code.
Held: Application allowed. CDAS has a broad representative base, will not expand the scope of the appeal, and may bring a valuable perspective to the Court. Further, the appeal legitimately engages CDAS's interests in the extraterritorial application of the criminal law because the appellants seek to argue that the certification judge erred in finding there is an arguable breach of s. 45 by failing to engage in a "straightforward interpretative exercise" about the extraterritorial application of the criminal law.

2023 BCCA 243 (CanLII)

WILLCOCK J.A.:

Introduction

[1] The Criminal Defence Advocacy Society ("CDAS") applies for an order permitting it to intervene on a public interest basis in this appeal. The appellants seek to overturn the certification of a class action alleging harm to Canadians arising from an international price-fixing conspiracy contrary to s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34.

Background

[2] On October 6, 2022, in reasons indexed at 2022 BCSC 1738, Justice Coval certified class proceedings for alleged price-fixing of computer hard-drive components known as "suspension assemblies". He identified the following, among others, as common questions:

a) Did the defendants, or any of them, breach s. 45 the *Competition Act*, giving rise to liability pursuant to s. 36 of the *Act*?

b) Did the defendants, or any of them, breach s. 46 the *Competition Act*, giving rise to liability pursuant to s. 36 of the *Act*?

c) Are the defendants, or any of them, liable in tort for conspiracy to fix prices for the suspension assemblies?

d) During the class period, did the defendants and/or any unnamed co-conspirator engage in unlawful conduct (by breaching ss. 45 or 46 of the *Competition Act*)?

[3] In support of the motion for certification, the respondents relied upon principles identified in certified class actions alleging price-fixing of electronic components, including *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, and *Pioneer Corp. v. Godfrey*, 2019 SCC 42.

[4] The appellants opposed the certification on a number of grounds, including an argument that the alleged price-fixing agreements were made and implemented entirely outside Canada, and the key provisions of the *Competition Act* relied on in *Pro-Sys* and *Godfrey* do not apply.

[5] The certification judge held that the requirements for certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1) were met. He held, following *Pro-Sys and Godfrey*, that s. 36(1) of the *Competition Act* creates a private right of action for conduct contrary to Part VI (where ss. 45 and 46 are found) and permits any person who has suffered loss or damage as a result of that conduct to sue for their loss. The allegation that the defendants' price-fixing agreement breached Part VI satisfied the illegality requirement for civil conspiracy, and supported the claim for restitution in unjust enrichment.

[6] He dismissed a challenge to the court's jurisdiction over the appellants for reasons set out at paras. 76–92 of his reasons. In short, following *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181, he considered the "strong presumption of a real and substantial connection to British Columbia for a foreign price-fixing conspiracy resulting in higher prices paid by British Columbians" to be determinative.

[7] The certification judge's ruling on jurisdiction is appealed. It is addressed in the appellants' joint factum (re: jurisdiction). The intervener is not primarily concerned with the court's jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

2023 BCCA 243 (CanLII)

[8] The argument that the price-fixing claim is founded upon inappropriate extraterritorial application of the provisions of the *Competition Act* was considered when addressing the question of whether the pleadings disclose a cause of action. The certification judge's dismissal of the appellants' extraterritoriality argument is addressed in the appellants' joint factum (re: certification).

[9] In considering whether the pleadings disclose a cause of action, the chambers judge held the respondents need only to show that, assuming the facts pleaded are true, it is not plain and obvious that the claim will fail (at para. 96): *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25.

[10] He described the task facing him as follows:

> [99] The case law recognizes the tension between a generous approach, erring on the side of allowing novel or questionable claims to proceed, and the gatekeeping function of resolving unmeritorious claims at an early stage. The Court of Appeal provided guidance for navigating this tension in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, where Chief Justice Bauman wrote:
>
>> [46] This Court has been clear that the ultimate question when assessing whether there is a cause of action is the *Hunt v. Carey* test: "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" While the burden is on the plaintiff, the bar is not high. <u>Where the question turns on statutory interpretation, "if it is arguable," the certification judge should not engage in a merits-based analysis. The gate-keeping role of the certification judge at this stage is to avoid squandering judicial resources when it is clear that the correct statutory interpretation would leave the pleadings bound to fail. This could be the case where there is previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority</u>.
>
> [Emphasis added.]

[11] There was no dispute before the certification judge that the appellants manufacture virtually all of the suspension assemblies in Asia; no manufacturing occurred in Canada; and all direct sales of the assemblies occurred in Asia. The appellants argued that all activities constituting the alleged s. 45 offence took place outside Canada, and the alleged harm to downstream Canadian purchasers is not an essential element of the s. 45 offence. They relied on the description of the

2023 BCCA 243 (CanLII)

territoriality principle (now enshrined in s. 6(2) of the *Criminal Code*, R.S.C. 1985, c. C-46), in *Libman v. The Queen*, [1985] 2 S.C.R. 178.

[12] For the following reasons, the certification judge held the appellants had not shown that the respondents were bound to lose:

a) the same "real and substantial connection test" applies to both the jurisdiction of criminal laws, and the territorial jurisdiction of our courts;

b) numerous statements in *Libman* arguably support a finding of territoriality based solely on harm occurring in Canada;

c) *Libman* arguably endorses a flexible approach accounting for all relevant facts that take place in Canada, as opposed to a strict test tied to the elements of the offence;

d) the governing case law interpreting s. 45 arguably favours the plaintiffs: *Pro-Sys*; *Fairhurst v. De Beers Canada Inc*., 2012 BCCA 257; *R. v. Rowbotham;* and *R. v. Roblin* (1992), 76 C.C.C. (3d) 542; and

e) the cases relied on by the appellants, including *R. v. O.(B.)* (1997), 116 C.C.C. (3d) 189, and *R. v. Drakes,* 2005 CanLII 23683 (Ont. Sup. Ct.), were distinguishable on the ground that, in those cases, every aspect of the offence occurred outside Canada.

[13] CDAS seeks to intervene on the appeal of the certification judgment, to make submissions on the proper interpretation of s. 6(2) of the *Criminal Code*. Its proposed submissions support the defendants' preferred interpretations of *Libman* and s. 45 of the *Competition Act*.

[14] Section 30(f) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 authorizes a justice of this Court to grant leave to intervene in an appeal. Rule 61 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 governs applications to intervene.

2023 BCCA 243 (CanLII)

[15] The substantive considerations applicable to such applications are unchanged under the new *Court of Appeal Rules*: *Linkletter v. Proctorio, Incorporated*, 2022 BCCA 313 at para. 14.

[16] An applicant may seek intervener status on the basis that it has a public interest in a public law issue. The following criteria are relevant for determining whether a prospective intervener has a public interest in a public law issue:

a) Does the proposed intervener have a broad representative base?

b) Does the case legitimately engage the proposed intervener's interests in the public law issue raised on appeal?

c) Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

(*British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers)).

[17] As Justice Fitch explained in *British Columbia v. Friends of Beacon Hill Park*, 2022 BCCA 383 (Chambers):

> [47] In deciding whether to grant public interest intervener status, the Court is concerned with ensuring that important perspectives are not overlooked. Prospective interveners must therefore demonstrate that it is in the Court's interest or, more broadly, the public interest to grant leave to intervene: *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 at para. 12 (Chambers); *Equustek Solutions Inc. v. Google Inc.,* 2014 BCCA 448 at para. 8 (Chambers) ….

[18] The applicant easily meets the first criteria for intervention. It has a relatively broad representative base; a membership of approximately 300 lawyers, a significant portion of the criminal defence bar in this Province. While arguably its perspective is, as the respondents submit, duplicative of the appellants', it is in a position to make a valuable contribution to the Court's consideration of the

2023 BCCA 243 (CanLII)

extraterritorial application of the criminal law that may assist the Court in the resolution of that issue. It may assist in ensuring that important perspectives are not overlooked when the question of concern to CDAS is addressed.

[19] Further, I am satisfied that CDAS, given its experience as an intervener, can be relied upon to respect its role as an intervener and not expand the scope of the appeal.

[20] The more difficult question with which I have wrestled is whether CDAS's interests in the scope of the extraterritorial application of the criminal law are legitimately engaged by the case on appeal, as opposed to the case that may go to trial.

[21] The certification judge considered the question before him in relation to extraterritorial application of the *Competition Act* to be whether the respondents' position with respect to the ambit of s. 45 (and by extension s. 6(2) of the *Criminal Code*) was arguable, not whether it was correct. In doing so, he was guided by the views we expressed in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22. In that case, as noted above, we noted that at certification, in order to find that it is plain and obvious that there is no cause of action on the facts as pleaded, there should either be a decided case directly on point demonstrating that the issue has been squarely dealt with and rejected, or a straightforward interpretative exercise. We cited with approval (at para. 45) the following passage from *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139:

> [25] … The only issue for resolution at the certification stage is whether the test for striking-out pleadings articulated in *Hunt v. Carey* has been satisfied. However novel or weak a claim may seem, *if it is arguable* the certification judge should not engage in a merits-based analysis of the claim.

[22] In their factum on certification, the appellants do not address *Trotman*. They do not suggest *Trotman* was wrongly decided or seek its reconsideration. They say:

> 20. Section 4(1)(a) of the *Class Proceedings Act* requires that the plaintiffs' claim disclose a cause of action. The chambers judge correctly stated that to satisfy s. 4(1)(a) of the *Class Proceedings Act*, the claim must not be bound to fail assuming the facts pleaded are true. [Footnote omitted.]

2023 BCCA 243 (CanLII)

[23] They say the definition of "committing" an offence in Canada cannot be stretched "so far beyond its natural meaning as to establish a cause of action under section 45" on the facts pleaded, in essence that it is not arguable that the conduct alleged constitutes an offence under the *Competition Act*. They say:

> 38. Under section 45 of the *Competition Act*, loss is not a constituent element of the alleged criminal offence. The only constituent elements are the acts of conspiring, agreeing or arranging for one of the specified unlawful purposes. Whether those acts cause losses is irrelevant.
>
> 39. Here, it is undisputed that the alleged conduct contrary to section 45 occurred entirely outside Canada. No aspect of the alleged conspiracy or sale of Assemblies happened in Canada. Because there were no direct sales of Assemblies to anyone in Canada, the chambers judge correctly did not certify the direct purchaser claims. The only possible link to Canada is the alleged effect of the conduct in the form of an indirect pass-through of an alleged overcharge of mere pennies.
>
> 40. As such, the question for the chambers judge and for this Court is whether potential harm of that nature is enough to establish that a section 45 offence was "committed" in Canada for the purposes of section 6(2) of the *Criminal Code*.
>
> 41. It is not; the chambers judge erred in finding that it was. Under *Libman*, the chambers judge was required to focus on where the constituent elements of the alleged section 45 offence took place.
>
> [Footnotes omitted.]

[24] This argument has not yet been joined because the respondents' factum has not been filed, but in response to the proposed intervener's argument, the respondents say the statutory interpretation arguments the applicant seeks to advance are inappropriate at the certification stage of this class proceeding because the case management judge properly left open the question raised by the proposed intervention to be determined at trial.

[25] They say the applicant's statutory interpretation and policy arguments will not make a valuable contribution to this Court's consideration of whether the case management judge wrongly exercised his discretion in leaving the statutory interpretation question unresolved. The same criticism, however, may be levelled against the whole of the appellants' argument on appeal. As counsel for the proposed intervener notes, the position of the respondents presupposes the approach the division will take. In order to accept the respondents' submission on

2023 BCCA 243 (CanLII)

the intervener application, I would have to find that there is no prospect of the appellants establishing that the certification judge erred by failing to engage in what the appellants appear to consider a “straightforward interpretative exercise”. In my view, despite the substantial hurdle posed by our decision in *Trotman*, I should not foreclose that possibility.

[26] I am somewhat troubled by the fact that the intervener’s argument may undermine the argument made by the appellants. While the appellants appear to argue that the law is so clear that the respondents cannot make out an arguable case, the proposed intervener emphasises the need for appellate clarification of the law with respect to extraterritorial application of the *Criminal Code*.

[27] CDAS appears to acknowledge (at para. 18(6) of its memorandum of argument) that the certification judge’s interpretation of s. 45 of the *Competition Act* (and by extension s. 6(2) of the *Criminal Code*) is arguable, when it says the trend in recent jurisprudence is the opposite of what *Libman* stands for when properly construed: if you can stretch to identify one particular element of the offence that had “effects” in Canada, then you can assert territorial jurisdiction under s. 6(2).

[28] As an intervener, CDAS will not take a position on the question of whether the judge erred in certifying the class action. It will not take a position on the question of whether the certification judge erred in exercising his discretion not to engage in the interpretive exercise arising in this case. It will not be taking the position that the interpretative exercise is capable of only one result. It will simply be advancing an argument that if the Court engages in the interpretative exercise, the question should be resolved against an expanded view of the extraterritorial application of the criminal law.

[29] A concession that there is uncertainty in the jurisprudence may assist the respondents in establishing that extraterritorial application of the *Competition Act* should not and cannot be resolved at the certification stage. Having said that, I note that the appellants in both appeals support the application for intervener status. My concerns that the intervener’s arguments weigh to some extent in the respondents’

2023 BCCA 243 (CanLII)

favour are clearly not shared.

[30] In my view, there is some prospect that the focused submissions of CDAS may assist the Court on appeal. I grant leave to the intervener to file a factum, not exceeding 10 pages in length, that does not duplicate the submissions of the appellants, and is restricted in the manner described in these reasons.

[31] In accordance with the general practice, I will leave the question of whether leave will be granted to counsel to make oral submissions to the division.

[32] The respondents will have leave to file a factum not to exceed 10 pages in length in response to the intervener.

[Discussion with parties re: reply factums]

[33] **WILLCOCK J.A.**: The respondents will have leave to file a factum in response to the intervener's factum, but I am not going to grant leave to the appellants to file any additional material.

"The Honourable Mr. Justice Willcock"

2023 BCCA 243 (CanLII)

TAB 48

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nisga'a Nation v. Malii,*
2024 BCCA 206

Date: 20240516
Docket: CA49617

Between:

Nisga'a Nation, as represented by the Nisga'a Lisims Government

Appellant
(Applicant)

And

Malii also known as Glen Williams, Gwaas Hlaam also known as George Philip Daniels, Luuxhon also known as Don Russell, Gamlaxyeltxw also known as Wilhelm Marsden, Sindihl also known as Graham Morgan, Watakhayetsxw also known as Deborah Good, Gwinuu also known as Phyllis Haizimsque, Wii'litsxw also known as Gregory Rush, Haizimsque also known as Verna Howard, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow Nation

Respondents
(Plaintiffs)

And

His Majesty the King in Right of the Province of British Columbia and the Attorney General of Canada

Respondents
(Defendants)

Before: The Honourable Mr. Justice Abrioux
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 17, 2024 (*Malii v. British Columbia*, 2024 BCSC 85, Vancouver Docket S036687).

Oral Reasons for Judgment

2024 BCCA 206 (CanLII)

Counsel for the Appellant:	A.H. Sabur Y. Gao
Counsel for the Respondents, Malii also known as Glen Williams, Gwaas Hlaam also known as George Philip Daniels, Luuxhon also known as Don Russell, Gamlaxyeltxw also known as Wilhelm Marsden, Sindihl also known as Graham Morgan, Watakhayetsxw also known as Deborah Good, Gwinuu also known as Phyllis Haizimsque, Wii'litsxw also known as Gregory Rush, Haizimsque also known as Verna Howard, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow Nation:	P.R.A. Grant, K.C.
Counsel for the Respondent, His Majesty the King in Right of the Province of British Columbia:	K.B. Bergner M.E. Casey
Counsel for the Respondent, Attorney General of Canada:	A.M.L. Harvey A.G. Dewitt
Counsel for the Proposed Interveners, Delgamuukw also known as George Muldoe, Baskyelaxha/Niist also known as Bill Blackwater Sr., Djogaslee also known as Ted Mowatt, Luus also known as Roy Wilson, Xhliiyemlaxha also known as John Olson, Gyolugyet also known as Bridie O'Brien, and Wii Minosik also known as Larry Skulsh:	D.R. Paterson
Place and Date of Hearing:	Vancouver, British Columbia May 16, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 16, 2024

2024 BCCA 206 (CanLII)

Summary:

The applicant seeks leave to intervene on the basis that it has a public interest in Aboriginal rights and title claims and can bring a valuable perspective to the Court. Held: Leave is granted but limited to issues that will not be repetitive and overlap with the submissions of the parties to the appeal.

2024 BCCA 206 (CanLII)

ABRIOUX J.A.:

Overview

[1] The Northern Gitxsan Hereditary Chiefs representing seven Gitxsan huwilp (houses) (the "Northern Gitxsan") seek an extension of time and leave to intervene on this appeal.

[2] In the appeal, the appellant, the Nisga'a Nation ("Nisga'a"), seeks to set aside the January 17, 2024 order of Justice Stephens dismissing the Nisga'a's motion to be added as a defendant to the Gitanyow Aboriginal title claim against the Governments of Canada and British Columbia. The reasons are indexed as *Malii v. British Columbia*, 2024 BCSC 85.

Background

[3] The plaintiffs in the underlying action (collectively, the "Gitanyow") seek Aboriginal rights and title to an area in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia (the "Gitanyow action"). The Gitanyow action is scheduled for an 84-day trial in October 2024.

[4] On May 31, 2023, the Nisga'a Nation applied to be added as a defendant to the Gitanyow action. The Nisga'a argued that the lands and waters subject to the action are within the Nisga'a traditional territory. They placed significant reliance on the Nisga'a treaty which granted the Nisga'a rights over specified geographic areas, including the Nass Wildlife Area and the Nass Area.

[5] The Nisga'a brought their application under Rules 6-2(7)(b) and (c) of the *Supreme Court Civil Rules*. Under Rule 6-2(7)(b)(i), the court may order that a person be added as a party if that "person ought to have been joined as a party".

Under Rule 6-2(7)(b)(ii), the court may order that a person be added as a party if "that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on". Under Rule 6-2(7)(c), a party may be added based on "an interest in the object and an interest in the subject of the litigation".

[6] The Nisga'a argued that it had an express treaty and statutory right to participate in these proceedings as a party. They also maintained they had relevant evidence to provide at the upcoming trial regarding the historical occupation of their traditional territory.

[7] The Gitanyow opposed the Nisga'a's participation, contending that its addition was unnecessary and would expand the length, complexity, and cost of the trial. The Gitanyow narrowed their claim, removing relief previously sought that would have entitled them to ratify, or refuse to ratify, previously granted rights and interests, including those of other Aboriginal nations.

[8] On January 17, 2024, Justice Stephens, dismissed the Nisga'a's application, finding that it was not necessary, just, or convenient to add the Nisga'a as a defendant.

[9] He rejected the Nisga'a's argument that it ought to be added as a defendant on the basis that it had evidence relevant to the Gitanyow action. The judge found that this was insufficient to fulfill Rule 6-2(7)(b) "since the [Nisga'a] could simply serve as a witness": at para. 53.

[10] The judge was not satisfied that the Nisga'a had a direct interest in the outcome of the proceedings sufficient to invoke Rule 6-2(7). He judge found that the evidence indicated only a "relatively modest geographic overlap between the Claim Area and the Nisga'a Treaty lands where the Nisga'a hold fee simple title … and a more considerable overlap with the 'Nass Wildlife Area' and 'Nass Area' under the Nisga'a Treaty where the Nisga'a have harvesting and other rights": at para. 23.

2024 BCCA 206 (CanLII)

According to the judge, that constituted a "general but not a direct and precise interest": at para. 61.

[11] Nor was he satisfied that the Nisga'a had a statutory or treaty right to be added as a party. Section 8(1) of the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, c. 8(1) and section 20(1) of the *Nisga'a Final Agreement Act,* S.C. 2000, c. 7, s. 20(1) provided the Nisga'a with the right to participate as a party in litigation in relation to specific issues, but not to participate at large. These provisions provided that the Nisga'a may only participate in proceedings in the event certain discrete issues arose, including the "interpretation or validity of the Nisga'a Final Agreement," and the "validity or applicability of any settlement legislation or any Nisga'a law": at para. 74.

[12] On the current pleadings, the Gitanyow did not raise any issue as to the validity of the Nisga'a treaty, or the validity or applicability of settlement legislation or Nisga'a law, or the interpretation of the Nisga'a treaty. While Canada and British Columbia's responses to the notice of civil claim could potentially raise an issue as to the interpretation of the Nisga'a treaty, the judge held that it would be premature at this stage in the litigation to make a finding that the Nisga'a's statutory party-conferring rights were engaged.

Legal Framework – Intervener

Overview

[13] Rule 61 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*] allows any person interested in an appeal to apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

[14] To be granted intervener status, the applicant must show it has some direct interest in the outcome of the proceeding ("direct interest basis") or, alternatively, if the appeal raises public law issues, must demonstrate it can bring a perspective that is different and useful to the court in resolving those issues ("public interest

2024 BCCA 206 (CanLII)

basis"): *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCCA 413 at paras. 15–16 (Chambers).

Position of the Parties

[15] The Northern Gitxsan were plaintiffs in the Aboriginal title case known as *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 [*Delgamuukw*]. They submit that allowing the appeal will have a material negative effect on their legal rights in the ongoing *Delgamuukw* dispute. They also argue that granting the appeal will greatly increase the length and complexity of any litigation involving claims for recognition of Aboriginal title or rights, thus frustrating the goal of reconciliation and reducing access to justice, for the Northern Gitxsan and any other claims advanced for recognition of s. 35 rights. If granted leave to intervene, the Northern Gitxsan will make submissions to advance, on the point of intervention, the proposition that Aboriginal title represents an exclusive interest in land such that it cannot be reconciled with other interests or treaty rights.

[16] The Attorney General of Canada consents to the intervener order sought by the applicants.

[17] The Attorney General of BC takes no position on the application for leave to intervene. It submits in its memorandum that should the application be granted, the affidavit filed in support of the application for leave to intervene — with certain redactions — would not be admissible at the hearing of the appeal itself with respect to the issues of any adjudicative fact that might arise on the appeal; it may be used solely for explaining to the Court the basis for the applicant's intervention. I am advised that wording has now being agreed to as between the applicant and the Province on this issue.

[18] The other parties who appeared today either consent or take no position to the application.

2024 BCCA 206 (CanLII)

2024 BCCA 206 (CanLII)

Analysis

[19] As Justice Fisher explained in *Ahousaht*:

> [18] I recognize that in cases such as this, which involve constitutionally protected Aboriginal rights, it is important for the court to have everything before it that could reasonably assist in its ultimate determination: *Stoney Creek Indian Band v. Alcan Aluminum Ltd*., 1999 BCCA 293 at para. 8; *Maple Trust Company v. A.G. (Canada)*, 2007 BCCA 195 at para. 5. However, repetition is to be avoided and the appeal must remain focused on the issues raised by the parties: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2012 BCCA 330 at para. 32; *British Columbia Civil Liberties Association* at para. 14. Given the number of applications before me, I must consider the orderly and efficient administration of justice. The number of intervenors should not overwhelm the appeal in a way that is a burden for the parties or the court: *British Columbia Civil Liberties Association* at para. 15.
>
> [19] It is important to note that the role of an intervenor is not to support the position of a party. While an intervenor's submission may support one party's position, its purpose is to make principled submissions on pertinent points of law: see *Araya* at para. 12, citing *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28.

[20] The application was originally framed on the basis that the Northern Gitxsan had both a direct and a public interest to seek intervention. At the hearing of this application, I was advised that they are no longer pursuing the direct interest basis. I will therefore turn to the public interest argument.

Public interest basis

[21] The Northern Gitxsan submit the appeal engages the public interest as many First Nations are in a similar position to the Northern Gitxsan. If the appeal were to be granted, any claim for Aboriginal title or rights could be complicated by other First Nations seeking to be added as full parties — including in cases where, as here, the litigation does not prejudice the claims of the First Nations seeking to be added.

[22] The Northern Gitxsan submit that as a First Nation with experience litigating one of the highest profile, longest running, and most expensive Aboriginal title claims in Canadian history, they undoubtedly have a unique and different perspective that will assist the Court in deciding the appeal. The Gitanyow, having not been part of *Delgamuukw*, cannot address these issues without the intervention of the Northern

Gitxsan. Further, the Gitanyow operate independently from the Northern Gitxsan in all material respects, and pursue their land claims and negotiations on their own.

[23] The Northern Gitxsan say that the issues raised in the proposed intervention will not expand the scope of the appeal. At first instance, Justice Stephens was already well alive to the access to justice concerns that would ensue if the court were to accede to the Nisga'a's request to be added as a party.

[24] In light of the proposed scope of the intervention, I am of the view that the Northern Gitxsan have established a proper basis to intervene on a public interest basis. Accordingly, I would grant the extension of time to seek leave to intervene on the basis that any submissions avoid repetition and overlap with the parties. I would direct that their factum not exceed 20 pages.

[25] Finally, by consent, the affidavit of Mr. Muldoe filed in support of the application for leave to intervene and which contains redactions which have been agreed to, is not admissible on the appeal itself with respect to issues of adjudicative fact that might arise on the appeal, but may be used solely for explaining to the Court the basis for the applicants' intervention.

"The Honourable Mr. Justice Abrioux"

2024 BCCA 206 (CanLII)

TAB 49

Ontex Resources Ltd. v. Metalore Resources Ltd. and Chilian; Metalore Resources Ltd. and Chilian v. Ontex Resources Ltd., D. Monardo, Hamouth, Shefsky, Fuda, M. Monardo and Weaver

Indexed as: Ontex Resources Ltd. v. Metalore Resources Ltd. (Gen. Div.)

75 O.R. (2d) 513
[1990] O.J. No. 2323
Action No. 12224/86

ONTARIO
Ontario Court (General Division)
Montgomery J.
December 18, 1990.

Contracts -- Performance and breach -- Fraud -- Joint venture agreement to develop gold mine property -- Mine operator to acquire interest in mine property -- Mine operator withholding valuable information and intentionally providing misleading facts to owner of property -- Operator negotiating second agreement with increased interest in property -- Fraud and breach of contract established -- Owner entitled to treat breach as repudiatory and to rescind agreements.

Trusts and trustees -- Fiduciary relationship -- Existence -- Confidential information -- Joint venture agreement to develop gold mine property -- Agreement by mine operator to develop property and to provide information to owner -- Agreement providing for operator to acquire interest in property -- Operator having exclusive control of operation and of information -- Owner dependent on and vulnerable to operator -- Deliberate concealment of information that property had substantial potential for gold mine -- Operator using information to acquire numerous adjacent claims and for

1990 CanLII 6952 (ON CTGD)

personal benefit -- Operator negotiating second agreement with greater interest in property -- Breach of fiduciary duty established -- Constructive trust appropriate remedy.

Industrial and intellectual property -- Trade secrets and confidential information -- Disclosure -- Agreement by mine operator to explore and develop mining claims and to provide information to owner -- Operator having exclusive control of operation and of information -- Operator not disclosing valuable information -- Operator using information to acquire numerous adjacent claims -- Breach of confidence established -- Constructive trust appropriate remedy.

1990 CanLII 6952 (ON CTGD)

In 1980, the plaintiff owned 18 leasehold mining claims on a property near the Village of Beardmore. In 1981, the defendant C, the president of the defendant M Ltd., asked whether the plaintiff would be interested in a joint venture. This contact led to the 1981 agreement between the plaintiff and M Ltd. The 1981 agreement provided that if M Ltd. expended $1.0 million on the property, set out a detailed drilling program and agreed to spend a further $5.0 million, then the plaintiff had a choice of (a) transferring the property to M Ltd. in return for a 30 per cent net royalty interest, or (b) granting M Ltd. a 60 per cent interest and retaining a 40 per cent ownership and entering a joint venture agreement. Under this agreement, M Ltd. became the operator and had exclusive possession of the property for mining operations.

Under the 1981 agreement, the plaintiff was entitled to information on demand and M Ltd. was also obliged to provide a report by July 1 of each year. For 1982, M Ltd. provided a report of a geologist S. Unknown to the plaintiff, M Ltd. had hired a much more experienced geologist W to analyze the data prepared by S. W prepared a report dated February 15, 1982. The W Report was positive and indicated substantial potential for a gold mine and the primary target areas for exploration. The W Report was never disclosed to the plaintiff.

M Ltd. was aware of the practice in the mineral exploration industry that when seeking to purchase another party's interest, the party in control of the property must make full

disclosure of all the information it possesses about the property. On June 15, 1982, C wrote the plaintiff that the "overall results did not live up to expectations". On October 30, 1982, C wrote and offered to increase M Ltd.'s interest in the property and noted that "the assays of the fourth deep hole were very disappointing". In a letter dated March 29, 1983 to the plaintiff, C briefly outlined the work completed on the property between December 1982 and February 1983.

In a letter dated March 28, 1983, in reply to M Ltd.'s offer to increase its interest, a director of the plaintiff set out terms to modify the 1981 agreement. This led to the 1983 agreement that although dated as of May 16, 1983 was not made until June 9, 1983. The 1983 agreement provided that in return for a payment of $40,000 and a 10 per cent net royalty interest and 39 additional staked claims surrounding the property, the plaintiff would assign its 100 per cent interest in the property. The 1983 agreement did not contain a mandatory disclosure requirement but provided for information on demand. It was a term of the 1983 agreement that the agreement had to be registered before it superseded the 1981 agreement. The 1983 agreement was not registered until June 6, 1986.

Before signing the 1983 agreement, in addition to not disclosing the W Report, M Ltd. misled the plaintiff about its drilling plans, created the impression that the focus would be on the staked claims and not the 18 leasehold claims, purposely concealed its positive and optimistic plans for the property, and deliberately refrained from drilling in the target area.

On February 3, 1984, C was advised about the assay results for drill hole 84-B31 -- "the discovery hole" which had been drilled in January 1984. The assay results were extraordinarily good (0.35 oz. gold/ton). On or about March 26, 1984 M Ltd. delivered drill maps to the plaintiff. Since the maps showed the "discovery hole" B-31 without an assay result, a reader would assume assay of less than 0.1 oz. gold/ton. C did not disclose the positive information and secretly purchased stock in both M Ltd. and the plaintiff. M Ltd. immediately began a staking and acquisition program that resulted in 232 claims

1990 CanLII 6952 (ON CTGD)

being acquired by July 1, 1985.

On January 14, 1986 the plaintiff demanded under the 1981 agreement reports for 1983, 1984 and 1985. C replied that the 1981 agreement had been superseded but promised to deliver information. On March 14, 1986, a box containing information was delivered to the plaintiff. The information provided was confusing, incomplete and inaccurate.

On March 24, 1986, M Ltd. announced its discovery. By this time, it had acquired an additional 227 claims. After the announcement, the plaintiff sued C and M Ltd. and claimed breach of contract, fraud, misuse of confidential information, breach of fiduciary duty and ownership of the mining claims.

Held, judgment should be given for the plaintiff.

The conduct of the defendants constituted both fraud and breaches of the 1981 and 1983 agreements going to the very root of the agreements. C's conduct fractured any ability for the parties to work together. Trust, confidence and good faith were destroyed by the conduct of one party. M Ltd. breached its obligations in three fundamental aspects: it intentionally provided misleading facts; it intentionally failed to provide the W Report; and it withheld other vital information. Pursuant to the terms of the 1981 agreement and under the common law, the plaintiff was entitled to treat the breach as repudiatory and to rescind the contract. The 1983 agreement did not come into force until registration. That did not occur until 1986 by which time C had perpetrated further falsehoods and deception. The misinformation, the missing information and the failure to present the information breached both agreements. The validity of the 1983 agreement depended on proper disclosure having been made under the 1983 agreement. Given M Ltd.'s intentional failure to make disclosure, the 1983 agreement could not stand.

C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd. (1980), 21 B.C.L.R. 345, 14 C.C.L.T. 87, 10 C.E.L.R. 10 (S.C.); vard (1981), 33 B.C.L.R. 290, 19 C.C.L.T. 263, [1982] 2 W.W.R. 385 (C.A.); Curtis v. Chemical Cleaning

1990 CanLII 6952 (ON CTGD)

& Dyeing Co., [1951] 1 K.B. 805, [1951] 1 All E.R. 631, 95 Sol. Jo. 253 (C.A.); Re London and Globe Finance Corp., [1903] 1 Ch. 728, [1900-3] All E.R. Rep. 891, 88 L.T. 194, 10 Mans. 198; Panzer v. Zeifman (1978), 20 O.R. (2d) 502, 88 D.L.R. (3d) 131 (C.A.); Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306, 15 D.L.R. (3d) 336; Redgrave v. Hurd (1881), 20 Ch. D. 1, [1881-5] All E.R. Rep. 77, 45 L.T. 485 (C.A.); Scott v. Commissioner of Police for the Metropolis, [1975] A.C. 819, [1974] 3 All E.R. 1032, 60 Cr. App. Rep. 124, 181 Sol. Jo. 863 (H.L.), consd

In the course of M Ltd.'s business relationship as operator on the plaintiff's lands, M Ltd. acquired valuable geological information which led to the discovery hole. This was confidential information to be shared with the plaintiff. M Ltd. used this valuable information to acquire hundreds of adjacent mining claims. C used this information for personal gain. Breach of confidence was established. Although M Ltd. "developed" the information, it was placed in a position to do so by being the plaintiff's operator. The only appropriate remedy was one in rem with the result that M Ltd. holds all the staked claims under a constructive trust for the plaintiff.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 69 O.R. (2d) 287 (note), 44 B.L.R. 1, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57, 6 R.P.R. (2d) 1; Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551, 50 C.P.R. 299, 57 D.L.R. (2d) 557, 56 W.W.R. 697, apld

M Ltd. was conducting exploration work on the plaintiff's property for their mutual benefit and was in control of information. The power of M Ltd. to conceal information was almost total. M Ltd. was in the position to exercise power or discretion in a way that affected the plaintiff and the plaintiff was vulnerable and at the mercy of M Ltd. and dependent upon the good faith of M Ltd. Specifically when requested, M Ltd. was obliged to provide accurate information

1990 CanLII 6952 (ON CTGD)

and to give full, fair and frank disclosure and it failed to do so. M Ltd. was in a fiduciary relationship with the plaintiff. It was C's abuse of power that created the breaches of fiduciary duty. In the result, the 1981 and 1983 agreements should be rescinded and title to the 18 leased claims should revert to the plaintiff. C's conduct must be condemned by punitive damages in the sum of $80,000. The 459 claims by M Ltd. and 12 other claims acquired after M Ltd. acquired confidential information are held in a constructive trust for the plaintiff. The 39 staked claims in the 1983 agreement must revert to M Ltd.

1990 CanLII 6952 (ON CTGD)

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 69 O.R. (2d) 287 (note), 44 B.L.R. 1, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57, 6 R.P.R. (2d) 1, apld

Other cases referred to

California Prune & Apricot Growers Inc. v. Baird, [1926] S.C.R. 208, [1926] 1 D.L.R. 314; Frame v. Smith, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 78 N.R. 40, 23 O.A.C. 84, 9 R.F.L. (3d) 225; Hogar Estates Ltd. v. Shebron Holdings Ltd. (1979), 25 O.R. (2d) 543, 101 D.L.R. (3d) 509 (H.C.J.); United Dominions v. Brian (1985), 60 A.L.R. 741 (Aust. S.C.)

Statutes referred to

Securities Act, R.S.O. 1980, c. 466, ss. 1(1) para. 21, 74, 74(1), (2), (3), 75 [rep. & sub. 1987, c. 7, s. 7], 75(1), (3)

Authorities referred to

Shepherd, J.C., The Law of Fiduciaries (Agincourt, Ont.: Carswell Co., 1981), pp. 41, 47-48
Waddams, Stephen M., The Law of Contracts, 2nd ed. (Aurora, Ont.: Canada Law Book, 1984), pp. 440-42

Waters, Donovan W.M., "Lac Minerals Ltd. v. International Corona Resources Ltd." (1990), 69 Can. Bar Rev. 455, at pp. 469-472

ACTION, based in breach of contract, fraud, misuse of confidential information and breach of fiduciary duty, to determine ownership in certain mining claims.

Bryan Finlay, Q.C., and J. Gregory Richards, for plaintiff and defendants by counterclaim Ontex Resources Ltd., Dominique Monardo, Stephen Shefsky and Salvatore Fuda.

Patrick F. Schindler and Ian Hamilton, for defendants, plaintiffs by counterclaim.

MONTGOMERY J.:--

OVERVIEW

In 1980, Brookbank-Sturgeon Mines Limited (Brookbank) owned 100 per cent of a property composed of 18 leasehold claims in the Township of Irwin, in the Thunder Bay Mining Division, near the Village of Beardmore. This property is known as the Brookbank property. The Brookbank property lies on what is known as the Paint Lake Fault.

In June 1983, Brookbank amalgamated with Ontex Resources Limited (Ontex) and Brookbank became a part of Ontex. It is necessary therefore for me to refer to the plaintiff company as Brookbank when I am dealing with it prior to the June 1983 amalgamation and as Ontex when I am dealing with it subsequent to the June 1983 amalgamation.

Noranda became involved in the property in 1944. During its exploration, it sunk 40 drill holes. After Noranda abandoned the property, little work was done on it for 30 years. In 1974, Brookbank-Sturgeon, the owner of the leasehold, entered into an option agreement with Lynx-Canada Explorations Limited. After

1990 CanLII 6952 (ON CTGD)

drilling six holes, Lynx abandoned its option. Metalore became involved on the property in 1981.

Metalore's main operation consisted of 75 small producing gas wells. Between 1965-1980, it did little mineral exploration. In 1980, for income tax purposes, it sought a mining property to explore, George Chilian, the president of and driving force behind Metalore, had worked on several gold properties in the Beardmore area in the late 1950s. He felt the geology of the Brookbank was good by looking at the Noranda data file with the Department of Mines.

On January 27, 1981 Chilian wrote to Arthur White to see if Brookbank would be interested in an option or a joint venture. On March 31, 1981 Chilian wrote to Vance White the following:

> In the interest of expediency, I went over to the dept of mines assessment work library after leaving your office and found that Lynx had filed their work. They had done a mag survey (which wasn't even contoured) and eight shallow holes, east of the previous drilling, that yielded some scattered low values, similar to previous drillings.
>
> For whatever its (sic) worth, my appraisal is that you have a series of lenses, with relatively low values, within an alteration zone in basic volcanics, close to the sediments. The lenses have not even been correlated from hole to hole, to the shallow depths drilled, so you have to look for something a whole lot better either at depth or on-strike. Ten thousand feet of serious drilling will give you a better indication of what you have but it will require much more (probably twenty or thirty thousand) to start delineating any meaningful tonnage -- if it exists. Consequently, I don't feel the property is in any state of development to warrant a gross royalty with a large work commitment.
>
> We are prepared to offer the following:
>
> 1. $10,000 upon signing and $10,000 per year thereafter.
>
> 2. Firm commitment of $250,000, including minimum 10,000

1990 CanLII 6952 (ON CTGD)

feet of BQ drilling and minimum four holes below 500 feet vertical (700 to 800 foot holes). Three years.

3. $100,000 per year to continue, being cumulative.

4. We would earn a 60% interest when $1,000,000 is spent, whereat (sic) both interests become participating and diminishing progressively if participation is not maintained.

As an alternative to 4. we would consider paying up to a 30% net royalty, depending upon the total required to attain production.

If this is of any further interest to you, I would appreciate hearing from you shortly, as I am also considering alternative projects.

This letter led to the 1981 agreement between Metalore and Brookbank. The 1981 agreement was later re-negotiated and the 1983 agreement was born. This new agreement increased Metalore's interest in the property.

Between 1981 and 1986 Metalore acquired hundreds of additional claims in the area.

This action, based in breach of contract, fraud, misuse of confidential information and breach of fiduciary duty, is to determine ownership in certain mining claims.

THE PARTIES AND THEIR EMPLOYEES

Ontex is a public company whose shares are listed for trading on the Alberta Stock Exchange. Ontex resulted from the amalgamation on June 29, 1983 of Brookbank-Sturgeon Mines Limited and Ontex Resources Limited, both public companies incorporated pursuant to the laws of the Province of Ontario.

Arthur White had been in mining since the 1940s and raised risk capital. His management company had incorporated Campbell Red Lake which went on to become one of the country's major gold producers.

1990 CanLII 6952 (ON CTGD)

Vance White graduated from the University of Toronto in Physical and Health Education. He became involved in his father's company, Mid North, which provided management services to mining operations. In 1972, he became associated with Brookbank as secretary and a director.

W.P. Dickie was a senior executive at Ontex whose involvement in this matter began subsequent to the 1983 re-negotiation of the 1981 agreement.

Peter Vamos is a geologist who did some work for Ontex.

Metalore Resources Limited (Metalore) is a public corporation whose shares are traded on the Toronto Stock Exchange.

George Chilian is a 58-year-old mining executive and geological exploration specialist. He has been the president and directing force of Metalore since 1955. He has a B.A. in economics with a minor in journalism. He also took some courses in geology.

Metalore employed a series of geologists to work on the property. Gordon Skrecky conducted the 1981-82 drill campaign and was the author of the Skrecky Report, the importance of which will become clear below. Peter Lassila was involved in the 1982-83 campaign and was author of the Lassila Report. Barbara Kowalski was the on-site geologist from 1983 onwards, for all subsequent years relevant to this matter.

Stewart Winter is a senior geologist who was employed by Metalore and the author of the February 15, 1982 Winter Report. Again, the importance of this report will become clear below.

ISSUES

1. Did Metalore fundamentally breach either the 1981 agreement or the 1983 agreement or both?

2. Did Metalore's conduct amount to fraud?

3. Did Metalore misuse confidential information?

1990 CanLII 6952 (ON CTGD)

4. Did a fiduciary relationship exist between Metalore and Ontex and, if so, was that relationship breached?

CONTRACTS

The first analysis will be on the 1981 and 1983 agreements, focusing on the documents themselves without considering extrinsic evidence of industry practice.

The 1981 agreement gives Metalore the exclusive right to acquire leasehold interest in the property for a period of ten years (renewable). In return Metalore must spend $250,000 on the development of the property within the first three years (including minimum drilling requirements) and must pay Brookbank $10,000 per year. Metalore must spend $100,000 a year and pay Brookbank $5,000 a year in the years subsequent to the third year. If Metalore expends $1,000,000 on the property, sets out a detailed drilling program and agrees to spend further sums totalling $5,000,000 or more, then Brookbank has a choice of (a) transferring the property to Metalore in return for a 30 per cent net royalty interest, or (b) granting Metalore a 60 per cent ownership and retaining a 40 per cent ownership, and entering a joint venture agreement.

In a June 15, 1982 letter to Brookbank, Chilian made his first attempt to increase Metalore's interest in the property. He proposed that Metalore purchase the property for $50,000 and that Brookbank retain a 5 per cent net profit interest. Chilian renewed this offer in a letter of October 30, 1982. In a letter of March 28, 1983 Vance White wrote to Chilian and set out terms to modify the 1981 agreement. Chilian signed the letter indicating agreement to the terms but said his approval was subject to some clarification outlined in an April 5 letter to White. The terms of the 1983 agreement parallel the March 28 letter.

On April 13, 1983, $10,000 of the $40,000 payment was received by Brookbank and the balance of $30,000 was received on May 16. Although the agreement indicates it was made as of the 16th day of May, 1983, it was not made until June 9.

1990 CanLII 6952 (ON CTGD)

The 1983 agreement provides in return for a payment of $40,000 and a 10 per cent net royalty interest in the property and 39 additional staked claims surrounding the property, Brookbank shall assign 100 per cent interest in the leased property to Metalore.

The 1983 agreement specifically stipulates, when the 1981 agreement is superseded:

> 2. Metalore shall register this Agreement, or alternatively shall register the 10% net profit interest of Brookbank and shall provide Brookbank with abstracts to this effect.
>
> . . . . .
>
> 5. When Clauses 2, 3 and 4, foregoing, have been executed then both parties mutually agree that the agreement of 1 July, 1981 shall be superseded by this present agreement.

Pursuant to these express terms, the 1981 agreement has never been superseded by the 1983 agreement. The 1983 agreement was not registered in the Land Registry Office until June 6, 1986.

Disclosure provisions [under the] 1981 agreement

Clause 6 states:

> During the term of this Agreement and any renewal hereof, Metalore shall be entitled to exclusive possession of the Property for purposes of conducting mining operations thereon but Brookbank, through its agents and representatives, shall be entitled at reasonable times and with the consent of Metalore (which shall not be unreasonably withheld) to enter upon the Property to examine the mining operations. At the request of Brookbank, Metalore shall supply Brookbank with particulars of the results of any diamond driling, sampling and assaying and shall permit Brookbank to examine all relevant geological and geophysical data and other maps, reports, diamond drill cores and other records.

1990 CanLII 6952 (ON CTGD)

> Metalore shall provide Brookbank by July 1 in each year during the term of this Agreement and any renewal hereof with a progress report regarding the mining operations conducted by it upon the Property and a certificate of Metalore's Treasurer as to the amount of expenditures incurred on the Property in the preceding work year.

In the first paragraph, Brookbank is given the right to enter upon the property to examine the mining operations. Metalore is obligated upon the request of Brookbank to supply particulars of the results of any diamond drilling, sampling and assaying and Metalore must allow Brookbank to examine all relevant geological and geophysical data and other maps, reports, diamond drill cores and other records. I will refer to these disclosure obligations as the on demand information.

The second paragraph of clause 6 sets out a reporting requirement. Metalore shall provide Brookbank by July 1 in each year of the term of the agreement and any renewal thereof a progress report regarding the mining operations conducted by Metalore on the property and a certificate from Metalore's treasurer as to the expenditure on the property in the preceding year. This annual reporting requirement may conveniently be described as the mandatory information.

The 1981 agreement, then, has a two-part disclosure obligation, the mandatory information in the form of a yearly report, and the on demand information upon Brookbank's request.

The on demand information is very broadly defined in clause 6 (above). The mandatory information is equally broadly defined in light of its reference to "mining operations" with the expansive definition of that term. "Mining operations" includes "every kind of work done on or in respect of the Property". The definition goes on to list the types of work contemplated and includes:

> assessment, geophysical, geochemical and geological surveys, studies and mapping, investigating ... all other work usually considered to be prospecting exploration, development and mining work; in paying wages and salaries of men engaged in

1990 CanLII 6952 (ON CTGD)

such work ... in the management of any work ... for the due carrying out of the said prospecting, exploration and development work.

The wording of the mandatory disclosure provision is so broad that it is difficult to contemplate any work or report connected with the property that could escape the definition of mining operation.

The intent of both the mandatory and on demand provisions of the contract is full and fair disclosure.

Disclosure under the 1983 agreement

Clause 7 gives Brookbank the right "to enter upon the Property to examine the mining operations". It further provides that upon request Metalore shall supply Brookbank with particulars of the results of any diamond drilling, sampling and assaying and shall permit Brookbank to examine all relevant geological and geophysical data and other maps, reports, diamond drill cores and other records. This clause is virtually identical to the first paragraph in clause 6 of the 1981 agreement. Also "mining operations" is defined as in the 1981 agreement. The mandatory disclosure provision is absent in this agreement. There remains the same on demand reporting as in the 1981 agreement.

An examination of disclosures made by Metalore

Metalore says it met its mandatory July 1, 1982 reporting requirement by furnishing Brookbank with the Skrecky Report. Gordon Skrecky was the then project geologist for Metalore. Metalore contends that White accepted the Skrecky Report as satisfaction of the mandatory requirement. Brookbank's position was that it trusted Chilian at this stage.

A further obligation to report would arise on July 1, 1983, pursuant to the 1981 agreement; however, the 1983 agreement was to supersede the 1981 agreement and the 1983 agreement had no mandatory reporting provision. Further, there had to be compliance with certain provisions before the coming into force

1990 CanLII 6952 (ON CTGD)

of the 1983 agreement. One such requirement was the registration of the 1983 agreement. Ontex contends that as a result of Metalore's failure to register, the 1983 agreement did not come into force until 1986. If that is so, it is critical to the mandatory reporting provision.

It is not disputed that Brookbank received in August 1983, the report from geologist Peter Lassila (the Lassila Report) which covered the drilling from October 1982 to March 1983. Included in that report were copies of the diamond drilling logs for 1982 and 1983. It is not clear if this report was to be in answer to the reporting requirements in the 1981 agreement (despite the fact that Metalore appears to have considered the 1981 agreement superseded), in answer to a disclosure request under the 1983 agreement, or merely information Metalore felt obliged to pass along to Brookbank.

In a March 9, 1983 memo from Vance White to H. Miller, then treasurer of Brookbank, involving preparation for the Brookbank-Ontex merger, White indicated he had requested Chilian "to update his report" and Miller was asked to ensure that the report was under way. Minutes of a meeting of directors of Ontex, dated March 21, 1983, indicate Miller had called Chilian and asked for an update on the Metalore exploration and Chilian indicated it could be expected. Chilian describes the request as a perfunctory one for an update of the Skrecky Report.

In a letter of March 29, 1983, Chilian outlined very briefly the work completed on the property between December 1982 and February 1983. Metalore contends this was a full answer to Brookbank's request for a report which was made for merger purposes. This was the only request for information under the 1981 agreement, according to Metalore. They say, therefore, they have met all the reporting requirements, both mandatory and on demand, of the 1981 agreement.

The February 15, 1982 Stewart Winter Report was never produced. This is a pivotal report.

Gordon Skrecky was fresh out of school. He was a good and

1990 CanLII 6952 (ON CTGD)

competent geologist but according to his own assessment, he lacked experience. Chilian asked Stewart Winter, a highly experienced senior geologist, to analyze the Skrecky report. While the Winter Report is based upon the Skrecky data, it affords opinions and interpretation that go far beyond Skrecky and, taken with the covering letter, disclose a property with a potential close to economic value. This fact was never communicated to Ontex. All other reports are in Metalore's files but not this one. The report was never mentioned in Metalore's affidavit of documents. Schedule C of an affidavit requires mention of documents once held but no longer in a party's possession. There is no mention of Winter's Report here either. The only place it appeared was in a government file where Metalore had used it in support of a grant application. Ontex found the report after commencement of this lawsuit.

Ontex contends that the Winter Report was a vital piece of information that was required to be disclosed pursuant to the reporting requirements in the 1981 agreement. Ontex stresses Winter's experience and Skrecky's inexperience and likens the Stewart Winter Report to the opinion of a senior counsel based upon a junior counsel's report.

With the 1983 agreement, the mandatory reporting requirement falls. It becomes important to focus on Ontex's requests for information and to visit the property.

Metalore asserts that Ontex made no formal request for specific drill hole results until a letter of January 14, 1986. This request was answered by delivery of a "box" of information received by Ontex on March 14, 1986. Metalore attributes the fact that Ontex was not well informed prior to March 1986 to Ontex's complacency.

The following is a listing of all requests for information and the information that was given without any apparent request:

(1) It is clear from the Kowalski diary of March 5, 1984 that Peter Vamos looked over the logs, presumably from the 1983-84 drilling season. It is not clear whether this information was

1990 CanLII 6952 (ON CTGD)

given pursuant to a request by Ontex. Barbara Kowalski is the geologist for Metalore who took over from Gordon Skrecky. Peter Vamos is a geologist sometimes employed by Ontex.

(2) On or about March 26, 1984, diamond drill hole maps were delivered to Ontex by Metalore. Again, it is not clear whether they were delivered pursuant to Ontex's request or were something Metalore felt obliged to produce. Ontex says these maps show Hole B-31 but assigned no result to the hole. A hole shown without a result would be assumed by a reader to be a hole with an assay of less than .1 of gold per ton. This was what became known as the discovery hole. Ontex contends that this map intentionally misled it.

(3) In the spring and summer of 1984, Ontex wanted information for its annual meeting. In July 1984, Vamos visited the property but was denied access to certain information by Chilian citing negotiations on neighbouring property as his reason for denying the information. Ontex accepted the explanation at the time.

(4) The Kowalski diary entry of February 12, 1985 indicates Dickie called Chilian to discuss sale of Ontex's 10 per cent royalty interest. The entry indicates "he also wanted information".

(5) On February 18, 1985, Chilian wrote Ontex to summarize the 1983-84 exploration program in response to Dickie's request. In his letter of February 18, 1985, Chilian promises to prepare a composite geological summary of the work which will "be available to Ontex at the conclusion of this season". Ontex contends this summary should have been available to them in March 1985 as that is when the 1984-85 season ended. I agree. I reject Chilian's assertion that he meant the 1986 season.

(6) A May 7, 1985 entry in Kowalski's diary indicates that Dickie called and requested information and Chilian "stalled" citing ongoing negotiations on a ground lease as the reason.

(7) On January 14, 1986, in what Metalore says is the only

1990 CanLII 6952 (ON CTGD)

instance of a formal request for information, Dickie wrote Metalore and give it notice that if the 1983, 1984 and 1985 reports as required by the 1981 agreement were not delivered within 15 days, then Metalore would be in breach of the 1981 agreement.

Chilian wrote in reply on January 28, 1986 and said the 1981 agreement had been superseded by the 1983 agreement. Chilian cited his letter of February 18, 1985 in which he gave a summary of all the work completed since 1982. Chilian proposed in his letter that he would deliver the information in the second week in March at the prospectors convention. On March 14, 1986 a "box" containing information dealing with the property between 1983 and 1985 was delivered to Ontex.

John A. Macdonald (an expert on contracts at an exploration stage and in carrying out and implementing programs) said he did not believe Metalore had met its reporting requirements under the 1981 agreement. He indicated that the Skrecky Report reported on part and only part of the work and that Stewart Winter's work was "an integral part" of the work program.

In response to a question from Ontex's counsel as to whether Metalore's March 29, 1983 letter to Ontex constituted an appropriate progress report, Macdonald replied with an "unequivocal no". He indicated he believed the 1981 agreement specifically called for a progress report and that such a document should state what was done, giving results and telling of future plans and recommendations.

Macdonald stated that upon making the "very significant discovery" involving Holes B31, B36, B38, and their wedges, industry practice would be to notify the plaintiff and then make a news release for the purpose of complying with Ontario Securities Commission rules. Macdonald indicated that the significant discovery was made as of the end of April 1984 at the latest; he pointed out that all of the results but those for wedge B31-A were available by the end of March 1984. He also said that the results for Hole B31, which indicated a "significant intersection", were available as of February 3, 1984.

1990 CanLII 6952 (ON CTGD)

Macdonald stated that for Metalore to have "the assay results (for B31, B36, B38, and their wedges) in hand and then turn around and make an offer (for Ontex's 10 per cent interest) would be totally unethical". Metalore's offer for the Ontex 10 per cent was made in a letter dated February 23, 1984. This may not be relevant as the Ontex 10 per cent was never sold, but it shows the mark of the man.

Regarding the disclosure obligations of Metalore when re-negotiating the 1981 agreement, Macdonald said Ontex was entitled to know of, and rely upon, the impressions and interpretation of Metalore at the time of the re-negotiation.

The disclosure provisions in the two agreements are clear and unambiguous.

THE EXPERTS

H.D. Hume was an expert called by Ontex. He is a non-geologist but the principal of a junior mining company with extensive experience. Mr. Hume's evidence was not contradicted. His credentials were first-rate and I found him to be an unshakeable witness.

Dr. David S. Robertson was called by Ontex as an expert in geology, including the evaluation and development of resource properties. I found Dr. Robertson to be a highly qualified geologist with an excellent understanding not only of the geology of the property but also of the facts of the case.

John A. Macdonald, whose opinions are discussed in part above, was called by Ontex. He impressed me with his grasp of the facts as well as the geology. He is engaged in providing consulting services to the mining industry. He has a Master's degree in geology and a Ph.D. in graduate studies. He was a highly credible witness with a calm, thoughtful and detailed delivery.

Ross D. Lawrence was called by Metalore as an expert in economic geology and mineral exploration practice. I have three

1990 CanLII 6952 (ON CTGD)

serious reservations about Mr. Lawrence's testimony: first, I do not feel he was as well qualified as Dr. Robertson or Mr. Macdonald to give testimony about geological exploration; second, I found Mr. Lawrence to be ill-prepared; and finally, I lost confidence in Mr. Lawrence's objectivity when he assumed the tone of an advocate.

Dr. N.C. Carter was also called by Metalore. Like Mr. Lawrence, Dr. Carter's field of expertise is economic geology and practice in the mineral exploration industry. I was impressed both by Dr. Carter's knowledge of the subject-matter and his knowledge of the facts in this case; however, I was disappointed to see Dr. Carter let himself fall into the role of advocate when cross-examined. At one point in his testimony, Dr. Carter seemed to contradict a portion of his own report and only when pressed did he agree with the position expressed in his report.

Hugh Snyder testified for Metalore as an expert in economic geology and business practice in the mining industry. Though well qualified, Mr. Snyder was not a persuasive witness. He was defensive, evasive, and he too became an advocate.

Where conflict occurs among the experts, I prefer the opinions of Robertson and Macdonald on behalf of Ontex to Metalore's experts.

THE RELATIONSHIP BETWEEN THE PARTIES

Before embarking on an analysis of the relationship between the parties, it is important to understand something about the nature and work habits of George Chilian. This is so because the correspondence in the action is crucial to factual determinations. I conclude that Chilian is meticulous about detail and nuances in his correspondence and reports. A read-in from the Kowalski discovery shows the extent of detail and care taken by Chilian in drafting:

1073. Q. Would these reports go through a number of drafts? What was the process? A. Sometimes there would be a number of drafts.

1990 CanLII 6952 (ON CTGD)

1074. Q. You would prepare them here, in southern Ontario? A. Yes.

1075. Q. Would you type them up, or hand write them? A. I'd type them up.

1076. Q. And you'd then sent (sic) them to Mr. Chilian? A. Yes.

1077. Q. And he would review them? A. Yes.

1078. Q. And he would then return them to you? A. Yes.

1079. Q. And he would incorporate some changes, or changes he had requested? A. Right.

1080. Q. And then you'd type them up again? A. Right.

1081. Q. And then send it to him, for his review? A. Right, and they would come back again with more changes.

1082. Q. More changes? A. Yes. Sometimes it could go through more than ten versions.

1083. Q. He's fairly meticulous, is he? A. He is very meticulous about everything.

Another example is to be found in the careful redrafting of the January 27, 1986 letter from Chilian to Dickie. Under ordinary circumstances, one should not be hypercritical of differences in colour or flavour in correspondence addressed to different people. This is no ordinary circumstance. In my view, Chilian considered who the reader was and knew exactly the message he wished to impart. A consistent pattern developed of downplaying the value of the property to the owner and painting an optimistic picture to government and major mining companies.

The 1981 agreement between Brookbank and Metalore created a common enterprise: Brookbank, the owner, contributed the land,

1990 CanLII 6952 (ON CTGD)

and Metalore its money and work. Their goal was to find and develop a mine in which each would share in the profit. In Chilian's letter of January 27, 1981 to Arthur White that led to the agreement, he said: "I would like to know if you would be interested in optioning or joint venturing this property with a production objective" (Emphasis added).

Metalore was the operator under the 1981 agreement and, while Brookbank had rights to an annual progress report and access to and information from the property, Metalore was in complete control of the release of the information from the property. Consequently, its power to conceal information was complete. As Peter Vamos stated with respect to his site visit in July 1984 you have to rely on the willingness of the operator to provide you with information because antagonizing the operator does not work.

Chilian admitted that Metalore would understand more about the property than anyone else, including Ontex, as work on the property continued. Chilian directed the exploration program with a hands-on approach and he personally spotted all the drill holes.

As operator Metalore had exclusive jurisdiction over the property, was in effective control of the property and controlled what information was released from the property.

Brookbank had to expect Metalore would release information on a timely basis. Dickie said in cross-examination that the owner has to trust and depend on the operator for timely information. Vance White said Ontex believed and trusted what Chilian was telling them. I conclude that Ontex trusted and relied upon Chilian, the operator. I reject the contention of Chilian that Ontex was lackadaisical in its approach to the project.

H.D. Hume, an expert called by Ontex, testified that because the common adversary is mother nature and the odds of success are very low, there exists in the industry a high degree of co-operation between the owner and the operator. He stated that there has to be a high degree of communication and that each party helps the other.

1990 CanLII 6952 (ON CTGD)

It is the practice in the mineral exploration industry that where agreements exist such as we have here (the 1981 and 1983 agreements), the party in control of the property must make full disclosure of all the information it possesses regarding the property when seeking to purchase the other party's interest. This was the evidence of Chilian, V. White and Dickie as well as that of D. Robertson, an expert called by Ontex and R. Lawrence, an expert called by Metalore.

Brookbank was entitled under the 1981 agreement to receive an annual report by July 1 each year from Metalore regarding the "mining operations" conducted by it on the 18 leased claims. That term is defined in the 1981 agreement, in part, as follows:

> ... "mining operations" shall include every kind of work done on or in respect of the Property or the products therefrom by or under the direction of Metalore and, without limiting the generality of the foregoing, shall include the work of assessment, geophysical, geochemical and geological surveys, studies and mapping, investigating, drilling, designing, examining, equipping, improving, surveying, shaft sinking, raising, cross-cutting and drifting, searching for, digging, trucking, sampling, working and producing minerals, ores and metals, in surveying and bringing any mining claims to lease or patent, in doing all other work usually considered to be prospecting, exploration, development and mining work ... .

Metalore argues that the Skrecky Report was sufficient to constitute a report to satisfy the mandatory reporting requirement. Metalore, according to Chilian, complied with this obligation by purporting to provide to Ontex copies of all the documentation it received from the work it had done on or in respect of the property. This documentation included:

(a) Skrecky Report;

(b) June 15, 1982 letter from Metalore to Brookbank-Sturgeon;

(c) November 10, 1981 Winterbourne Survey accompanied by two

1990 CanLII 6952 (ON CTGD)

maps;

(d) October 30, 1982 letter from Metalore to Brookbank-Sturgeon;

(e) March 29, 1983 letter from Metalore to Brookbank; and

(f) April 1983 Lassila Report delivered to Brookbank-Sturgeon on August 12, 1983.

Chilian said that in May 1982 Metalore, pursuant to its obligation to Brookbank, purported to deliver all the material it had to Brookbank.

In the documentation delivered, Metalore purported to provide not only the specific results of the physical work done but also its opinion, its feelings about, and its plans for the property. This is confirmed in Metalore's letters of June 15 and October 30, 1982 and March 29, 1983.

In so doing, Metalore was attempting to comply with its obligation to provide a progress report.

Geophysical data was communicated by Stewart Winter to Chilian in a handwritten letter of November 10, 1981 and that was provided to Ontex. However, the critical report of Winter, dated February 15, 1982, was never given to Ontex. Chilian made the crucial admission in cross-examination that this report should have been delivered to Ontex.

METALORE'S TRUE OPINION

It is important to analyze the letter that led up to the re-negotiated 1983 agreement. The June 15, 1982 letter of Chilian to Vance White says, in part: "overall results certainly did not live up to our expectations"; "we contemplate doing a second work program, about one-half the size of the initial one". Then follows a buy-out offer: "we are prepared to make you an offer for the outright purchase of the property for $50,000 cash plus 5% of net profits".

The October 30, 1982 letter says: "the assays of the fourth

1990 CanLII 6952 (ON CTGD)

deep hole were very disappointing and I did not receive those assays ... until John Mason, the govt geologist, went into the property after I wrote to you on June 15. We are still prepared to give you $50,000, plus 5% of net profits".

The letter of March 29, 1983 is short and is reproduced in its entirety:

> This is to give you a brief resume of the work completed on the Brookbank property between December, 1982 and February, 1983.
>
> Three holes were drilled and VLF and Mag surveys (Proton) were completed on grids covering the areas drilled where geophysics had not previously been completed.
>
> 83M2, Line 36W, 462 feet, one assay above 0.10 Au 83M1,Line 18W,272 feet, only very low values 83-4, Line 6E,349 " " " " "
>
> 84M1 was a "fill-in" hole, recommended in the Skrecky report; however, it did not contribute a more positive result to the overall picture.
>
> 83M2 was a step-out, some 1400 feet west of our most westerly previous hole on Line 22W. It indicates there is still good exploratory potential for the 1400 feet between these holes and we will be drilling this out at maximum 200 foot centers this summer.

In my view in providing to Brookbank its opinion, its feelings and its plans for the property as set forth in the letters of June 15, October 30, 1982 and March 29, 1983, Metalore was doing so to comply with its obligation to provide a progress report. I find that Metalore knew of its obligation to make full disclosure of all the information it had on the property when making an offer to purchase the interest of the owner.

With respect to Metalore's wish in 1982 to buy out Brookbank, its motive was clearly articulated by its president. In his

1990 CanLII 6952 (ON CTGD)

examination-in-chief, Chilian stated that from the outset he had not been content with the 1981 agreement because Brookbank had in his view retained too large an interest. He stated that Metalore knew that it was going to be spending a lot of money on the 18 leased claims and wanted to reduce Ontex's equity.

As summarized by Vance White, the disclosure made to Brookbank by Metalore at the time of negotiation indicated a lack of encouragement, that the results obtained were not living up to expectations and that the Skrecky program was generally discouraging.

In making these representations, Metalore purposely misled Brookbank and concealed its true feelings, opinions and plans for the property. Chilian admitted that he had ideas concerning the property in 1982 and 1983 that he did not share with Ontex.

I conclude that certain material facts were intentionally withheld by Metalore from Brookbank at the time of the re-negotiation.

Metalore's true opinion of the potential of the 18 leased claims was positive and optimistic and included the belief that there was a good probability that there existed on the 18 claims a large tonnage deposit of economic grade. In a letter of May 31, 1983 (before execution of the 1983 agreement), Chilian wrote to Dr. Gerald Riverin of Falconbridge Copper. The letter stated in part:

> We intend to fill-in both tiers, along the presently indicated length, at 100 foot intervals this season and possibly run a ramp or decline next year, since there is a new GOMILL right in Beardmore, presently idle and the zone is wide enough for an open cut, at least for bulk samples.
>
> ... and (Metalore) will probably need some production financing somewhere along the way ... .

A letter of July 11, 1983 from Chilian to the Department of Natural Resources says, in part:

1990 CanLII 6952 (ON CTGD)

Concerning our own property, we are involved in the third consecutive year of drilling, scheduled for 20,000 feet plus, this season, to delineate and define tonnage and grade of an indicated large tonnage deposit that was already recommended for shaft sinking by Noranda personnel in 1944.

Dr. Carter, a defence expert, said this meant an indicated large tonnage of economic value. While this letter postdates the execution of the 1983 agreement, the facts did not change from the date the agreement was signed and the date of this letter.

A further indication of Metalore's true opinion is expressed in its annual report for the fiscal year ending March 31, 1983. This reads in part:

> Milestones of Progress have been achieved by your Company during its Fortieth Anniversary year of Resource Exploration and Development.
>
> Precious Metals (Milestone #4) ... Results thus far indicate that there is a good probability that an economic ore body can be developed at Windigokan and preparations are under way for extensive drilling to delineate the tonnage and grade of this deposit.
>
> For forty years the "Pioneers" of your company have wandered and searched the exploration wilderness -- in quest of that elusive ore body. We are now confident that we have reached our "promised land" at Windigoken.

Contrast the enthusiastic, optimistic and positive tone regarding the potential of the 18 leased claims reflected in this material to the letters of June 15 and October 30, 1982 and March 29, 1983, all written by the meticulous Mr. Chilian. I can conclude nothing short of artful deception.

THE FEBRUARY 15, 1982 WINTER REPORT

Metalore sought the opinion of L.D.S. Winter, a senior geologist whose opinion it respected. Metalore had specifically

1990 CanLII 6952 (ON CTGD)

requested his opinion on the results obtained by G. Skrecky and the latter's report including the potential those results indicated and the prospects for future work. This opinion was provided to Metalore by letter dated February 15, 1982.

From the covering letter:

The drilling to date does not allow one to put numbers on tonnage and grade, but it is suggested that more detailed drilling could quite possibly indicate between 500,000 and 1,000,000 tons in the hanging wall and foliated zones combined, with an average grade of about 0.2 oz. Au per ton.

From the Winter Report:

1.1 FOLIATED OR CONTACT ZONE ADJACENT TO THE VOLCANIC-SEDIMENT CONTACT

This zone was intersected in the 4 deep holes drilled on lines 10W, 12W, 20W and 22W as well as the shallower holes. The foliated zone is consistent and appears to become stronger in depth and to the west but due to the wide spacing of the drill holes there is no indication that ore grade gold mineralization over mineable widths is as consistent as the altered foliated zone. The shallow drill holes indicate a lack of continuity to the mineralization within an altered zone. The intersections in the deeper holes suggest some continuity but their spacing is too wide to confirm it. One assessment is that the foliated zone consists of some ore grade shoots or lenses close to surface and to the east which become more connected and continuous in depth and to the west. This zone is considered to have the best potential to develop a significant tonnage with a grade between 0.2 and 0.1 Au per ton. As such, it is suggested that considerable drilling be done on this structure to determine its economic potential.

. . . . .

3. PROPOSED FUTURE WORK

1990 CanLII 6952 (ON CTGD)

On the assumption that the objective is to outline an economic gold deposit that could be brought into production, the following work is proposed as a means of attaining that objective.

3.1 Detailed drilling of the foliated zone, particularly between lines 10W and 22W. This would consist of both shallow and deep holes.

. . . . .

4. OTHER CONSIDERATIONS

It is understood that Pancontinental Mining Ltd. is refurbishing the old Empire mine at Beardmore and as part of this process is constructing a 400 tpd (tons per day) gold mill.

This letter and the enclosed report were not produced by Metalore and only came to the knowledge of Ontex through its own investigative efforts. But for those efforts this action would have proceeded without the existence of this letter coming to the attention of the court.

Chilian says he had no recollection of the Winter Report, nor does he recall receiving the report. He says he forgot all about it until it was found by Ontex in the summer of 1990.

I do not accept Chilian's evidence. This is the only report that has gone missing from Metalore's files. The report was specifically requested by Metalore from a geologist whose opinion it respected. In fact Metalore had first asked L.D.S. Winter to conduct the 1981 drill program but he was too expensive and G. Skrecky was engaged.

Metalore gave the report to the Ontario Mineral Exploration Program (OMEP) of the Ministry of Natural Resources on May 28, 1982, within the same month that it purported to deliver all its material on the property to Brookbank. The report itself is the most important analysis done, to aid a non-geologist owner, on the property at that time, identifying both a substantial

1990 CanLII 6952 (ON CTGD)

potential and the primary target in language clearly understandable to the non-professional.

Vance White said he was "shocked" when he saw the report on June 18, 1990. There would have been no re-negotiation, he said, if he had seen this report earlier.

The expert H.D. Hume said this report would cause "a flare to go up'', that one would not forget about this report and that it was ''getting awfully close to a mine".

J.A. Macdonald said, "you'd be excited about (the report), you're in the ball park". He also testified that the difference between the Winter Report and the Skrecky Report is "the difference between night and day".

Dr. Robertson testified that many clients would not understand the detailed Skrecky Report and said his practice is to write a three to four page covering letter explaining a report. He stated that in the Winter Report, "Stewart Winter is telling Chilian that this is a darn good bet". Dr. Robertson felt it "inconceivable" that an explorationist would forget about the Winter Report, the only report of authority at the time.

R. Lawrence, a geologist called by Metalore, agreed in cross-examination that he could not point out how the Skrecky Report could be read to disclose the potential for 500,000 to 1,000,000 tons grading .2 oz/ton of gold. He admitted that for someone reading the report the difference between .1 and .2 is significant. He agreed that the experienced geologist can articulate in concise form what the client can look for as a target and that was what Winter had done in his report. He had identified a useful target to go after which would justify a $500,000 program to pursue.

Dr. Carter, a defence expert, stated that nowhere in the Skrecky Report could you really come up with the tonnage and grade identified in the Winter Report. He further stated that 500,000 to 1,000,000 tons of .1 is not economic. However, he testified that that same tonnage at a grade of .2 is the

1990 CanLII 6952 (ON CTGD)

threshold of a commercial deposit. He also testified that the owner upon receipt of the Winter Report would be interested in Winter's further thoughts and views on the property.

Mr. Snyder, another defence expert, stated that 1 million tons grading .1 was worthless. He further stated that Winter in giving the figures of 500,000 to 1,000,000 tons grading .2 was providing his professional opinion as to what could happen. Although initially he stated that .2 was not economic he later admitted that 1 million tons of .2 in this area is approaching the threshold of a commercial mine. Since all exploration information is of interest to an owner, the Winter Report would be of interest to the owner.

Herbert Douglas Hume was not contradicted. He described the Winter Report as a different animal than the Skrecky Report and as an analysis of the field report of Skrecky. He said he would very seldom receive a report like the Winter Report. He said no junior resource company would forget about the Winter Report. When asked if he would expect as an owner to receive the Winter Report, he said: "Absolutely!".

Dr. David Robertson said Winter saw what Skrecky saw, but Winter was telling Chilian from the point of view of his experience that the property is a good bet. He said it is the sort of report Brookbank should get from its operator.

Robertson said the Winter Report was fundamental and something the operator was obliged to give to the owner. He described the October 30, 1982 letter of Chilian to White as absolute misinformation. In the March 29, 1983 letter, Chilian said to White that Hole 83M 1 did not contribute a more positive result to the overall picture. Robertson described 83M 1 as a darn good hole and could not understand how Chilian could write such contradictory letters.

John A. Macdonald described the four deep holes of Skrecky as indicating downdip continuity of the foliated zone improving at depth. This is a positive finding. He said the Metalore deep holes were better than the Noranda shallow holes and that a strike length of 800 feet of .1 oz. of gold was very

1990 CanLII 6952 (ON CTGD)

significant. He also said Chilian's letter of June 15, 1982 was not a fair representation of the 1981 drill program. He said comparing the Chilian letters to White with the Chilian letter to Dr. Riverin of Falconbridge, you would not recognize that it was the same property under discussion.

He said the significance of the Winter Report was the potential for significant tonnage and that was very positive news on the property that any junior mining company would be delighted to get.

Winter's primary target zone was stated in 3.1 of his report to be the foliated zone, particularly between lines 10W and 22W. The so-called discovery hole, B31, was within that area. Macdonald interpreted it as saying "stay in the centre, don't flank out". Yet Chilian flanked out and did not touch that target area until he obtained execution of the 1983 agreement.

Macdonald said Chilian's March 29, 1983 letter to White did not meet reporting requirements. It should have outlined what was planned, what was done and what results were achieved. He said paragraph 4 of the letter to Dr. Riverin of May 31, 1983 contained information not in the report to White: e.g., "probably need some production financing somewhere along the way." He described the difference in the letters as the difference between black and white.

Barbara Kowalski was the most knowledgeable person about the Brookbank other than Chilian. She was aware of his stalling tactics and they were commented upon in her diary. She might have given further insight into the disappearance of the Winter Report. She was never called by the defence. I can come to no other conclusion than to find that Chilian deliberately and knowingly secreted and withheld the Winter Report.

Drilling the gap

Metalore had not yet drilled the area with the greatest known potential. Metalore intentionally refrained in its 1981 drill program and again in its 1982-83 drill program from drilling the "gap" being the known area of greatest potential on the 18

1990 CanLII 6952 (ON CTGD)

leased claims.

Metalore viewed N-8 as an important hole in its analysis of the property. It was the best hole Noranda had drilled. Metalore in the Skrecky Drill Program (1981) correlated two shallow holes (M-21 and M-22) with N-8. Metalore, however, refrained from N-8 by drilling at depth. Metalore left that area alone. Instead, Metalore drilled the required four deep holes at the reasonable extremities of the Brookbank zone leaving the "gap" in between untouched (lines 12 west and 20 west). Metalore did not intend to drill the "gap" until later. The 1982-83 program did not touch the "gap". It was only after the re-negotiation of the 1981 agreement that Metalore returned to drill the "gap'' at depth where it found below Noranda's N-8 the Discovery Hole B31 in the very next drill program.

Production of the Winter Report would have shown this to be Winter's first target zone. What might Barbara Kowalski have said about why the gap was not drilled before execution of the 1983 contract? In light of Chilian's desire to reduce Ontex's equity, I conclude that he deliberately refrained from drilling the gap until he had the 1983 agreement signed.

The location of the 20,000 feet of drilling

Metalore's drill program for the 1983-84 season was to drill 20,000 feet all on the 18 leased claims. However, Brookbank was led to believe that a substantial amount of this drilling would take place on the 39 staked claims.

Vance White was led to believe by Metalore that the bulk of the proposed 20,000 feet of drilling the next season was going to be carried out on the 39 staked claims. Metalore's March 29, 1983 letter to Brookbank describes a drill program on the west end of the 18 leased claims of only about 3,000 feet.

Metalore admitted that it was reasonable for Brookbank to believe from Metalore's statements that an extensive amount of the work was going to be done on the 39 staked claims. Metalore planned to do all 20,000 feet of drilling on the 18 leased claims and their plans for drilling in the 1983-84 program did

1990 CanLII 6952 (ON CTGD)

not change between March 1983 and August 1983 when the program commenced, according to Chilian's evidence.

Metalore described their proposed program in far different terms when communicating with persons other than Brookbank. In his May 31, 1983 letter to Falconbridge Copper, Chilian described a program of 10,000 to 11,700 feet in the central part of the Brookbank zone where the discovery was actually made. In his July 11, 1983 letter to the Department of Natural Resources, Chilian advised that the 20,000 feet of drilling was being directed on the 18 leased claims to "delineate and define tonnage and grade of an indicated large tonnage deposit".

The defence experts all agreed that the program described to Brookbank and the program Metalore in truth planned to undertake in 1983-84 were substantially different. They also agreed that this would be of significance to someone in the position of Brookbank.

If Brookbank had been told that 20,000 feet of drilling was to be done on its property, would it as a reasonable enterprise have reduced its own equity in the property? Indeed, Chilian told Dr. Riverin of Falconbridge that drilling would probably go on forever on the leased property. This is another opinion he failed to pass on to Brookbank.

THE VALUE OF THE 39 STAKED CLAIMS

It was Metalore's proposal to contribute the 39 staked claims to the property package in March 1983. Brookbank trusted Chilian's judgment and was relying on his geological expertise. Chilian knew this. Chilian was not saying anything negative about the 39 staked claims to White in the course of the negotiations. Chilian told White that Metalore had completed "the geology" on some of the 39 staked claims, but with respect to drilling he did not advise White of the results of the drilling.

Chilian admitted that by that stage, nothing he had drilled on the 39 staked claims showed anything as promising as had been shown on the Brookbank zone on the 18 leased claims. He

1990 CanLII 6952 (ON CTGD)

also admitted that he did not tell White this fact.

In a letter to the Toronto Stock Exchange, Chilian described the result of the drilling on the 39 staked claims as disclosing little or no encouragement.

While Chilian's conduct with his co-venturer lacked candour here, I am not prepared to conclude that with respect to the 39 staked claims I can infer any fraudulent deception.

The status of the four lapsed claims

Four of the 39 staked claims that Metalore was introducing into the property package had lapsed at the time of signing the 1983 agreement but Metalore represented to Brookbank that at that time all 39 were in good standing.

In the course of the re-negotiation of the 1981 agreement, Chilian made certain representations regarding the status of the 39 staked claims.

In cross-examination, Chilian admitted that he was keeping track of the status of the 39 staked claims with the use of claim maps and abstracts. He conceded that his representation in the April 5, 1983 letter was that the 39 staked claims would all have sufficient assessment work on them to remain in good standing for at least eight months. Chilian admitted that on May 29, 1983 four of the 39 claims lapsed.

Notwithstanding that the third recital in the 1983 agreement was false in stating that Metalore was the holder of 39 staked claims I must conclude that error to be negligent misstatement. I do not ascribe any animus to this conduct.

I conclude that the intentional withholding of material facts outlined under the headings, "Metalore's True Opinion", "The February 15, 1982 Winter Report", "Drilling the Gap" and "The Location of the 20,000 Feet of Drilling", constitute a breach of the 1981 agreement, which goes to the very root of that agreement. Similarly, the intentional withholding of the same material goes to the root of the 1983 agreement and constitutes

1990 CanLII 6952 (ON CTGD)

fraud.

THE LAW OF FRAUD

There is no exhaustive definition of fraud. Some references from cases follow:

Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306, 15 D.L.R. (3d) 336 at p. 316 S.C.R.:

> Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

Re London and Globe Finance Corp., [1903] 1 Ch. 728, [1900-3] All E.R. Rep. 891, 88 L.T. 194, 10 Mans. 198 at pp. 732-33 Ch.:

> To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

Scott v. Commissioner of Police for the Metropolis, [1974] 3 All E.R. 1032, [1975] A.C. 819, 60 Cr. App. Rep. 124, 181 Sol. Jo. 863 (H.L.), at p. 1038 All E.R.: The definition of "defraud" in the London and Globe Finance case is not exhaustive and the word ordinarily means:

> ... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled.

Silence and half-truths that mislead or imply something other than the truth may amount to a fraudulent misrepresentation:

Curtis v. Chemical Cleaning & Dyeing Co., [1951] 1 K.B. 805, [1951] 1 All E.R. 631, 95 Sol. Jo. 253 (C.A.), Denning L.J. (as he then was), at p. 809 K.B., adopted in Panzer v. Zeifman (1978), 20 O.R. (2d) 502, 88 D.L.R. (3d) 131 (C.A.), at

1990 CanLII 6952 (ON CTGD)

p. 509 O.R.:

> ... a representation may be literally true but practically false, not because of what is said, but because of what is left unsaid; in short, because of what is implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation.

See also C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd. (1980), 21 B.C.L.R. 345, 14 C.C.L.T. 87, 10 C.E.L.R. 10 (S.C.), affd on issue of liability, appeal from damage assessment allowed (1981), 33 B.C.L.R. 290, 19 C.C.L.T. 263, [1982] 2 W.W.R. 385 (C.A.) at pp. 96-97 C.C.L.T. (S.C.):

> The law with respect to deceit by half-truth has its foundation in the colourful dictum of Chambre J. in Tapp v. Lee (1803), 3 Bos. & P. 367, 127 E.R. 200 at 203:
>
> "An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the Defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

In Peek v. Gurney (1873), L.R. 6 H.L. 377, Lord Chelmsford observes (at pp. 391-92) that while mere concealment will not suffice to give rise to a right of action in deceit, so that there must be "something actively done to deceive (the other party) and draw him in to deal with the person withholding the truth from him", this may well be accomplished by a half-truth. He observes that half a truth will sometimes amount to a "real falsehood", and may contain "a positive misrepresentation". The law is summarized in Spencer-Bower and Turner on Actionable Misrepresentation (3rd ed., 1974), at p. 94 in this passage:

1990 CanLII 6952 (ON CTGD)

"To state a thing which is true only with qualifications or additions known to, but studiously with-held by, the representor is to say the thing which is not. Such a statement is a lie, and one of the most dangerous and insidious forms of lie."

In defence of a claim for fraud, it is no answer for the defendant to say that the falsehood would have been discovered had the plaintiff made his own investigations. This was set out by Jessel M.R. in Redgrave v. Hurd (1881), 20 Ch. D. 1, [1881-5] All E.R. Rep. 77, 45 L.T. 485 (C.A.), at p. 13 Ch. D.:

If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them."

The breaches of the 1981 and 1983 agreements previously outlined require rescission of the contracts. The 1981 agreement constituted a common enterprise between the parties. The conduct of Chilian has fractured any ability of these parties to continue to work together. The trust, the confidence, the good faith has been blasted away by the conduct of one party. The 1983 contract did not come into force until registration. That did not occur until 1986 -- by then there were further falsehoods and deception perpetrated by Chilian. There has been a total failure to make full and complete disclosure both under the mandatory and request aspects of the contracts.

For the reasons given I concluded both agreements to be fundamentally breached. If the 1983 agreement survived its birth it died very soon after because of further vital breaches.

SECURITIES ACT

The assay results for Hole B31 (0.35 oz./ton of gold over 54

1990 CanLII 6952 (ON CTGD)

feet) were extraordinarily good. Chilian admitted in cross-examination that if the results of B31 had been released, the price of Metalore stock would have increased significantly.

The results for Hole B31 constituted a "material change" in the affairs of Metalore. Section 1(1), para. 21 of the Securities Act, R.S.O. 1980, c. 466 defines "material change" as follows:

> 1(1)21. "material change" where used in relation to the affairs of an issuer means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable.

Both D. Robertson and J.A. Macdonald, experts in the field of exploration geology called on behalf of Ontex, stated that by no later than the end of March 1984 Metalore knew that it had a significant discovery and was obliged, given general industry practice and their understanding of the regulations of the Ontario Securities Commission, to make public disclosure. While I agree with the experts that Chilian was obligated to make public disclosure under Ontario security law, I have formed this opinion based on my own reading of the Securities Act.

Notwithstanding his lack of familiarity, R. Lawrence (for the defence) described Hole 84-B31 in his evidence as a "significant milestone" and labelled it as the "Discovery Hole" on Exhibit 107 although he removed this label for the longitudinal section which was entered as Exhibit 102 in his evidence-in-chief. I found this to be improper conduct for an expert who is supposed to be unbiased. N. Carter (for the defence) admitted in cross-examination that he had not reviewed the relevant logs in detail. He then advised that his view that some confusion could have arisen from the results of 84-B31, 84-B36 and 84-B38 perhaps came from his looking at the core, but he was unable to identify which core and stated that maybe

1990 CanLII 6952 (ON CTGD)

he had looked at the core for subsequent holes. This evidence reflected a disregard and lack of proper analysis of the existing data.

Chilian got the assay results of the Discovery Hole 84-B31 by telephone on February 3, 1984. Instead of promptly notifying his co-venturer of the discovery, Chilian wrote to Ontex on February 24, 1984, offering to buy Ontex's 10 per cent net royalty interest. Chilian admitted in cross-examination that Metalore could not buy Ontex out without making disclosure. Chilian said he really didn't intend to go through with this without making disclosure. I find these answers to be utter fabrication. What did he do then? He furnished map Exhibit 7 which showed 84-B31 and 84-B36 with no assay results. As .1 is the cut-off point, below which assays are not expected to be posted, this left a reader of the map with the impression that there was less than .1 gold per ton on these assays. That was another example of an attempt to deceive Ontex. It was totally false disclosure.

Chilian and Kowalski met with representatives of Ontex at the March 1984 Prospector's Convention. Chilian had no recollection of what went on at the Prospector's Convention. However, the Kowalski diary entry for March 5, 1984 states "Hopefully they (Ontex) will take our offer and sell their interest in the Brookbank". Kowalski's diary describes the results for B31 as "Discovery!".

Did Chilian rush off to tell his co-venturer the wonderful news of Metalore's discovery on February 3, 1984 and then promptly make a press release as required? No! He secreted the discovery for two years during which time he went to the market personally as an insider and bought stock and set off on a course of land acquisition to the detriment of his business associate.

Insider trading

On the same day that Chilian obtained the results for Hole 84-B31, he went into the market and purchased Metalore shares. He purchased these shares without disclosing the results to the

1990 CanLII 6952 (ON CTGD)

public.

In the ensuing months, Chilian continued to purchase Metalore stock without making public disclosure of the important drill results for B31 and other deep holes. This included purchases of stock on the open market, purchases of stock from his 91-year-old father and acquisition of stock from Metalore itself pursuant to an option agreement.

Chilian admitted on cross-examination that he should not have been buying Metalore stock in the circumstances.

Barbara Kowalski also participated in the purchase of Metalore stock while in possession of inside information regarding drill results that had not been released to the public.

Chilian admitted that disclosure of the Hole B-31 results would have had the effect of increasing the value of Metalore stock. This is a material change in the affairs of Metalore and required public disclosure pursuant to s. 74(1), (2) and (3) of the Securities Act:

> 74.(1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a press release authorized by a senior officer disclosing the nature and substance of the change.
>
> (2) Subject to subsection (3), the reporting issuer shall file a report of such material change in accordance with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs.
>
> (3) Where,
>
> (a) in the opinion of the reporting issuer, the disclosure required by subsections (1) and (2) would be unduly detrimental to the interests of the reporting issuer; or
>
> (b) the material change consists of a decision to implement

1990 CanLII 6952 (ON CTGD)

a change made by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable and senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of such knowledge in purchasing or selling securities of the issuer,

the reporting issuer may, in lieu of compliance with subsection (1), forthwith file with the Commission the report required under subsection (2) marked "confidential" together with written reasons for non-disclosure.

Metalore was required on making the disclosure to forthwith "issue and file a press release". Instead of complying "forthwith" Chilian waited two years. Chilian's excuse was that he was acquiring more land. Another reason he gave was he questioned the results of B31 and wondered if his son had salted the assay. I reject this suggestion. The wedge of B31 displayed high assays too.

In any event, Chilian failed to take advantage of the provisions of s. 74(3) and file a confidential report together with written reasons for non-disclosure. There was therefore no lawful excuse for not making public disclosure.

In January, February and March 1984, there were rumours and, in Chilian's opinion, a leak of the results of the discovery hole from the assay laboratory which resulted in a surge of trading in Metalore stock. Both of these events required public disclosure of the results obtained pursuant to T.S.E. guidelines. No such disclosure was made. Metalore was at the time a member of the T.S.E.

At this time the 1983 agreement was still executory since no registration of the agreement had occurred and did not occur until 1986. There was no basis for Metalore's failure to disclose the discovery to Ontex. Ontex was entitled to expect Metalore to at least observe the law relating to public disclosure.

Armed with the assay result of B31, not only did Chilian

1990 CanLII 6952 (ON CTGD)

trade as an insider in Metalore prior to making public disclosure, he embarked on a staking program to the exclusion of Ontex and he traded as an insider in Ontex shares.

Immediately after obtaining the results for Hole 84-B31 on February 3, 1984, Metalore engaged in a claim staking and acquisition program. This program ultimately resulted in its acquisition of 232 claims along with the volcanic/ sedimentary contact which runs through the Brookbank property. These claims were acquired before July 1, 1985. Metalore also staked or acquired an additional 227 claims before it made the public announcement of the discovery in March 1986, including claims running along a second volcanic/ sedimentary contact to the south.

Ontex says that if the discovery had been disclosed to it Ontex would have shared in the staking. Ontex had $300,000 in its treasury at the time. Announcement of a discovery would have increased Ontex borrowing powers and provided funds for land acquisition. It is clear, therefore, that Ontex could have financed a staking campaign.

Let us look at Chilian's acquisition of Ontex stock prior to public disclosure.

By December 1985 Chilian knew that he was soon going to have to make a public announcement of the discovery. Commencing in December 1985, and continuing through until January 27, 1986, Chilian purchased approximately 90,000 shares of Ontex. He effected these purchases through a numbered company and the facilities of the Bank of Montreal, both vehicles being intentionally used by him to conceal his identity as the purchaser from the public. These shares were purchased for a total cash consideration of $14,150.

The discovery was publicly announced by Metalore in March 1986. In April 1986 Chilian sold the 90,000 Ontex shares for a total cash consideration of $94,150 thereby obtaining a profit of approximately $80,000. In order to effect the sale transactions, Chilian continued to use the numbered company but on this occasion he used the facilities of the Royal Bank of

1990 CanLII 6952 (ON CTGD)

Canada. His purpose in using these vehicles was to conceal his identity as vendor from the public.

In cross-examination, Chilian admitted that he engaged in this share trading activity in Ontex stock so that he might "get ahead". His purpose was solely to make a personal profit. Chilian saw his purchase of Ontex stock before the announcement as a way of making some money from the public announcement.

In the circumstances, Chilian breached s. 75 of the Securities Act:

> 75.(1) No person or company in a special relationship with a reporting issuer shall,
>
> (a) purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change in the affairs of the reporting issuer that he or it knew or ought reasonably to have known had not been generally disclosed; or
>
> (b) inform, other than in the necessary course of business, another person or company about a fact or change which he knows is a material fact or material change before the material fact or material change has been generally disclosed.
>
> . . . . .
>
> (3) For the purposes of this section, a person or company is in a special relationship with a reporting issuer where,
>
> (a) the person or company is an insider or an affiliate of the reporting issuer;
>
> (b) the person is a director, officer or employee of the reporting issuer or of a company that is an insider or an affiliate of the reporting issuer;
>
> (c) the person or company has engaged, is engaging in or

1990 CanLII 6952 (ON CTGD)

proposes to engage in any business or professional activities with or on behalf of the reporting issuer and thereby has acquired knowledge of the material fact or material change; or

(d) the person or company is an associate of the reporting issuer or of any person or company referred to in clause (a), (b) or (c). [s. 75 since rep. & sub. 1987, c. 7, s. 7; proclaimed in force February 15, 1988]

In addition to the failure to disclose the discovery to Ontex, Chilian invited Ontex geologist Peter Vamos to have a site visit at the property in July of 1984. At that time Vamos was refused information except for vague generalities. It is clear to me that Chilian again rebuffed Ontex's attempts to get information. Up to the time of delivery of the "box" of material Ontex trusted Chilian. These two events of non-disclosure go to the root of the 1983 agreement as well as constituting vital breaches of contract.

By the end of August 1984 Metalore had in its possession sufficient values for the deep holes that even absent all the breaches set forth above, there existed absolutely no justification for withholding such information from the public beyond August 1984. In fact, Metalore was in possession of all the results which it subsequently published in the March 24, 1986 Northern Miner article by August of 1984.

Ontex, trusting its operator, was prepared to wait. Ontex believed that if Metalore had been possessed of material information it would have been provided on a timely basis. Throughout this period and up to the delivery of "the box" in March 1986 W.P. Dickie understood that there was no significant or material information apart from the two maps (Exhibits 7 and 17) which had been delivered to Ontex at the end of March 1984.

Notwithstanding the trust of Ontex, Metalore and its president possessed material information which Metalore purposely withheld from Ontex and the public while the president and geologist of Metalore to Metalore's knowledge continued to trade, admittedly improperly, in the shares of the

1990 CanLII 6952 (ON CTGD)

company. Metalore also continued to misuse confidential information in staking and acquiring adjacent mining claims to the east and west.

"THE BOX"

Metalore delivered a box of materials to the plaintiff in March 1986. The box contained drill logs and reports. Peter Vamos testified as to the condition of the data contained in the box. In many instances, there were no assays posted to logs. In other cases, the poorer assays were posted to logs with the better assays having been deleted. With respect to cross-sections, poorer assays were posted to some holes whereas the more significant assays were omitted. The practical effect of presenting the data in this manner was to create confusion and frustration. It is clear from the testimony of the experts called by the plaintiff that this is not the customary manner in which to present such information. No working papers were provided.

DECEPTION OF OMEP

The deception continued. The Ontario government was deceived. J. Bruce Gordon testified that under the OMEP program an explorationist was required to post assays on the logs if assaying had been carried out. This is because public funds were being spent for the assaying and the public was entitled to the information. When asked whether it was proper to file logs with only the poor assays posted and while leaving off the good assays he responded "Pick and choose? -- Certainly not!"

Assays, according to OMEP, are to be posted to the logs. Metalore deleted significant assays from logs it submitted to OMEP. It only supplied the assays on a separate piece of paper after public disclosure was made.

Metalore deleted significant assays from the logs submitted to OMEP.

Mr. Gordon also said that one could not claim a cost incurred in the course of one OMEP program in the subsequent year's OMEP

1990 CanLII 6952 (ON CTGD)

program. An expenditure in excess of an OMEP program budget could not be recovered.

In cross-examination, Chilian admitted that he knew you could not carry over expenditures from one year to another under the OMEP program. However, an invoice from Bradley Brothers Limited dated March 25, 1984 in the amount of $43,528.89 for drilling conducted in March 31, 1983 to April 1, 1984 program was characterized as an April 1984 invoice.

Thus the $43,528.89 was claimed in a subsequent year. Chilian did this knowingly and obtained a 25 per cent rebate on the $43,528.89 committing fraud to the public purse.

PUBLIC DECEPTION -- THE NORTHERN MINER ARTICLES

To comply belatedly with the need for public disclosure two articles appeared in the Northern Miner.

The falsification of information in the two Northern Miner articles (March 24 and 31, 1986) described by J.A. Macdonald can be clearly seen from Exhibit 46 and the diagram, Exhibit 47.

The March 24, 1986 Northern Miner article stated in part:

Hole 34, drilled in late 1985, intersected 54.4 feet grading 0.47 ounces gold per ton from a depth of approximately 1,250 feet, George Chilian, President, says.

Nick Tintor, a geologist, the author of the Northern Miner article of March 24, 1986, said he specifically recalled Mr. Chilian telling him that "Hole 34" was drilled in late 1985. He also recalled the intersection given. Chilian's statements to Tintor were false and misleading.

Northern Miner "Hole 34" was actually Metalore Hole 84-B31. Further, the results for the hole given in the Northern Miner actually came from the wedge hole, 84-B31A. Hole 84-B31 was drilled in January 1984 and the assay results were received on February 3, 1984. Thus, the impression given by Chilian's

1990 CanLII 6952 (ON CTGD)

statement to Mr. Tintor was that the discovery hole was drilled almost two years later than when in truth it had been drilled.

The actual hole numbers were changed for purposes of publication in the Northern Miner because Chilian "wanted the numbers to appear as if they were drilled in a particular sequence", according to Kowalski's discovery evidence, which was read in. I conclude this was done to deceive Ontex.

R. Lawrence, defence expert, said that it could be very important to know when a discovery is made. He testified that he saw a misstatement of fact in Chilian's representation as to when the discovery hole was drilled. Lawrence characterized this as "dishonest". He also said that the difference between the actual value for the main hole and the value that was reported in the Northern Miner was "significant".

Other examples of false or misleading information contained in the Northern Miner articles include the fact that only 8 of 24 pierce points in the zone were reported, only the better intercepts were reported with the poor intercepts being omitted, and the zone was said to be open to the west when this was not true.

Not only did Chilian mislead Ontex, he flagrantly and knowingly misled the public. I reject Chilian's evidence where it conflicts with other witnesses. He is a totally incredible witness.

Assay dates are often not listed. That is consistent with the dishonest disclosure in the Northern Miner of when the discovery was made. Some other matters reported in the Northern Miner were not in the box at all.

The contents of the box, the misinformation, the missing information and the failure to fairly present the information as well go to breach of the two agreements.

INTEREST BY FALCONBRIDGE

By letter dated May 18, 1983 Corporation Falconbridge Copper

1990 CanLII 6952 (ON CTGD)

wrote to Metalore expressing interest in the property. After receiving Metalore's response by letter dated May 31, 1983, Falconbridge wrote by letter dated June 3, 1983 to Metalore. The letter concluded:

> If we are still interested in your property after our visit, I hope that you will consider Corporation Falconbridge Copper as a possible partner for either exploration or development work.

Gerald Riverin said that Falconbridge had looked at 400 to 600 gold properties, identified 20 to 25 of the most interesting prospects and determined that, of those prospects, the Brookbank property was the first priority. Falconbridge wished to acquire an interest in the Brookbank property.

In a memorandum dated September 1, 1983, recording a telephone conversation which Riverin had with Chilian, Riverin states that "G. Chilian mentioned that Metalore will drill an initial 20,000 feet but that 'drilling is likely to go on forever'."

Representatives from Falconbridge, including Riverin, visited the Brookbank property in September 1983. After visiting the property, Riverin recorded in a memo the following: "After the visit we clearly told G. Chilian that CFC (Falconbridge) is interested in acquiring an interest in the prospect."

By letter dated October 27, 1983 Falconbridge advised Metalore of the following:

> I also wish to confirm that our company would definitely be interested in participating in the development of your Beardmore property if you ever need a partner for the project.

In a memorandum dated October 28, 1983, Riverin stated the following:

> After compilation of available data and after our visit, the Metalore prospect still appears as an outstanding target and

1990 CanLII 6952 (ON CTGD)

every effort should be made to acquire it. Our interest in the property was made clear to Metalore.

In a memorandum dated November 14, 1983, Riverin identified the Metalore property as the number one priority for acquisition by Falconbridge.

By letter dated May 3, 1984 to Metalore, Falconbridge again expressed interest in the Brookbank property. The letter stated, in part:

> Your project is still very much of interest to us and before we pursue further any of the numerous proposals that we receive from various prospectors and companies, we need to know what the possibilities are (if any) for getting involved in exploring and/or developing your property.

By letter dated May 12, 1984 to Falconbridge, Chilian responded to Falconbridge:

> I will keep in touch with you when and if a participant is needed.

An expression of interest by a major such as Falconbridge is of importance to a junior company such as Ontex. A major mining company has production experience, expertise and funding ability. A junior whose property has attracted the interest of a major achieves a level of credibility.

An expression of interest by a major mining company in the Brookbank property is something about which Metalore would be expected to advise Ontex, according to Dr. Robertson.

THE LAW

Breach of contract

Stephen M. Waddams, The Law of Contracts, 2nd ed. (Aurora, Ont.: Canada Law Book, 1984), at pp. 440-442:

> A variety of expressions has been used to define the sort

1990 CanLII 6952 (ON CTGD)

of term that, if broken by one party, will excuse the other. "Dependent covenant", covenant which goes to the whole of the consideration", "condition", "condition precedent", "breach going to the root of the contract", "concurrent condition", breach that "terminates" or "frustrates the object" of the contract, "non-severable breach", "repudiation", "renunciation", "breach of an entire contract", are among the expressions used. Behind them all, it is suggested, lies a single notion -- that of substantial failure of performance. Diplock, L.J., said in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.:

"... in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? ...

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing; does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

Fundamental breach is a phrase sometimes employed for this purpose but its meaning has been distorted by its use for a different purpose altogether, namely, to control unfair exclusions of liability. An exclusion of liability is said not to apply if there is a "fundamental breach"; the effect of this doctrine has been, of course, that courts tend to employ the phrase "fundamental breach" as a technique for relieving parties from exclusions of liability that are seen as unfair. But the inquiry into the unfairness of an exclusion clause is very different from the inquiry into whether one party should be excused on the ground of the other's non-performance. Clarity of thought demands that they be kept separate. In Keefe v. Fort, Pace, J.A., said that:

"In recent history, the term 'fundamental breach' appears to have taken on a meaning all of its own, which in its

1990 CanLII 6952 (ON CTGD)

application tends to mystify rather than clarify the true meaning of the concept. In my opinion, it means nothing more or nothing less than the type of breach which entitles the innocent party to treat it as a repudiatory and to rescind the contract."

In California Prune & Apricot Growers Inc. v. Baird, [1926] S.C.R. 208, [1926] 1 D.L.R. 314, at p. 217 S.C.R., Mr. Justice Rinfret said:

> In that view, the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not "an unimportant variation" which may, under the present contract, be excluded as constituting a "basis for a claim"; but, on the contrary, "may fairly be considered by the other party as a substantial failure to perform the contract at all" [Wallis v. Pratt, [1911] A.C. 394].

Here, the fact that the freight car was routed CPR rather than CNR from Chicago went to the root of the contract.

Metalore breached its obligations under the 1981 agreement in three fundamental aspects: it intentionally provided misleading facts; it intentionally failed to provide the Winter Report, dated February 15, 1982; and it withheld other vital information from Ontex. The 1981 agreement, therefore, falls and the 18 leased mining claims must be returned to Ontex.

A breach by one party to a contract that goes to the core, heart, root or essence of the contract allows the other party to treat the breach as repudiatory and to rescind the contract.

In addition to the common law remedy, failure to perform obligations was addressed in paragraph 10 of the agreement:

> 10. If Metalore shall fail to perform any of its obligations hereunder (other than an obligation to make a joint venture contribution pursuant to clause 7(b) or 8) within the time or times respectively herein provided and shall not have rectified same within 90 days of notice in writing of such

1990 CanLII 6952 (ON CTGD)

default from Brookbank, this Agreement shall terminate and Metalore shall have the right within 6 months thereafter to remove all machinery, plant and equipment placed by it on the property and Metalore shall have no further rights of any kind whatsoever in the Property or under the Agreement.

The 1983 agreement rests for its validity on proper disclosure having been made under the 1981 agreement. Given Metalore's intentional failure to make proper disclosure, the 1983 agreement cannot stand.

Misuse of confidential information

In the course of Metalore's business relationship as operator on Ontex lands, Metalore acquired valuable geological information which led to the Discovery Hole B-31. This was confidential information to be shared by Metalore and Ontex prior to public disclosure. Metalore used this valuable information to the exclusion of Ontex to acquire hundreds of adjacent mining claims.

Chilian, as well, used the confidential information for personal gain.

In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 69 O.R. (2d) 287 (note), 44 B.L.R. 1, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57, 6 R.P.R. (2d) 1, all five members of the court agreed that when information of a confidential nature is disclosed by one party to another in circumstances that would lead the reasonable business person to appreciate that the information is confidential and to expect that the recipient would respect that confidence, the confidant is precluded from using the information for personal gain. No evidence has been led to show that Metalore was entitled to use this information for its own benefit.

Mr. Justice La Forest, speaking for the majority on the issue of remedy in Lac, held the constructive trust to be appropriate. In my view, the three-part test of breach of confidence (disclosure of confidential information, an

1990 CanLII 6952 (ON CTGD)

awareness on the part of the recipient of the confidential nature of the information and the use of the information to the detriment of the disclosing party) has been met. Although Metalore "developed" the information it was placed in a position to do so by virtue of being Ontex's operator on its lands. I, therefore, conclude that Ontex has established a breach of confidence by Metalore. In my view, the only appropriate remedy is one in rem. I conclude that Metalore holds all the staked claims, as described more specifically in my conclusions below, under a constructive trust for Ontex. Mr. Justice La Forest concluded that no major player in the market would be deterred if he knew the alternative was the equal sharing joint venture that would come about had that party not breached its confidence.

Further, as in Lac, the mining property is unique, its potential virtually unknown, and of incalculable value.

A similar issue was considered much earlier by the court in Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551, 50 C.P.R. 299, 57 D.L.R. (2d) 557, 56 W.W.R. 697. Mr. Justice Judson, speaking for the court at p. 555 S.C.R., said:

> Without the information acquired during the course of his employment. McTavish would not have staked the adjoining claims. This was highly confidential information and the purpose for which it was being sought was obvious -- the acquisition of other connected claims which would be of advantage to the existing claims. Neither Pre-Cam nor McTavish, its servant, could acquire these connected claims against the interest of Murtack. Contrary to the majority opinion in the Court of Appeal, I think that it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term "fraud" by the learned Chief Justice at trial was fully warranted. The severance of his employment on December 27 was an empty formality which could not improve his position. I do not mean by this that a simple-minded person with his own ideas of common honesty could do this sort of thing without having to answer. The

1990 CanLII 6952 (ON CTGD)

constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.

The doctrine of breach of confidence has equal application to the 1981 and 1983 agreements.

Breach of fiduciary duty

While I have disposed of the issues before me on other grounds, it is important to consider the question of fiduciary duty.

While the court in Lac split 3-2 against the imposition of a fiduciary duty, it did agree unanimously on what the appropriate test ought to be. They concluded that the test was as set out by Wilson J. in Frame v. Smith, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 78 N.R. 40, 23 O.A.C. 84, 9 R.F.L. (3d) 225.

Sopinka J. said at pp. 598-600 S.C.R., pp. 62-63 D.L.R. of Lac, supra:

While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with enumeration of these features made by Wilson J. in dissent in Frame v. Smith, [1987] 2 S.C.R. 99. The majority, although disagreeing in the result, did not disapprove of the following statement, at pp. 135-36:

"A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts, (3rd ed. 1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty"

1990 CanLII 6952 (ON CTGD)

(1968), 84 L.Q.R. 472; George W. Keeton and L.A. Sheridan, Equity (1969), at pp. 336-52; Shepherd, [The Law of Fiduciaries], at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(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 legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in Hospital Products Ltd. v. United States Surgical Corp., supra, at p. 488, that:

"There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other."

1990 CanLII 6952 (ON CTGD)

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in Guerin, supra, p. 384 that:

"... the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

Cromarty J. found a fiduciary duty in Hogar Estates Ltd. v. Shebron Holdings Ltd. (1979), 25 O.R. (2d) 543, 101 D.L.R. (3d) 509 (H.C.J.).

The headnote reads:

H and S were parties to a joint land development venture. S proposed to H that the venture should be terminated on terms whereby S was to purchase H's interest, S informing H that the land was dormant, development having been blocked by planning authorities. This statement was true when made, but subsequently S learned that an important obstacle to the authorities' approval was likely to be overcome. S did not reveal this information to H, and S and H later entered into an agreement to terminate the joint venture. In an action by H to set aside the termination agreement, held, the agreement would be set aside. S owed a fiduciary duty to disclose all material facts. Further, S, having learned that his earlier statement was no longer accurate, had a duty to disclose to H the true state of affairs.

Applying Wilson J.'s three characteristics of a fiduciary duty, as discussed above, I find as follows:

1. Metalore was conducting exploration work on Ontex property for their mutual benefit and was in total control of information from the property. The power of Metalore to conceal information was almost total. There was, therefore, scope in the fiduciary for exercise of power or discretion.

2. Metalore was able to unilaterally exercise that power in a way that affected Ontex.

1990 CanLII 6952 (ON CTGD)

3. Ontex was peculiarly vulnerable and at the mercy of Metalore as Metalore was in complete control of the explorations and of the information released by it.

Because Metalore was conducting the exploration work, it had the exclusive right to explore the property. Ontex was dependent upon the good faith of its co-venturer. Ontex trusted Metalore and reposed its trust in its co-venturer to provide information on the property. Specifically when requested Metalore was obliged to provide accurate information and give full, fair, frank disclosure and it failed to do so. Ontex was vulnerable to Metalore's total control over information. If Metalore chose to be dishonest, as it did, no contractual provision could protect Ontex.

In United Dominions v. Brian (1985), 60 A.L.R. 741, the Supreme Court of Australia held where joint ventures were associated in a relationship for their advantage based on mutual confidence, their relationship was a fiduciary one.

Where a fiduciary relationship exists, the fiduciary has a paramount duty of loyalty. A fiduciary cannot permit a conflict between the interest of his beneficiary and any other interest, especially his own. A fiduciary may not obtain a profit, benefit, or advantage as a result of his position. (See generally, J.C. Shepherd, The Law of Fiduciaries (Agincourt, Ont.: Carswell Co., 1981), at pp. 41, 47-48.)

In Volume 69 of the Canadian Bar Review, 1990, Professor Donovan Waters at p. 455 made a thoughtful analysis of Lac. At pp. 469-71, he said in considering fiduciary duties:

> It was while the commercial world and its legal advisers sought to digest the Court of Appeal decision in Lac Minerals that Professor Finn underlined how from the Australian perspective Canadian courts appear to be moving in the direction of turning the fiduciary relationship and its duty of loyalty into a medium for securing good faith in contract. He also drew attention to Lambert J.A.'s summing up in Harry v. Kreutziger of the issue in an unconscionable transaction

1990 CanLII 6952 (ON CTGD)

case as "whether the transaction seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".

In the present writer's opinion it is the same notion of "community standards of commercial morality" in bargaining towards contract, in interpreting contracts (implied terms), and in performing them, that is now generally felt by the courts to be the desirable and essential criterion. All forms of equity's constructive fraud concept, the product of the system's sense of conscience, and in particular equity's fiduciary relationship, are increasingly being seen in Canada as the instrument through which to achieve that general criterion. Seen from this standpoint, of course, the fiduciary relationship has the potential to embrace all types of conduct, from the procurement of unconscionable bargains to profit-making by the fraudulent express trustee.

On the other hand there is resistance to this all-enveloping fiduciary relationship, with its range of available remedies and its rule that the defendant's gain and not the plaintiff's loss, should be the measure of the defendant's obligation. As Lambert J.A. himself pointed out in his dissenting judgment in Burns v. Kelly Peters & Associates, litigation where investors sued their financial consultants when losses were experienced through investment in foreign real estate, and there was an accompanying non-disclosure by the consulting firm of a personal interest through commissions received, the fiduciary relationship must not be too readily applied to commercial dealings. The investors in that case were professional people at arm's length from the consultants, and that the consultants were receiving a financial return for disposing of the real estate was in his view an extraneous element to the investment advice. The investors, as Lambert J.A. saw it, had simply suffered losses, and were seeking to pass on the investors' market risk to their consultants. To impose fiduciary standards in this instance, he said, would be to impose upon financial advisers and dealers in financial instruments a higher standard of behaviour than is applied to the rest of the financial and commercial community.

1990 CanLII 6952 (ON CTGD)

. . . . .

These then were the two views of how the law of fiduciary relationships, especially in the commercial setting, should develop, when the Supreme Court of Canada came to hear the Lac Minerals case in October 1988. The question was whether relationships of an ever wider range are to be designated fiduciary so that fiduciary obligations and the associated equitable remedies have a generalized application, or the fiduciary obligation is to be imposed on that defendant only whose relationship involved trust-like trust and confidence. It was also a question as to whether that trust-like role could only be relevant in a setting where the fiduciary dedicates himself to acting solely for the benefit of another, or of the joint venture or partnership to which he and another are party.

And at p. 472:

La Forest J. ... considers at length the nature of a fiduciary relationship, and the categories of origin of such relationships, delivers a point-by-point response on the facts to the majority judgment, and concludes with a discussion on the essential object of this concept. The judgment starts with the published literature on the subject, and reviews the entire gamut of the subject, in response it would seem to argument in each of the factums and before the court. Though it is the voice of only one member of the court, one senses that it is the theoretical thinking of this judgment that is going to ring down through the years, rather as Laskin J.'s dissent in Murdoch v. Murdoch was to catch the imagination of the second half of the 1970s.

I leave Water's article and return to Lac where at pp. 648-49 S.C.R., p. 29 D.L.R., La Forest J. said:

This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather,

1990 CanLII 6952 (ON CTGD)

a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in "The Fiduciary Principle", supra, at p. 64:

"What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation'. Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility."

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship: see Waters, The Law of Trusts in Canada (2nd ed. 1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

1990 CanLII 6952 (ON CTGD)

And further at pp. 656-57 S.C.R., pp. 35-36 D.L.R.:

I turn then to a consideration of the factors which in this case support the imposition of that duty. These can conveniently be grouped under three headings, (1) trust and confidence, (2) industry practice and (3) vulnerability. As will be seen these factors overlap to some extent, but considered as a whole they support the proposition that Corona could reasonably expect Lac to not act to Corona's detriment by acquiring the Williams land, and that Corona's expectation should be legally protected.

Trust and Confidence

The relationship of trust and confidence that developed between Corona and Lac is a factor worthy of significant weight in determining if a fiduciary obligation existed between the parties. The existence of such a bond plays an important role in determining whether one party could reasonably expect the other to act or refrain from acting against the interests of the former. That said, the law of confidence and the law relating to fiduciary obligations are not co-extensive. They are not, however, completely distinct. Indeed, while there may be some dispute as to the jurisdictional basis of the law of confidence, it is clear that equity is one source of jurisdiction: see Saltman Engineering Co. v. Campbell Engineering Co. (1948), 65 R.P.C. 203 (C.A.). In Guerin v. The Queen, supra, Dickson J. noted that the law of fiduciary obligations had its origin in the law of confidence. Professor Finn thought it was settled that confidential information, whether classified as property or not, will attract fiduciary law's protection provided the circumstances are such as to attract a duty of confidence: "The Fiduciary Principle", supra, at p. 50. I agree with the view of both courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

In a claim for breach of confidence, Gurry tells us (Breach of Confidence, at pp. 161-62):

1990 CanLII 6952 (ON CTGD)

"... the court's concern is for the protection of a confidence which has been created by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is not focused on the information as a medium by which a pre-existing duty is breached."

However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

At p. 672 S.C.R., p. 47 D.L.R.:

The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where the protection accords with the expectations of the parties.

Bargaining in good faith was within the contemplation of the parties. The experts as well, in this case, addressed the

1990 CanLII 6952 (ON CTGD)

accepted business morality in the mining industry.

It was Chilian's abuse of power that created the breaches of fiduciary duty. The gravity of his conduct in taking advantage of Metalore's superior position is the sum total of the findings of deceit, misinformation and fraud made against him.

In my view, the facts of this case meet the test in Lac defined by Wilson J. in Frame v. Smith.

I agree with La Forest J. that no uncertainty is imported into business relationships because courts apply fiduciary duties.

For these reasons I find that a fiduciary relationship existed between Metalore and Ontex. I apply the doctrine of constructive trust and conclude that the claims, as described specifically in my conclusions below, are held by Metalore in a constructive trust for Ontex.

Damages are not an appropriate remedy when dealing with an exploration property.

Punitive damages

Only in rare cases are punitive damages awarded. Metalore, in this case, breached its contracts with Ontex, perpetrated fraud on Ontex and breached its fiduciary duty to Ontex. Chilian was the instrument of all the deceitful conduct. In addition, he profited as an insider before making public disclosure contrary to the Securities Act in buying and selling Ontex stock in the clandestine manner previously outlined. His ill-gotten gain amounted to some $80,000. He also traded improperly in Metalore stock as an insider prior to disclosure to the public.

Conduct of this sort must be condemned. I assess punitive damages against George Chilian in the sum of $80,000 together with pre-judgment interest at 12 per cent per annum from the date of his sale of the Ontex stock.

CONCLUSIONS

1990 CanLII 6952 (ON CTGD)

1. The 1981 agreement and the 1983 agreement are rescinded and title to the 18 leased claims reverts to Ontex.

2. The 459 claims staked by Metalore after the discovery of B31 and prior to Metalore's public announcement are held by Metalore in a constructive trust for Ontex.

3. The 39 claims that were included in the 1983 agreement were, according to Exhibit 90, acquired in 1981. Chilian's letter to the Department of Natural Resources indicates the time of staking to pre-date the execution of the 1981 agreement.

Here, unlike Lac, no confidential information had been made available to Metalore by Ontex at this juncture. There was therefore no breach of duty of confidentiality nor was there any breach of fiduciary duty in the acquisition of the 39 claims. On the basis of the rescission of the 1983 agreement those 39 claims must revert to Metalore. The additional consideration in the 1983 agreement was $40,000 paid to Ontex by means of two cheques. The second cheque was cashed on May 16, 1983. Metalore is therefore entitled to the return of the $40,000 together with pre-judgment interest at a rate of 12 per cent per annum from May 16, 1983.

4. Twelve claims coloured green on Exhibit 16 were acquired after confidential information came into the hands of Metalore and on the basis of confidentiality, these claims are subject to a constructive trust and are held by Metalore in trust for Ontex.

COSTS

Ontex will have costs on a solicitor-and-client basis against Metalore and Chilian. Metalore will have indemnity against Chilian for any costs it is compelled to pay.

Judgment for plaintiff.

1990 CanLII 6952 (ON CTGD)

TAB 50

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pepper's Produce Ltd. v. Medallion Realty Ltd.,*
2012 BCCA 247

Date: 20120607
Docket: CA039094

Between:

Pepper's Produce Ltd.

Appellant
(Plaintiff)

And

Medallion Realty Ltd. dba Sutton Group Medallion Realty, Anna Wai Shan Cheng, and Geoffrey Boe Kay Ng

Respondents
(Defendants)

And

Wei Gao and Guang Wei Tan aka James Guang Wei Tan aka James Tan

Respondents
(Proposed Third Parties)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, May 4, 2011
(*Pepper's Produce Ltd. v. Medallion Realty Ltd.,*
Vancouver Registry, Docket Number S090003)

Appearing on behalf of the Appellant: L. Lam

Counsel for the Proposed Third Parties: W.M. Wong

Place and Date of Hearing: Vancouver, British Columbia
April 23, 2012

Place and Date of Judgment: Vancouver, British Columbia
June 7, 2012

2012 BCCA 247 (CanLII)

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

2012 BCCA 247 (CanLII)

2012 BCCA 247 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, Pepper's Produce Ltd., appeals from an order dismissing its application to add the respondents, Wei Gao and James Guang Wei Tan, as defendants to its Supreme Court action. The action concerns a failed contract for the purchase and sale of a business known as the Terra Nova Market. The proceedings in the litigation so far arise from confusion in the agreement of purchase and sale about the identity of the owner and seller of the business.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] The appellant entered into an agreement of purchase and sale of the business on April 29, 2008 (the "Contract"). The seller of the business was shown on the Contract as "Gao Tam Enterprise Ltd." The Contract was signed by the respondents, Wei Gao and James Guang Wei Tan. (I will refer to each of them respectively as "Gao" and "Tan".)

[4] It is common ground that the business was owned by a corporation named "Gaotam Enterprises Ltd." (the "Corporation"). The directors and officers of the Corporation were Gao and Kwong Hung Tam ("Tam"). Tan was an employee, but not a director or officer, of the Corporation.

[5] The other defendants, Medallion Realty Ltd., Anna Cheng and Geoffrey Ng, were the realtors involved in the transaction. They are not involved in this appeal.

[6] The purchase price for the business was $54,000. The appellant paid a deposit of $15,000 to the realtors.

[7] The appellant did not complete the purchase on the completion date, June 6, 2008. It gave written notice of non-completion on that date.

[8] On July 30, 2008, Gao and Tan filed a claim in Small Claims Court, describing themselves as "Wei Gao and Guang Wei Tan doing business as Gao Tam Enterprise Ltd." They claimed the appellant had wrongfully repudiated the Contract and sought to retain the deposit and damages for loss of the difference between the contract price and the current market price of the business.

[9] The appellant responded with an affidavit dated January 2, 2009 sworn by its President, Stephen Wong, stating that he, on behalf of Pepper's, had entered into a contract to purchase the business of "an incorporated business entity, namely Gaotam Enterprises Ltd. ("Gaotam") with a trade name as Terra Nova Market". He swore further:

> 6. The Claimants Wei Gao and Guang Wei Tan were not the parties in the Contract.
>
> 7. The Claimaints Wei Gao and Guang Wei Tan, in their personal capacity, do not have legal standing to commence legal action or to claim any alleged damages on behalf of a corporation, namely Gaotam Enterprises Ltd. Attached and marked as **Exhibit "C"** is a true copy of the Corporate Search of Gaotam Enterprises Ltd., which was incorporated on June 13, 2005.
>
> 8. The Claimant Guan Wei Tan has no legal interest of any kind in the purchasing of all business assets and business of Gaotam.
>
> 9. At all material times, I have never met the Claimants Wei Gao or Guang Wei Tan.
>
> 10. I have never entered into any Contract of any kind with the Claimants Wei Gao or Guang Wei Tan.

[10] The appellant also commenced an action in Supreme Court on January 2, 2009, naming as defendants the Corporation (described as "Gaotam"), Tam, and the realtors. The appellant claimed the Corporation had agreed to sell to the appellant all "Business Assets and Business", described in paragraph 7 of the statement of claim as "the Business Assets and Business of Gaotam, doing business in a trade name as Terra Nova Market".

[11] On February 2, 2009, the Small Claims Action was dismissed at a Pre-Trial Settlement Conference, apparently because the wrong parties were named as claimants.

2012 BCCA 247 (CanLII)

[12] On September 29, 2009, the appellant, the Corporation and Tam settled the Supreme Court action. The appellant's $15,000 deposit was returned, and the Corporation paid $10,000 to the appellant. The appellant's claims against the Corporation were dismissed by consent order dated January 21, 2010.

[13] On January 25, 2010, the appellant filed an amended statement of claim, deleting the Corporation and Tam as defendants, and describing "Gao Tam Ent. Ltd." as "the Seller doing business in a trade name as Terra Nova Market".

[14] On January 6, 2011, the appellant applied to add Gao and Tan as respondents and to file an Amended Notice of Civil Claim in which it alleged:

> 7. The defendants, Tan and Gao, were operating a business in a non-incorporated entity, namely Gao Tam Enterprise Ltd. ("non-incorporated Gao Tam").
>
> 8. On March 18, 2008, the Defendants, Tan and Gao, in their personal capacity, engaged their non-incorporated business name - Gao Tam Enterprise Ltd. entered into a Multiple Listing Contract with Sutton Group for the sale of a business and business assets, namely Terra Nova market, located at 6011 No. 1 Road, Richmond, B.C. to the general public.
>
> 9. On April 29, 2008, the Defendants, Tan and Gao, in their personal capacity, engaged their non-incorporated business name - Gao Tam Enterprise Ltd., through their agents, the Defendants, Ng, Cheng and Sutton Group, entered into a Contract for Purchase and Sale dated April 29, 2008 for purchase and sale of Business and Business Assets of Terra Nova Market located at 6011 No. 1. Road, Richmond, B.C. with the Plaintiff ("Contract").
>
> ...
>
> 13. Subsequent to the entering into the Contract, the Plaintiff discovered that the Seller, namely Gao Tam Ent. Ltd., as stated in the Contract was a non-incorporated entity and did not own any Business or Business Assets of Terra Nova market located at 6011 No. 1 Road, Richmond, B.C.
>
> 14. Subsequent to the commencement of this action, the Plaintiff discovered that the Business Assets and Business of Terra Nova Market located at 6011 No. 1 Road, Richmond, B.C. was owned by a corporate entity, namely Gaotam Enterprises Ltd.

[15] In the proposed Amended Notice of Civil Claim, the appellant claimed damages from Gao and Tan, "who were doing business as non-incorporated Gao Tam", for "their negligence and breach of their duty of care owed the [appellant]". It

2012 BCCA 247 (CanLII)

claimed in particular that Gao and Tan had "improperly and negligently executed the Contract as seller/owner of Terra Nova Market"; "failed to inform the [appellant] they were not the owners of Terra Nova Market"; "negligently made false representations and promises to the [appellant] that they would fulfill the terms and conditions of the Contract, while they had no legal capacity to do so"; and "negligently created and provided improper financial statement of the business".

[16] The appellant's application to add Gao and Tan as defendants was heard and the chambers judge dismissed the application on May 4, 2011.

Chambers Judge's Reasons for Judgment

[17] In the course of describing the background, the chambers judge commented: "It is evident from the material before me that the vendor was misnamed" (at para. 3).

[18] He summarized the legal test for adding a defendant and amending pleadings, noting that it is "not high", citing *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25 (C.A.) (at para. 17). He said "the discretion to add parties should be exercised generously to allow effective determination of the issues without delay, inconvenience, or separate trials", citing *Ipsos S.A. v. Reid*, 2005 BCSC 1114 (at para. 18). He acknowledged that he could not weigh evidence on the application, but from the original writ and statement of claim and the record of the proceedings he concluded the amended claim disclosed no cause of action (at paras. 20-21).

[19] He reasoned that all of the claims against the Corporation had been settled, and if Gao and Tan were acting on behalf of the Corporation as they claimed, the settlement included all claims against them. If they were not acting on behalf of the Corporation, the claims against them were for fraudulent misrepresentation, deceit, bad faith, or fraud, none of which were claimed in the amended claim. There was no legal claim in negligence on the facts pleaded (at paras. 22-24).

[20] He therefore dismissed the applications to add defendants and to amend the pleadings.

2012 BCCA 247 (CanLII)

2012 BCCA 247 (CanLII)

The Appeal

[21] The appellant's stated ground of appeal is that the chambers judge erred in stating "it is evident" that the vendor in the agreement of purchase and sale was "misnamed". He argues the chambers judge misconceived the affidavit evidence and the effect of the Small Claims action.

[22] This ground of appeal has no merit. The judge's observation played no part in his decision to dismiss the applications. He concluded that on the facts alleged in the Amended Notice of Civil Claim there was no reasonable claim in negligence against Gao and Tan. The appellant has not provided any basis for this Court to conclude otherwise. The chambers judge expressly stated that he could not consider the affidavit evidence, he considered the applicable legal tests, and based on the original and proposed pleadings, he dismissed the applications.

[23] I would not accede to the appellant's stated ground of appeal. That is sufficient to dispose of the appeal.

[24] In their factum, the respondents raised the issue of abuse of process. They suggest:

> In light of the resolution of the Small Claims Action, and the fact that the Appellant is bringing very similar allegations against the Respondents Wei Gao and James Tan, after settling the same against the Corporation, the Appellant's application is tantamount to an abuse of process, in that the process of the court is not being fairly or honestly used.

[25] The characterization of inconsistent pleadings amounting to an abuse of process was discussed recently by this Court in *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5. In that case, the defendants argued (at para. 23):

> ... the doctrine of abuse of process should be used to prevent the plaintiffs from bringing a subsequent action based upon allegations that are inconsistent with allegations made in support of a previous action.

[26] In his reasons for judgment for the Court, Mr. Justice Tysoe referred (at para. 24) to *Vanmills Establishment v. Coles* (1992), 8 C.P.C. (3d) 178 at para. 10 (Cohen J. in Chambers) for the discussion of the effect of pursuing inconsistent rights:

> [10] This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that, in the case of inconsistent rights, a plaintiff's irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in *Scarf v. Jardine* (1882), 7 App. Cas. 345, 30 W.R. 893 (H.L.) and *Ashmore v. Bank of British North America* (1913), 4 W.W.R. 1014, 18 B.C.R. 257, 13 D.L.R. 73 (C.A.).

[27] Mr. Justice Tysoe noted (at para. 25):

> In *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480, 10 Alta. L.R. (5th) 260, Mr. Justice Brooker considered the existence of inconsistent allegations within the context of the court's inherent jurisdiction to prevent abuses of the court's process. He expressed the principle in the following terms:
>
> > [49] In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus <u>knowingly</u> advancing irreconcilable positions which are not articulated as alternative claims.

[28] In this case, the appellant commenced and settled an action against the Corporation, claiming it entered into the Contract with the Corporation as the seller of the Terra Nova Market and suffered losses in connection with that transaction. It then amended the statement of claim to allege that "Gao Tam Ent. Ltd." was the Seller of the business. In the application to add Gao and Tan as defendants and to further amend its claim, the appellant claims that they represented they were the owners of the business and thereby caused the appellant to suffer losses in the same transaction. These positions are diametrically inconsistent within the same action, and the claims against Gao and Tan are diametrically inconsistent with the appellant's response to the Small Claims action. These proceedings cannot, as a matter of protecting the integrity of the court's process, stand together.

2012 BCCA 247 (CanLII)

[29] I would dismiss the appeal.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Mr. Justice Tysoe"

I Agree:

"The Honourable Mr. Justice Groberman"

2012 BCCA 247 (CanLII)

TAB 51

JACK PONG (DEFENDANT) ..... APPELLANT;

1927
*Feb. 23, 24.

AND

LUM QUONG AND LUM CHONG (PLAINTIFFS) ..... RESPONDENTS;

AND

MRS. W. J. THOMSON (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Trust—Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O., 1914, c. 155.

P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might "hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor." The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.

Held, affirming judgment of the Appellate Division, Ont. (56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith* v. *Owen* ([1907] 1 Ch. 195) applied.

Held further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act*, R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs.

APPEAL by the defendant Pong from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing order of Mowat J.) declared that said

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1925) 56 Ont. L.R. 616.

1927 CanLII 2 (SCC)

1927
PONG
v.
QUONG.

defendant was trustee for the plaintiffs of a certain lease, and ordered that he assign it to the plaintiffs.

The plaintiff Quong and the defendant Pong were members of a firm carrying on a laundry business on premises leased from the defendant Mrs. Thomson. Mrs. Thomson had leased the premises to Pong in his own name for a term of three years from 1st March, 1916. Before the expiry of this lease, the partnership was dissolved (in November, 1917). Pong, in June, 1918, acquired a lease of the property in his own name for a period of five years, commencing on 1st March, 1919 (at the expiry of the first term). Litigation followed. A judgment of Winchester Co. C.J. contained an alternative direction that Pong should assign the lease to Quong and his co-partner in consideration of $600 to be paid to him. The lease was accordingly assigned, and in the assignment it was provided that the assignees might

> hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.

The lease did not contain any provision for renewal. Before the expiry of the lease, Pong procured from Mrs. Thomson a further lease of the premises for six years from 1st March, 1924 (the date of expiry of the existing lease). The plaintiffs, Quong and his co-partner Chong (who was the successor in interest of Quong's former co-partner Lum Lin), remained in possession after 1st March, 1924, being willing to assume the burden of the new lease (which was at an increased rental), and claiming the right to the benefit of it. They continued to pay rent which was taken by Mrs. Thomson without prejudice. The latter took proceedings under the overholding tenants provisions of *The Landlord and Tenant Act,* R.S.O., 1914, c. 155. The proceedings came on before His Honour, Judge Denton, of the County Court of the County of York. It was apparently agreed that the hearing should proceed on the basis of the assumption that rent from the plaintiffs had not been accepted by Mrs. Thomson; in other words, that, if Quong and Chong were not entitled to the benefit of the lease made to Pong, she should not be prejudiced in the proceedings by having taken rent from Quong and Chong. It appeared that the real dispute was between Pong on the one hand, and Quong

1927 CanLII 2 (SCC)

and Chong on the other, as to the right to the lease. There was some discussion, and, apparently, misunderstanding, as to the question of jurisdiction, and consent in regard thereto, which is referred to in the judgment now reported.

His Honour, Judge Denton, held that the lease acquired by Pong was not a renewal, in any sense, of the former lease, and made an order for possession against the present plaintiffs. The latter appealed to the Appellate Division of the Supreme Court of Ontario, which dismissed the appeal without written reasons. See the reference to this appeal in the judgment now reported.

The plaintiffs then brought the present action in the Supreme Court of Ontario, claiming a declaration that the defendant Pong was a trustee for the plaintiffs of the lease, and that it should be assigned to them, and for an injunction restraining him from assigning the lease to any person other than the plaintiffs, and for an injunction restraining the defendant Mrs. Thomson from evicting them.

The plaintiffs' motion for an interlocutory injunction was dismissed by Mowat J. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario. By consent of counsel, the motion was turned into a motion for judgment and the case was heard upon the merits. The Appellate Division allowed the appeal, holding that the defendant Pong was a trustee of the lease for the plaintiffs, and that the lease should be assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained therein (1).

The defendant Pong appealed to the Supreme Court of Canada. His two main grounds of appeal were: (1) That plaintiffs were estopped by *res judicata* by reason of the overholding tenants proceedings above mentioned and the judgment of Denton Co. C.J. therein, sustained by the Appellate Division; and (2) That, on the merits, the Appellate Division was wrong in holding that Pong should be deemed a trustee of the lease for the plaintiffs.

Norman Sommerville K.C. for the appellant.

Fraser Raney for the plaintiffs, respondents.

No one appeared for the defendant (respondent) Mrs. Thomson.

(1) (1925) 56 Ont. L.R. 616.

1927 CanLII 2 (SCC)

1927
PONG
v.
QUONG.

At the conclusion of the argument for the appellant, the Chief Justice orally delivered the judgment of the court as follows:

"It is not necessary to call on you, Mr. Raney.

"We have all had an opportunity of considering this case over night, and the position seems to us quite clear.

"The first ground of appeal is that the respondent is estopped from bringing this action by reason of the judgment given in the overholding tenancy proceedings by His Honour, Judge Denton, nominally affirmed on appeal. I say "nominally" for reasons presently to appear.

"Judge Denton's only jurisdiction under the overholding tenants provisions was to determine the right of the landlord to possession. He himself states that in order that he should proceed it was necessary that there must be an admission before him that the rent had not been paid. His jurisdiction was to determine whether or not the landlord was entitled to possession. It was apparently desired that he should deal with issues as to the relationship of Pong and Quong, and determine the rights between them. Mr. Raney consented in some sort of form to that being done, but it would appear that his consent was given on the understanding and basis that the judge should deal with the matter as one within his jurisdiction under the overholding tenants provisions. It is perfectly manifest that he had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator. That being so, the Appellate Division, when the case came before it on appeal from Judge Denton, must have taken the view, as Mr. Raney states, and as the subsequent proceedings bear out, that the judge had assumed a jurisdiction he did not possess under the overholding tenants provisions, and that as to the relations between Pong and Quong the matter was *coram non judice*. Mr. Raney's consent had been given subject to a condition which could not be fulfilled; in other words, he consented upon the condition that he would retain an effective right of appeal. On the appeal in the present action, the Appellate Division must have taken the view that the former proceeding was not binding as to the obligations of Pong; that the only thing judici-

1927 CanLII 2 (SCC)

ally determined by it was the landlord's right to possession, the order in this respect, assuming non-payment of rent, being within the jurisdiction of the judge who made it. Taking that view,—and they of course knew what had been their appreciation of the former proceeding—it was open to the Appellate Division to deal with the appeal from the judgment of Mowat J. in this action, as they did.

"The other branch of the appeal is directed to the merits. It is claimed by the plaintiffs that the lease obtained by Pong is held by him as trustee for them. The Appellate Division gave effect to that contention, and, in our opinion, upon the whole case, rightly gave effect to it. It is manifest to us that the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal. The case is fairly within the principle stated by Mr. Justice Parker in *Griffith* v. *Owen* (1). That principle was properly applied in the judgment now appealed from. That judgment is affirmed, and the appeal is dismissed with costs."

Appeal dismissed with costs.

Solicitors for the appellant: *Norman Sommerville & Co.*
Solicitors for the respondents, plaintiffs: *Raney & Raney.*
Solicitors for the respondent, Mrs. Thomson: *Grant & Grant.*

1927 CanLII 2 (SCC)

TAB 52

Nelson Pierre Bernard *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* BERNARD

File No.: 19558.

1987: December 8; 1988: December 15.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Mens rea — Specific and general intent — Drunkenness — Sexual assault causing bodily harm — Whether or not evidence of self-induced intoxication should be considered in determining whether mens rea proved beyond a reasonable doubt — Criminal Code, R.S.C. 1970, c. C-34, s. 246.2(c) — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).

Evidence — Criminal offences — Drunkenness — Mens rea — Whether or not evidence of drunkenness should not be considered in proof of mens rea.

Appellant was charged with sexual assault causing bodily harm contrary to s. 246.2(*c*) of the *Criminal Code*, tried by judge and jury, and found guilty. He admitted forcing the complainant to have sexual intercourse with him and stated that his drunkenness caused the attack on her. The Ontario Court of Appeal dismissed an appeal from conviction. At issue here is whether evidence of self-induced intoxication should be considered by the trier of fact, along with all other relevant evidence, in determining whether the prosecution has proved beyond a reasonable doubt the *mens rea* required to constitute the offence.

Held (Dickson C.J. and Lamer J. dissenting): The appeal should be dismissed.

Per Beetz and McIntyre JJ.: The general intent offence is one in which the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose. A specific intent offence is one which involves the performance of the *actus reus* coupled with an intent or purpose going beyond the mere performance of the questioned act. The

* Estey and Le Dain JJ. took no part in the judgment.

Nelson Pierre Bernard *Appelant*

c.

Sa Majesté La Reine *Intimée*

RÉPERTORIÉ: R. *c.* BERNARD

N° du greffe: 19558.

1987: 8 décembre; 1988: 15 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest et L'Heureux-Dubé.

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

Droit criminel — Mens rea — Intention générale et spécifique — Ivresse — Agression sexuelle causant des lésions corporelles — La preuve de l'intoxication volontaire doit-elle être prise en considération pour déterminer si la mens rea a été prouvée hors de tout doute raisonnable? — Code criminel, S.R.C. 1970, chap. C-34, art. 246.2c) — Charte canadienne des droits et libertés, art. 1, 7, 11d).

Preuve — Infractions criminelles — Ivresse — Mens rea — La preuve de l'ivresse doit-elle être prise en considération relativement à la preuve de la mens rea?

L'appelant a été accusé d'agression sexuelle causant des blessures corporelles en infraction à l'al. 246.2*c*) du *Code criminel*; il a été jugé par juge et jury et a été reconnu coupable. Il a admis avoir forcé la plaignante à avoir des relations sexuelles avec lui et a déclaré qu'il l'avait attaquée parce qu'il était ivre. La Cour d'appel de l'Ontario a rejeté l'appel interjeté à l'encontre de la déclaration de culpabilité. Le pourvoi vise à déterminer si le juge des faits doit prendre en considération la preuve de l'intoxication volontaire avec tous les autres éléments de preuve pertinents pour déterminer si le ministère public a prouvé hors de tout doute raisonnable la *mens rea* requise pour constituer l'infraction.

Arrêt (le juge en chef Dickson et le juge Lamer sont dissidents): Le pourvoi est rejeté.

Les juges Beetz et McIntyre: L'infraction d'intention générale est celle pour laquelle l'intention se rapporte uniquement à l'accomplissement de l'acte en question, sans qu'il y ait d'autre intention ou dessein. Une infraction d'intention spécifique se caractérise par la perpétration de l'*actus reus* assortie d'une intention ou d'un dessein qui ne se limite pas à l'accomplissement de l'acte

* Les juges Estey et Le Dain n'ont pas pris part au jugement.

1988 CanLII 22 (SCC)

distinction, which is neither artificial nor based on a legal fiction, is not divorced from logical underpinnings.

Drunkenness in a general sense is not a true defence to a criminal act. The defence, however, may apply in a specific intent offence when the accused is so intoxicated that he lacks the capacity to form the specific intent required to commit the crime. The defence does not apply in offences of general intent.

The elements of a charge under s. 246.2(*c*) are an assault which, objectively viewed, is of a sexual nature as a consequence of which the complainant has suffered bodily injury. The requisite mental element is only the intention to commit the assault. The surrounding circumstances are to be considered for evidence of its sexual nature and of the resulting bodily harm. The resulting interference with the physical integrity of the complainant aggravates the seriousness of a sexual assault but the mental element remains the same.

The Crown must still prove the *mens rea* in a general intent offence, notwithstanding the absence of a defence of voluntary intoxication. This can be proved in two ways. Firstly, the *mens rea* in most cases can be inferred from the *actus reus* itself: a person is presumed to have intended the natural and probable consequences of his actions. Secondly, where the accused was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may establish the necessary blameworthy mental state of the accused by proving voluntary self-induced intoxication. As a result, persons accused of these crimes cannot hold up voluntary drunkenness as a defence.

The rule in *Leary* does not convert the offence in s. 246.2(*c*) into an absolute liability offence by removing the Crown's onus of proving the requisite intention and, accordingly, does not violate ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The rule upholds the principle that the morally innocent should not be convicted for it recognizes that accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control leading to the commission of a crime, are not morally innocent and are, indeed, criminally blameworthy.

If the trial judge wrongly excluded the evidence of drunkenness, s. 613(1)(*b*)(iii) of the *Criminal Code*

en question. Cette distinction, qui n'est ni artificielle ni ne repose sur une fiction juridique, n'est pas privée de fondement logique.

L'ivresse au sens général ne constitue pas véritablement une défense opposable à une accusation d'avoir commis un acte criminel. La défense peut toutefois s'appliquer à un crime d'intention spécifique lorsque l'état d'ébriété de l'accusé est de nature à le rendre incapable de former l'intention spécifique requise pour commettre le crime. Elle ne s'applique cependant pas aux infractions d'intention générale.

Les éléments d'une accusation portée en vertu de l'al. 246.2*c*) sont une agression qui, considérée objectivement, a un caractère sexuel et qui a pour conséquence des lésions corporelles subies par le plaignant. Le seul élément moral requis est l'intention de commettre l'agression. Les circonstances dans lesquelles elle a eu lieu doivent être examinées pour dégager la preuve du caractère sexuel de l'agression et des lésions corporelles qu'elle a causées. L'atteinte à l'intégrité physique du plaignant qui en est la conséquence aggrave l'agression sexuelle, mais l'élément moral demeure le même.

Le ministère public doit toujours prouver la *mens rea* pour les infractions d'intention générale, indépendamment de l'absence d'une défense d'intoxication volontaire. Il peut la prouver de deux façons. Premièrement, la *mens rea* peut dans la plupart des cas se déduire de l'*actus reus* lui-même: une personne est présumée avoir voulu les conséquences naturelles et probables de ses actes. Deuxièmement, dans les cas où l'accusé était ivre au point de faire naître des doutes quant au caractère volontaire de sa conduite, le ministère public peut établir que l'accusé avait l'état mental coupable nécessaire en prouvant l'intoxication volontaire. En conséquence, les personnes accusées de ces crimes ne peuvent invoquer l'ivresse volontaire en défense.

La règle énoncée dans l'arrêt *Leary* ne transforme pas l'infraction prévue à l'al. 246.2*c*) en crime de responsabilité absolue, en dispensant le ministère public de prouver l'intention requise et, par conséquent, il n'enfreint pas l'art. 7 et l'al. 11*d*) de la *Charte canadienne des droits et libertés*. La règle confirme le principe que ceux qui sont moralement innocents ne devraient pas se voir déclarer coupables, car elle reconnaît que les accusés qui ont volontairement consommé des stupéfiants ou de l'alcool, se privant ainsi de la maîtrise de soi, ce qui mène à la perpétration d'un crime, loin d'être moralement innocents, sont en fait coupables en droit criminel.

Si le juge du procès a exclu à tort la preuve de l'ivresse, il faut appliquer le sous-al. 613(1)*b*)(iii) du

1988 CanLII 22 (SCC)

should be applied because no substantial wrong or miscarriage of justice occurred here.

Per Wilson and L'Heureux-Dubé JJ.: Sexual assault causing bodily harm is an offence of general intent requiring only the minimal intent to apply force. Here, as in most cases involving general intent offences and intoxication, the Crown can establish the accused's blameworthy mental state by inference from his or her acts. The evidence of intoxication withheld from the trier of fact could not possibly have raised a reasonable doubt as to the existence of the minimal intent to apply force.

The *Leary* rule is perfectly consistent with an onus resting on the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences. The rule, as applied in its more flexible form, should be preserved so that evidence of intoxication can go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence. Evidence of intoxication should not go to the trier of fact in every case regardless of its possible relevance to the issue of the existence of the minimal intent required for the offence. The rule in *Leary* should not be overruled.

Leary does not operate so as to relieve the Crown from proving the existence of the required minimal intent and so turn the offence into one of absolute liability. The Crown must still prove beyond a reasonable doubt the existence of the required mental element of the intentional application of force.

Per La Forest J.: The requirement of *mens rea* in truly criminal offences is so fundamental that it cannot, since the *Charter*, be removed on the basis of judicially-developed policy. If incursions are to be made upon fundamental legal values, Parliament, not the courts, must do so. Although established common law rules should not lightly be assumed to violate the *Charter*, when a common law rule is found to violate a *Charter* right, that violation must be justified in the same way as legislative rules. No adequate justification was made here. However, s. 613(1)(*b*)(iii) of the *Criminal Code* could properly be applied as no substantial wrong or miscarriage of justice occurred here.

Code criminel car cela n'a pas entraîné de tort important ni d'erreur judiciaire grave en l'espèce.

Les juges Wilson et L'Heureux-Dubé: L'agression sexuelle causant des lésions corporelles est une infraction d'intention générale exigeant seulement l'intention minimale d'utiliser la force. En l'espèce comme dans la plupart des cas mettant en cause des infractions d'intention générale et l'intoxication, le ministère public peut prouver l'état mental blâmable de l'accusé en le déduisant de ses actes. Il est impossible que la preuve de l'intoxication, qui n'a pas été soumise au juge des faits, ait pu soulever un doute raisonnable quant à l'existence de l'intention minimale d'utiliser la force.

La règle énoncée dans l'arrêt *Leary* est tout à fait compatible avec la charge imposée au ministère public de prouver l'intention minimale qui doit accompagner l'exécution de l'acte prohibé dans les infractions d'intention générale. La règle, appliquée dans la forme plus souple, doit être préservée pour permettre que la preuve de l'intoxication soit soumise au juge des faits pour les infractions d'intention générale seulement s'il s'agit d'une preuve d'intoxication extrême entraînant l'absence de conscience voisine de l'aliénation ou de l'automatisme. C'est seulement dans ce cas que la preuve peut soulever un doute raisonnable sur l'existence de l'intention minimale requise par l'infraction. La preuve de l'intoxication ne doit pas être soumise au juge des faits dans tous les cas, indépendamment de sa pertinence possible à l'égard de la question de l'existence de l'intention minimale requise pour l'infraction. La règle énoncée dans l'arrêt *Leary* ne doit pas être renversée.

L'arrêt *Leary* n'a pas pour effet de dégager le ministère public de l'obligation de prouver l'existence de l'intention minimale requise pour l'infraction ni d'en faire une infraction de responsabilité absolue. Le ministère public doit toujours prouver hors de tout doute raisonnable l'existence de l'élément mental requis, soit le recours intentionnel à la force.

Le juge La Forest: L'exigence de la *mens rea* dans les infractions véritablement criminelles est tellement fondamentale qu'on ne peut la supprimer depuis l'avènement de la *Charte*, sur la base d'une politique de droit prétorien. Si on doit porter atteinte aux valeurs juridiques fondamentales, il appartient au législateur de le faire et non aux tribunaux. Même si on ne doit pas présumer à la légère que des règles de *common law* violent un droit garanti par la *Charte*, toute violation éventuelle doit être justifiée de la même façon que dans le cas des règles législatives. Aucune justification valable n'a été présentée en l'espèce. Toutefois, le sous-al. 613(1)*b*)(iii) du *Code criminel* peut à bon droit s'appliquer car il n'y a pas eu de tort important ni d'erreur judiciaire grave.

1988 CanLII 22 (SCC)

Per Dickson C.J. and Lamer J. (dissenting): Evidence of self-induced intoxication should be considered by the trier of fact, along with all other relevant evidence, in determining whether the *mens rea* required to constitute the offence has been proved beyond a reasonable doubt. Intoxication is relevant in principle to the mental element required in crime.

The unrestrained application of basic *mens rea* doctrine would not open a gaping hole in the criminal law inimical to social protection. Intoxication, to the extent that it merely lowers inhibitions, removes self-restraint or induces unusual self-confidence or aggressiveness, does not relate to the *mens rea* requirement for volitional and intentional or reckless conduct. Similarly, intoxication would be of no avail to an accused who got drunk in order to gain the courage to commit a crime or to aid in his defence. Juries are quite able to weigh all the evidence in a fair and responsible manner and are unlikely to acquit too readily those who have committed offences while intoxicated.

The distinction between "general" and "specific" intent, which is used to exclude otherwise relevant evidence from the jury, is artificial and two fundamental problems stem from it. Firstly, Parliament, not the courts, should alter the law if it is to be done in the name of policy over principle. Secondly, even if it were appropriate for the courts to do so, there is no evidence that the artificiality of the specific intent requirement is actually required for social protection.

Leary, which gave rise to the distinction between general and specific intent, should be overruled. This pre-*Charter* decision imposes a form of absolute liability on intoxicated offenders: an essential element is presumed on proof of intoxication. The *Charter* right to be presumed innocent until proven guilty and the presumption of innocence are accordingly infringed. The rule in *Leary* cannot be upheld under s. 1 of the *Charter*, because the objective of protecting the public, while important, is not achieved within the scope of the *Oakes* proportionality test. *Leary* has also been undermined independently of the *Charter*. An honest but unreasonable mistaken belief in consent negates the *mens rea* required for some crimes. The jury's task in determining whether or not the belief was honestly held is unnecessarily complicated by the *Leary* qualification concerning mistake of fact. The uncertainty caused by *Leary* also

Le juge en chef Dickson et le juge Lamer (dissidents): Le juge des faits doit prendre en considération avec tous les autres éléments de preuve pertinents la preuve de l'intoxication volontaire pour déterminer si la *mens rea* requise pour qu'il y ait infraction a été prouvée hors de tout doute raisonnable. L'intoxication est pertinente en principe à l'égard de l'élément moral requis pour un crime.

L'application sans restriction du principe fondamental de la *mens rea* ne créerait pas en droit criminel une immense lacune qui compromettrait la protection de la société. Dans la mesure où l'intoxication ne fait que diminuer les inhibitions, supprimer la retenue ou provoquer une confiance en soi ou une agressivité inhabituelles, elle n'a rien à voir avec l'exigence d'une *mens rea* en matière de conduite volontaire et intentionnelle ou insouciante. De même, un accusé ne pourrait invoquer l'intoxication s'il s'était enivré afin de se donner le courage de commettre un crime ou pour faciliter sa défense. Les jurys sont tout à fait capables de peser l'ensemble de la preuve d'une manière équitable et impartiale et il est peu probable qu'ils acquittent trop facilement ceux qui commettent des infractions en état d'ébriété.

La distinction entre l'intention «générale» et «spécifique» qu'on utilise pour ne pas soumettre au jury des éléments de preuve par ailleurs pertinents, est artificielle et soulève deux problèmes fondamentaux. Premièrement, c'est le législateur et non les tribunaux qui doivent modifier la loi si la politique générale doit l'emporter sur les principes. Deuxièmement, même si les tribunaux pouvaient le faire à bon droit, il n'y a aucune preuve démontrant que l'exigence artificielle d'une intention spécifique est vraiment nécessaire pour protéger la société.

L'arrêt *Leary*, qui a donné naissance à la distinction entre l'intention générale et l'intention spécifique doit être renversé. Cette décision antérieure à la *Charte* impose une forme de responsabilité absolue aux délinquants intoxiqués: un élément essentiel est présumé quand on prouve l'intoxication. Il porte donc atteinte au droit garanti par la *Charte* d'être présumé innocent tant qu'on n'est pas déclarée coupable et à la présomption d'innocence. La règle énoncée dans l'arrêt *Leary* ne saurait être maintenue aux termes de l'article premier de la *Charte* car l'objectif de la protection du public, quoique important, n'y est pas atteint d'une manière conforme au critère de proportionnalité formulé dans l'arrêt *Oakes*. L'autorité de l'arrêt *Leary* a également été ébranlée tout à fait indépendamment de la *Charte*. Une croyance sincère mais déraisonnable et erronée au consentement réduit à néant la *mens rea* requise pour

1988 CanLII 22 (SCC)

undermines the clarity and certainty in law which underpin the principle of *stare decisis*. The classification of offences as to specific intent category is an *ad hoc*, unpredictable exercise. Finally, the courts should not create new offences or broaden the net of liability. The *Leary* rule expands the scope of criminal liability beyond normal limits. It is acceptable, however, to overrule a prior decision to establish a rule favourable to the accused.

The absence in the charge to the jury of any reference to the Crown's duty to prove that the accused acted with the requisite intent was fatal to the conviction. The Crown made no request that this Court apply s. 613(1)(*b*)(iii) of the *Criminal Code* and it was not for this Court to speculate as to the likely result had the jury been properly instructed.

Cases Cited

By McIntyre J.

Applied: *Leary v. The Queen*, [1978] 1 S.C.R. 29; **considered:** *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, [1975] 3 All E.R. 296; *R. v. George*, [1960] S.C.R. 871; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *R. v. Chase*, [1987] 2 S.C.R. 293; **referred to:** *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *Attorney-General for Northern Ireland v. Gallagher*, [1961] 3 All E.R. 299; *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523; *R. v. Doherty* (1887), 16 Cox. C.C. 306; *R. v. Morgan*, [1976] A.C. 182; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; **not followed:** *O'Connor* (1980), 4 A. Crim. R. 348.

By Wilson J.

Applied: *Leary v. The Queen*, [1978] 1 S.C.R. 29; **referred to:** *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, aff'g (1978), 44 C.C.C. (2d) 267; *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443; *R. v. George*, [1960] S.C.R. 871; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045.

certains crimes. La tâche du jury pour déterminer si la croyance est sincère est inutilement compliquée par les restrictions de l'arrêt *Leary* concernant l'erreur de fait. L'incertitude causée par l'arrêt *Leary* porte aussi atteinte à la clarté et à la certitude du droit sous-jacent au principe du *stare decisis*. La classification des infractions relativement à la catégorie de l'intention spécifique est nécessairement un exercice *ad hoc* au résultat imprévisible. Enfin, il n'appartient pas aux tribunaux de créer de nouvelles infractions ni de donner plus d'extension à la responsabilité. La règle énoncée dans l'arrêt *Leary* étend la portée de la responsabilité criminelle au-delà des limites normales. Il est toutefois acceptable de renverser un arrêt antérieur pour créer une règle favorable à l'accusé.

Le fait que, dans l'exposé au jury, on n'ait pas parlé de l'obligation du ministère public de prouver que l'accusé avait agi avec l'intention requise est fatal à la déclaration de culpabilité. Le ministère public n'a pas demandé à cette Cour d'appliquer le sous-al. 613(1)*b*)(iii) du *Code criminel* et il n'appartient pas à cette Cour de faire des conjectures sur le résultat probable si le jury avait reçu des instructions appropriées.

Jurisprudence

Citée par le juge McIntyre

Arrêt appliqué: *Leary c. La Reine*, [1978] 1 R.C.S. 29; **arrêts examinés:** *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, [1975] 3 All E.R. 296; *R. v. George*, [1960] R.C.S. 871; *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956; *R. c. Chase*, [1987] 2 R.C.S. 293; **arrêts mentionnés:** *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *Attorney-General for Northern Ireland v. Gallagher*, [1961] 3 All E.R. 299; *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523; *R. v. Doherty* (1887), 16 Cox. C.C. 306; *R. v. Morgan*, [1976] A.C. 182; *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. Vaillancourt*, [1987] 2 R.C.S. 636; **arrêt non suivi:** *O'Connor* (1980), 4 A. Crim. R. 348.

Citée par le juge Wilson

Arrêt appliqué: *Leary c. La Reine*, [1978] 1 R.C.S. 29; **arrêts mentionnés:** *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956, conf. (1978), 44 C.C.C. (2d) 267; *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443; *R. v. George*, [1960] R.C.S. 871; *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. Vaillancourt*, [1987] 2 R.C.S. 636; *R. c. Sault Ste-Marie*, [1978] 2 R.C.S. 1299; *R. c. Whyte*, [1988] 2 R.C.S. 3; *R. c. Smith (Edward Dewey)*, [1987] 1 R.C.S. 1045.

1988 CanLII 22 (SCC)

By La Forest J.

Referred to: *R. v. Landry*, [1986] 1 S.C.R. 145.

By Dickson C.J. (dissenting)

Leary v. The Queen, [1978] 1 S.C.R. 29; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *R. v. Chase*, [1987] 2 S.C.R. 293; *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, [1976] 2 All E.R. 142; *O'Connor* (1980), 4 A. Crim. R. 348; *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610; *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *R. v. Roulston*, [1976] 2 N.Z.L.R. 644; *R. v. Keogh*, [1964] V.R. 400; *R. v. Hill*, [1986] 1 S.C.R. 313; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Binus v. The Queen*, [1967] S.C.R. 594; *Peda v. The Queen*, [1969] S.C.R. 905; *Barnett v. Harrison*, [1976] 2 S.C.R. 531; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43; *Bell v. The Queen*, [1979] 2 S.C.R. 212; *Paquette v. The Queen*, [1977] 2 S.C.R. 189; *Dunbar v. The King* (1936), 67 C.C.C. 20 (S.C.C.); *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651; *R. v. Therens*, [1985] 1 S.C.R. 613; *Chromiak v. The Queen*, [1980] 1 S.C.R. 471; *Duke v. The Queen*, [1972] S.C.R. 917; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Holmes*, [1988] 1 S.C.R. 914; *Reference re the Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Moreau* (1986), 26 C.C.C. (3d) 359; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228; *R. v. Quin*, [1988] 2 S.C.R. 825; *R. v. Campbell* (1974), 17 C.C.C. (2d) 320; *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*).
Criminal Code, R.S.C. 1970, c. C-34, ss. 213(*d*), 244, 244(4), 245.1(2), 246(1)(*a*), 246.2(*c*), 306(1)(*a*), (*b*), 613(1)(*b*)(iii), 623(1).

Citée par le juge La Forest

Arrêt mentionné: *R. c. Landry*, [1986] 1 R.C.S. 145.

Citée par le juge en chef Dickson (dissident)

Leary c. La Reine, [1978] 1 R.C.S. 29; *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956; *R. c. Chase*, [1987] 2 R.C.S. 293; *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, [1976] 2 All E.R. 142; *O'Connor* (1980), 4 A. Crim. R. 348; *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610; *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *R. v. Roulston*, [1976] 2 N.Z.L.R. 644; *R. v. Keogh*, [1964] V.R. 400; *R. c. Hill*, [1986] 1 R.C.S. 313; *R. c. Bulmer*, [1987] 1 R.C.S. 782; *Ministre des Affaires indiennes et du Nord canadien c. Ranville*, [1982] 2 R.C.S. 518; *Reference Re The Farm Products Marketing Act*, [1957] R.C.S. 198; *Binus v. The Queen*, [1967] R.C.S. 594; *Peda v. The Queen*, [1969] R.C.S. 905; *Barnett c. Harrison*, [1976] 2 R.C.S. 531; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141; *A.V.G. Management Science Ltd. c. Barwell Developments Ltd.*, [1979] 2 R.C.S. 43; *Bell c. La Reine*, [1979] 2 R.C.S. 212; *Paquette c. La Reine*, [1977] 2 R.C.S. 189; *Dunbar v. The King* (1936), 67 C.C.C. 20 (C.S.C.); *McNamara Construction (Western) Ltd. c. La Reine*, [1977] 2 R.C.S. 654; *Farwell v. The Queen* (1894), 22 R.C.S. 553; *Vetrovec c. La Reine*, [1982] 1 R.C.S. 811; *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. Vaillancourt*, [1987] 2 R.C.S. 636; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Robertson and Rosetanni v. The Queen*, [1963] R.C.S. 651; *R. c. Therens*, [1985] 1 R.C.S. 613; *Chromiak c. La Reine*, [1980] 1 R.C.S. 471; *Duke c. La Reine*, [1972] R.C.S. 917; *R. c. Smith (Edward Dewey)*, [1987] 1 R.C.S. 1045; *Miller et Cockriell c. La Reine*, [1977] 2 R.C.S. 680; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Holmes*, [1988] 1 R.C.S. 914; *Renvoi relativement à la Loi sur l'organisation du marché des produits agricoles*, [1978] 2 R.C.S. 1198; *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120; *Sansregret c. La Reine*, [1985] 1 R.C.S. 570; *R. c. Robertson*, [1987] 1 R.C.S. 918; *R. v. Moreau* (1986), 26 C.C.C. (3d) 359; *Commonwealth of Puerto Rico c. Hernandez*, [1975] 1 R.C.S. 228; *R. c. Quin*, [1988] 2 R.C.S. 825; *R. v. Campbell* (1974), 17 C.C.C. (2d) 320; *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 11*d*).
Code criminel, S.R.C. 1970, chap. C-34, art. 213*d*), 244, 244(4), 245.1(2), 246(1)*a*), 246.2*c*), 306(1)*a*), *b*), 613(1)*b*)(iii), 623(1).

1988 CanLII 22 (SCC)

Authors Cited

Ashworth, A. J. "Reason, Logic and Criminal Liability" (1975), 91 *L.Q.R.* 102.
Boyle, Christine. *Sexual Assault*. Toronto: Carswells, 1984.
Colvin, Eric. "A Theory of the Intoxication Defence" (1981), 59 *Can. Bar Rev.* 750.
Connelly, Peter J. "Drunkenness and Mistake of Fact: Pappajohn v. The Queen; Swietlinski v. The Queen" (1981), 24 *Crim. L.Q.* 49.
Cross, Sir Rupert. "Blackstone v. Bentham" (1976), 92 *L.Q.R.* 516.
Doherty, David H. "*Regina v. O'Connor: Mens Rea* Survives in Australia" (1981), 19 *U.W.O. L. Rev.* 281.
Mewett, Alan W. and Morris Manning. *Criminal Law*, 2nd ed. Toronto: Butterworths, 1985.
Quigley, Tim. "Reform of the Intoxication Defence" (1987), 33 *McGill L.J.* 1.
Smith, George. "Footnote to O'Connor's Case" (1981), 5 *Crim. L.J.* 270.
Stuart, Don. *Canadian Criminal Law*, 2nd ed. Toronto: Carswells, 1987.
Thornton, Mark T. "Making Sense of *Majewski*" (1981), 23 *Crim. L.Q.* 465.
Watt, J. D. *The New Offences Against the Person*. Toronto: Butterworths, 1984.
Williams, Glanville Llewelyn. *Textbook of Criminal Law*, 2nd ed. London: Stevens & Sons, 1983.

APPEAL from a judgment of the Ontario Court of Appeal (1985), 7 O.A.C. 305, 18 C.C.C. (3d) 574, 44 C.R. (3d) 398, dismissing an appeal from conviction found by Vannini J. sitting with jury. Appeal dismissed, Dickson C.J. and Lamer J. dissenting.

Clayton Ruby and *Michael Code*, for the appellant.

David A. Fairgrieve, for the respondent.

The reasons of Dickson C.J. and Lamer J. were delivered by

THE CHIEF JUSTICE (dissenting)—Counsel for the appellant submits that there are two issues raised in this appeal: (i) whether sexual assault causing bodily harm contrary to s. 246.2(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, is an offence of "specific" intent; (ii) whether drunkenness can ever be a "defence" to a charge of sexual assault causing bodily harm.

Doctrine citée

Ashworth, A. J. «Reason, Logic and Criminal Liability» (1975), 91 *L.Q.R.* 102.
Boyle, Christine. *Sexual Assault*. Toronto: Carswells, 1984.
Colvin, Eric. «A Theory of the Intoxication Defence» (1981), 59 *R. du B. can.* 750.
Connelly, Peter J. «Drunkenness and Mistake of Fact: Pappajohn v. The Queen; Swietlinski v. The Queen» (1981), 24 *Crim. L.Q.* 49.
Cross, Sir Rupert. «Blackstone v. Bentham» (1976), 92 *L.Q.R.* 516.
Doherty, David H. «*Regina v. O'Connor: Mens Rea* Survives in Australia» (1981), 19 *U.W.O. L. Rev.* 281.
Mewett, Alan W. and Morris Manning. *Criminal Law*, 2nd ed. Toronto: Butterworths, 1985.
Quigley, Tim. «Reform of the Intoxication Defence» (1987), 33 *McGill L.J.* 1.
Smith, George. «Footnote to O'Connor's Case» (1981), 5 *Crim. L.J.* 270.
Stuart, Don. *Canadian Criminal Law*, 2nd ed. Toronto: Carswells, 1987.
Thornton, Mark T. «Making Sense of *Majewski*» (1981), 23 *Crim. L.Q.* 465.
Watt, J. D. *The New Offences Against the Person*. Toronto: Butterworths, 1984.
Williams, Glanville Llewelyn. *Textbook of Criminal Law*, 2nd ed. London: Stevens & Sons, 1983.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1985), 7 O.A.C. 305, 18 C.C.C. (3d) 574, 44 C.R. (3d) 398, qui a rejeté un appel de la déclaration de culpabilité rendue par le juge Vannini siégeant avec jury. Pourvoi rejeté, le juge en chef Dickson et le juge Lamer sont dissidents.

Clayton Ruby et *Michael Code*, pour l'appelant.

David A. Fairgrieve, pour l'intimée.

Version française des motifs du juge en chef Dickson et du juge Lamer rendus par

LE JUGE EN CHEF (dissident)—L'avocat de l'appelant plaide que le présent pourvoi soulève deux questions: (i) celle de savoir si la perpétration d'une agression sexuelle qui entraîne des lésions corporelles, au sens de l'al. 246.2*c*) du *Code criminel*, S.R.C. 1970, chap. C-34, est une infraction nécessitant une intention «spécifique» et (ii) celle de savoir si l'ivresse peut jamais constituer un «moyen de défense» opposable à une accusation d'agression sexuelle entraînant des lésions corporelles.

1988 CanLII 22 (SCC)

I

Facts

The appellant, Nelson Pierre Bernard, was charged with sexual assault causing bodily harm to the complainant contrary to s. 246.2(*c*) of the *Criminal Code*. That subsection provides that everyone who, in committing a sexual assault, causes bodily harm to the complainant is guilty of an indictable offence and liable to imprisonment for fourteen years.

The facts may be briefly stated.

The complainant, eighteen years of age at the relevant time, visited the appellant, twenty-four years old. The appellant went out to dinner and to a bar with some friends while the complainant stayed behind in his apartment. Later that night the group returned to the flat. The friends departed, leaving the appellant and the complainant alone together.

The complainant testified that she had complied with the appellant's request to remain in the apartment after the friends' departure, both because she was not feeling well and because it was the first Christmas since the death of her father. She and the appellant, who had been a good friend of her late father, were going to talk about him.

The two lay down on the couch together and began talking. The complainant testified that she was then forced to have sexual intercourse without her consent and was subjected to serious bodily injury at the hands of the appellant. There was evidence that the appellant had punched the complainant twice with a closed fist, once above the eye, causing the eyelid to bleed profusely, and that he had threatened to kill her. There was evidence of a blood-stained towel and pillow case concealed in the toilet tank of the appellant's apartment. Counsel for the appellant admitted that intercourse had taken place.

The complainant testified that the appellant had been drinking but was able to walk, to see everything, to talk clearly, and to put albums on the record player. One of the friends of the appellant testified that the appellant had been drinking on

I

Les faits

L'appelant, Nelson Pierre Bernard, a été accusé d'avoir commis une agression sexuelle qui a causé des lésions corporelles à la plaignante, en infraction à l'al. 246.2*c*) du *Code criminel*. Aux termes de cet alinéa, est coupable d'un acte criminel et passible d'un emprisonnement de quatorze ans, quiconque, en commettant une agression sexuelle, inflige des lésions corporelles au plaignant.

Les faits peuvent être exposés brièvement.

La plaignante, âgée de dix-huit ans à l'époque en cause, était en visite chez l'appelant, qui avait vingt-quatre ans. L'appelant est sorti dîner et est allé à un bar avec des amis tandis que la plaignante est restée dans l'appartement de l'appelant. Plus tard la même nuit, le groupe est revenu à l'appartement. Les amis sont partis, laissant l'appelant et la plaignante tout seuls.

La plaignante a dit dans son témoignage que si elle a accédé à la demande de l'appelant de rester chez lui après le départ des amis, c'est parce qu'elle ne se sentait pas bien et parce que c'était le premier Noël depuis la mort de son père. L'appelant avait été un bon ami du père de la plaignante et ils allaient parler de lui.

Les deux se sont étendus sur le canapé et se sont mis à causer. La plaignante a témoigné que l'appelant l'a alors forcée d'avoir des rapports sexuels avec lui sans son consentement et qu'il lui a infligé des lésions corporelles graves. D'après la preuve, l'appelant a frappé la plaignante de deux coups de poing, dont un au-dessus d'un œil qui a fait saigner abondamment la paupière, et il a menacé de la tuer. Il ressort également de la preuve qu'une serviette et une taie d'oreiller tachées de sang avaient été cachées dans le réservoir de chasse des cabinets de l'appartement de l'appelant. L'avocat de ce dernier a reconnu qu'il y avait eu rapports sexuels.

La déposition de la plaignante révèle que l'appelant avait bu, mais qu'il était capable de marcher, de voir clair, de parler intelligiblement et de poser des disques sur le phonographe. Une des amis de l'appelant a témoigné que celui-ci avait bu la nuit

1988 CanLII 22 (SCC)

the night in question and, though he became rowdy, he was walking straight and talking.

When the police arrived at the appellant's apartment, he was awakened from a deep sleep and seemed to be suffering somewhat from his drinking. The appellant stated that his drunkenness caused the attack on the complainant.

The appellant was tried before a judge and jury. He did not testify at the trial, but the Crown led evidence of a statement he had made to the police. In the statement he admitted that he had forced the complainant to have sexual intercourse with him. He stated that he did not know why he had done it because he was drunk and that, "when I realized what I was doing, I got off." In charging the jury, the trial judge made no reference to the intent requirement, beyond reading the jury the definition of assault. The jury was told that the sole issue was whether the Crown had proved beyond a reasonable doubt that the complainant had not consented to the intercourse because of the assault and threats made by the accused. With respect to drunkenness, the trial judge said as follows: "Only the accused in his statement says, 'I was all drunked up too.' There was no evidence of drunkenness except that statement and it is open to you to accept it and find that he was drunk but even if he was drunk, drunkenness is no defence to the charge alleged against this accused."

The appellant was convicted and sentenced to four years imprisonment. An appeal to the Court of Appeal of Ontario was dismissed (now reported at (1985), 18 C.C.C. (3d) 574). Dubin J.A., delivering the oral judgment of the Court, said at p. 574:

> On the merits, the Crown's case was overwhelming. The complainant's testimony that she was forced to have sexual intercourse without her consent and the serious bodily injury which she suffered during the course of the assault was confirmed in every respect by other evidence.

With respect, I agree.

Dubin J.A. concluded at p. 576:

en question et que, bien qu'il soit devenu batailleur, il marchait droit et pouvait s'exprimer.

La police, en arrivant à l'appartement de l'appelant, l'a tiré d'un sommeil profond et il semblait souffrir quelque peu des effets de l'alcool. L'appelant a dit que c'est son ivresse qui l'a fait agresser la plaignante.

L'appelant a été jugé devant un juge et jury. Il n'a pas témoigné au procès, mais le ministère public a produit en preuve une déclaration qu'il avait faite à la police et dans laquelle il a avoué avoir forcé la plaignante d'avoir des rapports sexuels avec lui. Il affirmait ignorer pourquoi il l'avait fait parce qu'il était ivre et a ajouté: [TRADUCTION] «Quand je me suis rendu compte de ce que je faisais, j'ai arrêté.» Dans son exposé au jury, le juge du procès n'a pas fait mention de l'intention, si ce n'est en lisant au jury la définition de voies de fait. Il a dit au jury que l'unique question était de savoir si le ministère public avait prouvé hors de tout doute raisonnable qu'en raison de l'agression commise par l'accusé et en raison des menaces proférées par lui, la plaignante n'avait pas consenti aux rapports sexuels. En ce qui concerne l'ivresse, le juge du procès a dit: [TRADUCTION] «L'accusé a été le seul à parler d'ivresse dans sa déclaration: «J'étais bien soûl aussi.» Exception faite de cette déclaration, il n'y a aucune preuve qu'il était ivre. Or, vous pouvez l'accepter et conclure qu'il était en état d'ébriété, mais même s'il l'était, l'ivresse ne peut être opposée comme défense à l'accusation portée contre lui.»

L'appelant a été reconnu coupable et condamné à quatre ans d'emprisonnement. Un appel devant la Cour d'appel de l'Ontario a été rejeté (arrêt maintenant publié à (1985), 18 C.C.C. (3d) 574). Le juge Dubin, qui a prononcé les motifs oraux de la Cour, a dit à la p. 574:

> [TRADUCTION] Sur le fond, la preuve à charge a été accablante. Le témoignage de la plaignante selon lequel elle a été forcée d'avoir des rapports sexuels sans y consentir et selon lequel elle a subi des lésions corporelles graves au cours de l'agression a été confirmé en tous points par d'autres témoignages.

Avec égards, je suis d'accord.

En conclusion, le juge Dubin a affirmé, à la p. 576:

1988 CanLII 22 (SCC)

Mr. Ruby also took objection to passages in the judge's charge. We are all satisfied that the charge, when read as a whole, is more favourable to the appellant than the evidence warranted. In any event, we are satisfied that even if objection could be taken to some of the expressions used by the trial judge, there was no substantial wrong or miscarriage of justice in this case.

[TRADUCTION] Me Ruby a en outre contesté certains passages de l'exposé du juge au jury. Or, nous sommes tous convaincus que dans l'ensemble l'exposé est plus favorable à l'appelant que la preuve ne le justifie. Quoi qu'il en soit, nous sommes convaincus que, même si on pouvait trouver à redire à certaines expressions employées par le juge du procès, il n'y a eu en l'espèce aucun préjudice appréciable ni aucun déni de justice.

II

Drunkenness and *Mens Rea*

In my view, the only issue the Court needs to address may be put as follows: should evidence of self-induced intoxication be considered by the trier of fact, along with all other relevant evidence, in determining whether the prosecution has proved beyond a reasonable doubt the *mens rea* required to constitute the offence? I am of the opinion that the Court should answer that question in the affirmative.

I wish to make clear at the outset, however, that nothing in these reasons is intended to apply with respect to the quite distinct issues raised by offences, such as driving while impaired, where intoxication or the consumption of alcohol is itself an ingredient of the offence. The *mens rea* of such offences can be left for consideration another day.

In *Leary v. The Queen*, [1978] 1 S.C.R. 29, Pigeon J. for the majority of the Court, held that rape was an offence requiring proof of only "basic" or "general" intent rather than "specific" intent. Under that categorization, the Court held, the jury should be instructed that evidence that drunkenness may have deprived the accused of the capacity to form the requisite intent should not be taken into account when considering whether the Crown had satisfied the burden of proving beyond a reasonable doubt that the accused had acted with the requisite intent. (See also *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, dealing with the offence of indecent assault). The offence of rape has now been removed from the *Criminal Code* and in its place are the sexual assault provisions. More recently, in *R. v. Chase*, [1987] 2 S.C.R. 293, the Court held that sexual assault was a

II

L'ivresse et la *mens rea*

À mon avis, l'unique question sur laquelle la Cour doit se pencher peut être ainsi formulée: pour déterminer si la poursuite a établi hors de tout doute raisonnable la *mens rea* requise pour constituer l'infraction en cause, le juge des faits doit-il prendre en considération avec tous les autres éléments de preuve pertinents la preuve de l'intoxication volontaire? Pour ma part, j'estime que la Cour doit donner à cette question une réponse affirmative.

Je tiens toutefois à préciser dès l'abord que rien dans les présents motifs ne doit s'appliquer aux questions tout à fait distinctes qui se posent dans le cas d'infractions comme la conduite avec facultés affaiblies, où l'ébriété ou la consommation d'alcool sont elles-mêmes des éléments de l'infraction. La *mens rea* requise par ces infractions-là pourra être examinée dans un autre contexte.

Dans l'arrêt *Leary c. La Reine*, [1978] 1 R.C.S. 29, le juge Pigeon, parlant au nom de la majorité de cette Cour, a conclu que le viol était une infraction exigeant seulement la preuve d'une intention «fondamentale» ou «générale» plutôt que d'une intention «spécifique». Selon cette catégorisation, a statué la Cour, il faut dire au jury qu'une preuve selon laquelle l'accusé a pu pour cause d'ivresse se trouver dans l'incapacité de former l'intention requise ne doit pas être prise en considération relativement à la question de savoir si le ministère public s'est acquitté de son obligation de prouver hors de tout doute raisonnable que l'accusé avait agi avec l'intention requise. (Voir aussi l'arrêt *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956, portant sur l'infraction d'attentat à la pudeur). L'infraction de viol a depuis été supprimée du *Code criminel* pour être remplacée par des

1988 CanLII 22 (SCC)

crime of "basic" or "general" intent. In *Chase*, however, drunkenness was not in issue and the propriety of maintaining the distinction between general and specific intent for purposes of evidence regarding intoxication was not considered. The present case raises that much more basic issue which, in my view, the Court should reconsider.

In my dissent in *Leary*, I sought to advance the view that respect for basic criminal law principles required that the legal fiction, the artificial "specific" intent threshold requirement, be abandoned. I do not intend in these reasons to repeat what I said in *Leary*. With due regard for *stare decisis*, as to which I will have more to say in a moment, and with the greatest of respect for those of a contrary view, I would only add that nothing I have heard or read since the judgment in *Leary* has caused me to abandon or modify in the slightest degree the views of dissent which I there expressed. Analysis of the *Leary* dissent may be summarized as follows.

First of all, one must recognize the fundamental nature of the *mens rea* requirement. To warrant the condemnation of a conviction and the infliction of punishment, one who has caused harm must have done so with a blameworthy state of mind. It is always for the Crown to prove the existence of a guilty mind beyond a reasonable doubt. Intoxication affects one's mental state, one's ability to perceive the circumstances in which one acts, and to appreciate possible consequences. In principle, therefore, intoxication is relevant to the mental element in crime, and should be considered, together with all other evidence, in determining whether the Crown has proved the requisite mental state beyond a reasonable doubt.

dispositions relatives à l'agression sexuelle. Plus récemment, dans l'arrêt *R. c. Chase*, [1987] 2 R.C.S. 293, la Cour a conclu que l'agression sexuelle était un crime d'intention «fondamentale» ou «générale». Dans l'affaire *Chase*, cependant, l'ivresse n'était pas en cause et on ne s'est pas demandé s'il convenait de conserver la distinction entre l'intention générale et l'intention spécifique en ce qui concerne la preuve d'intoxication. La présente espèce par contre soulève cette question tout à fait fondamentale et, selon moi, la Cour doit la réexaminer.

Dans la dissidence que j'ai rédigée dans l'affaire *Leary*, j'ai tenté d'avancer que le respect des principes fondamentaux du droit criminel commandait l'abandon de la fiction juridique qu'était l'exigence artificielle d'une intention «spécifique». Je ne me propose pas de répéter ici ce que j'ai déjà dit dans l'affaire *Leary*. Nonobstant la question du *stare decisis*, sur laquelle je reviendrai plus loin, et avec les plus grands égards pour les tenants du point de vue contraire, j'ajoute simplement que je n'ai rien lu ni entendu depuis l'arrêt *Leary* qui m'ait amené à renoncer à l'opinion que j'ai exprimée en dissidence ou à la modifier le moindrement. Ce qui suit est une brève analyse des motifs dissidents dans l'affaire *Leary*.

Tout d'abord, il faut reconnaître la nature fondamentale de l'exigence d'une *mens rea*. La personne qui a causé un préjudice doit l'avoir fait dans un état d'esprit blâmable, sans quoi on ne saurait justifier une déclaration de culpabilité et l'imposition d'une peine avec tout ce que cela peut avoir d'infamant. C'est toujours au ministère public qu'il incombe de prouver hors de tout doute raisonnable l'existence d'un état d'esprit coupable. L'intoxication a un effet sur l'état mental d'une personne, sur sa capacité de prendre conscience des circonstances dans lesquelles elle agit et de se rendre compte des conséquences possibles. En principe, donc, l'intoxication est pertinente relativement à l'élément moral d'un crime et on doit en tenir compte avec tous les autres éléments de preuve en déterminant si le ministère public a prouvé hors de tout doute raisonnable l'existence de l'état mental requis.

1988 CanLII 22 (SCC)

It is quite wrong, I think, to characterize the issue as whether the "defence of drunkenness" should apply to this or that offence. While this expression is commonly used, it is misleading and perhaps even unduly emotive. It suggests that those who would otherwise be liable for their criminal conduct will escape because they were drunk at the time the offence was committed. But, of course, no one suggests that special concessions should be made to drunken offenders. The issue is really whether the Crown should be relieved of the usual burden of proving the requisite mental element for the offence because the accused was intoxicated. Should the jury be entitled to assess all of the evidence relevant to intent and be entitled to decide on the basis of all of the evidence whether the Crown has satisfied that burden?

Il est tout à fait erroné, à mon avis, de dire que la question est de savoir si la «défense d'ivresse» doit s'appliquer à telle ou telle infraction. Bien que cette expression s'emploie couramment, elle est trompeuse et peut-être même trop chargée de connotations. Elle sous-entend en effet que ceux qui seraient par ailleurs responsables de leur conduite criminelle y échapperont parce qu'ils étaient ivres au moment de la perpétration de l'infraction. Mais personne n'allègue évidemment que des concessions spéciales devraient être faites aux délinquants en état d'ébriété. La question qui se pose en réalité est celle de savoir si le ministère public doit, du fait que l'accusé était ivre, être déchargé de l'obligation habituelle de prouver l'élément moral requis pour qu'il y ait infraction. Le jury devrait-il avoir le droit d'examiner la totalité de la preuve se rapportant à l'intention et de décider en fonction de cette preuve-là si le ministère public s'est acquitté de l'obligation qui lui incombe?

The categories of "specific" intent on the one hand and "basic" or "general" intent on the other have evolved as an artificial device whereby evidence, otherwise relevant, is excluded from the jury's consideration. This Court, in *Swietlinski*, has recognized that intoxication may as a matter of fact deprive an accused of "basic" or "general" intent. It is said, however, by those who support the classification that as a matter of policy, consideration of evidence of intoxication must be excluded. Indeed, a notable feature to be found in the analysis of many of those who support restricting the jury's use of evidence relating to drunkenness is the concession that while principle and logic lead in an opposite direction, the policy of protection of the public requires that principle and logic should yield: see, e.g., *Director of Public Prosecutions v. Majewski*, [1976] 2 All E.R. 142, at pp. 167-68, *per* Lord Edmund-Davies, quoted by Pigeon J. in *Leary*, *supra*, at pp. 52-53.

Les catégories de l'intention «spécifique» d'une part et de l'intention «fondamentale» ou «générale» d'autre part ont évolué en tant que moyen artificiel d'exclure de l'examen du jury une preuve par ailleurs pertinente. Dans l'arrêt *Swietlinski*, cette Cour a en fait reconnu que l'ivresse peut, en tant que fait, jouer de manière à priver l'accusé de l'intention «fondamentale» ou «générale». Les partisans de cette classification prétendent toutefois que, pour des raisons de politique générale, la considération de la preuve d'ivresse doit être exclue. De fait, une caractéristique notable de l'analyse d'un bon nombre de ceux qui se prononcent en faveur de la restriction de l'usage qu'un jury peut faire d'une preuve relative à l'ivresse est la concession que, bien que les principes et la logique aillent dans l'autre sens, ceux-ci doivent céder le pas devant la nécessité de protéger le public: voir p. ex. *Director of Public Prosecutions v. Majewski*, [1976] 2 All E.R. 142, aux pp. 167 et 168, motifs de lord Edmund-Davies, cités par le juge Pigeon dans l'arrêt *Leary*, précité, aux pp. 52 et 53.

In my view, there are two fundamental problems with this approach. First, if the law is to be altered in the name of policy over principle, that is surely a task for Parliament rather than the courts. As

D'après moi, ce point de vue pose deux problèmes fondamentaux. Premièrement, si la loi doit être modifiée de manière que la politique générale l'emporte sur les principes, c'est certainement là

1988 CanLII 22 (SCC)

Barwick C.J. of the High Court of Australia concluded in *O'Connor* (1980), 4 A. Crim. R. 348, at pp. 363-64:

> It seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do.
>
> I can readily understand that a person who has taken alcohol or another drug to such an extent that he is intoxicated thereby to the point where he has no will to act or no capacity to form an intent to do an act is blameworthy and that his act of having ingested or administered the alcohol or other drug ought to be visited with severe consequences. The offence of being drunk and disorderly is not maintained these days in all systems of the common law. In any case it has not carried a sufficient penalty properly to express the public opprobrium which should attach to one who, by the taking of alcohol or the use of drugs, has become intoxicated to the point where he is the vehicle for unsocial or violent behaviour. But, though blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional. For what is blameworthy there should be an appropriate criminal offence. But it is not for the judges to create an offence appropriate in the circumstances: cf. *Knuller (Publishing, Printing & Promotions) Ltd. v. D.P.P.*, [1973] A.C. 435, at pp. 457-458, 464-465 and 490). It must be for the Parliament.

Secondly, even if it were appropriate for the courts to bend principle in the name of policy, so far as I am aware, there is no evidence that the artificiality of the specific intent requirement is actually required for social protection.

An unrestrained application of basic *mens rea* doctrine would not, in my opinion, open a gaping hole in the criminal law inimical to social protection. There are several reasons for this. To the extent that intoxication merely lowers inhibitions, removes self-restraint or induces unusual self-confidence or aggressiveness, it would be of no avail to an accused, as such effects do not relate to the *mens rea* requirement for volitional and intentional or reckless conduct. Similarly, intoxication would

une tâche qui revient au législateur plutôt qu'aux tribunaux. Comme l'a conclu le juge en chef Barwick de la Haute Cour d'Australie dans l'arrêt *O'Connor* (1980), 4 A. Crim. R. 348, aux pp. 363 et 364:

> [TRADUCTION] Il me semble tout à fait incompatible avec les principes de la *common law* qu'un homme soit définitivement présumé avoir une intention qu'en réalité il n'a pas ou avoir accompli un acte qu'à la vérité il n'a pas accompli.
>
> Je conçois bien qu'une personne qui, à force de consommer de l'alcool ou de prendre une autre drogue se met dans un état d'ébriété à tel point qu'il n'a pas la volonté d'agir ni la capacité de former l'intention d'accomplir un acte, mérite le blâme et que son acte d'avoir ingéré de l'alcool ou de s'être administré une autre drogue devrait entraîner des conséquences sérieuses. L'infraction d'ivresse publique a disparu maintenant de tous les ressorts de *common law*. De toute façon, elle n'a jamais entraîné une peine suffisante pour refléter adéquatement l'opprobre que devrait s'attirer quelqu'un qui, par la consommation d'alcool ou l'usage de la drogue, s'enivre tellement que son comportement devient antisocial ou violent. Mais, bien qu'on puisse lui reprocher de s'être enivré, je ne vois aucune raison de présumer que ses actes étaient volontaires et qu'ils étaient intentionnels au sens pertinent. À toute conduite répréhensible devrait correspondre une infraction criminelle. Il n'appartient toutefois pas aux juges de créer une infraction qui est appropriée dans les circonstances: cf. *Knuller (Publishing, Printing & Promotions) Ltd. v. D.P.P.*, [1973] A.C. 435, aux pp. 457, 458, 464, 465 et 490). C'est au législateur de le faire.

Deuxièmement, même si les tribunaux pouvaient à bon droit faire une entorse aux principes au nom de la politique générale, il n'y a, autant que je sache, aucune preuve démontrant que l'exigence artificielle d'une intention spécifique est vraiment nécessaire pour protéger la société.

Selon moi, l'application sans restriction du principe fondamental de la *mens rea* ne créerait pas en droit criminel une immense lacune qui compromettrait la protection de la société. Cela s'explique de plusieurs façons. Dans la mesure où l'intoxication ne fait que diminuer les inhibitions, supprimer la retenue ou provoquer une confiance en soi ou une agressivité inhabituelles, un accusé ne saurait s'en prévaloir, car de tels effets n'ont rien à voir avec l'exigence d'une *mens rea* en matière de conduite

1988 CanLII 22 (SCC)

be of no avail to an accused who got drunk in order to gain the courage to commit a crime or to aid in his defence. Thirdly, one can trust in the good sense of the jury and that of our trial judges to weigh all the evidence in a fair and responsible manner, and they are unlikely to acquit too readily those who have committed offences while intoxicated.

The High Court of Australia held in *O'Connor*, *supra*, that the distinction between specific and general intent should not be followed and that in all cases, evidence of drunkenness should be left with the jury along with all other evidence relative to the issue of intent. The New Zealand Court of Appeal also rejected the artificial specific intent distinction: *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610. In that case, McCarthy P. gave the judgment of the Court and stated at p. 614 in relation to the correct interpretation of *Director of Public Prosecutions v. Beard*, [1920] A.C. 479:

(1) The quotations from Lord Birkenhead set out above refer to "specific" intents. The use of this adjective has of recent years been often criticised as suggesting the existence of a distinction between the Crown's burden in those cases when the general intent involved in proof of mens rea is necessary, on the one hand, and in those when the statute prescribes a particular intent on the other. But we cannot accept that Lord Birkenhead intended any such distinction. He also said:

"I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—eg wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea. Drunkenness, rendering a person incapable of the intent, would be an

volontaire et intentionnelle ou insouciante. De même, un accusé ne pourrait invoquer l'intoxication s'il s'était enivré afin de se donner le courage de commettre un crime ou pour faciliter sa défense. Troisièmement, on peut compter sur le bon sens du jury et de nos juges du procès pour peser la totalité de la preuve d'une manière équitable et impartiale et il est peu probable qu'ils acquittent trop facilement ceux qui commettent des infractions en état d'ébriété.

La Haute Cour d'Australie a conclu dans l'arrêt *O'Connor*, précité, qu'il ne fallait pas continuer à faire une distinction entre l'intention spécifique et l'intention générale et que, dans tous les cas, la preuve d'ivresse devrait être soumise au jury avec tous les autres éléments de preuve se rapportant à la question de l'intention. La Cour d'appel de la Nouvelle-Zélande a également rejeté cette distinction artificielle: *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610. Dans cette affaire-là, le président McCarthy a prononcé le jugement de la Cour et a dit, à la p. 614, relativement à l'interprétation à donner à l'arrêt *Director of Public Prosecutions v. Beard*, [1920] A.C. 479:

[TRADUCTION] (1) Les citations de lord Birkenhead reproduites ci-dessus parlent d'intentions «spécifiques». Au cours des dernières années on a souvent critiqué l'emploi de cet adjectif parce qu'il laisse entendre l'existence d'une distinction entre la charge de la preuve qui incombe au ministère public dans les cas où l'intention générale doit nécessairement être présente pour prouver la *mens rea* d'une part et dans ceux où la loi prescrit une intention particulière d'autre part. Nous ne pouvons toutefois pas admettre que lord Birkenhead ait voulu établir une telle distinction, puisqu'il a dit en outre:

«Je ne crois pas que le principe de droit déduit de cette jurisprudence plus ancienne constitue une exception qui s'applique uniquement aux cas où il faut prouver une intention spécifique pour qu'il y ait perpétration de l'infraction plus grave, p. ex. blesser avec l'intention d'infliger des lésions corporelles graves ou de tuer. Certes, l'intention spécifique doit être démontrée dans ces cas-là afin d'établir la perpétration du crime en question, mais, en dernière analyse, cela n'est que conforme aux règles de droit ordinaires applicables aux actes criminels car, d'une manière générale (et mis à part certaines infractions spéciales), nul ne peut être déclaré coupable d'un crime à moins d'avoir eu la *mens rea*. L'ivresse rendant une personne incapable de former l'intention serait un moyen de défense, comme

1988 CanLII 22 (SCC)

1407

answer, as it is for example in a charge of attempted suicide" (ibid., 504).

So whether it be a general or a particular intent the burden is the same; the Crown must prove the intent required by the crime alleged.

(Compare *R. v. Roulston*, [1976] 2 N.Z.L.R. 644 (N.Z.C.A.), at pp. 653-54, holding the issue to be open in the light of *Majewski*, *supra*.)

As counsel for the appellant submits:

There has been no empirical evidence to indicate that during the brief period of ten to fifteen years, that the Canadian and English Courts have experimented with the rule in *Majewski* and *Leary*, that there has been a reduction in the incidence of intoxicated offenders. Nor is there empirical evidence that the incidence of intoxicated offenders is greater in Australia, and particularly in the State of Victoria, where the rule has long been eschewed (see the comments of Mr. Justice Stephen in *Regina v. O'Connor*, *supra*, at pp. 99-100 and of Mr. Justice Wilson at p. 139). More importantly, there was no evidence before the House of Lords in 1976 in *Majewski* or before this Honourable Court in 1970 in *Perrault* and in 1977 in *Leary* to the effect that the pre-existing common law was not functioning properly in this area.

The experience in New Zealand and Australia, where the specific intent has been abandoned, suggests that the public will be adequately protected if the issue is left to the good sense of the jury. *O'Connor* was preceded in the State of Victoria by *R. v. Keogh*, [1964] V.R. 400. In *O'Connor*, Stephen J. explained as follows, at p. 358:

A distrust of jurors and an anxiety that they may too readily be persuaded to an acquittal if evidence of the result of self-induced intoxication, particularly by drugs other than alcohol, were allowed, may have formed some part of the public policy on which the decision rests. I may say at once that I have, of course, no experience of English juries: but I have of juries in New South Wales. Starke J., a most experienced judge in the hearing of criminal charges in Victoria, having had as well a long and distinguished career as an advocate, expressed him-

il l'est par exemple dans le cas d'une accusation de tentative de suicide» (*ibid.*, à la p. 504).

Qu'il s'agisse donc d'une intention générale ou d'une intention particulière, la charge de la preuve demeure la même: le ministère public doit prouver l'intention requise comme élément du crime reproché.

(Comparer *R. v. Roulston*, [1976] 2 N.Z.L.R. 644 (N.Z.C.A.), aux pp. 653 et 654, où il a été décidé que, compte tenu de la décision *Majewski*, précitée, la question demeurait entière.)

Comme le fait valoir l'avocat de l'appelant:

[TRADUCTION] Il n'y a aucune preuve empirique indiquant que, pendant la brève période d'une dizaine ou d'une quinzaine d'années où les tribunaux canadiens et anglais ont fait des expériences fondées sur la règle établie dans les arrêts *Majewski* et *Leary*, on a assisté à une diminution du nombre d'infractions commises en état d'ébriété, pas plus qu'il n'existe une preuve empirique que ces infractions sont plus nombreuses en Australie, et particulièrement dans l'État de Victoria, où la règle n'est plus suivie depuis longtemps (voir les observations du juge Stephen dans l'arrêt *Regina v. O'Connor*, précité, aux pp. 99 et 100, et celles du juge Wilson, à la p. 139). Plus important encore, on n'avait produit ni devant la Chambre des lords en 1976 dans l'affaire *Majewski* ni devant la Cour suprême du Canada en 1970 dans l'affaire *Perrault* et en 1977 dans l'affaire *Leary* aucune preuve établissant que la *common law* préexistante fonctionnait mal dans ce domaine.

D'après ce qui a été constaté en Nouvelle-Zélande et en Australie, pays dans lesquels l'intention spécifique a été abandonnée, le public sera adéquatement protégé si l'on s'en remet au bon sens du jury. L'arrêt *O'Connor* a été précédé dans l'État de Victoria par la décision *R. v. Keogh*, [1964] V.R. 400. Dans l'arrêt *O'Connor*, le juge Stephen a expliqué, à la p. 358:

[TRADUCTION] Une méfiance envers les jurés et la crainte qu'ils ne se laissent trop facilement persuader de rendre un verdict d'acquittement si on admettait la preuve du résultat de l'intoxication volontaire, notamment au moyen de drogues autre que l'alcool, ont pu motiver en partie la politique générale sur laquelle repose la décision. Je m'empresse de signaler que je n'ai bien entendu aucune expérience des jurys anglais; je connais cependant ceux de Nouvelle-Galles du Sud. Le juge Starke, un juge de très grande expérience en matière pénale dans l'État de Victoria et en outre un avocat ayant eu une longue carrière distinguée, s'est

1988 CanLII 22 (SCC)

self in the present case in relation to the impact of evidence of intoxication upon Victorian jurors. He said:

> "I, of course, have no knowledge of how English juries react. But over nearly forty years' experience in this State I have found juries to be very slow to accept a defence based on intoxication. I do not share the fear held by many in England that if intoxication is accepted as a defence as far as general intent is concerned the floodgates will open and hordes of guilty men will descend on the community."

I share his views, as if they had been expressed about jurors in New South Wales. In my opinion, properly instructed jurors would be scrupulous and not indulgent in deciding an issue of voluntariness or of intention. Indeed, I am inclined to think that they may tend to think that an accused who had taken alcohol and particularly other drugs to the point of extreme intoxication had brought on himself what flowed from that state of intoxication.

The empirical evidence is to the same effect: see George Smith J., "Footnote to O'Connor's Case" (1981), 5 *Crim. L.J.* 270, reviewing the effects of the *O'Connor* decision in Australia, and concluding, after review of over 500 trials held in the District Court of New South Wales, that the actual impact on the acquittal rate was minimal (at p. 277):

> Certainly my inquiries would indicate that the decision in *O'Connor*'s case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap.

My comment in *R. v. Hill*, [1986] 1 S.C.R. 313, at p. 334, although made in a different context, bears repeating here: "I have the greatest of confidence in the level of intelligence and plain common sense of the average Canadian jury sitting on a criminal case. Juries are perfectly capable of sizing the matter up." In *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 792, which dealt with the requirement in s. 244(4) of the *Criminal Code* that the jury be instructed on the issue of the honesty of the accused's mistaken belief in consent to consider the presence or absence of a reasonable grounds of that belief, McIntyre J. stated as follows:

prononcé en l'espèce sur l'effet d'une preuve d'intoxication sur les jurés de l'État de Victoria. Il a dit:

> «Je ne sais, bien sûr, comment réagissent les jurys anglais. Toutefois, une expérience de presque quarante ans dans cet État m'a permis de remarquer que les jurys ne retiennent pas très volontiers une défense fondée sur l'intoxication. Je ne partage pas la crainte de plusieurs en Angleterre que, si l'intoxication était acceptée comme moyen de défense en ce qui concerne l'intention générale, cela ouvrirait les vannes et des flots de coupables s'abattraient sur la société.»

Je partage le point de vue du juge Starke comme s'il l'avait exprimé au sujet des jurés de Nouvelle-Galles du Sud. À mon avis, des jurés ayant reçu des directives appropriées, plutôt que de faire preuve d'indulgence, se montreraient scrupuleux en décidant si un acte a été commis volontairement ou intentionnellement. De fait, j'incline à penser qu'ils peuvent tendre à croire qu'un accusé qui, à force de consommer de l'alcool et, particulièrement, d'autres drogues, avait atteint un état d'extrême intoxication s'était infligé à lui-même les conséquences de cette intoxication.

La preuve empirique va dans le même sens: voir les observations du juge George Smith qui, dans «Footnote to O'Connor's Case» (1981), 5 *Crim. L.J.* 270, fait une revue des effets de l'arrêt *O'Connor* en Australie puis, après avoir examiné plus de 500 procès tenus devant la Cour de district de la Nouvelle-Galles du Sud, conclut que son incidence réelle sur le taux d'acquittement était minime, à la p. 277:

> [TRADUCTION] Certes, mes enquêtes tendent à indiquer que l'arrêt *O'Connor*, loin d'ouvrir les vannes, a permis tout au plus qu'une goutte occasionnelle s'échappe du robinet.

Ce que j'ai dit dans l'arrêt *R. c. Hill*, [1986] 1 R.C.S. 313, à la p. 334, bien que le contexte fût différent, vaut la peine d'être répété ici: «J'ai la plus grande confiance dans le niveau d'intelligence et de simple bon sens du jury canadien moyen qui siège dans une affaire criminelle. Les jurys sont parfaitement capables d'évaluer la question.» Dans l'arrêt *R. c. Bulmer*, [1987] 1 R.C.S. 782, à la p. 792, qui porte sur l'exigence du par. 244(4) du *Code criminel*, savoir qu'on doit dire au jury que, lorsqu'il examine si l'accusé croyait sincèrement mais de façon erronée au consentement, il doit examiner si cette croyance est justifiée par des motifs raisonnables, le juge McIntyre écrit:

1988 CanLII 22 (SCC)

This section, in my view, does not change the law as applied in *Pappajohn*. It does not require that the mistaken belief be reasonable or reasonably held. It simply makes it clear that in determining the issue of the honesty of the asserted belief, the presence or absence of reasonable grounds for the belief are relevant factors for the jury's consideration. This approach was, I suggest, foreshadowed in *Pappajohn* by Dickson J., at pp. 155-56, where he said:

> Perpetuation of fictions does little for the jury system or the integrity of criminal justice. The ongoing debate in the courts and learned journals as to whether mistake must be reasonable is conceptually important in the orderly development of the criminal law, but in my view, practically unimportant because the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable. The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although "reasonable grounds" is not a precondition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defence. The reasonableness, or otherwise, of the accused's belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking.

Cet article, à mon avis, ne modifie pas le droit appliqué dans l'arrêt *Pappajohn*. Il n'exige pas que la croyance erronée soit raisonnable ou jugée raisonnable. Il établit simplement de manière précise que, dans l'examen de la question de la sincérité de la croyance, la présence ou l'absence de motifs raisonnables à l'appui de cette croyance sont des facteurs pertinents que le jury doit prendre en considération. Je suis d'avis que cette position avait été annoncée dans l'arrêt *Pappajohn* par le juge Dickson aux pp. 155 et 156, lorsqu'il a dit:

> Ni le système du jury ni l'intégrité de la justice criminelle ne sont bien servis par la perpétuation de fictions. Le débat actuel dans les tribunaux et les journaux spécialisés sur la question de savoir si l'erreur doit être fondée, est important sur le plan conceptuel pour l'évolution harmonieuse du droit criminel, mais, à mon avis, c'est sans importance pratique, parce qu'il est peu probable que le jury croie l'accusé qui déclare être dans l'erreur à moins que celle-ci ne soit, aux yeux du jury, fondée sur des motifs raisonnables. Le jury devra examiner le caractère raisonnable de tous les motifs qui appuient le moyen de défense d'erreur ou que l'on affirme tel. Bien que des «motifs raisonnables» ne constituent pas une condition préalable au moyen de défense de croyance sincère au consentement, ils déterminent le poids qui doit lui être accordé. Le caractère raisonnable ou non de la croyance de l'accusé n'est qu'un élément qui appuie ou non l'opinion que la croyance existait en réalité et que, par conséquent, l'intention était absente.

III

Stare Decisis

The real issue in this appeal, it seems to me, is whether the Court should now overrule *Leary*. Let me say immediately that, even if a case were wrongly decided, certainty in the law remains an important consideration. There must be compelling circumstances to justify departure from a prior decision. On the other hand, it is clear that this Court may overrule its own decisions and indeed, it has exercised that discretion on a number of occasions. See *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527, citing the following cases for the proposition that the Court may overturn a prior decision: *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 212; *Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; *Peda v. The Queen*, [1969] S.C.R. 905, at

III

Stare decisis

La véritable question en litige, à ce qu'il me semble, est de savoir si la Cour devrait maintenant renverser l'arrêt *Leary*. Je souligne immédiatement que, même si une affaire a été décidée de façon erronée, le principe de la certitude en droit demeure une considération importante. Il doit en effet y avoir des circonstances impérieuses pour justifier qu'on s'écarte d'un précédent. D'un autre côté, il est évident que cette Cour peut renverser ses propres arrêts, pouvoir discrétionnaire qu'elle a d'ailleurs exercé à plusieurs reprises. Voir *Ministre des Affaires indiennes et du Nord canadien c. Ranville*, [1982] 2 R.C.S. 518, à la p. 527, où l'on cite la jurisprudence suivante qui confirme que la Cour peut renverser un de ses propres arrêts: *Reference Re The Farm Products Marketing Act*, [1957] R.C.S. 198, à la p. 212; *Binus v. The*

1988 CanLII 22 (SCC)

p. 911; *Barnett v. Harrison*, [1976] 2 S.C.R. 531, at p. 559; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at p. 161; *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43, at p. 57; *Bell v. The Queen*, [1979] 2 S.C.R. 212, at pp. 219-20.

Cases in which the Court has actually exercised its discretion and acted to overrule, in addition to *Ranville, supra*, include the following: *Paquette v. The Queen*, [1977] 2 S.C.R. 189, at p. 197, overruling *Dunbar v. The King* (1936), 67 C.C.C. 20 (S.C.C.); *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, at p. 661, overruling *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 830.

There are at least four separate factors which find support in the jurisprudence of the Court which in my submission lead to the conclusion that *Leary* should be overruled.

A. *Canadian Charter of Rights and Freedoms*

Since *Leary* was decided, the *Canadian Charter of Rights and Freedoms* has come into force. This Court has held that legislation which imposes the sanction of imprisonment without proof of a blameworthy state of mind violates the guarantee of fundamental justice contained in s. 7 of the *Charter* and must be struck down unless it can meet the exacting test of s. 1 (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636).

The appellant submits that *Leary* runs counter to s. 7 by providing that intoxication is no defence to a crime of general intent. In circumstances where the requisite mental intent is lacking due to an intoxicated condition, a general intent offence is converted into one of absolute liability in which proof of the commission of the *actus reus* by itself mandates conviction. It is also submitted that *Leary* runs counter to the presumption of innocence and the right to a fair hearing as guaranteed

Queen, [1967] R.C.S. 594, à la p. 601; *Peda v. The Queen*, [1969] R.C.S. 905, à la p. 911; *Barnett c. Harrison*, [1976] 2 R.C.S. 531, à la p. 559; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, à la p. 161; *A.V.G. Management Science Ltd. c. Barwell Developments Ltd.*, [1979] 2 R.C.S. 43, à la p. 57; *Bell c. La Reine*, [1979] 2 R.C.S. 212, aux pp. 219 et 220.

Parmi les cas dans lesquels la Cour a en fait exercé son pouvoir discrétionnaire de manière à renverser certains de ses arrêts antérieurs, figurent, outre l'arrêt *Ranville*, précité, les arrêts suivants: *Paquette c. La Reine*, [1977] 2 R.C.S. 189, à la p. 197, renversant l'arrêt *Dunbar v. The King* (1936), 67 C.C.C. 20 (C.S.C.); *McNamara Construction (Western) Ltd. c. La Reine*, [1977] 2 R.C.S. 654, à la p. 661, renversant *Farwell v. The Queen* (1894), 22 R.C.S. 553; *Vetrovec c. La Reine*, [1982] 1 R.C.S. 811, à la p. 830.

Il y a au moins quatre facteurs distincts qui se dégagent de la jurisprudence de cette Cour qui, selon moi, mène à la conclusion que l'arrêt *Leary* doit être renversé.

A. *La Charte canadienne des droits et libertés*

Depuis que l'arrêt *Leary* a été rendu, la *Charte canadienne des droits et libertés* est entrée en vigueur. Cette Cour a jugé qu'une loi qui prévoit une peine d'emprisonnement sans exiger une preuve d'un état d'esprit blâmable viole la garantie de justice fondamentale énoncée à l'art. 7 de la *Charte* et doit en conséquence être invalidée, à moins qu'elle ne puisse satisfaire au critère sévère de l'article premier (voir *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, *R. c. Vaillancourt*, [1987] 2 R.C.S. 636).

L'appelant prétend que l'arrêt *Leary* va à l'encontre de l'art. 7 en disposant que l'ivresse ne constitue pas une défense dans le cas d'un crime d'intention générale. Donc, lorsque l'intention requise est manquante pour cause d'ébriété, une infraction d'intention générale se transforme en infraction de responsabilité absolue, de sorte que la preuve de la perpétration de l'*actus reus* suffit pour qu'une déclaration de culpabilité s'impose. On allègue en outre que, dans la mesure où la

1988 CanLII 22 (SCC)

by s. 11(*d*) of the *Charter*, in so far as wrongful intent is irrebuttably presumed upon the showing of intoxication.

preuve d'intoxication fait naître une présomption irréfragable d'intention coupable, l'arrêt *Leary* est incompatible avec la présomption d'innocence et avec le droit à un procès équitable énoncés à l'al. 11*d*) de la *Charte*.

In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J. held, at p. 603, that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution." This principle supports the proposition that *Leary* ought to be reconsidered in light of the *Charter*.

Dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, le juge McIntyre a conclu à la p. 603 que «le judiciaire devrait expliquer et développer des principes de *common law* d'une façon compatible avec les valeurs fondamentales enchâssées dans la Constitution». Ce principe appuie la proposition selon laquelle il y a lieu de réexaminer l'arrêt *Leary* à la lumière de la *Charte*.

The special mandate of the *Charter* has been found by the Court to require reconsideration of its own past decisions, and, where necessary, to overrule those authorities which fail to reflect the *Charter*'s values: see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 333-34, overruling *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, on the meaning of "freedom of religion"; *R. v. Therens*, [1985] 1 S.C.R. 613, at pp. 639-40 overruling *Chromiak v. The Queen*, [1980] 1 S.C.R. 471, on the meaning of "detention"; *Re B.C. Motor Vehicle Act, supra*, departing from *Duke v. The Queen*, [1972] S.C.R. 917, on the meaning of "fundamental justice"; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, adopting the minority opinion in *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, in preference to that of the majority.

La Cour a conclu que la *Charte*, de par son mandat spécial, l'oblige à réexaminer ses propres arrêts antérieurs et, au besoin, à renverser ceux qui se révèlent non conformes aux valeurs consacrées dans la *Charte*: voir p. ex. *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, aux pp. 333 et 334, renversant l'arrêt *Robertson and Rosetanni v. The Queen*, [1963] R.C.S. 651 quant au sens de l'expression «liberté de religion»; *R. c. Therens*, [1985] 1 R.C.S. 613, aux pp. 639 et 640, renversant l'arrêt *Chromiak c. La Reine*, [1980] 1 R.C.S. 471 quant au sens du mot «détention»; *Renvoi: Motor Vehicle Act de la C.-B.*, précité, s'écartant de l'arrêt *Duke c. La Reine*, [1972] R.C.S. 917, quant au sens de «justice fondamentale»; *R. c. Smith (Edward Dewey)*, [1987] 1 R.C.S. 1045, adoptant l'opinion de la minorité dans *Miller et Cockriell c. La Reine*, [1977] 2 R.C.S. 680, de préférence à celle de la majorité.

In *Leary*, I expressed the opinion that the fundamental rationale for the *mens rea* presumption could be framed in the following terms, at p. 34:

> The notion that a court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems. It is founded upon respect for the person and for the freedom of human will. A person is accountable for what he wills. When, in the exercise of the power of free choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less. But, to be criminal, the wrongdoing must have been consciously committed. To subject the offender to pun-

Dans l'arrêt *Leary*, j'ai déclaré que la raison d'être fondamentale de la présomption de *mens rea* pouvait être ainsi formulée, à la p. 34:

> Le principe selon lequel un tribunal ne devrait conclure à la culpabilité d'une personne en droit criminel que si elle était mal intentionnée existe dans tous les systèmes de droit pénal civilisés. Il repose sur le respect de la personne et la notion de libre arbitre. Toute personne est responsable de sa volonté. Lorsqu'en exerçant son libre choix, un membre de la société adopte une conduite nuisible ou socialement inacceptable, contraire au droit criminel, il doit accepter les peines qu'impose la loi pour décourager de tels comportements. La justice n'exige rien de moins. Cependant, pour être qualifié de criminel, l'acte reproché doit avoir été accompli consciemment. Pour qu'un délinquant soit passible d'une peine, le crime

1988 CanLII 22 (SCC)

ishment, a mental element as well as a physical element is an essential concomitant of the crime. The mental state basic to criminal liability consists in most crimes in either (a) an intention to cause the *actus reus* of the crime, *i.e.* an intention to do the act which constitutes the crime in question, or (b) foresight or realization on the part of the person that his conduct will probably cause or may cause the *actus reus*, together with assumption of or indifference to a risk, which in all of the circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness.

In my view, that same principle is now given constitutional force in *Re B.C. Motor Vehicle Act*, *supra* and *Vaillancourt*, *supra*. In *Re B.C. Motor Vehicle Act*, the Court held, at p. 514, that "absolute liability in penal law offends the principles of fundamental justice." In *Vaillancourt*, Lamer J. stated that *Re B.C. Motor Vehicle Act* "elevated *mens rea* from a presumed element in *Sault Ste. Marie*, *supra*, to a constitutionally required element" (p. 652). While the Court has not yet dealt directly with the extent to which objective foreseeability may suffice for the imposition of criminal liability (*Vaillancourt*, at pp. 653-54), that issue is not raised in the present context.

The effect of the majority holding in *Leary* is to impose a form of absolute liability on intoxicated offenders, which is entirely inconsistent with the basic requirement for a blameworthy state of mind as a prerequisite to the imposition of the penalty of imprisonment mandated by the above-cited authorities. I agree with the observation of Professor Stuart in *Canadian Criminal Law* (2nd ed. 1987) that s. 7 of the *Charter* mandates the reversal of *Leary* and the assertion of "the fundamental principles of voluntariness and fault" in relation to intoxication and the criminal law (at p. 378). If the constitutional guarantee empowers the court to strike down legislation as in the two cases cited above, surely it provides a sufficient basis for

doit nécessairement comporter un élément mental et un élément matériel. L'état mental requis pour qu'il y ait responsabilité pénale consiste dans la plupart des cas dans a) l'intention d'accomplir l'*actus reus* du crime, c'est-à-dire l'intention d'accomplir l'acte qui constitue le crime en question, ou dans b) le fait que la personne prévoit ou sait que son comportement entraînera probablement ou pourra entraîner l'*actus reus*, tout en acceptant le risque ou en y étant indifférente alors que, dans les circonstances, le risque est considérable ou injustifiable. Cet état d'esprit est parfois qualifié d'indifférence à l'égard des conséquences de l'acte.

À mon avis, ce même principe est maintenant constitutionnalisé dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, et l'arrêt *Vaillancourt*, précité. Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, la Cour a dit, à la p. 514, que «la responsabilité absolue en droit pénal contrevient aux principes de justice fondamentale». Dans l'arrêt *Vaillancourt*, le juge Lamer a affirmé que «de l'élément présumé qu'elle était dans l'arrêt *Sault Ste-Marie*, précité, la *mens rea* est ainsi devenue un élément requis par la Constitution» (à la p. 652) dans le *Renvoi: Motor Vehicle Act de la C.-B.* Bien que la Cour ne se soit pas encore prononcée directement sur la mesure dans laquelle la prévisibilité objective peut suffire pour fonder une conclusion à la responsabilité criminelle (*Vaillancourt*, aux pp. 653 et 654), cette question-là ne se pose pas dans le présent contexte.

La décision de la majorité dans l'affaire *Leary* a pour effet d'imposer à ceux qui commettent une infraction en état d'ébriété une sorte de responsabilité absolue, ce qui est tout à fait inconciliable avec l'exigence fondamentale, posée par la jurisprudence susmentionnée, de l'existence d'un état d'esprit blâmable comme condition pour que soit infligée une peine d'emprisonnement. J'abonde dans le sens du professeur Stuart qui dit dans *Canadian Criminal Law* (2nd ed. 1987) que l'art. 7 de la *Charte* commande le renversement de l'arrêt *Leary* et l'application des [TRADUCTION] «principes fondamentaux de l'intention et de la faute» relativement à l'intoxication en droit criminel (à la p. 378). Si la garantie constitutionnelle investit la Cour du pouvoir d'invalider des lois comme elle l'a fait dans les deux arrêts précités, elle lui permet certainement de renverser un de ses

1988 CanLII 22 (SCC)

1413

overruling a prior decision of the Court which fails to respect constitutionally entrenched values.

The majority holding in *Leary* also runs counter to the s. 11(*d*) right to be presumed innocent until proven guilty. With respect to crimes of general intent, guilty intent is in effect presumed upon proof of the fact of intoxication. Moreover, the presumption of guilt created by the *Leary* rule is irrebuttable. In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Court stated, at p. 132:

> . . . a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*).

In *Vaillancourt*, Lamer J. stated the following, at pp. 654-55:

> . . . before an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the *Charter*. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(*d*). [Emphasis added.]

The same argument made in the context of s. 7 can be made in relation to s. 11(*d*). By providing that intoxication is no defence to a crime of general intent, *Leary* renders the offence one of absolute liability and runs counter to the presumption of innocence by presuming an essential element required by s. 7 upon the proof of the fact of intoxication.

In my view, the *Leary* rule cannot be upheld by reference to s. 1, as it cannot survive the "proportionality" inquiry. While the protection of the public, said to underlie the *Leary* rule, could serve as an important objective, in my view the *Leary* rule does not achieve that objective in a manner consistent with the proportionality test of *Oakes*, *supra*. *Oakes* requires that "the measures adopted

arrêts antérieurs qui ne respecte pas des valeurs enchâssées dans la Constitution.

De plus, la décision de la majorité dans l'affaire *Leary* va à l'encontre du droit garanti par l'al. 11*d*) d'être présumé innocent tant qu'on n'est pas déclaré coupable. En ce qui concerne les crimes d'intention générale, l'intention coupable se présume en effet du moment que l'ivresse est prouvée. Au surplus, la présomption de culpabilité créée par la règle posée dans l'arrêt *Leary* est irréfragable. Dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, la Cour a dit, à la p. 132:

> . . . une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11*d*).

Dans l'arrêt *Vaillancourt*, le juge Lamer a dit, aux pp. 654 et 655:

> . . . pour qu'un accusé soit déclaré coupable d'une infraction, le juge des faits doit être convaincu hors de tout doute raisonnable de l'existence de tous les éléments essentiels de l'infraction. Ces éléments essentiels comprennent non seulement ceux énoncés par le législateur dans la disposition qui crée l'infraction, mais également ceux requis par l'art. 7 de la *Charte*. Toute disposition créant une infraction qui permet de déclarer un accusé coupable malgré l'existence d'un doute raisonnable quant à un élément essentiel porte atteinte à l'art. 7 et à l'al. 11*d*). [Je souligne.]

L'argument invoqué dans le contexte de l'art. 7 peut également être soulevé relativement à l'al. 11*d*). En établissant que l'ivresse ne constitue pas une défense dans le cas d'un crime d'intention générale, l'arrêt *Leary* fait de ce crime une infraction de responsabilité absolue et détruit la présomption d'innocence en présumant, dès lors qu'on apporte une preuve d'intoxication, l'existence d'un élément essentiel requis par l'art. 7.

À mon avis, la règle énoncée dans l'arrêt *Leary* ne saurait être maintenue aux termes de l'article premier, car elle ne satisfait pas au critère de «proportionnalité». Quoique la protection du public, but qui sous-tendait cette règle, puisse constituer un objectif important, j'estime que ladite règle n'atteint pas cet objectif d'une manière conforme au critère de proportionnalité formulé

1988 CanLII 22 (SCC)

must be carefully designed to achieve the objective in question." As I have noted, there is no agreement in the case law as to how to distinguish between crimes of "general intent" and crimes of "specific intent". This distinction was plainly not in the minds of the *Code* drafters, and the mental elements of many crimes are not readily classified into one category or the other. There is no rational reason for protecting the public against some drunken offenders but not against others, particularly where the distinction is not based upon the gravity of the offence or the availability of included offences. If the public protection does require special measures, that should be accomplished through comprehensive legislation rather than *ad hoc* judicial re-casting of some offences. For a recent review of possible legislative schemes, see Quigley, "Reform of the Intoxication Defence" (1987), 33 *McGill L.J.* 1.

The *Leary* rule in effect treats the deliberate act of becoming intoxicated as culpable in itself, but inflicts punishment measured by the unintended consequences of becoming intoxicated. Punishment acts as a deterrent where the conduct is intended or foreseen. There is no evidence to support the assertion that the *Leary* rule deters the commission of unintended crimes. Hence, there is no warrant for violating fundamental principles and convicting those who would otherwise escape criminal liability.

The *Leary* rule fails to satisfy the second branch of the proportionality test as well, namely, that the means chosen should impair as little as possible the right or freedom in question. In general intent offences, the jury is to be instructed to excise from their minds any evidence of drunkenness with the result that the Crown, because the accused is intoxicated, is relieved of proving *mens rea*, thereby placing the intoxicated person in a worse posi-

dans l'arrêt *Oakes*, précité. Suivant cet arrêt, «les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question». Or, comme je l'ai déjà fait remarquer, on ne peut dégager de la jurisprudence aucun consensus permettant de distinguer les crimes «d'intention générale» des crimes «d'intention spécifique». Il s'agit là, de toute évidence, d'une distinction qui n'a pas été envisagée par les rédacteurs du *Code* et l'élément moral d'un bon nombre de crimes ne peut pas être facilement rangé dans une catégorie ou dans l'autre. Il n'y a aucune raison logique de protéger le public contre certains délinquants en état d'ébriété mais non contre d'autres, particulièrement lorsque la distinction ne repose ni sur la gravité de l'infraction ni sur l'existence d'infractions comprises. Si des mesures spéciales s'imposent pour la protection du public, elles doivent être prises au moyen d'un texte législatif détaillé plutôt que par une reformulation de certaines infractions par les tribunaux pour faire face à des situations précises. Pour une étude récente des régimes législatifs possibles, voir Quigley, «Reform of the Intoxication Defence» (1987), 33 *McGill L.J.* 1.

La règle énoncée dans l'arrêt *Leary* a en réalité pour effet de traiter comme coupable en soi l'acte qui consiste à s'enivrer délibérément mais, en même temps, elle inflige une peine en fonction des conséquences non intentionnelles de l'ivresse. La peine joue un rôle dissuasif lorsqu'il s'agit d'une conduite intentionnelle ou prévue. Il n'existe aucune preuve toutefois pour appuyer l'assertion que la règle énoncée dans l'arrêt *Leary* sert à prévenir les crimes commis non intentionnellement. Pourtant rien ne justifie qu'on porte atteinte à des principes fondamentaux et qu'on déclare coupable ceux qui échapperaient normalement à la responsabilité criminelle.

La règle énoncée dans l'arrêt *Leary* ne satisfait pas non plus au second volet du critère de proportionnalité, savoir que le moyen choisi doit porter le moins possible atteinte au droit ou à la liberté en question. Dans le cas d'infractions d'intention générale, on doit dire aux jurés de faire abstraction de toute preuve d'ivresse, ce qui a pour conséquence que le ministère public, du fait de l'ivresse de l'accusé, est dispensé d'avoir à prouver la *mens*

1988 CanLII 22 (SCC)

tion than a sober person. Alternatively, the jury is required to examine the mental state of the accused, without reference to the alcohol ingested, and consequently find a fictional intent. In my view, imposition of this form of absolute liability goes well beyond what is required to protect the public from drunken offenders. As I have already indicated, striking down the artificial rule which precludes the trier of fact from considering evidence of intoxication in relation to *mens rea* has not produced an increase in the threat to public safety from drunken offenders in Australia, and there is no evidence to suggest that it would do so in Canada.

Finally, it is my view that there is a disproportionality between the effects of *Leary* on rights protected by the *Charter* and the objective of public safety. To paraphrase Lamer J. in *Re B.C. Motor Vehicle Act*, *supra*, at p. 521, it has not been demonstrated that risk of imprisonment of a few innocent persons is required to attain the goal of protecting the public from drunken offenders.

As stated in *R. v. Holmes*, [1988] 1 S.C.R. 914, at p. 940: "This effect, given the range of alternative legislative devices available to Parliament, is too deleterious to be justified as a reasonable limit under s. 1 of the *Charter*. Simply put, the provision exacts too high a price to be justified in a free and democratic society."

B. *Leary Attenuated by Subsequent Cases*

Since *Leary* there have been developments in the jurisprudence of the Court which, in my submission, seriously undermine the view taken by the majority in *Leary*. The Court has held that where the holding of a case has been "attenuated" by subsequent decisions, it may be appropriate to overrule that earlier decision: *Reference re the*

rea, ce qui désavantage la personne en état d'ébriété par rapport à celle qui ne l'est pas; ou bien encore, on exige du jury qu'il examine l'état mental de l'accusé, sans tenir compte de l'alcool qu'il a pu consommer, ce qui l'oblige à conclure à l'existence d'une intention fictive. À mon avis, en retenant cette forme de responsabilité absolue, on dépasse de loin ce qui est nécessaire pour protéger le public contre les délinquants en état d'ébriété. L'invalidation de la règle artificielle qui vient empêcher le juge des faits de prendre en considération une preuve d'intoxication relativement à la question de la *mens rea*, je le répète, n'a pas entraîné en Australie une augmentation du danger que présentent les délinquants ivres pour la sécurité du public, et rien ne porte à croire qu'il en serait autrement au Canada.

Finalement, j'estime qu'il y a disproportion entre les effets qu'a l'arrêt *Leary* sur les droits protégés par la *Charte* et l'objectif de la sécurité publique. Pour paraphraser ce qu'a dit le juge Lamer dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, à la p. 521, on n'a pas démontré qu'il est nécessaire pour atteindre le but de protéger le public contre les délinquants en état d'ébriété de courir le risque d'emprisonner quelques personnes innocentes.

Comme le dit l'arrêt *R. c. Holmes*, [1988] 1 R.C.S. 914, à la p. 940: «Compte tenu de la gamme de mécanismes législatifs auxquels le législateur peut recourir, cet effet est trop néfaste pour être justifié comme limite raisonnable aux termes de l'article premier de la *Charte*. En somme, la disposition exige que l'on paie un prix trop élevé pour qu'elle soit justifiée dans une société libre et démocratique».

B. *L'atténuation des effets de l'arrêt Leary par la jurisprudence subséquente*

Depuis l'arrêt *Leary*, la jurisprudence de cette Cour a évolué d'une manière qui, à mon humble avis, ébranle sérieusement le point de vue adopté par la majorité dans cet arrêt-là. En effet, la Cour a jugé que dans un cas où un arrêt a été «atténué» par des décisions ultérieures, il peut convenir de renverser l'arrêt antérieur: *Renvoi relativement à*

1988 CanLII 22 (SCC)

Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198.

In my view, *Leary* has also been undermined quite independently of the *Charter*. The Court has consistently held that an honest but unreasonable mistaken belief in consent will negate the *mens rea* required for rape, indecent assault or sexual assault: see *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Bulmer*, *supra*, and *R. v. Robertson*, [1987] 1 S.C.R. 918, at pp. 939-40. While the reasonableness of the accused's belief is a factor for the jury to consider in determining whether or not the belief was honestly held, a mistaken belief in consent need not be reasonable.

The *Leary* rule fits most awkwardly with that enunciated in *Pappajohn*. Lower courts have held that in the light of *Leary*, where intoxication is a factor in inducing a mistaken belief in consent, the jury must be instructed that while an honest but unreasonable belief will negate *mens rea* (*Pappajohn*) they are to disregard the affect that intoxication might have had in inducing that mistake (*Leary*). In *R. v. Moreau* (1986), 26 C.C.C. (3d) 359 (Ont. C.A.), at pp. 386-87, Martin J.A. described the task of the jury as follows:

> It does not follow that the defence of honest belief in consent is unavailable on a charge of sexual assault to an accused who is voluntarily intoxicated. Where an issue arises on the evidence as to the accused's honest belief in consent, the defence of honest belief in consent must be put to the jury, notwithstanding the accused's self-induced intoxication. There may be a basis in the evidence for the accused's honest belief in consent apart altogether from his intoxication; there may even be reasonable grounds for that belief even though he was intoxicated. The intoxication may not be the cause of the mistaken belief. However, the accused cannot rely on his self-induced intoxication as the basis for his belief that the complainant consented. As Mayrand J.A. said in *R. v. Bresse, Vallières and Theberge* (1978), 48 C.C.C. (2d) 78 at p. 87, 7 C.R. (3d) 50 (Que. C.A.):

la Loi sur l'organisation du marché des produits agricoles, [1978] 2 R.C.S. 1198.

Selon moi, l'autorité de l'arrêt *Leary* a également été ébranlée tout à fait indépendamment de la *Charte*. Cette Cour a systématiquement conclu qu'une croyance sincère mais déraisonnable et erronée au consentement réduit à néant la *mens rea* requise pour le viol, l'attentat à la pudeur ou l'agression sexuelle: voir *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120, *Sansregret c. La Reine*, [1985] 1 R.C.S. 570, *R. c. Bulmer*, précité, et *R. c. Robertson*, [1987] 1 R.C.S. 918, aux pp. 939 et 940. Quoique le caractère raisonnable de la croyance de l'accusé soit un facteur que le jury doit prendre en considération en déterminant s'il s'agissait d'une croyance sincère, il n'est pas nécessaire qu'une croyance erronée au consentement soit raisonnable.

Or, la règle énoncée dans l'arrêt *Leary* cadre très mal avec celle énoncée dans l'arrêt *Pappajohn*. Certains tribunaux d'instance inférieure, se fondant sur l'arrêt *Leary*, ont conclu que dans un cas où l'ivresse est la cause d'une croyance erronée au consentement, il faut dire au jury qu'une croyance sincère mais déraisonnable réduit à néant la *mens rea* (l'arrêt *Pappajohn*), mais qu'on doit faire abstraction du rôle que l'ivresse a pu jouer dans cette erreur (l'arrêt *Leary*). Dans l'arrêt *R. v. Moreau* (1986), 26 C.C.C. (3d) 359 (C.A. Ont.), aux pp. 386 et 387, le juge Martin a ainsi décrit la tâche du jury:

> [TRADUCTION] Il ne s'ensuit pas qu'un accusé qui s'est enivré volontairement ne saurait opposer en défense à une accusation d'agression sexuelle la croyance sincère au consentement. Lorsque la preuve soulève une question quant à la croyance sincère de l'accusé au consentement, cette défense doit être présentée au jury, bien que l'accusé soit responsable de son intoxication. Il se peut en fait que, tout à fait indépendamment de l'ivresse, la preuve permette de conclure que l'accusé croyait sincèrement qu'il y avait eu consentement; il se peut même que l'accusé ait eu des motifs raisonnables d'y croire, en dépit de son intoxication. Celle-ci peut ne pas être la cause de la croyance erronée. L'accusé ne saurait toutefois invoquer son intoxication volontaire pour fonder sa croyance au consentement de la plaignante. Comme l'a dit le juge Mayrand dans l'arrêt *Pierre Bresse et autres c. R.*, [1978] C.A. 443, à la p. 452, 48 C.C.C. (2d) 78, 7 C.R. (3d) 50 (C.A. Qué.):

1988 CanLII 22 (SCC)

One must distinguish the case in which, because of one's voluntary inebriation, a man takes no account of the refusal manifested by a woman from the case in which a man, because of the ambiguous conduct of the woman, believes sincerely that she consented to sexual relations. This *error of fact committed for reasons other than one's voluntary inebriation* is, in my opinion, a valid ground of defence.

(Emphasis added.)

In those circumstances the jury is required to engage in the difficult, and perhaps somewhat artificial task, of putting out of their minds the evidence of intoxication on the issue whether the accused honestly believed that the complainant consented. The test is not whether a reasonable and sober person would have made the same mistake but whether *the accused* would have made the same mistake if he had been sober; see Glanville Williams, *Textbook on Criminal Law*, 2nd ed. (1983) at pp. 481-2. However, to hold that evidence of self-induced intoxication is relevant to the honesty of the accused's belief in consent where his belief is founded on his mistaken appreciation, due to intoxication, of the facts relating to the complainant's consent is, in my view, incompatible with the rule laid down in *Leary*, and would completely negate the policy rule that self-induced intoxication is not a defence in crimes of general intent.

In my view, the *Leary* qualification on the criminal law principle of general application with respect to mistake of fact unnecessarily and unduly complicates the jury's task. Indeed, I find it difficult to imagine how it is humanly possible to follow the jury instruction apparently mandated by the combination of *Leary* and *Pappajohn*. This confusing and anomalous result is entirely the product of the deviation from basic criminal law principles which occurred in *Leary* and accordingly there is much to support the view that it should be overruled.

The inconsistency between *Leary* and *Pappajohn* has not gone unnoticed in the literature. In *Canadian Criminal Law, supra*, at p. 378, Professor Stuart describes the collision between *Leary* and *Pappajohn* as a "glaring inconsistency". In "*Regina v. O'Connor: Mens Rea* Survives in Aus-

Mais il faut distinguer le cas où, à cause de son ébriété volontaire, un homme ne tient aucun compte du refus manifesté par une femme et le cas où un homme, à cause du comportement équivoque de la femme, croit sincèrement qu'elle consent à des rapports sexuels. Cette *erreur de fait commise pour des raisons autres que son ébriété volontaire* est à mon avis un moyen de défense valable.

(Les italiques sont à moi.)

Dans ces circonstances, les jurés sont obligés, si difficile et peut-être artificiel que cela puisse être, de chasser de leur esprit la preuve d'intoxication quand ils examinent la question de savoir si l'accusé croyait sincèrement au consentement de la plaignante. Le test consiste non pas à se demander si une personne raisonnable qui n'était pas en état d'ébriété aurait commis la même erreur, mais bien si *l'accusé* aurait commis la même erreur s'il n'avait pas été ivre; voir Glanville Williams, *Textbook on Criminal Law*, 2nd ed. (1983), aux pp. 481 et 482. Conclure toutefois que la preuve de l'intoxication volontaire est pertinente relativement à la question de savoir si l'accusé a sincèrement cru au consentement lorsque cette croyance se fonde sur son interprétation erronée, causée par son intoxication, des faits reliés au consentement de la plaignante, va selon moi à l'encontre de la règle énoncée dans l'arrêt *Leary* et réduirait à néant le principe de politique générale voulant que l'intoxication volontaire ne constitue pas un moyen de défense dans le cas de crimes d'intention générale.

À mon avis, la restriction apportée par l'arrêt *Leary* au principe de droit criminel généralement applicable en matière d'erreur de fait complique inutilement et indûment la tâche du jury. De fait, je conçois mal comment il soit humainement possible de suivre les directives aux jurys apparemment commandées par la combinaison des arrêts *Leary* et *Pappajohn*. Ce résultat à la fois déroutant et anormal est entièrement attribuable au fait que dans l'arrêt *Leary* on s'est écarté des principes fondamentaux du droit criminel. Il existe donc de sérieuses raisons de conclure que cet arrêt doit être renversé.

L'incompatibilité des arrêts *Leary* et *Pappajohn* n'est pas passée inaperçue dans la doctrine. Dans *Canadian Criminal Law*, précité, à la p. 378, le professeur Stuart la qualifie de «criante». Dans «*Regina v. O'Connor: Mens Rea* Survives in Aus-

1988 CanLII 22 (SCC)

tralia" (1981), 19 *U.W.O. L. Rev.* 281, at pp. 300-301, David H. Doherty observes:

The two judgments are clearly inconsistent. *Pappajohn* confirms the essential requirement of a subjective mental culpability as a prerequisite to criminal liability. *Leary* creates a fundamental exception to that requirement. The facts of *Pappajohn* show that the judgments will inevitably come into conflict. The Supreme Court of Canada chose to avoid dealing with the conflict in *Pappajohn* by ignoring the evidence of drinking by the accused. It is to be hoped that in a later case the Court will seek a more positive resolution to the problem. In seeking that resolution the majority position in *O'Connor* deserves emulation. After reading the opinions expressed in *O'Connor*, one concludes, as did the minority in *Leary*, that the position taken in *Majewski* and adopted by the majority in *Leary* constitutes an illogical, unwarranted, and detrimental departure from the contemporary trend in criminal law which recognizes subjective mental blameworthiness at the time of the doing of the prohibited act as the *sine qua non* of criminal liability. The creation of exceptions to the principle compelled by considerations of public policy must be left to Parliament.

See also Peter J. Connelly, "Drunkenness and Mistake of Fact: Pappajohn v. The Queen; Swietlinski v. The Queen" (1981), 24 *Crim. L.Q.* 49; Christine Boyle, *Sexual Assault* (1984), at pp. 89-90.

C. *Leary Creates Uncertainty*

The third general consideration justifying the Court in overruling *Leary* is the principle established in *Ranville*, *supra*, where the Court overruled its previous decision in *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, on the ground that continued recognition of the *persona designata* category could only have the effect of creating doubt as to which procedure a party should follow. The prior decision itself was a cause of uncertainty, and therefore following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law. Similarly, in *Vetrovec*, *supra*, the Court overruled previous decisions relating to corroboration and

tralia» (1981), 19 *U.W.O. L. Rev.* 281, aux pp. 300 et 301, David H. Doherty fait observer:

[TRADUCTION] Visiblement, les deux arrêts sont contradictoires. L'arrêt *Pappajohn* confirme l'exigence essentielle d'une culpabilité mentale subjective comme condition de la responsabilité criminelle. L'arrêt *Leary* crée une exception fondamentale à cette exigence. Il se dégage des faits de l'affaire *Pappajohn* que ces deux arrêts entreront inévitablement en conflit. Dans l'affaire *Pappajohn*, la Cour suprême du Canada a choisi d'éluder le problème du conflit en ne tenant pas compte de la preuve que l'accusé avait bu. Or, il est à espérer que dans un arrêt ultérieur la Cour cherchera plutôt à résoudre ce problème et il serait bon qu'en le résolvant elle s'inspire de la position de la majorité dans l'affaire *O'Connor*. En effet, lecture faite des opinions exprimées dans l'affaire *O'Connor*, on est amené à conclure, à l'instar de la minorité dans l'affaire *Leary*, que la position prise dans l'arrêt *Majewski* et adoptée par la majorité dans l'affaire *Leary* constitue une entorse illogique, injustifiée et nuisible à la tendance actuelle en droit criminel qui reconnaît la culpabilité mentale subjective au moment de la perpétration de l'acte prohibé comme condition *sine qua non* de la responsabilité criminelle. C'est au législateur que doit revenir la tâche de créer des exceptions au principe lorsque cela s'impose pour des raisons de politique générale.

Voir en outre Peter J. Connelly, «Drunkenness and Mistake of Fact: Pappajohn v. The Queen; Swietlinski v. The Queen» (1981) 24 *Crim. L.Q.* 49; Christine Boyle, *Sexual Assault* (1984), aux pp. 89 et 90.

C. *L'arrêt Leary: cause d'incertitude*

La troisième considération d'ordre général justifiant que cette Cour renverse l'arrêt *Leary* est le principe établi dans l'arrêt *Ranville*, précité, où cette Cour a renversé son arrêt antérieur *Commonwealth de Puerto Rico c. Hernandez*, [1975] 1 R.C.S. 228, pour le motif que si on continuait à reconnaître l'existence de la catégorie de *persona designata*, cela ne pourrait que faire naître des doutes quant à la procédure à suivre par une partie. L'arrêt antérieur était lui-même une cause d'incertitude, de sorte que, en le suivant simplement par respect pour le principe du *stare decisis*, on se serait trouvé aller à l'encontre de la valeur fondamentale sous-tendant ce principe, c'est-à-dire celle de la clarté et de la certitude du droit. De

1988 CanLII 22 (SCC)

1419

stated, "The law of corroboration is unduly and unnecessarily complex and technical".

I have already indicated the confusion created by the combination of *Leary* and *Pappajohn*. I suggest that the distinction between "general" and "specific" intent which *Leary* mandates and the notorious difficulty in articulating a clear and workable definition of specific intent falls squarely within the principle enunciated in *Ranville* and *Vetrovec*. Because that category is based on policy rather than principle, classification of offences as falling within or without the specific intent category is necessarily an *ad hoc*, unpredictable exercise.

The situation with respect to the offence of break and enter, raised by the companion case, *R. v. Quin*, [1988] 2 S.C.R. 825, provides an example. In *R. v. Campbell* (1974), 17 C.C.C. (2d) 320 (Ont. C.A.), the accused was charged with breaking and entering with intent pursuant to s. 306(1)(*a*). The Ontario Court of Appeal held that offence to be a crime of specific intent and hence drunkenness was relevant to the issue of intention. In *Quin*, the accused was charged with breaking and entering and committing an indictable offence pursuant to s. 306(1)(*b*). The same court held that under that subsection, the break and enter offence was one requiring only proof of general intent and hence evidence of intoxication could not be considered. A legal category which creates distinctions of this kind, in my view, complicates and confuses the law to an unacceptable degree and, absent some compelling need for its retention, should be abandoned.

Another example of the complexity and uncertainty caused by the specific/general intent dichotomy is provided by *Swietlinski*, *supra*. In that case, the accused was charged with murder pursuant to s. 213(*d*) of the *Criminal Code*. The

même, dans l'arrêt *Vetrovec*, précité, la Cour a renversé des arrêts antérieurs en matière de corroboration et a affirmé que «le droit relatif à la corroboration est inutilement et indûment complexe et formaliste».

J'ai déjà mentionné la confusion engendrée par la combinaison des arrêts *Leary* et *Pappajohn*. Selon moi, la distinction entre une intention «générale» et une intention «spécifique» que l'arrêt *Leary* impose et la difficulté notoire qu'il y a à formuler une définition claire et pratique de l'intention spécifique relèvent directement du principe énoncé dans les arrêts *Ranville* et *Vetrovec*. Parce qu'il s'agit d'une catégorie fondée sur la politique générale plutôt que sur les principes, la classification des infractions selon qu'elles tombent dans la catégorie de l'intention spécifique ou non est nécessairement un exercice *ad hoc* au résultat imprévisible.

La situation en ce qui concerne l'infraction d'introduction par effraction, dont il est question dans l'arrêt *R. c. Quin*, [1988] 2 R.C.S. 825, en est un exemple. Dans l'affaire *R. v. Campbell* (1974), 17 C.C.C. (2d) 320 (C.A. Ont.), l'accusé a été inculpé aux termes de l'al. 306(1)*a*) de s'être introduit dans un endroit par effraction avec l'intention d'y commettre un acte criminel. La Cour d'appel de l'Ontario a conclu qu'il s'agissait d'un crime d'intention spécifique de sorte que l'ivresse était pertinente relativement à la question de l'intention. Dans l'affaire *Quin*, l'accusé se trouvait inculpé d'avoir enfreint l'al. 306(1)*b*) en s'introduisant dans un endroit par effraction et en y commettant un acte criminel. La même cour a jugé qu'en vertu de cet alinéa cette dernière infraction ne nécessitait que la preuve d'une intention générale et qu'on ne pouvait donc pas tenir compte de la preuve d'intoxication. Or, à mon avis, une catégorie juridique qui crée des distinctions de ce genre complique et embrouille le droit d'une manière intolérable et, en l'absence d'une nécessité impérieuse de la conserver, elle doit être abandonnée.

L'arrêt *Swietlinski*, précité, fournit une autre illustration de la complexité et de l'incertitude résultant de la dichotomie entre l'intention spécifique et l'intention générale. Dans cette affaire-là, l'accusé avait été inculpé de meurtre aux termes de

1988 CanLII 22 (SCC)

enumerated offence the accused was alleged to have committed was indecent assault. *Leary* had held that rape was an offence of general intent and in *Swietlinski*, the Court applied *Leary* to the offence of indecent assault. However, because of the constructive murder provision, this would have led to a situation where the accused would be convicted of murder without any criminal intent. To avoid that result, the Court held that where indecent assault formed the ingredient of constructive murder pursuant to s. 213, evidence of drunkenness could be taken into account in determining whether in fact the accused had the requisite intent for the offence of indecent assault. In other words, the Court held quite explicitly that intoxication did logically bear upon the issue of intent to commit indecent assault, and that the only issue was whether, as a matter of policy, the jury should be told to put that evidence out of mind. In the light of *Vaillancourt*, *Swietlinski* is no longer significant for its result. Indeed, *Vaillancourt* and *Swietlinski* have this in common: both cases demonstrate the Court's aversion to the imposition of liability without *mens rea*. In my view, to hold that evidence of intoxication can be taken into account with reference to an offence for certain purposes but not for other purposes is further reflection of the confusion, uncertainty, and lack of principle which motivates the specific/general intent dichotomy.

D. *Leary Unfavourable to Accused*

The fourth factor which bears directly upon whether or not the Court should overrule *Leary* in my view, is that the *Leary* rule is one which operates against the accused by expanding the scope of criminal liability beyond normal limits. Respect for the principle of certainty and the institutional limits imposed upon the law-making function of the courts should constrain the Court from overruling a prior decision where the effect would be to expand criminal liability. It is not for the courts to create new offences, or to broaden

l'al. 213*d*) du *Code criminel*. Parmi les infractions énumérées, celle qu'on reprochait à l'accusé était l'attentat à la pudeur. On avait décidé dans l'arrêt *Leary* que le viol était une infraction d'intention générale et, dans l'affaire *Swietlinski*, la Cour a appliqué l'arrêt *Leary* à l'infraction d'attentat à la pudeur. Toutefois, la disposition relative au meurtre par imputation aurait fait que l'accusé se serait trouvé déclaré coupable de meurtre sans qu'il ait eu d'intention criminelle. Pour parer à un tel résultat, la Cour a jugé que, dans un cas où l'attentat à la pudeur constituait l'élément permettant de conclure au meurtre par imputation aux fins de l'art. 213, on pouvait prendre en considération la preuve d'ivresse pour déterminer si l'accusé avait réellement l'intention requise pour l'infraction d'attentat à la pudeur. En d'autres termes, la Cour a dit très explicitement que l'ivresse avait bel et bien un rapport logique avec la question de l'intention de commettre un attentat à la pudeur et que l'unique point à décider était de savoir si la politique générale exigeait qu'on dise au jury de ne pas prendre cette preuve en considération. Compte tenu de l'arrêt *Vaillancourt*, l'arrêt *Swietlinski* ne tire plus à conséquence. De fait, les arrêts *Vaillancourt* et *Swietlinski* ont ceci de commun qu'ils révèlent tous les deux la répugnance qu'a cette Cour à conclure à la responsabilité lorsqu'il n'y a pas de *mens rea*. À mon avis, la conclusion que la preuve d'intoxication peut être prise en considération relativement à une infraction à certaines fins mais non à d'autres constitue une manifestation de plus de la confusion, de l'incertitude et de l'absence de principes qui est à l'origine de la dichotomie entre l'intention spécifique et l'intention générale.

D. *L'arrêt Leary est défavorable à l'accusé*

Selon moi, le quatrième facteur qui se rapporte directement à la question de savoir si la Cour doit renverser l'arrêt *Leary* est que la règle énoncée dans cet arrêt joue contre l'accusé en élargissant la portée de la responsabilité criminelle au-delà des limites normales. Le respect du principe de la certitude et les restrictions institutionnelles imposées aux tribunaux en ce qui concerne l'élaboration du droit prétorien devraient inciter la Cour à refuser de renverser un arrêt antérieur quand cela aurait pour effet d'élargir la responsabilité crimi-

1988 CanLII 22 (SCC)

the net of liability, particularly as changes in the law through judicial decision operate retrospectively. The same argument does not apply, however, where the result of overruling a prior decision is to establish a rule favourable to the accused. In my submission, this principle underlies the decision of the Court in *Paquette v. The Queen*, *supra*, at p. 197, where the Court overruled its previous decision in *Dunbar v. The King*, *supra*, which had held that an accused who was a party to murder, but who had not himself committed the act, could not rely upon the defence of duress. (See also *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.), at p. 46, *per* Brooke J.A.: "I do not feel bound by a judgment of this Court where the liberty of the subject is in issue if I am convinced that that judgment is wrong.")

IV

Disposition

The trial judge made no reference in his charge to the jury to the requirement that the Crown prove that the accused acted with the requisite intent. In my view, this is fatal to the conviction. Although the Crown presented a strong case against the accused at trial, no request was made by the respondent that this Court apply the provision of s. 613(1)(*b*)(iii) of the *Criminal Code*, and in any event, it is not for this Court to speculate as to the likely result had the jury been properly instructed.

It follows that the appeal should be allowed, the conviction set aside, and a new trial ordered.

The judgment of Beetz and McIntyre JJ. was delivered by

McINTYRE J.—I have had the advantage of reading the reasons for judgment of the Chief Justice. With the greatest deference, I find that I am unable to agree with his reasons and his dispo-

nelle. Il n'appartient pas aux tribunaux de créer de nouvelles infractions ni de donner plus d'extension à la responsabilité, d'autant plus que les changements apportés au droit par des décisions judiciaires ont un effet rétroactif. Le même argument ne peut toutefois pas être invoqué lorsque le fait de renverser un arrêt antérieur a pour conséquence la création d'une règle favorable à l'accusé. À mon humble avis, c'est là le principe qui sous-tend l'arrêt *Paquette c. La Reine*, précité, à la p. 197, où cette Cour a renversé son arrêt antérieur *Dunbar v. The King*, précité, dans lequel on avait conclu qu'un accusé ayant participé à un meurtre, mais sans l'avoir commis lui-même, ne pouvait se prévaloir du moyen de défense de la contrainte. (Voir en outre l'arrêt *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (C.A. Ont.), à la p. 46, motifs du juge Brooke, qui a dit: [TRADUCTION] «Je ne me sens pas lié par un arrêt de cette Cour dans un cas où la liberté d'un individu est en jeu, si je suis convaincu que l'arrêt en question est erroné.»)

IV

Dispositif

Le juge du procès n'a pas indiqué dans ses instructions au jury que le ministère public devait prouver que l'accusé avait agi avec l'intention requise. À mon avis, cela porte un coup fatal à la déclaration de culpabilité. Bien que le ministère public ait présenté une preuve solide contre l'accusé au procès, l'intimée n'a pas demandé à cette Cour d'appliquer la disposition du sous-al. 613(1)*b*)(iii) du *Code criminel* et, de toute façon, il n'appartient pas à cette Cour de faire des conjectures sur le résultat probable si le jury avait reçu des instructions appropriées.

Il s'ensuit que le pourvoi doit être accueilli, la déclaration de culpabilité infirmée et un nouveau procès ordonné.

Version française du jugement des juges Beetz et McIntyre rendu par

LE JUGE McINTYRE—J'ai eu l'avantage de lire les motifs de jugement du Juge en chef. Avec égards, je ne puis souscrire ni à ses motifs ni à sa

1988 CanLII 22 (SCC)

sition of the appeal. I would dismiss the appeal for the reasons I will endeavour to set out.

The appellant was charged with sexual assault causing bodily harm, contrary to s. 246.2(*c*) of the *Criminal Code*. The facts giving rise to the charge have been set out by the Chief Justice and I need not make extensive reference to them. It will suffice to say that the twenty-four-year-old appellant committed the sexual assault upon the eighteen-year-old complainant in his apartment. It was conceded that intercourse had taken place without the consent of the complainant. During the course of the assault, the appellant punched her, caused an injury to her eye, and threatened to kill her. He was convicted at trial before judge and jury. He gave no evidence but his statement to the police, admitting that he had forced the complainant to have intercourse, was put in evidence. The trial judge told the jury that the sole issue before them was that of consent. On the question of drunkenness, he said:

> Only the accused in his statement says, "I was all drunked up too". There was no evidence of drunkenness except that statement and it is open to you to accept it and find that he was drunk but even if he was drunk drunkenness is no defence to the charge alleged against this accused.

The appellant's appeal was dismissed. It is now reported at (1985), 18 C.C.C. (3d) 574. The Court of Appeal held that the offence of causing bodily harm was an offence of general intent to which the defence of drunkenness did not apply. In this, they followed *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443 (H.L.), and their disposition of the case is consistent with *Leary v. The Queen*, [1978] 1 S.C.R. 29.

There are two issues which arise in this appeal. The first is whether sexual assault causing bodily harm (*Criminal Code*, s. 246.2(*c*)) is an offence requiring proof of specific or of general intent, and the second is whether evidence of self-induced drunkenness is relevant to the issue of guilt or

décision en l'espèce. Pour les raisons que je vais exposer ci-après, je suis d'avis de rejeter le pourvoi.

L'appelant a été accusé d'agression sexuelle causant des lésions corporelles, en infraction à l'al. 246.2*c*) du *Code criminel*. Les faits qui ont donné lieu à l'accusation sont relatés par le Juge en chef, de sorte que je n'ai pas à en parler très longuement. Il suffit de signaler que l'appelant, âgé de vingt-quatre ans, a commis une agression sexuelle contre la plaignante, âgée de dix-huit ans, dans son appartement à lui. Il est admis qu'il y a eu des rapports sexuels sans le consentement de la plaignante. Au cours de l'agression, l'appelant a donné des coups de poing à la plaignante, la blessant à l'œil, et a menacé de la tuer. Il a été déclaré coupable à l'issue d'un procès devant un juge et un jury. Quoique l'appelant n'ait pas témoigné, la déclaration qu'il avait faite à la police, dans laquelle il avoue avoir forcé la plaignante à avoir des rapports sexuels, a été produite en preuve. Le juge du procès a dit aux jurés que la seule question qu'ils avaient à décider était celle du consentement. Sur la question de l'ivresse, il a dit:

> [TRADUCTION] L'accusé a été le seul à parler d'ivresse dans sa déclaration: «J'étais bien soûl aussi.» Exception faite de cette déclaration, il n'y a aucune preuve qu'il était ivre. Or, vous pouvez l'accepter et conclure qu'il était en état d'ébriété, mais même s'il l'était, l'ivresse ne peut être opposée comme défense à l'accusation portée contre lui.»

L'appel interjeté par l'appelant a été rejeté dans un arrêt qui est maintenant publié à (1985), 18 C.C.C. (3d) 574. La Cour d'appel a conclu que l'infraction qui consiste à infliger des lésions corporelles est une infraction d'intention générale à laquelle le moyen de défense d'ivresse ne s'applique pas. En cela la Cour d'appel a suivi l'arrêt *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443 (H.L.), et a tranché l'appel d'une manière conforme à l'arrêt *Leary c. La Reine*, [1978] 1 R.C.S. 29.

Ce pourvoi soulève deux questions. La première est de savoir si l'agression sexuelle entraînant des lésions corporelles (*Code criminel*, al. 246.2*c*)) est une infraction nécessitant la preuve d'une intention spécifique ou bien d'une intention générale et la seconde est de savoir si la preuve d'ivresse volon-

1988 CanLII 22 (SCC)

innocence in an offence of general intent. Before dealing in detail with these questions, it will be helpful to make certain observations.

A distinction has long been recognized in the criminal law between offences which require the proof of a specific intent and those which require only the proof of a general intent. This distinction forms the basis of the defence of drunkenness and it must be understood and kept in mind in approaching this case. In *R. v. George*, [1960] S.C.R. 871, Fauteux J. said, at p. 877:

> In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

This statement makes the distinction clear. The general intent offence is one in which the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose. The minimal intent to apply force in the offence of common assault affords an example. A specific intent offence is one which involves the performance of the *actus reus*, coupled with an intent or purpose going beyond the mere performance of the questioned act. Striking a blow or administering poison with the intent to kill, or assault with intent to maim or wound, are examples of such offences.

This distinction is not an artificial one nor does it rest upon any legal fiction. There is a world of difference between the man who in frustration or anger strikes out at his neighbour in a public house with no particular purpose or intent in mind, other than to perform the act of striking, and the man who strikes a similar blow with intent to cause death or injury. This difference is best illustrated

taire est pertinente relativement à la question de la culpabilité ou de l'innocence dans le cas d'une infraction d'intention générale. Avant d'entreprendre une étude détaillée de ces questions, il est utile de faire quelques observations.

Voilà longtemps que le droit criminel reconnaît l'existence d'une distinction entre les infractions requérant la preuve d'une intention spécifique et celles qui n'exigent que la preuve d'une intention générale. En abordant la présente affaire, il faut comprendre et garder à l'esprit cette distinction, qui constitue le fondement de la défense d'ivresse. Dans l'arrêt *R. v. George*, [1960] R.C.S. 871, le juge Fauteux dit, à la p. 877:

> [TRADUCTION] En étudiant la question de la *mens rea*, il y a lieu d'établir une distinction entre (i) l'intention qui s'applique aux actes en fonction des buts visés et (ii) l'intention qui s'applique aux actes indépendamment des buts visés. Dans certains cas, l'intention générale de perpétrer l'acte suffit pour qu'il y ait crime alors que dans d'autres cas il doit y avoir, outre l'intention générale, une intention spécifique de commettre l'acte.

Ce passage rend la distinction claire. L'infraction d'intention générale est celle pour laquelle l'intention se rapporte uniquement à l'accomplissement de l'acte en question, sans qu'il y ait d'autre intention ou dessein. L'intention minimale d'avoir recours à la force qui doit exister dans le cas de l'infraction de voies de fait en est un exemple. Une infraction d'intention spécifique se caractérise par la perpétration de l'*actus reus* assortie d'une intention ou d'un dessein qui ne se limite pas à l'accomplissement de l'acte en question. Frapper une personne ou lui administrer du poison avec l'intention de la tuer, ou encore commettre des voies de fait avec l'intention de mutiler une personne ou de lui infliger des blessures, voilà des exemples de telles infractions.

Cette distinction n'est ni artificielle ni ne repose sur une fiction juridique. Il y a un monde entre l'homme qui dans un accès de frustration ou de colère porte un coup à quelqu'un dans un débit de boissons sans avoir d'autre dessein ou intention que de frapper et l'homme qui assène le même coup avec l'intention de causer la mort ou des lésions corporelles. Cette différence se dégage le plus net-

1988 CanLII 22 (SCC)

by a consideration of the relationship between murder and manslaughter. He who kills intending to kill or cause bodily harm is guilty of murder, whereas he who has killed by the same act without such intent is convicted of manslaughter. The proof of the specific intent, that is, to kill or to cause bodily harm, is necessary in murder because the crime of murder is incomplete without it. No such intent is required, however, for the offence of manslaughter because it forms no part of the offence, manslaughter simply being an unlawful killing without the intent required for murder. The relevance of intoxication which could deprive an accused of the capacity to form the necessary specific intent in murder and its irrelevance in the crime of manslaughter can readily be seen.

tement d'un examen du rapport entre le meurtre et l'homicide involontaire coupable. Quiconque tue quelqu'un avec l'intention de le tuer ou de lui infliger des lésions corporelles se rend coupable de meurtre, tandis qu'une personne qui commet l'acte identique sans cette intention se voit déclarer coupable d'homicide involontaire coupable. La preuve de l'intention spécifique, c'est-à-dire celle de tuer ou de causer des lésions corporelles, est nécessaire pour établir le meurtre parce que le crime de meurtre est incomplet sans cet élément. Aucune intention de ce genre n'est toutefois requise pour l'infraction d'homicide involontaire coupable parce qu'elle ne fait pas partie de l'infraction, l'homicide involontaire coupable étant simplement un homicide illégal qui ne comporte pas l'intention nécessaire pour qu'il y ait meurtre. On voit donc facilement que l'intoxication pouvant mettre l'accusé dans l'incapacité de former l'intention spécifique requise est pertinente dans le cas du meurtre, mais qu'elle ne l'est pas relativement au crime d'homicide involontaire coupable.

The present law relating to the drunkenness defence has developed in this Court from the application of principles set out in *Director of Public Prosecutions v. Beard*, [1920] A.C. 479 (H.L.), discussed and adapted in other United Kingdom cases, including *Attorney-General for Northern Ireland v. Gallagher*, [1961] 3 All E.R. 299 (H.L.); *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523 (H.L.), and *Director of Public Prosecutions v. Majewski*, *supra*. In this Court, the matter has been dealt with in *R. v. George*, *supra*, and other cases, but particularly in *Leary v. The Queen*, *supra*, where Pigeon J., speaking for the majority of the Court, said, at p. 57, that rape is a crime of general intention as distinguished from specific intention, a crime therefore "in which the defence of drunkenness can have no application". This may be said to have confirmed the law as it stands in Canada on this question and the appellant's principal attack in this Court is upon that decision. It is not necessary for the purposes of this judgment to review in detail the authorities in this Court on the question. It will be sufficient to summarize their effect in the following terms. Drunkenness in a general sense is not a true defence to a criminal

La règle de droit actuelle en ce qui concerne la défense d'ivresse a été élaborée par cette Cour en application des principes posés dans l'arrêt *Director of Public Prosecutions v. Beard*, [1920] A.C. 479 (H.L.), puis analysés et adaptés dans d'autres arrêts britanniques, notamment *Attorney-General for Northern Ireland v. Gallagher*, [1961] 3 All E.R. 299 (H.L.), *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523 (H.L.) et *Director of Public Prosecutions v. Majewski*, précité. En cette Cour, la question a été abordée dans l'arrêt *R. v. George*, précité, et dans plusieurs autres, mais surtout dans l'arrêt *Leary c. La Reine*, précité, où, parlant au nom de la majorité, le juge Pigeon affirme, à la p. 57, que le viol est un crime d'intention générale par opposition à un crime d'intention spécifique, un crime donc «pour lequel la défense d'ivresse n'est pas recevable». On peut dire que cela a confirmé le droit au Canada à cet égard et, en cette Cour, l'appelant a principalement attaqué l'arrêt *Leary*. Il n'est pas nécessaire aux fins de la présente discussion d'entreprendre un examen minutieux des arrêts de cette Cour à ce sujet. Il suffira de résumer leur effet dans les termes suivants. L'ivresse au sens général ne constitue pas véritablement une défense opposable à

1988 CanLII 22 (SCC)

act. Where, however, in a case which involves a crime of specific intent, the accused is so affected by intoxication that he lacks the capacity to form the specific intent required to commit the crime charged it may apply. The defence, however, has no application in offences of general intent.

The criticism of the law with respect to the defence of drunkenness is based on two propositions. It is said, firstly, that the distinction between the general intent and specific intent offences is artificial and is little more than a legal fiction. Secondly, it is said that it is illogical, because it envisages a defence of drunkenness in certain situations and not in others; it is merely a policy decision made by judges and not based on principle or logic. It will be evident from what I have said that I reject the first ground of criticism. As to the second criticism that it is based upon grounds of policy, I would say that there can be no doubt that considerations of policy are involved in this distinction. Indeed, in some cases, principally *Majewski*, *supra*, the distinction has been defended on the basis that it is sound social policy. The fact, however, that considerations of policy have influenced the development of the law in this field cannot, in my view, be condemned. In the final analysis all law should be based upon and consistent with sound social policy. No good law can be inconsistent with or depart from sound policy.

If the policy behind the present law is that society condemns those who, by the voluntary consumption of alcohol, render themselves incapable of self-control so that they will commit acts of violence causing injury to their neighbours, then in my view no apology for such policy is needed, and the resulting law affords no affront to the well established principles of the law or to the freedom of the individual. Furthermore, the existing law is not divorced from logical underpinnings as suggested in some academic writings. Not all the

une accusation d'avoir commis un acte criminel. Toutefois, dans le cas d'un crime d'intention spécifique, lorsque l'intoxication de l'accusé est de nature à le rendre incapable de former l'intention spécifique requise pour commettre le crime qu'on lui impute, il se peut que cette défense puisse s'appliquer. Elle ne s'applique cependant pas aux infractions d'intention générale.

Le droit relatif à la défense d'ivresse est critiqué à deux titres. On prétend d'abord que la distinction entre les infractions d'intention générale et les infractions d'intention spécifique est artificielle et qu'elle n'est rien d'autre qu'une fiction juridique. En deuxième lieu, on dit qu'elle est illogique puisqu'elle envisage une défense d'ivresse dans certaines situations, mais non dans d'autres; il s'agit simplement d'une décision de politique générale prise par des juges, qui ne repose ni sur les principes ni sur la logique. Il sera évident à la lecture de ce qui précède que je rejette la première critique. Quant à la seconde, celle selon laquelle la distinction est fondée sur des motifs de politique générale, je dirais qu'il ne fait aucun doute que des considérations de politique générale jouent dans cette distinction. De fait, dans certaines décisions, principalement dans l'arrêt *Majewski*, précité, la distinction a été défendue parce qu'elle traduit une saine politique sociale. Toutefois, on ne saurait, selon moi, trouver à redire au fait que des considérations de politique générale ont influencé l'évolution du droit dans ce domaine. En dernière analyse, toutes les règles de droit devraient avoir à leur base une saine politique sociale et être compatibles avec celle-ci. Aucune règle de droit valable ne peut être incompatible avec une telle politique ni s'en écarter.

Si la règle de droit actuelle repose sur une politique suivant laquelle la société condamne ceux qui, par la consommation volontaire d'alcool, se rendent incapables de se maîtriser, de sorte qu'ils commettent des actes violents qui occasionnent des blessures à leurs semblables, alors j'estime qu'une telle politique se passe de justification et la règle de droit qui en résulte ne se heurte d'aucune manière aux principes de droit bien établis ni ne porte atteinte à la liberté de l'individu. De plus, contrairement à ce que prétendent certains auteurs

1988 CanLII 22 (SCC)

academic literature has been critical. A strong statement in support of the law on utilitarian or policy grounds made shortly after *Majewski* is by Sir Rupert Cross in "Blackstone v. Bentham" (1976), 92 *L.Q.R.* 516, where he said, at pp. 525-26:

In reply to Bentham and the academics I would ask why it is "hard and unthinking" to refuse to allow people to exempt themselves from criminal responsibility for harm done by their bodies by incapacitating their minds from controlling them. Why should the requirement that intention or recklessness must be proved in order to establish liability for an assault not be subject to what appears to be the wholly reasonable retributive principle that it is unjust to those who remain sober to allow those who become drunk to allege that they were unaware of consequences of their bodily movements of which all sober people would have been aware? This is what Blackstone meant when he said that the law would not suffer any man "to privilege one crime by another."

. . .

Punishment is an evil and the less of it the better. But the evil of inflicting punishment is justified if the harm which is thus avoided is greater than that caused by the punishment. It may be asceticism to blame people for simply getting drunk, but it is sound utilitarianism to seek to prevent people from doing certain kinds of harm while they are drunk. In so far as this object can be achieved by punishment, it is achieved most economically by singling out for punishment those who commit the kind of harm which the law seeks to prevent while they are drunk.

A. J. Ashworth in "Reason, Logic and Criminal Liability" (1975), 91 *L.Q.R.* 102 says, at p. 130:

Moreover, it is hardly appropriate to regard a defence of acute intoxication as a simple denial of *mens rea*; it has been suggested that defences should not be classified solely according to the effect of the accused's condition, without reference to their cause. The criminal law permits reason to override the logical application of the traditional doctrines in cases of deliberately self-induced incapacities; to do otherwise would be tantamount to allowing a fraud on the law. It is submitted that, if the law provides no other means of imposing criminal liabili-

de doctrine, la règle de droit existante n'est pas dénuée de tout fondement logique. La doctrine d'ailleurs n'a pas été unanime à la critiquer. L'apologie de la règle pour des raisons utilitaires ou de politique générale a été faite peu après l'arrêt *Majewski* par sir Rupert Cross dans «Blackstone v. Bentham» (1976), 92 *L.Q.R.* 516, où il dit, aux pp. 525 et 526:

[TRADUCTION] En réponse à Bentham et aux auteurs, je leur demanderais en quoi on se montre «dur et irréfléchi» si l'on refuse de permettre aux gens de se dégager de toute responsabilité criminelle pour le préjudice qu'ils causent du fait d'avoir mis leur esprit dans un état où il ne pouvait dominer leur corps. Pourquoi l'exigence que l'intention ou l'insouciance soient prouvées pour établir la responsabilité d'une voie de fait ne devrait-elle pas être soumise au principe distributif tout à fait raisonnable selon lequel c'est une injustice envers ceux qui ne s'enivrent pas de permettre à ceux qui le font d'alléguer qu'ils étaient inconscients des conséquences de leurs mouvements, alors que toute personne qui n'a pas bu s'en serait rendue compte? C'est ce qu'a entendu Blackstone quand il a dit que le droit ne souffre pas qu'un homme «privilégie un crime par la perpétration d'un autre».

. . .

La sanction est un mal qu'on souhaiterait voir le moins répandu possible. Toutefois, ce mal qui consiste à infliger des sanctions se justifie lorsque le préjudice ainsi évité est plus grand que le mal résultant de la sanction. Il se peut qu'on fasse preuve de rigorisme en blâmant les gens du simple fait de s'être enivrés, mais c'est un sain utilitarisme que de chercher à les empêcher de causer certains types de préjudice lorsqu'ils sont en état d'ébriété. Dans la mesure où cet objectif peut être atteint au moyen d'une sanction, la façon la plus rationnelle d'y arriver est de punir ceux qui, lorsqu'ils sont en état d'ébriété, causent le genre de préjudice que le droit vise à prévenir.

A. J. Ashworth, dans «Reason, Logic and Criminal Liability» (1975), 91 *L.Q.R.* 102, dit, à la p. 130:

[TRADUCTION] D'autre part, il ne convient guère de considérer la défense d'extrême intoxication comme une simple négation de la *mens rea*. On a dit que les moyens de défense ne devraient pas être classifiés uniquement en fonction des conséquences de l'état de l'accusé, sans tenir compte de leur cause. Le droit criminel permet que la raison prenne le pas sur l'application logique des principes traditionnels dans le cas d'incapacités provoquées délibérément. S'il en était autrement, cela équivaudrait à autoriser de frustrer le droit. On soutient que,

1988 CanLII 22 (SCC)

ty in the cases of "voluntarily-induced" incapacities discussed in this article, then there are sufficient reasons for restricting the scope of the defences as the English judges have done.

Further, Mark T. Thornton in "Making Sense of *Majewski*" (1981), 23 *Crim. L.Q.* 465, justifies the distinction made between specific and general intent offences in this way, at pp. 482-83:

> I believe that the foregoing discussion shows that there are "legally adequate criteria" for distinguishing crimes of specific intent from other crimes. As regards consequences, the agent must actually intend (and not merely be reckless in regard to) some consequences which amounts to an *actus reus*. As regards circumstances, the agent must intend his action to take place in those circumstances, or he must intend to disregard those circumstances, or he must have some further intention in respect of those circumstances, depending on the nature of the particular offence. Simple recklessness (excluding the possible complexity of "malice aforethought") does not suffice for specific intent. Where such actual intentions as we have mentioned are required for a crime to have been committed, voluntary intoxication is a defence by the *Majewski* rule.

and, as well, Eric Colvin ("A Theory of the Intoxication Defence" (1981), 59 *Can. Bar Rev.* 750) argues against the illogicality of the present rules, as follows (at p. 779):

> If the only choice is between liability or immunity where a requisite mental element is absent due to culpable intoxication, there must at least be some sympathy for the approach which the courts have taken. Even the most stringent critics of the intoxication rules have been wary of suggesting that no penal consequences should follow. Their preference has generally been the creation of a special offence of dangerous intoxication which would require legislative initiative. Would it be proper for the courts to encourage the legislatures to action by abandoning the present intoxication rules and insisting upon the contemporaneity of the culpable state of mind and the prohibited conduct? At stake here are theories of the judicial role which lie beyond the scope of this article. It is, however, concluded that one good reason

si le droit ne prévoit pas d'autre moyen d'imposer la responsabilité criminelle dans le cas des incapacités «provoquées volontairement» dont traite le présent article, alors il existe des motifs suffisants de limiter la portée des défenses, comme l'ont fait les juges anglais.

De plus, Mark T. Thornton, dans «Making Sense of *Majewski*» (1981), 23 *Crim. L.Q.* 465, justifie de la manière suivante la distinction faite entre les infractions d'intention spécifique et les infractions d'intention générale, aux pp. 482 et 483:

> [TRADUCTION] Je crois que l'analyse qui précède démontre l'existence de «critères juridiquement adéquats» pour distinguer les crimes d'intention spécifique des autres crimes. Pour ce qui est des conséquences, l'auteur doit réellement vouloir (et non pas simplement faire preuve d'insouciance concernant) certaines conséquences, ce qui constitue un *actus reus*. Quant aux circonstances, l'auteur doit, selon la nature de l'infraction dont il s'agit, soit vouloir que son acte ait lieu dans ces circonstances-là, soit avoir l'intention de ne pas tenir compte des circonstances, soit avoir quelque autre intention reliée à celles-ci. La simple insouciance (si l'on fait abstraction des complications que peut apporter la «préméditation») ne suffit pas pour qu'il y ait une intention spécifique. Lorsque des intentions réelles comme celles qui viennent d'être mentionnées sont nécessaires pour qu'un crime ait été perpétré, l'intoxication volontaire constitue un moyen de défense d'après la règle établie dans l'arrêt *Majewski*.

Eric Colvin («A Theory of the Intoxication Defence» (1981), 59 *R. du B. can.* 750) élève sa voix contre l'illogisme des règles actuelles. Il dit, à la p. 779:

> [TRADUCTION] S'il n'y a qu'un choix entre la responsabilité et l'immunité lorsque, par suite d'intoxication coupable, il manque un élément moral requis, on doit à tout le moins voir d'un œil plutôt favorable l'approche qu'ont adoptée les tribunaux. Même les critiques les plus sévères des règles en matière d'intoxication se sont montrés réticents à affirmer qu'il ne devrait pas y avoir de conséquences pénales. D'une manière générale, ils ont préféré la création d'une infraction spéciale d'intoxication dangereuse, ce qui nécessiterait une initiative du législateur. Dans cette optique, siérait-il que les tribunaux encouragent les législateurs à passer à l'action en abandonnant les règles actuelles relatives à l'intoxication et en exigeant la concomitance de l'état d'esprit coupable et de la conduite prohibée? Ceci met en cause des théories du rôle des tribunaux qui dépassent le cadre du présent article. On peut cependant conclure qu'une

1988 CanLII 22 (SCC)

for judicial activism—the irrationality of present law—does not apply to the intoxication defence.

In my view, the common law rules on the defence of drunkenness, though frequently the subject of criticism, have a rationality which not only accords with criminal law theory, but has also served society well. It is not questioned in this case that the defence of drunkenness, as it applies to specific intent offences, is supportable. It is submitted, however, that it should be extended to include all criminal charges. It is my view that this proposition is not sustainable.

Turning now to the issues raised, the first one is to consider whether the offence of sexual assault causing bodily harm is an offence requiring a general or specific intent. In *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, this Court held that indecent assault, then an offence under the *Criminal Code*, was an offence of general intent. The indecent character of the assault was to be judged upon an objective view of the facts and not upon the mental state of the accused. It was said, at p. 968:

> What acts are indecent and what circumstances will have that character are questions of fact that will have to be decided in each case, but the determination of those questions will depend upon an objective view of the facts and circumstances in relation to the actual assault, and not upon the mental state of the accused.

and later at pp. 970-71:

> Because indecent assault is an offence of general or basic intent, the defence of drunkenness cannot apply where a person is charged with that offence.

This Court dealt with the question of sexual assault *simpliciter* under s. 246.1(1)(*a*) in *R. v. Chase*, [1987] 2 S.C.R. 293, where the offence was defined in these terms, at p. 302:

> Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is

bonne raison militant en faveur de l'activisme judiciaire, savoir l'irrationalité de la règle de droit actuelle, ne s'applique pas au moyen de défense d'intoxication.

À mon avis, les règles de *common law* concernant la défense d'ivresse, quoique souvent critiquées, possèdent une rationalité qui non seulement concorde avec la théorie du droit criminel, mais qui s'est révélée fort utile pour la société. Qu'il soit permis de se prévaloir de la défense d'ivresse dans le cas d'infractions d'intention spécifique n'est pas contesté en l'espèce. On prétend cependant qu'elle devrait s'appliquer à toutes les infractions criminelles. À mon avis, cette proposition est injustifiable.

Passons maintenant aux questions soulevées en l'espèce. Il s'agit d'abord d'examiner si l'agression sexuelle entraînant des lésions corporelles est une infraction qui nécessite une intention générale ou bien une intention spécifique. Dans l'arrêt *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956, cette Cour a statué que l'attentat à la pudeur, alors une infraction prévue au *Code criminel*, était une infraction d'intention générale. Le caractère indécent de l'attentat devait être apprécié selon une interprétation objective des faits et non pas en fonction de l'état mental de l'accusé. À la page 968, on dit:

> Quels actes sont indécents et quelles circonstances présentent cette caractéristique sont des questions de fait qu'il faut décider dans chaque cas, mais leur détermination repose sur une appréciation objective des faits et des circonstances par rapport à l'attentat lui-même et non sur l'état mental du prévenu.

Aux pages 970 et 971, on ajoute:

> Parce que l'attentat à la pudeur est une infraction d'intention générale ou fondamentale, la défense d'ivresse n'est pas recevable lorsqu'un prévenu en est accusé.

Cette Cour a traité de la question de l'infraction d'agression sexuelle simple prévue à l'al. 246.1(1)*a*) dans l'arrêt *R. c. Chase*, [1987] 2 R.C.S. 293, où l'infraction est ainsi définie à la p. 302:

> Appliquant ces principes et la jurisprudence citée, je fais les observations suivantes. L'agression sexuelle est une agression, au sens de l'une ou l'autre des définitions de ce concept au par. 244(1) du *Code criminel*, qui est

1988 CanLII 22 (SCC)

committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer". . . .

commise dans des circonstances de nature sexuelle, de manière à porter atteinte à l'intégrité sexuelle de la victime. Le critère qui doit être appliqué pour déterminer si la conduite reprochée comporte la nature sexuelle requise est objectif: «Compte tenu de toutes les circonstances, une personne raisonnable peut-elle percevoir le contexte sexuel ou charnel de l'agression?» . . .

and later, on the issue of intent, the following was said:

Plus loin, on dit concernant l'intention:

The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

L'intention ou le dessein de la personne qui commet l'acte, dans la mesure où cela peut ressortir des éléments de preuve, peut également être un facteur à considérer pour déterminer si la conduite est sexuelle. Si le mobile de l'accusé était de tirer un plaisir sexuel, dans la mesure où cela peut ressortir de la preuve, il peut s'agir d'un facteur à considérer pour déterminer si la conduite est sexuelle. Toutefois, il faut souligner que l'existence d'un tel mobile constitue simplement un des nombreux facteurs dont on doit tenir compte et dont l'importance variera selon les circonstances.

It was further said, at pp. 302-3:

On affirme en outre, aux pp. 302 et 303:

Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. This is consistent with the approach adopted by this Court in cases such as *Leary v. The Queen*, [1978] 1 S.C.R. 29, and *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, where it was held that rape and indecent assault were offences of general intent. I am unable to see any reason why the same approach should not be taken with respect to sexual assault. The factors which could motivate sexual assault are said to be many and varied (see C. Boyle, *Sexual Assault* (1984), at p. 74). To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment. Moreover, there are strong reasons in social policy which would support this view. To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force (see *R. v. Bernard* (1985), 18 C.C.C. (3d) 574 (Ont. C.A., *per* Dubin J.A.)) For these reasons, I would say that the offence will be one of general rather than specific intent.

La notion que l'infraction n'exige qu'une intention générale se dégage implicitement de cette conception de l'agression sexuelle. Cela est conforme au point de vue que cette Cour a adopté dans les arrêts *Leary c. La Reine*, [1978] 1 R.C.S. 29, et *Swietlinski c. La Reine*, [1980] 2 R.C.S. 956, où on a jugé que le viol et l'attentat à la pudeur étaient des infractions exigeant une intention générale. Il m'est impossible de voir pourquoi on ne pourrait adopter le même point de vue en matière d'agression sexuelle. On dit que les facteurs qui pourraient motiver l'agression sexuelle sont nombreux et variés (voir C. Boyle, *Sexual Assault* (1984), à la p. 74). Imposer au ministère public le fardeau de démontrer une intention spécifique contribuerait largement à faire échouer l'objet évident de la disposition. En outre, il y a de solides motifs en matière de politique sociale qui appuieraient ce point de vue. Le processus d'application serait entravé de manière déraisonnable par l'ajout d'un élément d'intention spécifique dans ces infractions. Cela contribuerait à soulever la question de la défense d'ivresse qui a toujours été reliée à la capacité de former une intention spécifique et qui a généralement été exclue par le droit et les principes des infractions n'exigeant qu'une intention minimale de faire usage de la force (voir *R. v. Bernard* (1985), 18 C.C.C. (3d) 574 (C.A. Ont., le juge Dubin)). Pour ces motifs, je suis d'avis de dire que l'infraction exige une intention générale plutôt que spécifique.

1988 CanLII 22 (SCC)

The elements of the new offence under s. 246.2(*c*) with which the accused was charged are assault, as defined in s. 244 of the *Criminal Code*, which objectively viewed must be of a sexual nature, as a consequence of which the complainant has suffered bodily injury as defined in s. 245.1(2) of the *Code*, which provides:

245.1 ...

(2) For the purposes of this section and sections 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than merely transient or trifling in nature.

It would therefore be my view that the mental element of the offence in s. 246.2(*c*) is only the intention to commit the assault. The surrounding circumstances must be considered for evidence of its sexual nature and of the resulting bodily harm. The Crown need not show any further mental element (see J. D. Watt, *The New Offences Against the Person* (1984), at p. 113).

In my view, the comments in *Chase*, *supra*, are equally applicable to an offence under s. 246.2(*c*) which merely adds to the sexual assault *simpliciter* the requirement of bodily harm to the complainant. The resulting interference with the physical integrity of the complainant aggravates the seriousness of a sexual assault but the mental element remains the same. I would conclude that s. 246.2(*c*) creates an offence of general rather than specific intent.

The second issue, whether the defence of drunkenness applies to an offence of general intent includes the question of whether the Court should overrule its earlier decision in *Leary*. The attack on *Leary* was based on its rejection of the defence for crimes of general intent. As already mentioned, nobody has suggested that it should not apply in cases of specific intent. The Chief Justice has expressed the view that evidence of self-induced intoxication should be a relevant consideration in determining whether the *mens rea* of any particular offence has been proved by the Crown. As I

Les éléments de la nouvelle infraction prévue à l'al. 246.2*c*), dont l'accusé a été inculpé en l'espèce, sont les suivants: il doit y avoir des voies de fait au sens de l'art. 244 du *Code criminel*, lesquelles, considérées objectivement, doivent revêtir un caractère sexuel et, par suite de ces voies de fait, le plaignant doit avoir subi des lésions corporelles selon la définition que donne à cette expression le par. 245.1(2) du *Code*, qui dispose:

245.1 ...

(2) Pour l'application du présent article et des articles 245.3 et 246.2, «lésions corporelles» désigne une blessure qui nuit à la santé ou au bien-être du plaignant et qui n'est pas de nature passagère ou sans importance.

J'estime en conséquence que le seul élément moral requis pour l'infraction prévue à l'al. 246.2*c*) est l'intention de commettre l'agression. Les circonstances dans lesquelles elle a eu lieu doivent être examinées pour dégager la preuve du caractère sexuel de l'agression et des lésions corporelles qu'elle a causées. Le ministère public n'a à prouver l'existence d'aucun autre élément moral (voir J. D. Watt, *The New Offences Against the Person* (1984), à la p. 113).

À mon avis, les observations faites dans l'arrêt *Chase*, précité, s'appliquent tout autant à une infraction à l'al. 246.2*c*), car celui-ci ne fait qu'ajouter à l'agression sexuelle simple l'exigence que le plaignant ait subi des lésions corporelles. L'atteinte à l'intégrité physique du plaignant qui en est la conséquence aggrave l'agression sexuelle, mais l'élément moral demeure le même. Je conclus donc que l'al. 246.2*c*) crée une infraction d'intention générale plutôt que spécifique.

La seconde question, celle de savoir si la défense d'ivresse s'applique à une infraction d'intention générale, englobe la question de savoir si la Cour devrait renverser son propre arrêt rendu dans l'affaire *Leary*. Ce qu'on reproche à l'arrêt *Leary* est son rejet de ce moyen de défense pour les crimes d'intention générale. Comme je l'ai déjà dit, personne ne prétend qu'il ne devrait pas s'appliquer lorsqu'il y a une intention spécifique. Le Juge en chef s'est dit d'avis que la preuve d'intoxication volontaire doit être un élément pertinent à retenir pour déterminer si le ministère public a établi la

1988 CanLII 22 (SCC)

have indicated, I am unable to agree with this conclusion. The effect of such a conclusion would be that the more drunk a person becomes by his own voluntary consumption of alcohol or drugs, the more extended will be his opportunity for a successful defence against conviction for the offences caused by such drinking, regardless of the nature of the intent required for those offences.

mens rea d'une infraction donnée. Je le répète, je ne puis souscrire à cette conclusion, car il en découlerait que plus une personne s'enivre par la consommation volontaire d'alcool ou de stupéfiants, plus elle sera en mesure d'invoquer avec succès un moyen de défense qui lui permettra d'échapper à une déclaration de culpabilité pour les infractions résultant de cette consommation, indépendamment de la nature de l'intention requise pour ces infractions.

The appellant made two principal arguments in seeking the reversal of the *Leary* rule. He contended that it relieves the Crown from the burden of proving *mens rea* in cases of general intent and, in effect, imposes strict liability upon proof of the *actus reus*. He also contended that the *Leary* rule violates ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

L'appelant a avancé deux arguments principaux en demandant que la règle énoncée dans l'arrêt *Leary* soit écartée. Cette règle, a-t-il soutenu, dégage le ministère public de l'obligation de prouver la *mens rea* dans le cas des infractions d'intention générale et elle a pour effet d'imposer une responsabilité stricte du moment que l'*actus reus* est prouvé. Il a fait valoir en outre que la règle énoncée dans l'arrêt *Leary* enfreint l'art. 7 et l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

In my opinion, both of these submissions must be rejected. I would say at the outset that in crimes of general intent the Crown is not relieved from proving any element of the offence. The effect of excluding the drunkenness defence from such offences is merely to prevent the accused from relying on his self-imposed drunkenness as a factor showing an absence of any necessary intent. While this Court has consistently recognized the basic proposition that an accused person should not be subject to criminal sanction unless the Crown shows the existence of a blameworthy or criminal mental state associated with the *actus reus* of the crime, it does not follow that a person who so deprives himself by the voluntary consumption of alcohol or a drug of the normal power of self-restraint that a crime results, should be entitled to an acquittal. Compelling reasons grounded in logic, common sense, and sound social policy dictate otherwise.

Selon moi, ces arguments doivent tous les deux être rejetés. Je précise dès le départ que, dans le cas de crimes d'intention générale, le ministère public n'est dispensé de faire la preuve d'aucun élément de l'infraction. L'exclusion de la défense d'ivresse pour ces infractions n'a pas d'autre effet que d'empêcher l'accusé d'invoquer l'ivresse qu'il s'est infligée à lui-même comme facteur démontrant l'absence de l'intention requise. Bien que cette Cour ait toujours admis le principe fondamental selon lequel un accusé ne devrait être exposé à une sanction pénale que si le ministère public établit l'existence d'un état mental coupable ou criminel qui accompagne l'*actus reus* du crime, il ne s'ensuit pas qu'une personne qui, par la consommation volontaire d'alcool ou d'un stupéfiant, se prive à ce point du pouvoir normal de se dominer qu'un crime en résulte, devrait avoir droit à l'acquittement. Des raisons impérieuses fondées sur la logique, le bon sens et une saine politique sociale commandent qu'il en soit autrement.

As I indicated earlier, it is not necessary to review all of the authorities which have dealt with this issue. It is clear from a review of the cases, however, that until the early years of the nineteenth century drunkenness was considered "rath-

Ainsi que je l'ai déjà signalé, point n'est besoin de passer en revue toutes les décisions traitant de cette question. Il est toutefois évident à l'examen de la jurisprudence que, jusqu'au début du dix-neuvième siècle, l'ivresse était considérée

1988 CanLII 22 (SCC)

er an aggravation than a defence": see Lord Birkenhead in *Director of Public Prosecutions v. Beard*, *supra*, at p. 494. The early principle of the common law was that a voluntary destruction of will power would entitle a person to no more favourable treatment with regard to criminal conduct than a sober person. By the latter part of the nineteenth century this earlier rule was "mercifully relaxed" (see Lawton L.J. in *Director of Public Prosecutions v. Majewski*, [1975] 3 All E.R. 296 (C.A.), at p. 305) in respect of crimes of specific intent where the capacity to form the required specific intent was not present because of intoxication: see the early cases such as *R. v. Doherty* (1887), 16 Cox. C.C. 306, *per* Stephen J., at p. 308. This new approach was given approval in *Beard*'s case and the more modern authorities have been based upon it. This relaxation stems no doubt from a recognition of the severity of the penal consequence of most of the specific intent offences, as compared with the generally lesser penalties associated with the general intent offences. Therefore, the exclusion of the defence from general intent offences was not an exception to the general rule. The exception was the allowance of the defence in specific intent cases adopted to recognize the more complicated mental processes required for the crimes of special intent and the greater penalties involved. Some measure of relief for such cases was therefore provided. Otherwise, the common law preserved the general rule that a person may not by voluntary intoxication render himself immune from the consequences of his conduct.

In *R. v. George*, this Court considered the question of the relevance of drunkenness in a case of common assault. The accused had been acquitted of a charge of robbery with violence on the ground that, because of drunkenness, he was incapable of forming the specific intent to commit robbery. The trial judge did not consider the question of common assault. After stating that no specific

[TRADUCTION] «plutôt comme une circonstance aggravante que comme un moyen de défense»: voir lord Birkenhead dans l'arrêt *Director of Public Prosecutions v. Beard*, précité, à la p. 494. Suivant le principe initialement appliqué en *common law*, une personne qui de son propre gré se privait de toute volonté n'avait pas droit, dans le cas d'une conduite criminelle, à un traitement plus favorable que celui réservé à une personne qui n'avait pas bu. Dès la fin du dix-neuvième siècle, cette règle avait été, [TRADUCTION] «fort heureusement, assouplie» (voir le lord juge Lawton dans l'arrêt *Director of Public Prosecutions v. Majewski*, [1975] 3 All E.R. 296 (C.A.), à la p. 305) à l'égard des crimes d'intention spécifique lorsque la capacité de former l'intention spécifique requise était absente pour cause d'intoxication: voir les décisions anciennes telles *R. v. Doherty* (1887), 16 Cox C.C. 306, le juge Stephen, à la p. 308. Cette nouvelle approche a été approuvée dans l'arrêt *Beard* et les décisions plus modernes sont fondées sur elle. L'assouplissement procède sans doute d'une reconnaissance de la sévérité des conséquences pénales de la plupart des infractions d'intention spécifique par opposition aux peines généralement moins sévères qu'entraînent les infractions d'intention générale. Il s'ensuit donc que l'exclusion de la défense d'ivresse dans le cas des infractions d'intention générale ne constituait pas une exception à la règle générale. L'exception consistait en réalité à admettre ce moyen de défense pour les infractions d'intention spécifique, ce qui a été fait pour tenir compte de la plus grande complexité de la démarche mentale nécessaire pour les crimes d'intention spécifique et des peines plus sévères qu'ils entraînent. C'est pourquoi une certaine atténuation a été prévue pour ces cas. Du reste, la *common law* a conservé la règle générale suivant laquelle on ne saurait, en s'enivrant volontairement, échapper aux conséquences de sa conduite.

Dans l'arrêt *R. v. George*, cette Cour s'est penchée sur la question de la pertinence de l'ivresse dans un cas de voies de fait simples. L'accusé avait été acquitté relativement à une inculpation de vol qualifié avec violence, parce que l'ivresse l'avait rendu incapable de former l'intention spécifique de commettre le vol qualifié. Le juge du procès n'a pas examiné la question des voies de fait simples.

1988 CanLII 22 (SCC)

intent is necessary to constitute the offence of common assault, Fauteux J. (with whom Taschereau J. concurred) said, at p. 878:

> There can be no pretence, in this case, that the manner in which force was applied by respondent to his victim was accidental—excluding at the moment, from the consideration, the defence of drunkenness—unintentional.
>
> On this finding of fact, the accused was guilty of common assault unless there was evidence indicating a degree of drunkenness affording, under the law, a valid defence.

He went on to say at p. 879:

> Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved. It is certain that, on the facts found by the trial Judge, this situation did not exist in this case.

Ritchie J., with Martland J. concurring, saw the issue as the degree of drunkenness "necessary to negative" such intent, as is an ingredient of common assault, and he said, at p. 890:

> In considering the question of *mens rea*, a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. The former acts may be the purely physical products of momentary passion, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense. The offence of robbery, as defined by the *Criminal Code*, requires the presence of the kind of intent and purpose specified in ss. 269 and 288, but the use of the word "intentionally"

Ayant affirmé qu'aucune intention spécifique n'est nécessaire pour l'infraction de voies de fait simples, le juge Fauteux (à l'avis duquel le juge Taschereau s'est rangé) dit, à la p. 878:

> [TRADUCTION] Il est impossible de soutenir en l'espèce que c'est accidentellement ou, abstraction faite pour l'instant de la défense d'ivresse, involontairement que l'intimé a eu recours à la force contre sa victime.
>
> D'après cette conclusion de fait, l'accusé est coupable de voies de fait simples, à moins que la preuve n'indique un degré d'ivresse suffisant pour constituer en droit un moyen de défense valable.

Le juge Fauteux poursuit, à la p. 879:

> [TRADUCTION] La question est donc de savoir si, pour cause d'ivresse, l'état de l'intimé a été tel qu'il était incapable d'avoir intentionnellement recours à la force. Or, je ne crois pas qu'en l'absence d'un degré d'ivresse créant un état équivalant à l'aliénation, il soit métaphysiquement possible de concevoir une telle situation dans le cas de voies de fait comme celles présentement en cause. Il est certain que, compte tenu des conclusions de fait du juge du procès, cette situation ne s'est pas présentée en l'espèce.

Le juge Ritchie, à l'avis duquel le juge Martland a souscrit, a estimé que la question qui se posait était celle du degré d'ivresse [TRADUCTION] «nécessaire pour établir l'absence» de l'intention qui forme un élément de l'infraction de voies de fait simples. Il dit, à la p. 890:

> [TRADUCTION] En étudiant la question de la *mens rea*, on doit faire une distinction entre «l'intention» dans le cas d'actes accomplis pour atteindre un but immédiat d'une part et dans le cas d'actes accomplis dans le dessein et avec l'intention spécifique d'atteindre ou de contribuer à atteindre un but illégal d'autre part. Les actes illégaux du premier type sont «intentionnels» en ce sens qu'on ne les fait pas par accident ou par simple erreur. Les actes qui relèvent de la seconde catégorie, toutefois, résultent de la préméditation et représentent des mesures prises délibérément en vue d'atteindre un but illégal. Ceux-là peuvent être les conséquences purement physiques d'une passion momentanée, tandis que ceux-ci comportent la démarche mentale qui consiste à former une intention spécifique. Un homme en état d'ivresse très avancé peut frapper un autre intentionnellement au premier sens à un moment où son esprit est à ce point obscurci par la boisson qu'il est incapable de former une intention spécifique au deuxième sens. L'infraction de vol qualifié, telle qu'elle est définie au *Code*

1988 CanLII 22 (SCC)

in defining "common assault" in s. 230(*a*) of the *Criminal Code* is exclusively referable to the physical act of applying force to the person of another.

and at p. 891:

The decision of the learned trial judge, in my opinion, constitutes a finding that the respondent violently manhandled a man and knew that he was hitting him. Under these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault because there is no suggestion that the drink which had been consumed had produced permanent or temporary insanity and the respondent's own statement indicates that he knew that he was applying force to the person of another.

It is evident that the majority in *R. v. George* considered that the mental element required for a conviction of common assault involved no more than the intentional—as opposed to the accidental—performance of the *actus reus* and that they concluded that self-induced intoxication, "falling short of a degree of drunkenness creating a condition tantamount to insanity," would afford no defence to a charge of common assault, an offence of general intention.

In *Leary*, this Court followed the approach taken in the House of Lords in *Majewski*, where the House of Lords unanimously approved the distinction between general and specific intent on the basis that the rule had evolved to protect the community and that voluntary intoxication was a sufficient substitute for the fault element in crimes of general intent. Lord Elwyn Jones L.C. (Diplock, Simon, Kilbrandon LI.J. concurring) cited a speech by Lord Simon in *R. v. Morgan*, [1976] A.C. 182, at pp. 216-17, where he defined assault as a crime of basic intent and concluded, at pp. 474-75, with the following comment:

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him

criminel, nécessite le genre d'intention et de dessein spécifiés aux art. 269 et 288, mais l'emploi du mot «intentionnelle» dans la définition des «voies de fait simples» à l'al. 230*a*) du *Code criminel* se rapporte uniquement à l'acte physique d'avoir recours à la force contre une autre personne.

À la page 891, il fait les observations suivantes:

[TRADUCTION] La décision du savant juge du procès constitue, selon moi, une conclusion que l'intimé a violemment agressé un homme et savait qu'il le frappait. Dans ces circonstances, une preuve établissant que l'accusé se trouvait en état d'ivresse volontaire ne saurait être considérée comme une défense opposable à une accusation de voies de fait simples parce que rien n'indique que l'alcool qu'il avait consommé avait provoqué une aliénation permanente ou temporaire et qu'il ressort de la déclaration faite par l'intimé lui-même qu'il savait qu'il employait la force contre une autre personne.

Il est évident que les juges formant la majorité dans l'affaire *R. v. George* ont estimé que l'élément moral requis pour qu'il y ait une déclaration de culpabilité de voies de fait simples n'était rien d'autre que l'accomplissement intentionnel, par opposition à accidentel, de l'*actus reus* et qu'ils ont conclu que l'intoxication volontaire, [TRADUCTION] «lorsqu'il ne s'agit pas d'un degré d'ivresse créant un état équivalant à l'aliénation», ne pourrait pas être invoquée comme défense dans le cas d'une accusation de voies de fait simples, une infraction d'intention générale.

Dans l'arrêt *Leary*, cette Cour a suivi l'analyse adoptée dans l'arrêt *Majewski*, où la Chambre des lords a approuvé à l'unanimité la distinction faite entre l'intention générale et l'intention spécifique, étant donné que la règle avait évolué de manière à protéger la société et que l'intoxication volontaire suffisait à titre de substitut pour l'élément de faute dans les crimes d'intention générale. Le lord chancelier Elwyn Jones (les lords juges Diplock, Simon et Kilbrandon souscrivant à son avis) a cité l'opinion exprimée par lord Simon dans l'affaire *R. v. Morgan*, [1976] A.C. 182, aux pp. 216 et 217, où il définit les voies de fait comme un crime d'intention fondamentale. Lord Elwyn Jones conclut en disant, aux pp. 474 et 475:

[TRADUCTION] Si un homme prend de son gré une substance qui lui fait rejeter les contraintes de la raison et de la conscience, on ne lui fait aucun tort en lui

1988 CanLII 22 (SCC)

answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases: see *Reg.* v. *Venna*, [1976] Q.B. 421, *per* James L.J. at p. 429. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness. On this I adopt the conclusion of Stroud in 1920, 36 L.Q.R. 273 that:

> "... it would be contrary to all principle and authority to suppose that drunkenness" (and what is true of drunkenness is equally true of intoxication by drugs) "can be a defence for crime in general on the ground that 'a person cannot be convicted of a crime unless the mens was rea.' By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to mens rea for the purpose of all ordinary crimes."

He continued in reference to the American view, at p. 475:

This approach is in line with the American Model Penal Code (S. 2.08 (2)):

> "When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."

and then added:

Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary mens rea has to be proved) would in my view undermine the criminal law and I do not think that it is enough to say, as did Mr. Tucker, that we can rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted. It may well be that Parliament will at some future time consider, as I think it should, the recommendation in the Butler Committee Report on Mentally Abnormal Offenders (Cmnd. 6244, 1975) that a new offence of "dangerous intoxication" should be created. But in the meantime it would be irresponsible to aban-

imposant la responsabilité criminelle pour tout préjudice qu'il peut occasionner lorsqu'il est dans cet état. Le fait qu'il s'est mis dans cet état par la consommation de stupéfiants et de la boisson constitue, à mon avis, la preuve d'une *mens rea*, de l'intention coupable qui est certainement suffisante pour les crimes d'intention fondamentale. Il s'agit d'une conduite qui témoigne d'insouciance et l'insouciance suffit pour constituer la *mens rea* requise pour des voies de fait: voir *Reg.* v. *Venna* [1976] Q.B. 421, le lord juge James, à la p. 429. L'ivresse représente en soi un élément intrinsèque du crime et en fait partie intégrante; l'autre élément est la preuve du recours illégal à la force contre la victime. Pris ensemble, ces éléments constituent de l'insouciance criminelle. Sur ce point j'adopte la conclusion qu'a tirée Stroud à 1920, 36 L.Q.R. 273:

> «... il serait contraire aux principes et à la jurisprudence de supposer que l'ivresse» (et ce qui s'applique à l'ivresse provoquée par l'alcool vaut également pour l'intoxication causée par des stupéfiants) «peut servir de défense pour les crimes en général parce que «nul ne peut être reconnu coupable d'un crime s'il n'y a pas eu de *mens rea*». En se permettant de s'enivrer et en se mettant ainsi dans un état où on ne tient plus compte des prescriptions de la loi, on fait preuve d'une insouciance qui équivaut à la *mens rea* requise pour tous les crimes ordinaires.»

À la page 475, il poursuit en parlant du point de vue retenu aux États-Unis:

[TRADUCTION] Cette position concorde avec le Model Penal Code des États-Unis (par. 2.08(2)):

> «Lorsque l'insouciance établit un élément de l'infraction, si l'auteur de l'acte, en raison de son intoxication volontaire, est inconscient d'un risque dont il aurait été conscient n'eût été son intoxication, cette inconscience ne doit pas être prise en considération.»

Lord Elwyn Jones ajoute:

[TRADUCTION] Si, d'une manière générale (par opposition aux cas exceptionnels où doit être prouvé un élément moral en plus de la *mens rea* ordinaire), l'intoxication était acceptée comme moyen de défense, cela minerait, à mon avis, le droit criminel et je ne crois pas qu'on puisse se contenter d'affirmer, comme l'a fait Me Tucker, que nous pouvons nous en remettre au bon sens des jurés ou des magistrats pour assurer que les coupables seront condamnés. Il se peut bien qu'un jour le législateur examine, comme à mon avis il le devrait, la recommandation concernant la création d'une infraction d'«intoxication dangereuse», que formule le comité Butler dans son Report on Mentally Abnormal Offen-

1988 CanLII 22 (SCC)

don the common law rule, as "mercifully relaxed," which the courts have followed for a century and a half.

Lord Simon, after noting that a person is not criminally responsible for unlawful conduct unless that conduct is accompanied by a wrongful state of mind—the *mens rea*—, said, at p. 478:

Mens rea is therefore on ultimate analysis the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence. There is no juristic reason why mental incapacity (short of *M'Naghten* insanity), brought about by self-induced intoxication, to realise what one is doing or its probable consequences should not be such a state of mind stigmatised as wrongful by the criminal law; and there is every practical reason why it should be.

And, at pp. 479-80, he said:

As I have ventured to suggest, there is nothing unreasonable or illogical in the law holding that a mind rendered self-inducedly insensible (short of *M'Naghten* insanity), through drink or drugs, to the nature of a prohibited act or to its probable consequences is as wrongful a mind as one which consciously contemplates the prohibited act and foresees its probable consequences (or is reckless as to whether they ensue). The latter is all that is required by way of mens rea in a crime of basic intent. But a crime of specific intent requires something more than contemplation of the prohibited act and foresight of its probable consequences. The mens rea in a crime of specific intent requires proof of a purposive element. This purposive element either exists or not; it cannot be supplied by saying that the impairment of mental powers by self-induced intoxication is its equivalent, for it is not. So that the 19th century development of the law as to the effect of self-induced intoxication on criminal responsibility is juristically entirely acceptable; and it need be a matter of no surprise that Stephen stated it without demur or question.

ders (Cmnd. 6244, 1975). Mais, entre-temps, je crois qu'il serait irresponsable d'abandonner la règle de *common law*, «fort heureusement, assouplie», que les tribunaux suivent depuis un siècle et demi.

Lord Simon, ayant fait remarquer qu'une personne n'est responsable en droit criminel pour une conduite illégale que si cette conduite est accompagnée d'un état d'esprit coupable, savoir la *mens rea*, dit, à la p. 478:

[TRADUCTION] La *mens rea* est donc en dernière analyse l'état d'esprit que le droit criminel considère comme répréhensible et qu'il stigmatise en conséquence. Cet état d'esprit, lorsqu'il vient s'ajouter à la conduite prohibée en question, constitue une infraction particulière. Il n'existe aucune raison juridique pour laquelle l'incapacité mentale (lorsqu'elle n'équivaut pas à l'aliénation au sens de l'arrêt *M'Naghten*), résultant de l'intoxication volontaire, de se rendre compte de ses actes ou de leurs conséquences probables ne devrait pas constituer précisément ce genre d'état d'esprit que le droit criminel considère comme répréhensible et qu'il stigmatise en conséquence; de fait, sur le plan pratique, il y a de très bonnes raisons de la ranger dans cette catégorie.

Aux pages 479 et 480, il dit:

[TRADUCTION] Je me suis déjà hasardé à affirmer qu'il n'y a rien de déraisonnable ni d'illogique à ce que le droit dise qu'un esprit rendu, par la consommation volontaire d'alcool ou de stupéfiants, inconscient (lorsque cette inconscience n'équivaut pas à l'aliénation au sens de l'arrêt *M'Naghten*) de la nature d'un acte prohibé ou de ses conséquences probables, est un esprit aussi coupable que celui qui envisage consciemment l'acte prohibé et en prévoit les conséquences probables (ou qui ne se soucie pas que ces conséquences en résultent). C'est là tout ce qui est requis comme *mens rea* dans le cas d'un crime d'intention fondamentale. Un crime d'intention spécifique, par contre, exige davantage que le fait d'avoir envisagé l'acte prohibé et d'avoir prévu ses conséquences probables. La *mens rea* dans le cas d'un crime d'intention spécifique exige la preuve d'un dessein. Cet élément existe ou n'existe pas; on ne saurait suppléer à son absence en disant que l'affaiblissement des facultés mentales provoqué par l'intoxication volontaire en est l'équivalent, car ce n'est pas le cas. Par conséquent, la règle de droit relative à l'effet de l'intoxication volontaire sur la responsabilité criminelle, telle que cette règle s'est développée au XIXe siècle, est entièrement acceptable sur le plan juridique; il n'est donc pas surprenant du tout que Stephen l'ait énoncée sans aucune hésitation ni aucune réserve.

1988 CanLII 22 (SCC)

1437

Lord Salmon and Lord Edmund-Davies admitted that the current state of the law could not be entirely justified in logic but rather must be founded in common sense and experience. Lord Salmon said, at pp. 483-84:

As I have already indicated, I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous master. The law is primarily concerned with human affairs. I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence.

If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequence could be appalling.

And Lord Edmund-Davies said, at p. 494:

Are the claims of logic, then, so compelling that a man behaving as the Crown witnesses testified the appellant did must be cleared of criminal responsibility? As to this, Lawton L.J. rightly said ante, p. 456B-C:

"Although there was much reforming zeal and activity in the 19th century, Parliament never once considered whether self-induced intoxication should be a defence *generally* to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal."

If such be the inescapable result of the strict application of logic in this branch of the law, it is indeed not surprising that illogicality has long reigned, and the

Lord Salmon et lord Edmund-Davies ont reconnu que la règle de droit actuellement en vigueur ne peut pas se justifier entièrement par la logique et qu'elle doit plutôt être fondée sur le bon sens et l'expérience. Lord Salmon dit, aux pp. 483 et 484:

[TRADUCTION] Comme je l'ai déjà indiqué, je conviens de l'existence d'un certain illogisme dans la règle selon laquelle l'intoxication peut excuser ou effacer un type d'intention, mais non un autre. J'accepte cependant cet illogisme, je l'accepte parce que la règle, dans son aspect indulgent, évite toute sévérité excessive sans pour autant nuire à la sécurité tandis que, dans son aspect rigoureux, elle s'applique de manière à ne pas nuire à la justice. Il serait tout aussi ridicule de supprimer l'aspect indulgent de la règle (ce que personne ne propose d'ailleurs) que d'adopter l'autre possibilité qui consiste à lui enlever son aspect rigoureux dans l'intérêt d'une logique absolue. Dans les affaires humaines, la logique absolue est un guide peu sûr et un maître très dangereux. Le droit s'occupe surtout d'affaires humaines. Je crois que la principale raison d'être de notre système de droit est de préserver la liberté individuelle. Or, la protection contre la violence physique représente un élément important de la liberté individuelle.

S'il n'y avait aucune sanction pénale pour des lésions illégalement infligées alors qu'on est complètement sous l'empire de la boisson ou de la drogue qu'on a prise volontairement, les conséquences sociales risqueraient d'être épouvantables.

Et, à la p. 494, lord Edmund-Davies tient ces propos:

[TRADUCTION] Peut-on pousser la logique jusqu'à dire qu'un homme qui s'est conduit comme les témoins à charge ont dit que l'appelant l'avait fait, doit être dégagé de toute responsabilité criminelle? À ce sujet, le lord juge Lawton déclarait à juste titre, ci-dessus à la p. 456B-C:

«Malgré le grand zèle réformateur du XIXe siècle, le Parlement n'a jamais examiné la question de savoir si l'intoxication volontaire devait constituer un moyen de défense *général* à une accusation criminelle. Il serait pour le moins étrange que l'adoucissement d'une règle de droit rigoureuse la dénature à tel point, sans l'intervention du Parlement, qu'elle vienne à signifier que plus un homme s'enivre, sans aller jusqu'à l'aliénation mentale, plus il a de chances d'être acquitté.»

Si tel est le résultat inéluctable de l'application rigoureuse de la logique à cette branche du droit, il n'est pas

1988 CanLII 22 (SCC)

prospect of its dethronement must be regarded as alarming.

Lord Russell added these words, at p. 498:

> . . . but logic in criminal law must not be allowed to run away with common sense, particularly when the preservation of the Queen's Peace is in question. The ordinary citizen who is badly beaten up would rightly think little of the criminal law as an effective protection if, because his attacker had deprived himself of ability to know what he was doing by getting himself drunk or going on a trip with drugs, the attacker is to be held innocent of any crime in the assault. Mens rea has many aspects. If asked to define it in such a case as the present I would say that the element of guilt or moral turpitude is supplied by the act of self-intoxication reckless of possible consequences.

From the judgments in *Majewski*, it may be concluded that the law in England on this question is that in offences of general intent the defence of drunkenness shall not apply; that the requirement of *mens rea* in such offences is met by proof of voluntary intoxication; and that any logical weakness in this position is justified on the basis of sound social policy.

This Court in *Leary* approved the *Majewski* approach which has long been accepted in the law of Canada and, for the reasons which I have set out, it is my opinion that this Court's judgment in *Leary* ought not to be overruled. I must re-emphasise that the *Leary* rule does not relieve the Crown from its obligation to prove the *mens rea* in a general intent offence. The fact that an accused may not rely on voluntary intoxication in such offences does not have that effect because of the nature of the offence and the mental elements which must be shown. The requisite state of mind may be proved in two ways. Firstly, there is the general proposition that triers of fact may infer *mens rea* from the *actus reus* itself: a person is presumed to have intended the natural and probable consequences of his actions. For example, in an offence involving the mere application of force, the minimal intent to apply that force will suffice

surprenant que l'illogisme règne depuis longtemps, et il serait dangereux de le détrôner.

À la page 498, lord Russell ajoute les observations suivantes:

> [TRADUCTION] . . . mais il ne faut pas permettre que la logique en droit criminel l'emporte sur le bon sens, surtout quand il est question du maintien de l'ordre public. Le citoyen ordinaire qui a été gravement brutalisé aurait, à juste titre d'ailleurs, une mauvaise opinion du droit criminel en tant que moyen de protection efficace si son agresseur, du fait de s'être enivré ou de s'être drogué au point de se mettre dans l'incapacité de se rendre compte de ses actes, était jugé innocent de tout crime relié à l'agression. La *mens rea* comporte de multiples aspects. Si on me demandait d'en donner une définition dans le présent contexte, je dirais que l'élément de culpabilité ou de turpitude morale existe du fait qu'on s'est enivré sans se soucier des conséquences possibles.

On peut déduire des opinions exprimées dans l'arrêt *Majewski* que la règle de droit anglaise dans ce domaine veut que la défense d'ivresse ne s'applique pas aux infractions d'intention générale; que, dans le cas de ces infractions, il suffit pour satisfaire à l'exigence de *mens rea* de produire une preuve d'intoxication volontaire; et que toute faiblesse que peut comporter ce point de vue sur le plan de la logique est justifiée par des raisons qui relèvent d'une saine politique sociale.

Dans l'arrêt *Leary*, cette Cour a approuvé la position énoncée dans l'arrêt *Majewski*, qui est acceptée depuis longtemps en droit canadien, et, pour les raisons déjà exposées, j'estime qu'il ne faut pas renverser l'arrêt *Leary*. Je tiens à souligner encore une fois que la règle énoncée dans l'arrêt *Leary* ne dégage pas le ministère public de son obligation de prouver la *mens rea* lorsqu'il s'agit d'une infraction d'intention générale. Le fait qu'un accusé ne peut invoquer l'intoxication volontaire dans le cas de ces infractions n'a pas cet effet vu la nature de l'infraction et les éléments moraux devant être démontrés. L'existence de l'état d'esprit requis peut se prouver de deux manières. Il y a d'abord la proposition générale selon laquelle les juges des faits peuvent déduire la *mens rea* de l'*actus reus* lui-même: une personne est présumée avoir voulu les conséquences naturelles et probables de ses actes. Par exemple, dans une infraction

1988 CanLII 22 (SCC)

to constitute the necessary *mens rea* and can be reasonably inferred from the act itself and the other evidence. Secondly, in cases where the accused was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may meet its evidentiary obligation respecting the necessary blameworthy mental state of the accused by proving the fact of voluntary self-induced intoxication by drugs or alcohol. This was the approach suggested in *Majewski*. In most cases involving intoxication in general intent offences, the trier of fact will be able to apply the first proposition, namely, that the intent is inferable from the *actus reus* itself. As Fauteux J. observed in *R. v. George*, *supra*, at p. 879, it is almost metaphysically inconceivable for a person to be so drunk as to be incapable of forming the minimal intent to apply force. Hence, only in cases of the most extreme self-intoxication does the trier of fact need to use the second proposition, that is, that evidence of self-induced intoxication is evidence of the guilty mind, the blameworthy mental state.

The result of this two-fold approach is that for these crimes accused persons cannot hold up voluntary drunkenness as a defence. They cannot be heard to say: "I was so drunk that I did not know what I was doing". If they managed to get themselves so drunk that they did not know what they were doing, the reckless behaviour in attaining that level of intoxication affords the necessary evidence of the culpable mental condition. Hence, it is logically impossible for an accused person to throw up his voluntary drunkenness as a defence to a charge of general intent. Proof of his voluntary drunkenness can be proof of his guilty mind.

As I have endeavoured to show, the exclusion of the drunkenness defence in general intent cases is not without logical underpinnings but, whatever the logical weaknesses may be, an overwhelming

comportant le simple recours à la force, l'intention minimale d'exercer cette force suffira pour constituer la *mens rea* nécessaire et cette intention peut raisonnablement déduire de l'acte lui-même et des autres éléments de preuve. Deuxièmement, dans les cas où l'accusé était intoxiqué au point de faire naître des doutes quant au caractère volontaire de sa conduite, le ministère public peut s'acquitter de son obligation de prouver que l'accusé avait l'état mental coupable nécessaire en prouvant l'intoxication volontaire que l'accusé a provoquée lui-même par la consommation de stupéfiants ou d'alcool. C'est là la démarche proposée dans l'arrêt *Majewski*. Dans la plupart des cas d'intoxication lors de la perpétration d'infractions d'intention générale, le juge des faits pourra appliquer la première proposition, savoir que l'intention peut être déduite de l'*actus reus* lui-même. Comme le fait observer le juge Fauteux dans l'arrêt *R. v. George*, précité, à la p. 879, il est presque métaphysiquement inconcevable qu'une personne soit ivre au point d'être incapable de former l'intention minimale d'avoir recours à la force. Il s'ensuit que ce n'est que dans le cas de la plus extrême intoxication volontaire que le juge des faits doit recourir à la seconde proposition, c'est-à-dire celle suivant laquelle la preuve d'intoxication volontaire démontre l'existence d'un esprit coupable, d'un état mental condamnable.

Il résulte de ce processus à deux étapes que, pour ces crimes, un accusé ne saurait soulever l'ivresse volontaire comme moyen de défense. Il ne saurait alléguer: «J'étais tellement ivre que je ne savais pas ce que je faisais.» S'il a pu s'enivrer au point d'être inconscient de ses actes, l'insouciance dont il a témoigné en se mettant dans cet état constitue la preuve nécessaire pour établir l'état mental coupable. Par conséquent, il est, du point de vue de la logique, impossible qu'une personne accusée d'une infraction d'intention générale invoque son ivresse volontaire comme moyen de défense. La preuve de son ivresse volontaire peut constituer une preuve de son esprit coupable.

Comme j'ai essayé de le démontrer, l'exclusion de la défense d'ivresse dans le cas des infractions d'intention générale n'est pas dénuée de tout fondement logique, mais, quelles que puissent être ses

1988 CanLII 22 (SCC)

justification for the exclusion may rest on policy, policy so compelling that it possesses its own logic. Intoxication, whether by alcohol or drugs, lies at the root of many if not most violent assaults: intoxication is clearly a major cause of violent crime. What then is preferable, a recognition of this fact and the adoption of a policy aimed at curbing the problem, or the application of what is said to be logic by providing in law that he who voluntarily partakes of that which is the cause of the crime should for that reason be excused from the consequences of his crime? If that is logic, I prefer policy.

It was argued by the appellant that the *Leary* rule converts the offence of sexual assault causing bodily harm into a crime of absolute liability in that the Crown need not prove the requisite intention for the completion of the offence. Therefore, it is said that *Leary* violates ss. 7 and 11(*d*) of the *Charter*. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, and in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, it was held that the requirement for a minimum mental state before the attachment of criminal liability is a principle of fundamental justice. Criminal offences, as a general rule, must have as one of their elements the requirement of a blameworthy mental state. The morally innocent ought not to be convicted. It is said that the *Leary* rule violates this fundamental premise. In my opinion, the *Leary* rule clearly does not offend this essential principle of criminal law but rather upholds it. The *Leary* rule recognizes that accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control leading to the commission of a crime, are not morally innocent and are, indeed, criminally blameworthy. While the rule excludes consideration of voluntary intoxication in the approach to general intent offences, it nonetheless recognizes that it may be a relevant factor in those generally more serious offences where the *mens rea* must involve not only the intentional performance of the *actus reus* but, as well, the formation of further ulterior motives and purposes. It therefore intrudes upon the security of the person only in accordance

faiblesses sur le plan de la logique, cette exclusion peut trouver une justification irrésistible dans la politique générale, une politique si impérieuse qu'elle est dotée de sa propre logique. Qu'elle soit provoquée par l'alcool ou par des stupéfiants, l'intoxication est à l'origine d'un bon nombre, sinon de la plupart, des agressions violentes: sans conteste, l'intoxication est une cause majeure de crimes violents. Quel parti faut-il donc préférer, celui de reconnaître ce fait et d'adopter une politique visant à enrayer le problème, ou celui d'appliquer ce qu'on dit être logique en créant une règle de droit voulant que quiconque participe volontairement à ce qui est la cause du crime doive pour cette raison être excusé des conséquences de son crime? Si c'est là la logique, je préfère la politique générale.

L'appelant a fait valoir que la règle énoncée dans l'arrêt *Leary* transforme l'infraction d'agression sexuelle causant des lésions corporelles en crime de responsabilité absolue, en ce sens que le ministère public est dispensé d'avoir à prouver l'intention requise pour qu'il y ait perpétration de l'infraction. Il prétend donc que l'arrêt *Leary* va à l'encontre de l'art. 7 et de l'al. 11*d*) de la *Charte*. Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, et dans l'arrêt *R. c. Vaillancourt*, [1987] 2 R.C.S. 636, il a été jugé que l'exigence d'un certain état mental minimal comme condition de la responsabilité criminelle est un principe de justice fondamentale. Un des éléments des infractions criminelles doit en règle générale être l'exigence d'un état mental coupable. Ceux qui sont moralement innocents ne devraient pas se voir déclarer coupables. On dit que la règle énoncée dans l'arrêt *Leary* viole ce principe fondamental. À mon avis, cette règle ne va manifestement pas à l'encontre de ce principe essentiel du droit criminel; au contraire, elle l'étaye. Il s'agit d'une règle qui reconnaît que les accusés qui ont volontairement consommé des stupéfiants ou de l'alcool, se privant ainsi de la maîtrise de soi, ce qui mène à la perpétration d'un crime, loin d'être moralement innocents, sont en fait coupables en droit criminel. Quoique la règle ne permette pas de tenir compte de l'intoxication volontaire dans le cas d'infractions d'intention générale, elle reconnaît néanmoins que cela peut représenter un facteur pertinent à l'égard des infractions générale-

1988 CanLII 22 (SCC)

with sound principle and within the established boundaries of the legal process. For these reasons, I would say that the *Charter* is not violated.

In the High Court of Australia in the case of *O'Connor* (1980), 4 A. Crim. R. 348, the court reached a different conclusion and its view has found favour in the judgment of the Chief Justice. I have tried to set out my reasons for rejecting the approach in the *O'Connor* case. I have done so on the basis that the existing law, resting on a recognition of the distinction between the general and specific intent, has not only served our society well but is not divorced from logical support and is based on sound policy. The present law has long been settled and applied in the United Kingdom. It has been accepted as well in Canada and has general support in the United States and up until the *O'Connor* case, as far as I have been able to ascertain, has been followed in both Australia and New Zealand. It has, in other words, embraced the greater part of the common law world. For this reason and those earlier outlined, I would not overrule the judgment of this Court in *Leary* and I would confirm the law as it presently stands. Parliament at some time in the future may intervene in the matter with such statutory provisions as it may consider appropriate but failing that occurrence I would not enlarge the defence of drunkenness, and I do not consider that the suggestion that juries may decline to give effect to such an enlarged defence is a factor to be urged in its favour.

I would therefore conclude that the courts below made no error and I would dismiss the appeal.

In any event, should it be considered that I am wrong in my approach to the *Leary* case, this is nonetheless a case in which the provisions of s. 613(1)(*b*)(iii) of the *Criminal Code* should be applied. The Court of Appeal, reaching the conclu-

ment plus graves pour lesquelles la *mens rea* doit comprendre non seulement l'accomplissement intentionnel de l'*actus reus*, mais aussi l'existence d'autres motifs et desseins. La règle ne nuit donc à la sécurité de la personne qu'en conformité avec des principes solides et d'une manière qui ne dépasse pas les limites établies du processus légal. Pour ces raisons, je suis d'avis qu'il n'y a pas de violation de la *Charte*.

Dans l'affaire *O'Connor* (1980), 4 A. Crim. R. 348, la Haute Cour de l'Australie est arrivée à une conclusion différente et son avis a été retenu par le Juge en chef dans les motifs qu'il a rédigés en l'espèce. J'ai tenté d'exposer les raisons qui m'amènent à rejeter le point de vue adopté dans l'arrêt *O'Connor*. Mon opinion est motivée par le fait que non seulement la règle de droit actuelle, qui repose sur la reconnaissance de l'existence d'une distinction entre l'intention générale et l'intention spécifique, a bien servi notre société, mais aussi elle n'est pas sans soutien logique et elle est fondée sur une politique saine. Voilà longtemps que cette règle bien établie est appliquée au Royaume-Uni. Elle a été acceptée également au Canada et jouit d'un appui général aux États-Unis. De plus, à ce que je peux voir, avant l'arrêt *O'Connor* elle avait été suivie en Australie et en Nouvelle-Zélande. En d'autres termes, elle a eu cours dans la majeure partie du monde de *common law*. Pour ce motif et pour ceux exposés précédemment, je suis d'avis de ne pas renverser l'arrêt *Leary* et de confirmer la règle de droit actuellement en vigueur. Il se peut que dans l'avenir le législateur intervienne en adoptant les dispositions législatives qu'il juge appropriées, mais en attendant je n'élargirais pas la portée de la défense d'ivresse et je ne crois pas que la proposition selon laquelle les jurys pourront refuser de retenir ce moyen de défense élargi soit un facteur qui milite en sa faveur.

Je conclus donc que les tribunaux d'instance inférieure n'ont pas commis d'erreur et je suis d'avis de rejeter le pourvoi.

Quoi qu'il en soit, à supposer que ma façon de voir l'arrêt *Leary* soit considérée comme erronée, il y a néanmoins lieu en l'espèce d'appliquer le sous-al. 613(1)*b*)(iii) du *Code criminel*. Étant donné la conclusion à laquelle elle est arrivée, la

1988 CanLII 22 (SCC)

sion that it did, did not find it necessary to consider this question. The issue, however, was raised by the respondent Crown in its factum. The trial judge found no evidence of drunkenness, except the statement of the appellant made to the police before trial. The appellant himself did not see fit to give evidence at the trial. The trial judge in addressing the jury made the following statement:

> You heard the evidence of the police officers and of the complainant of the condition of the accused with respect to drink. None of them say that he was drunk. Only the accused in his statement says "I was all drunked up too". There was no evidence of drunkenness except that statement and it is open to you to accept it and find that he was drunk but even if he was drunk drunkenness is no defence to the charge alleged against this accused. It is no defence.

It is my view that there is no sufficient evidence of drunkenness to form any basis whatever for the defence of drunkenness. I can only conclude after reviewing the evidence that even if the exclusion of the evidence of drunkenness was an error on the part of the trial judge, no substantial wrong or miscarriage of justice has occurred in this case and the verdict of the jury would necessarily have been the same, even if the evidence of drunkenness had not been excluded from the jury's consideration. Acting under the powers given in s. 623(1) of the *Code*, I would apply the proviso, dismiss the appeal, and confirm the conviction.

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J.—I have had the benefit of the reasons of the Chief Justice and of my colleagues McIntyre and La Forest JJ. I agree with McIntyre J. for the reasons given by him that sexual assault causing bodily harm is an offence of general intent requiring only the minimal intent to apply force. I agree with him also that in most cases involving general intent offences and intoxication the Crown will be able to establish the accused's blameworthy mental state by inference from his or her acts. I think that is the case here. The evidence of intoxication withheld from the trier of fact in this case could not possibly have raised a reasonable doubt

Cour d'appel n'a pas jugé nécessaire d'aborder cette question. Elle a toutefois été soulevée par l'intimée dans son mémoire. Le juge du procès n'a constaté l'existence d'aucun élément de preuve établissant l'ivresse, si ce n'est la déclaration faite par l'appelant à la police avant le procès. L'appelant lui-même n'a pas cru bon de témoigner au procès. Dans son exposé au jury, le juge du procès a dit:

> [TRADUCTION] Vous avez entendu les témoignages des policiers et de la plaignante concernant l'état de l'accusé en ce qui concerne son ébriété. Aucun ne prétend qu'il était ivre. L'accusé a été le seul à parler d'ivresse dans sa déclaration: «J'étais bien soûl aussi.» Exception faite de cette déclaration, il n'y a aucune preuve qu'il était ivre. Or, vous pouvez l'accepter et conclure qu'il était en état d'ébriété, mais même s'il l'était, l'ivresse ne peut être opposée comme moyen de défense à l'accusation portée contre lui. Ce n'est tout simplement pas une défense.

À mon avis, on n'a pas produit une preuve d'ivresse qui suffit pour fonder la défense d'ivresse. Je ne puis que conclure au vu de la preuve que, même si le juge du procès a eu tort d'exclure l'ivresse, il n'y a eu en l'espèce aucun tort important ni erreur judiciaire grave et le jury aurait nécessairement rendu le même verdict, même si on lui avait permis de tenir compte de la preuve d'ivresse. Exerçant les pouvoirs que confère le par. 623(1) du *Code*, je suis d'avis d'appliquer l'exception, de rejeter le pourvoi et de confirmer la déclaration de culpabilité.

Version française des motifs des juges Wilson et L'Heureux-Dubé rendus par

LE JUGE WILSON—J'ai eu l'avantage de lire les motifs du Juge en chef et de mes collègues les juges McIntyre et La Forest. Je souscris aux motifs du juge McIntyre portant que l'agression sexuelle causant des lésions corporelles est une infraction d'intention générale exigeant seulement l'intention minimale d'utiliser la force. Je suis aussi d'accord avec lui pour dire que, dans la plupart des cas mettant en cause des infractions d'intention générale et l'intoxication, le ministère public sera à même de prouver l'état mental blâmable de l'accusé en le déduisant de ses actes. Je pense que tel est le cas en l'espèce. Il est impossible

1988 CanLII 22 (SCC)

as to the existence of the minimal intent to apply force. It is accordingly not necessary in this case to resort to self-induced intoxication as a substituted form of *mens rea*. And, indeed, I have some real concerns as to whether the imposition of criminal liability on that basis would survive a challenge under the *Canadian Charter of Rights and Freedoms*.

que la preuve de l'intoxication, qui n'a pas été soumise au juge des faits en l'espèce, ait pu soulever un doute raisonnable quant à l'existence de l'intention minimale d'utiliser la force. Il n'est donc pas nécessaire en l'espèce de recourir à l'intoxication volontaire à titre de substitut de la *mens rea*. De toute façon, je suis loin d'être sûre que l'imposition de la responsabilité criminelle sur ce fondement survivrait à une contestation en vertu de la *Charte canadienne des droits et libertés*.

The facts are fully set out in the reasons of the Chief Justice and I refer to them only to underline why I agree with my colleague, McIntyre J., that the rule in *Leary v. The Queen*, [1978] 1 S.C.R. 29, should be preserved and applied in this case.

Le Juge en chef a exposé les faits en détail dans ses motifs et je ne m'y reporterai que pour souligner pourquoi je partage l'avis du juge McIntyre que la règle énoncée dans l'arrêt *Leary c. La Reine*, [1978] 1 R.C.S. 29 doit être préservée et appliquée en l'espèce.

Sexual assault is a crime of violence. There is no requirement of an intent or purpose beyond the intentional application of force. It is first and foremost an assault. It is sexual in nature only because, objectively viewed, it is related to sex either on account of the area of the body to which the violence is applied or on account of words accompanying the violence. Indeed, the whole purpose, as I understand it, of the replacement of the offence of rape by the offence of sexual assault was to emphasize the aspect of violence and put paid to the benign concept that rape was simply the act of a man who was "carried away" by his emotions.

L'agression sexuelle est un crime violent. Il n'exige pas d'intention ou de dessein autre que l'utilisation intentionnelle de la force. C'est toujours et avant tout une agression. Elle est de nature sexuelle seulement parce que, d'un point de vue objectif, elle est reliée aux activités sexuelles soit en raison de la partie du corps qui subit la violence, soit en raison des paroles qui accompagnent la violence. De fait, à mon avis, on a remplacé l'infraction de viol par l'infraction d'agression sexuelle dans le but de mettre l'accent sur l'aspect violent et d'écarter le concept bénin que le viol était simplement l'acte d'un homme qui se «laisse emporter» par ses émotions.

The appellant in his statement to the police admitted that he had forced the complainant to have sexual intercourse with him but claimed that because of his drunkenness he did not know why he had done this and that when he realized what he was doing he "got off" the complainant. There was evidence that the appellant had punched the complainant twice with his closed fist and had threatened to kill her. The doctor who examined the complainant testified that the complainant's right eye was swollen shut and that three stitches were required to close the wound. It is clear from this that there was intentional and voluntary, as opposed to accidental or involuntary, application of force.

Dans sa déclaration à la police, l'appelant a admis qu'il avait forcé la plaignante à avoir des relations sexuelles avec lui, mais il a allégué qu'à cause de son ivresse, il ne savait pas pourquoi il l'avait fait et que quand il s'est rendu compte de ce qu'il faisait, il «s'est enlevé» de la plaignante. La preuve indique que l'appelant a donné deux coups avec le poing fermé à la plaignante et qu'il l'a menacée de la tuer. Le médecin qui a examiné la plaignante a témoigné que son œil droit était fermé à cause de l'enflure et qu'il avait fallu trois points de suture pour recoudre la blessure. Il est clair que l'utilisation de la force a été intentionnelle et volontaire et non accidentelle et involontaire.

1988 CanLII 22 (SCC)

The evidence of the appellant's intoxication consisted of his own statements to the police that he was drunk; the complainant's testimony that, while the appellant was acting out of character in making advances to her, he was able to walk, talk and put albums on the record player; a friend's testimony that prior to the incident the appellant had been drinking at a bar and had become "very rowdy" although still capable of talking and walking straight. By his own admission the appellant had sufficient wits about him after the violent assault to hide a bloodied towel and pillowcase from the police. There is no evidence that we are dealing here with extreme intoxication, verging on insanity or automatism, and as such capable of negating the inference that the minimal intent to apply force was present: see *R. v. Swietlinski* (1978), 44 C.C.C. (2d) 267 (Ont. C.A.), at p. 294, aff'd [1980] 2 S.C.R. 956. The evidence of intoxication in this case was simply not capable of raising a reasonable doubt as to the existence of the minimal intent required. In this I agree with McIntyre J.

I am less confident about the proposition accepted by my colleague that self-induced intoxication may substitute for the mental element required to be present at the time the offence was committed although I realize that there are statements in judgments of this Court to that effect. I do not believe, however, that the Court has clearly adopted that proposition. The decision of the House of Lords in *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, may stand for the rather harsh proposition that even self-induced intoxication producing a state of automatism cannot constitute a defence to an offence of general intent such as assault but I doubt that our Canadian jurisprudence goes that far.

For example in *R. v. George*, [1960] S.C.R. 871, Fauteux J. in holding the evidence of intoxication in that case not to be relevant in determining the minimal intent required for an assault conviction took care to note at pp. 878-79:

La preuve de l'état d'intoxication de l'appelant découle de ses déclarations à la police à cet effet, du témoignage de la plaignante portant que quoique l'appelant ait agi de façon inhabituelle en lui faisant des avances, il était capable de marcher, de parler et de mettre des disques sur le phonographe, du témoignage d'un ami portant qu'avant l'incident l'appelant avait bu dans un bar et qu'il était devenu «très batailleur» tout en étant encore capable de parler et de marcher droit. De son propre aveu, l'appelant avait encore assez de lucidité après l'agression violente pour cacher à la police une serviette et un oreiller tachés de sang. Aucune preuve n'indique qu'en l'espèce nous avons à faire à une intoxication extrême, au seuil de l'aliénation ou de l'automatisme et apte à ce titre à empêcher la déduction que l'intention minimale d'utiliser la force était présente: voir *R. v. Swietlinski* (1978), 44 C.C.C. (2d) 267 (C.A. Ont.), à la p. 294, conf. par [1980] 2 R.C.S. 956. La preuve de l'intoxication en l'espèce ne permet simplement pas de soulever un doute raisonnable quant à l'existence de l'intention minimale requise. À cet égard, je suis d'accord avec le juge McIntyre.

Je suis moins sûre de la proposition acceptée par mon collègue selon laquelle l'intoxication volontaire peut se substituer à l'élément mental requis au moment de la perpétration de l'infraction, quoique je sois consciente qu'on trouve des déclarations à cet effet dans des arrêts de cette Cour. Je ne crois cependant pas que la Cour ait clairement adopté cette proposition. L'arrêt de la Chambre des Lords *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443, vaut peut-être pour la proposition assez sévère que même l'intoxication volontaire qui produit un état d'automatisme ne peut constituer une défense à une infraction nécessitant une intention générale comme les voies de fait, mais je doute que la jurisprudence canadienne aille aussi loin.

Par exemple dans l'arrêt *R. v. George*, [1960] R.C.S. 871, le juge Fauteux, en décidant que la preuve de l'intoxication dans ce cas n'était pas utile pour déterminer s'il y avait l'intention minimale requise pour une déclaration de culpabilité de voies de fait, a pris soin de noter aux pp. 878 et 879:

1988 CanLII 22 (SCC)

There can be no pretence, in this case, that the manner in which force was applied by respondent to his victim was accidental—or excluding at the moment, from the consideration, the defence of drunkenness—unintentional.

On this finding of fact, the accused was guilty of common assault unless there was evidence indicating a degree of drunkenness affording, under the law, a valid defence.

. . .

Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved. It is certain that, on the facts found by the trial Judge, this situation did not exist in this case.

Likewise Ritchie J. concluded at pp. 890-91:

The fact that the learned trial judge found, as I think he did, that the respondent had "violently manhandled" an old man but was not guilty of assault because he was drunk at the time raises the question of law posed by the appellant as to whether, under the circumstances as found by the trial judge, drunkenness is a valid defence to common assault.

In considering the question of *mens rea*, a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. The former acts may be the purely physical products of momentary passion, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense.

. . .

The decision of the learned trial judge, in my opinion, constitutes a finding that the respondent violently man-

[TRADUCTION] Il est impossible de soutenir en l'espèce que c'est accidentellement ou, abstraction faite pour l'instant de la défense d'ivresse, involontairement que l'intimé a eu recours à la force contre sa victime.

D'après cette conclusion de fait, l'accusé est coupable de voies de fait simples, à moins que la preuve n'indique un degré d'ivresse suffisant pour constituer en droit un moyen de défense valable.

. . .

La question est donc de savoir si, pour cause d'ivresse, l'état de l'intimé a été tel qu'il était incapable d'avoir intentionnellement recours à la force. Or, je ne crois pas qu'en l'absence d'un degré d'ivresse créant un état équivalant à l'aliénation, il soit métaphysiquement possible de concevoir une telle situation dans le cas de voies de fait comme celles présentement en cause. Il est certain que, compte tenu des conclusions de fait du juge du procès, cette situation ne s'est pas présentée en l'espèce.

De même le juge Ritchie a conclu aux pp. 890 et 891:

[TRADUCTION] Le fait que le juge du procès ait conclu, comme je crois qu'il l'a fait, que l'intimé avait «violemment maltraité» un vieillard, mais n'était pas coupable de voies de fait parce qu'il était ivre à ce moment là, soulève la question de droit posée par l'appelante, savoir si, vu les circonstances établies par le juge du procès, l'ivresse est une défense valide aux voies de fait simples.

En étudiant la question de la *mens rea*, on doit faire une distinction entre «l'intention» dans le cas d'actes accomplis pour atteindre un but immédiat d'une part et dans le cas d'actes accomplis dans le dessein et avec l'intention spécifique d'atteindre ou de contribuer à atteindre un but illégal d'autre part. Les actes illégaux du premier type sont «intentionnels» en ce sens qu'on ne les fait pas par accident ou par simple erreur. Les actes qui relèvent de la seconde catégorie, toutefois, résultent de la préméditation et représentent des mesures prises délibérément en vue d'atteindre un but illégal. Ceux-là peuvent être les conséquences purement physiques d'une passion momentanée, tandis que ceux-ci comportent la démarche mentale qui consiste à former une intention spécifique. Un homme en état d'ivresse très avancé peut frapper un autre intentionnellement au premier sens à un moment où son esprit est à ce point obscurci par la boisson qu'il est incapable de former une intention spécifique au deuxième sens.

. . .

La décision du savant juge du procès constitue, selon moi, une conclusion que l'intimé a violemment agressé

1988 CanLII 22 (SCC)

handled a man and knew that he was hitting him. Under these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault because there is no suggestion that the drink which had been consumed had produced permanent or temporary insanity and the respondent's own statement indicates that he knew that he was applying force to the person of another.

In *Leary*, *supra*, although Pigeon J. categorically stated at p. 57 that because rape was an offence of general intent it was "therefore a crime in which the defence of drunkenness can have no application", he went on to say that he was obliged to determine whether on the facts of the case the application of the law would result in a miscarriage of justice. In order to do this he addressed the question whether there was evidence that the accused was so intoxicated that he could not form a criminal intent and concluded at pp. 59-60:

Therefore, in the circumstances, although it is not strictly necessary in view of my conclusion on the question of law, I wish to say that, even if I held a different view, I would have to hold that in the instant case there was no evidence that the accused was drunk to such a degree as to be incapable of forming the intent to commit rape. Here is what Bull J.A. said:

> The evidence was clear that the appellant was intoxicated (as was the boy friend Lesley) but there was no suggestion that he was in such a drunken condition either that he did not know what he was doing or that he would not appreciate that his menacing use of the knife, combined with this insistence on sexual intercourse, extorted submission or consent to the act. The appellant's position, as voluntarily made to the police, was merely that he "started petting" with her, removed her tampax for her and had intercourse. The whole statement was clear and concise as to the event and details and negated any such drunken condition.

I do not think that the trial judge's remark indicates that he thought there was some evidence of drunkenness going to the extent of an inability to form a criminal intent. (Assuming this is at all possible in a rape case, see Glanville L. Williams, *The Mental Element in Crime* (1965), p. 47.) In my opinion, the trial judge merely wanted to guard against the erroneous view that mere drunken condition could be a defence.

un homme et savait qu'il le frappait. Dans ces circonstances, une preuve établissant que l'accusé se trouvait en état d'ivresse volontaire ne saurait être considérée comme une défense opposable à une accusation de voies de fait simples parce que rien n'indique que l'alcool qu'il avait consommé avait provoqué une aliénation permanente ou temporaire et qu'il ressort de la déclaration faite par l'intimé lui-même qu'il savait qu'il employait la force contre une autre personne.

Dans l'arrêt *Leary*, précité, bien que le juge Pigeon ait dit, à la p. 57, de façon catégorique que, étant donné que le viol est une infraction nécessitant l'intention générale, il est «en conséquence un crime pour lequel la défense d'ivresse n'est pas recevable», il a dit ensuite qu'il était tenu de décider si, vu les faits de l'affaire, l'application de la règle de droit entraînerait un déni de justice. À cette fin, il a décidé d'examiner si la preuve indiquait que l'accusé était tellement ivre qu'il ne pouvait pas former l'intention criminelle et il a conclu aux pp. 59 et 60:

En conséquence, bien que cela ne soit pas strictement nécessaire compte tenu de ma conclusion sur la question de droit, je tiens à préciser que, même si j'étais parvenu à une conclusion différente, j'aurais jugé qu'en l'espèce il n'y a aucune preuve que l'accusé était ivre au point d'être incapable de former l'intention de commettre un viol. Le juge d'appel Bull a déclaré:

> [TRADUCTION] Il est manifeste d'après la preuve que l'appelant était ivre (comme son ami Lesley) mais rien n'indique qu'il était ivre au point de ne pas avoir conscience de ce qu'il faisait ou de ne pas se rendre compte que c'est en menaçant la plaignante de son couteau et en insistant pour avoir des rapports sexuels, qu'il a arraché sa capitulation ou son consentement à l'acte. Selon la déclaration volontaire de l'appelant à la police, il s'est simplement mis à la «caresser», lui a retiré son tampax et a eu des rapports sexuels. Sa déclaration est une relation claire, concise et détaillée de l'incident et écarte la possibilité d'une ivresse aussi avancée.

Je ne pense pas que la remarque du juge de première instance indique qu'il ait cru qu'il y avait preuve d'un état d'ivresse rendant impossible l'intention criminelle. (À supposer que ce soit possible dans le cas d'un viol, voir Glanville L. Williams, *The Mental Element in Crime* (1965), p. 47.) À mon avis, le juge du procès voulait seulement mettre le jury en garde contre l'opinion erronée que l'ivresse pourrait constituer un moyen de défense.

1988 CanLII 22 (SCC)

1447

I believe that the *Leary* rule is perfectly consistent with an onus resting on the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences. I view it as preferable to preserve the *Leary* rule in its more flexible form as Pigeon J. applied it, i.e., so as to allow evidence of intoxication to go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence. I would not overrule *Leary*, as the Chief Justice would, and allow evidence of intoxication to go to the trier of fact in every case regardless of its possible relevance to the issue of the existence of the minimal intent required for the offence.

Je crois donc que la règle énoncée dans l'arrêt *Leary* est tout à fait compatible avec la charge imposée au ministère public de prouver l'intention minimale qui doit accompagner l'exécution de l'acte prohibé dans les infractions d'intention générale. Je considère qu'il est préférable de préserver la règle énoncée dans l'arrêt *Leary* dans la forme plus souple appliquée par le juge Pigeon, c.-à-d. de permettre que la preuve de l'intoxication soit soumise au juge des faits pour les infractions d'intention générale seulement s'il s'agit d'une preuve d'intoxication extrême entraînant l'absence de conscience voisine de l'aliénation ou de l'automatisme. C'est seulement dans ce cas que la preuve peut soulever un doute raisonnable sur l'existence de l'intention minimale requise par l'infraction. Je ne suis pas d'avis de renverser l'arrêt *Leary*, comme le ferait le Juge en chef, et de permettre que la preuve de l'intoxication soit soumise au juge des faits dans tous les cas, indépendamment de sa pertinence possible à l'égard de la question de l'existence de l'intention minimale requise pour l'infraction.

It was argued by the appellant and indeed accepted by the Chief Justice in his reasons that the *Leary* rule converts the offence of sexual assault causing bodily harm into a crime of absolute liability in that the Crown need not prove any mental element. This is said to offend s. 7 of the *Charter* as interpreted in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 and in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. With all due respect to those who think differently I do not believe that the Crown is relieved from proving the existence of the required minimal intent by the operation of *Leary*. In *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, Dickson J., as he then was, stated at p. 1310:

Selon un des arguments de l'appelant que le Juge en chef a d'ailleurs accepté dans ses motifs, la règle énoncée dans l'arrêt *Leary* transforme l'infraction d'agression sexuelle causant des lésions corporelles en un crime de responsabilité absolue puisque le ministère public n'a plus à prouver l'élément mental. Ce serait contraire à l'art. 7 de la *Charte* selon l'interprétation donnée dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486 et dans *R. c. Vaillancourt*, [1987] 2 R.C.S. 636. Avec égards pour les tenants de l'opinion contraire, je ne crois pas que le ministère public soit déchargé de la preuve de l'existence de l'intention minimale requise pour l'infraction du fait de l'arrêt *Leary*. Dans l'arrêt *R. c. Sault Ste-Marie*, [1978] 2 R.C.S. 1299, le juge Dickson, alors juge puîné, dit, à la p. 1310:

> In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

> Par contre la «responsabilité absolue» entraîne condamnation sur la simple preuve que le défendeur a commis l'acte prohibé qui constitue l'*actus reus* de l'infraction. Aucun élément moral n'est nécessaire. On ne peut plaider que l'accusé n'a commis aucune faute. Il peut être moralement innocent sous tous rapports et malgré cela être traité de criminel et puni comme tel.

1988 CanLII 22 (SCC)

When the *Leary* rule is applied in this case the Crown must still prove beyond a reasonable doubt the existence of the required mental element of the intentional application of force. The offence cannot be said to be one of absolute liability in the sense that no mental element has to be proved in order to obtain a conviction. As Alan Mewett and Morris Manning write in *Criminal Law* (2nd ed. 1985), at p. 210:

> The courts are not saying that crimes of general or basic intent do not require mens rea. Rather they are saying that those crimes have a mens rea of a type directed solely to the present and that drunkenness is not sufficient to negate that type of thought process.

Similarly, Glanville Williams argues in his *Textbook of Criminal Law* (2nd ed. 1983), at pp. 475-76, that it is a misunderstanding to read even *Majewski*, *supra*, as transforming general intent offences into absolute liability offences because "even on a charge of a crime of basic intent the jury must have regard to all the evidence except the evidence of intoxication in determining the defendant's intention." In short, when evidence of intoxication is withheld from the jury, the Crown still bears the burden of proving a blameworthy state of mind.

It was also argued by the appellant and accepted by the Chief Justice that the application of the *Leary* rule violates s. 11(*d*) of the *Charter* by allowing an accused to be convicted even although the trier of fact might well have a reasonable doubt as to the existence of the essential mental element of the offence or as to the availability of a defence which could raise a reasonable doubt as to the guilt of the accused: see *Vaillancourt*, *supra*; *R. v. Whyte*, [1988] 2 S.C.R. 3. Again I find myself in respectful disagreement with the Chief Justice and the appellant on this issue. To my mind, the operation of the *Leary* rule in this case does not have that result because the Crown still must prove that the accused applied force intentionally and the evidence of intoxication is withheld from the jury only because it is incapable of

L'application de la règle énoncée dans l'arrêt *Leary* en l'espèce n'évite pas au ministère public d'avoir à prouver hors de tout doute raisonnable l'existence de l'élément mental requis, soit le recours intentionnel à la force. On ne peut pas dire qu'il s'agit d'une infraction de responsabilité absolue en ce sens qu'aucun élément mental n'a à être prouvé pour obtenir une déclaration de culpabilité. Comme Alan Mewett et Morris Manning l'écrivent dans *Criminal Law* (2nd ed. 1985), à la p. 210:

> [TRADUCTION] Les tribunaux ne disent pas que les crimes nécessitant une intention générale ou une intention fondamentale ne requièrent pas la mens rea. Ils disent plutôt que ces crimes ont une mens rea d'un type visant seulement le présent et que l'ivresse ne suffit pas à nier ce type de processus mental.

De même Glanville Williams fait valoir dans son ouvrage *Textbook of Criminal Law* (2nd ed. 1983), aux pp. 475 et 476, qu'il est erroné de considérer que même l'arrêt *Majewski*, précité, transforme les infractions d'intention générale en infractions de responsabilité absolue car [TRADUCTION] «même dans le cas d'une accusation relative à un crime d'intention fondamentale, le jury doit tenir compte de l'ensemble de la preuve, sauf celle d'intoxication, pour déterminer l'intention du défendeur». En bref, quand la preuve de l'intoxication n'est pas soumise au jury, le ministère public a toujours la charge de prouver un état d'esprit blâmable.

Selon un autre argument de l'appelant que le Juge en chef a accepté, l'application de la règle énoncée dans l'arrêt *Leary* porte atteinte à l'al. 11*d*) de la *Charte* en permettant la condamnation d'un accusé alors que le juge des faits aurait bien pu avoir un doute raisonnable sur l'existence d'un élément mental essentiel de l'infraction ou sur l'existence d'une défense qui aurait pu soulever un doute raisonnable quant à la culpabilité de l'accusé: voir *Vaillancourt*, précité, et *R. c. Whyte*, [1988] 2 R.C.S. 3. Je suis ici aussi en désaccord avec le Juge en chef et l'appelant sur ce point. À mon avis, l'application de la règle énoncée dans l'arrêt *Leary* en l'espèce n'a pas ce résultat parce que le ministère public doit toujours prouver que l'accusé a utilisé la force intentionnellement, et que la preuve de l'intoxication n'est pas soumise au

1988 CanLII 22 (SCC)

raising a reasonable doubt as to the accused's guilt. This is not a case in which self-induced intoxication is being resorted to as a substituted *mens rea* for the intentional application of force.

It is, in my view, not strictly necessary in this case to address the constitutionality of substituting self-induced intoxication as the *mens rea* for the minimal *mens rea* requirements of general intent offences. The issue would, in my view, only arise in those rare cases in which the intoxication is extreme enough to raise doubts as to the existence of the minimal intent which characterizes conscious and volitional conduct. However, as both the Chief Justice and McIntyre J. have addressed the issue, I will express my own somewhat tentative views upon it.

This Court has affirmed as fundamental the proposition that a person should not be exposed to a deprivation of liberty unless the Crown proves the existence of a blameworthy or culpable state of mind: see *Re B.C. Motor Vehicle Act*, *supra*, at pp. 513-20. It does not follow from this, however, that those who, through the voluntary consumption of alcohol or drugs incapacitate themselves from knowing what they are doing, fall within the category of the "morally innocent" deserving of such protection. This is not to say that such persons do not have a right under ss. 7 or 12 of the *Charter* to be protected against punishment that is disproportionate to their crime and degree of culpability: see *Re B.C. Motor Vehicle Act*, *supra*, at pp. 532-34; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045. They do, especially if the consequences of their becoming intoxicated were not intended or foreseen.

The real concern over the substituted form of *mens rea* arises, it seems to me, under s. 11(*d*) of the *Charter*. While this Court has recognized that in some cases proof of an essential element of a criminal offence can be replaced by proof of a different element, it has placed stringent limitations on when this can happen. In *Vaillancourt*, *supra*, Lamer J. said at p. 656:

jury uniquement parce qu'elle ne peut soulever de doute raisonnable quant à la culpabilité de l'accusé. Il ne s'agit pas d'un cas où on a recours à l'intoxication volontaire à titre de substitut de la *mens rea* relativement à l'utilisation intentionnelle à la force.

J'estime qu'il n'est pas strictement nécessaire en l'espèce d'examiner la constitutionnalité de la substitution de l'intoxication volontaire à titre de *mens rea* relativement aux exigences minimales en matière de *mens rea* pour les infractions d'intention générale. Cette question ne se posera, à mon avis, que dans les rares cas où l'intoxication est si extrême que cela soulève des doutes quant à l'existence de l'intention minimale qui caractérise un comportement conscient et volontaire. Toutefois, comme le Juge en chef et le juge McIntyre se sont penchés sur cette question, je vais exposer l'état de ma réflexion actuelle à cet égard.

Cette Cour a affirmé qu'il était fondamental qu'une personne ne puisse pas être privée de sa liberté sans que le ministère public ait prouvé l'existence d'un état d'esprit blâmable ou coupable: voir *Renvoi: Motor Vehicle Act de la C.-B.*, précité, aux pp. 513 à 520. Toutefois il ne s'ensuit pas que ceux qui se mettent dans l'incapacité de savoir ce qu'ils font à cause de leur consommation volontaire d'alcool ou de drogues, tombent dans la catégorie des gens «moralement innocents» qui méritent une telle protection. Ceci ne veut pas dire que ces personnes n'ont pas le droit en vertu des art. 7 ou 12 de la *Charte* d'être protégés contre des peines disproportionnées par rapport à leur crime et à leur degré de culpabilité: voir *Renvoi: Motor Vehicle Act de la C.-B.*, précité, aux pp. 532 à 534; *R. c. Smith (Edward Dewey)*, [1987] 1 R.C.S. 1045. Elles le sont en particulier si les conséquences de leur ivresse n'étaient ni voulues ni prévisibles.

La véritable difficulté que pose la substitution d'un autre élément à la *mens rea*, me semble-t-il, découle de l'al. 11*d*) de la *Charte*. Bien que cette Cour ait reconnu que, dans certains cas, la preuve d'un élément essentiel d'une infraction criminelle puisse être remplacée par la preuve d'un élément différent, elle a placé des limites très strictes aux cas où cela peut se produire. Dans l'arrêt *Vaillancourt*, précité, le juge Lamer dit, à la p. 656:

1988 CanLII 22 (SCC)

Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(*d*).

Enfin, au lieu d'éliminer simplement la nécessité de faire la preuve d'un élément essentiel, le législateur peut remplacer cela par la preuve d'un élément différent. À mon sens, cela ne sera constitutionnel que si après que l'on a prouvé hors de tout doute raisonnable l'existence de l'élément ainsi substitué, il serait déraisonnable que le juge des faits ne soit pas convaincu hors de tout doute raisonnable de l'existence de l'élément essentiel. Si le juge des faits peut avoir un doute raisonnable quant à l'élément essentiel malgré la preuve hors de tout doute raisonnable qui a été faite de l'existence de l'élément substitué, alors la substitution contrevient à l'art. 7 et à l'al. 11*d*).

In *Whyte*, *supra*, the Chief Justice approved the above statement at pp. 18-19 and added:

Dans l'arrêt *Whyte*, précité, le Juge en chef a approuvé la déclaration susmentionnée aux pp. 18 et 19:

In the passage from *Vaillancourt* quoted earlier, Lamer J. recognized that in some cases substituting proof of one element for proof of an essential element will not infringe the presumption of innocence if, upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element. This is another way of saying that a statutory presumption infringes the presumption of innocence if it requires the trier of fact to convict in spite of a reasonable doubt. Only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid.

Dans le passage de l'arrêt *Vaillancourt* cité précédemment, le juge Lamer reconnaît que, dans certains cas, substituer la preuve d'un élément à la preuve d'un élément essentiel ne portera pas atteinte à la présomption d'innocence si, après qu'on a prouvé l'existence de l'élément substitué, il était déraisonnable que le juge des faits ne soit pas convaincu hors de tout doute raisonnable de l'existence de l'élément essentiel. Il s'agit d'une autre façon de dire que la présomption légale porte atteinte à la présomption d'innocence si elle oblige le juge des faits à prononcer une déclaration de culpabilité malgré l'existence d'un doute raisonnable. La présomption légale ne sera constitutionnelle que si l'existence du fait substitué entraîne inexorablement la conclusion que l'élément essentiel existe, sans aucune autre possibilité raisonnable.

In my tentative view, it is unlikely that in those cases in which it is necessary to resort to self-induced intoxication as the substituted element for the minimal intent, proof of the substituted element will "inexorably" lead to the conclusion that the essential element of the minimal intent existed at the time the criminal act was committed. But I prefer to leave this question open as it is unnecessary to decide it in order to dispose of this appeal.

Mon point de vue actuel me porte à dire qu'il est improbable que dans les affaires où il est nécessaire de recourir à l'intoxication volontaire comme élément substitué à l'intention minimale, la preuve de l'élément substitué entraîne «inexorablement» la conclusion que l'élément essentiel, soit l'intention minimale, existait au moment de la perpétration de l'acte criminel. Je préfère donc laisser cette question en suspens puisqu'il n'est pas nécessaire de la trancher afin de statuer sur ce pourvoi.

I agree with my colleagues McIntyre and La Forest JJ. that, had there been error in the court below, no substantial wrong or miscarriage of justice resulted from it and that it would accordingly be appropriate to apply s. 613(1)(*b*)(iii) of the *Criminal Code*. I would dismiss the appeal.

Je suis d'accord avec mes collègues les juges McIntyre et La Forest pour dire que, si le tribunal d'instance inférieure avait commis une erreur, elle n'aurait entraîné aucun tort important ni erreur judiciaire grave et, par conséquent, il aurait été approprié d'appliquer le sous-al. 613(1)*b*)(iii) du *Code criminel*. Je suis d'avis de rejeter le pourvoi.

1988 CanLII 22 (SCC)

The following are the reasons delivered by

LA FOREST J.—I have had the advantage of reading the opinions prepared by the Chief Justice and Justice McIntyre. The requirement of *mens rea* in truly criminal offences is, as the Chief Justice has demonstrated, so fundamental that it cannot, since the *Canadian Charter of Rights and Freedoms*, be removed on the basis of judicially-developed policy. It would be anomalous if the courts could infringe such a fundamental right on the basis of such policies when not demonstrated to be essential, while any attempt by Parliament to do so would be subjected to searching scrutiny under s. 1 as established by this Court.

In my dissenting reasons in *R. v. Landry*, [1986] 1 S.C.R. 145, at p. 187, I set forth my views regarding the general issue posed here. I there observed that in the changed constitutional environment brought about by the *Charter*, if incursions are to be made upon fundamental legal values, it is for Parliament to do so, not the courts. It is the duty of Parliament to respond to the challenge of criminal activities. While the courts must sensitively consider actions taken by Parliament for the protection of the public generally, they must be forever diligent to prevent undue intrusions on our liberty. The courts are the protectors of our rights. It does not sit well for them to make rules intruding on fundamental rights even when this may appear to them to be desirable in a properly balanced system of criminal justice. That is Parliament's work. I added, at p. 189 of *Landry*:

> If Parliament in its wisdom finds it necessary to adjust the balance, it can do so. It is in a better position to provide for the precise balance and has a far better access to the knowledge required to achieve that balance than the courts. The courts can then perform their duty of scrutinizing Parliament's laws both in their general tenor and in their particular application to safeguard our traditional values.

Established common law rules should not, it is true, lightly be assumed to violate the *Charter*. As a repository of our traditional values they may, in fact, assist in defining its norms. But when a

Version française des motifs rendus par

LE JUGE LA FOREST—J'ai eu l'avantage de lire les motifs préparés par le Juge en chef et par le juge McIntyre. Comme le Juge en chef l'a établi, l'exigence de la *mens rea* dans les infractions véritablement criminelles est tellement fondamentale qu'on ne peut la supprimer, depuis l'avènement de la *Charte canadienne des droits et libertés*, sur la base d'une politique de droit prétorien. Il serait anormal que les tribunaux puissent porter atteinte à un tel droit fondamental en s'appuyant sur ces politiques dont le caractère essentiel n'a pas été démontré, alors que toute tentative du législateur de le faire serait passée au crible de l'article premier, ainsi que cette Cour l'a établi.

Dans mes motifs de dissidence dans l'arrêt *R. c. Landry*, [1986] 1 R.C.S. 145, à la p. 187, j'ai exposé mon point de vue sur la question générale soulevée en l'espèce. J'y ai souligné que, dans l'environnement constitutionnel nouveau établi par la *Charte*, si on doit porter atteinte aux valeurs juridiques fondamentales, il appartient au législateur de le faire et non aux tribunaux. Il incombe au législateur de relever le défi que causent les activités criminelles. Bien que les tribunaux doivent être sensibles à ce que fait le législateur pour protéger le public en général, ils doivent toujours veiller à empêcher les atteintes indues à notre liberté. Les tribunaux sont les protecteurs de nos droits. Il n'est pas de leur ressort d'adopter des règles qui portent atteinte aux droits fondamentaux même si elles leur semblent souhaitables dans un système équilibré de justice criminelle. C'est le travail du législateur. J'ajoute dans l'affaire *Landry*, à la p. 189:

> Si dans sa sagesse le législateur estime nécessaire de modifier cet équilibre, il peut le faire. Il est plus en mesure que les tribunaux de réaliser cet équilibre précis et il a plus facilement accès aux connaissances nécessaires pour y arriver. Les tribunaux pourront ensuite remplir leur rôle d'examiner les lois du législateur tant dans leur portée générale que dans leur application particulière pour préserver nos valeurs traditionnelles.

Il est vrai qu'on ne doit pas présumer à la légère que des règles de *common law* établies enfreignent la *Charte*. En tant que dépositaires de nos valeurs traditionnelles, elles peuvent faciliter la définition

1988 CanLII 22 (SCC)

common law rule is found to infringe upon a right or freedom guaranteed by the *Charter*, it must be justified in the same way as legislative rules. No adequate justification was made here.

Accordingly, I am in general agreement with the law as stated by the Chief Justice. However, I agree with McIntyre J. that on the particular facts of this case no substantial wrong or miscarriage of justice has occurred and it is, therefore, a proper case to apply s. 613(1)(*b*)(iii) of the *Criminal Code*. For this reason, I would dispose of the case in the manner proposed by McIntyre J.

Appeal dismissed, DICKSON C.J. *and* LAMER J. *dissenting.*

Solicitors for the appellant: Ruby & Edwardh, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

de ses normes. Mais lorsqu'on conclut qu'une règle de *common law* enfreint un droit ou une liberté garanti par la *Charte*, elle doit être justifiée de la même façon qu'une règle législative. Or, il n'existe aucune justification adéquate en l'espèce.

Par conséquent, je suis en accord général avec la façon dont le Juge en chef a énoncé le droit. Toutefois je conclus comme le juge McIntyre que, compte tenu des faits particuliers de l'espèce, il n'y a pas eu de tort important ni d'erreur judiciaire grave et qu'il s'agit donc d'une affaire où l'on peut appliquer le sous-al. 613(1)*b*)(iii) du *Code criminel*. Pour ce motif, je suis d'avis de trancher l'affaire comme le propose le juge McIntyre.

Pourvoi rejeté, le juge en chef DICKSON *et le juge* LAMER *sont dissidents.*

Procureurs de l'appelant: Ruby & Edwardh, Toronto.

Procureur de l'intimée: Le procureur général de l'Ontario, Toronto.

1988 CanLII 22 (SCC)

TAB 53

Samuel Dineley *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada and Attorney General of Quebec *Interveners*

Indexed as: R. *v.* Dineley

2012 SCC 58

File No.: 33640.

2011: October 13; 2012: November 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Defences — "Carter defence" — Accused charged with impaired driving and driving "over 80" — Amendments brought to Criminal Code during accused's trial limiting evidence that may be adduced in defence to raise doubt about reliability of breathalyzer test results — Whether Carter defence available to accused — Whether amendments have retrospective effect to time of alleged offences — Whether amendments affect procedural or substantive rights — Criminal Code, R.S.C. 1985, c. C-46, s. 258(1)(c), (d.01) — Tackling Violent Crime Act, S.C. 2008, c. 6.

Legislation — Interpretation — Effect of new legislation — Amendments brought to Criminal Code during accused's trial limiting evidence that may be adduced in defence to raise doubt about reliability of breathalyzer test results — Whether amendments have retrospective effect to time of alleged offences — Whether amendments affect procedural or substantive rights — Whether Parliament provided for preservation of evidence for cases that began before amendments came

Samuel Dineley *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada et procureur général du Québec *Intervenants*

Répertorié : R. *c.* Dineley

2012 CSC 58

N^o du greffe : 33640.

2011 : 13 octobre; 2012 : 2 novembre.

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

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

Droit criminel — Moyens de défense — « Défense de type Carter » — Accusé inculpé de conduite avec facultés affaiblies et de conduite avec une alcoolémie « supérieure à 80 » — Modifications apportées au Code criminel durant le procès de l'accusé limitent les éléments de preuve qui peuvent être produits en défense pour mettre en doute la fiabilité des résultats obtenus par l'utilisation d'un alcootest — L'accusé peut-il se prévaloir de la défense de type Carter? — Les modifications s'appliquent-elles rétrospectivement au moment où les infractions reprochées auraient été commises? — Les modifications portent-elles atteinte à des droits procéduraux ou substantiels? — Code criminel, L.R.C. 1985, ch. C-46, art. 258(1)c), d.01) — Loi sur la lutte contre les crimes violents, L.C. 2008, ch. 6.

Législation — Interprétation — Effet d'une nouvelle loi — Modifications apportées au Code criminel durant le procès de l'accusé limitent les éléments de preuve qui peuvent être produits en défense pour mettre en doute la fiabilité des résultats obtenus par l'utilisation d'un alcootest — Les modifications s'appliquent-elles rétrospectivement au moment où les infractions reprochées auraient été commises? — Les modifications portent-elles atteinte à des droits procéduraux ou

2012 SCC 58 (CanLII)

into force — Criminal Code, R.S.C. 1985, c. C-46, s. 258(1)(c), (d.01) — Tackling Violent Crime Act, S.C. 2008, c. 6.

substantiels? — Le législateur a-t-il prévu la conservation d'éléments de preuve en vue des procès intentés avant l'entrée en vigueur des modifications? — Code criminel, L.R.C. 1985, ch. C-46, art. 258(1)c), d.01) — Loi sur la lutte contre les crimes violents, L.C. 2008, ch. 6.

D was involved in a motor vehicle incident, following which he was asked to submit to breathalyzer tests. The instrument registered 99 and 97 mg of alcohol per 100 mL of blood. D was charged with impaired driving and driving with a blood alcohol level over the legal limit of 80 mg of alcohol in 100 mL of blood.

D a été impliqué dans un accident automobile après lequel on lui a demandé de se soumettre à des alcootests qui ont révélé des taux de 99 et 97 mg d'alcool par 100 ml de sang. D a été inculpé de conduite avec facultés affaiblies et de conduite avec une alcoolémie supérieure à la limite légale de 80 mg d'alcool par 100 ml de sang.

At the beginning of D's trial, counsel for D advised the judge that he intended to tender a toxicology report in order to challenge the accuracy of the breathalyzer test results — what is known as a *Carter* defence. Crown counsel wished to cross-examine the toxicologist on his report, but the latter was not present and the trial was accordingly adjourned. Following the adjournment but prior to the resumption of D's trial, amendments to the *Criminal Code* were enacted, the effect of which is to eliminate the *Carter* defence as an independent means to raise a doubt about the reliability of breathalyzer test results.

Au début du procès de D, l'avocat de ce dernier a informé le juge qu'il comptait produire le rapport d'un toxicologue pour contester l'exactitude des résultats de l'alcootest — ce qu'on appelle une défense de type *Carter*. L'avocat du ministère public souhaitait contre-interroger le toxicologue au sujet de son rapport, mais ce dernier était absent. Le procès a donc été ajourné. Après l'ajournement, mais avant la reprise du procès de D, des modifications au *Code criminel* ont été adoptées, ce qui a eu pour effet d'éliminer la défense de type *Carter* comme moyen indépendant pour soulever un doute raisonnable quant à la fiabilité des résultats de l'alcootest.

The trial judge accepted the *Carter* defence adduced by D and entered an acquittal. The summary conviction appeal judge upheld that decision concluding that the new legislative provisions virtually eliminated the *Carter* defence, that they were substantive in nature and not procedural, and that they therefore applied only prospectively. The Court of Appeal reversed that decision and held that the new legislative provisions were merely evidentiary and that they therefore applied to the case. A new trial was ordered to proceed on the basis of s. 258(1) of the *Criminal Code* as amended.

Le juge du procès a conclu à la recevabilité de la défense de type *Carter* présentée par D et a acquitté ce dernier. Le juge de la cour d'appel des poursuites sommaires a maintenu cette décision, concluant que les nouvelles dispositions législatives avaient pratiquement supprimé la défense de type *Carter*, qu'elles étaient des dispositions substantielles et non procédurales, et qu'elles ne s'appliquaient donc que pour l'avenir. La Cour d'appel a infirmé cette décision et conclu que les nouvelles dispositions législatives portaient simplement sur la preuve et qu'elles s'appliquaient par conséquent au cas à l'étude. La tenue d'un nouveau procès sur le fondement du par. 258(1) du *Code criminel* tel que modifié a été ordonnée.

Held (McLachlin C.J. and Rothstein and Cromwell JJ. dissenting): The appeal should be allowed and the acquittal restored.

Arrêt (la juge en chef McLachlin et les juges Rothstein et Cromwell sont dissidents) : Le pourvoi est accueilli et l'acquittement est rétabli.

Per LeBel, Deschamps, Fish and Abella JJ.: Courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where new legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. The key task in determining the temporal application of new legislative provisions lies not in labelling the provisions "procedural"

Les juges LeBel, Deschamps, Fish et Abella : Les tribunaux reconnaissent depuis longtemps le caractère exceptionnel des mesures législatives applicables rétrospectivement. Plus précisément, ils ont jugé indésirable l'application rétrospective de nouvelles dispositions législatives portant atteinte à des droits acquis ou substantiels. La tâche qui s'impose pour statuer sur l'application dans le temps des nouvelles dispositions

2012 SCC 58 (CanLII)

or "substantive", but in discerning whether they affect substantive rights.

The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected. As a result of the amendments to the *Criminal Code* and the decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, the only evidence that can be tendered to raise a reasonable doubt about the reliability of breathalyzer test results is now evidence that the instrument was malfunctioning or was operated improperly. The *Carter* defence has been eliminated as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results. This illustrates that the amendments to the *Criminal Code* are not merely procedural; they affect a defence open to an accused and are therefore subject to the presumption against the retrospective application of new legislation.

The broad scheme put in place by Parliament is based on presumptions that the results of the breathalyzer analyses are accurate and that they are identical to the blood alcohol level of the accused at the time of the alleged offence. As discussed in *St-Onge Lamoureux*, these statutory presumptions infringe the constitutionally protected right to be presumed innocent. The conclusion that the infringement is justified in the context of the new legislation does not alter the fact that constitutional rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply.

Finally, where the former legislation does not contemplate the gathering of evidence that is required by the new legislation, the new legislation can only be prospective.

Per McLachlin C.J. and Rothstein and Cromwell JJ. (dissenting): There are three principles of statutory interpretation that are potentially relevant to the issue of when new legislative provisions apply. One principle is that the legislature is presumed not to intend legislation to change the legal character or consequences of

législatives consiste non pas à les qualifier de « dispositions procédurales » ou de « dispositions substantielles », mais à déterminer si elles portent atteinte à des droits substantiels.

Le fait qu'une nouvelle mesure législative influe sur le contenu ou sur l'existence d'un moyen de défense, plutôt qu'uniquement sur sa présentation, indique que des droits substantiels sont en jeu. Étant donné les modifications apportées au *Code criminel* et l'arrêt *R. v. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187, la seule preuve pouvant être produite pour soulever un doute raisonnable quant à la fiabilité des résultats de l'alcootest se limite désormais à celle du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest. La défense de type *Carter* a été supprimée comme moyen de défense susceptible de soulever, à lui seul, un doute raisonnable quant à la fiabilité des résultats de l'analyse. Cela indique que les modifications au *Code criminel* ne sont pas simplement de nature procédurale; elles ont une incidence sur un moyen de défense dont dispose l'accusé et sont, par le fait même, assujetties à la présomption de non-rétrospectivité des nouvelles mesures législatives.

Le régime général instauré par le législateur repose sur des présomptions voulant que les résultats des analyses soient exacts et correspondent à l'alcoolémie de l'accusé au moment où l'infraction reprochée aurait été commise. Comme l'illustre l'arrêt *St-Onge Lamoureux*, ces présomptions légales portent atteinte à la présomption d'innocence garantie par la Constitution. La conclusion selon laquelle l'atteinte est justifiée sous le régime des nouvelles mesures législatives ne change rien au fait qu'il a été porté atteinte à des droits constitutionnels. Il s'agit d'une indication supplémentaire que les nouvelles mesures législatives portent atteinte à des droits substantiels puisque les droits constitutionnels sont forcément de nature substantielle. La règle générale interdisant l'application rétrospective des mesures législatives devrait s'appliquer en cas d'atteinte à des droits constitutionnels.

Finalement, dans les cas où l'ancienne mesure législative n'envisage pas la collecte d'éléments de preuve devenue nécessaire en raison de la nouvelle mesure législative, celle-ci ne peut s'appliquer que pour l'avenir.

La juge en chef McLachlin et les juges Rothstein et Cromwell (dissidents) : Trois principes d'interprétation des lois peuvent être pertinents pour déterminer dans quels cas s'appliquent de nouvelles dispositions législatives. Selon le premier d'entre eux, le législateur est présumé ne pas souhaiter que la loi modifie la nature

2012 SCC 58 (CanLII)

actions that occurred before its enactment. Another is that the legislature is presumed not to intend to interfere with vested rights. A third is that the legislature intends an enactment dealing with exclusively procedural matters, including matters of evidence, to apply immediately to all proceedings, whether commenced before or after the enactment comes into force. The principal question in this case is whether the new legislative provisions at issue are procedural or substantive.

ou les conséquences juridiques des actes commis avant son adoption. Selon le deuxième principe, le législateur est présumé ne pas avoir l'intention de porter atteinte à des droits acquis. Selon le troisième, le législateur souhaite qu'un texte portant exclusivement sur des questions de procédure, y compris de preuve, s'applique immédiatement à toutes les instances, que celles-ci aient été engagées avant ou après l'entrée en vigueur du texte. La principale question en litige en l'espèce est celle de savoir si les nouvelles dispositions législatives en cause sont de nature procédurale ou substantielle.

The new legislative provisions in issue meet all of the tests enunciated in the Court's jurisprudence for determining whether a provision is procedural and they have none of the characteristics of provisions which are properly characterized as substantive. The provisions deal with factual presumptions and what is required to rebut them, and their operation is dependent on the existence of litigation. Evidentiary provisions like these are ordinarily considered to be procedural. Moreover, the provisions have none of the hallmarks of substantive provisions. They do not attach new consequences to past acts or change the substantive content of a defence, nor do they change the existence or content of a right. The elements of the offence have not changed and it remains open to the accused to point to evidence raising a reasonable doubt about the existence of those elements. The provisions do not make conduct unlawful that was lawful at the time it occurred. In addition, the fact that a provision is found to limit an accused's right to be presumed innocent under s. 11(*d*) of the *Charter* does not support the conclusion that the provision is substantive.

Les nouvelles dispositions législatives en cause satisfont à tous les critères énoncés par la Cour dans sa jurisprudence pour établir qu'une disposition est de nature procédurale, et elles n'ont aucune des caractéristiques des dispositions considérées à juste titre comme relevant du fond. Les dispositions traitent de présomptions de fait et des éléments de preuve nécessaires pour les réfuter, et elles ne sont pertinentes que s'il y a bel et bien un litige. Les dispositions relatives à la preuve comme celles en cause en l'espèce sont habituellement considérées de nature procédurale. Qui plus est, ces dispositions n'ont aucune des caractéristiques des dispositions de fond. Elles ne confèrent pas de conséquences nouvelles à des actes antérieurs, ni ne modifient le contenu substantiel d'un moyen de défense. Elles n'influent pas non plus sur l'existence ou sur le contenu d'un droit. Les éléments de l'infraction n'ont pas changé et il demeure loisible à l'accusé de présenter une preuve soulevant un doute raisonnable quant à l'existence de ces éléments. Les dispositions n'interdisent pas une conduite qui était légale au moment où elle est survenue. En outre, le fait que la disposition limite le droit de l'accusé d'être présumé innocent protégé par l'al. 11*d*) de la *Charte* ne soutient pas la conclusion que la disposition en est une de fond.

The new provisions do not eliminate or neuter a defence. The so-called "*Carter* defence" in reality is a particular type of evidence adduced in order to raise a reasonable doubt. If these provisions are characterized as taking away a defence, then any evidentiary provision that increases the risk of conviction would have to be so characterized. The jurisprudence of this Court makes clear that this is not the case.

Les nouvelles dispositions n'éliminent pas de moyen de défense, elles n'en neutralisent pas non plus. Ce que l'on appelle la « défense de type *Carter* » est en fait un type particulier de preuve présentée afin de soulever un doute raisonnable. Si l'on considère que ces dispositions écartent un moyen de défense, il faudrait alors considérer que toute disposition relative à la preuve qui augmente le risque de condamnation a le même effet. La jurisprudence de la Cour indique clairement qu'il n'en est rien.

The new provisions accordingly relate only to the rules of evidence which apply at trial and they are therefore purely procedural. As such, these new provisions are subject to the presumption of immediate application, and there is nothing to rebut this presumption.

Ainsi, les nouvelles dispositions ne concernent que les règles de preuve applicables lors d'un procès et elles sont donc purement procédurales. Cela étant, elles sont présumées s'appliquer immédiatement, et rien ne réfute cette présomption.

2012 SCC 58 (CanLII)

Cases Cited

By Deschamps J.

Referred to: *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Carter* (1985), 19 C.C.C. (3d) 174; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *R. v. Gervais* (1978), 43 C.C.C. (2d) 533; *R. v. Ali*, [1980] 1 S.C.R. 221; *R. v. Loiseau*, 2010 QCCA 1872 (CanLII).

By Cromwell J. (dissenting)

R. v. Crosthwait, [1980] 1 S.C.R. 1089; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; *R. v. Carter* (1985), 19 C.C.C. (3d) 174; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349; *R. v. Monney*, [1999] 1 S.C.R. 652; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306; *West v. Gwynne*, [1911] 2 Ch. 1; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530; *Ciecierski v. Fenning*, 2005 MBCA 52, 195 Man. R. (2d) 272; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Moon v. Durden*, [1848] 2 Ex. 22, 154 E.R. 389; *Midland Railway Co. v. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419; *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553; *Martin v. Perrie*, [1986] 1 S.C.R. 41; *The Ydun*, [1899] P. 236; *Republic of Costa Rica v. Erlanger*, [1876] 3 Ch. D. 62; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548; *R. v. Gervais* (1978), 43 C.C.C. (2d) 533; *Taylor v. The Queen* (1876), 1 S.C.R. 65; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038; *R. v. Puskas*, [1998] 1 S.C.R. 1207; *R. v. Ali*, [1980] 1 S.C.R. 221; *R. v. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. v. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. v. Loiseau*, 2010 QCCA 1872 (CanLII).

Jurisprudence

Citée par la juge Deschamps

Arrêts mentionnés : *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187; *R. c. Carter* (1985), 19 C.C.C. (3d) 174; *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248; *Wildman c. La Reine*, [1984] 2 R.C.S. 311; *R. c. Gervais*, [1978] J.Q. n° 181 (QL); *R. c. Ali*, [1980] 1 R.C.S. 221; *R. c. Loiseau*, 2010 QCCA 1872, [2010] R.J.Q. 2246.

Citée par le juge Cromwell (dissident)

R. c. Crosthwait, [1980] 1 R.C.S. 1089; *R. c. St. Pierre*, [1995] 1 R.C.S. 791; *R. c. Carter* (1985), 19 C.C.C. (3d) 174; *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187; *R. c. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349; *R. c. Monney*, [1999] 1 R.C.S. 652; *Canada (Commissaire à l'information) c. Canada (Ministre de la Défense nationale)*, 2011 CSC 25, [2011] 2 R.C.S. 306; *West c. Gwynne*, [1911] 2 Ch. 1; *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256; *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*, [1933] R.C.S. 629; *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271; *Dikranian c. Québec (Procureur général)*, 2005 CSC 73, [2005] 3 R.C.S. 530; *Ciecierski c. Fenning*, 2005 MBCA 52, 195 Man. R. (2d) 272; *Upper Canada College c. Smith* (1920), 61 R.C.S. 413; *Procureur général du Québec c. Tribunal de l'expropriation*, [1986] 1 R.C.S. 732; *Venne c. Québec (Commission de protection du territoire agricole)*, [1989] 1 R.C.S. 880; *Wright c. Hale* (1860), 6 H. & N. 227, 158 E.R. 94; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248; *Moon c. Durden*, [1848] 2 Ex. 22, 154 E.R. 389; *Midland Railway Co. c. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419; *Yew Bon Tew c. Kenderaan Bas Mara*, [1983] 1 A.C. 553; *Martin c. Perrie*, [1986] 1 R.C.S. 41; *The Ydun*, [1899] P. 236; *Republic of Costa Rica c. Erlanger*, [1876] 3 Ch. D. 62; *Howard Smith Paper Mills Ltd. c. The Queen*, [1957] R.C.S. 403; *R. c. E. (A.W.)*, [1993] 3 R.C.S. 155; *Wildman c. La Reine*, [1984] 2 R.C.S. 311; *Bingeman c. McLaughlin*, [1978] 1 R.C.S. 548; *R. c. Gervais*, [1978] J.Q. n° 181 (QL); *Taylor c. The Queen* (1876), 1 R.C.S. 65; *Banque Royale du Canada c. Concrete Column Clamps (1961) Ltd.*, [1971] R.C.S. 1038; *R. c. Puskas*, [1998] 1 R.C.S. 1207; *R. c. Ali*, [1980] 1 R.C.S. 221; *R. c. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. c. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. c. Loiseau*, 2010 QCCA 1872, [2010] R.J.Q. 2246.

2012 SCC 58 (CanLII)

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*).
Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(*a*), (*b*), 258(1)(*c*), (*d.01*).
Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44.
Tackling Violent Crime Act, S.C. 2008, c. 6.

Authors Cited

Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.
Phipson, Sidney Lovell. *Phipson on the Law of Evidence*, 9th ed. by Ronald Burrows. London: Sweet & Maxwell, 1952.
Roubier, Paul. *Le droit transitoire: conflits des lois dans le temps*, 2e éd. Paris: Dalloz et Sirey, 1960.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Cronk and Epstein JJ.A.), 2009 ONCA 814, 98 O.R. (3d) 81, 248 C.C.C. (3d) 489, 71 C.R. (6th) 25, 256 O.A.C. 235, 86 M.V.R. (5th) 45, [2009] O.J. No. 4875 (QL), 2009 CarswellOnt 7170, setting aside a decision of Sproat J. (2009), 86 M.V.R. (5th) 34, 2009 CanLII 24636, [2009] O.J. No. 2007 (QL), 2009 CarswellOnt 2698, upholding the acquittal entered by Clements J. Appeal allowed, McLachlin C.J. and Rothstein and Cromwell JJ. dissenting.

Paul Burstein and *J. Thomas Wiley*, for the appellant.

Philip Perlmutter and *James Palangio*, for the respondent.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Michel Déom, *Jean-Vincent Lacroix*, *Marie-Ève Mayer* and *Patricia Blair*, for the intervener the Attorney General of Quebec.

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

[1] DESCHAMPS J. — This appeal raises the question whether certain provisions of the *Tackling*

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 11*d*).
Code criminel, L.R.C. 1985, ch. C-46, art. 253(1)*a*), *b*), 258(1)*c*), *d.01*).
Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 43, 44.
Loi sur la lutte contre les crimes violents, L.C. 2008, ch. 6.

Doctrine et autres documents cités

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal : Thémis, 2009.
Phipson, Sidney Lovell. *Phipson on the Law of Evidence*, 9th ed. by Ronald Burrows. London : Sweet & Maxwell, 1952.
Roubier, Paul. *Le droit transitoire : conflits des lois dans le temps*, 2e éd. Paris : Dalloz et Sirey, 1960.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Cronk et Epstein), 2009 ONCA 814, 98 O.R. (3d) 81, 248 C.C.C. (3d) 489, 71 C.R. (6th) 25, 256 O.A.C. 235, 86 M.V.R. (5th) 45, [2009] O.J. No. 4875 (QL), 2009 CarswellOnt 7170, qui a infirmé une décision du juge Sproat (2009), 86 M.V.R. (5th) 34, 2009 CanLII 24636, [2009] O.J. No. 2007 (QL), 2009 CarswellOnt 2698, confirmant l'acquittement prononcé par le juge Clements. Pourvoi accueilli, la juge en chef McLachlin et les juges Rothstein et Cromwell sont dissidents.

Paul Burstein et *J. Thomas Wiley*, pour l'appelant.

Philip Perlmutter et *James Palangio*, pour l'intimée.

Jeffrey G. Johnston, pour l'intervenant le procureur général du Canada.

Michel Déom, *Jean-Vincent Lacroix*, *Marie-Ève Mayer* et *Patricia Blair*, pour l'intervenant le procureur général du Québec.

Version française du jugement des juges LeBel, Deschamps, Fish et Abella rendu par

[1] LA JUGE DESCHAMPS — Le présent pourvoi soulève la question de savoir si certaines

2012 SCC 58 (CanLII)

Violent Crime Act, S.C. 2008, c. 6 ("Amendments"), which amended the *Criminal Code*, R.S.C. 1985, c. C-46, operate retrospectively.

[2] As I explain in greater detail in my reasons in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, a case heard concurrently with the case at bar, the Amendments limit the evidence an accused can adduce to raise doubt about the reliability of breathalyzer test results obtained using an approved instrument. The objective of the Amendments, which form part of a broader scheme implemented by Parliament to reduce the incidence of impaired driving, is to give those results a weight consistent with their scientific value (*St-Onge Lamoureux*, at paras. 29 and 31). In order to rebut the presumptions of accuracy and identity applicable to breathalyzer test results, which favour the Crown, an accused can no longer simply rely on an expert opinion that the amount of alcohol he or she consumed is inconsistent with the test results — what is known as the "*Carter* defence" (*R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)).

[3] There are no transitional provisions that provide express guidance as to whether the Amendments apply retrospectively, that is, to conduct which occurred before the Amendments came into force. Resort must be had to general principles and to the effect of the Amendments. For the reasons that follow, I conclude that the Amendments do not apply retrospectively. I would allow the appeal and restore the acquittal entered at trial.

I. Facts and Judicial History

[4] On July 22, 2007, a vehicle driven by the appellant, Samuel Dineley, struck a parked vehicle. He was asked to submit to breathalyzer tests. The instrument registered 99 and 97 mg of alcohol per 100 mL of blood. He was charged with impaired driving and driving with a blood alcohol level over the legal limit of 80 mg of alcohol in 100 mL of blood.

dispositions de la *Loi sur la lutte contre les crimes violents*, L.C. 2008, ch. 6 (les « modifications »), qui ont modifié le *Code criminel*, L.R.C. 1985, ch. C-46, s'appliquent rétrospectivement.

[2] Comme je l'explique plus en détail dans *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187, une affaire entendue en même temps que la présente espèce, les modifications limitent les éléments de preuve que l'accusé peut produire pour mettre en doute la fiabilité des résultats obtenus par l'utilisation d'un alcootest approuvé. Les modifications, qui s'inscrivent dans un régime plus large mis en place par le législateur pour réduire la fréquence de la conduite avec facultés affaiblies, ont pour objet d'attribuer à ces résultats un poids correspondant à leur valeur scientifique (*St-Onge Lamoureux*, par. 29 et 31). Pour réfuter les présomptions d'exactitude et d'identité dont jouit le ministère public à l'égard des résultats de l'alcootest, l'accusé ne peut plus se fonder simplement sur l'avis d'un expert selon lequel la quantité d'alcool qu'il a consommé est incompatible avec les résultats de l'analyse, ce que l'on appelle la « défense de type *Carter* » (*R. c. Carter* (1985), 19 C.C.C. (3d) 174 (C.A. Ont.)).

[3] Il n'y a aucune disposition transitoire indiquant expressément si les modifications s'appliquent rétrospectivement, c'est-à-dire aux actes commis avant leur entrée en vigueur. Il faut donc s'en remettre aux principes généraux et à l'effet des modifications. Pour les motifs exposés ci-après, je conclus que les modifications ne s'appliquent pas rétrospectivement. Je suis d'avis d'accueillir le pourvoi et de rétablir l'acquittement prononcé au procès.

I. Faits et historique judiciaire

[4] Le 22 juillet 2007, le véhicule conduit par l'appelant, Samuel Dineley, est entré en collision avec un véhicule stationné. On lui a demandé de se soumettre à des alcootests. Les résultats de ces alcootests ont révélé des taux de 99 et 97 mg d'alcool par 100 ml de sang. Il a été inculpé de conduite avec facultés affaiblies et de conduite avec une alcoolémie supérieure à la limite légale de 80 mg d'alcool par 100 ml de sang.

2012 SCC 58 (CanLII)

[5] At the beginning of the trial, on June 19, 2008, counsel for Mr. Dineley advised the judge that he would not be able to complete the case for the defence that day. He intended to tender a toxicology report in support of a *Carter* defence in order to challenge the accuracy of the breathalyzer test results; Crown counsel had asked to cross-examine the toxicologist on his report, but the latter was not present. The hearing started that day on the common understanding that the case for the defence would be continued on July 15, 2008 to enable the Crown to cross-examine the toxicologist. Both Crown and defence counsel were or ought to have been aware that the Amendments would come into force on July 2, 2008. Section 258(1)(*c*) of the *Criminal Code*, as amended by the Amendments, establishes a presumption of accuracy of breathalyzer test results and a presumption of identity of those results with the blood alcohol level of the accused at the time of the alleged offence. Under s. 258(1)(*c*), these presumptions will now be rebutted only if the accused leads evidence tending to show that the instrument malfunctioned or was improperly operated. The effect of that provision, together with s. 258(1)(*d.01*), is to eliminate the *Carter* defence as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results.

[6] The trial judge did not allow the Crown to argue that the Amendments applied to preclude a *Carter* defence. In his opinion, it was improper for the Crown to obtain an adjournment for purposes of cross-examining the toxicologist and then invoke the Amendments which came into force in the interim without having first warned defence counsel that it intended to do so. He accepted the *Carter* defence and acquitted Mr. Dineley.

[7] The summary conviction appeal judge held that it was not improper for the Crown to raise the issue of the applicability of the Amendments. However, he was of the view that the Amendments virtually eliminated the *Carter* defence, that they were

[5] Au début du procès, le 19 juin 2008, l'avocat de M. Dineley a informé le juge qu'il ne serait pas en mesure d'achever la présentation de la défense ce jour-là. Il comptait produire le rapport d'un toxicologue à l'appui d'une défense de type *Carter* pour contester l'exactitude des résultats de l'alcootest; l'avocat du ministère public avait pour sa part demandé de contre-interroger le toxicologue au sujet de son rapport, mais ce dernier était absent. Ce jour-là, toutes les parties ont convenu que la présentation de la défense se poursuivrait le 15 juillet 2008 pour permettre au ministère public de procéder à ce contre-interrogatoire. Tant l'avocat du ministère public que celui de la défense savaient ou auraient dû savoir que les modifications entreraient en vigueur le 2 juillet 2008. L'alinéa 258(1)*c*) du *Code criminel*, tel qu'il a été modifié par les modifications, crée une présomption d'exactitude des résultats de l'alcootest et une présomption voulant que ces résultats correspondent à l'alcoolémie de l'accusé au moment où l'infraction reprochée aurait été commise. Selon l'al. 258(1)*c*), ces présomptions ne peuvent être réfutées que si l'accusé présente des éléments de preuve tendant à démontrer le mauvais fonctionnement ou l'utilisation incorrecte de l'alcootest. Cette disposition, combinée à l'al. 258(1)*d.01*), élimine la défense de type *Carter* comme moyen indépendant pour soulever un doute raisonnable quant à la fiabilité des résultats de l'alcootest.

[6] Le juge du procès n'a pas autorisé le ministère public à soutenir que l'application des modifications faisait obstacle à une défense de type *Carter*. Il lui semblait inapproprié que le ministère public demande un ajournement pour contre-interroger le toxicologue et invoque ensuite les modifications qui sont entrées en vigueur dans l'intervalle sans avoir prévenu au préalable l'avocat de la défense que telle était son intention. Il a jugé recevable la défense de type *Carter* et acquitté M. Dineley.

[7] Le juge de la cour d'appel des poursuites sommaires a estimé qu'il n'était pas inapproprié que le ministère public ait soulevé la question de l'applicabilité des modifications. Toutefois, il s'est dit d'avis que ces dernières avaient pratiquement supprimé la

2012 SCC 58 (CanLII)

substantive in nature and not procedural, and that they therefore applied only prospectively.

[8] The Court of Appeal reversed that decision. It held that the Amendments were merely evidentiary and that they therefore applied to the case. According to MacPherson J.A., writing for the court, the *Carter* defence had not been eliminated: it had been changed, but survived in a different form (2009 ONCA 814, 98 O.R. (3d) 81, at para. 26). The court ordered a new trial to proceed on the basis of s. 258(1) of the *Criminal Code* as amended.

II. Analysis

[9] Whether the Amendments apply retrospectively has been a hotly contested issue. As MacPherson J.A. mentioned in the instant case, a large number of provincial and superior court judges across the country have expressed conflicting opinions in this regard.

[10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the

défense de type *Carter*, qu'elles étaient des dispositions substantielles et non procédurales, et qu'elles ne s'appliquaient donc que pour l'avenir.

[8] La Cour d'appel a infirmé cette décision. Elle a jugé que les modifications portaient simplement sur la preuve et qu'elles s'appliquaient par conséquent au cas à l'étude. S'exprimant au nom de la cour, le juge MacPherson a dit être d'avis que la défense de type *Carter* n'avait pas été supprimée : elle avait été modifiée, mais elle continuait d'exister sous une forme différente (2009 ONCA 814, 98 O.R. (3d) 81, par. 26). La Cour d'appel a ordonné la tenue d'un nouveau procès sur le fondement du par. 258(1) du *Code criminel* tel que modifié.

II. Analyse

[9] L'application rétrospective des modifications en cause est une question très controversée. Comme le juge MacPherson l'a affirmé en l'espèce, de nombreux juges des cours provinciales et des cours supérieures dans tout le pays ont exprimé des opinions contradictoires à cet égard.

[10] Plusieurs règles d'interprétation peuvent aider à circonscrire les cas où une nouvelle mesure législative trouve application. Vu le besoin d'assurer la certitude des conséquences juridiques découlant des faits et des actes antérieurs, les tribunaux reconnaissent depuis longtemps le caractère exceptionnel des mesures législatives applicables rétrospectivement. Plus précisément, ils ont jugé indésirable l'application rétrospective de dispositions législatives portant atteinte à des droits acquis ou substantiels. Ainsi, une nouvelle mesure législative qui porte atteinte à de tels droits est présumée n'avoir d'effet que pour l'avenir, à moins qu'il soit possible de discerner une intention claire du législateur qu'elle s'applique rétrospectivement (*Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256, p. 266-267; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 57; *Wildman c. La Reine*, [1984] 2 R.C.S. 311, p. 331-332). Les nouvelles dispositions procédurales destinées à ne régir que la

2012 SCC 58 (CanLII)

substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331).

manière utilisée pour établir ou faire respecter un droit n'ont pour leur part pas d'incidence sur le fond de ces droits. De telles mesures sont présumées s'appliquer immédiatement, à la fois aux instances en cours et aux instances à venir (*Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57 et 62; *Wildman*, p. 331).

[11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights.

[11] Ce ne sont pas toutes les dispositions procédurales qui s'appliquent rétrospectivement. Certaines peuvent, dans leur application, porter atteinte à des droits substantiels. De telles dispositions ne sont pas purement procédurales et ne s'appliquent pas immédiatement (P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009, p. 208). Par conséquent, la tâche qui s'impose pour statuer sur l'application dans le temps des modifications en cause consiste non pas à qualifier les dispositions de « dispositions procédurales » ou de « dispositions substantielles », mais à déterminer si elles portent atteinte à des droits substantiels.

[12] Moreover, a further factor may be relevant to the determination of whether the Amendments apply retrospectively. It is whether they require evidence that the accused had no reason to gather under the former legislation.

[12] Un autre facteur peut être pertinent pour décider de l'application rétrospective ou non des modifications : il s'agit de la question de savoir si elles commandent la présentation d'éléments de preuve que l'accusé n'avait aucune raison de réunir sous le régime de l'ancienne mesure législative.

[13] It will be helpful to reproduce the relevant portions of the Amendments, which came into force while Mr. Dineley's trial was under way:

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

. . .

(*c*) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if [list of conditions to be met],

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence

[13] Il convient de reproduire les parties pertinentes des modifications, qui sont entrées en vigueur durant le procès de M. Dineley :

258. (1) Dans des poursuites engagées en vertu du paragraphe 255(1) à l'égard d'une infraction prévue à l'article 253 ou au paragraphe 254(5) ou dans des poursuites engagées en vertu de l'un des paragraphes 255(2) à (3.2) :

. . .

c) lorsque des échantillons de l'haleine de l'accusé ont été prélevés conformément à un ordre donné en vertu du paragraphe 254(3), [conditions préalables à remplir]

la preuve des résultats des analyses fait foi de façon concluante, en l'absence de toute preuve tendant à démontrer à la fois que les résultats des analyses montrant une alcoolémie supérieure à quatre-vingts

2012 SCC 58 (CanLII)

was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

. . .

(*d.01*) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

(i) the amount of alcohol that the accused consumed,

(ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or

(iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed;

(It should be noted that the temporal application of the second presumption of identity provided for in s. 258(1)(*d.1*) of the *Criminal Code* is not at issue in this case.)

[14] In *St-Onge Lamoureux*, I conclude that the first requirement that the approved instrument was malfunctioning or was operated improperly, as set out in s. 258(1)(*c*) and qualified by s. 258(1)(*d.01*), infringes the right to be presumed innocent protected by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, but that the infringement is justified under s. 1. I also find in that case that the other two requirements of s. 258(1)(*c*) — (1) that a causal connection be demonstrated between the malfunctioning or improper operation of the

milligrammes d'alcool par cent millilitres de sang découlent du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest approuvé et que l'alcoolémie de l'accusé au moment où l'infraction aurait été commise ne dépassait pas quatre-vingts milligrammes d'alcool par cent millilitres de sang, de l'alcoolémie de l'accusé tant au moment des analyses qu'à celui où l'infraction aurait été commise, ce taux correspondant aux résultats de ces analyses, lorsqu'ils sont identiques, ou au plus faible d'entre eux s'ils sont différents, si les conditions suivantes sont réunies :

. . .

d.01) il est entendu que ne constituent pas une preuve tendant à démontrer le mauvais fonctionnement ou l'utilisation incorrecte de l'alcootest approuvé ou le fait que les analyses ont été effectuées incorrectement les éléments de preuve portant :

(i) soit sur la quantité d'alcool consommé par l'accusé,

(ii) soit sur le taux d'absorption ou d'élimination de l'alcool par son organisme,

(iii) soit sur le calcul, fondé sur ces éléments de preuve, de ce qu'aurait été son alcoolémie au moment où l'infraction aurait été commise;

(Je note que l'application dans le temps de la deuxième présomption d'identité prévue à l'al. 258(1)*d.1*) du *Code criminel* n'est pas en cause dans la présente affaire.)

[14] Dans *St-Onge Lamoureux*, je conclus que la première exigence énoncée à l'al. 258(1)*c*) et précisée à l'al. 258(1)*d.01*) voulant que l'alcootest approuvé ait mal fonctionné ou ait été utilisé incorrectement porte atteinte au droit à la présomption d'innocence garanti par l'al. 11*d*) de la *Charte canadienne des droits et libertés*, mais que cette atteinte est justifiée au regard de l'article premier. Je conclus également dans cette affaire que les deux autres exigences de l'al. 258(1)*c*) — (1) la démonstration d'un lien de causalité entre le

2012 SCC 58 (CanLII)

instrument and the determination that the blood alcohol level of the accused exceeded the legal limit, and (2) that further evidence be submitted to demonstrate that the blood alcohol level of the accused did not exceed the legal limit — unjustifiably infringe s. 11(*d*) of the *Charter*. All the other constitutional challenges in that case are rejected. Since only the first requirement of s. 258(1)(*c*) survives the Court's decision in *St-Onge Lamoureux*, I will address the Amendments only as they stand following that decision.

[15] Although I will not engage in the impossible task of reconciling all the decisions in which the courts have grappled with whether new legislation affects substantive rights, references to a few cases will be helpful. The following statements of La Forest J. in *Angus*, at pp. 265-66, are particularly relevant to the issue before us:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. . . .
>
> . . .
>
> Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. [Emphasis in original.]

[16] The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected. I cannot accept the approach adopted by the Court of Appeal in the instant case, according to which legislation that alters the evidentiary content of a defence applies retrospectively (para. 27).

[17] The first question is thus whether, in imposing a new requirement for rebutting the presumptions of accuracy and identity applicable to breathalyzer test results, Parliament has affected

mauvais fonctionnement ou l'utilisation incorrecte de l'alcootest et le constat que l'alcoolémie de l'accusé dépasse la limite légale, et (2) la présentation d'éléments de preuve supplémentaires démontrant que l'alcoolémie de l'accusé ne dépassait pas la limite légale — violent de façon injustifiée l'al. 11*d*) de la *Charte*. Toutes les autres contestations constitutionnelles soulevées dans cette affaire sont rejetées. Puisque seule la première exigence de l'al. 258(1)*c*) survit à l'arrêt *St-Onge Lamoureux* de la Cour, je n'examinerai que les modifications telles qu'elles sont à la suite de cet arrêt.

[15] Même si je ne tenterai pas d'accomplir la tâche impossible de faire la synthèse de toute la jurisprudence dans laquelle les tribunaux se sont demandé si une nouvelle mesure législative porte atteinte à des droits substantiels, il est utile de mentionner quelques arrêts. Les propos tenus par le juge La Forest aux p. 265-266 de l'arrêt *Angus* sont particulièrement pertinents quant à la question dont notre Cour est saisie :

> Normalement, les règles de procédure n'ont pas d'effet sur le contenu ou sur l'existence d'une action ou d'un moyen de défense (ou d'un droit, d'une obligation ou de quelque autre objet de la loi), mais seulement sur la manière de l'appliquer ou de l'utiliser. . .
>
> . . .
>
> Le changement d'un « mode » de procédure dans la production d'une défense est une chose très différente du retrait complet du moyen de défense. [Souligné dans l'original.]

[16] Le fait qu'une nouvelle mesure législative influe sur le contenu ou sur l'existence d'un moyen de défense, plutôt qu'uniquement sur sa présentation, indique que des droits substantiels sont en jeu. Je ne saurais accepter l'approche adoptée en l'espèce par la Cour d'appel pour qui une mesure législative modifiant le contenu d'un moyen de défense au chapitre de la preuve doit s'appliquer rétrospectivement (par. 27).

[17] La première question est donc de savoir si, en imposant une nouvelle exigence à satisfaire pour réfuter les présomptions d'exactitude et d'identité applicables aux résultats de l'alcootest, le législateur

2012 SCC 58 (CanLII)

the existence or content of a defence. As a result of the Amendments and the decision in *St-Onge Lamoureux*, the only evidence that can be tendered to raise a reasonable doubt about the reliability of breathalyzer test results is now evidence that the instrument was malfunctioning or was operated improperly. It is clear from s. 258(1)(*d.01*) that the *Carter* defence is no longer sufficient on its own to rebut the presumptions of accuracy and identity. The burden on the accused has thus been increased, as he or she can no longer ask the judge to draw an inference of malfunction or improper operation from indirect evidence by raising a *Carter* defence. Evidence related directly to the instrument itself is now required.

a influé sur l'existence ou le contenu d'un moyen de défense. Étant donné les modifications et l'arrêt *St-Onge Lamoureux*, la seule preuve pouvant être produite pour soulever un doute raisonnable quant à la fiabilité des résultats de l'alcootest se limite désormais à celle du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest. Il ressort clairement de l'al. 258(1)*d.01*) que la défense de type *Carter* ne suffit plus, à elle seule, pour réfuter les présomptions d'exactitude et d'identité. Le fardeau de preuve qui repose sur l'accusé s'en trouve alourdi, celui-ci ne pouvant plus demander au juge, au moyen de la défense de type *Carter*, de conclure au mauvais fonctionnement ou à l'utilisation incorrecte de l'alcootest à partir d'une preuve indirecte. L'accusé doit dorénavant produire une preuve visant directement l'alcootest.

[18] The fact that the *Carter* defence is no longer sufficient on its own to rebut the presumptions established in s. 258(1)(*c*) makes it difficult to accept MacPherson J.A.'s opinion that the defence has not been eliminated, neutered or abolished and that it survives in a different form. In fact, this opinion is in sharp contrast with the very words of s. 258(1)(*d.01*), according to which "evidence tending to show that an approved instrument was malfunctioning or was operated improperly" does not include the evidence that would be tendered in raising the *Carter* defence. Unlike MacPherson J.A., I must conclude that the *Carter* defence has been eliminated as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results. This, in my view, indicates that the provisions are not merely procedural; they affect a defence open to an accused and are therefore subject to the presumption against the retrospective application of new legislation. I agree with Mayrand J.A. in *R. v. Gervais* (1978), 43 C.C.C. (2d) 533 (Que. C.A.), that the right of an accused to rely on a defence is a substantive right and that new legislation has to be interpreted so as not to deprive the accused of a defence that would have been open to him or her at the time of the impugned act (p. 535).

[18] Comme la défense de type *Carter* ne suffit plus, à elle seule, pour réfuter les présomptions prévues à l'al. 258(1)*c*), il est difficile d'accepter l'opinion du juge MacPherson que cette défense n'a pas été supprimée, neutralisée ou abolie, et qu'elle continue d'exister sous une forme différente. En fait, cette opinion contraste nettement avec le texte même de l'al. 258(1)*d.01*), selon lequel la preuve produite par l'accusé en invoquant la défense de type *Carter* ne constitue pas une « preuve tendant à démontrer le mauvais fonctionnement ou l'utilisation incorrecte de l'alcootest approuvé ». Contrairement à l'opinion exprimée par le juge MacPherson, je dois conclure que la défense de type *Carter* a été supprimée comme moyen de défense susceptible de soulever, à lui seul, un doute raisonnable quant à la fiabilité des résultats de l'alcootest. À mon avis, cela indique que les dispositions ne sont pas simplement de nature procédurale; elles ont une incidence sur un moyen de défense dont dispose l'accusé et sont, par le fait même, assujetties à la présomption de non-rétrospectivité des nouvelles mesures législatives. Je partage l'avis du juge Mayrand lorsqu'il dit dans *R. c. Gervais*, [1978] J.Q. n° 181 (QL) (C.A.), que le droit d'un accusé d'invoquer un moyen de défense est de nature substantielle et qu'une nouvelle mesure législative doit être interprétée de façon à ne pas priver l'accusé d'un moyen de défense dont il disposait au moment où l'acte litigieux aurait été posé (par. 8-9).

2012 SCC 58 (CanLII)

[19] In *St-Onge Lamoureux*, I conclude that precluding the use of the *Carter* defence to raise on its own a doubt about the accuracy of breathalyzer test results does not violate s. 7 of the *Charter*. However, the fact that Parliament could exclude evidence of alcohol consumption does not change the fact that a defence which on its own enabled an accused to avert conviction has been eliminated.

[19] Dans *St-Onge Lamoureux*, je conclus que de priver une personne accusée du droit de recourir à la défense de type *Carter* comme moyen suffisant à lui seul pour mettre en doute la fiabilité des résultats de l'alcootest ne viole pas l'art. 7 de la *Charte*. Cependant, la faculté du législateur d'exclure la preuve de consommation d'alcool ne change rien à la suppression d'un moyen de défense qui, à lui seul, permettait à un accusé d'éviter une déclaration de culpabilité.

[20] This brings me to my second reason for finding that the Amendments affect substantive rights of the accused. The broad scheme put in place by Parliament is based on presumptions that the results of the breathalyzer analyses are accurate and that they are identical to the blood alcohol level of the accused at the time of the alleged offence. As discussed in *St-Onge Lamoureux*, at para. 27, these statutory presumptions infringe the constitutionally protected right to be presumed innocent, as they relieve the Crown of the requirement of proving the guilt of the accused beyond a reasonable doubt before he or she need to respond. The legislated means to rebut these presumptions are relevant to the determination of whether the infringement of the right to be presumed innocent is justified under s. 1. This is where the *Carter* defence comes into play. Under the former legislation, the *Carter* defence enabled the accused to discharge his or her burden of rebutting the statutory presumptions, which favour the Crown, by relying on an expert opinion that the amount of alcohol he or she consumed is inconsistent with the breathalyzer test results. As a result of the Amendments, this is no longer the case. Instead, the accused must now present direct evidence about the use or operation of the instrument in order to rebut the presumptions.

[20] Cela m'amène à la deuxième raison pour laquelle j'estime que les modifications portent atteinte à des droits substantiels de l'accusé. Le régime général instauré par le législateur repose sur des présomptions voulant que les résultats des analyses soient exacts et correspondent à l'alcoolémie de l'accusé au moment où l'infraction reprochée aurait été commise. Comme l'illustre l'arrêt *St-Onge Lamoureux* au par. 27, ces présomptions légales portent atteinte à la présomption d'innocence garantie par la Constitution puisqu'elles libèrent le ministère public de l'obligation d'établir hors de tout doute raisonnable la culpabilité de l'accusé avant que celui-ci n'ait besoin de répondre. Les moyens légaux de repousser ces présomptions sont pertinents pour déterminer si l'atteinte au droit à la présomption d'innocence est justifiée au regard de l'article premier. C'est à cette étape qu'entre en jeu la défense de type *Carter*. Sous le régime des anciennes mesures législatives, la défense de type *Carter* permettait à l'accusé de s'acquitter de son fardeau de repousser les présomptions légales en faveur du ministère public en s'appuyant sur l'opinion d'un expert selon laquelle la quantité d'alcool qu'il avait bu n'était pas compatible avec les résultats de l'alcootest. Ce n'est plus le cas, par suite de l'adoption des modifications. Pour réfuter ces présomptions, l'accusé doit plutôt dorénavant présenter une preuve directe quant au fonctionnement ou à l'utilisation de l'alcootest.

[21] The possibility for the accused of rebutting the statutory presumptions by means of a *Carter* defence (under the former legislation) or by adducing evidence related to the instrument (under the Amendments) is determinative of whether the infringement of the right to be presumed innocent is justified. However, the conclusion that the

[21] Le fait que l'accusé puisse réfuter les présomptions légales au moyen d'une défense de type *Carter* (sous le régime des anciennes mesures législatives) ou d'une preuve ciblant l'alcootest (selon les modifications) est déterminant lorsqu'il s'agit de décider si l'atteinte à la présomption d'innocence est justifiée. Toutefois, la conclusion selon laquelle

2012 SCC 58 (CanLII)

infringement is justified in the context of the new legislation does not alter the fact that constitutional rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply.

l'atteinte est justifiée sous le régime des nouvelles mesures législatives ne change rien au fait qu'il a été porté atteinte à des droits constitutionnels. Il s'agit d'une indication supplémentaire que les nouvelles mesures législatives portent atteinte à des droits substantiels puisque les droits constitutionnels sont forcément de nature substantielle. Ainsi, la règle générale interdisant l'application rétrospective des mesures législatives devrait s'appliquer en cas d'atteinte à des droits constitutionnels.

[22] In addition to the impact on the substantive rights of the accused, there is another reason why the Amendments should not be found to operate retrospectively. As a result of the Amendments, the evidence the accused may present to rebut the presumptions is limited to evidence that the instrument was malfunctioning or was operated improperly. The nature of that evidence is not defined in the Amendments, but it presumably has to relate to the instrument that was used to test the accused and not to the functioning of such instruments generally. This means that the accused may need to have access to information concerning the instrument used in his or her case or to operating records that would enable him or her to determine whether the instrument was functioning properly and was operated correctly. It is difficult to conceive how such an examination could take place months or even years after the tests were conducted. There is no indication that the instruments are isolated after being used in a given case. Parliament has not provided for the preservation of evidence for cases that began before the Amendments came into force.

[22] Outre l'incidence sur les droits substantiels de l'accusé, il existe une autre raison de ne pas conclure à l'application rétrospective des modifications. En raison de celles-ci, la preuve que l'accusé peut produire pour réfuter les présomptions se limite à celle du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest. Les modifications ne définissent pas la nature de cette preuve, mais elle doit vraisemblablement se rapporter à l'alcootest utilisé pour tester l'alcoolémie de l'accusé, et non au fonctionnement des alcootests en général. Cela signifie que l'accusé pourrait avoir besoin de renseignements sur l'alcootest utilisé dans son cas ou de comptes rendus d'utilisation qui lui permettraient d'établir si l'appareil a bien fonctionné ou a été utilisé correctement. On voit mal comment cet examen pourrait être effectué des mois, voire des années, après les analyses. Rien n'indique que les alcootests sont conservés isolément après leur utilisation dans un cas donné. Le législateur n'a pas prévu la conservation des éléments de preuve en vue des procès intentés avant l'entrée en vigueur des modifications.

[23] In *St-Onge Lamoureux*, one of the arguments put to the Court was that the Amendments violated the s. 7 rights of the accused because the defence required by the new legislation was so difficult to present that it was practically illusory. This argument was rejected on the basis that there are no limits on the evidence the accused can reasonably tender, provided that it relates to the malfunctioning or improper operation of the instrument. However, where, as in the case at bar, the parties did not know at the time of the breathalyzer tests that such a defence would be required, and years elapsed between the tests and the trial, it may be

[23] On a notamment soutenu dans *St-Onge Lamoureux* que les modifications violaient les droits garantis à l'accusé par l'art. 7 parce qu'il était tellement difficile de présenter le moyen de défense nécessaire par suite de l'adoption des nouvelles mesures législatives que cela le rendait pratiquement illusoire. Cet argument a été rejeté au motif que l'accusé peut raisonnablement produire tous les éléments de preuve qu'il veut, pourvu que ceux-ci aient trait au mauvais fonctionnement ou à l'utilisation incorrecte de l'alcootest. Cependant, dans les cas où, comme en l'espèce, les parties n'étaient pas conscientes, au moment des analyses, du besoin

2012 SCC 58 (CanLII)

impossible to present evidence to rebut the presumptions.

d'invoquer par la suite un tel moyen de défense, et où plusieurs années se sont écoulées entre les analyses et le procès, il pourrait s'avérer impossible de présenter des éléments de preuve pour réfuter les présomptions.

[24] There are similarities between the situation in the instant case and the one before the Court in *R. v. Ali*, [1980] 1 S.C.R. 221. In that case, amendments to the *Criminal Code* authorized the police to request more than one breath sample and made the taking of two samples a condition of application of the presumptions attached to breathalyzer test results. Because the former provision had not authorized the police to take two samples, prosecutions commenced before the new provision came into force would be frustrated by the new requirement if the amendments were held to apply retrospectively. The Court held that Parliament could not have intended such a result. Both in *Ali* and in the present case, Parliament added a requirement related to the evidence a party must adduce. In the case at bar, the new requirement is a condition for the rebuttal of the presumption provided for in s. 258(1)(*c*), whereas in *Ali* the new requirement was a condition for the application of the presumption.

[24] La situation dans l'affaire qui nous occupe présente des similitudes avec celle dont la Cour était saisie dans *R. c. Ali*, [1980] 1 R.C.S. 221. Dans cette affaire, des modifications au *Code criminel* autorisaient les policiers à demander plus d'un échantillon d'haleine et avaient fait du prélèvement de deux échantillons une condition de l'application des présomptions liées aux résultats de l'alcootest. Puisque l'ancienne disposition n'autorisait pas les policiers à prélever deux échantillons, l'ajout de la nouvelle condition aurait entravé les poursuites engagées avant l'entrée en vigueur de la nouvelle disposition s'il avait été conclu à l'application rétrospective des modifications. La Cour a conclu que le législateur ne pouvait avoir souhaité un tel résultat. Tant dans l'affaire *Ali* que dans la présente affaire, le législateur a ajouté une exigence relative aux éléments de preuve qu'une partie doit produire. En l'espèce, la nouvelle exigence constitue une condition à remplir pour repousser la présomption établie à l'al. 258(1)*c*), tandis que, dans *Ali*, la nouvelle exigence était une condition additionnelle pour que s'applique la présomption.

[25] *Ali* supports the view that, where the former legislation did not contemplate the gathering of evidence that is required by the new legislation, the new legislation can only be prospective. In the instant case, the accused cannot adduce evidence that he had no reason to gather before the Amendments. This is an additional reason for concluding that the Amendments do not apply to cases that were commenced before the Amendments came into force. I therefore disagree with MacPherson J.A. that the difficulty for an accused of obtaining evidence on the functioning of the instrument used in his or her case after years have gone by is speculative. Rather, I agree with the following comment by Bich J.A. (dissenting) in *R. v. Loiseau*, 2010 QCCA 1872 (CanLII), at para. 56:

[25] *Ali* étaye l'avis que, dans les cas où l'ancienne mesure législative n'envisage pas la collecte d'éléments de preuve devenue nécessaire en raison de la nouvelle disposition, celle-ci ne peut s'appliquer que pour l'avenir. En l'espèce, l'accusé ne peut présenter des éléments de preuve qu'il n'avait aucune raison de réunir avant l'entrée en vigueur des modifications. C'est là une raison de plus de conclure que les modifications ne s'appliquent pas aux instances introduites avant leur entrée en vigueur. Je ne partage donc pas l'avis du juge MacPherson selon lequel la difficulté que peut éprouver un accusé pour obtenir des éléments de preuve concernant le fonctionnement de l'alcootest utilisé dans son cas plusieurs années auparavant relève de l'hypothèse. Je suis plutôt d'accord avec le commentaire suivant formulé par la juge Bich (dissidente) dans *R. c. Loiseau*, 2010 QCCA 1872, [2010] R.J.Q. 2246, par. 56 :

2012 SCC 58 (CanLII)

[TRANSLATION] Because the law makes the requirements for the gathering of evidence more stringent and, due to the state of the law at the time, ensures that the accused will not have sought evidence that would now be indispensable to him to mount a defence, the amended provisions should not apply to this situation.

Devant une loi qui alourdit les exigences de la constitution de la preuve et fait en sorte que l'accusé n'aura pas recherché, à cause de l'état du droit à l'époque, des éléments qui lui seraient maintenant indispensables afin de faire valoir sa défense, il ne saurait y avoir application des dispositions modifiées à la présente situation.

[26] For these reasons, I would allow the appeal and restore the acquittal entered by the trial judge.

[26] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de rétablir l'acquittement prononcé par le juge du procès.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Cromwell rendus pas

CROMWELL J. (dissenting) —

LE JUGE CROMWELL (dissident) —

I. Introduction

[27] Section 253(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, makes it an offence to operate (or to have care and control of) a motor vehicle with a blood alcohol content of more than 80 mg of alcohol in 100 mL of blood. To facilitate proof of this offence, the Crown has for many years had the benefit of certain factual presumptions. These presumptions arise once it is proven that breath samples were taken and analyzed by a breathalyzer device in accordance with detailed statutory requirements. Putting aside some points of detail, one of these presumptions is that the readings obtained under the statutory conditions are accurate (the presumption of accuracy); another presumption is that the readings at the time of testing represent the accused's blood alcohol content at the time of the alleged offence (the presumption of identity).

[28] For many years, an accused could rebut these presumptions by pointing to any sort of evidence that would raise a reasonable doubt in the mind of the trier of fact about the existence of the presumed facts. However, in 2008, Parliament enacted the *Tackling Violent Crime Act*, S.C. 2008, c. 6, which amends the *Criminal Code* by imposing some new rules about what sorts of evidence could be used to rebut these presumptions.

I. Introduction

[27] Selon l'alinéa 253(1)*b*) du *Code criminel*, L.R.C. 1985, ch. C-46, commet une infraction quiconque conduit (ou a la garde ou le contrôle d') un véhicule à moteur avec une alcoolémie supérieure à 80 mg d'alcool par 100 ml de sang. Pour faciliter la preuve de cette infraction, le ministère public bénéficie depuis de nombreuses années de certaines présomptions de fait. Ces présomptions entrent en jeu une fois qu'il est établi que les échantillons d'haleine ont été prélevés et analysés au moyen d'un alcootest, conformément aux exigences détaillées prescrites par la loi. Mis à part certains détails, l'une de ces présomptions veut que les résultats obtenus en conformité avec les conditions prévues par la loi soient exacts (la présomption d'exactitude); une autre présomption veut que les résultats obtenus au moment de l'analyse correspondent à l'alcoolémie de l'accusé au moment de l'infraction reprochée (la présomption d'identité).

[28] Pendant de nombreuses années, un accusé pouvait renverser ces présomptions en présentant toute espèce d'élément de preuve qui ferait naître un doute raisonnable dans l'esprit du juge des faits quant à l'existence des faits présumés. Or, en 2008, le législateur a adopté la *Loi sur la lutte contre les crimes violents*, L.C. 2008, ch. 6, qui a modifié le *Code criminel* en créant de nouvelles règles pour préciser quels types de preuve pouvaient être utilisés pour réfuter ces présomptions.

2012 SCC 58 (CanLII)

[29] The issue on the appeal is when these new evidentiary provisions apply. Do they apply, as the Court of Appeal held, to trials that are held on and after the day the new rules came into force, or, as the appellant contends, do they apply only to trials relating to events alleged to have occurred after they came into force?

[30] In my view, the holding of the Court of Appeal is correct and I would dismiss the appeal.

II. Brief Overview of the Issue

[31] Before the 2008 amendments, the presumption of accuracy (and therefore also the presumption of identity) could be rebutted by any evidence that raised a reasonable doubt that the actual blood alcohol level at the time of testing was below 80 mg of alcohol per 100 mL of blood: see, e.g., *R. v. Crosthwait*, [1980] 1 S.C.R. 1089. The presumption of identity itself could be rebutted by evidence tending to show that the accused's blood alcohol level at the time of the offence and at the time of testing had changed, provided that the effect of normal biological processes of absorption and elimination could not, of itself, constitute rebutting evidence: *R. v. St. Pierre*, [1995] 1 S.C.R. 791, at paras. 44 and 59-61.

[32] Often evidence to the contrary was offered in the form of "consumption and elimination" evidence — sometimes referred to as "*Carter*" evidence (*R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)). This typically consisted of evidence from the accused and perhaps other witnesses about how much the accused had to drink and when, as well as evidence from a toxicologist indicating that if the accused had consumed the amount claimed, his or her blood alcohol level at the time of the offence would have been below the legal limit. Sometimes the introduction of this evidence has been referred to as the "*Carter* defence", but it really is not a defence at all. It is simply the presentation of evidence that could be relied on to raise a doubt about whether the breathalyzer device had accurately determined the accused's blood alcohol content

[29] La question en l'espèce est de savoir dans quels cas s'appliquent ces nouvelles dispositions relatives à la preuve. S'appliquent-elles, comme l'a affirmé la Cour d'appel, aux procès tenus le ou après le jour de l'entrée en vigueur des nouvelles règles ou s'appliquent-elles, comme le prétend l'appelant, uniquement aux procès concernant des événements qui seraient survenus après leur entrée en vigueur?

[30] La décision de la Cour d'appel me semble correcte et je suis d'avis de rejeter le pourvoi.

II. Aperçu de la question en litige

[31] Avant les modifications de 2008, la présomption d'exactitude (et aussi par le fait même la présomption d'identité) pouvait être réfutée par tout type d'éléments de preuve permettant de soulever un doute raisonnable quant au fait que l'alcoolémie réelle au moment de l'analyse était inférieure à 80 mg d'alcool par 100 ml de sang : voir, p. ex., *R. c. Crosthwait*, [1980] 1 R.C.S. 1089. La présomption d'identité elle-même pouvait être réfutée par une preuve tendant à démontrer que l'alcoolémie de l'accusé avait changé entre le moment de l'infraction et celui de l'alcootest, à la condition que l'effet du processus biologique normal de l'absorption et l'élimination de l'alcool par le métabolisme ne puisse pas, en soi, constituer une contre-preuve : *R. c. St. Pierre*, [1995] 1 R.C.S. 791, par. 44 et 59-61.

[32] On présentait souvent une preuve contraire sous forme de preuve de la « consommation et de l'élimination » de l'alcool — parfois appelée preuve de type « *Carter* » (*R. c. Carter* (1985), 19 C.C.C. (3d) 174 (C.A. Ont.)). Il s'agissait généralement de la déposition de l'accusé et peut-être aussi de celle d'autres témoins concernant la quantité d'alcool que l'accusé avait bu et le moment où il l'avait bu, de même que du témoignage d'un toxicologue selon lequel l'alcoolémie de l'accusé au moment de l'infraction aurait été inférieure à la limite légale si l'accusé avait consommé la quantité alléguée. La production de cette preuve a parfois été qualifiée de « défense de type *Carter* », mais, en fait, il ne s'agit aucunement d'un moyen de défense. Il s'agit simplement de la présentation d'éléments de preuve sur lesquels on peut se fonder

2012 SCC 58 (CanLII)

and whether that reading reflected the accused's blood alcohol content at the time of operation, care or control.

[33] The appellant in this case presented this sort of evidence and was acquitted at trial. The driving in question occurred before the 2008 amendments came into force, but his trial continued after they had. His breathalyzer readings were 99 and 97 mg of alcohol per 100 mL of blood and there was nothing to indicate that the device was operating improperly. However, the appellant testified that he had only had three beers over a roughly two-hour period and his toxicologist testified that if that were so, his blood alcohol level would have been between 0 and 40 at the time of testing and between 20 and 52 at the time of driving. The judge believed the appellant and found that he was not satisfied beyond a reasonable doubt that the appellant's blood alcohol concentration at the time of driving exceeded 80.

[34] The 2008 amendments, if applied at the appellant's trial, would have limited in two respects the type of evidence that he could have relied on to rebut the presumptions of accuracy and identity. First, by virtue of the amended s. 258(1)(*c*), evidence to rebut the accuracy of the readings at the time of testing must raise a doubt with respect to whether the device malfunctioned or was improperly operated, about whether the malfunction or improper operation resulted in an over 80 reading and, as well, about whether the appellant's blood alcohol concentration at the time of driving was below 80 (these last two requirements have been eliminated in this Court's decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187). Second, by virtue of the amended s. 258(1)(*d.01*), so-called *Carter* evidence cannot be relied on to raise a doubt about whether the approved instrument was malfunctioning or was operated improperly. These amended provisions are based on the idea that breathalyzer results obtained in accordance with the statutory requirements should be taken to be accurate, absent evidence to think otherwise, and that *Carter* evidence is too unreliable

pour soulever un doute quant à l'exactitude de l'alcoolémie de l'accusé établie par l'alcootest et quant à la fidélité des résultats par rapport à son alcoolémie au moment où il conduisait le véhicule ou en avait la garde ou le contrôle.

[33] L'appelant, en l'espèce, a présenté ce type de preuve et a été acquitté au procès. L'incident en question est survenu avant l'entrée en vigueur des modifications de 2008, mais le procès de l'appelant s'est poursuivi après leur entrée en vigueur. Son alcoolémie avait été établie à 99 et à 97 mg d'alcool par 100 ml de sang et rien n'indiquait que l'appareil fonctionnait mal. L'appelant a toutefois affirmé n'avoir bu que trois bières durant une période d'environ deux heures et son toxicologue a témoigné que, si c'était le cas, son alcoolémie se serait située entre 0 et 40 au moment de l'analyse et entre 20 et 52 au moment de l'incident. Le juge a cru l'appelant et a conclu qu'il n'était pas convaincu hors de tout doute raisonnable que l'alcoolémie de l'appelant au moment de l'incident dépassait 80.

[34] Si on avait appliqué les modifications de 2008 lors du procès de l'appelant, elles auraient limité doublement le type de preuve sur laquelle il aurait pu s'appuyer pour réfuter les présomptions d'exactitude et d'identité. Premièrement, selon l'al. 258(1)*c*) modifié, la preuve visant à réfuter l'exactitude des résultats au moment de l'analyse doit soulever un doute raisonnable quant à savoir si l'appareil a mal fonctionné ou a été utilisé incorrectement, si son mauvais fonctionnement ou son utilisation incorrecte a entraîné un résultat supérieur à 80, et si l'alcoolémie de l'appelant au moment de l'incident était inférieure à 80 (la Cour supprime ces deux dernières exigences dans son arrêt *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187). Deuxièmement, selon l'al. 258(1)*d.01*) modifié, la preuve dite de type *Carter* ne peut être invoquée pour soulever un doute quant au mauvais fonctionnement ou à l'utilisation incorrecte de l'alcootest approuvé. Ces dispositions modifiées reposent sur l'idée que les résultats de l'alcootest obtenus conformément aux exigences prévues par la loi doivent être tenus pour exacts, en l'absence de preuve donnant à penser le contraire, et que

2012 SCC 58 (CanLII)

to be admitted to cast doubt on the accuracy of such readings. These ideas find impressive support in the scientific literature. The amended provisions, in effect, define what types of evidence are *not* sufficiently probative to be used to undermine the accuracy of the breathalyzer readings.

la preuve de type *Carter* est trop peu fiable pour être admise en vue de mettre en doute l'exactitude de ces résultats. L'idée en question est largement reconnue dans la documentation scientifique. Les dispositions modifiées indiquent en fait quels types de preuve *n*'ont *pas* une force probante suffisante pour qu'on les utilise en vue de mettre en doute l'exactitude des résultats de l'alcootest.

[35] There are three principles of statutory interpretation that are potentially relevant to the issue of when the 2008 amendments apply. The question is which of these principles governs in this case. One principle is that the legislature is presumed not to intend legislation to change the legal character or consequences of actions that occurred before its enactment. Another is that the legislature is presumed not to intend to interfere with vested rights. A third is that the legislature intends an enactment dealing with exclusively procedural matters, including matters of evidence, to apply immediately to all proceedings, whether commenced before or after the enactment comes into force. These are all principles of interpretation and yield to clear statutory language to the contrary.

[35] Trois principes d'interprétation des lois peuvent être pertinents pour déterminer dans quels cas s'appliquent les modifications de 2008. Il faut d'abord décider lequel de ces principes est applicable en l'espèce. Selon le premier d'entre eux, le législateur est présumé ne pas souhaiter que la loi modifie la nature ou les conséquences juridiques des actes commis avant son adoption. Selon le deuxième principe, le législateur est présumé ne pas avoir l'intention de porter atteinte à des droits acquis. Selon le troisième, le législateur souhaite qu'un texte portant exclusivement sur des questions de procédure, y compris de preuve, s'applique immédiatement à toutes les instances, que celles-ci aient été engagées avant ou après l'entrée en vigueur du texte. Ce sont tous des principes d'interprétation subordonnés à des dispositions législatives claires à l'effet contraire.

[36] The appellant's position is that the first principle applies. He submits that the amended provisions are not simply matters of procedure but affect the content of a defence to the charge. Alternatively, the appellant's position is that even if the amended provisions are procedural, Parliament did not intend them to apply to trials arising out of past events and therefore the operation of the third principle of interpretation is ousted by clear parliamentary intent. The Crown on the other hand supports the conclusion of the Court of Appeal that the third principle applies because the amended provisions are procedural in nature.

[36] L'appelant soutient que le premier principe s'applique en l'espèce. Selon lui, les dispositions modifiées ne relèvent pas simplement de la procédure : elles ont une incidence sur le contenu d'un moyen de défense contre l'accusation. L'appelant soutient subsidiairement que, même si les dispositions modifiées sont de nature procédurale, le législateur ne voulait pas qu'elles s'appliquent aux procès résultant d'événements antérieurs. Ainsi, pour l'appelant, l'application du troisième principe d'interprétation est écartée par l'intention claire du législateur. Pour sa part, le ministère public appuie la conclusion de la Cour d'appel que le troisième principe s'applique parce que les dispositions modifiées sont de nature procédurale.

[37] To resolve the appeal, we must answer two questions:

1. Are the amended provisions procedural in nature so that they are presumed to apply to all

[37] Pour trancher l'appel, nous devons répondre à deux questions :

1. Les dispositions modifiées sont-elles de nature procédurale, de sorte qu'elles sont présumées

2012 SCC 58 (CanLII)

trials occurring or continuing after they came into force?

2. If so, is this presumption rebutted by an indication of legislative intent that they should not so apply?

[38] I will address these two questions in turn, after a brief account of the facts and proceedings.

III. Facts and Proceedings

[39] In the early hours of July 22, 2007, after a night spent with friends at a nightclub, the appellant, Samuel Dineley, drove his parents' car into a parked vehicle. Police administered two breath tests, which revealed blood alcohol concentrations of 99 and 97 mg in 100 mL of blood. The administration of the tests was videotaped. The appellant was charged with impaired driving and driving over 80 mg under s. 253(1)(*a*) and (*b*) of the *Criminal Code*.

[40] His trial before a provincial court judge began on June 19, 2008, and the Crown completed its case on that day. However, the trial was adjourned to July 15 so that the Crown would be able to cross-examine the appellant's toxicologist. On July 2, that is between the trial's adjournment and continuation, the 2008 amendments came into force. These had the effect of rendering the appellant's expert evidence incapable of rebutting the presumptions set up in s. 258(1)(*c*). The Crown argued that the newly amended s. 258(1) applied immediately to all s. 253 offences, regardless of the timing of their underlying facts. The trial judge did not decide the issue, and instead decided that it was improper for the Crown to attempt to rely on the new amendments when the trial resumed. After the trial's resumption, the trial judge found the appellant not guilty.

[41] On a summary conviction appeal, a judge of the Ontario Superior Court of Justice found the

s'appliquer à tous les procès qui ont lieu ou qui se poursuivent après leur entrée en vigueur?

2. Si oui, cette présomption est-elle réfutée par une indication que le législateur ne souhaite pas qu'elles soient appliquées de la sorte?

[38] J'examinerai successivement ces deux questions après avoir donné un aperçu des faits et des procédures.

III. Les faits et les procédures

[39] Le 22 juillet 2007 au petit matin, l'appelant, Samuel Dineley, au volant de la voiture de ses parents, a heurté un véhicule stationné après avoir passé la nuit avec des amis dans une boîte de nuit. Les policiers lui ont fait subir deux alcootests qui ont indiqué respectivement que son alcoolémie atteignait 99 et 97 mg d'alcool par 100 ml de sang. L'administration des alcootests a été enregistrée sur bande vidéo. L'appelant a été inculpé, en vertu des al. 253(1)*a*) et *b*) du *Code criminel*, de conduite avec facultés affaiblies et de conduite avec une alcoolémie dépassant 80.

[40] Son procès devant un juge de la cour provinciale a commencé le 19 juin 2008. Le ministère public a terminé la présentation de sa preuve le jour même. Le procès a cependant été ajourné au 15 juillet pour permettre au ministère public de contre-interroger le toxicologue de l'appelant. Or, les modifications de 2008 sont entrées en vigueur le 2 juillet, c'est-à-dire entre l'ajournement du procès et sa reprise. Elles ont eu pour effet d'empêcher que la preuve d'expert produite par l'appelant puisse réfuter les présomptions établies à l'al. 258(1)*c*). Le ministère public a fait valoir que le par. 258(1) récemment modifié s'appliquait sur-le-champ à toutes les infractions visées à l'art. 253, peu importe le moment où étaient survenus les faits dont elles découlaient. Le juge du procès n'a pas tranché la question, décidant plutôt, d'une part, qu'il était inapproprié que le ministère public tente d'invoquer les récentes modifications à la reprise du procès et, d'autre part, qu'il reconnaissait l'appelant non coupable.

[41] En appel de la déclaration de culpabilité par procédure sommaire, un juge de la Cour supérieure

2012 SCC 58 (CanLII)

2008 amendments to be substantive in nature, and so subject to the presumption against the alteration of the legal character or consequences of past actions. In his view, the amended provisions applied only to offences alleged to have been committed after they came into force, and so did not apply to the charges against the appellant: (2009), 86 M.V.R. (5th) 34. (I should add that the judge concluded that it had not been improper for the Crown to attempt to rely on the new amendments when the trial resumed. The appellant did not contest that conclusion in the Court of Appeal or in this Court.)

de justice de l'Ontario a conclu que les modifications de 2008 sont de nature substantielle et assujetties par le fait même à la présomption de non-modification de la nature ou des conséquences juridiques des actes antérieurs. À son avis, les dispositions modifiées ne s'appliquent qu'aux infractions qui auraient été commises après leur entrée en vigueur, et ne s'appliquent donc pas aux accusations portées contre l'appelant : (2009), 86 M.V.R. (5th) 34. (Je devrais ajouter que, selon le juge, il n'était pas inapproprié pour le ministère public d'essayer d'invoquer les récentes modifications à la reprise du procès. L'appelant n'a contesté cette conclusion ni devant la Cour d'appel, ni devant la Cour.)

[42] The Ontario Court of Appeal reversed this decision, and sent the matter back for a new trial to be conducted on the basis that the new version of s. 258(1) applied to the appellant's case: 2009 ONCA 814, 98 O.R. (3d) 81. The court held that the amended provisions were procedural in nature and therefore applied to all trials occurring after they came into force.

[42] La Cour d'appel de l'Ontario a infirmé cette décision et ordonné qu'un nouveau procès soit tenu en partant du principe que le nouveau par. 258(1) s'appliquait à l'appelant : 2009 ONCA 814, 98 O.R. (3d) 81. La Cour d'appel a qualifié les dispositions modifiées de procédurales et en a conclu qu'elles s'appliquent à tous les procès tenus après leur entrée en vigueur.

IV. Analysis

IV. Analyse

[43] I will first give a brief outline of the interpretive principles relevant to this case. I will then explain that the 2008 amendments at issue are purely procedural. It follows that at the moment of their coming into force, they became applicable to all s. 253(1) charges, including those against the appellant, regardless of the timing of those charges' underlying facts. I will then set out my reasons for concluding that the presumption of immediate application is not rebutted by clear legislative intent to the contrary.

[43] Je vais d'abord exposer brièvement les principes d'interprétation pertinents en l'espèce. J'expliquerai ensuite que les modifications de 2008 en cause sont purement procédurales. Il s'ensuit que, au moment de leur entrée en vigueur, elles sont devenues applicables à toutes les accusations portées en vertu du par. 253(1), y compris à celles déposées contre l'appelant, peu importe le moment où sont survenus les faits à l'origine de ces accusations. Je motiverai ensuite ma conclusion selon laquelle la présomption d'application immédiate n'est pas réfutée par une intention claire du législateur qu'il en soit autrement.

A. *The Presumptions of Legislative Intent*

A. *Les présomptions portant sur l'intention du législateur*

[44] Statutory interpretation aims to ascertain legislative intent, which is "a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used": *R. v. Secretary of State for the Environment, Transport*

[44] L'interprétation des lois vise à découvrir l'intention du législateur, qui [TRADUCTION] « désigne de façon abrégée l'intention que le tribunal prête raisonnablement au législateur à l'égard des termes employés » : *R. c. Secretary of State for the*

2012 SCC 58 (CanLII)

and the Regions, Ex parte Spath Holme Ltd., [2001] 2 A.C. 349 (H.L.), at p. 396; *R. v. Monney*, [1999] 1 S.C.R. 652, at para. 26. The courts ascertain legislative intent by reading legislative language in context and in its grammatical and ordinary sense, harmoniously with the scheme and purpose of the legislation at issue: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 27. When the legislator's words permit it, the courts will take the legislature not to have intended to work injustice or unfairness. The presumptions against the alteration of the legal character or consequences of past acts and against the interference with vested rights, as well as the presumption supporting the immediate application of purely procedural changes, are all manifestations of this posture of respect.

[45] Under the first of these presumptions, the court presumes that the legislature did not intend to change the legal character or consequences of actions that occurred before the legislation in question came into effect: *West v. Gwynne*, [1911] 2 Ch. 1 (C.A.), at pp. 11-12; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at p. 262; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 118. Under the second, the court presumes that the legislature did not intend to interfere with vested rights that came into being before the legislation came into effect: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 282; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 32-36.

[46] These two presumptions of legislative intent are closely related. Both aim to protect parties' reliance on the law as it was at the time of acting: *Angus*, at p. 268-69; *Ciecierski v. Fenning*, 2005 MBCA 52, 195 Man. R. (2d) 272, at para. 29; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413. Despite the presumptions' similar motivating concerns, this Court has consistently considered them to be distinct: *Gustavson Drilling (1964) Ltd.*, at pp. 279-83; *Attorney General of Quebec*

Environment, Transport and the Regions, Ex parte Spath Holme Ltd., [2001] 2 A.C. 349 (H.L.), p. 396; *R. c. Monney*, [1999] 1 R.C.S. 652, par. 26. Les tribunaux découvrent l'intention du législateur en lisant le texte de la loi dans son contexte et en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit et l'objet de la loi en cause : *Canada (Commissaire à l'information) c. Canada (Ministre de la Défense nationale)*, 2011 CSC 25, [2011] 2 R.C.S. 306, par. 27. Quand les termes employés par le législateur le permettent, les tribunaux supposent qu'il ne voulait pas créer une injustice ou une iniquité. Les présomptions de non-modification de la nature ou des conséquences juridiques des actes antérieurs et de non-atteinte aux droits acquis ainsi que la présomption d'application immédiate des modifications purement procédurales témoignent toutes de cette attitude de respect.

[45] Selon la première de ces présomptions, le tribunal présume que le législateur ne voulait pas modifier la nature ou les conséquences juridiques des actes posés avant l'entrée en vigueur de la loi en question : *West c. Gwynne*, [1911] 2 Ch. 1 (C.A.), p. 11-12; *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256, p. 262; *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801, par. 118. D'après la deuxième, le tribunal présume que le législateur ne voulait pas porter atteinte aux droits acquis ayant pris naissance avant l'entrée en vigueur de la loi : *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*, [1933] R.C.S. 629, p. 638; *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271, p. 282; *Dikranian c. Québec (Procureur général)*, 2005 CSC 73, [2005] 3 R.C.S. 530, par. 32-36.

[46] Ces deux présomptions portant sur l'intention du législateur sont étroitement liées et visent toutes deux à protéger le droit des parties de s'appuyer sur l'état du droit au moment des actes : *Angus*, p. 268-269; *Ciecierski c. Fenning*, 2005 MBCA 52, 195 Man. R. (2d) 272, par. 29; *Upper Canada College c. Smith* (1920), 61 R.C.S. 413. Bien que les présomptions reposent sur les mêmes préoccupations, la Cour a toujours considéré qu'elles étaient distinctes : *Gustavson Drilling (1964)*

2012 SCC 58 (CanLII)

v. Expropriation Tribunal, [1986] 1 S.C.R. 732, at pp. 741-47; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at pp. 906-7; *Dikranian*, at paras. 29-31. However, this case does not require an examination of the nice distinctions between them.

[47] This is because neither presumption of legislative intent operates with respect to purely procedural law. And so the third presumption is that, in the absence of legislative indication to the contrary, procedural law is presumed to operate from the moment of its enactment, regardless of the timing of the facts underlying a particular case: *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, at p. 96, quoted with approval in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 62.

[48] The significance of the distinction between substantive and procedural provisions for statutory interpretation is reflected in the *Interpretation Act*, R.S.C. 1985, c. I-21. On the one hand, proceedings commenced under a now-repealed provision are to continue under the procedures set out in the new provisions. On the other, the repeal of an enactment does not affect any right acquired under it. I will briefly describe the relevant provisions.

[49] The first is s. 44. It provides that where a former enactment is repealed and a new enactment is substituted for it, proceedings taken under the former enactment are to be continued in conformity with the new enactment. It further provides that "the procedure established by the new enactment shall be followed as far as it can be adapted thereto . . . in the enforcement of rights, existing or accruing under the former enactment, and . . . in a proceeding in relation to matters that have happened before the repeal": s. 44(*c*) and (*d*)(ii) and (iii). As Professor Sullivan puts it, "[t]hese provisions call for the immediate application of new procedural law to all actions, including those that were pending when the legislation came into

Ltd., p. 279-283; *Procureur général du Québec c. Tribunal de l'expropriation*, [1986] 1 R.C.S. 732, p. 741-747; *Venne c. Québec (Commission de protection du territoire agricole)*, [1989] 1 R.C.S. 880, p. 906-907; *Dikranian*, par. 29-31. Il n'est toutefois pas nécessaire en l'espèce d'examiner les subtilités qui les distinguent.

[47] Il en est ainsi parce qu'aucune de ces présomptions portant sur l'intention du législateur ne s'applique quant au droit purement procédural. Par conséquent, la troisième présomption veut qu'en l'absence d'une indication contraire du législateur, une loi de nature procédurale soit réputée s'appliquer à compter de son adoption, peu importe le moment où surviennent les faits à l'origine d'une affaire donnée : *Wright c. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, p. 96, cité avec approbation dans *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 62.

[48] L'importance que revêt la distinction entre les dispositions de fond et celles de procédure pour l'interprétation des lois ressort de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21. D'une part, les instances engagées sous le régime d'une disposition maintenant abrogée doivent se poursuivre sous le régime de la procédure prévue par les nouvelles dispositions. D'autre part, l'abrogation d'un texte ne porte atteinte à aucun droit acquis en vertu de ce texte. Je vais décrire brièvement les dispositions pertinentes.

[49] La première est l'art. 44 qui prévoit que, en cas d'abrogation et de remplacement d'un texte, les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte. Il prévoit en outre que « la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible [. . .] pour l'exercice des droits acquis sous le régime du texte antérieur, [et] dans toute affaire se rapportant à des faits survenus avant l'abrogation » : al. 44*c*) et sous-al. 44*d*)(ii) et (iii). Comme le dit le professeur Sullivan, [TRADUCTION] « ces dispositions prévoient l'application immédiate des nouvelles règles procédurales à toutes les instances, notamment celles en cours au moment de l'entrée en vigueur de

2012 SCC 58 (CanLII)

force": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 698.

[50] The second provision is s. 43. It provides that the repeal of an enactment does not affect any "right, privilege, obligation or liability acquired, accrued, accruing or incurred" under it: s. 43(*c*). As Professor Sullivan puts it, the repeal does not destroy any right or liability arising under the repealed enactment, i.e. "the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law" (p. 708).

[51] Professor Sullivan sums up the cumulative effect of these two provisions as follows: ". . . the application of new substantive law is delayed by the survival of repealed law [but] the application of new procedural law is not" (p. 698).

B. *Substantive and Procedural Law*

[52] The question is how to determine whether an enactment is substantive or procedural. A provision is substantive if it alters the legal effect of a transaction, or if it interferes with vested rights. While there have been many attempts to define what sorts of provisions interfere with substantive or vested rights, a good starting point is the statement of Duff J. in *Upper Canada College*, at p. 417, citing with approval *Moon v. Durden*, [1848] 2 Ex. 22, 154 E.R. 389, *per* Rolfe B. (at p. 396) and *per* Parke B. (at p. 398): ". . . it would not only be widely inconvenient but 'a flagrant violation of natural justice' to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time" (emphasis added). The same point is captured by the idea that a provision affects substantive or vested rights if "an act legal at the time of doing it should be made unlawful by some new enactment": *Midland Railway Co. v. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419, at p. 424, cited with approval by Duff J. in *Upper Canada College*, at p. 419. Yet another way of putting it is to ask whether, if applied, the provision "would impair existing rights and obligations": *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.),

la loi » : R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 698.

[50] La deuxième est l'art. 43 qui prévoit que l'abrogation d'un texte ne porte pas atteinte aux « droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues » sous le régime du texte abrogé : al. 43*c*). Comme le dit le professeur Sullivan, l'abrogation ne supprime aucun droit ou aucune responsabilité qui découle du texte abrogé; c'est-à-dire que [TRADUCTION] « la loi abrogée continue de s'appliquer aux faits antérieurs à son abrogation dans la plupart des cas comme si elle était toujours en vigueur » (p. 708).

[51] Le professeur Sullivan résume ainsi l'effet cumulatif de ces deux dispositions : [TRADUCTION] « . . . le maintien en vigueur de la loi abrogée retarde l'application d'une nouvelle loi portant sur le fond, [mais] non celle d'une nouvelle loi de nature procédurale » (p. 698).

B. *Droit substantiel et droit procédural*

[52] Il s'agit donc de savoir comment décider si un texte législatif est de nature substantielle ou procédurale. Une disposition porte sur le fond si elle modifie l'effet juridique d'une opération ou porte atteinte à des droits acquis. Bien qu'on ait tenté à maintes reprises de déterminer quels types de disposition portent atteinte aux droits substantiels ou acquis, il convient de prendre comme point de départ l'affirmation faite dans *Moon c. Durden*, [1848] 2 Ex. 22, 154 E.R. 389, par le baron Rolfe (p. 396) et le baron Parke (p. 398) et citée avec approbation par le juge Duff dans *Upper Canada College*, p. 417 : [TRADUCTION] « . . . non seulement il serait extrêmement inopportun de priver des gens de droits acquis lors d'opérations parfaitement valides et régulières au regard du droit alors applicable, mais il s'agirait d'une "violation flagrante de la justice naturelle" » (je souligne). Ce point de vue est aussi exprimé par l'idée qu'une disposition porte atteinte à des droits substantiels ou acquis si [TRADUCTION] « un acte légal au moment de sa perpétration devient illégal en raison d'un quelconque nouveau texte » : *Midland Railway Co. c. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419, p. 424, cité avec approbation par le juge Duff dans *Upper Canada College*, p. 419.

2012 SCC 58 (CanLII)

at p. 563, approved in *Martin v. Perrie*, [1986] 1 S.C.R. 41, at pp. 48-49. Most recently, the Court accepted that a vested right is one that results from a legal situation that is tangible, concrete and sufficiently constituted at the time of the enactment of the new provision: *Dikranian*, at para. 37.

Autrement dit, il faut se demander si l'application de la disposition [TRADUCTION] « porterait atteinte aux droits et aux obligations existants » : *Yew Bon Tew c. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (C.P.), p. 563, cité avec approbation dans *Martin c. Perrie*, [1986] 1 R.C.S. 41, p. 48-49. Plus récemment, la Cour a reconnu qu'un droit acquis résulte d'une situation juridique individualisée, concrète et constituée au moment de l'adoption de la nouvelle disposition : *Dikranian*, par. 37.

[53] Procedural provisions, on the other hand, "gover[n] the methods by which facts are proven and legal consequences are established in any type of proceedings": Sullivan, at p. 698; they relate only to the method of conducting litigation, not to the removal of rights of action or defences: *Upper Canada College*, at p. 442, *per* Anglin J.; *Angus*, at p. 265. Included among such provisions are legislative prescriptions of "what evidence must be produced to prove particular facts": *Wright*, at p. 95, *per* Pollock C.B., approved in *The Ydun*, [1899] P. 236 (C.A.), at p. 245, *per* Smith L.J. and in *Upper Canada College*, at p. 444, *per* Anglin J.; see also *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.

[53] Pour leur part, les dispositions procédurales [TRADUCTION] « régi[ssent] les moyens de prouver des faits et d'établir des conséquences juridiques dans tout genre d'instance » : Sullivan, p. 698. Elles ne touchent qu'au moyen de conduire un litige, et non au retrait de droits d'action ou de moyens de défense : *Upper Canada College*, p. 442, le juge Anglin; *Angus*, p. 265. Au nombre des dispositions de ce genre figurent les prescriptions législatives indiquant [TRADUCTION] « quelle preuve doit être produite pour établir des faits précis » : *Wright*, p. 95, le baron en chef Pollock, approuvé par *The Ydun*, [1899] P. 236 (C.A.), p. 245, le lord Smith, et dans *Upper Canada College*, p. 444, le juge Anglin; voir aussi *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57.

[54] Underlying the distinction between substantive rights and matters of procedure is the idea that a change in procedure does not deprive anyone of rights acquired by transactions perfectly valid and regular according to the law at the time they were undertaken: *Upper Canada College*, at p. 417, *per* Duff J. In *Upper Canada College*, at p. 423, Duff J. quoted with approval the words of Mellish L.J. in *Republic of Costa Rica v. Erlanger*, [1876] 3 Ch. D. 62 (C.A.), at p. 69: "No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided, of course, that no injustice is done." Sometimes, the test is expressed negatively: a provision is not procedural if it "creates or impinges upon substantive or vested rights": *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.

[54] La distinction entre les droits substantiels et les questions de procédure repose sur l'idée qu'un changement d'ordre procédural ne prive personne de droits acquis lors d'opérations parfaitement valides et régulières au regard du droit applicable au moment de leur conclusion : *Upper Canada College*, p. 417, le juge Duff. Le juge Duff a cité, dans cet arrêt à la p. 423, en les approuvant, les propos suivants tenus par le lord juge Mellish dans *Republic of Costa Rica c. Erlanger*, [1876] 3 Ch. D. 62 (C.A.), p. 69 : [TRADUCTION] « Aucun plaideur n'a de droit acquis quant à la façon de procéder, ni le droit de se plaindre en cas de modification de la procédure au cours d'un litige, pour autant, bien entendu, que cette modification n'entraîne pas d'injustice ». Ce test est parfois formulé sous une forme négative : une disposition n'est pas de nature procédurale si elle « crée des droits substantiels ou acquis, ou empiète sur ces droits » : *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57.

2012 SCC 58 (CanLII)

[55] A key point arising from the jurisprudence is that the courts do not classify a provision as substantive or procedural by looking simply at its form, but also at its function and effect: *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Yew Bon Tew*, at p. 563; *Angus*, at p. 265. This applies to rules of evidence as much as it does to other procedural provisions. If a rule of evidence "either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect": *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57. It will be helpful to review a few examples from the Court's jurisprudence. I will begin with three cases that deal with the substantive/procedural distinction in more general terms.

[55] Il ressort notamment de la jurisprudence que les tribunaux ne déterminent pas qu'une disposition est de nature substantielle ou de nature procédurale en examinant simplement sa forme; ils en analysent aussi la fonction et l'effet : *Howard Smith Paper Mills Ltd. c. The Queen*, [1957] R.C.S. 403; *R. c. E. (A.W.)*, [1993] 3 R.C.S. 155; *Yew Bon Tew*, p. 563; *Angus*, p. 265. Cela vaut autant pour les règles de preuve que pour les autres dispositions procédurales. Si une règle de preuve « crée des droits substantiels ou acquis, ou empiète sur ces droits, elle n'a pas une incidence strictement procédurale et elle ne prend pas effet immédiatement » : *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57. Il est utile de revenir sur quelques exemples tirés de la jurisprudence de la Cour. J'étudierai d'abord trois arrêts qui portent de façon plus générale sur la distinction entre le fond et la procédure.

[56] *Upper Canada College* is a good early example of a functional analysis. In issue in that case was a provision preventing the bringing of an action for payment of a commission for the sale of real property unless the agreement on which the action was based was in writing and signed by the party to be charged. The question was whether this provision applied to actions on oral contracts for commissions entered into before the provision came into force. It was argued that it did because the provision was purely procedural: it did not take away the right but simply the procedure for enforcing it. The majority of the Court rejected this argument and held that the provision did not apply to contracts entered into before the provision was enacted. The Court looked to the effect of the provision rather than simply to its form. While in form, the provision related to the legal remedy available, in effect, the provision "abrogat[ed] a right of action which otherwise a party to a contract might have asserted" and therefore should be seen as "prejudicially affecting an 'existing legal right or status'": p. 431, *per* Duff J.

[56] *Upper Canada College* est un bon exemple d'arrêt ancien où la Cour a procédé à une analyse fonctionnelle. Il y était question d'une disposition interdisant d'intenter une action en paiement d'une commission sur la vente d'un immeuble, à moins que l'entente sur laquelle se fondait l'action ait été faite par écrit et signée par la partie visée. Il s'agissait de savoir si cette disposition s'appliquait aux actions visant les contrats oraux de commission conclus avant son entrée en vigueur. On a fait valoir qu'il fallait répondre par l'affirmative à cette question parce que la disposition était purement procédurale : elle écartait non pas le droit, mais seulement la procédure d'exercice de ce droit. La Cour à la majorité a rejeté cet argument et décidé que la disposition ne s'appliquait pas aux contrats conclus avant son adoption. La Cour a examiné l'effet de la disposition, et non pas simplement sa forme. Bien que la disposition se soit rapportée en apparence au recours judiciaire possible, elle [TRADUCTION] « annulait [en fait] un droit d'action qu'une partie à un contrat aurait pu autrement faire valoir » et il fallait donc la considérer comme « portant atteinte à un "droit ou à un statut conféré par la loi" » : p. 431, le juge Duff.

[57] *Angus* provides another good example of the focus on function over form. The question there

[57] L'arrêt *Angus* illustre également bien l'accent mis sur la fonction plutôt que sur la forme. Dans

2012 SCC 58 (CanLII)

was whether legislation abolishing spousal immunity in tort should be applied to allegedly tortious conduct occurring before its enactment.

cette affaire, il s'agissait de savoir si la loi abolissant l'immunité des époux en matière délictuelle devait s'appliquer aux actes prétendument délictueux commis avant son adoption.

[58] The Court answered this question in the negative and characterized the provisions as dealing with substantive rights. La Forest J. for the Court stated, at p. 265, that "[n]ormally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use" (emphasis in original). As he noted, it was difficult to see how the provisions in issue affected procedure at all (p. 265). They did not regulate what evidence was or was not admissible or what fact should be presumed upon proof of other facts. Rather, the provisions did away with what at the time of the conduct in question had been a complete exemption from tort liability.

[58] La Cour a répondu à cette question par la négative et déclaré que les dispositions traitaient de droits substantiels. Le juge La Forest a affirmé au nom de la Cour, aux p. 265-266, que « [n]ormalement, les règles de procédure n'ont pas d'effet sur le contenu ou sur l'existence d'une action ou d'un moyen de défense (ou d'un droit, d'une obligation ou de quelque autre objet de la loi), mais seulement sur la manière de l'appliquer ou de l'utiliser » (souligné dans l'original). Comme l'a fait remarquer le juge La Forest, il était difficile de voir de quelle façon la procédure était touchée par les dispositions en question (p. 265). Les dispositions ne réglementaient ni les éléments de preuve admissibles ou non, ni les faits dont il faut présumer l'existence lorsque d'autres faits sont établis. Elles ont plutôt écarté ce qui constituait une exemption complète de responsabilité civile délictuelle au moment de la conduite en question.

[59] In *Application under s. 83.28 of the Criminal Code (Re)*, the question was whether new provisions of the *Criminal Code* permitting judicial investigative hearings, under which a person could be ordered to attend and compelled to answer questions, could be invoked in relation to events that occurred prior to their enactment. The Court concluded that the provisions did apply because they were exclusively procedural in nature (para. 61). As Iacobucci and Arbour JJ. put it, at para. 60, "while the judicial investigative hearing may generate information pertaining to an offence . . . the hearing itself remains procedural. In the manner of other procedural tools such as DNA and wiretap authorizations, s. 83.28 provides a mechanism for the gathering of information and evidence in the ongoing investigation of past, present, and future offences." In other words, the appellant did not have a substantive right not to be examined in accordance with this procedure (para. 66).

[59] L'arrêt *Demande fondée sur l'art. 83.28 du Code criminel (Re)* portait, pour sa part, sur la question de savoir s'il était possible d'invoquer les nouvelles dispositions du *Code criminel* autorisant la tenue d'investigations judiciaires — auxquelles une personne pouvait recevoir l'ordre de se présenter afin de répondre à des questions — dans le cas d'événements survenus avant leur adoption. Selon la Cour, les dispositions s'appliquaient effectivement parce qu'elles étaient de nature strictement procédurale : par. 61. Comme l'ont dit les juges Iacobucci et Arbour, au par. 60, « bien qu'elle puisse permettre d'obtenir des renseignements relatifs à une infraction [. . .] l'investigation judiciaire elle-même reste de nature procédurale. À l'instar d'autres outils procéduraux, telles les empreintes génétiques et les autorisations d'écoute électronique, l'art. 83.28 offre un moyen de recueillir des renseignements et des éléments de preuve dans le cadre d'une enquête portant sur des infractions passées, présentes et futures. » Autrement dit, l'appelant ne disposait pas du droit substantiel de ne pas être interrogé selon cette procédure (par. 66).

2012 SCC 58 (CanLII)

[60] I turn now to the jurisprudence of this Court that relates more specifically to evidentiary matters. In *Howard Smith*, the question was whether an amended provision of the *Combines Investigation Act* applied in a prosecution for a conspiracy alleged to have been completed before the amendment came into force. The effect of the provision was to make admissible in evidence documents described as "inter-office memoranda" and to deem them to be *prima facie* evidence against the corporation in whose possession they were found and also against the persons named in them: *Combines Investigation Act*, R.S.C. 1927, c. 26, s. 41, as enacted by S.C. 1949 (2nd Sess.), c. 12, renumbered and amended by S.C. 1952, c. 39. The Court unanimously held that this provision was procedural and therefore applied to a trial held after it came into force. As Cartwright J. put it, at p. 420: "While [the provision] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only . . ." (emphasis added). Thus, evidence that before the enactment would not have been cogent evidence of guilt became such evidence as a result of the enactment, yet the Court concluded nonetheless that the enactment was procedural in nature and applied to the proceedings. Simply making inculpatory evidence admissible that was previously inadmissible did not "take away" a defence.

[61] *Howard Smith* is also helpful in defining the scope of what is meant by rules of evidence. Cartwright J., at p. 419, approving a passage from the 9th edition of *Phipson on the Law of Evidence* (1952) (at p. 1), referred to substantive law as defining rights, duties and liabilities and adjective law as defining procedure, pleading and proof by which the substantive law is applied in practice. The passage from *Phipson on Evidence* quoted by Cartwright J. further refers to proof as "the

[60] Je passe maintenant à la jurisprudence de la Cour qui traite plus particulièrement des questions de preuve. Dans *Howard Smith*, il fallait déterminer si une disposition modifiée de la *Loi relative aux enquêtes sur les coalitions* s'appliquait à une poursuite intentée relativement à un complot qui aurait été mené à terme avant l'entrée en vigueur de la modification. La disposition avait pour effet de rendre admissibles en preuve des documents qualifiés de [TRADUCTION] « notes internes » et indiquait qu'ils étaient réputés être une preuve *prima facie* contre la société en possession de qui ils étaient trouvés et contre les personnes qui étaient nommées : *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1927, ch. 26, art. 41, telle qu'elle a été édictée par S.C. 1949 (2e sess.), ch. 12, puis renumérotée et modifiée par S.C. 1952, ch. 39. La Cour a conclu à l'unanimité que cette disposition était de nature procédurale et qu'elle s'appliquait donc aux procès tenus après son entrée en vigueur. Comme l'a dit le juge Cartwright, à la p. 420 : [TRADUCTION] « Bien que [la disposition] entraîne une modification majeure du droit de la preuve, elle ne crée aucune infraction, elle n'écarte aucun moyen de défense, elle n'incrimine aucune conduite qui ne l'était pas déjà avant son adoption, elle ne modifie la nature ou l'effet juridique d'aucune opération déjà complétée; elle porte uniquement sur une question de preuve . . . » (je souligne). Ainsi, une preuve qui n'aurait pas constitué une preuve concluante de culpabilité avant l'adoption de la modification est devenue une telle preuve par suite de cette adoption; la Cour a néanmoins attribué au texte une nature procédurale et l'a appliqué à l'instance. Le simple fait de rendre admissible une preuve incriminante qui ne l'était pas auparavant n'a pas pour effet d'« écarter » un moyen de défense.

[61] L'arrêt *Howard Smith* est également utile pour délimiter la portée de ce que l'on entend par règle de preuve. Approuvant un passage de la 9e édition de l'ouvrage *Phipson on the Law of Evidence* (1952) (p. 1), le juge Cartwright y a mentionné, à la p. 419, que le droit substantiel définit les droits, les obligations et les responsabilités tandis que le droit adjectival définit la procédure, les actes de procédure et la preuve qui permettent d'appliquer le droit substantiel. Le passage de *Phipson*

2012 SCC 58 (CanLII)

establishment of such facts by proper legal means to the satisfaction of the Court".

on Evidence cité par le juge Cartwright précise en outre que la preuve [TRADUCTION] « consiste à établir ces faits par des moyens juridiques appropriés à la satisfaction de la Cour ».

[62] Further guidance is offered by *Wildman v. The Queen*, [1984] 2 S.C.R. 311. At issue there was whether a new provision in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, would apply at the accused's trial relating to events that had arisen before its enactment. Section 4(3.1) of the *Canada Evidence Act* made the spouse of an accused a competent and compellable witness for the prosecution where the complainant or victim was under 14 years of age. Lamer J. (as he then was) held for the Court that the incompetence and non-compellability of witnesses is "not the result of a substantive right to confidentiality and is merely procedural": p. 332. He also noted that one test of whether a provision is substantive or procedural is whether it is [TRANSLATION] "independent of the existence of an issue" and whether it is "not affected by the fact that there is litigation in progress": pp. 331-32, citing P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1960), at p. 237.

[62] L'arrêt *Wildman c. La Reine*, [1984] 2 R.C.S. 311, donne des indications supplémentaires. Dans cette affaire, il s'agissait de déterminer si une nouvelle disposition de la *Loi sur la preuve au Canada*, S.R.C. 1970, ch. E-10, s'appliquerait lors du procès intenté contre l'accusé relativement à des événements survenus avant son adoption. Le paragraphe 4(3.1) de cette loi prévoyait que le conjoint de l'accusé était un témoin compétent et contraignable pour la poursuite lorsque le plaignant ou la victime était âgé de moins de 14 ans. Le juge Lamer (plus tard Juge en chef) a conclu, au nom de la Cour, que l'inhabilité et la non-contraignabilité à témoigner « ne résultent pas d'une règle de fond en matière de confidentialité, il s'agit d'une simple règle de procédure » : p. 332. Il a aussi précisé qu'un test servant à déterminer si une disposition est de nature substantielle ou de nature procédurale consiste à se demander si elle est « indépendant[e] de l'existence d'un litige » et si elle n'est « pas modifié[e] par la survenance d'un procès » : p. 331-332, citant P. Roubier, *Le droit transitoire : conflits des lois dans le temps* (2e éd. 1960), p. 237.

[63] Lamer J. recognized, however, that some presumptions could be substantive. He gave the example of the presumption of advancement which was held by the Court in *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548, at p. 557, to be substantive. The presumption of advancement is a rebuttable presumption that when a conveyance is made from a husband to his wife, the consideration given by the husband is intended to advance the wife. It therefore must be seen as affecting the legal rights as between the husband and wife at the time of the conveyance and as not being in any way affected by the fact that there is litigation in progress.

[63] Le juge Lamer a cependant reconnu que certaines présomptions pourraient relever du fond. Il a cité l'exemple de la présomption de donation, que la Cour a jugée comme portant sur le fond dans *Bingeman c. McLaughlin*, [1978] 1 R.C.S. 548, p. 557. La présomption de donation est une présomption réfutable selon laquelle, lorsqu'un mari consent un transfert à son épouse, l'avantage consenti par le mari est censé profiter à l'épouse. Il faut donc considérer que cette présomption a un effet sur les droits dont jouissaient entre eux le mari et son épouse au moment du transfert et qu'elle n'est pas touchée de quelque façon que ce soit par la survenance d'un litige.

[64] The result of the decision in *Wildman* was that the new provision applied at the trial even though at the time of the alleged offence, the accused's spouse would not have been a compellable witness

[64] Étant donné la décision rendue dans *Wildman*, la nouvelle disposition s'appliquait lors du procès même si, au moment de l'infraction reprochée, l'épouse de l'accusé n'aurait pas pu être

2012 SCC 58 (CanLII)

for the Crown. As in *Howard Smith*, potentially important evidence of guilt was inadmissible at the time of the events giving rise to the trial but was nonetheless held to be admissible at trial by virtue of the new rules of evidence.

[65] I turn next to *E. (A.W.)*. The issue relevant for our purposes was whether the repeal of the corroboration requirement for a child's unsworn evidence applied to trials occurring after the repeal but in relation to events that occurred before. Lamer C.J. (in dissent, but not on this point) concluded that the corroboration provision was part of the law of evidence and that it is "the law of evidence at the time of trial that prevails": p. 189. Thus, potentially important inculpatory evidence which would not have been admitted without corroboration at the time of the alleged crime would be admissible without it under the new rules in effect at the time of trial.

[66] From this review of the case law, we may conclude:

1. Substantive provisions "alter the character or legal effect of any transaction" (*Howard Smith*, at p. 420). This includes taking away a previously-available defence (*Upper Canada College*; *Howard Smith*; *Angus*). The operation of such provisions is not affected by the fact that there is litigation in progress (*Wildman*).

2. Procedural provisions "gover[n] the methods by which facts are proven and legal consequences are established" (Sullivan, at p. 698). Their operation is generally dependent on the existence of litigation.

3. Rules of evidence are considered to be procedural in nature unless in effect they impact on substantive rights: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.

contrainte à témoigner pour le ministère public. Tout comme dans *Howard Smith*, une preuve de culpabilité potentiellement importante était irrecevable au moment des événements à l'origine du procès, mais elle a malgré tout été jugée admissible au procès en raison des nouvelles règles de preuve.

[65] Je passe maintenant à l'arrêt *E. (A.W.)*. La question importante pour les besoins du présent pourvoi était de savoir si l'abrogation de l'exigence de corroboration du témoignage d'un enfant qui n'a pas prêté serment s'appliquait aux procès tenus après l'abrogation de cette exigence, mais découlant d'événements survenus avant son abrogation. Le juge en chef Lamer (dissident, mais non sur ce point) a conclu que la disposition relative à la corroboration faisait partie du droit de la preuve et que c'était « les règles de preuve en vigueur à l'époque du procès qui s'appliqu[aient] » : p. 189. Une preuve inculpatoire potentiellement importante qui n'aurait pas été admise sans corroboration au moment du crime reproché serait donc recevable en vertu des nouvelles règles en vigueur au moment du procès.

[66] Nous pouvons tirer de cette étude de la jurisprudence les conclusions suivantes :

1. Les dispositions de fond [TRADUCTION] « modifient la nature ou l'effet juridique d'une opération » (*Howard Smith*, p. 420), notamment en écartant un moyen de défense qui pouvait être invoqué auparavant (*Upper Canada College*; *Howard Smith*; *Angus*). L'application des dispositions de ce genre n'est pas modifiée par la survenance d'un litige (*Wildman*).

2. Les dispositions procédurales [TRADUCTION] « régi[ssent] les moyens de prouver des faits et d'établir des conséquences juridiques » (Sullivan, p. 698). Leur application est habituellement fonction de l'existence d'un litige.

3. Les règles de preuve sont considérées comme étant de nature procédurale, sauf si elles ont en fait une incidence sur des droits substantiels : *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57.

2012 SCC 58 (CanLII)

4. Rules of evidence are concerned with "the establishment [or disproof] of … facts by proper legal means": *Howard Smith*, at p. 419, citing *Phipson on Evidence*, at p. 1.

5. Provisions which make evidence admissible that was previously inadmissible or change the conditions under which evidence may be admitted are procedural. This is true even if the new provisions make admissible important incriminating evidence that was formerly excluded. Examples include provisions which: make a revolutionary change in the admissibility and effect of documentary evidence (*Howard Smith*); make a previously non-compellable witness compellable for the Crown (*Wildman*); and repeal the corroboration requirement for a child's unsworn evidence: *E. (A.W.)*.

C. *The Provisions Are Procedural*

[67] In my view, the provisions in issue here are purely procedural. They meet all of the tests enunciated in the Court's jurisprudence for determining whether a provision is procedural and they have none of the characteristics of provisions which are properly characterized as substantive.

[68] The provisions deal with factual presumptions and what is required to rebut them. To use the words approved by Cartwright J. in *Howard Smith*, these provisions deal with the "establishment of . . . facts" by proper legal means. Evidentiary provisions like these are ordinarily considered to be procedural. Procedural provisions generally depend for their operation upon the existence of litigation. The provisions in question here do not operate unless there is a trial in which the blood alcohol level as indicated by the breathalyzer is contested: they are irrelevant unless and until there actually is litigation. The provisions do not "render criminal any course of conduct which was not already so declared before [their] enactment" (*Howard Smith*,

4. Les règles de preuve portent sur [TRADUCTION] « l'établissement [ou la réfutation] de [. . .] faits par des moyens juridiques appropriés » : *Howard Smith*, p. 419, citant *Phipson on Evidence*, p. 1.

5. Les dispositions qui rendent admissible une preuve qui ne l'était pas auparavant ou modifient les conditions d'admissibilité de la preuve sont de nature procédurale. Cela vaut même pour les nouvelles dispositions qui rendent admissible une preuve incriminante importante qui était auparavant exclue. Mentionnons, à titre d'exemple, les dispositions qui : entraînent une modification majeure de l'admissibilité et de l'effet de la preuve documentaire (*Howard Smith*); rendent contraignable à témoigner pour le ministère public une personne qui ne l'était pas auparavant (*Wildman*); et qui abrogent l'exigence de corroboration du témoignage d'un enfant qui n'a pas prêté serment : *E. (A.W.)*.

C. *Les dispositions en cause sont de nature procédurale*

[67] Les dispositions en cause ici me semblent purement procédurales. Elles satisfont à tous les critères énoncés par la Cour dans sa jurisprudence pour établir qu'une disposition est de nature procédurale, et elles n'ont aucune des caractéristiques des dispositions considérées à juste titre comme relevant du fond.

[68] Les dispositions sur lesquelles nous sommes appelés à nous pencher traitent de présomptions de fait et des éléments de preuve nécessaires pour les réfuter. Pour reprendre les termes approuvés par le juge Cartwright dans *Howard Smith*, ces dispositions intéressent l'[TRADUCTION] « établissement [. . .] de faits » par des moyens juridiques appropriés. Les dispositions relatives à la preuve comme celles en cause en l'espèce sont habituellement considérées de nature procédurale. L'application des dispositions procédurales est généralement fonction de l'existence d'un litige. Or, les dispositions en cause ici ne s'appliquent que s'il y a un procès où l'on conteste l'alcoolémie établie par l'alcootest : elles ne sont pertinentes que s'il y a bel et bien

2012 SCC 58 (CanLII)

at p. 420); the elements of the offence which must be established have not changed. They do not affect the content or existence of an action or defence; they regulate the types of evidence required to rebut factual presumptions. Provisions such as these that alter the mode of procedure in the conduct of a defence are still procedural: *Angus*, at p. 266. The provisions in issue thus have all the hallmarks of procedural provisions.

un litige. Elles n'[TRADUCTION] « incrimine[nt] aucune conduite qui ne l'était pas déjà avant [leur] adoption » (*Howard Smith*, p. 420); les éléments de l'infraction à établir n'ont pas changé. Elles n'ont pas d'effet sur le contenu ou sur l'existence d'une action ou d'un moyen de défense; elles réglementent les types de preuve nécessaires pour réfuter les présomptions de fait. Les dispositions comme celles en cause en l'espèce qui modifient le mode de procédure dans la production d'une défense restent de nature procédurale : *Angus*, p. 266. Les dispositions dont il est question ici ont donc toutes les caractéristiques des dispositions procédurales.

[69] Moreover, the provisions have none of the hallmarks of substantive provisions. They do not attach new consequences to past acts or change the substantive content of a defence. They do not change the existence or content of a right. The elements of the offence have not changed and it remains open to the accused to point to evidence raising a reasonable doubt about the existence of those elements. The provisions do not make conduct unlawful that was lawful at the time it occurred.

[69] Qui plus est, ces dispositions n'ont aucune des caractéristiques des dispositions de fond. Elles ne confèrent pas de conséquences nouvelles à des actes antérieurs, ni ne modifient le contenu substantiel d'un moyen de défense. Elles n'influent pas sur l'existence ou sur le contenu d'un droit. Les éléments de l'infraction n'ont pas changé et il demeure loisible à l'accusé de présenter une preuve soulevant un doute raisonnable quant à l'existence de ces éléments. Les dispositions n'interdisent pas une conduite qui était légale au moment où elle est survenue.

[70] My colleague Deschamps J. writes that the provisions have eliminated or neutered a defence. I respectfully disagree. The provisions limit the scope of admissible evidence which could formerly have been adduced in order to attempt to raise a reasonable doubt about one of the essential elements of the offence. The so-called "*Carter* defence" in reality is a particular type of evidence adduced in order to raise a reasonable doubt. If these provisions are characterized as taking away a defence, then any evidentiary provision that increases the risk of conviction would have to be so characterized. The jurisprudence of this Court, reviewed above, makes clear in my view that this is not the case.

[70] Ma collègue la juge Deschamps écrit que les dispositions ont supprimé ou neutralisé un moyen de défense. En toute déférence, je ne suis pas d'accord. Les dispositions limitent l'éventail des éléments de preuve admissibles qui auraient pu être produits auparavant pour tenter de soulever un doute raisonnable au sujet d'un des éléments essentiels de l'infraction. Ce que l'on appelle la « défense de type *Carter* » est en fait un type particulier de preuve présentée afin de soulever un doute raisonnable. Si on considère que ces dispositions écartent un moyen de défense, il faudrait alors considérer que toute disposition relative à la preuve qui augmente le risque de condamnation a le même effet. À mon avis, la jurisprudence de la Cour que je viens d'examiner indique clairement qu'il n'en est rien.

[71] The Court has held in *St-Onge Lamoureux* that limiting the admissibility of *Carter* evidence does not infringe an accused's s. 7 *Charter* right to make full answer and defence. If the limitation on

[71] La Cour a conclu dans *St-Onge Lamoureux* que la limitation de l'admissibilité d'une preuve de type *Carter* ne porte pas atteinte au droit garanti à un accusé par l'art. 7 de la *Charte* de présenter

2012 SCC 58 (CanLII)

the availability of *Carter* evidence does not take away a defence for the purposes of the *Charter*, it cannot be that the same limitation is substantive because it somehow does take away a defence.

une défense pleine et entière. Si la restriction de la possibilité de produire une preuve de type *Carter* n'écarte pas un moyen de défense pour l'application de la *Charte*, il est impossible que la même restriction soit de nature substantielle parce qu'elle écarte bel et bien d'une certaine manière un moyen de défense.

[72] The decision of the Quebec Court of Appeal in *R. v. Gervais* (1978), 43 C.C.C. (2d) 533, is of no assistance to the appellant. *Gervais* concerned a change to rights of appeal. The jurisprudence from this Court has long made clear that the right of appeal is a substantive right, not a matter of procedure: see, e.g., *Taylor v. The Queen* (1876), 1 S.C.R. 65; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038, at pp. 1041-42; *R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 6.

[72] L'arrêt *R. c. Gervais*, [1978] J.Q. n° 181 (QL), de la Cour d'appel du Québec n'est d'aucune utilité pour l'appelant. Il y était question d'une modification des droits d'appel. La jurisprudence de la Cour établit clairement depuis longtemps que le droit d'appel est un droit substantiel, et non une question de procédure : voir, p. ex., *Taylor c. The Queen* (1876), 1 R.C.S. 65; *Banque Royale du Canada c. Concrete Column Clamps (1961) Ltd.*, [1971] R.C.S. 1038, p. 1041-1042; *R. c. Puskas*, [1998] 1 R.C.S. 1207, par. 6.

[73] I cannot accept the suggestion that the fact that the provision is found to limit an accused's right to be presumed innocent under s. 11(*d*) of the *Charter* supports the conclusion that the provision is substantive. There are two points. First, procedural provisions may limit *Charter* rights or indeed violate the *Charter* just as readily as substantive ones. The *Charter* analysis says nothing about the nature of the provisions for the purposes of applying the presumption that procedural provisions have immediate effect. Second, I agree with my colleague Deschamps J. (at para. 14) that we must assess the temporal application of these provisions on the basis of the provisions as they stand following the Court's decision in *St-Onge Lamoureux*. The provisions in that form do not violate the *Charter*. I respectfully do not accept that the fact that they have been found to be reasonably justified as opposed to not limiting the rights in question at all has anything to do with whether the provisions interfere with substantive rights.

[73] Je ne puis accepter la proposition selon laquelle le fait que la disposition limite le droit de l'accusé d'être présumé innocent protégé par l'al. 11*d*) de la *Charte* soutient la conclusion que la disposition en est une de fond, et ce, pour deux raisons. Premièrement, les dispositions procédurales peuvent limiter les droits garantis par la *Charte* ou même contrevenir à la *Charte* tout autant que les dispositions de fond. L'analyse fondée sur la *Charte* ne nous apprend rien au sujet de la nature des dispositions pour l'application de la présomption d'application immédiate des dispositions procédurales. Deuxièmement, je souscris à l'opinion qu'exprime ma collègue la juge Deschamps, au par. 14, qu'il nous faut examiner l'application temporelle de ces dispositions telles qu'elles sont par suite de l'arrêt *St-Onge Lamoureux* de la Cour. Les dispositions ainsi formulées ne contreviennent pas à la *Charte*. Avec égards, je ne peux toutefois convenir que le fait d'avoir conclu que ces dispositions sont raisonnablement justifiées plutôt que d'avoir conclu qu'elles ne limitent aucunement les droits en cause a un rapport quelconque avec la question de savoir si les dispositions portent atteinte à des droits substantiels.

[74] I conclude that the provisions relate only to the rules of evidence which apply at trial and

[74] Je conclus que les dispositions ne concernent que les règles de preuve applicables lors d'un

2012 SCC 58 (CanLII)

that they are therefore purely procedural. As I have explained earlier in these reasons, the standard position on the temporal applicability of procedural provisions is that they operate with immediate effect.

D. *The Presumption of Immediate Application Is Not Rebutted*

[75] That brings us to the second question on the appeal: even if the provisions are procedural, do the surrounding circumstances or the language of the provisions rebut the presumption that they are to be applied immediately?

[76] The appellant submits that the legislation does not indicate that Parliament intended any part of the amended provisions to apply with respect to events that occurred before their enactment. The answer to this point, as I see it, is that the provisions are purely procedural and therefore their temporal application is well settled by the common law and reinforced by the provisions of the *Interpretation Act*. Parliament is deemed to know the law.

[77] The appellant also submits that, had it been Parliament's intent that these provisions should have immediate application, it would have taken steps before they came into effect to ensure that evidence crucial to the defence, such as video-recordings of breath testing, was preserved and that disclosure practices were modified accordingly. Respectfully, these considerations do not point to parliamentary intent that these procedural provisions should not take immediate effect. Video-recordings, disclosure and evidence about how the device performed on the occasion in question were all important and highly relevant to the defence before as well as after these provisions came into effect. The limitation on the admissibility of *Carter* evidence in these provisions did not suddenly render this other evidence relevant or important. It was always relevant and important. Furthermore, Parliament has made no provision for these matters for any cases, whether they arose before or after the amendments came into effect. I cannot see how Parliament's inaction in this regard before the amendments' enactment can reveal legislative intent against immediate

procès et qu'elles sont donc purement procédurales. Comme je l'ai déjà expliqué, l'opinion répandue sur l'application temporelle des dispositions procédurales veut qu'elles s'appliquent avec effet immédiat.

D. *La présomption d'application immédiate n'est pas réfutée*

[75] Cela nous amène à la deuxième question sur laquelle porte le pourvoi : malgré la nature procédurale des dispositions, la présomption qu'elles doivent s'appliquer immédiatement est-elle réfutée par leur libellé ou l'ensemble des circonstances?

[76] Selon l'appelant, la loi n'indique pas que le législateur voulait qu'une partie quelconque des dispositions modifiées s'applique à des événements survenus avant leur adoption. De mon point de vue, la réponse sur ce point est que les dispositions sont purement procédurales et que leur application dans le temps est donc bien établie par la jurisprudence et renforcée par les dispositions de la *Loi d'interprétation*. Le législateur est réputé connaître la loi.

[77] Toujours selon l'appelant, si le législateur avait voulu que ces dispositions s'appliquent immédiatement, il aurait pris des mesures avant leur entrée en vigueur pour s'assurer que les éléments de preuve essentiels à la défense, comme les bandes vidéo des alcootests, soient conservés et que les pratiques en matière de communication de la preuve soient modifiées en conséquence. En toute déférence, ces considérations n'indiquent pas que le législateur voulait que ces dispositions procédurales ne prennent pas effet immédiatement. Les bandes vidéos, la communication de la preuve et les éléments de preuve relatifs au fonctionnement de l'appareil au moment en question étaient tous importants et fort pertinents pour la défense tant avant qu'après l'entrée en vigueur de ces dispositions. La limitation de l'admissibilité de la preuve de type *Carter* prévue par ces dispositions n'a pas rendu soudainement cette autre preuve pertinente ou importante. Elle a toujours été pertinente et importante. Qui plus est, le législateur n'a édicté aucune disposition à l'égard de ces éléments pour quelque affaire que ce soit, que l'affaire

2012 SCC 58 (CanLII)

application, given that Parliament has been similarly inactive after the amendments have come into force. It is therefore difficult for me to understand how the absence of these sorts of provisions supports the view that they were not intended to have immediate effect.

soit survenue avant ou après l'entrée en vigueur des modifications. Je ne vois pas comment l'inaction du législateur à cet égard avant l'adoption des modifications peut traduire son souhait que les modifications ne s'appliquent pas immédiatement, vu qu'il est resté tout aussi inactif après l'entrée en vigueur des modifications. Il m'est donc difficile de comprendre comment l'absence de ce genre de dispositions appuie la thèse qu'elles n'étaient pas censées prendre effet immédiatement.

[78] The Court's decision in *R. v. Ali*, [1980] 1 S.C.R. 221, is not in my view of assistance to the appellant. In that case, this Court considered the applicability of amendments that required a certificate to be based on two breath samples — not only one as in the previous legislation — to give rise to the presumption of accuracy. This amendment was accompanied by another amendment allowing peace officers to take more than one sample. Pratte J., writing for the majority, assumed but did not decide that the first-mentioned amendment was procedural. However, he decided that this amendment did not apply to events that occurred before its coming into force, since before the amendment, it was not legally possible to obtain the required two breath samples, but after the amendment it was. The amendment to the amount of samples required for a valid certificate "cannot be taken to refer to samples of breath that could not be legally demanded at the time of the offence" (p. 239). The changes to the legislative scheme as a whole demonstrated that, for cases arising before the amendments, Parliament intended the old law to remain effective. I respectfully do not see any parallel between that situation and the present one. As mentioned in the previous paragraph, the amendments in issue here were not accompanied by other amendments changing the legal availability of relevant evidence. Nor did they make evidence relevant that was not equally relevant before their enactment. The questions of whether the breathalyzer device malfunctioned or was improperly operated were highly relevant to an accused before as well as after the amendments. It cannot be said, in my respectful view, that the effect of the amended provisions was to require an accused to adduce evidence that he or she had no reason to gather before

[78] À mon avis, l'arrêt *R. c. Ali*, [1980] 1 R.C.S. 221, de la Cour n'est d'aucune utilité pour l'appelant. La Cour y a examiné l'applicabilité de modifications selon lesquelles un certificat devait se fonder sur deux échantillons d'haleine — et non pas un seul comme le prévoyait l'ancienne disposition législative — pour donner ouverture à la présomption d'exactitude. À cette modification s'en ajoutait une autre qui autorisait les agents de la paix à prendre plus d'un échantillon. S'exprimant au nom de la majorité, le juge Pratte a tenu pour acquis, mais n'a pas décrété, que la première modification mentionnée était de nature procédurale. Il a toutefois décidé que cette modification ne s'appliquait pas aux événements survenus avant son entrée en vigueur, parce qu'il n'était pas légalement possible auparavant d'obtenir les deux échantillons d'haleine exigés alors qu'il était possible de les obtenir après l'entrée en vigueur de la modification. La modification du nombre d'échantillons nécessaires à l'obtention d'un certificat valide « ne peut se rapporter à des échantillons d'haleine qui ne pouvaient légalement faire l'objet d'une sommation au moment de l'infraction » : p. 239. Il ressort de l'ensemble des changements apportés au régime législatif que le législateur voulait que l'ancienne règle de droit continue de s'appliquer dans les affaires survenues avant les modifications. Avec égards, je ne vois aucun parallèle entre cette situation et celle de l'espèce. Comme je l'ai mentionné au paragraphe précédent, les modifications en cause dans la présente affaire n'étaient pas accompagnées d'autres modifications touchant la preuve pertinente qui, selon la loi, pouvait être présentée. Elles n'ont pas non plus rendu pertinente une preuve qui ne l'était pas avant leur adoption. Les questions de savoir si l'alcootest a mal fonctionné ou a été

2012 SCC 58 (CanLII)

the provisions came into force. An accused had every reason to gather such evidence before as well as after the enactment of these provisions.

E. *Conclusion*

[79] I am therefore of the view that the amendments to s. 258(1) were purely procedural. They did not bring about any substantive right. Nor did they alter the facts with respect to which a reasonable doubt must be raised in order to rebut the presumptions that s. 258(1) creates. The amendments are subject to the presumption of immediate application, and there is nothing to rebut the presumption. I am reinforced in this view by the fact that in addition to the Ontario Court of Appeal in this case, the courts of appeal for Alberta, British Columbia and Quebec have reached the same conclusions: *R. v. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. v. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. v. Loiseau*, 2010 QCCA 1872 (CanLII).

[80] The amended version of s. 258(1) is therefore applicable to all s. 253 charges, whether the facts that ground them occurred before or after the amendments' enactment. This includes the charges against the appellant.

V. Disposition

[81] I would dismiss the appeal and uphold the Court of Appeal's order for a new trial. This trial should apply the amended provisions, as severed in this Court's concurrently released decision in *St-Onge Lamoureux*.

Appeal allowed, McLachlin C.J. *and* Rothstein *and* Cromwell JJ. *dissenting.*

utilisé incorrectement étaient fort pertinentes pour un accusé tant avant qu'après l'entrée en vigueur des modifications. À mon humble avis, on ne saurait dire que ces dispositions modifiées ont eu pour effet d'obliger un accusé à produire des éléments de preuve qu'il n'avait aucune raison de réunir avant leur entrée en vigueur. Un accusé avait toutes les raisons de réunir de tels éléments de preuve tant avant qu'après l'adoption de ces dispositions.

E. *Conclusion*

[79] J'estime donc que les modifications du par. 258(1) sont de nature purement procédurale. Elles ne font intervenir aucun droit substantiel, ni ne modifient les faits à l'égard desquels il est possible de soulever un doute raisonnable afin de réfuter les présomptions créées par le par. 258(1). Les modifications sont présumées s'appliquer immédiatement, et rien ne réfute cette présomption. Je suis conforté dans mon opinion par le fait qu'outre la Cour d'appel de l'Ontario en l'espèce, les cours d'appel de l'Alberta, de la Colombie-Britannique et du Québec sont arrivées aux mêmes conclusions : *R. c. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. c. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. c. Loiseau*, 2010 QCCA 1872, [2010] R.J.Q. 2246.

[80] La version modifiée du par. 258(1) s'applique donc à toutes les accusations portées en vertu de l'art. 253, notamment celles portées contre l'appelant, que les faits sur lesquels elles reposent se soient produits avant ou après l'adoption des modifications.

V. Dispositif

[81] Je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel portant nouveau procès. Les dispositions modifiées, telles qu'elles ont été scindées dans l'arrêt *St-Onge Lamoureux* rendu par la Cour en même temps que le présent arrêt, doivent s'appliquer à ce nouveau procès.

Pourvoi accueilli, la juge en chef McLachlin *et les juges* Rothstein *et* Cromwell *sont dissidents.*

2012 SCC 58 (CanLII)

Solicitors for the appellant: Burstein Bryant, Toronto; J. Thomas Wiley, Brampton.

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

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Montréal and Québec.

Procureurs de l'appelant : Burstein Bryant, Toronto; J. Thomas Wiley, Brampton.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

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

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Montréal et Québec.

2012 SCC 58 (CanLII)

TAB 54

Her Majesty The Queen *Appellant*

v.

Rosaire Poulin *Respondent*

and

Attorney General of Ontario, Association québécoise des avocats et avocates de la défense and Criminal Lawyers' Association *Interveners*

Sa Majesté la Reine *Appelante*

c.

Rosaire Poulin *Intimé*

et

Procureur général de l'Ontario, Association québécoise des avocats et avocates de la défense et Criminal Lawyers' Association *Intervenants*

Indexed as: R. *v.* Poulin

2019 SCC 47

File No.: 37994.

2019: March 25; 2019: October 11.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.

Répertorié : R. *c.* Poulin

2019 CSC 47

N° du greffe : 37994.

2019 : 25 mars; 2019 : 11 octobre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown et Martin.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Benefit of lesser punishment — Offender convicted of historical sexual offences — Offender asserting constitutional right to receive sentence not available in Criminal Code at time of commission of offences or time of sentencing, but only for discrete period between those two times — Whether offender has right to benefit only of punishment applicable at time of offence and time of sentencing or right to benefit of any punishment applicable during the interval between those two times — Canadian Charter of Rights and Freedoms, s. 11(i).

Criminal law — Appeals — Mootness — Death of respondent — Respondent passing away after leave to appeal granted but prior to hearing of appeal — Whether Court should exercise discretion to hear appeal.

P was found guilty in 2016 of historical sexual offences committed between 1979 and 1987 when the complainant was 7 to 15 years old and P was 44 to 51 years old. The sentencing judge sentenced P to a conditional sentence of two years less a day for two counts of gross indecency. A conditional sentence could not be imposed

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Bénéfice de la peine la moins sévère — Contrevenant déclaré coupable d'infractions d'ordre sexuel historiques — Revendication par le contrevenant du droit constitutionnel de se voir infliger une peine qui n'était prévue au Code criminel ni au moment de la perpétration des infractions ni à celui de la sentence, mais seulement au cours d'une période précise entre ces deux moments — Le contrevenant a-t-il le droit de bénéficier uniquement de la peine applicable au moment de l'infraction et à celui de la sentence ou le droit de bénéficier de toute peine applicable durant l'intervalle entre ces deux moments? — Charte canadienne des droits et libertés, art. 11i).

Droit criminel — Appels — Caractère théorique — Décès de l'intimé — Décès de l'intimé après l'octroi de l'autorisation d'appel mais avant l'audition du pourvoi — La Cour devrait-elle exercer son pouvoir discrétionnaire pour entendre le pourvoi?

En 2016, P a été reconnu coupable d'infractions d'ordre sexuel historiques commises entre 1979 et 1987 à l'époque où le plaignant était âgé entre 7 et 15 ans et qu'il avait lui-même entre 44 et 51 ans. Le juge chargé de la détermination de la peine a condamné P à une peine d'emprisonnement avec sursis de deux ans moins un jour pour deux chefs

2019 SCC 47 (CanLII)

as a punishment when P committed his acts of gross indecency — it only became available as a form of sentence in 1996. Furthermore, the parties agreed that it was no longer applicable to the offence of gross indecency, according to the provisions in force, by the time P was charged, convicted and sentenced. In imposing a conditional sentence on P, the judge considered that s. 11(*i*) of the *Charter* entitled P to the benefit of a lesser sentence that was available in the interval between the commission of the offences and P's sentencing. The Court of Appeal dismissed the Crown's appeal, holding that s. 11(*i*) gave P the right to a conditional sentence. Shortly before the hearing of the Crown's appeal before the Court, P passed away. The appeal proceeded nonetheless, accompanied by a Crown motion for the Court to adjudicate the appeal even though it had become factually moot.

de grossière indécence. Une peine d'emprisonnement avec sursis ne pouvait être infligée quand P a commis ses actes de grossière indécence; l'emprisonnement avec sursis n'est devenu une peine applicable qu'en 1996. En outre, les parties ont convenu que ce type de peine ne s'appliquait plus à l'infraction de grossière indécence, d'après les dispositions en vigueur, lorsque P a été accusé, déclaré coupable et condamné. En infligeant une peine d'emprisonnement avec sursis à P, le juge a considéré que l'al. 11*i*) de la *Charte* accordait à P le droit de bénéficier de la peine la moins sévère qui pouvait être infligée pour sanctionner ses infractions dans l'intervalle entre le moment où celles-ci ont été perpétrées et celui de sa sentence. La Cour d'appel a rejeté l'appel du ministère public et conclu que l'al. 11*i*) conférait à P le droit à une peine d'emprisonnement avec sursis. P est décédé peu avant que la Cour entende le pourvoi du ministère public. Le pourvoi a néanmoins été instruit et le ministère public a présenté une requête visant à ce que la Cour tranche le pourvoi même s'il est désormais théorique sur le plan factuel.

Held (Abella, Karakatsanis and Brown JJ. dissenting): The motion to proceed with the appeal and the appeal should be allowed.

Arrêt (les juges Abella, Karakatsanis et Brown sont dissidents) : La requête en vue de la poursuite de l'instance et le pourvoi sont accueillis.

Per Wagner C.J. and Moldaver, Côté and Martin JJ.: This is one of those rare and exceptional cases in which the Court ought to exercise its discretion to adjudicate a moot criminal appeal. First, the Court has had the benefit of adversarial submissions in this case. Second, the Crown's appeal raises an important constitutional question that has not yet received comprehensive treatment in the jurisprudence. Third, the proper interpretation of s. 11(*i*) of the *Charter* is a legal issue of general public importance which transcends P's death. Fourth, the value of the Court's ruling on the proper interpretation of s. 11(*i*) clearly outweighs any concerns about limited judicial resources. It is much more efficient and fair for the Court to decide this question of national importance now, rather than cause future litigants and lower courts to expend further resources debating this question until, inevitably, it reaches the Court anew. Finally, it is for the courts, not Parliament, to define the scope of *Charter* rights. The Court would therefore not be intruding on the legislative role by answering the question put to it.

Le juge en chef Wagner et les juges Moldaver, Côté et Martin : Le présent pourvoi constitue l'un de ces cas où la Cour doit exercer son pouvoir discrétionnaire pour trancher un pourvoi en matière criminelle devenu théorique, ce qu'elle fait rarement et à titre exceptionnel. Premièrement, la Cour a eu l'avantage d'entendre des observations contradictoires en l'espèce. Deuxièmement, le pourvoi du ministère public soulève une question constitutionnelle importante qui n'a pas encore été traitée à fond dans la jurisprudence. Troisièmement, l'interprétation juste de l'al. 11*i*) de la *Charte* est une question de droit d'intérêt général qui transcende le décès de P. Quatrièmement, la valeur de la décision de la Cour sur l'interprétation appropriée de l'al. 11*i*) l'emporte sans conteste sur toute préoccupation quant aux ressources judiciaires limitées. Il est beaucoup plus efficace et juste que la Cour tranche aujourd'hui cette question d'importance nationale que d'obliger les futurs plaideurs et les tribunaux d'instance inférieure à consacrer des ressources supplémentaires au débat de cette question jusqu'à ce que celle-ci soit inévitablement soumise à la Cour de nouveau. Enfin, il incombe aux tribunaux, et non au législateur, de définir la portée des droits garantis par la *Charte*. La Cour n'empiéterait donc pas sur le rôle du législateur en tranchant la question dont elle est saisie.

A purposive analysis of s. 11(*i*) of the *Charter* leads to the conclusion that an offender is not entitled to the benefit

Une analyse téléologique de l'al. 11*i*) de la *Charte* mène à la conclusion qu'un contrevenant n'a pas droit

2019 SCC 47 (CanLII)

of a temporary reduction in punishment which occurred in the interval between the time of commission and the time of sentencing. Section 11(*i*) confers a binary right, not a global one. A binary right involves a comparison of the punishments under the laws in force at two set points in time (commission of the offence and sentencing) and the right to receive the lesser of these punishments. By contrast, a global right involves a review of all punishments that have existed for the offence between its commission and sentencing, and the right to receive the least severe punishment in that entire span of time. The language and origins of s. 11(*i*) both confirm the purposes of s. 11(*i*) — namely the rule of law and fairness — and indicate that s. 11(*i*) is intended to confer a binary right.

A *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes. Purposive interpretation can be mistakenly conflated with generous interpretation. While *Charter* rights must be interpreted in a large and liberal manner, they are ultimately bounded by their purposes. Courts that have given s. 11(*i*) a global reading have fallen into the error of prioritizing generosity over purpose. Rather than identifying the principles or purposes underlying s. 11(*i*), they have simply concluded that s. 11(*i*) should be given the interpretation most generous to the accused. However, the principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation. It is a principle of penal statutory interpretation. Reading s. 11(*i*) in a manner that would require the court to impose the most favourable punishment identifiable in the interval between the offence and sentencing does not reflect the kind of generous interpretation that *Charter* rights should receive. Rather, it reflects an unduly generous interpretation, disconnected from the purposes of the right.

When conducting a purposive analysis of a *Charter* right, the starting point must be the language of the section. Section 11(*i*) was worded to confer a binary right. The origins of s. 11(*i*) corroborate this conclusion. While the origins of s. 11(*i*) are not determinative of the right's proper scope, they provide an instructive starting point. A review of s. 11(*i*)'s historical context reveals that there was nothing to inspire a global right at the time of its drafting and enactment. A global right was not part of the legal landscape; the common law certainly did not recognize

au bénéfice d'un adoucissement temporaire de la peine survenu dans l'intervalle entre le moment de la perpétration de l'infraction et celui de la sentence. L'alinéa 11*i*) confère un droit binaire et non un droit global. Un droit binaire repose sur une comparaison des peines prévues par les lois en vigueur à deux moments précis (soit entre le moment de la perpétration de l'infraction et celui de la sentence) et le droit de bénéficier de la moins sévère de ces peines. À l'inverse, un droit global repose sur un examen de toutes les peines prévues pour sanctionner l'infraction entre le moment de sa perpétration et celui de la sentence et le droit de bénéficier de la peine la moins sévère qui soit durant l'ensemble de la période visée. Tant le libellé que les origines de l'al. 11*i*) confirment les objectifs qui le sous-tendent — soit la primauté du droit et l'équité — et indiquent que l'al. 11*i*) vise à conférer un droit binaire.

Un droit garanti par la *Charte* doit être interprété téléologiquement, c'est-à-dire d'une façon qui est justifiée par ses objets. L'interprétation téléologique et l'interprétation libérale peuvent être confondues à tort. Bien que les droits garantis par la *Charte* doivent être interprétés de façon large et libérale, ils sont, au bout du compte, subordonnés à leurs objets. Les tribunaux qui ont donné à l'al. 11*i*) une interprétation globale ont fait l'erreur d'accorder la priorité à la libéralité de l'interprétation plutôt qu'à l'objet. Au lieu de relever les principes ou les objets qui sous-tendent l'al. 11*i*), ils ont tout simplement conclu qu'il fallait donner à l'al. 11*i*) l'interprétation la plus favorable à l'accusé. Toutefois, le principe selon lequel une disposition ayant plus d'une signification plausible doit être interprétée d'une manière favorable à l'accusé ne constitue pas un principe d'interprétation de la *Charte*. Il s'agit plutôt d'un principe d'interprétation législative pénale. Une interprétation de l'al. 11*i*) qui obligerait le tribunal à infliger la peine la plus favorable parmi celles qui se sont appliquées dans l'intervalle entre le moment de la perpétration de l'infraction et le moment de la sentence ne correspond pas au type d'interprétation libérale qui devrait être faite des droits garantis par la *Charte*. Il s'agit plutôt d'une interprétation excessivement libérale, sans rapport avec les objets du droit.

Lorsque l'on procède à une analyse téléologique d'un droit garanti par la *Charte*, il faut tout d'abord se pencher sur le libellé de la disposition en cause. L'alinéa 11*i*) a été rédigé de façon à conférer un droit binaire, une conclusion que corroborent les origines de l'al. 11*i*). Bien que ces origines ne déterminent pas la portée exacte du droit conféré, elles offrent un point de départ instructif. Une étude du contexte historique de l'al. 11*i*) révèle que rien ne pointait vers une interprétation globale du droit garanti à cet alinéa au moment de sa rédaction et de son adoption.

2019 SCC 47 (CanLII)

one, and none of the enactments inspiring s. 11(*i*) embraced one either.

Une interprétation globale de ce droit ne faisait pas partie du paysage juridique; la common law ne reconnaissait aucune interprétation globale et aucune des dispositions à l'origine de l'al. 11*i*) n'appuyait une telle interprétation.

Section 11(*i*) balances, on the one hand, the principle of the rule of law and, on the other, the principle of fairness. It enshrines the common law rule that an offender should not be retrospectively subjected to a heavier punishment than the one applicable at the time the person committed the offence. The rationale for this rule is the rule of law and, more specifically, the principle of legality, which dictates that persons who rely on the state of the law in conducting themselves, or who risk the liability associated with a law in breaking it, should not subsequently be held to different laws, particularly more stringent ones. However, s. 11(*i*) constitutionalizes an additional protection. It stipulates that, where the law provides a more favourable punishment at the time of the offender's sentencing than it did at the time of the offence, the offender is entitled to the benefit of this more favourable, current punishment. The rationale for this is fairness. It would not be fair to subject an offender to a punishment which, in choosing to reduce it, Parliament has expressly recognized as no longer appropriate. Further, a criminal sentence is an expression of society's collective voice; it is meant to reflect contemporary values.

L'alinéa 11*i*) concilie, d'une part, le principe de la primauté du droit et, d'autre part, le principe de l'équité. Il consacre la règle de common law selon laquelle un contrevenant ne doit pas être soumis rétrospectivement à une peine plus sévère que celle qui s'appliquait au moment où il a commis son infraction. Cette règle est fondée sur la primauté du droit et, plus précisément, sur le principe de la légalité, lequel veut que les personnes qui ajustent leur comportement en fonction de l'état du droit, ou qui prennent le risque d'assumer les conséquences liées à la violation d'une règle de droit donnée, ne devraient pas ensuite être jugées en vertu d'autres règles de droit, en particulier de règles de droit plus rigoureuses. Cependant, l'al. 11*i*) constitutionnalise une mesure de protection additionnelle. Il dispose que, lorsque la loi prévoit l'infliction d'une peine plus favorable au moment de la sentence du contrevenant que celle qui s'appliquait au moment de la perpétration de l'infraction, le contrevenant a le droit de bénéficier de la peine actuelle, qui lui est plus favorable. L'équité en est la raison. Il ne serait pas équitable d'infliger à un contrevenant une peine qui, lorsque le législateur a choisi de l'adoucir, a expressément été reconnue par ce dernier comme n'étant plus juste. De plus, une peine criminelle est l'expression de la voix collective de la société; elle doit donc tenir compte des valeurs contemporaines.

A binary interpretation of s. 11(*i*) is not unfair or arbitrary for an offender who is punished according to the law in place at the time he committed his offence, or a more favourable law, if one is in place when he is sentenced. To the contrary, these two laws are linked to the offender and the proceedings against him; the first sets out the punishment he risked incurring at the time he acted, and the other likewise sets the contours for a sentence that reflects society's attitude about the gravity of the offence and the responsibility of the offender at the precise moment the sentence is imposed. It is, accordingly, fair and rational for the offender to have the benefit of one of these punishments. Conversely, there is no principled basis to grant an offender the benefit of a punishment which has no connection to his offending conduct or to society's view of his conduct at the time the court is called upon to pass sentence. Furthermore, countervailing fairness considerations militate against a global approach to s. 11(*i*). A global approach to s. 11(*i*) would disproportionately benefit those who are sentenced years, or even decades, after their offences. Sexual offences like P's often go long unreported. Survivors of sexual trauma commonly delay in disclosing

Une interprétation binaire de l'al. 11*i*) n'est ni injuste ni arbitraire pour un contrevenant qui est puni conformément à la loi en vigueur au moment de la perpétration de l'infraction ou, le cas échéant, à une loi plus favorable en vigueur au moment de sa condamnation. Au contraire, ces deux lois sont liées au contrevenant et à la poursuite engagée contre lui : la première loi établit la peine qu'il risquait de se voir infliger au moment où il a commis l'infraction et l'autre établit de la même manière les contours d'une peine qui tient compte de la perception de la société quant à la gravité de l'infraction et à la responsabilité du contrevenant au moment précis où la peine lui est infligée. Il est, par conséquent, juste et rationnel que le contrevenant puisse bénéficier de l'une de ces peines. À l'inverse, il n'existe aucune raison de principe d'accorder à un contrevenant le bénéfice d'une peine n'ayant aucun lien avec sa conduite fautive ou avec la perception de la société à l'égard de sa conduite au moment où le tribunal est appelé à déterminer la peine. De plus, il existe des considérations en matière d'équité qui militent contre une interprétation globale de l'al. 11*i*). Une interprétation globale de l'al. 11*i*) avantagerait démesurément les contrevenants condamnés des

2019 SCC 47 (CanLII)

abuse for reasons such as embarrassment, fear, guilt, or a lack of understanding and knowledge. There should be no additional gain to an offender under s. 11(*i*) when a victim is traumatized to the point of requiring significant time to overcome any reluctance to report the offence.

Per Abella, Karakatsanis and Brown JJ. (dissenting): The motion to proceed with the appeal should be dismissed. This case is one of the overwhelming number of cases in which proceeding with the appeal would not be in the interests of justice. First, it is hard to conclude that a real adversarial context exists. Second, while it is true that any issue concerning the interpretation of a *Charter* provision is always of great importance, there are no special circumstances in this case that transcend the death of P. In light of 30 years of consistent case law on this issue, it cannot be said that there are conflicting lines of cases here or an issue that is ordinarily evasive of appellate review. Finally, the inequity of proceeding with an appeal against a deceased offender despite opposition from his family is obvious.

Furthermore, the appeal should be dismissed on the merits. For 30 years, the Canadian courts have interpreted s. 11(*i*) of the *Charter* consistently, holding that it guarantees any offender the benefit of the lesser sentence that applied between the time of commission of the offence and the time of sentencing. This approach finds ample support in the words of s. 11(*i*), which suggest a continuum between the time of commission and the time of sentencing. A technical construction such as the one proposed by the Crown is contrary to the Court's conclusion that a generous and purposive approach must be taken to the interpretation of *Charter* rights. The interpretation adopted by other Canadian courts reflects two objects of s. 11(*i*) identified by the Court, namely the rule of law and ensuring fairness in criminal proceedings. There are several points in the course of a criminal investigation and prosecution — before the time of sentencing — at which an individual might be required to make choices in light of punishments then applicable. The protection of s. 11(*i*), which cannot be contingent on evidence that the accused relied on the existing law, is grounded in this very possibility. Here, the possibility that the interpretation of s. 11(*i*)

années, voire des décennies, après avoir commis leurs infractions. Les infractions d'ordre sexuel comme celles de P demeurent souvent cachées durant de longues périodes. Il arrive fréquemment que des survivants de traumatismes sexuels tardent à révéler les agressions pour diverses raisons comme la gêne, la crainte, le sentiment de culpabilité ainsi que le manque de compréhension et de connaissance. Un contrevenant ne devrait pas pouvoir bénéficier d'un avantage supplémentaire au titre de l'al. 11*i*) lorsqu'une victime est traumatisée au point d'avoir besoin d'un délai considérable pour surmonter sa réticence à dénoncer l'infraction.

Les juges Abella, Karakatsanis et Brown (dissidents) : La requête en poursuite de l'instance devrait être rejetée. La présente affaire fait partie de la très grande majorité des cas dans lesquels la poursuite de l'instance ne serait pas dans l'intérêt de la justice. Premièrement, il est difficile de conclure à l'existence d'un véritable débat contradictoire. Deuxièmement, bien qu'une question portant sur l'interprétation d'une disposition de la *Charte* soit toujours d'une grande importance, il n'existe pas en l'espèce de circonstances spéciales qui transcendent le décès de P. Face à 30 ans de jurisprudence constante sur la question en litige, l'on ne peut pas dire que l'on soit en présence d'une controverse jurisprudentielle ou d'une question qui échappe ordinairement à l'examen des tribunaux d'appel. Enfin, l'iniquité du fait de poursuivre une instance contre un délinquant décédé, malgré l'opposition de sa famille, est évidente.

Par ailleurs, l'appel devrait être rejeté sur le fond. Pendant 30 ans, les tribunaux canadiens ont interprété l'al. 11*i*) de la *Charte* de façon constante, concluant que cette disposition garantit à tout contrevenant le bénéfice de la peine la moins sévère qui ait été applicable entre le moment de la perpétration de l'infraction et celui de la sentence. Cette approche est amplement appuyée par le texte de l'al. 11*i*), dont la formulation suggère un continuum entre le moment de la perpétration de l'infraction et celui de la sentence. L'application d'une interprétation formaliste comme celle avancée par la Couronne va à l'encontre des enseignements de la Cour voulant que les droits garantis par la *Charte* doivent être interprétés de façon libérale et en fonction de l'objet visé. L'interprétation adoptée par les autres cours canadiennes reflète deux objets de l'al. 11*i*) dégagés par la Cour : la primauté du droit et la garantie de l'équité des procédures criminelles. Il y a, au cours des enquêtes et poursuites pénales — avant l'infliction de la peine —, plusieurs moments où un individu peut être appelé à faire des choix sur la foi des peines alors applicables. C'est précisément cette possibilité qui est à la base de la protection de l'al. 11*i*), laquelle ne saurait

2019 SCC 47 (CanLII)

adopted by the courts will complicate the analysis of the applicable punishments should not weigh against it. It seems imprudent to rule out an interpretation that provides offenders with more substantial protection where there is no evidence that there are difficulties, especially in light of the actual wording of the provision. Finally, the proposal that s. 11(*i*) has a third object, to ensure that the imposed punishment corresponds to the social stigma associated with the offence at the time of sentencing, seems to confuse the availability of a punishment with its fairness and appropriateness. In a case involving multiple incidents in which serious acts of sexual abuse were committed against a young relative, it may be that the conditional sentence was not a fair and appropriate punishment. But that is not the question before the Court.

être conditionnelle à une preuve que l'inculpé s'est fié au droit en vigueur. Ici, la possibilité que l'interprétation de l'al. 11*i*) retenue par la jurisprudence alourdisse l'analyse des peines applicables ne devrait pas militer contre celle-ci. Il semble téméraire d'écarter une interprétation qui offre une protection plus importante aux contrevenants en l'absence de toute preuve de l'existence de difficultés, surtout à la lumière du libellé exprès de la disposition. Enfin, la proposition que l'al. 11*i*) a un troisième objet, de garantir que la peine infligée corresponde au degré de réprobation sociale associé à l'infraction au moment où la peine est infligée, semble confondre la question de la disponibilité d'une peine et la nature juste et appropriée de celle-ci. Dans une affaire concernant de multiples abus sexuels sérieux contre un jeune parent, il se peut que l'emprisonnement avec sursis ne soit pas une peine juste et appropriée. Or, ceci n'est pas la question dont la Cour est saisie.

Cases Cited

By Martin J.

Applied: *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; **referred to:** *R. v. Belzil*, [1989] R.J.Q. 1117; *R. v. MacLellan*, 2019 NSCA 2, 369 C.C.C. (3d) 482; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Beaton*, 2018 ONCA 924; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Yusuf*, 2011 BCSC 626; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238; *R. v. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *R. v. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289; *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163; *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289; *Nucci v. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 221; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. D.H.*, 2017 ONCJ 51; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Dunn*, [1995] 1 S.C.R. 226; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v.*

Jurisprudence

Citée par la juge Martin

Arrêt appliqué : *R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385; **arrêts mentionnés :** *R. c. Belzil*, [1989] R.J.Q. 1117; *R. c. MacLellan*, 2019 NSCA 2, 369 C.C.C. (3d) 482; *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *R. c. Beaton*, 2018 ONCA 924; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541; *R. c. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. c. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. c. Yusuf*, 2011 BCSC 626; *R. c. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906; *Liang c. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238; *R. c. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160; *R. c. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *R. c. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234; *R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895; *R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554; *R. c. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349; *R. c. Boudreault*, 2018 CSC 58, [2018] 3 R.C.S. 599; *R. c. Johnson*, 2003 CSC 46, [2003] 2 R.C.S. 357; *Tran c. Canada (Sécurité publique et Protection civile)*, 2017 CSC 50, [2017] 2 R.C.S. 289; *R. c. R.A.R.*, 2000 CSC 8, [2000] 1 R.C.S. 163; *Canada (Attorney General) c. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289; *Nucci c. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 221; *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; *R. c. Sinclair*, 2010 CSC 35, [2010] 2 R.C.S. 310; *R. c. D.H.*, 2017 ONCJ 51; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *R. c. Dunn*, [1995] 1 R.C.S. 226; *Carter c. La Reine*,

2019 SCC 47 (CanLII)

Potvin, [1993] 2 S.C.R. 880; *R. v. Kelly*, [1992] 2 S.C.R. 170; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *X. v. Federal Republic of Germany*, Application No. 7900/77, March 6, 1978, D.R. 13, p. 70; *Scoppola v. Italy (No. 2)* (2010), 51 E.H.R.R. 12; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Dubois*, Que. Sup. Ct., December 8, 1982; *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149.

By Karakatsanis J. (dissenting)

R. v. L. (J.-J.), [1998] R.J.Q. 971; *R. v. Belzil*, [1989] R.J.Q. 1117; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. v. Yusuf*, 2011 BCSC 626; *R. v. G.C.D.*, 2011 MBQB 235, 271 Man. R. (2d) 41; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. v. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. v. E.H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. v. Palacios*, 2012 ONCJ 195; *R. v. Simmonds*, 2018 BCCA 205, 415 C.R.R. (2d) 88; *R. v. F.C.*, 2018 ONSC 561; *R. v. Boudreau*, 2012 ONCJ 322; *R. v. D.P.*, 2014 ONSC 386; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.

[1986] 1 R.C.S. 981; *R. c. Kalanj*, [1989] 1 R.C.S. 1594; *R. c. Potvin*, [1993] 2 R.C.S. 880; *R. c. Kelly*, [1992] 2 R.C.S. 170; *R. c. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81; *R. c. Dineley*, 2012 CSC 58, [2012] 3 R.C.S. 272; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *R. c. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392; *R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217; *Montréal (Ville) c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 CSC 48, [2008] 2 R.C.S. 698; *R. c. Stillman*, 2019 CSC 40, [2019] 3 R.C.S. 144; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *R. c. S.A.C.*, 2008 CSC 47, [2008] 2 R.C.S. 675; *R. c. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *X. c. République fédérale d'Allemagne*, requête n° 7900/77, 6 mars 1978, D.R. 13, p. 70; *Scoppola c. Italie (n° 2)* (2010), 51 E.H.R.R. 12; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. L.M.*, 2008 CSC 31, [2008] 2 R.C.S. 163; *R. c. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *R. c. Dubois*, C.S. Qc, 8 décembre 1982; *R. c. R.N.S.*, 2000 CSC 7, [2000] 1 R.C.S. 149.

Citée par la juge Karakatsanis (dissidente)

R. c. L. (J.-J.), [1998] R.J.Q. 971; *R. c. Belzil*, [1989] R.J.Q. 1117; *R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *R. c. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. c. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. c. Yusuf*, 2011 BCSC 626; *R. c. G.C.D.*, 2011 MBQB 235, 271 Man. R. (2d) 41; *R. c. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. c. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. c. E.H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. c. Palacios*, 2012 ONCJ 195; *R. c. Simmonds*, 2018 BCCA 205, 415 C.R.R. (2d) 88; *R. c. F.C.*, 2018 ONSC 561; *R. c. Boudreau*, 2012 ONCJ 322; *R. c. D.P.*, 2014 ONSC 386; *R. c. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. c. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906; *Black-Clawson International Ltd. c. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089.

2019 SCC 47 (CanLII)

2019 SCC 47 (CanLII)

Statutes and Regulations Cited

Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 3.
Canadian Bill of Rights, S.C. 1960, c. 44.
Canadian Charter of Rights and Freedoms, ss. 7, 8, 10(*b*) 11, 12.
Criminal Code, R.S.C. 1970, c. C-34, ss. 157 [rep. & sub. c. 19 (3rd Supp.), s. 4], 246.1(1)(*a*).
Criminal Code, R.S.C. 1985, c. C-46, ss. 151, 161(1)(c), 271, 718.1, 718.2(b), (d), (e), 742.1 [ad. S.C. 1995, c. 22, s. 6; sub. S.C. 2012, c. 1, s. 34].
Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44(e) [previously S.C. 1967-68, c. 7, s. 37(*e*)].
Supreme Court Act, R.S.C. 1985, c. S-26, ss. 40(1), 76.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 8, 10*b*), 11, 12.
Code criminel, S.R.C. 1970, c. C-34, art. 157 [abr. & rempl. c. 19 (3e suppl.), art. 4], 246.1(1)*a*).
Code criminel, L.R.C. 1985, c. C-46, art. 151, 161(1)c), 271, 718.1, 718.2b), d), e), 742.1 [aj. L.C. 1995, c. 22, art. 6; rempl. L.C. 2012, c. 1, art. 34].
Déclaration canadienne des droits, S.C. 1960, c. 44.
Loi d'interprétation, L.R.C. 1985, c. I-21, art. 43, 44e) [auparavant S.C. 1967-1968, c. 7, art. 37*e*)].
Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada, L.C. 2005, c. 32, art. 3.
Loi sur la Cour suprême, L.R.C. 1985, c. S-26, art. 40(1), 76.

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 7.
International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 15(1).

Traités et autres instruments internationaux

Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 213 R.T.N.U. 221 [la *Convention européenne des droits de l'homme*], art. 7.
Pacte international relatif aux droits civils et politiques, R.T. Can. 1976 nº 47, art. 15(1).

Authors Cited

Canada. Meeting of Officials on the Constitution. *Canadian Charter of Rights and Freedoms (Draft for Discussion Purposes Only)*, div. III. Ottawa, 1979.
Canada. Senate and House of Commons. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 47, 1st Sess., 32nd Parl., January 28, 1981, pp. 65-69.
Canada. *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada*. Ottawa: Government of Canada, 1980.
Canada. The Right Honourable Pierre Elliott Trudeau. *The Constitution and the People of Canada: An approach to the Objectives of Confederation, the Rights of People and the Institutions of Government*. Ottawa: Queen's Printer, 1969.
Canadian Oxford Dictionary, 2nd ed. by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, "lesser".
Chevrette, François, Hugo Cyr and François Tanguay-Renaud. "La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive", in Gérald-A. Beaudoin and Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. Markham, Ont.: LexisNexis Butterworths, 2005.

Doctrine et autres documents cités

Canada. *La Constitution canadienne 1980 : Projet de résolution concernant la Constitution du Canada*, Ottawa, Gouvernement du Canada, 1980.
Canada. Le Très Honorable Pierre Elliott Trudeau. *La Constitution Canadienne et le Citoyen : Un aperçu des objectifs de la Confédération, des droits des individus et des institutions gouvernementales*, Ottawa, Imprimeur de la Reine, 1969.
Canada. Réunion de fonctionnaires sur la Constitution. *La Charte canadienne des droits et libertés (Avant-projet pour étude seulement)*, section III, Ottawa, 1979.
Canada. Sénat et Chambre des communes. *Procès-verbaux et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada*, nº 47, 1re sess., 32e lég., 28 janvier 1981, p. 65-69.
Canadian Oxford Dictionary, 2nd ed. by Katherine Barber, ed., Don Mills (Ont.), Oxford University Press, 2004, « *lesser* ».
Chevrette, François, Hugo Cyr et François Tanguay-Renaud. « La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive », dans Gérald-A. Beaudoin et Errol Mendes, dir., *Charte canadienne des droits et libertés*, 4e éd., Markham, (Ont.), LexisNexis Butterworths, 2005.

Collins Canadian Dictionary. Toronto: HarperCollins, 2010, "lesser".

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2018, release 1).

McLeod, Roderick M., et al. *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences*, vol. 4. Toronto: Carswell, 1983 (loose-leaf updated 2019, release 5).

Petit Robert: dictionnaire alphabétique et analogique de la langue française, nouvelle éd. Paris: Le Robert, 2012, "*le moins*".

Vauclair, Martin and Tristan Desjardins. *Traité général de preuve et de procédure pénales*, 26e éd. Montréal: Yvon Blais, 2019.

Westen, Peter. "*Lex Mitior*: Converse of *Ex Post Facto* and Window into Criminal Desert" (2015), 18 *New Crim. L. Rev.* 167.

MOTION to proceed with the appeal despite the respondent's death. Motion allowed, Abella, Karakatsanis and Brown JJ. dissenting.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, St-Pierre and Mainville JJ.A.), 2018 QCCA 21, 43 C.R. (7th) 216, [2018] AZ-51456758, [2018] J.Q. nº 73 (QL), 2018 CarswellQue 55 (WL Can.), affirming the sentencing decision of Vanchestein J., 2017 QCCQ 7015, [2017] AZ-51400728, [2017] J.Q. nº 8287 (QL), 2017 CarswellQue 6146 (WL Can.). Appeal allowed, Abella, Karakatsanis and Brown JJ. dissenting.

Maxime Hébrard and *Sylvie Villeneuve*, for the appellant.

Nicolas Lemyre-Cossette and *Lida Sara Nouraie*, for the respondent.

Michael Perlin and *Kathleen Farrell*, for the intervener the Attorney General of Ontario.

Gabriel Babineau and *Vincent Paquet*, for the intervener Association québécoise des avocats et avocates de la défense.

Breana Vandebeek and *Marianne Salih*, for the intervener the Criminal Lawyers' Association.

Collins Canadian Dictionary, Toronto, HarperCollins, 2010, « *lesser* ».

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 5th ed. Supp., Scarborough (Ont.), Thomson/Carswell, 2007 (updated 2018, release 1).

McLeod, Roderick M., et al. *The Canadian Charter of Rights : The Prosecution and Defence of Criminal and Other Statutory Offences*, vol. 4, Toronto, Carswell, 1983 (loose-leaf updated 2019, release 5).

Petit Robert : dictionnaire alphabétique et analogique de la langue française, nouvelle éd., Paris, Le Robert, 2012, « le moins ».

Vauclair, Martin et Tristan Desjardins. *Traité général de preuve et de procédure pénales*, 26e éd., Montréal, Yvon Blais, 2019.

Westen, Peter. « *Lex Mitior* : Converse of *Ex Post Facto* and Window into Criminal Desert » (2015), 18 *New Crim. L. Rev.* 167.

REQUÊTE en poursuite de l'instance malgré le décès de l'intimé. Requête accueillie, les juges Abella, Karakatsanis et Brown sont dissidents.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Dutil, St-Pierre et Mainville), 2018 QCCA 21, 43 C.R. (7th) 216, [2018] AZ-51456758, [2018] J.Q. nº 73 (QL), 2018 CarswellQue 55 (WL Can.), qui a confirmé le jugement sur la peine rendu par le juge Vanchestein, 2017 QCCQ 7015, [2017] AZ-51400728, [2017] J.Q. nº 8287 (QL), 2017 CarswellQue 6146 (WL Can.). Pourvoi accueilli, les juges Abella, Karakatsanis et Brown sont dissidents.

Maxime Hébrard et *Sylvie Villeneuve*, pour l'appelante.

Nicolas Lemyre-Cossette et *Lida Sara Nouraie*, pour l'intimé.

Michael Perlin et *Kathleen Farrell*, pour l'intervenant le procureur général de l'Ontario.

Gabriel Babineau et *Vincent Paquet*, pour l'intervenante l'Association québécoise des avocats et avocates de la défense.

Breana Vandebeek et *Marianne Salih*, pour l'intervenante Criminal Lawyers' Association.

2019 SCC 47 (CanLII)

The judgment of Wagner C.J. and Moldaver, Côté and Martin JJ. was delivered by

MARTIN J. —

I. Overview

[1] Every person charged with an offence in Canada enjoys certain basic rights. One such right is contained in s. 11(*i*) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), which grants a person found guilty of an offence the right "to the benefit of the lesser punishment" "if the punishment . . . has been varied between the time of commission [of the offence] and the time of sentencing". Relying on s. 11(*i*), the respondent Rosaire Poulin asserts the constitutional right to receive a conditional sentence. This punishment was not applicable under the laws in force when he committed his sexual offences between 1979 and 1987 or, according to the parties, when he was sentenced for those offences in 2017. However, it was applicable for a discrete period between those two times. In essence, Mr. Poulin argues that s. 11(*i*) entitles him not only to the lesser of the punishments under the laws in force at the time of his offences and the time of his sentencing but, further, to an *even lesser* punishment that was temporarily applicable to his offences during the decades that elapsed before he was held accountable for his crimes. Mr. Poulin claims the right to this punishment even though it bears no temporal connection to his offending conduct or to his sentencing, and even though the record does not show he took steps in reliance on this punishment in his interactions with the criminal justice system. Mr. Poulin did not, for instance, confess or enter a plea when a conditional sentence was applicable to his offences.

[2] This appeal therefore asks to what an offender is entitled under s. 11(*i*) of the *Charter*. Based on the nature and purposes of this particular constitutional right, which punishments are to be considered when

Version française du jugement du juge en chef Wagner et des juges Moldaver, Côté et Martin rendu par

LA JUGE MARTIN —

I. Aperçu

[1] Au Canada, tout inculpé jouit de certains droits fondamentaux. L'un de ces droits figure à l'al. 11*i*) de la *Charte canadienne des droits et libertés* (« *Charte* »), qui confère à quiconque est déclaré coupable d'une infraction le droit « de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence ». Se fondant sur l'al. 11*i*), l'intimé Rosaire Poulin invoque le droit constitutionnel d'être condamné à une peine d'emprisonnement avec sursis. Cette peine ne s'appliquait pas suivant les lois en vigueur lorsqu'il a commis ses infractions d'ordre sexuel entre 1979 et 1987 ou, selon les parties, lorsqu'il a été condamné pour ces infractions en 2017. Elle s'est toutefois appliquée pendant une période précise entre ces deux moments. Essentiellement, M. Poulin soutient que l'al. 11*i*) lui garantit non seulement le droit de bénéficier de la peine la moins sévère prévue par les lois en vigueur au moment de la perpétration de ses infractions et à celui de sa sentence, mais aussi le droit de bénéficier de la peine *encore moins sévère* qui s'est appliquée temporairement à ses infractions au cours des décennies qui se sont écoulées avant qu'il soit tenu responsable de ses crimes. M. Poulin revendique le droit de bénéficier de cette peine en dépit de l'absence de lien temporel entre celle-ci et les actes répréhensibles qu'il a commis ou sa sentence, et même si le dossier ne montre pas qu'il a pris des mesures en s'appuyant sur cette peine au cours de ses démêlés avec le système de justice pénale. M. Poulin n'a pas, par exemple, avoué ses crimes ou inscrit de plaidoyer lorsque la peine d'emprisonnement avec sursis s'appliquait aux infractions qu'il a commises.

[2] Le présent pourvoi porte donc sur la teneur du droit que garantit l'al. 11*i*) de la *Charte* à un contrevenant. Compte tenu de la nature et des objectifs de ce droit constitutionnel particulier, quelles peines

2019 SCC 47 (CanLII)

determining the "lesser" one to which the accused is entitled? Does s. 11(*i*) confer:

- a "binary" right — which involves a comparison of the punishments under the laws in force at two set points in time (commission of the offence and sentencing) and the right to receive the lesser of these punishments; or

- a "global" right — which involves a review of *all* punishments that have existed for the offence between its commission and sentencing, and the right to receive the *least severe* punishment in that entire span of time?

[3] I conclude that, properly interpreted, s. 11(*i*) confers a binary right, not a global one. Section 11(*i*) entitles an offender to the lesser of (1) the punishment under the laws in force when the offender committed the offence, and (2) the punishment under the laws in force when the offender is sentenced, as these punishments are tethered to two meaningful points in time. The former reflects the jeopardy or legal risk the offender took by offending. That punishment established, in advance of the offender's conduct, the legal consequences that would flow from that chosen conduct. The latter is the punishment that society considers just at the precise moment the court is called upon to pass a sentence. It provides the contours for a sentence that reflects society's most up-to-date view of the gravity of the offence and the degree of responsibility of the offender. As these two punishments are clearly connected to the offender's conduct and criminality, there is a strong and principled basis for the offender to have the constitutional right to receive the lesser of the punishments at these two points in time.

[4] By contrast, there is no principled basis for offenders to enjoy the automatic constitutional right to a previous punishment which is lower than *both* the one to which they exposed themselves when they committed the offence and the one that reflects society's

doivent être prises en considération lors de la détermination de la peine « la moins sévère » à laquelle a droit l'accusé? L'alinéa 11*i*) confère-t-il l'un des droits suivants :

- un droit « binaire », qui repose sur une comparaison des peines prévues par les lois en vigueur à deux moments précis (soit le moment de la perpétration de l'infraction et celui de la sentence) et le droit de bénéficier de la moins sévère de ces peines?

- un droit « global », qui repose sur un examen de *toutes* les peines prévues pour sanctionner l'infraction entre le moment de sa perpétration et celui de la sentence et le droit de bénéficier de la peine *la moins sévère qui soit* durant l'ensemble de la période visée?

[3] Je conclus que, correctement interprété, l'al. 11*i*) confère un droit binaire et non un droit global. L'alinéa 11*i*) confère au contrevenant le droit de bénéficier de la peine la moins sévère entre (1) la peine prévue par les lois en vigueur au moment de la perpétration de l'infraction, et (2) la peine prévue par les lois en vigueur au moment de la sentence, puisque ces peines sont liées à deux moments significatifs. La première peine tient compte du risque de subir un procès ou le risque juridique qu'a pris le contrevenant en commettant l'infraction. Elle établit, avant que le contrevenant n'agisse, les conséquences juridiques qui découleront de la conduite que le contrevenant aura choisi d'adopter. La deuxième peine est celle que la société estime juste au moment précis où la cour est appelée à la prononcer. Elle fixe les contours d'une peine qui reflète l'opinion la plus actuelle de la société quant à la gravité de l'infraction commise et au degré de responsabilité du contrevenant. Ces deux peines étant manifestement liées à la conduite et à la criminalité du contrevenant, de solides raisons de principe militent pour que ce dernier ait le droit constitutionnel de bénéficier de la moins sévère des peines qui étaient en vigueur à ces deux moments précis.

[4] En revanche, il n'y a aucune raison de principe d'accorder aux contrevenants le droit constitutionnel de bénéficier automatiquement d'une peine antérieurement applicable qui est *à la fois* moins sévère que celle à laquelle ils se sont exposés lorsqu'ils

2019 SCC 47 (CanLII)

current sense of the gravity of the offence and the responsibility of the offenders. Reading s. 11(*i*) in a manner that would grant an offender the right to the most lenient punishment that existed for the offence at any point between its commission and sentencing would both exceed and distort the purposes of s. 11(*i*). As I will explain, these purposes are the rule of law and fairness. Far from supporting a global reading of s. 11(*i*), these purposes strongly militate towards reading s. 11(*i*) in a manner that sets the applicable punishment at the time of the offence as *the ceiling*, and entitles the offender to a more clement punishment under the laws in force at the time of sentencing, if one exists.

[5] As a result, I conclude that s. 11(*i*) does not resurrect any temporary reductions in punishment which came after the offence and which bear no connection whatsoever to the offender's conduct or to contemporary sentencing standards. By granting the offender specific retrospective access to the applicable punishment at the time of the offence, s. 11(*i*) need not and does not open the door to the lowest identifiable punishment that has ever applied to the offence since the offender committed it. Section 11(*i*) did not constitutionalize the right to past punishments that Parliament has since discarded or amended. The legal rights reflected in our *Charter* represent the core tenets of fairness in our criminal justice system. The right to comb the past for the most favourable punishment does not belong among these rights.

[6] I would therefore allow the Crown's appeal. Mr. Poulin was not eligible for the conditional sentence imposed on him as it was not applicable to his offences under the sentencing provisions in force either at the time of commission or, according to the parties, of his sentencing. However, given

ont commis leur infraction et que celle qui reflète l'opinion actuelle de la société quant à la gravité de l'infraction commise et à la responsabilité des contrevenants. Interpréter l'al. 11*i*) de manière à accorder au contrevenant le droit de bénéficier de la peine la plus clémente qui se soit appliquée à l'infraction, à un moment donné, entre la perpétration de celle-ci et sa sentence excéderait et déformerait les objets de l'al. 11*i*). Comme je l'expliquerai, ces objets sont la primauté du droit et l'équité. Ces objets, qui sont loin d'appuyer une interprétation globale de l'al. 11*i*), militent fortement en faveur d'une interprétation de cette disposition selon laquelle la peine applicable au moment de la perpétration de l'infraction est la *peine maximale* qui peut être infligée, et le contrevenant a le droit de bénéficier d'une peine plus clémente prévue par les lois en vigueur au moment de sa sentence si une telle peine existe.

[5] Par conséquent, je conclus que l'al. 11*i*) ne fait pas renaître tout adoucissement temporaire de peine qui est survenu après la perpétration de l'infraction et qui n'a aucun lien avec la conduite du contrevenant ou les normes contemporaines en matière de détermination de la peine. En conférant au contrevenant le droit exprès de bénéficier rétrospectivement de la peine applicable au moment de la perpétration de l'infraction, l'al. 11*i*) n'exige pas et ne permet pas que soit appliquée la peine la moins sévère qui ait jamais été applicable pour sanctionner l'infraction depuis que le contrevenant a commis celle-ci. L'alinéa 11*i*) n'a pas constitutionnalisé le droit de bénéficier de peines antérieurement applicables que le législateur a depuis écartées ou modifiées. Les droits enchâssés dans la *Charte* représentent les préceptes fondamentaux d'équité dans notre système de justice pénale. Le droit de passer au peigne fin les lois antérieures pour trouver la peine la plus clémente qui soit ne peut faire partie de ces droits.

[6] Je suis donc d'avis d'accueillir le pourvoi du ministère public. M. Poulin n'était pas admissible à la peine d'emprisonnement avec sursis qui lui a été infligée, car elle ne s'appliquait pas à ses infractions selon les dispositions sur la détermination de la peine en vigueur au moment de la perpétration

2019 SCC 47 (CanLII)

Mr. Poulin's recent death, I decline to pass a different sentence or remit the matter for sentencing.

des infractions ou, selon les parties, au moment de sa sentence. Toutefois, compte tenu du décès récent de M. Poulin, je refuse de prononcer une peine différente ou de renvoyer l'affaire pour détermination d'une nouvelle peine.

II. Facts and Judicial History

II. Faits et historique judiciaire

[7] In 2016, Mr. Poulin was found guilty of historical sexual offences: two counts of gross indecency and one count of sexual assault, contrary to ss. 157 and 246.1(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34. Mr. Poulin committed the offences of gross indecency between 1979 and 1983 and the offence of sexual assault between 1983 and 1987 when the complainant was 7 to 15 years old and Mr. Poulin was 44 to 51 years old.

[7] En 2016, M. Poulin a été reconnu coupable d'infractions d'ordre sexuel historiques : deux chefs de grossière indécence et un chef d'agression sexuelle, qui étaient des infractions prévues à l'art. 157 et à l'al. 246.1(1)*a*) du *Code criminel*, S.R.C. 1970, c. C-34. M. Poulin a commis les infractions de grossière indécence entre 1979 et 1983 et l'infraction d'agression sexuelle entre 1983 et 1987, à l'époque où le plaignant était âgé entre 7 et 15 ans et qu'il avait lui-même entre 44 et 51 ans.

[8] By the time of his sentencing, Mr. Poulin was 82 years old and suffering from a number of significant health problems. At his sentencing hearing, Mr. Poulin conceded that a prison sentence of three and a half years would be appropriate for his crimes. However, he argued that, exceptionally, he should receive a conditional sentence — i.e. a sentence of less than two years, to be served in the community — because of his health problems.

[8] Au moment de sa sentence, M. Poulin était âgé de 82 ans et souffrait de plusieurs problèmes de santé importants. À l'audience de détermination de sa peine, M. Poulin a reconnu qu'une peine d'emprisonnement de trois ans et demi serait indiquée eu égard à ses crimes. Toutefois, compte tenu de ses problèmes de santé, il a fait valoir qu'il devrait exceptionnellement être condamné à une peine d'emprisonnement avec sursis — c'est-à-dire une peine de moins de deux ans à être purgée dans la collectivité.

[9] The sentencing judge accepted Mr. Poulin's position and sentenced him to a conditional sentence of two years less a day for the two counts of gross indecency. This is the sentence at issue in this appeal. The sentence imposed for the count of sexual assault — a suspended sentence with two years' probation, together with ancillary orders — is not at issue.

[9] Le juge chargé de la détermination de la peine a accepté le point de vue de M. Poulin et a condamné ce dernier à une peine d'emprisonnement avec sursis de deux ans moins un jour pour ce qui est des deux chefs de grossière indécence. Cette peine est en cause dans le présent pourvoi. La peine infligée relativement au chef d'agression sexuelle — c'est-à-dire une peine avec sursis assortie de deux ans de probation ainsi que la délivrance d'ordonnances accessoires — n'est toutefois pas en cause.

[10] Conditional sentences did not exist when Mr. Poulin committed his acts of gross indecency. The conditional sentence entered into force as a form of sentence in 1996 (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22, s. 6). The parties agree that a conditional sentence was no longer applicable to

[10] La peine d'emprisonnement avec sursis n'existait pas à l'époque où M. Poulin a commis ses actes de grossière indécence. L'emprisonnement avec sursis est entré en vigueur comme peine en 1996 (*Loi modifiant le Code criminel (détermination de la peine) et d'autres lois en conséquence*, L.C. 1995, c. 22, art. 6). Les parties conviennent que la peine

2019 SCC 47 (CanLII)

the offence of gross indecency, according to the provisions in force, by the time Mr. Poulin was charged, convicted and sentenced (2014 to 2017). Their view is that, when gross indecency was repealed from the *Criminal Code*, R.S.C. 1985, c. C-46, in 1988 (R.S.C. 1985, c. 19 (3rd Supp.), s. 4, which came into force in 1988), some conduct that had amounted to gross indecency, including Mr. Poulin's, was now captured under other sexual offence provisions, such as ss. 151 and 271 of the *Criminal Code*. Since conditional sentences have been made statutorily unavailable for such sexual offences (see *Criminal Code*, ss. 742.1(b), 151 and 271), the parties consider the conditional sentence to have equally been made unavailable for the indictable acts of gross indecency that are now criminalized under these modern sexual offences. Put differently, the parties agree that the current restriction on conditional sentences for sexual offences extends to Mr. Poulin's offences of gross indecency. I do not comment on this interpretation as it is not an issue that has been raised before this Court.

[11] The sentencing judge did not analyze the threshold question of whether a conditional sentence was actually available for Mr. Poulin's gross indecencies. Rather, the judge considered that s. 11(*i*) entitled Mr. Poulin to the benefit of a lesser sentence that was applicable to his offences in the interval between their commission and sentencing (2017 QCCQ 7015, at paras. 26-27 (CanLII)).

[12] The Crown appealed, arguing, among other things, that a conditional sentence was not available to Mr. Poulin under s. 11(*i*) of the *Charter*. The Court of Appeal rejected the Crown's argument. It applied its earlier decision in *R. v. Belzil*, [1989] R.J.Q. 1117 (C.A.), which took for granted that s. 11(*i*) confers a global right (2018 QCCA 21, 43 C.R. (7th) 216, at paras. 32-33; *Belzil*, at p. 1139). Thus, the Court of Appeal held that s. 11(*i*) gave

d'emprisonnement avec sursis ne s'appliquait plus à l'infraction de grossière indécence, d'après les dispositions en vigueur, lorsque M. Poulin a été accusé, déclaré coupable et condamné (de 2014 à 2017). Elles sont d'avis que, lorsque l'infraction de grossière indécence a été supprimée du *Code criminel*, L.R.C. 1985, c. C-46, en 1988 (L.R.C. 1985, c. 19 (3e suppl.), art. 4, entré en vigueur en 1988), certains actes qui constituaient de la grossière indécence, dont ceux commis par M. Poulin, sont alors tombés sous le coup d'autres dispositions relatives aux infractions d'ordre sexuel, dont les art. 151 et 271 du *Code criminel*. Puisque la peine d'emprisonnement avec sursis ne s'appliquait plus à ce type d'infraction d'ordre sexuel (voir le *Code criminel*, al. 742.1b), art. 151 et 271), les parties estiment que la peine d'emprisonnement avec sursis ne s'appliquait pas non plus aux actes de grossière indécence qui constituent maintenant des actes criminels aux termes de ces dispositions modernes relatives aux infractions d'ordre sexuel. Autrement dit, les parties conviennent que la restriction actuelle applicable aux peines d'emprisonnement avec sursis qui visent à sanctionner les infractions d'ordre sexuel s'applique également aux infractions de grossière indécence commises par M. Poulin. Je ne commenterai pas cette interprétation, qui ne fait pas partie des questions soulevées devant notre Cour.

[11] Le juge chargé de la détermination de la peine n'a pas analysé la question préliminaire de savoir si une peine d'emprisonnement avec sursis pouvait effectivement s'appliquer aux actes de grossière indécence commis par M. Poulin. Le juge a plutôt considéré que l'al. 11*i*) accordait à M. Poulin le droit de bénéficier de la peine la moins sévère qui s'appliquait à ses infractions dans l'intervalle entre le moment où celles-ci ont été perpétrées et celui de sa sentence (2017 QCCQ 7015, par. 26-27 (CanLII)).

[12] Le ministère public s'est pourvu en appel de cette décision, alléguant, entre autres choses, qu'une peine d'emprisonnement avec sursis ne pouvait pas être infligée à M. Poulin selon l'al. 11*i*) de la *Charte*. La Cour d'appel a rejeté l'argument du ministère public. Elle a plutôt appliqué la décision qu'elle a rendue dans *R. c. Belzil*, [1989] R.J.Q. 1117 (C.A.), où elle a tenu pour acquis que l'al. 11*i*) conférait un droit global (2018 QCCA 21, 43 C.R. (7th) 216,

2019 SCC 47 (CanLII)

Mr. Poulin the right to a sentence that was not on the books at the time of his offences, and that had been expressly repealed for his offences by the time of his sentencing.

par. 32-33; *Belzil*, p. 1139). Par conséquent, la Cour d'appel a conclu que l'al. 11*i*) conférait à M. Poulin le droit de bénéficier d'une peine qui n'était pas en vigueur au moment de la perpétration de ses infractions et qui, au moment de sa sentence, avait été expressément exclue des peines susceptibles de lui être infligées.

[13] The Crown now appeals to this Court by leave.

[13] Le ministère public se pourvoit maintenant devant notre Cour avec l'autorisation de cette dernière.

[14] On February 22, 2019, shortly before the hearing of this appeal, Mr. Poulin passed away. The appeal proceeded nonetheless, accompanied by a Crown motion for the Court to adjudicate the appeal even though it had become factually moot.

[14] Le 22 février 2019, peu avant l'audition du présent pourvoi, M. Poulin est décédé. Le pourvoi a néanmoins été instruit et le ministère public a présenté une requête visant à ce que la Cour tranche le pourvoi même s'il est désormais théorique sur le plan factuel.

III. Issues

III. Questions en litige

[15] This appeal raises two issues:

A. Should this Court exercise its discretion to decide this moot appeal?

B. Does s. 11(*i*) of the *Charter* constitutionalize a binary or a global right?

[15] Le présent pourvoi soulève deux questions :

A. Notre Cour doit-elle exercer son pouvoir discrétionnaire pour trancher le présent pourvoi devenu théorique?

B. L'alinéa 11*i*) de la *Charte* constitutionnalise-t-il un droit binaire ou un droit global?

IV. Analysis

IV. Analyse

A. *Should This Court Exercise Its Discretion to Decide This Moot Appeal?*

A. *Notre Cour doit-elle exercer son pouvoir discrétionnaire pour trancher le présent pourvoi devenu théorique?*

[16] As outlined above, Mr. Poulin passed away, a few weeks before the hearing of this appeal. Mr. Poulin's death occurred after the appellant Crown had filed its factum and after this Court had granted leave to intervene to the interveners.

[16] Comme je l'ai déjà mentionné, M. Poulin est décédé quelques semaines avant l'audition du présent pourvoi. Le décès de M. Poulin est survenu après que le ministère public appelant ait déposé son mémoire et que notre Cour ait autorisé les intervenants à intervenir.

[17] Upon learning of Mr. Poulin's death, the Crown filed a motion to proceed with its appeal, in accordance with s. 76 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. Mr. Poulin's counsel wrote to the Crown saying that he would proceed to file the respondent's appeal materials by the deadline applicable to Mr. Poulin, which he ultimately did. Mr. Poulin's

[17] Après avoir appris le décès de M. Poulin, le ministère public a déposé une requête en vue de la poursuite de l'instance, conformément à l'art. 76 de la *Loi sur la Cour suprême*, L.R.C. 1985, c. S-26. L'avocat de M. Poulin a écrit au ministère public pour l'informer qu'il déposerait les documents d'appel de l'intimé avant la date limite qui avait été imposée à

2019 SCC 47 (CanLII)

counsel later provided affidavit evidence confirming that Mr. Poulin's executor had instructed Mr. Poulin's counsel to continue representing Mr. Poulin's position on this appeal should this Court decide to hear it. The Crown's motion to proceed with the appeal was heard alongside the appeal. Mr. Poulin's counsel did not take a position on the motion to proceed.

M. Poulin, et c'est ce qu'il a finalement fait. Par la suite, l'avocat de M. Poulin a présenté une preuve par affidavit qui confirmait que l'exécuteur testamentaire de ce dernier lui avait demandé de continuer de représenter M. Poulin dans le présent pourvoi si notre Cour décidait d'instruire celui-ci. La requête présentée par le ministère public en vue de poursuivre l'instance a été instruite en même temps que le pourvoi. L'avocat de M. Poulin ne s'est pas prononcé sur la requête déposée en vue de poursuivre l'instance.

[18] The Crown appropriately concedes that this appeal is moot in light of Mr. Poulin's death. However, the Crown argues that this Court should exercise its discretion to adjudicate this appeal despite its mootness. I agree.

[18] Le ministère public reconnaît à juste titre que le présent pourvoi est théorique compte tenu du décès de M. Poulin. Il soutient cependant que notre Cour doit exercer son pouvoir discrétionnaire pour trancher le présent pourvoi en dépit de son caractère théorique. Je suis d'accord.

[19] In *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, this Court set out five (non-exhaustive) factors for determining whether there are exceptional circumstances warranting the adjudication of an appeal rendered moot by the accused's death. These factors are:

1. whether the appeal will proceed in a proper adversarial context;
2. the strength of the grounds of the appeal;
3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
   (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
   (b) a systemic issue related to the administration of justice;
   (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;

[19] Dans l'arrêt *R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385, notre Cour a énoncé cinq facteurs (non exhaustifs) servant à déterminer si des circonstances exceptionnelles justifient que la Cour statue sur un pourvoi devenu théorique par suite du décès de l'accusé. Ces facteurs sont les suivants :

1. l'existence d'un débat contradictoire approprié à la poursuite de l'instance en appel;
2. le sérieux des motifs d'appel;
3. l'existence de circonstances spéciales qui transcendent le décès de l'appelant ou de l'intimé, dont :
   a) une question de droit d'intérêt général, particulièrement s'il s'agit d'une question qui échappe ordinairement à l'examen en appel;
   b) une question de nature systémique ayant trait à l'administration de la justice;
   c) les conséquences accessoires pour la famille du défunt, tout autre intéressé ou le public;
4. la question de savoir si la nature de l'ordonnance que pourrait rendre la cour d'appel justifie l'affectation de ses ressources limitées au règlement d'un appel théorique;

2019 SCC 47 (CanLII)

5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the Court in free-standing, legislative-type pronouncements more properly left to the legislature itself. [para. 50]

[20] Overall, these factors militate towards adjudicating the Crown's appeal.

[21] First, despite Mr. Poulin's death, Mr. Poulin's counsel submitted a full-length factum advancing Mr. Poulin's position and advocated for that position at the hearing of this appeal. The interveners the Criminal Lawyers' Association ("CLA") and the Association québécoise des avocats et avocates de la défense ("AQAAD") also provided the Court with perspectives aligned with Mr. Poulin's. Thus, this Court has had the benefit of adversarial submissions in this case.

[22] Second, the appellant's case is clearly more than "arguable" (see *R. v. MacLellan*, 2019 NSCA 2, 369 C.C.C. (3d) 482, at para. 96). The Crown's appeal raises an important constitutional question that has not yet received comprehensive treatment in the jurisprudence. Indeed, the Crown points out that the existing s. 11(*i*) decisions addressing the binary/global question, while consistent, do not engage with, let alone identify, the underlying purposes of the right. This is a critical shortcoming because, as discussed below, the interpretation of a *Charter* right hinges on the right's purposes. There is, accordingly, "real substance" to the Crown's appeal and the Crown raises a serious issue (*ibid.*).

[23] Third, the proper interpretation of s. 11(*i*) is "a legal issue of general public importance" which "transcend[s] the death" of Mr. Poulin. The binary/global question is the sole question on appeal in this case. By granting leave to appeal, this Court signalled that it considers the binary/global question to be of public importance and to merit closer analysis (see *Supreme Court Act*, s. 40(1)). Further, and unlike

5. la question de savoir si, en poursuivant l'instance en appel, la cour n'excède pas la fonction judiciaire, qui est de trancher des différends concrets, et est amenée à se prononcer sur des questions de type législatif autonomes qu'il vaut mieux laisser au législateur. [par. 50]

[20] Dans l'ensemble, ces facteurs justifient que la Cour statue sur le pourvoi du ministère public.

[21] Premièrement, malgré le décès de M. Poulin, l'avocat de ce dernier a présenté un mémoire complet dans lequel est exposée la position de M. Poulin et il a défendu cette position à l'audition du présent pourvoi. Les intervenantes Criminal Lawyers' Association (« CLA ») et Association québécoise des avocats et avocates de la défense (« AQAAD ») ont également présenté des observations qui cadraient avec la position de M. Poulin. Par conséquent, notre Cour a eu l'avantage d'entendre des observations contradictoires en l'espèce.

[22] Deuxièmement, il est évident que le cas de l'appelant est plus que [TRADUCTION] « défendable » (voir *R. c. MacLellan*, 2019 NSCA 2, 369 C.C.C. (3d) 482, par. 96). Le pourvoi du ministère public soulève une question constitutionnelle importante qui n'a pas encore été traitée à fond dans la jurisprudence. En effet, le ministère public souligne que, bien qu'elles soient concordantes, les décisions existantes relatives à l'al. 11*i*) qui traitent de la question du droit binaire ou global n'abordent pas, et définissent encore moins, les objets qui sous-tendent le droit garanti par cette disposition. Cette lacune est capitale car, comme je l'explique ci-dessous, l'interprétation d'un droit garanti par la *Charte* dépend de son objet. Par conséquent, le pourvoi du ministère public est [TRADUCTION] « bien fondé » et le ministère public soulève une question sérieuse (*ibid.*).

[23] Troisièmement, l'interprétation juste de l'al. 11*i*) est « une question de droit d'intérêt général » qui « transcend[e] le décès » de M. Poulin. La question du droit binaire ou global est la seule à trancher en l'espèce. En octroyant l'autorisation de former le présent pourvoi, notre Cour a indiqué qu'elle estime que la question du droit binaire ou global est d'intérêt public et qu'elle mérite de faire

2019 SCC 47 (CanLII)

in *Smith*, the question in this appeal is not restricted to the facts of the case. To the contrary, the proper interpretation of this *Charter* provision engages a systemic issue related to the administration of justice, since s. 11(*i*) applies to all sentencing proceedings. As a result, the Crown, acting on behalf of the public, has a strong interest in seeing the question resolved (see *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at p. 97). Moreover, this appeal has meaningful collateral consequences; the proper interpretation of s. 11(*i*) touches not only all persons found guilty of offences and their families, but also all persons interested in the sentencing of those offenders — which extends beyond victims and their loved ones to society at large. As such, it is "in the public interest to address the merits in order to settle the state of the law" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 364).

l'objet d'une analyse plus poussée (voir la *Loi sur la Cour suprême*, par. 40(1)). En outre, contrairement à l'arrêt *Smith*, la question à trancher dans le présent pourvoi n'est pas propre aux faits de l'espèce. Au contraire, l'interprétation juste de cette disposition de la *Charte* met en jeu une question de nature systémique ayant trait à l'administration de la justice, car l'al. 11*i*) s'applique à toutes les procédures de détermination de la peine. Par conséquent, le ministère public, qui agit au nom du public, a tout intérêt à ce que cette question soit résolue (voir *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90, p. 97). De plus, le présent pourvoi a des conséquences accessoires importantes; en effet, l'interprétation appropriée de l'al. 11*i*) touche non seulement toutes les personnes déclarées coupables d'infractions et leurs familles, mais aussi toutes les personnes qui s'intéressent à la sentence de ces contrevenants, ce qui comprend la société en général en plus des victimes et de leurs proches. Ainsi, il est « dans l'intérêt du public de statuer sur le fond de la question pour déterminer l'état du droit » (*Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, p. 364).

[24] Fourth, the value of this Court's ruling on the proper interpretation of s. 11(*i*) clearly outweighs any concerns about limited judicial resources. At this stage and in these circumstances, the option most respectful of all participants' resources is to decide the appeal. While a decision not to adjudicate this appeal might save *this* Court some resources in the short term, it would undoubtedly cost *other* courts and justice system participants additional resources in the longer term. It is much more efficient and fair for this Court to decide this question of national importance now, rather than cause future litigants and lower courts to expend further resources debating this question until, inevitably, it reaches this Court anew. There is a clear "social cost in leaving the matter undecided" which outweighs any small cost to this Court associated with deciding the appeal (*Borowski*, at pp. 361-62).

[24] Quatrièmement, la valeur de la décision de notre Cour sur l'interprétation appropriée de l'al. 11*i*) l'emporte sans conteste sur toute préoccupation quant aux ressources judiciaires limitées. À ce stade et dans les circonstances, la solution la plus respectueuse des ressources de toutes les parties consiste à trancher le pourvoi. Bien que *notre* Cour puisse économiser certaines ressources à court terme si une décision de ne pas trancher le présent pourvoi était rendue, il ne fait aucun doute qu'une telle décision obligerait d'*autres* cours et les acteurs du système de justice à dépenser des ressources supplémentaires à long terme. Il est beaucoup plus efficace et juste que notre Cour tranche aujourd'hui cette question d'importance nationale que d'obliger les futurs plaideurs et les tribunaux d'instance inférieure à consacrer des ressources supplémentaires au débat de cette question jusqu'à ce que celle-ci soit inévitablement soumise à notre Cour de nouveau. De toute évidence, le « coût social de laisser une question sans réponse » l'emporte sur tous les menus frais que notre Cour pourrait engager pour trancher le pourvoi (*Borowski*, p. 361-362).

2019 SCC 47 (CanLII)

[25] Fifth, and finally, it is for the courts, not Parliament, to define the scope of *Charter* rights. Unlike in *Borowski*, this Court would not be intruding on the legislative role by answering the question put to it.

[26] Based on these five factors, I am satisfied that there is "a continuing controversy which, notwithstanding the death of the individual most directly affected by the appeal, requires resolution in the interests of justice" (*Smith*, at para. 4; see also para. 50). The Crown's factum, filed prior to Mr. Poulin's death, is exclusively concerned with the proper interpretation of s. 11(*i*), and not the sentencing of Mr. Poulin *per se*. This demonstrates that this appeal raises a pure question of law that stands on its own, independent of the now moot factual context that initially gave rise to it. Indeed, it bears almost all of the hallmarks of an appeal warranting adjudication despite its mootness: it is of "importance to the administration of criminal justice"; has "a constitutional dimension"; requires "the interpretation of a statutory provision . . . of frequent application"; and involves a matter "in the daily business of our trial courts" (*R. v. Beaton*, 2018 ONCA 924, at para. 14 (CanLII)). This is therefore one of those "rare and exceptional" cases in which the Court ought to exercise its discretion to adjudicate a moot criminal appeal (*Smith*, at para. 10). I would grant the motion to proceed with the appeal.

[27] In these reasons, I refer to the position advanced on behalf of Mr. Poulin as "Mr. Poulin's position", despite his death.

B. *Does Section 11(i) of the Charter Constitutionalize a Binary or a Global Right?*

[28] Section 11(*i*) of the *Charter* sits within a larger provision that protects "crucial fundamental rights" of the accused (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 558, per Wilson J.). Among the

[25] Cinquièmement, et enfin, il incombe aux tribunaux, et non au législateur, de définir la portée des droits garantis par la *Charte*. À la différence de l'arrêt *Borowski*, notre Cour n'empiéterait pas sur le rôle du législateur en tranchant la question dont elle est saisie.

[26] Compte tenu de ces cinq facteurs, je suis convaincue qu'en l'espèce, « une question demeure en litige et doit être tranchée dans l'intérêt de la justice malgré le décès de la personne la plus directement touchée par l'appel » (*Smith*, par. 4; voir également le par. 50). Le mémoire déposé par le ministère public avant le décès de M. Poulin porte exclusivement sur l'interprétation juste de l'al. 11*i*) et non sur la sentence de M. Poulin elle-même. Cela démontre que le présent pourvoi soulève une pure question de droit qui est indépendante du contexte factuel devenu maintenant théorique qui a donné naissance au départ à cette question. En effet, il présente presque toutes les caractéristiques d'un pourvoi qui doit être tranché en dépit de son caractère théorique : il est [TRADUCTION] « important pour l'administration de la justice criminelle »; il a « une dimension constitutionnelle »; il nécessite « l'interprétation d'une disposition législative [. . .] qui est appliquée fréquemment »; et il porte sur une question que « les tribunaux de première instance sont appelés à trancher quotidiennement » (*R. c. Beaton*, 2018 ONCA 924, par. 14 (CanLII)). Par conséquent, le présent pourvoi constitue l'un de ces cas où la Cour doit exercer son pouvoir discrétionnaire pour trancher un pourvoi en matière criminelle devenu théorique, ce qu'elle fait « rarement et à titre exceptionnel » (*Smith*, par. 10). Je suis d'avis d'accueillir la requête visant la poursuite du pourvoi.

[27] Dans les présents motifs, j'appelle la position présentée au nom de M. Poulin la « position de M. Poulin » même s'il est décédé.

B. *L'alinéa 11i) de la Charte constitutionnalise-t-il un droit binaire ou un droit global?*

[28] L'alinéa 11*i*) de la *Charte* fait partie d'une disposition générale qui protège les « droits fondamentaux très importants » de l'accusé (*R. c. Wigglesworth*, [1987] 2 R.C.S. 541, p. 558, la juge

2019 SCC 47 (CanLII)

rights enshrined in s. 11 are the right to be presumed innocent (s. 11(*d*)); the right to a trial within a reasonable time (s. 11(*b*)); the right to trial by jury for certain serious offences (s. 11(*f*)); the right not to be compelled to be a witness against oneself (s. 11(*c*)); and the right not to be denied reasonable bail without just cause (s. 11(*e*)).

[29] Section 11(*i*) of the *Charter* states:

11. Any person charged with an offence has the right

. . .

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[30] The appellant Crown and the intervener the Attorney General of Ontario argue that s. 11(*i*) confers a binary right. In their view, the provision entitles the offender to the lesser of the punishments under the laws in force at two key points in time: commission of the offence and sentencing. The respondent Mr. Poulin and the interveners the CLA and the AQAAD claim that s. 11(*i*) confers a global right. On their view, the provision entitles the offender to receive the least onerous punishment that has existed for the offence since it was committed.

[31] Thus far, Canadian courts have favoured Mr. Poulin's approach. Courts across this country, including the Quebec Court of Appeal in this case, have consistently read s. 11(*i*) as conferring a global right (see, for instance, *Belzil*; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Yusuf*, 2011 BCSC 626; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271). Generally speaking, and as further detailed below, two factors have led these courts to conclude that s. 11(*i*) entitles an offender to receive a lesser punishment that was not applicable at the time of the offence's commission or of the offender's

Wilson). Parmi les droits consacrés à l'art. 11 figurent le droit d'être présumé innocent (al. 11*d*)), le droit d'être jugé dans un délai raisonnable (al. 11*b*)), le droit de bénéficier d'un procès avec jury pour certaines infractions graves (al. 11*f*)), le droit de ne pas être contraint de témoigner contre soi-même (al. 11*c*)), et le droit de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable (al. 11*e*)).

[29] L'alinéa 11*i*) de la *Charte* dispose :

11. Tout inculpé a le droit :

. . .

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[30] Le ministère public appelant et le procureur général de l'Ontario intervenant soutiennent que l'al. 11*i*) confère un droit binaire. À leur avis, cette disposition donne au contrevenant le droit de bénéficier de la moins sévère des peines prévues par les lois en vigueur à deux moments importants : celui de la perpétration de l'infraction et celui de la sentence. L'intimé M. Poulin et les intervenantes la CLA et l'AQAAD affirment que l'al. 11*i*) confère un droit global. À leur avis, cette disposition donne au contrevenant le droit de bénéficier de la peine la moins sévère qui ait existé depuis que l'infraction a été commise.

[31] Jusqu'à maintenant, les tribunaux canadiens ont privilégié l'interprétation de M. Poulin. Les tribunaux du pays, dont la Cour d'appel du Québec en l'espèce, ont toujours interprété l'al. 11*i*) comme conférant un droit global (voir, par exemple, *Belzil*; *R. c. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. c. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. c. Yusuf*, 2011 BCSC 626; *R. c. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271). De façon générale, et tel qu'il est précisé ci-après, deux facteurs ont amené ces tribunaux à conclure que l'al. 11*i*) confère au contrevenant le droit de bénéficier d'une peine moins sévère qui ne s'appliquait pas au moment

2019 SCC 47 (CanLII)

sentencing, but was applicable for a period at some point in between the two. The first factor is s. 11(*i*)'s use of the word "between". In their view, "between" indicates that the s. 11(*i*) right is concerned with the entire interval of time that elapses between the offence and sentencing. The second factor is the principle of liberal interpretation of *Charter* rights. According to them, this principle dictates that s. 11(*i*) should receive the interpretation most favourable to the offender.

de la perpétration de l'infraction ou au moment de la sentence, mais qui s'est appliquée pendant un certain temps entre ces deux moments. Le premier facteur est l'emploi du terme « entre » à l'al. 11*i*). Selon les tribunaux canadiens, l'emploi du terme « entre » indique que le droit garanti par l'al. 11*i*) s'applique à l'ensemble de la période qui s'est écoulée entre le moment de la perpétration de l'infraction et celui de la sentence. Le deuxième facteur est le principe de l'interprétation libérale des droits garantis par la *Charte*. Selon les tribunaux canadiens, ce principe exige que l'al. 11*i*) soit interprété de la manière la plus favorable qui soit pour le contrevenant.

[32] Absent from these decisions, however, is an analysis rooted in the purposes of s. 11(*i*). Indeed, these decisions do not examine the purposes of s. 11(*i*). Yet, the interpretation of a *Charter* right is a *purposive* endeavour (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). A *Charter* right must be interpreted in light of the purpose or purposes driving it. In *Big M*, this Court explained that the purpose of a right or freedom is to be determined "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (p. 344). Accordingly, a proper determination of whether s. 11(*i*) confers a binary or global right cannot be made without examining the purposes of the right by reference to these considerations.

[32] Toutefois, ces décisions ne contiennent pas d'analyse fondée sur les objets de l'al. 11*i*). En effet, elles ne traitent pas des objets de l'al. 11*i*). Or, l'interprétation d'un droit garanti par la *Charte* est une entreprise *téléologique* (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344). Un droit garanti par la *Charte* doit être interprété en fonction de l'objet ou des objets qui le sous-tendent. Dans l'arrêt *Big M*, notre Cour a expliqué que l'objet du droit ou de la liberté en question doit être déterminé « en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte* » (p. 344). Par conséquent, il est impossible de déterminer si l'al. 11*i*) confère un droit binaire ou un droit global sans examiner les objets du droit que garantit cette disposition en tenant compte de ces considérations.

[33] In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, this Court stated that the underlying purposes of s. 11(*i*) are the rule of law and fairness. I begin my analysis by explaining how s. 11(*i*) reflects these two purposes. Building on this foundation, and in accordance with the methodology articulated in *Big M*, I examine the linguistic and historical context of s. 11(*i*). In my view, the text and history of this provision lend support to the binary interpretation. Furthermore, unlike the global interpretation, the binary interpretation is consistent with the purposes

[33] Dans l'arrêt *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, notre Cour a déclaré que les objets qui sous-tendent l'al. 11*i*) sont la primauté du droit et l'équité. Je commence mon analyse en expliquant comment l'al. 11*i*) reflète ces deux objets. En m'appuyant sur ce fondement, et conformément à la méthode formulée dans *Big M*, j'examinerai le contexte linguistique et historique de l'al. 11*i*). À mon avis, le libellé et l'historique de cette disposition étayent l'interprétation binaire. Qui plus est, contrairement à l'interprétation globale, l'interprétation binaire

2019 SCC 47 (CanLII)

animating s. 11(*i*). Far from advancing the rule of law and fairness, a global interpretation of s. 11(*i*) would undermine them. Therefore, a purposive analysis of s. 11(*i*) leads to the conclusion that it confers a binary right.

[34] In order to engage in a purposive analysis of s. 11(*i*), it is necessary to understand how the provision would operate, both in general as well as under each of the binary and global approaches. We cannot appreciate the implications of the two competing approaches to s. 11(*i*), and whether these accord with the purposes of s. 11(*i*), without first understanding the basic mechanics of the provision and what each approach to the provision entails. I therefore begin by reviewing these mechanics. As will be seen, four questions arise when applying s. 11(*i*). The fact that s. 11(*i*) raises these questions is not in dispute. The questions naturally follow from the language of s. 11(*i*) and feature in the case law applying the right. As will be seen, what differs between the binary and global approaches to s. 11(*i*) is what they require to answer each of the four questions.

(1) Context: How Section 11(*i*) Operates

(a) *Question One: What Are the Applicable Sentencing Provisions?*

[35] It is clear from its wording that s. 11(*i*) involves a comparison between multiple "punishments" and an entitlement to the lesser of these. Thus, the first question that arises when applying s. 11(*i*) is "What are the various sentencing provisions attached to the offence at the relevant points in time?" The sentencing provisions needed to apply s. 11(*i*) in a binary manner are the ones in force at the time of the offence and the ones in force at the time of sentencing. By contrast, a global approach to s. 11(*i*) would require an exhaustive legislative history of all sentencing provisions associated with the offence since its commission. To respect Mr. Poulin's s. 11(*i*) right under a global approach, all of the sentencing provisions

est conforme aux objets que vise l'al. 11*i*). Loin de servir la primauté du droit et l'équité, une interprétation globale de l'al. 11*i*) minerait leur atteinte. Par conséquent, une interprétation téléologique de l'al. 11*i*) mène à la conclusion qu'il confère un droit binaire.

[34] Pour procéder à une analyse téléologique de l'al. 11*i*), il est nécessaire de comprendre comment s'appliquerait cette disposition, tant en général que dans le contexte d'une interprétation binaire et d'une interprétation globale. Il nous est impossible de comprendre les incidences de ces deux interprétations divergentes de l'al. 11*i*), et de déterminer si elles concordent avec les objets de l'al. 11*i*), sans d'abord comprendre le fonctionnement de base de cette disposition et les effets de chacune de ces interprétations. Je commencerai donc par étudier ce fonctionnement. Comme nous le verrons, l'application de l'al. 11*i*) soulève quatre questions. Nul ne conteste que l'al. 11*i*) soulève ces questions. Elles découlent naturellement de son libellé et figurent dans la jurisprudence relative à ce droit. Comme nous le verrons, ce qui distingue les deux interprétations, binaire et globale, de l'al. 11*i*), ce sont les réponses qu'elles commandent à l'égard de chacune des quatre questions.

(1) Contexte : Application de l'al. 11*i*)

a) *Première question : quelles sont les dispositions applicables en matière de détermination de la peine?*

[35] Il ressort clairement du libellé de l'al. 11*i*) que cette disposition implique une comparaison entre de nombreuses « peines » et le droit de bénéficier de la moins sévère d'entre elles. Ainsi, la première question que soulève l'application de l'al. 11*i*) est de savoir quelles sont les différentes dispositions relatives à la détermination de la peine qui étaient appliquées pour sanctionner l'infraction aux moments pertinents. Une interprétation binaire de l'al. 11*i*) exige que les dispositions relatives à la détermination de la peine qui étaient en vigueur au moment de la perpétration de l'infraction et celles en vigueur au moment de la sentence soient appliquées. À l'inverse, une interprétation globale de l'al. 11*i*)

2019 SCC 47 (CanLII)

bearing on gross indecency over the decades between Mr. Poulin's offences and his sentencing would need to be identified. Otherwise, the least onerous punishment available in that interval might inadvertently be overlooked.

impose d'établir un historique législatif exhaustif de toutes les dispositions relatives à la détermination de la peine qui ont pu s'appliquer à l'infraction depuis sa perpétration. Selon une interprétation globale, il faudrait dresser la liste de toutes les dispositions établissant la peine relative à l'infraction de grossière indécence qui ont été appliquées au cours des décennies qui se sont écoulées entre les infractions commises par M. Poulin et sa sentence afin de respecter le droit que lui confère l'al. 11*i*). Sinon, la peine la moins sévère qui était en vigueur au cours de cet intervalle pourrait ne pas être prise en considération par inadvertance.

[36] As set out above, the crime of which Mr. Poulin was found guilty — gross indecency — was repealed in 1988, after he committed it. However, the parties agree that the sentencing provisions applicable to Mr. Poulin's offences of gross indecency after that date are the ones applicable to the indictable sexual offences in the *Criminal Code*. Then, because amendments to the *Criminal Code* made the conditional sentence unavailable for these sexual offences, the parties agree that this sentence was similarly statutorily unavailable for Mr. Poulin's counts of gross indecency at the time he was sentenced in 2017. Without the parties' agreement that the sentencing provisions applicable to the modern sexual offences apply to Mr. Poulin's acts of gross indecency, it would have been necessary for the court to determine which crime(s) and associated provisions corresponded to Mr. Poulin's acts of gross indecency after this crime was repealed.

[36] Comme je l'ai mentionné, la disposition applicable au crime dont M. Poulin a été reconnu coupable — la grossière indécence — a été abrogée en 1988 après que M. Poulin l'eut commis. Cependant, les parties conviennent que, après cette date, les dispositions en matière de détermination de la peine applicables aux infractions de grossière indécence commises par M. Poulin sont celles qui s'appliquent aux actes criminels d'ordre sexuel prévus au *Code criminel*. De plus, étant donné que la peine d'emprisonnement avec sursis ne pouvait plus être infligée pour sanctionner ce type d'infractions d'ordre sexuel à la suite des modifications apportées au *Code criminel*, les parties conviennent que cette peine ne pouvait pas non plus être infligée à M. Poulin en vertu de la loi pour les chefs de grossière indécence lorsque ce dernier a reçu sa sentence en 2017. Si les parties n'avaient pas convenu que les dispositions sur la détermination de la peine applicables aux infractions d'ordre sexuel modernes s'appliquent également aux actes de grossière indécence commis par M. Poulin, la Cour aurait été tenue de déterminer quel(s) crime(s) et quelles dispositions correspondaient aux actes de grossière indécence de M. Poulin depuis l'abrogation des dispositions relatives à ce crime.

(b) *Question Two: Which Measures Contained in These Sentencing Provisions Constitute "Punishments"?*

b) *Deuxième question : quelles mesures prévues dans ces dispositions sur la détermination de la peine constituent des « peines »?*

[37] Once the relevant sentencing provisions have been identified, the question becomes which of the

[37] Après avoir dressé la liste des dispositions pertinentes relatives à la détermination de la peine, il

2019 SCC 47 (CanLII)

measures or sanctions contained within these provisions constitute "punishments" in the sense contemplated by s. 11(*i*). In *K.R.J.*, at para. 41, this Court held that a measure will constitute punishment under s. 11(*i*) when:

> . . . (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests. [Footnote omitted; para. 41.]

Notably, *K.R.J.* expanded the s. 11(*i*) concept of "punishment" beyond what it had been before. Specifically, *K.R.J.* added factor (3) to the test for punishment "to carve out a clearer and more meaningful role for the consideration of the impact of a sanction" (para. 41; see also paras. 28 and 36).

[38] Numerous measures and sanctions have been assessed against the s. 11(*i*) concept of "punishment". The following measures have been found to qualify as punishment: the timing of eligibility for parole (*Liang v. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238, at paras. 27 and 43); pre-sentence custody (*R. v. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160, at para. 32); the conditions governing the "faint hope" regime (*R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, at paras. 88-89); *Criminal Code* driving prohibition orders (*R. v. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234, at para. 37); and weapons prohibition orders (*Bent*, at para. 71; see also *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 3 (although not a s. 11(*i*) case)). By contrast, the following sanctions have been found *not* to constitute s. 11(*i*) "punishment": post-conviction DNA databank orders (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 64-65); sex offender registration (or "SOIRA") orders (see, for instance, *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at para. 84); and provincial driving suspensions imposed in response to criminal

faut se demander lesquelles des mesures ou des sanctions prévues dans ces dispositions constituent des « peines » au sens de l'al. 11*i*). Au par. 41 de l'arrêt *K.R.J.*, notre Cour a statué qu'une mesure constitue une peine au sens de l'al. 11*i*) si :

> . . . (1) elle est une conséquence d'une déclaration de culpabilité qui fait partie des sanctions dont est passible un accusé pour une infraction donnée et (2) soit elle est conforme à l'objectif et aux principes de la détermination de la peine, (3) soit elle a une grande incidence sur le droit du contrevenant à la liberté ou à la sécurité. [Note en bas de page omise, par. 41.]

Il est à noter que, dans l'arrêt *K.R.J.*, le concept de « peine » dont il est question à l'al. 11*i*) a été élargi au-delà du sens qu'il revêtait auparavant. Plus précisément, le troisième facteur énoncé dans le passage précédent a été ajouté au critère qui permet « d'assimiler une mesure à une peine afin de conférer un rôle plus clair et plus important à la prise en compte de l'incidence de la sanction » (par. 41; voir aussi les par. 28 et 36).

[38] De nombreuses mesures et sanctions ont été évaluées en regard du concept de « peine » énoncé à l'al. 11*i*). Ainsi, les mesures suivantes sont assimilées à une peine : la période d'admissibilité à la libération conditionnelle (*Liang c. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238, par. 27 et 43); la détention présentencielle (*R. c. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160, par. 32); les conditions régissant le régime dit du [TRADUCTION] « faible espoir » (*R. c. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, par. 88-89); les ordonnances d'interdiction de conduire relevant du *Code criminel* (*R. c. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234, par. 37); et les ordonnances d'interdiction de posséder des armes (*Bent*, par. 71; voir aussi *R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895, par. 3 (bien que cette affaire ne porte pas sur l'al. 11*i*)). Par contre, les sanctions suivantes *ne* sont *pas* assimilées à une « peine » au sens de l'al. 11*i*) : les ordonnances d'utilisation d'une banque de données génétiques après une déclaration de culpabilité (*R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554, par. 64-65); les ordonnances d'enregistrement au registre des

2019 SCC 47 (CanLII)

convictions (*Wilson*, at para. 34). However, without commenting on their merits, I observe that these latter decisions were rendered prior to *K.R.J.*

délinquants sexuels prononcées sous le régime de la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* (ou la « LERDS ») (voir, par exemple, *R. c. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, par. 84); et les suspensions de permis de conduire provinciales imposées à la suite d'une déclaration de culpabilité au criminel (*Wilson*, par. 34). Toutefois, sans me prononcer sur leur bien-fondé, je constate que ces dernières décisions ont été rendues avant l'arrêt *K.R.J.*

[39] In this case, the parties accept that a conditional sentence is a "punishment" for the purposes of s. 11(*i*). Given my ultimate conclusion that s. 11(*i*) confers a binary right and therefore does not entitle Mr. Poulin to *any* "punishments" temporarily available in the interval between his offence and sentencing, I need not determine whether a conditional sentence constitutes a "punishment" to which Mr. Poulin could be entitled under s. 11(*i*).

[39] En l'espèce, les parties conviennent que l'emprisonnement avec sursis constitue une « peine » pour l'application de l'al. 11*i*). Vu ma conclusion finale selon laquelle l'al. 11*i*) confère un droit binaire et ne permet donc pas à M. Poulin de bénéficier de *toute* « peine » qui était temporairement en vigueur entre le moment de la perpétration de son infraction et celui de sa sentence, je n'ai pas à décider si l'emprisonnement avec sursis constitue une « peine » à laquelle M. Poulin pourrait avoir droit au titre de l'al. 11*i*).

[40] As the cases outlined above reveal, "punishment" is a broad concept. It captures not only traditional prison sentences, but also ancillary orders and other statutory measures. The consequence of this is significant: in light of the meaning of "punishment", s. 11(*i*) does not involve the simple comparison of two or more *whole* sentencing provisions. Rather, s. 11(*i*) requires that the applicable sentencing provisions be parsed into their various measures. Each type of measure must then be evaluated under the *K.R.J.* test for "punishment". In this evaluation, attention must also be paid to whether the measure at issue has been found to constitute "punishment" under ss. 11(*h*) or 12 of the *Charter*, as "punishment should be defined consistently across ss. 11 and 12 of the *Charter*" (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 38).

[40] Comme le révèlent les décisions précitées, le concept de « peine » est large. Ce concept englobe non seulement les peines d'emprisonnement traditionnelles, mais aussi les ordonnances accessoires et les autres mesures prescrites par la loi. Cela a une incidence importante : compte tenu de la signification du concept de « peine », l'al. 11*i*) ne suppose pas la simple comparaison d'au moins deux dispositions *intégrales* relatives à la détermination de la peine. L'alinéa 11*i*) exige plutôt que les dispositions relatives à la détermination de la peine applicables soient appréciées en fonction des diverses mesures qu'elles prévoient. Chaque type de mesure doit ensuite être évalué en fonction du critère énoncé dans *K.R.J.* qui permet d'assimiler une mesure à une « peine ». Pendant cette évaluation, il faut également se pencher sur la question de savoir si la mesure en cause est considérée comme une « peine » au sens de l'al. 11*h*) ou de l'art. 12 de la *Charte*, car la « peine devrait recevoir la même acception aux art. 11 et 12 de la *Charte* » (*R. c. Boudreault*, 2018 CSC 58, [2018] 3 R.C.S. 599, par. 38).

[41] It is only once the evaluation of all of the measures is complete that the court will have before

[41] Ce n'est qu'après avoir évalué toutes les mesures que la Cour aura pris connaissance des

2019 SCC 47 (CanLII)

it the various "punishments" that must be compared to identify the "lesser" punishment or punishments to which the offender is entitled under s. 11(*i*). A binary approach to s. 11(*i*) would only require the evaluation of the measures applicable at the two relevant points in time (offence and sentencing). In contrast, a global approach to s. 11(*i*) would require the evaluation of each and every type of measure that was applicable at some point during the entire interval between the offence and sentencing, no matter the length of that interval.

différentes « peines » qui doivent être comparées afin de déterminer la ou les peines « l[es] moins sévère[s] » dont le contrevenant a le droit de bénéficier aux termes de l'al. 11*i*). Une interprétation binaire de l'al. 11*i*) exigerait seulement une évaluation des mesures applicables aux deux moments pertinents (le moment de la perpétration de l'infraction et celui de la sentence). En revanche, une interprétation globale de l'al. 11*i*) exigerait une évaluation de tous les types de mesures qui s'appliquaient à un moment donné pendant toute la période qui s'est écoulée entre la perpétration de l'infraction et la sentence, et ce, quelle que soit la longueur de cette période.

(c) *Question Three: Which Punishment(s) Represent the "Lesser" Punishment(s)?*

c) *Troisième question : quelles peines constituent les peines « l[es] moins sévère[s] »?*

[42] Once the various "punishments" for the offence have been identified, they must be compared and contrasted to determine which one — or ones — reflect the "lesser" punishment. Often, this determination is obvious; it selects the shorter period of incarceration over the longer one, and the absence of a weapons prohibition over the imposition of one. However, sometimes the determination of the lesser punishment is more nuanced. For instance, the sentencing court comparing two competing sentencing regimes must be alive to the possibility that each of the regimes contains some "lesser" aspect of punishment. To this end, in *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, this Court observed that while the new sentencing regime was more favourable to Mr. Johnson if he qualified as a long-term offender, the former regime would be more favourable to him if he did not, as it provided him with the benefit of an earlier parole hearing (para. 46).

[42] Après avoir relevé les différentes « peines » qui peuvent être infligées pour sanctionner une infraction, il convient de les comparer et de les mettre en opposition afin de déterminer laquelle — ou lesquelles — constitue la peine « la moins sévère ». Souvent, cette détermination est évidente; le tribunal choisit la plus courte période d'incarcération au lieu de la période d'incarcération la plus longue, et l'absence d'interdiction de posséder des armes au lieu d'imposer pareille interdiction. Cependant, la détermination de la peine la moins sévère est parfois plus nuancée. Par exemple, le tribunal chargé de déterminer la peine qui compare deux régimes de détermination de la peine concurrents doit envisager la possibilité que chacun des régimes prévoie une peine moins sévère. À cet égard, notre Cour a fait remarquer dans l'arrêt *R. c. Johnson*, 2003 CSC 46, [2003] 2 R.C.S. 357, que même si le nouveau régime de détermination de la peine était plus favorable envers M. Johnson s'il était déclaré délinquant à contrôler, le régime antérieur lui serait plus favorable si une telle déclaration n'était pas prononcée, car ce régime lui permettait de présenter une demande de libération conditionnelle plus rapidement (par. 46).

[43] Just as it would require an evaluation of all sentencing measures available between the offence and sentencing to answer "Question Two", the global approach would require a comparison

[43] En plus d'exiger, pour répondre à la deuxième question, une évaluation de toutes les mesures sentencielles applicables entre le moment de la perpétration de l'infraction et celui de la sentence,

2019 SCC 47 (CanLII)

of all *punishments* identified between the offence and sentencing to answer "Question Three". On the other hand, answering "Question Three" under a binary approach to s. 11(*i*) would involve only the comparison of those punishments applicable under the laws in force at the time of the offence and the time of sentencing.

l'interprétation globale nécessiterait une comparaison de toutes les *peines* pouvant être infligées entre le moment de la perpétration de l'infraction et le moment de la sentence qui ont été relevées en réponse à la troisième question. Par contre, répondre à la troisième question dans le cadre d'une interprétation binaire de l'al. 11*i*) consisterait seulement à comparer les peines applicables selon les lois en vigueur au moment de la perpétration de l'infraction et au moment de la sentence.

(d) *Question Four: What Punishment(s) Must Be Imposed to Honour the Offender's Section 11(i) Right?*

d) *Quatrième question : quelle(s) peine(s) faut-il infliger pour respecter le droit garanti au contrevenant par l'al. 11i)?*

[44] Finally, once the sentencing court has isolated the lesser punishment or punishments, it must then sentence the offender according to that punishment or those punishments. This is, after all, the right that s. 11(*i*) confers, regardless of whether the right is binary or global. What it looks like to receive "the benefit of the lesser punishment" depends on the nature of the punishment in question.

[44] Enfin, après avoir cerné la ou les peines les moins sévères, le tribunal doit s'appuyer sur celles-ci pour infliger une peine au contrevenant. Il s'agit après tout du droit que confère l'al. 11*i*), que ce droit soit binaire ou global. Ce que c'est « de bénéficier de la peine la moins sévère » dépend de la nature de la peine en question.

[45] Where the offender does not need to satisfy any statutory criteria to obtain the lesser punishment, receiving the benefit of the lesser punishment simply means having that punishment applied. Thus, if the punishments being compared are a maximum sentence of seven years' imprisonment and a maximum sentence of 14 years' imprisonment, receiving the benefit of the lesser punishment means receiving, at most, a sentence of seven years' imprisonment (see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 37). In the same vein, s. 11(*i*) would entitle an offender to a fine of $100 if, at the time of his offence, the law imposed a mandatory fine of $500, but, by the time of his sentencing, the amount of the mandatory fine had dropped to $100. Importantly, in such cases, the sentencing judge is bound under s. 11(*i*) to impose the lesser punishment, regardless of whether the judge considers a more onerous punishment to be fit and proportionate.

[45] Si le contrevenant n'est pas tenu de remplir des conditions prévues par la loi pour se voir infliger la peine la moins sévère, le droit de bénéficier de la peine la moins sévère signifie simplement que cette peine doit être appliquée. Donc, si les peines comparées sont une peine maximale de sept ans d'emprisonnement et une peine maximale de 14 ans d'emprisonnement, le droit de bénéficier de la peine la moins sévère signifie que le délinquant peut être condamné à une peine maximale de sept ans d'emprisonnement (voir *Tran c. Canada (Sécurité publique et Protection civile)*, 2017 CSC 50, [2017] 2 R.C.S. 289, par. 37). Dans le même ordre d'idées, l'al. 11*i*) permettrait d'infliger une amende de 100 $ à un contrevenant si, au moment de la perpétration de son infraction, la loi prévoyait l'infliction d'une amende obligatoire de 500 $, mais qu'au moment de sa sentence, le montant de cette amende était de 100 $. Fait important, dans de tels cas, le juge chargé de la détermination de la peine est tenu par l'al. 11*i*) d'infliger la peine la moins sévère, et ce, même s'il estime qu'une peine plus sévère serait juste et proportionnée.

2019 SCC 47 (CanLII)

[46] Where the lesser punishment has built-in criteria that the offender must meet to qualify for the punishment, receiving the benefit of that punishment means, at a minimum, having the court consider the punishment. If the court finds that the offender meets the criteria, the offender becomes entitled to that punishment. This was demonstrated in *Johnson*, in which this Court held that s. 11(*i*) obliged the sentencing judges to consider whether the offenders satisfied the criteria of the newer, more favourable long-term offender regime, before automatically applying the harsher dangerous offender regime already in place when the offenders committed their offences. If the offenders satisfied the criteria of the long-term offender regime, they were entitled to long-term supervision orders as long-term offenders following determinate periods of incarceration, instead of indeterminate detention as dangerous offenders (para. 45).

[46] Lorsque la peine la moins sévère comporte des conditions que le contrevenant doit remplir pour y être admissible, le droit de bénéficier de cette peine signifie, à tout le moins, que le tribunal est tenu de prendre en considération cette peine. Si le tribunal conclut que le contrevenant remplit les conditions, ce dernier est admissible à cette peine. C'est ce qu'a démontré l'arrêt *Johnson*, dans lequel notre Cour a statué que l'al. 11*i*) obligeait le juge chargé de la détermination de la peine à décider si le contrevenant remplissait les conditions du nouveau régime plus favorable applicable aux délinquants à contrôler avant d'appliquer automatiquement le régime plus sévère applicable aux délinquants dangereux qui était déjà en vigueur lorsque le contrevenant a commis son infraction. Le contrevenant qui remplit les conditions du régime applicable aux délinquants à contrôler est en droit d'obtenir une ordonnance de surveillance de longue durée en tant que délinquant à contrôler après des périodes déterminées d'incarcération au lieu d'être condamné à une peine de détention d'une durée indéterminée en tant que délinquant dangereux (par. 45).

[47] Notably, the punishment sought by Mr. Poulin in this case, a conditional sentence, is a form of sentence with built-in prerequisites and criteria (see *Criminal Code*, s. 742.1, and, in particular, para. (a); see also *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163, at paras. 14-16 and 25). Therefore, if this sentence were applicable to Mr. Poulin (which I find it is not), and if it were found to constitute the lesser punishment, Mr. Poulin would only be entitled to it if the sentencing judge found that Mr. Poulin met the relevant statutory criteria.

[47] Il convient de noter que la peine demandée par M. Poulin en l'espèce, soit l'emprisonnement avec sursis, est une forme de peine assortie de conditions préalables et de critères à respecter (voir le *Code criminel*, art. 742.1 et, plus particulièrement, l'al. 742.1a); voir aussi *R. c. R.A.R.*, 2000 CSC 8, [2000] 1 R.C.S. 163, par. 14-16 et 25). Par conséquent, si cette peine s'appliquait à M. Poulin (ce qui, à mon avis, n'est pas le cas), et si elle était considérée comme la peine la moins sévère, il n'aurait le droit de bénéficier de cette peine que si le juge chargé de la détermination de la peine concluait qu'il satisfaisait aux critères légaux pertinents.

[48] Finally, where the punishments being compared are qualitatively different versions of a provision or sentencing regime, receiving the benefit of the lesser punishment means being sentenced under the more favourable provision or regime. Thus, in *K.R.J.*, the order prohibiting the offender from communicating with children had to conform with the version of s. 161(1)(c) of the *Criminal Code* in force at the time of K.R.J.'s offence, not the version

[48] Enfin, lorsque les peines comparées relèvent de versions qualitativement différentes d'une disposition ou d'un régime de détermination de la peine, le droit de bénéficier de la peine la moins sévère signifie que le contrevenant peut se voir infliger une peine qui est conforme à la disposition ou au régime le plus favorable. Ainsi, dans l'arrêt *K.R.J.*, l'ordonnance interdisant au contrevenant de communiquer avec des enfants devait être conforme à la version de

2019 SCC 47 (CanLII)

in force when he was sentenced, which was more restrictive of liberty (paras. 57 and 115). Similarly, in *Liang*, the Court of Appeal held that the offenders were entitled to access the automatic, accelerated parole review ("APR") process that was applicable to them and their offences when they committed those offences. By virtue of s. 11(*i*), the offenders could not be subjected to the more restrictive parole eligibility rules that had replaced the APR regime (see also *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289, and *Nucci v. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 221, which follow *Liang*).

l'al. 161(1)c) du *Code criminel* qui était en vigueur au moment où K.R.J. a commis son infraction et non à celle qui était en vigueur lorsqu'il a été condamné, laquelle restreignait davantage la liberté (par. 57 et 115). De même, dans l'arrêt *Liang*, la Cour d'appel a statué que les contrevenants pouvaient bénéficier de la procédure d'examen expéditif (« PEE ») automatique qui s'appliquait à leur situation et à leurs infractions au moment où ils ont commis celles-ci. Selon l'al. 11*i*), les contrevenants ne pouvaient pas être assujettis aux règles d'admissibilité à la libération conditionnelle plus restrictives qui avaient remplacé la PEE (voir également *Canada (Attorney General) c. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289, et *Nucci c. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 221, qui ont été rendus après l'arrêt *Liang*).

[49] Crucially, and as a number of these examples illustrate, granting the offender the benefit of the lesser punishment does not simply equate to providing the court with an additional sentencing option (or additional sentencing options) to consider. Rather, s. 11(*i*) redefines and delimits the scope of the court's options. It sets the parameters in which the sentencing court is permitted to operate. Those parameters are determined by the lesser punishment. Therefore, instead of lengthening the list of available punishments, a global approach to s. 11(*i*) would winnow down the sentencing court's options to those contained within the least onerous punishment on the books for the relevant offence since the offence's commission. Of course, if this "least" punishment involved criteria which the offender did not meet, a global approach to s. 11(*i*) would require the court to apply the "next least" punishment. In this sense, a global s. 11(*i*) right would also sometimes require the sentencing court to create a kind of "ranking" of the lowest punishments.

[49] Fondamentalement, et comme l'illustrent plusieurs de ces exemples, conférer au contrevenant le droit de bénéficier de la peine la moins sévère n'équivaut tout simplement pas à offrir au tribunal une autre peine (ou d'autres peines) à prendre en considération. L'alinéa 11*i*) redéfinit et délimite plutôt la portée des options qui s'offrent au tribunal. Il établit également les paramètres à l'intérieur desquels le tribunal chargé de déterminer la peine doit accomplir son mandat. Ces paramètres sont établis en fonction de la peine la moins sévère. Par conséquent, au lieu d'allonger la liste des peines applicables, une interprétation globale de l'al. 11*i*) restreindrait les choix dont dispose le tribunal chargé de déterminer la peine aux peines les moins sévères applicables à une infraction depuis sa perpétration. Bien entendu, si la peine « la moins sévère » repose sur des critères qui ne sont pas respectés par le contrevenant, une interprétation globale de l'al. 11*i*) exigerait que le tribunal applique la « deuxième peine la moins sévère ». En ce sens, une interprétation globale du droit conféré à l'al. 11*i*) exigera aussi parfois que le tribunal chargé de déterminer la peine établisse un certain « classement » des peines les moins sévères.

[50] Having itemized the four questions that arise when applying s. 11(*i*), I acknowledge that, generally speaking, parties invoking a global s. 11(*i*) right have not systematically asked and answered them. Instead,

[50] Après avoir énuméré les quatre questions soulevées par l'application de l'al. 11*i*), je reconnais que, généralement, les parties qui ont invoqué l'interprétation globale du droit reconnu à l'al. 11*i*)

2019 SCC 47 (CanLII)

the offender has typically requested and received a particular lesser punishment available at some time in the interval between the offence and sentencing. Indeed, this is what occurred in Mr. Poulin's case. Rather than canvassing all of the sentencing measures available for his offence since he committed it, he proposed to the court a conditional sentence, presumably considering it to be the most favourable "lesser punishment".

n'ont pas systématiquement répondu à ces questions. Au contraire, le contrevenant demande et obtient habituellement une peine particulière moins sévère qui était applicable à un certain moment entre la perpétration de l'infraction et celui de la sentence. C'est effectivement ce qui s'est produit dans le cas de M. Poulin. Ce dernier a proposé au tribunal de lui infliger une peine d'emprisonnement avec sursis en croyant probablement qu'il s'agissait de la « peine la moins sévère » la plus favorable au lieu de répertorier toutes les peines applicables à l'infraction reprochée depuis sa perpétration.

[51] However, this approach is not what the global interpretation of s. 11(*i*) contemplates. As the jurisprudence reviewed in this section reveals, under the global approach, the sentencing court cannot be satisfied that it has respected the offender's constitutional right to receive "the benefit of the lesser punishment" unless it has canvassed and evaluated all of the relevant sentencing provisions and compared and contrasted all of the relevant "punishments". The failure to do so may result in the offender being subjected to a harsher punishment than the one to which they are constitutionally entitled if a global approach to s. 11(*i*) is taken.

[51] Toutefois, cette approche ne correspond pas à une interprétation globale de l'al. 11*i*). Comme le révèle la jurisprudence examinée dans la présente section, d'après l'interprétation globale, le tribunal chargé de déterminer la peine ne peut être convaincu d'avoir respecté le droit constitutionnel du contrevenant de « bénéficier de la peine la moins sévère » que s'il a répertorié et évalué toutes les dispositions applicables en matière de détermination de la peine et qu'il a comparé et mis en opposition toutes les « peines » applicables. Sinon, le contrevenant pourrait faire face à une peine plus sévère que celle dont il a constitutionnellement le droit de bénéficier si l'on adopte une interprétation globale de l'al. 11*i*).

[52] In essence, the global approach posits that these numerous historical punishments be considered as potentially applicable sentences even though they bear no temporal relationship to the offender's unlawful actions or the legal proceedings commenced against the offender in respect of those actions. If such an approach to s. 11(*i*) is to be adopted, it must be warranted by the right's purposes. I now turn to those purposes.

[52] Essentiellement, l'interprétation globale veut que ces nombreuses peines antérieures soient considérées comme étant susceptibles de s'appliquer même si elles n'ont aucun lien temporel avec les actes illicites du contrevenant ou la poursuite judiciaire intentée contre lui par suite de ces actes. Si une telle interprétation de l'al. 11*i*) doit être adoptée, elle doit se justifier par les objets du droit que confère cette disposition. J'examinerai maintenant ces objets.

(2) Purposive Analysis

(2) Analyse téléologique

[53] As outlined above, a *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes. This bears repeating because, as this Court has observed, "purposive" can be mistakenly conflated with "generous" (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17; see

[53] Comme je l'ai déjà mentionné, un droit garanti par la *Charte* doit être interprété téléologiquement, c'est-à-dire d'une façon qui est justifiée par ses objets. Cela mérite d'être répété car, comme l'a fait observer notre Cour, l'interprétation « téléologique » et l'interprétation « libérale » peuvent

2019 SCC 47 (CanLII)

also P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 36-30). This is despite this Court's instruction in *Big M* that, in applying a generous — rather than legalistic — lens, "it is important not to overshoot the actual purpose of the right or freedom in question" (p. 344). As was reiterated in *Grant*, "[t]he purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose" (para. 17). This is because an overly generous reading of a right risks protecting "behaviour that is outside the purpose and unworthy of constitutional protection" (Hogg, at p. 36-30). Indeed, "[i]n the case of most rights . . . the widest possible reading of the right, which is the most generous interpretation, will 'overshoot' the purpose of the right" (*ibid.*).

être confondues à tort (*R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, par. 17; voir aussi P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), vol. 2, p. 36-30), et ce, malgré la directive qu'a énoncée notre Cour dans l'arrêt *Big M*, selon laquelle dans l'application d'une interprétation libérale — plutôt que formaliste — « il importe de ne pas aller au-delà de l'objet véritable du droit ou de la liberté en question » (p. 344). Notre Cour a réitéré dans l'arrêt *Grant* que « [l]'objet du droit doit demeurer la principale préoccupation; la libéralité de l'interprétation est restreinte par cet objet et elle y est subordonnée » (par. 17). Il en est ainsi parce qu'une interprétation excessivement libérale d'un droit risquerait de protéger [TRADUCTION] « des comportements qui dépassent l'objet et ne sont pas dignes d'une protection constitutionnelle » (Hogg, p. 36-30). De plus, « dans le cas de la plupart des droits [. . .] l'interprétation la plus large possible du droit, qui est également l'interprétation la plus libérale, ira "au-delà" de l'objet du droit . . . » (*ibid.*).

[54] Thus, while it has often been said that *Charter* rights must be interpreted in a "large and liberal" manner, they are ultimately bounded by their purposes. Put differently, *Charter* rights, including s. 11(*i*), must be interpreted liberally within the limits that their purposes allow. This was acknowledged in *K.R.J.*, in which the Court held that s. 11(*i*) warranted a "liberal *and* purposive approach" (para. 37 (emphasis added)). Indeed, in that case, the Court justified its liberal interpretation of the term "punishment" by linking it to the purposes of s. 11(*i*). The Court explained that the rule of law and fairness purposes of s. 11(*i*) would, in fact, be "compromised" if a liberal interpretation of "punishment" were not adopted (para. 37). Similarly, in *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, a majority of this Court held that the right in s. 10(*b*) of the *Charter* "to retain and instruct counsel" upon arrest or detention does not grant detainees the right to suspend their police interrogations to consult counsel upon reasonable request. The majority rejected this generous interpretation of s. 10(*b*) as the purpose of the right did not warrant it (*Sinclair*, at paras. 36 and 56-57). Rather, the purpose of s. 10(*b*) was satisfied by a more measured reading of the right, which permits detainees under interrogation to consult counsel anew when a change

[54] Par conséquent, bien que l'on ait souvent dit que les droits garantis par la *Charte* doivent être interprétés de façon « large et libérale », ils sont, au bout du compte, subordonnés à leurs objets. Autrement dit, les droits garantis par la *Charte*, y compris celui reconnu à l'al. 11*i*), doivent être interprétés de façon libérale dans les limites de leurs objets. La Cour l'a reconnu dans l'arrêt *K.R.J.*, où elle a jugé que l'al. 11*i*) méritait une « interprétation libérale *et* téléologique » (par. 37 (je souligne)). De fait, dans cet arrêt, la Cour a justifié son interprétation libérale du terme « peine » en le reliant aux objets de l'al. 11*i*). La Cour a expliqué que les objectifs de primauté du droit et d'équité qui sous-tendent l'al. 11*i*) seraient, en réalité, « compromis » si une interprétation libérale du terme « peine » n'était pas adoptée (par. 37). De même, dans l'arrêt *R. c. Sinclair*, 2010 CSC 35, [2010] 2 R.C.S. 310, notre Cour a conclu à la majorité que le droit garanti par l'al. 10*b*) de la *Charte* « d'avoir recours [. . .] à l'assistance d'un avocat » en cas d'arrestation ou de détention ne donne pas aux détenus le droit de suspendre l'interrogatoire de la police auquel ils sont soumis pour consulter un avocat sur demande raisonnable à cet effet. Les juges majoritaires ont rejeté cette interprétation libérale de l'al. 10*b*), car l'objet

2019 SCC 47 (CanLII)

of circumstances in the course of the investigation justifies consultation.

du droit que confère cette disposition ne la justifiait pas (*Sinclair*, par. 36 et 56-57). En effet, l'objet de l'al. 10*b*) est atteint si le droit que confère cette disposition est interprété d'une façon plus mesurée qui permet aux détenus subissant un interrogatoire de consulter de nouveau un avocat lorsqu'un changement de circonstances pendant l'enquête justifie une consultation.

[55] In my respectful view, courts that have given s. 11(*i*) a global reading have fallen into the error identified in *Grant* of prioritizing generosity over purpose. Rather than identifying the principles or purposes underlying s. 11(*i*), they have simply concluded that s. 11(*i*) should be given the interpretation most generous to the accused, which they have called the liberal interpretation (see *Yusuf*, at para. 30 (CanLII); *Mehanmal*, at paras. 75-76; *R. v. D.H.*, 2017 ONCJ 51, at para. 17 (CanLII); *Bent*, at para. 79; see also *Cadman*, which relies on these paragraphs of *Yusuf* and *Bent*). However, the principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation. It is a principle of penal statutory interpretation (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 27, 29 and 38-39; *R. v. Dunn*, [1995] 1 S.C.R. 226, at para. 28). As just explained, *Charter* rights do not automatically receive the most generous interpretation that their language can bear (see *Sinclair*, at paras. 19-23 and 35-36; see also, for example: *Wigglesworth*, at pp. 553-54, in which this Court gave a "narrower interpretation" to the broad opening words of s. 11 ("[a]ny person charged with an offence"); *Carter v. The Queen*, [1986] 1 S.C.R. 981, per Lamer J.; *R. v. Kalanj*, [1989] 1 S.C.R. 1594, per McIntyre J.; *R. v. Potvin*, [1993] 2 S.C.R. 880, per Sopinka J., in which this Court held that the right "to be tried within a reasonable time" under s. 11(*b*) of the *Charter* does not protect against pre-charge delay or appellate delay).

[55] À mon humble avis, les tribunaux qui ont donné à l'al. 11*i*) une interprétation globale ont fait l'erreur, tel qu'il a été mentionné dans l'arrêt *Grant*, d'accorder la priorité à la libéralité de l'interprétation plutôt qu'à l'objet. Au lieu de relever les principes ou les objets qui sous-tendent l'al. 11*i*), ils ont tout simplement conclu qu'il fallait donner à l'al. 11*i*) l'interprétation la plus favorable à l'accusé, interprétation qu'ils ont qualifiée de libérale (voir *Yusuf*, par. 30 (CanLII); *Mehanmal*, par. 75-76; *R. c. D.H.*, 2017 ONCJ 51, par. 17 (CanLII); *Bent*, par. 79; voir aussi *Cadman*, lequel arrêt est fondé sur les paragraphes cités des arrêts *Yusuf* et *Bent*). Toutefois, le principe selon lequel une disposition ayant plus d'une signification plausible doit être interprétée d'une manière favorable à l'accusé ne constitue pas un principe d'interprétation de la *Charte*. Il s'agit plutôt d'un principe d'interprétation législative pénale (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 27, 29 et 38-39; *R. c. Dunn*, [1995] 1 R.C.S. 226, par. 28). Comme je viens de l'expliquer, les droits garantis par la *Charte* ne sont pas interprétés automatiquement de la façon la plus libérale que peut permettre leur libellé (voir *Sinclair*, par. 19-23 et 35-36; voir également, par exemple, l'arrêt *Wigglesworth*, p. 553-554, dans lequel notre Cour a donné aux termes généraux « [t]out inculpé » qui figurent au début de l'art. 11 une « interprétation plus restrictive »; *Carter c. La Reine*, [1986] 1 R.C.S. 981, le juge Lamer; *R. c. Kalanj*, [1989] 1 R.C.S. 1594, le juge McIntyre; *R. c. Potvin*, [1993] 2 R.C.S. 880, le juge Sopinka, arrêt dans lequel notre Cour a statué que le droit « d'être jugé dans un délai raisonnable » que garantit l'al. 11*b*) de la *Charte* n'empêche pas qu'il y ait un délai antérieur à l'accusation ou un délai d'appel).

[56] In light of the above, it is necessary to approach the determination of whether s. 11(*i*) confers a binary or a global right from an understanding of

[56] Compte tenu de ce qui précède, il est nécessaire de se pencher sur la question de savoir si l'al. 11*i*) confère un droit binaire ou un droit global

2019 SCC 47 (CanLII)

the purposes of s. 11(*i*) — and not simply from the perspective of the interested offender.

[57] Echoing this Court's statement in *Big M*, Professor Hogg observes that guidance about a right's purposes "can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the Charter, from the pre-Charter history of the right and from the legislative history of the Charter" (p. 36-30). In this case, I find that the language and origins of s. 11(*i*), in particular, provide helpful indicia of the provision's meaning. Therefore, after reviewing the purposes of s. 11(*i*) already identified in *K.R.J.*, I study the language and origins of s. 11(*i*). Then, with the purposes, language and origins of s. 11(*i*) in mind, I turn to the heart of the purposive analysis: deciding which interpretation of s. 11(*i*) is supported by the right's purposes.

(a) *The Recognized Purposes and Effect of Section 11(i)*

[58] At common law, the general rule is that an accused must be tried and punished under the substantive law in force at the time the offence was committed, rather than the law in force at any other time — such as at trial or sentencing (*R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203, per McLachlin J.; *Johnson*, at para. 41; *K.R.J.*, at para. 1; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, at para. 42. I call this a "general rule" as it can sometimes be displaced by other interpretive rules or principles). Where the law changes after an offence is committed, the new criminal provisions are generally presumed not to apply retrospectively to the offence (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 10, 35 and 45-46; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Tran*, at para. 43; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22). This explains why, in this case, the state was able to charge Mr. Poulin in 2014 for an offence that had been repealed from the *Criminal Code* in 1987. While the offence no longer existed when Mr. Poulin was charged, convicted and sentenced, it existed when

du point de vue des objets de cet alinéa, et non seulement du point de vue du contrevenant concerné.

[57] Reprenant la déclaration de notre Cour dans l'arrêt *Big M*, le professeur Hogg a fait observer que certaines indications sur les objets d'un droit [TRADUCTION] « peuvent être dégagées des termes dans lesquels le droit est énoncé, des inférences découlant du contexte dans lequel se situe le droit, y compris d'autres dispositions de la Charte, de l'historique du droit antérieur à la Charte et de l'historique législatif de la Charte » (p. 36-30). En l'espèce, j'estime que le libellé et les origines de l'al. 11*i*) fournissent des indices utiles du sens de cette disposition. Par conséquent, après avoir examiné les objets de l'al. 11*i*) qui ont déjà été cernés dans l'arrêt *K.R.J.*, j'examinerai le libellé et les origines de l'al. 11*i*). Par la suite, en gardant à l'esprit les objets, le libellé et les origines de cet alinéa, j'en arriverai au cœur de l'analyse téléologique et je déciderai laquelle des interprétations de l'al. 11*i*) est étayée par les objets du droit que confère cette disposition.

a) *Objets et effet reconnus de l'al. 11i)*

[58] En common law, la règle générale est qu'un inculpé doit être jugé et puni en vertu du droit substantiel en vigueur au moment où l'infraction a été commise et non en vertu du droit en vigueur à tout autre moment, comme celui du procès ou de la sentence (*R. c. Kelly*, [1992] 2 R.C.S. 170, p. 203, la juge McLachlin; *Johnson*, par. 41; *K.R.J.*, par. 1; *R. c. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, par. 42. J'utilise le terme « règle générale » parce que cette règle peut parfois être remplacée par d'autres règles ou principes d'interprétation). Dans les cas où le droit est modifié après la perpétration d'une infraction, on présume généralement que les nouvelles dispositions en matière criminelle ne s'appliquent pas rétrospectivement à l'infraction (*R. c. Dineley*, 2012 CSC 58, [2012] 3 R.C.S. 272, par. 10, 35 et 45-46; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *Tran*, par. 43; *R. c. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22). C'est la raison pour laquelle, en l'espèce, l'État a été en mesure d'accuser M. Poulin en 2014 d'une infraction au *Code criminel* qui avait été abolie en

2019 SCC 47 (CanLII)

he committed his offences of gross indecency between 1979 and 1983 (see also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 43).

1987. Même si l'infraction ne figurait plus dans la loi lorsque M. Poulin a été accusé, déclaré coupable et condamné, elle y figurait lorsqu'il a commis ses infractions de grossière indécence entre 1979 et 1983 (voir également la *Loi d'interprétation*, L.R.C. 1985, c. I-21, art. 43).

[59] The rationale for this common law rule is the rule of law and, more specifically, the principle of legality. The principle of legality dictates that persons who rely on the state of the law in conducting themselves, or who risk the liability associated with a law in breaking it, should not subsequently be held to different laws, particularly more stringent ones (*K.R.J.*, at paras. 22-25). This principle is a pillar of the criminal law. In *K.R.J.*, this Court recognized that it lies at the heart of s. 11(*i*) (paras. 2, 23-24, 27 and 37). Section 11(*i*) safeguards the principle of legality by "constitutionally enshrin[ing] the fundamental notion that criminal laws should generally not operate retrospectively" (*K.R.J.*, at para. 22). The principle of legality also finds expression, for instance, in s. 11(*g*) of the *Charter*, which protects a person against being convicted for an act which was not a crime when the person engaged in it. As explained in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1152:

[59] Cette règle de common law est fondée sur la primauté du droit et, plus précisément, sur le principe de la légalité. Le principe de la légalité veut que les personnes qui ajustent leur comportement en fonction de l'état du droit, ou qui prennent le risque d'assumer les conséquences liées à la violation d'une règle de droit donnée, ne devraient pas ensuite être jugées en vertu d'autres règles de droit, en particulier de règles de droit plus rigoureuses (*K.R.J.*, par. 22-25). Ce principe est un pilier du droit criminel. Dans l'arrêt *K.R.J.*, notre Cour a reconnu que ce principe est au cœur même de l'al. 11*i*) (par. 2, 23-24, 27 et 37). L'alinéa 11*i*) protège le principe de la légalité en « constitutionnalis[ant] la notion fondamentale voulant que, en matière pénale, une disposition ne doive généralement pas s'appliquer rétrospectivement » (*K.R.J.*, par. 22). Le principe de la légalité trouve également son expression, par exemple, à l'al. 11*g*) de la *Charte*, qui protège le droit d'une personne de ne pas être déclarée coupable en raison d'un acte qui, au moment où il a été commis, ne constituait pas un crime. Comme il a été expliqué dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, p. 1152 :

> [T]here can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid . . . .

> [I]l n'y a de crime ou de peine qu'en conformité avec une loi qui est certaine, sans ambiguïté et non rétroactive. La raison d'être de ce principe est claire. Il est essentiel dans une société libre et démocratique que les citoyens soient le mieux possible en mesure de prévoir les conséquences de leur conduite afin d'être raisonnablement prévenus des conduites à éviter . . .

[60] Section 11(*i*) of the *Charter* enshrines the common law rule that an offender should not be retrospectively subjected to a heavier punishment than the one applicable at the time the person committed the offence (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 55; *K.R.J.*, at para. 22). However, it does not stop there.

[60] L'alinéa 11*i*) de la *Charte* consacre la règle de common law selon laquelle un contrevenant ne doit pas être soumis rétrospectivement à une peine plus sévère que celle qui s'appliquait au moment où il a commis son infraction (*Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392, par. 55; *K.R.J.*, par. 22). Cependant, cela ne s'arrête

2019 SCC 47 (CanLII)

Section 11(*i*) constitutionalizes an additional protection. It stipulates that, where the law provides a more favourable punishment at the time of the offender's sentencing than it did at the time of the offence, the offender is entitled to the benefit of this more favourable, current punishment. This is so even though the offender actively risked a greater punishment in committing the offence.

pas là. L'alinéa 11*i*) constitutionnalise une autre mesure de protection. Il dispose que, lorsque la loi prévoit l'infliction d'une peine plus favorable au moment de la sentence du contrevenant que celle qui s'appliquait au moment de la perpétration de l'infraction, le contrevenant a le droit de bénéficier de la peine actuelle, qui lui est plus favorable. Il en est ainsi même si le contrevenant s'est exposé au risque de subir une peine plus sévère en commettant l'infraction.

[61] Why, then, should the offender enjoy access to a lower present-day punishment? The clear rationale is fairness (see *K.R.J.*, at paras. 2, 27, 37 and 39). It would not be fair to subject an offender to a punishment which, in choosing to reduce it, Parliament has expressly recognized as no longer appropriate. Further, a criminal sentence is an expression of society's collective voice; it is meant to reflect contemporary values. It would frustrate a fundamental principle of sentencing — proportionality (*Criminal Code*, s. 718.1) — to impose a disproportionately high, outdated punishment which no longer reflects the moral blameworthiness of the offence. Thus, an offender who committed an offence at a time when that offence attracted a life sentence should not be imprisoned for life if, at the moment of sentencing, the offence now attracts a lesser sentence of imprisonment. Instead of being unfairly subjected to a sentence which is out of step with current moral norms, this offender should receive the benefit of society's current, modernized view of the offender's conduct.

[61] Alors pourquoi le contrevenant devrait-il avoir la possibilité de bénéficier d'une peine actuelle moins sévère? L'équité en est manifestement la raison (voir *K.R.J.*, par. 2, 27, 37 et 39). Il ne serait pas équitable d'infliger à un contrevenant une peine qui, lorsque le législateur a choisi de l'adoucir, a expressément été reconnue par ce dernier comme n'étant plus juste. De plus, une peine criminelle est l'expression de la voix collective de la société; elle doit donc tenir compte des valeurs contemporaines. L'infliction d'une peine démesurément lourde et dépassée qui ne tient plus compte du caractère moralement répréhensible de l'infraction commise irait à l'encontre d'un principe fondamental de la détermination de la peine — la proportionnalité (*Code criminel*, art. 718.1). Ainsi, le contrevenant qui a commis une infraction qui était passible d'une peine d'emprisonnement à perpétuité ne devrait pas être emprisonné à vie si, au moment de sa sentence, l'infraction est passible d'une peine d'emprisonnement moins sévère. Plutôt que d'être soumis injustement à une peine qui n'est pas conforme aux normes morales actuelles, ce contrevenant devrait pouvoir bénéficier d'une peine qui reflète l'opinion moderne actuelle de la société quant à sa conduite.

[62] By adopting this view and entitling the offender to lesser, current punishments, s. 11(*i*) involves an expansion of the offender's common law right to be judged according to the law in force at the time of the offence. The additional protection that s. 11(*i*) confers is, therefore, access to a *decrease* in punishment which coincides with an important step in the proceedings — namely, sentencing. Instead of merely guaranteeing to the offender the punishment applicable at the time of the offence, s. 11(*i*)

[62] En adoptant ce point de vue et en donnant au contrevenant le droit de bénéficier de peines actuelles moins sévères, l'al. 11*i*) élargit le droit que la common law confère au contrevenant d'être jugé en fonction des règles de droit en vigueur au moment de la perpétration de l'infraction. L'autre mesure de protection qu'offre l'al. 11*i*) est donc l'accès à un *adoucissement* de peine, ce qui coïncide avec une étape importante de l'instance, soit le prononcé de la sentence. Au lieu de garantir simplement au

2019 SCC 47 (CanLII)

designates that punishment as *the ceiling*. An offender is entitled to the benefit of that punishment if it is favourable to the offender, and to the benefit of a lesser punishment if one has replaced the first punishment. The result is that, where the punishment at the time of the offence is lesser, the offender is entitled to it even though its imposition might mean that the offender receives a punishment which is now considered disproportionately low. Conversely, where the current punishment is lesser, the offender is entitled to it even though the offender might have risked a much higher punishment at the time the offender broke the law. In this way, s. 11(*i*) balances, on one hand, the principle of the rule of law (or legality) and, on the other, the principle of fairness (see F. Chevrette, H. Cyr and F. Tanguay Renaud, "La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive", in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), at p. 781).

contrevenant le droit de bénéficier de la peine applicable au moment de la perpétration de son infraction, l'al. 11*i*) désigne cette peine comme la peine *maximale* qui peut lui être infligée. Un contrevenant a le droit de bénéficier de cette peine si elle lui est favorable et de bénéficier d'une peine moins sévère si une telle peine a remplacé celle qui s'appliquait au moment de la perpétration de l'infraction. Par conséquent, lorsque la peine applicable au moment de la perpétration de l'infraction est moins sévère, le contrevenant a le droit de bénéficier de cette peine même s'il peut ainsi obtenir une peine qui est maintenant considérée comme démesurément légère. À l'inverse, lorsque la peine actuelle est moins sévère, le contrevenant a le droit de bénéficier de cette peine même s'il était exposé à une peine beaucoup plus sévère au moment où il a enfreint la loi. L'alinéa 11*i*) concilie ainsi, d'une part, le principe de la primauté du droit (ou de la légalité) et, d'autre part, le principe de l'équité (voir F. Chevrette, H. Cyr et F. Tanguay-Renaud, « La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive », dans G.-A. Beaudoin et E. Mendes, dir., *Charte canadienne des droits et libertés* (4e éd. 2005), p. 781).

[63] The parties and interveners appear to agree that the rule of law and fairness are underlying purposes of s. 11(*i*). Their dispute centres on whether these purposes support a binary or a global interpretation of s. 11(*i*). For its part, and as further discussed below, the CLA asserts that an additional purpose of s. 11(*i*) is to counteract the randomness or arbitrariness of the timing of one's sentencing. I see no indication of such a purpose in the right's language or origins. To the contrary, I find that the language and origins of s. 11(*i*) lend support to a binary interpretation of the provision. I examine each of them next.

[63] Les parties et les intervenants semblent être d'accord pour dire que la primauté du droit et l'équité sont des objets qui sous-tendent l'al. 11*i*). Leur différend est centré sur la question de savoir si ces objets appuient une interprétation binaire ou une interprétation globale de l'al. 11*i*). Pour sa part, et comme il en sera question plus loin, la CLA soutient que l'al. 11*i*) a un autre objet, soit celui de neutraliser le caractère aléatoire ou arbitraire du moment où la sentence est prononcée. Je crois que rien dans le libellé ou les origines du droit garanti par cette disposition ne démontre l'existence d'un tel objet. Au contraire, j'estime que le libellé et les origines de l'al. 11*i*) étayent une interprétation binaire de cette disposition. J'aborderai maintenant chacun de ces points.

(b) *The Language of Section 11(i)*

b) *Libellé de l'al. 11i)*

[64] When conducting a purposive analysis of a *Charter* right, "the starting point must be the

[64] Lorsque l'on procède à une analyse téléologique d'un droit garanti par la *Charte*, « il faut tout

2019 SCC 47 (CanLII)

language of the section" (*Grant*, at para. 15). To reiterate, s. 11(*i*) reads:

11. Any person charged with an offence has the right

. . .

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

11. Tout inculpé a le droit :

. . .

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[65] In support of a binary interpretation of this right, the Crown emphasizes the word "lesser" in "lesser punishment", which denotes the lower of *two* options. It says that, had Parliament intended for s. 11(*i*) to confer a global right, it could have specified that the offender was entitled to the "least severe punishment" instead of the "lesser punishment". To the extent that the French version of s. 11(*i*) employs broader language evoking the least severe punishment ("*la peine la moins sévère*"), the Crown says that, in this case, the English wording must take precedence. This is because of the established principle of bilingual interpretation that the authoritative meaning is the common meaning between the two provisions (*R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at paras. 26 and 29; *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698, at para. 53). As "least" encompasses "lesser", the latter is the common meaning between the two.

[66] For his part, Mr. Poulin emphasizes the word "between", which he says demonstrates Parliament's

d'abord se pencher sur son libellé » (*Grant*, par. 15). Je le répète, l'al. 11*i*) est ainsi rédigé :

11. Tout inculpé a le droit :

. . .

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

11. Any person charged with an offence has the right

. . .

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[65] Pour appuyer une interprétation binaire de ce droit, le ministère public insiste sur l'emploi du terme « *lesser* » dans l'expression « *lesser punishment* » dans la version anglaise de la disposition pour désigner la moins sévère de *deux* options. Le ministère public affirme que, si le législateur avait voulu que l'al. 11*i*) confère un droit global, il aurait utilisé l'expression « *least severe punishment* » au lieu de l'expression « *lesser punishment* » dans la version anglaise de la disposition pour désigner la peine dont un contrevenant a le droit de bénéficier. Dans la mesure où l'expression « la peine la moins sévère » employée dans la version française de l'al. 11*i*) possède un sens plus large, le ministère public soutient que, en l'espèce, la version anglaise doit avoir préséance. La raison en est que le principe bien établi de l'interprétation bilingue veut que le sens commun à deux dispositions fasse autorité (*R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217, par. 26 et 29; *Montréal (Ville) c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 CSC 48, [2008] 2 R.C.S. 698, par. 53). Comme l'expression « la moins sévère » englobe le sens du terme anglais « *lesser* », ce dernier correspond au sens commun aux deux dispositions.

[66] Pour sa part, M. Poulin insiste sur l'emploi du terme « entre » qui, selon lui, témoigne de la

2019 SCC 47 (CanLII)

intent that s. 11(*i*) capture those punishments available *in the interval between* the offence and sentencing. As set out above, the courts in *Cadman*, at para. 44, *Bent*, at para. 79, and *Mehanmal*, at para. 75, placed similar reliance on the term "between" in reading s. 11(*i*) globally.

volonté du législateur de faire en sorte que l'al. 11*i*) englobe les peines qui pouvaient être infligées *dans l'intervalle entre* le moment de la perpétration de l'infraction et celui de la sentence. Comme il a été indiqué précédemment, dans les décisions *Cadman* (par. 44), *Bent* (par. 79) et *Mehanmal* (par. 75), les cours se sont appuyées d'une manière similaire sur l'emploi du terme « entre » en interprétant l'al. 11*i*) de façon globale.

[67] I do not find that the use of "between" favours a global reading of s. 11(*i*). In my view, this wording is consistent with both a binary and a global interpretation of s. 11(*i*). While it evokes an interval, an interval, in itself, does not suggest a global interpretation. This is because, for a different punishment to exist at the time of sentencing than existed at the time of the offence, the punishment must necessarily have changed *in the interval between* those two times. By its orientation toward change during that interval, s. 11(*i*) does not necessarily constitutionalize a right to the most favourable of any multiple changes in that interval. Put simply, s. 11(*i*)'s use of "between" tells us nothing about whether the right it confers is binary or global; it only tells us that s. 11(*i*) concerns itself with the situation where the punishment has been "varied between" the time of the offence and the time of sentencing — whether only once or multiple times.

[67] Je ne crois pas que l'emploi du terme « entre » favorise une interprétation globale de l'al. 11*i*). À mon avis, l'emploi de ce terme cadre autant avec une interprétation binaire qu'avec une interprétation globale de l'al. 11*i*). Bien que ce terme évoque la notion d'intervalle, un intervalle n'implique pas, en soi, une interprétation globale. En effet, pour qu'une peine différente de celle qui existait au moment de la perpétration de l'infraction puisse être infligée au moment de la sentence, la peine doit nécessairement avoir été modifiée *dans l'intervalle entre* ces deux moments. En étant axé sur la modification qui a été apportée pendant cet intervalle, l'al. 11*i*) ne constitutionnalise pas nécessairement le droit de bénéficier de la modification la plus favorable parmi les nombreuses modifications qui ont été apportées pendant cet intervalle. Pour le dire simplement, l'emploi du terme « entre » à l'al. 11*i*) ne permet pas de déterminer si le droit qu'il confère est binaire ou global; il nous apprend uniquement que l'al. 11*i*) s'attache à la peine qui a été « modifiée entre » le moment de la perpétration de l'infraction et celui de la sentence, et ce, que la peine ait été modifiée une seule fois ou de nombreuses fois.

[68] Not only do I reject Mr. Poulin's reliance on "between", I agree with the Crown that "lesser" evokes the comparison of two options. Whereas comparative terms ending in "est" or "st" single out one thing from the others, comparative terms ending in "er" contrast one thing with another. For instance, we speak of the "better" of two options and the "best" of multiple, the "higher" of two heights and the "highest" of multiple, the "faster" of two speeds and "fastest" of multiple, to give only a few examples. Instead of employing the obviously global phrase "the least severe punishment" (or even "the lowest punishment"), s. 11(*i*) uses the binary language

[68] Non seulement je rejette l'analyse que fait M. Poulin de l'emploi du terme « entre », mais je souscris aussi à la thèse du ministère public selon laquelle l'emploi du terme « *lesser* » dans la version anglaise de la disposition évoque une comparaison de deux possibilités. Alors qu'en anglais, les termes comparatifs qui se terminent par « *est* » ou « *st* » distinguent une chose par rapport à d'autres, les termes comparatifs se terminant par « *er* » mettent une chose en contraste avec une autre. Par exemple, nous disons d'une option qu'elle est meilleure (*better*) qu'une autre et qu'elle est la meilleure (*best*) en comparaison avec plusieurs autres, qu'un sommet

2019 SCC 47 (CanLII)

"the lesser punishment". "Lesser" further reflects the more specific, common meaning between the two articulations of s. 11(*i*) (*R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, at para. 32; see also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 85-87, per Bastarache J., concurring; *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675, at para. 15). As such, I reject the view that the use of "between" overcomes, or even counterbalances, the use of "lesser".

est plus haut (*higher*) qu'un autre et qu'il est le plus haut (*highest*) en comparaison avec plusieurs autres, ou encore que quelqu'un est plus rapide (*faster*) que quelqu'un d'autre et qu'il est le plus rapide (*fastest*) comparé à plusieurs autres, pour ne donner que quelques exemples. Plutôt que d'employer les termes clairement généraux « *the least severe punishment* » (ou encore, « *the lowest punishment* »), l'al. 11*i*) utilise le terme binaire « *the lesser punishment* ». Le mot « *lesser* » reflète le sens commun le plus précis des deux versions de l'al. 11*i*) (*R. c. Stillman*, 2019 CSC 40, [2019] 3 R.C.S. 144, par. 32; voir aussi *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 85-87, motifs concordants du juge Bastarache; *R. c. S.A.C.*, 2008 CSC 47, [2008] 2 R.C.S. 675, par. 15). En conséquence, je ne souscris pas à l'opinion selon laquelle l'emploi du mot « entre » permet de surmonter, voire de contrebalancer, l'emploi du terme « *lesser* » dans la version anglaise.

[69] Further, I find that the origins and history of s. 11(*i*) corroborate the conclusion that s. 11(*i*) was worded to confer a binary right.

[69] En outre, j'estime que les origines et l'historique de l'al. 11*i*) corroborent la conclusion selon laquelle cet alinéa a été rédigé de façon à conférer un droit binaire.

(c) *The Origins of Section 11(i)*

c) *Les origines de l'al. 11i)*

[70] Unlike those *Charter* rights that refer to evolving, open-ended standards — such as "reasonable" and "unreasonable" (ss. 8, 11(*a*), 11(*b*) and 11(*e*)), "fundamental justice" (s. 7), and "cruel and unusual" (s. 12) — s. 11(*i*) enunciates a rule with a particular application. In simple terms, s. 11(*i*) was enacted to confer a particular, constant protection. As explained above, the protection that s. 11(*i*) confers is something greater than the general common law entitlement to be judged according to the substantive law in force at the time of the offence. To understand what protection s. 11(*i*) is meant to confer, and in accordance with the direction in *Big M*, it is useful to review the origins of the right. While these are not determinative of the right's proper scope, they provide an instructive starting point.

[70] Contrairement aux droits garantis par la *Charte*, qui renvoient à des normes aux contours non définis et en constante évolution — comme les termes « anormal » et « abusives » (art. 8 et al. 11*a*), 11*b*) et 11*e*)), « justice fondamentale » (art. 7) et « cruels et inusités » (art. 12) — l'al. 11*i*) énonce une règle d'application particulière. En termes simples, l'al. 11*i*) a été adopté dans le but de conférer une protection particulière et constante. Comme il a été expliqué précédemment, la protection que confère l'al. 11*i*) est supérieure au droit général conféré par la common law, soit celui d'être jugé en fonction du droit substantiel en vigueur au moment de la perpétration de l'infraction. Pour comprendre quelle protection l'al. 11*i*) vise à conférer, et conformément à la directive formulée dans l'arrêt *Big M*, il est utile de passer en revue les origines de ce droit. Bien que ces origines ne déterminent pas la portée exacte du droit conféré, elles offrent un point de départ instructif.

2019 SCC 47 (CanLII)

[71] As the following history reveals, there was nothing to inspire a global s. 11(*i*) right at the time of its drafting and enactment. A global right was not part of the legal landscape; the common law certainly did not recognize one, and none of the enactments inspiring s. 11(*i*) embraced one either.

[71] Comme le révèle l'historique qui suit, rien ne pointait vers une interprétation globale du droit garanti à l'al. 11*i*) au moment de sa rédaction et de son adoption. Une interprétation globale de ce droit ne faisait pas partie du paysage juridique; la common law ne reconnaissait sûrement aucune interprétation globale et aucune des dispositions à l'origine de l'al. 11*i*) n'appuyait une telle interprétation.

[72] Published by the Government of Canada in 1969, possibly the earliest documented draft of what is now s. 11(*i*) (then s. 11(*g*)) read:

> (g) the right of a person not to be held guilty of an offence on account of any act or omission which at the time of its commission or omission did not constitute an offence, and the right of a person on being found guilty of an offence not to be subjected to a penalty heavier than the one applicable at the time the offence was committed . . . . [Emphasis added.]

(Government of Canada, The Right Honourable P. E. Trudeau, *The Constitution and the People of Canada: An approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (1969), at p. 54)

As is apparent, this early draft of s. 11(*i*) simply enshrined the common law principle that an offender should only face as heavy a punishment as they risked at the time of their offence. This version did not entitle the offender to any decrease in punishment occurring after the offence.

[72] Publiée en 1969 par le gouvernement du Canada, ce qui représente peut-être la première ébauche documentée de l'actuel al. 11*i*) (alors l'al. 11*g*)) était ainsi rédigée :

> g) le droit d'une personne de ne pas être reconnue coupable d'un délit pour toute action ou omission qui, au moment où elle a été commise, ne constituait pas un délit, et le droit d'une personne déclarée coupable d'un délit de ne pas être soumise à une peine plus sévère que celle qui était applicable au moment où le délit a été commis . . . [Je souligne.]

(Gouvernement du Canada, le très honorable P. E. Trudeau, *La Constitution Canadienne et le Citoyen : Un aperçu des objectifs de la Confédération, des droits des individus et des institutions gouvernementales* (1969), p. 55)

À l'évidence, cette ébauche initiale de l'al. 11*i*) enchâssait simplement le principe de common law selon lequel un contrevenant ne devrait pas être passible d'une peine plus lourde que celle qu'il risquait de se voir infliger au moment où il a commis l'infraction. Cette ébauche n'accordait pas au contrevenant le droit au bénéfice d'un adoucissement de la peine survenu après la perpétration de l'infraction.

[73] The 1969 publication introducing this provision notes that, unlike many of the other legal rights contained in the *Charter*, s. 11(*i*) did not have an existing counterpart in the *Canadian Bill of Rights*, S.C. 1960, c. 44 (Government of Canada, at p. 54). However, the policy paper does not explain the origin of the right.

[73] La publication de 1969 introduisant cette disposition souligne que, contrairement à bon nombre d'autres droits reconnus dans la *Charte*, le droit garanti par l'al. 11*i*) n'avait pas d'équivalent dans la *Déclaration canadienne des droits*, S.C. 1960, c. 44 (gouvernement du Canada, p. 55). Cependant, l'exposé de principes n'explique pas l'origine de ce droit.

[74] Nonetheless, it is reasonable to assume that this first articulation of s. 11(*i*) was inspired by

[74] Néanmoins, il est raisonnable de présumer que cette première formulation de l'al. 11*i*) était inspirée

2019 SCC 47 (CanLII)

two similar provisions. The first is s. 37(*e*) of the *Interpretation Act*, S.C. 1967-68, c. 7 — a form of which has existed since 1886 (*Dunn*, at paras. 17 and 41), and which is now expressed in s. 44(e) of the *Interpretation Act*, R.S.C. 1985, c. I-21. Section 37(*e*) stated (and s. 44(e) continues to state, with minor changes):

> **37.** Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
>
> . . .
>
> (*e*) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly . . . .

Mr. Poulin agrees that s. 11(*i*) was inspired by what is now s. 44(e) (R.F., at para. 55). Indeed, s. 11(*i*) has been characterized as the constitutional entrenchment of s. 44(e) of the *Interpretation Act* (Chevrette, Cyr and Tanguay-Renaud, at pp. 780-81; see also the comments of L'Heureux-Dubé J. in *Dunn*, at paras. 49-50, although dissenting, she was not contradicted by the majority).

[75] The second provision which can be credited for inspiring the first draft of s. 11(*i*) is art. 7(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221 ("*ECHR*"), which came into force on September 3, 1953. While Canada is not a party to the *ECHR*, the first draft of s. 11(*i*) bears strong resemblance to art. 7(1), which stated (and continues to state):

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[76] In 1976, Canada acceded to the *International Covenant on Civil and Political Rights*, Can. T.S.

de deux dispositions semblables. La première est l'al. 37*e*) de l'*Interpretation Act*, S.C. 1967-1968, c. 7 — dont une forme existe depuis 1886 (*Dunn*, par. 17 et 41) et qui figure maintenant à l'al. 44e) de la *Loi d'interprétation*, L.R.C. 1985, c. I-21. L'alinéa 37*e*) prévoyait (et l'al. 44e) prévoit toujours, sous réserve de modifications mineures) ce qui suit :

> **37.** Lorsqu'un texte législatif (au présent article appelé « texte antérieur ») est abrogé et qu'un autre texte législatif (au présent article appelé « nouveau texte ») y est substitué,
>
> . . .
>
> *e*) lorsqu'une peine, une confiscation ou une punition est réduite ou mitigée par le nouveau texte, la peine, confiscation ou punition, si elle est infligée ou prononcée après l'abrogation, doit être réduite ou mitigée en conséquence . . .

M. Poulin convient que l'al. 11*i*) tire son origine de ce qui est aujourd'hui l'al. 44e) (m.i., par. 55). En effet, on a dit de l'al. 11*i*) qu'il constitutionnalise l'al. 44e) de la *Loi d'interprétation* (Chevrette, Cyr et Tanguay-Renaud, p. 780-781; voir aussi les commentaires que la juge L'Heureux-Dubé a faits aux par. 49-50 de l'arrêt *Dunn*, bien que dissidente, elle n'a pas été contredite par la majorité).

[75] La deuxième disposition que l'on peut dire à l'origine de la première formulation de l'al. 11*i*) est le par. 7(1) de la *Convention européenne des droits de l'homme*, 213 R.T.N.U. 221 (« *CEDH* »), entrée en vigueur le 3 septembre 1953. Bien que le Canada ne soit pas partie à la *CEDH*, la première formulation de l'al. 11*i*) ressemble beaucoup au par. 7(1), qui était (et est toujours) ainsi libellé :

> 1. Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise.

[76] En 1976, le Canada a adhéré au *Pacte international relatif aux droits civils et politiques*, R.T.

2019 SCC 47 (CanLII)

1976 No. 47 ("*ICCPR*"). Article 15(1) of the *ICCPR* said (and continues to say):

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Notably, the first two sentences of art. 15(1) practically duplicate the entirety of art. 7(1) of the *ECHR*. It is only the last sentence of art. 15(1) — which codifies the equivalent of "the benefit of the lesser punishment" — which is distinct. The *ICCPR* appears to have been among the first international instruments to codify the "relatively modern" principle that an offender should benefit from a post-offence decrease in punishment — which is sometimes called the "*lex mitior*" principle (P. Westen, "*Lex Mitior*: Converse of *Ex Post Facto* and Window into Criminal Desert" (2015), 18 *New Crim. L. Rev.* 167, at pp. 169-70; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, at para. 32).

[77] After Canada acceded to the *ICCPR*, the draft language of s. 11(*i*) changed. By 1979, it reflected the right to a decrease in punishment, saying:

> (g) the right to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of conviction . . . .

(Meeting of Officials on the Constitution, *Canadian Charter of Rights and Freedoms (Draft for Discussion Purposes Only)* (1979), div. III, at p. 4)

With the exception of "the time of conviction" as the relevant end point, this is effectively the same language now enshrined in s. 11(*i*), albeit structured differently. By 1980, the words "time of sentencing" had replaced the words "time of conviction"

Can. 1976 nº 47 (« *PIRDCP* »). Le paragraphe 15(1) du *PIRDCP* était alors (et est toujours) ainsi libellé :

> 1. Nul ne sera condamné pour des actions ou omissions qui ne constituaient pas un acte délictueux d'après le droit national ou international au moment où elles ont été commises. De même, il ne sera infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise. Si, postérieurement à cette infraction, la loi prévoit l'application d'une peine plus légère, le délinquant doit en bénéficier.

Il convient de noter que les deux premières phrases du par. 15(1) sont une reproduction quasi fidèle de la totalité du par. 7(1) de la *CEDH*. Seule la dernière phrase du par. 15(1) — qui codifie l'équivalent de « bénéficier de la peine la moins sévère » — diffère. Le *PIRDCP* semble faire partie des premiers instruments internationaux à codifier le principe [TRADUCTION] « relativement moderne » selon lequel un contrevenant devrait bénéficier d'un adoucissement de peine postérieur à l'infraction — parfois appelé le principe de la « *lex mitior* » (P. Westen, « *Lex Mitior* : Converse of *Ex Post Facto* and Window into Criminal Desert » (2015), 18 *New Crim. L. Rev.* 167, p. 169-170; *R. c. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, par. 32).

[77] Après l'adhésion du Canada au *PIRDCP*, le libellé du projet d'al. 11*i*) a changé. En 1979, il faisait état du droit au bénéfice d'un adoucissement de peine :

> g) le droit [d'un accusé] de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la commission de l'infraction et celui de la déclaration de culpabilité . . .

(Réunion de fonctionnaires sur la Constitution, *La Charte canadienne des droits et libertés (Avant-projet pour étude seulement)* (1979), section III, p. 4)

Mis à part les mots « celui de la déclaration de culpabilité » à la fin, c'est effectivement le même langage qui est maintenant enchâssé à l'al. 11*i*), mais il est structuré différemment. En 1980, les mots « celui de la sentence » avaient remplacé « celui de la

2019 SCC 47 (CanLII)

("Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", in *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980), at p. 18).

déclaration de culpabilité » (« Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada », dans *La Constitution canadienne 1980 : Projet de résolution concernant la Constitution du Canada* (1980), p. 19).

[78] As stated in the explanatory notes to the 1980 draft, s. 11(*i*), among other rights, was drawn from similar provisions in the *ICCPR*, including art. 15(1) (*Proposed Resolution*, at p. 16). However, the drafters did not give s. 11(*i*) identical scope to art. 15(1). Whereas the language of art. 15(1) grants an offender the seemingly more expansive and indefinite right to a lesser punishment enacted "subsequent to the commission of the offence", the text of s. 11(*i*) limits the offender's entitlement to "the time of sentencing". This important difference was deliberate (see Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 47, 1st Sess., 32nd Parl., January 28, 1981 ("Committee"), at pp. 65-69).

[78] Comme l'indiquent les notes explicatives du projet de 1980, l'al. 11*i*), parmi d'autres dispositions conférant des droits, était tiré de dispositions semblables que l'on trouve dans le *PIRDCP*, notamment le par. 15(1) (*Projet de résolution*, p. 17). Cependant, les rédacteurs n'ont pas donné à l'al. 11*i*) une portée identique à celle du par. 15(1). Alors que le par. 15(1) garantit au contrevenant le droit, apparemment plus large et indéfini, de bénéficier d'une peine moins sévère adoptée « postérieurement à [l']infraction », le texte de l'al. 11*i*) limite quant à lui la portée de ce droit au « [moment] de la sentence ». Cette importante différence était délibérée (voir Sénat et Chambre des communes, *Procès-verbaux et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada*, nº 47, 1re sess., 32e lég., 28 janvier 1981 (« Comité »), p. 65-69).

[79] The Committee's discussion about cutting off s. 11(*i*) at "the time of sentencing" was its only discussion about s. 11(*i*) over its 56 sitting days. The Committee did not expressly consider whether s. 11(*i*) confers a binary or global right. The House of Commons debates from 1980 to 1983 similarly do not reflect any consideration of this question.

[79] La discussion du Comité sur la possibilité de limiter la portée de l'al. 11*i*) au « [moment] de la sentence » a été sa seule discussion sur l'al. 11*i*) au cours de ses 56 jours de séance. Le Comité ne s'est pas penché explicitement sur la question de savoir si l'al. 11*i*) confère un droit binaire ou un droit global. Cette question n'a pas non plus été examinée au cours des débats de la Chambre des communes de 1980 à 1983.

[80] Nonetheless, there is good reason to believe that s. 11(*i*) was intended to confer no more than the binary right reflected in its language; none of the three provisions inspiring s. 11(*i*) endorsed a global right.

[80] Néanmoins, il y a tout lieu de croire que l'al. 11*i*) n'était destiné à conférer que le droit binaire dont fait état son libellé; aucune des trois dispositions qui a inspiré l'al. 11*i*) n'appuyait un droit global.

[81] As Mr. Poulin acknowledges in his factum, s. 44(e) of the *Interpretation Act* is binary in nature. This provision entitles an offender to a reduced punishment in the "new enactment" if that enactment is in force by the time punishment is "imposed or adjudged". This merely confers on an offender the

[81] Comme le reconnaît M. Poulin dans son mémoire, l'al. 44e) de la *Loi d'interprétation* est de nature binaire. Cette disposition confère au contrevenant le droit au bénéfice d'une peine réduite prévue par le « nouveau texte » si ce texte est en vigueur au moment où la peine est « infligée ou prononcée ».

2019 SCC 47 (CanLII)

benefit of any *current* lesser punishment. This provision therefore cannot have inspired a global s. 11(*i*) right. To the contrary, it seems to have planted the seed of a binary right.

Comme elle ne fait que conférer à un contrevenant le droit au bénéfice d'une peine moins sévère *actuelle*, cette disposition ne peut donc pas avoir inspiré une interprétation globale du droit garanti à l'al. 11*i*). Au contraire, elle semble avoir été à l'origine d'un droit binaire.

[82] Likewise, the *ECHR* could not have inspired a global s. 11(*i*) right. From 1978 until 2009, the second sentence of art. 7(1) of the *ECHR* was understood as merely codifying the principle that an offender cannot be subjected to a heavier penalty than the one applicable when the offence was committed (*X. v. Federal Republic of Germany*, Application No. 7900/77, March 6, 1978, D.R. 13, p. 70; *Scoppola v. Italy (No. 2)* (2010), 51 E.H.R.R. 12, at paras. 103-9). Indeed, there is no language whatsoever in art. 7(1) reflecting the principle that an offender should benefit from a decrease in punishment — let alone a *global* version of that principle. In fact, as the Supreme Court of the United Kingdom observed in *Docherty*, at para. 32, "[a]n additional sentence containing th[e] lex mitior principle (benefit of a more lenient penalty) was considered and rejected when art. 7 ECHR was adopted in 1950" (see para. 55, and the partly dissenting reasons of Judge Nicolaou in *Scoppola*, at pp. 364-65). I acknowledge that in 2009, in *Scoppola*, a majority of a divided Grand Chamber of the European Court of Human Rights departed from its own precedent and superimposed a global right onto art. 7(1). (I address the merits of this decision below.) Nonetheless, it remains the case that, at the time of the *Charter*'s enactment, art. 7(1) was not understood as conferring a global right.

[82] De même, la *CEDH* n'aurait pas pu inspirer un droit global garanti à l'al. 11*i*). De 1978 à 2009, la deuxième phrase du par. 7(1) de la *CEDH* était interprétée comme codifiant simplement le principe selon lequel un contrevenant ne peut faire l'objet d'une peine plus lourde que celle qui s'appliquait au moment de la perpétration de l'infraction (*X. c. République fédérale d'Allemagne*, requête nº 7900/77, 6 mars 1978, D.R. 13, p. 70; *Scoppola c. Italie (nº 2)* (2010), 51 E.H.R.R. 12, par. 103-109). En effet, rien dans le libellé du par. 7(1) ne fait référence au principe selon lequel un contrevenant devrait bénéficier d'un adoucissement de peine, encore moins à une version *globale* de ce principe. En réalité, comme l'a fait observer la Cour suprême du Royaume-Uni au par. 32 de l'arrêt *Docherty*, [TRADUCTION] « [l]a possibilité d'ajouter une phrase supplémentaire faisant mention [du] principe de la *lex mitior* (droit de bénéficier d'une peine plus clémente) a été examinée puis rejetée lorsque l'art. 7 de la *CEDH* a été adopté en 1950 » (voir le par. 55 ainsi que les motifs dissidents en partie du juge Nicolaou dans l'arrêt *Scoppola*, p. 364-365). Je reconnais qu'en 2009, dans *Scoppola*, les juges majoritaires de la Grande chambre de la Cour européenne des droits de l'homme se sont écartés du précédent établi par la cour elle-même et ont superposé au par. 7(1) un droit global. (Je me pencherai sur le bien-fondé de cette décision ci-dessous.) Malgré cela, il demeure qu'au moment de l'adoption de la *Charte*, le par. 7(1) n'était pas considéré comme conférant un droit global.

[83] Article 15(1) of the *ICCPR* is admittedly more ambiguous. Like s. 11(*i*), it employs binary language ("a lighter penalty"), but, as stated above, the rest of its language is quite expansive. The parties have not identified, nor am I aware of, any decisions or General Comments of the United Nations Human Rights Committee grappling with the binary/global question in relation to art. 15(1). It therefore appears to remain undecided whether art. 15(1) confers a

[83] Le paragraphe 15(1) du *PIRDCP* est certes plus ambigu. À l'instar de l'al. 11*i*), il contient un langage binaire (« peine plus légère »), mais comme il a été mentionné précédemment, le reste du libellé a une portée assez vaste. Les parties n'ont renvoyé à aucune décision ni à aucun commentaire général du Comité des droits de l'homme des Nations Unies portant sur la question de l'interprétation binaire ou globale du par. 15(1), et je n'en connais pas non

2019 SCC 47 (CanLII)

binary or a global right. As such, I do not see how art. 15(1) could have caused the drafters of the *Charter* to deviate from a binary approach to s. 11(*i*) built upon s. 37(e) of the *Interpretation Act* and art. 7(1) of the *ECHR*.

plus. Il semble donc que la question de savoir si le par. 15(1) confère un droit binaire ou un droit global n'a toujours pas été tranchée. De ce fait, je ne vois pas comment le par. 15(1) aurait pu amener les rédacteurs de la *Charte* à s'écarter, pour l'al. 11*i*), d'une interprétation binaire fondée sur l'al. 37e) de la *Loi d'interprétation* et sur le par. 7(1) de la *CEDH*.

[84] From this review of the origins of s. 11(*i*), I see no indication that s. 11(*i*) enshrined a right broader than the binary one suggested in its wording. While a binary right was already expressly recognized in the *Interpretation Act* at the time of the *Charter*'s enactment, a global right was nowhere to be found.

[84] À l'issue de cet examen des origines de l'al. 11*i*), rien ne me laisse croire que l'al. 11*i*) a enchâssé un droit plus vaste que le droit binaire que laisse entrevoir son libellé. Alors qu'un droit binaire était déjà explicitement reconnu dans la *Loi d'interprétation* au moment de l'adoption de la *Charte*, il n'était fait état d'un droit global nulle part.

[85] What remains to be seen is whether the purposes of s. 11(*i*) support a global interpretation of s. 11(*i*), or whether there is any purposive basis to read s. 11(*i*) globally. While the origins of s. 11(*i*) do not support a global interpretation, s. 11(*i*) could still receive that interpretation if its purposes justified it (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.). However, I find that the purposes of s. 11(*i*) do not support a global right. I now conduct this central analysis.

[85] Il reste à voir si les objets de l'al. 11*i*) appuient une interprétation globale de ce dernier ou s'il existe un fondement téléologique justifiant une interprétation globale de l'al. 11*i*). Bien que les origines de l'al. 11*i*) n'appuient pas une interprétation globale, l'al. 11*i*) pourrait tout de même être interprété de cette façon si ses objets le justifiaient (voir *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, le juge Lamer). Cependant, je suis d'avis que les objets de l'al. 11*i*) n'appuient pas une interprétation globale du droit. Je me pencherai maintenant sur cette analyse essentielle.

(d) *The Purposes of Section 11(i) Give Rise to a Binary Right*

d) *Les objets de l'al. 11i) donnent naissance à un droit binaire*

[86] To reiterate, the purposes animating s. 11(*i*) are the rule of law and fairness. Of these purposes, Mr. Poulin and the CLA argue primarily that it is the fairness principle that demands a global interpretation of the right.

[86] Je le répète, les objets qui sous-tendent l'al. 11*i*) sont la primauté du droit et l'équité. M. Poulin et la CLA font valoir principalement que celui de ces principes qui exige une interprétation globale du droit est le principe de l'équité.

[87] In particular, Mr. Poulin and the CLA submit that a binary interpretation of s. 11(*i*) would result in unfairness where, for instance, two offenders who committed the same crime at the same time are sentenced at different times, when different sentencing regimes are in force. They argue that, under a binary s. 11(*i*) right, these two offenders would have constitutional rights to different punishments. The AQAAD also claims that this result would be arbitrary as offenders do not control the timing of

[87] Plus particulièrement, M. Poulin et la CLA plaident qu'une interprétation binaire de l'al. 11*i*) entraînerait une iniquité lorsque, par exemple, deux contrevenants ayant commis le même crime au même moment sont condamnés à des moments différents, alors que les régimes de détermination des peines en vigueur diffèrent. Ils soutiennent qu'une interprétation binaire du droit garanti par l'al. 11*i*) accorderait à ces deux contrevenants le droit constitutionnel de bénéficier de peines différentes. L'AQAAD prétend

2019 SCC 47 (CanLII)

their investigations, prosecutions and sentencings, nor the timing of legislative changes to sentencing provisions.

elle aussi que ce résultat serait arbitraire puisque les contrevenants n'ont aucun contrôle sur le moment de l'enquête, de la poursuite et de la détermination de la peine, ni sur le moment où des modifications législatives sont apportées aux dispositions sur la détermination de la peine.

[88] I offer the following hypothetical to illustrate the kind of situation contemplated by these parties:

- "A" and "B" commit the same offence at the same time. The punishment for the offence is at "Level 3".
- The punishment for the offence temporarily drops to "Level 1".
- A is sentenced and receives a "Level 1" sentence.
- The punishment for the offence rises to "Level 2".
- B is sentenced and receives a "Level 2" sentence.

[88] Voici un exemple hypothétique qui illustre bien le type de situation auquel songent ces parties :

- « A » et « B » commettent la même infraction au même moment. La peine prévue pour l'infraction est de « niveau 3 ».
- La peine prévue pour l'infraction est temporairement ramenée au « niveau 1 ».
- A est condamné à une peine de « niveau 1 ».
- La peine prévue pour l'infraction passe ensuite au « niveau 2 ».
- B est condamné à une peine de « niveau 2 ».

[89] There are, in my view, three crucial flaws with the argument that fairness (and, in particular, concerns about arbitrariness) mandate a global interpretation of s. 11(*i*).

[89] Il y a, à mon avis, trois failles cruciales dans l'argument selon lequel le principe d'équité (et, plus particulièrement, les préoccupations au sujet du caractère arbitraire) commande une interprétation globale de l'al. 11*i*).

[90] First, it is not unfair or arbitrary for an offender like B to be punished according to the laws in force at the time he committed his offence, or a more favourable law, if one is in force when he is sentenced. To the contrary, these two laws are *linked* to the offender and the proceedings against him; the first sets out the punishment he risked incurring at the time he acted, and the other likewise sets the contours for a sentence that reflects society's attitude about the gravity of the offence and the responsibility of the offender at the precise moment that the sentence is imposed. These punishments are therefore tethered to two points in time that bear a deep connection to the offender's conduct and criminality. It is, accordingly, fair and rational for the offender to have the benefit of one of these punishments. Conversely, there is no principled basis to grant an offender like B the benefit of a punishment which has no connection to his offending conduct or to society's view of his

[90] Premièrement, il n'est ni injuste ni arbitraire qu'un contrevenant comme B soit puni conformément aux lois en vigueur au moment où il a commis son infraction, ou à une loi plus favorable s'il y en avait une en vigueur au moment de sa sentence. Au contraire, ces deux lois sont *liées* au contrevenant et à la poursuite engagée contre lui : la première loi établit la peine qu'il risquait de se voir infliger au moment où il a commis l'infraction et l'autre établit de la même manière les contours d'une peine qui tient compte de la perception de la société quant à la gravité de l'infraction et à la responsabilité du contrevenant au moment précis où la peine lui est infligée. Ces peines sont donc rattachées à deux moments précis qui sont profondément liés à la criminalité et à la conduite du contrevenant. Il est, par conséquent, juste et rationnel que le contrevenant puisse bénéficier de l'une de ces peines. À l'inverse, il n'existe aucune raison de principe d'accorder à un contrevenant

2019 SCC 47 (CanLII)

conduct at the time the court is called upon to pass sentence.

comme B le bénéfice d'une peine n'ayant aucun lien avec sa conduite fautive ou avec la perception de la société à l'égard de sa conduite au moment où le tribunal est appelé à déterminer la peine.

[91] The fact that one of the two hypothetical offenders described above, A, receives a more lenient punishment than the other, B, is justified by society's changed sense of the gravity of the offence as between the dates of A and B's sentencings. This is not arbitrary; this is the reality of legislative change. One offender is not treated unfairly, or arbitrarily, by the other being sentenced at a time when society looks more forgivingly upon the offence.

[91] Le fait que l'un des deux contrevenants hypothétiques mentionnés plus haut (soit A) reçoive une peine plus clémente que l'autre (soit B) s'explique par le changement de perception de la société quant à la gravité de l'infraction, lequel changement est survenu entre le moment de la sentence de A et celui de la sentence de B. Ce n'est en rien arbitraire; c'est la réalité des modifications législatives. Un contrevenant n'est pas traité de façon injuste, ou arbitraire, du simple fait que l'autre est condamné à un moment où la société se montre plus indulgente à l'égard de l'infraction en cause.

[92] Without using its name, Mr. Poulin, the CLA and the AQAAD essentially resort to the sentencing principle of "parity" in arguing that s. 11(*i*) must be read in a manner that treats like offenders alike at sentencing. This principle, set out in s. 718.2(b) of the *Criminal Code*, instructs that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". Yet this principle has never guaranteed similar offenders equivalent sentences across different sentencing regimes. Indeed, it has never guaranteed like offenders equivalent sentences within the *same* regime (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92). As stated in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 36:

[92] Sans le nommer, M. Poulin, la CLA et l'AQAAD invoquent essentiellement le principe de la « parité » lorsqu'ils allèguent que l'al. 11*i*) doit être interprété d'une manière visant à traiter les contrevenants semblables de façon semblable au moment de la sentence. Ce principe, établi à l'al. 718.2b) du *Code criminel*, prévoit « l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables ». Toutefois, ce principe n'a jamais garanti à des contrevenants semblables des peines équivalentes dans le cadre de régimes de détermination des peines différents. Il n'a d'ailleurs jamais garanti des peines équivalentes à des contrevenants semblables dans le cadre d'un *même* régime (*R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 92). Comme la Cour l'a déclaré dans l'arrêt *R. c. L.M.*, 2008 CSC 31, [2008] 2 R.C.S. 163, par. 36 :

> Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality (see Dadour, at p. 18). As this Court noted in *M. (C.A.)*, at para. 92, "there is no such thing as a uniform sentence for a particular crime". [Emphasis in original.]

> Des peines prononcées à l'égard des mêmes catégories d'infraction ne seront pas toujours parfaitement semblables, en raison de la nature même d'un processus de détermination de la peine axé sur l'individu. En effet, le principe de la parité n'interdit pas la disparité *si les circonstances le justifient*, en raison de l'existence de la règle de la proportionnalité (voir Dadour, p. 18). Comme notre Cour l'a rappelé dans *M. (C.A.)*, par. 92, « il n'existe pas de peine uniforme pour un crime donné ». [En italique dans l'original.]

2019 SCC 47 (CanLII)

A different sentencing regime is clearly a circumstance that warrants a different sentence. To put it in terms of the hypothetical above, the difference in punishments for A and B "can be rationally explained" by the change in legislation (*R. v. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134, at para. 46).

Un régime de détermination des peines différent constitue visiblement une circonstance qui justifie une peine différente. Pour en revenir à l'exemple hypothétique présenté plus haut, la différence entre les peines infligées à A et à B [TRADUCTION] « peut s'expliquer rationnellement » par la modification législative (*R. c. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134, par. 46).

[93] By insisting that the two offenders in the hypothetical ought to be entitled to the same, lowest punishment, Mr. Poulin, the CLA and the AQAAD elevate their misplaced concern about unfairness or arbitrariness *as between these two offenders* above the settled principles of s. 11(*i*) — namely that an offender should not be "ambushed" by a subsequent aggravation of the applicable punishment and that an offender should not be subjected to an outdated harsher punishment. Proportionality looks in part to "the gravity of the offence" (*Criminal Code*, s. 718.1). Apart from the time of commission, it does not look to Parliament's former sense of the gravity of the offence, merely because it had once been more favourable to the offender.

[93] En insistant pour dire que les deux contrevenants présentés dans l'exemple hypothétique devraient tous deux bénéficier de la même peine la moins sévère, M. Poulin, la CLA et l'AQAAD font passer leur préoccupation mal placée quant au caractère injuste ou arbitraire de la situation *entre ces deux contrevenants* devant les principes établis par l'al. 11*i*) — à savoir qu'un contrevenant ne devrait pas se trouver « pris au piège » par l'aggravation ultérieure de la peine prévue et qu'il ne devrait pas se voir infliger une peine plus sévère et dépassée. La proportionnalité tient en partie à « la gravité de l'infraction » (*Code criminel*, art. 718.1). À part le moment où l'infraction est commise, elle ne tient pas à l'ancienne perception du législateur quant à la gravité de l'infraction simplement parce qu'elle a déjà été plus favorable au contrevenant.

[94] It is worth noting that, in the above hypothetical, both offenders receive a benefit. Both receive a punishment lower than the one in place at the time they committed the offence: A receives a Level 1, and B receives a Level 2, when the punishment they risked at the time of the offence was a Level 3. While s. 11(*i*) provides them with different lesser punishments from each other, they both receive the protection of a binary s. 11(*i*) right at their time of sentencing. They both face, as a *maximum* punishment, the punishment applicable at the time of their offence.

[94] Il vaut la peine de noter que, dans l'exemple hypothétique donné plus haut, les deux contrevenants sont avantagés. Ils bénéficient tous deux d'une peine moins sévère que celle qui s'appliquait au moment où ils ont commis leur infraction : A reçoit une peine de niveau 1 et B, une peine de niveau 2, alors que la peine à laquelle ils s'exposaient au moment où ils ont commis leur infraction était de niveau 3. Même s'ils bénéficient de peines moins sévères différentes au titre de l'al. 11*i*), ils bénéficient tous deux de la protection offerte par le droit binaire garanti à l'al. 11*i*) au moment de leur sentence. Ils sont tous deux passibles, en guise de peine *maximale*, de la peine applicable au moment où ils ont commis leur infraction.

[95] Second, and more fatally to the logic of their position, a global approach to s. 11(*i*) would not, in fact, ensure identical results for two offenders who committed their offences at the same time. This is

[95] Deuxièmement, la logique de la position de ces parties est fortement sapée par le fait qu'une interprétation globale de l'al. 11*i*) ne garantirait pas, en réalité, un résultat identique pour deux contrevenants ayant

2019 SCC 47 (CanLII)

illustrated by the following hypothetical, which, incidentally, was raised by the CLA:

- "A" and "B" commit an offence together. The punishment is a mandatory minimum sentence.
- A and B are tried separately.
- A is found guilty and sentenced to the mandatory minimum.
- B's trial ends in a mistrial. B undergoes a second trial.
- The mandatory minimum is abolished.
- B is found guilty and sentenced, without the mandatory minimum.

Notably, a global approach to s. 11(*i*) would not assist A here. Unlike in our previous hypothetical, this offender did not lose out on a lesser, intermediary sentence because of the timing of his sentencing. Rather, it just so happened that B's proceedings took longer, and lasted until a more favourable punishment was enacted. In essence, all that the CLA's hypothetical serves to illustrate is that individual offenders' proceedings can, inevitably, progress at different paces. As this hypothetical reveals, a global approach to s. 11(*i*) cannot prevent or counteract differences in treatment that flow from different proceedings progressing at their own paces.

[96] I offer a second hypothetical to demonstrate that a global interpretation of s. 11(*i*) could not succeed in ensuring that like offenders receive the same punishment:

- "A" commits an offence. The punishment for the offence is at "Level 2".
- The punishment for the offence temporarily drops to "Level 1".
- The punishment for the offence is quickly restored to "Level 2".
- "B" commits the same offence.

commis leur infraction au même moment. L'exemple hypothétique qui suit, lequel a d'ailleurs été donné par la CLA, l'illustre bien :

- « A » et « B » commettent une infraction ensemble. La peine prévue est une peine minimale obligatoire.
- A et B sont jugés séparément.
- A est déclaré coupable et est condamné à la peine minimale obligatoire.
- Le procès de B se solde par une annulation. B subit un deuxième procès.
- La peine minimale obligatoire est abolie.
- B est déclaré coupable et est condamné, mais ne se voit pas infliger la peine obligatoire.

Dans cet exemple, une interprétation globale de l'al. 11*i*) ne favoriserait en rien A. Contrairement à l'exemple précédent, ce contrevenant n'a pas été privé d'une peine intermédiaire moins sévère en raison du moment de sa sentence. Le fait est que les procédures engagées contre B ont pris plus de temps et ont duré jusqu'à ce qu'une peine plus clémente soit adoptée. En somme, tout ce que l'exemple hypothétique de la CLA arrive à démontrer est que les procédures engagées contre divers contrevenants peuvent, inévitablement, se dérouler à des rythmes différents. Comme le révèle l'exemple, une interprétation globale de l'al. 11*i*) ne peut ni empêcher ni contrebalancer les différences dans le traitement qui découlent du fait que chaque procédure se déroule à son propre rythme.

[96] Je propose un autre exemple hypothétique pour démontrer qu'une interprétation globale de l'al. 11*i*) ne permettrait pas de garantir que la même peine sera infligée à des contrevenants semblables :

- « A » commet une infraction. La peine prévue pour l'infraction est de « niveau 2 ».
- La peine prévue pour l'infraction est temporairement ramenée au « niveau 1 ».
- La peine prévue pour l'infraction est rapidement rétablie au « niveau 2 ».
- « B » commet la même infraction.

2019 SCC 47 (CanLII)

- The punishment for the offence is increased to "Level 3".
- A and B are both found guilty of the offence and are sentenced on the same day.

Under a global approach to s. 11(*i*), A would receive the benefit of a Level 1 punishment, as it was in place — albeit temporarily — between A's offence and sentencing. Meanwhile, B would only receive the benefit of a Level 2 sentence, even though the offenders both offended when the applicable punishment was at Level 2 and were both sentenced when the applicable punishment was at Level 3. Despite their identical positions, a global interpretation of s. 11(*i*) arbitrarily bestows a greater benefit upon A. I therefore do not see how a global approach to s. 11(*i*) can be championed on the basis that it meaningfully counteracts a certain inherent arbitrariness in the timing of one offender's sentencing as compared to another's. To the contrary, and as this hypothetical illustrates, a global approach to s. 11(*i*) can confer arbitrary benefits. While a binary approach to s. 11(*i*) will not ensure that like offenders receive *the same result*, it will ensure that like offenders are treated *fairly*; they each receive protections which are connected to them and their proceedings.

[97] Third, there are countervailing fairness considerations that militate against a global approach to s. 11(*i*). Recall that those offenders who stand to benefit most from a global approach to s. 11(*i*) are those who have gone unprosecuted or unsentenced long enough for the punishments in place for their offences to have changed multiple times. In my view, any perceived unfairness or arbitrariness flowing from a binary approach to s. 11(*i*) is outweighed by the unfairness or arbitrariness that would result from according greater constitutional protections to those offenders who are sentenced long after their offences, compared to those offenders who are promptly brought to justice. In simpler terms, a global approach to s. 11(*i*) would disproportionately

- La peine pour l'infraction est élevée au « niveau 3 ».
- A et B sont tous deux déclarés coupables et reçoivent leur sentence le même jour.

Selon une interprétation globale de l'al. 11*i*), A bénéficierait d'une peine de niveau 1, puisque cette peine s'appliquait — quoique temporairement — entre le moment où il a commis l'infraction et le moment de sa sentence. B, quant à lui, recevrait une peine de niveau 2, même si les deux contrevenants ont commis leur infraction alors que la peine applicable était de niveau 2 et qu'ils ont tous deux été condamnés alors que la peine applicable était de niveau 3. En dépit de leurs situations identiques, une interprétation globale de l'al. 11*i*) confère, de façon arbitraire, un plus grand avantage à A. Par conséquent, je ne vois pas comment on pourrait défendre une interprétation globale de l'al. 11*i*) au motif qu'elle permettrait de contrebalancer adéquatement un certain caractère arbitraire inhérent au moment de la sentence d'un contrevenant par rapport à celle d'un autre contrevenant. Au contraire, et l'exemple hypothétique ci-dessus le démontre, une interprétation globale de l'al. 11*i*) peut conférer des bénéfices arbitraires. Bien qu'une interprétation binaire de l'al. 11*i*) ne puisse pas garantir que des contrevenants semblables obtiendront *le même résultat*, elle garantit que des contrevenants semblables seront traités de façon *équitable*; chacun bénéficiera de la protection qui se rattache à lui et à la poursuite engagée contre lui.

[97] Troisièmement, il existe des considérations en matière d'équité qui militent contre une interprétation globale de l'al. 11*i*). Rappelons que les contrevenants qui sont susceptibles de bénéficier le plus d'une interprétation globale de l'al. 11*i*) sont ceux pour qui la poursuite ou la condamnation ont tardé suffisamment pour que les peines prévues pour leurs infractions aient le temps de changer de multiples fois. À mon avis, toute perception de caractère injuste ou arbitraire susceptible de découler d'une interprétation binaire de l'al. 11*i*) est supplantée par le caractère injuste ou arbitraire qui résulterait du fait d'accorder une meilleure protection constitutionnelle aux contrevenants condamnés longtemps après avoir commis leurs infractions

2019 SCC 47 (CanLII)

benefit those who are sentenced years, or even decades, after their offences, such as Mr. Poulin himself. It bears repeating that Mr. Poulin went over three decades before being held to account for his sexual offences. As this Court has observed, sexual offences like Mr. Poulin's often go long unreported. Survivors of sexual trauma commonly delay in disclosing abuse for reasons such as "embarrassment, fear, guilt, or a lack of understanding and knowledge" (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65). There should be no additional gain to an offender under s. 11(*i*) when a victim is traumatized to the point of requiring significant time to overcome any reluctance to report the offence. Offenders whose crimes go long unreported should not have access to a greater number of possible punishments under s. 11(*i*) by virtue of their own offending conduct.

que les contrevenants traduits rapidement en justice. En termes plus simples, une interprétation globale de l'al. 11*i*) avantagerait démesurément les contrevenants condamnés des années, voire des décennies, après avoir commis leurs infractions, comme M. Poulin lui-même. Il vaut la peine de répéter que M. Poulin a passé plus de trois décennies avant de rendre des comptes pour les infractions d'ordre sexuel qu'il a commises. Ainsi que notre Cour l'a fait remarquer, les infractions d'ordre sexuel comme celles de M. Poulin demeurent souvent cachées durant de longues périodes. Il arrive fréquemment que des survivants de traumatismes sexuels tardent à révéler les agressions pour diverses raisons comme « la gêne, la crainte, le sentiment de culpabilité ainsi que le manque de compréhension et de connaissance » (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 65). Un contrevenant ne devrait pas pouvoir bénéficier d'un avantage supplémentaire au titre de l'al. 11*i*) lorsqu'une victime est traumatisée au point d'avoir besoin d'un délai considérable pour surmonter sa réticence à dénoncer l'infraction. Les contrevenants dont les crimes sont gardés sous silence pendant longtemps ne devraient pas avoir accès au plus grand nombre de peines possibles, au titre de l'al. 11*i*), en raison de leur propre conduite fautive.

[98] For these reasons, I reject the contention that the principle of fairness animating s. 11(*i*) supports a global interpretation of that provision. To the contrary, a global interpretation of s. 11(*i*) would unfairly and arbitrarily benefit certain offenders by granting them the right to a punishment which is utterly disconnected from their conduct or proceedings. It is sufficiently and amply fair for s. 11(*i*) to guarantee to the offender the lesser of the punishments under the laws in force at the time of commission and the time of sentencing.

[98] Pour ces motifs, je rejette la prétention selon laquelle le principe de l'équité qui sous-tend l'al. 11*i*) appuie une interprétation globale de cette disposition. Au contraire, une interprétation globale de l'al. 11*i*) profiterait de façon injuste et arbitraire à certains contrevenants en leur accordant le droit de bénéficier d'une peine qui n'a rien à voir avec leur conduite ou la poursuite engagée contre eux. Il est suffisamment et amplement équitable que l'al. 11*i*) garantisse au contrevenant la moins sévère des peines prévues par les lois en vigueur au moment de la perpétration de l'infraction et à celui de la sentence.

[99] In addition, I find that a global interpretation of s. 11(*i*) would have at least two other unwarranted consequences.

[99] En outre, je suis d'avis qu'une interprétation globale de l'al. 11*i*) aurait au moins deux autres conséquences injustifiées.

[100] First, a global s. 11(*i*) right would have the effect of resurrecting punishments which Parliament has, by repealing or amending them, expressly

[100] Tout d'abord, une interprétation globale du droit garanti à l'al. 11*i*) aurait pour effet de faire renaître des peines que le législateur a expressément

2019 SCC 47 (CanLII)

rejected — even where such a result is not justified by the principle of legality. As set out above, s. 11(*i*) does not merely provide the sentencing court with additional options; it entitles the offender to the lesser punishment. I see no reason why the *Charter* would enshrine the constitutional right to access, in all cases, an array of punishments which Parliament has since deemed unsuitable. It is one thing for s. 11(*i*) to resurrect for the offender the lesser punishment under the laws in force when the offender committed the offence. It is quite another thing for s. 11(*i*) to resurrect any temporary reductions in punishment which came after the offence and bear no connection whatsoever to the offender's conduct or to contemporary sentencing norms (see *Docherty*, at para. 45). An interpretation of s. 11(*i*) that entitles an offender to the most favourable punishment in the array of past punishments would not only overshoot the purposes of this constitutional right, it would unduly undermine Parliament's general and exclusive authority to enact and amend the criminal law.

rejetées en les abrogeant ou en les modifiant, même si ce résultat n'est pas justifié par le principe de la légalité. Comme je l'ai mentionné précédemment, l'al. 11*i*) ne fait pas qu'offrir des possibilités supplémentaires au tribunal qui détermine la peine; il donne au contrevenant le droit au bénéfice de la peine la moins sévère. Je ne vois pas pourquoi la *Charte* enchâsserait le droit constitutionnel de bénéficier, dans toutes les affaires, d'un éventail de peines que le législateur a depuis jugées inadéquates. C'est une chose d'invoquer l'al. 11*i*) pour faire renaître, au profit du contrevenant, la peine la moins sévère prévue par les lois en vigueur au moment où le contrevenant a commis l'infraction. C'en est une autre de faire renaître tous les adoucissements de peine temporaires qui sont survenus après la perpétration de l'infraction et qui n'ont aucun lien avec la conduite du contrevenant ou les normes actuelles de détermination de la peine (voir *Docherty*, par. 45). Non seulement une interprétation de l'al. 11*i*) qui accorderait au contrevenant le droit au bénéfice de la peine la plus favorable parmi toutes les peines qui se sont appliquées par le passé irait au-delà des objets de ce droit constitutionnel, mais elle saperait indûment le pouvoir général et exclusif du législateur d'adopter et de modifier les règles du droit criminel.

[101] Moreover, as the Supreme Court of the United Kingdom observed in *Docherty*, there remains the possibility of legislative oversight or error. A global s. 11(*i*) right would entitle offenders to the benefit of any intervening oversights or errors in past sentencing provisions, even those not in force during the commission of the offence or at sentencing. But in my view, there is no principled basis to grant an offender the right to that benefit. As that Supreme Court held:

[101] En outre, comme l'a fait remarquer la Cour suprême du Royaume-Uni dans *Docherty*, le risque d'omission ou d'erreur de la part du législateur subsiste. Une interprétation globale du droit garanti à l'al. 11*i*) permettrait aux contrevenants de bénéficier d'omissions ou d'erreurs contenues dans les dispositions antérieures sur la détermination de la peine, même celles qui n'étaient pas en vigueur au moment de la perpétration de l'infraction ou au moment de la sentence. À mon avis, il n'y a aucune raison de principe d'accorder à un contrevenant le droit à cet avantage. Comme l'a statué cette cour suprême :

Sentencing legislation and practice may well go up and down as public policy is held by legislators to change, or current responsible views on particular offending are perceived by courts to develop. But there is no injustice to a defendant to be sentenced according either to the law as it existed at the time of his offence or, if more lenient, according to the law as it exists when he is convicted and

[TRADUCTION] La législation et les pratiques en matière de détermination de la peine peuvent très bien fluctuer puisque, d'un côté, il revient aux législateurs de modifier les politiques publiques et, de l'autre côté, il revient aux tribunaux de déterminer de quelle façon ils perçoivent certaines infractions. Cependant, il n'est pas injuste pour un défendeur de recevoir une sentence conforme à la loi

2019 SCC 47 (CanLII)

sentenced. To insist that a defendant should not be sentenced on a basis now authoritatively regarded as excessive is one thing. It is quite another to say that he should be sentenced according to a practice which did not obtain when he committed the offence and does not obtain now, merely because for some time in the interim, however short, a different practice was adopted which has now been abandoned as wrong.

(*Docherty*, at para. 45)

[102] Second, and on a more practical level, I have difficulty accepting that the vision for s. 11(*i*) was for counsel and the court to have to identify and then compare and contrast *every* sentencing provision that has applied to the offence since the offender committed it. As set out above (under the heading "Context: How Section 11(*i*) Operates"), a global approach to s. 11(*i*) would require just this. I fail to see what would justify this exercise. An offender does not suffer any injustice by not having access to *all* punishments that have come and gone through valid legislative change, especially those punishments that are completely disconnected from any step taken by the state against the offender or any step taken by the offender in reliance on the contemporaneous punishment. By claiming the right to a conditional sentence, Mr. Poulin asks for the benefit of a punishment which had no bearing on his conduct, case or sentencing. There is no unfairness in not having access to a sentencing regime which was unknown at the time of the offence and not relied upon when it was in force.

[103] In closing — and in response to Mr. Poulin's position that s. 11(*i*) should be read in a manner that provides sentencing courts with enhanced sentencing options — I reiterate that it is inaccurate to say that a global s. 11(*i*) would normally increase options and discretion in sentencing. As explained above, the

telle qu'elle existait au moment où il a commis son infraction ou, si elle est plus clémente, à la loi telle qu'elle est au moment où il est condamné. Insister pour dire qu'un défendeur ne devrait pas se voir infliger une peine fondée sur une disposition maintenant formellement considérée comme démesurée est une chose. Il en est une autre de dire qu'il devrait se voir infliger une peine conformément à une pratique à laquelle il n'avait pas droit au moment où il a commis son infraction et à laquelle il n'a pas droit maintenant, et ce, simplement parce que durant une brève période dans l'intervalle, une pratique différente avait été adoptée, laquelle pratique a maintenant été abandonnée parce qu'elle était mauvaise.

(*Docherty*, par. 45)

[102] Deuxièmement, sur un plan plus pratique, j'ai du mal à accepter que la vision pour l'al. 11*i*) était d'obliger l'avocat et le tribunal à cerner puis à comparer et à mettre en opposition *chaque* disposition sur la détermination de la peine s'étant appliquée à l'infraction depuis la perpétration de celle-ci par le contrevenant. Comme je l'ai indiqué précédemment (sous la rubrique « Contexte : Application de l'al. 11*i*) »), c'est exactement ce qu'exigerait une interprétation globale de l'al. 11*i*). Je ne vois pas ce qui pourrait justifier cet exercice. Ne constitue pas une injustice pour un contrevenant le fait de ne pas avoir accès à *toutes* les peines qui ont été mises en vigueur puis écartées dans le cadre de modifications législatives légitimes, surtout les peines qui ne sont aucunement liées aux mesures prises par l'État contre le contrevenant ou aux mesures prises par le contrevenant en s'appuyant sur la peine actuelle. En revendiquant le droit à une peine d'emprisonnement avec sursis, M. Poulin demande à bénéficier d'une peine qui n'avait rien à voir avec sa conduite, sa cause ou sa sentence. Il n'est pas injuste qu'il n'ait pas accès à un régime de détermination de la peine qui était inconnu au moment de la perpétration de l'infraction et sur lequel il ne s'est pas appuyé pendant qu'il était en vigueur.

[103] Pour conclure — et en réponse à la position de M. Poulin suivant laquelle l'al. 11*i*) devrait être interprété de manière à offrir davantage de possibilités aux tribunaux qui déterminent les peines — je réitère qu'il est inexact de dire qu'une interprétation globale de l'al. 11*i*) offrirait normalement un

2019 SCC 47 (CanLII)

effect of s. 11(*i*) is to confine the sentencing court to sentencing the offender according to the lesser punishment. It is appropriate for s. 11(*i*) to confine the court to the lesser of the two sentencing regimes mentioned in s. 11(*i*). For the reasons given, it is *not* appropriate for s. 11(*i*) to require the court to impose what is, from the offender's perspective, a random baseline punishment plucked from the past. I agree wholeheartedly with Mr. Poulin that discretion in sentencing enhances justice in sentencing. I part company with Mr. Poulin in his view that a global approach to s. 11(*i*) generally serves discretion; it demonstrably does not.

[104] For these reasons, I conclude that the principled interpretation of s. 11(*i*) is a binary one. Reading s. 11(*i*) in a manner that would require the court to impose the most favourable punishment identifiable in the interval between the offence and sentencing does not reflect the kind of generous interpretation that *Charter* rights should receive. Rather, it reflects an unduly generous interpretation, disconnected from the purposes of the right.

(e) *Addressing the Contrary Jurisprudence*

[105] In coming to the conclusion that s. 11(*i*) confers a binary right, I am cognizant that Canadian courts have consistently assumed that s. 11(*i*) confers a global right (with perhaps one exception: see *R. v. Dubois*, Que. Sup. Ct., December 8, 1982, cited in R. M. McLeod, J. D. Takach, H. F. Morton, and M. D. Segal, *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (2019 (loose-leaf)), vol. 4, at p. 20-10.12). However, as stated above, I do not find these authorities to be based upon a complete or compelling purposive analysis of s. 11(*i*). Had they properly examined and weighed the functioning of s. 11(*i*), its language and origins, and the implications of a global right, they should, in my view,

nombre accru de possibilités et une plus grande latitude en matière de détermination de la peine. Comme il a été expliqué plus haut, l'al. 11*i*) a pour effet d'obliger le tribunal qui détermine la peine à s'en tenir à condamner le contrevenant à la peine la moins sévère. Il est approprié que l'al. 11*i*) oblige le tribunal à s'en tenir au moins sévère des deux régimes de détermination de la peine prévus par celui-ci. Pour les motifs exposés, il *n'est pas* approprié que l'al. 11*i*) oblige le tribunal à infliger une peine qui, du point de vue du contrevenant, constitue une peine de base quelconque tout droit sortie du passé. Je partage entièrement l'avis de M. Poulin que le pouvoir discrétionnaire en matière de détermination de la peine favorise la justice. Je ne suis toutefois pas de son avis lorsqu'il affirme qu'une interprétation globale de l'al. 11*i*) favorise habituellement le pouvoir discrétionnaire; ce n'est manifestement pas le cas.

[104] Pour ces motifs, je conclus que, rationnellement, l'al. 11*i*) doit être interprété de façon binaire. Une interprétation qui obligerait le tribunal à infliger la peine la plus favorable parmi celles qui se sont appliquées dans l'intervalle entre le moment de la perpétration de l'infraction et le moment de la sentence ne correspond pas au type d'interprétation libérale qui devrait être faite des droits garantis par la *Charte*. Il s'agit plutôt d'une interprétation excessivement libérale, sans rapport avec les objets du droit.

e) *Analyse de la jurisprudence contraire*

[105] Même si j'en suis arrivée à la conclusion que l'al. 11*i*) confère un droit binaire, je suis consciente que les tribunaux canadiens ont toujours présumé que l'al. 11*i*) conférait un droit global (sauf peut-être dans un cas : voir *R. c. Dubois*, C.S. Qc, 8 décembre 1982, cité dans R. M. McLeod, J. D. Takach, H. F. Morton et M. D. Segal, *The Canadian Charter of Rights : The Prosecution and Defence of Criminal and Other Statutory Offences* (2019 (feuilles mobiles)), vol. 4, p. 20-10.12). Cependant, comme il a été mentionné précédemment, je suis d'avis que cette jurisprudence n'est pas fondée sur une analyse téléologique complète ou convaincante de l'al. 11*i*). Si les tribunaux avaient correctement examiné et soupesé l'application de l'al. 11*i*), son libellé et ses origines,

2019 SCC 47 (CanLII)

have concluded that there is no purposive basis to interpret s. 11(*i*) in a global manner. The purposes of s. 11(*i*) — including fairness — do not support a global s. 11(*i*) right; to the contrary, they reject it.

ainsi que les répercussions d'un droit global, ils auraient dû, selon moi, conclure qu'il n'existe aucun fondement téléologique justifiant une interprétation globale de l'al. 11*i*). Les objectifs de l'al. 11*i*) — y compris l'équité — n'appuient pas une interprétation globale du droit garanti par cet alinéa; au contraire, ils la rejettent.

[106] Similarly, I find that the European Court of Human Rights' majority decision in *Scoppola* does not provide a persuasive basis for reading s. 11(*i*) in a global manner. As the U.K. Supreme Court noted, the majority reasons in *Scoppola* do not appear to recognize the crucial distinction between the binary and global versions of the right to a decrease in punishment. In fact, the majority relied on the justification for a *binary* right in concluding that art. 7(1) of the *ECHR* should be *global*; it stated that art. 7(1) should not allow the imposition of a punishment "which the State — and the community it represents — now consider excessive" (para. 108 (emphasis added)). I echo the Supreme Court of the United Kingdom's statement in *Docherty* that:

> There is a very clear difference between (1) a principle which prevents a court from imposing a penalty above and outside the range currently provided for by the state as appropriate to the crime and (2) a principle which requires the court to seek out and apply the most favourable rule which has existed at any intervening time since the offence was committed, even if it has since been abandoned. The first would fall within the rationale of confining the court to a range currently considered appropriate for the offence; the latter would not. The difference between the two is not adverted to, still less explored, in the judgment in *Scoppola*. It is, accordingly, by no means clear that the court intended to expand its incorporation of lex mitior into art. 7 by including the latter proposition. [para. 40]

[106] De même, je conclus que la décision des juges majoritaires de la Cour européenne des droits de l'homme dans l'arrêt *Scoppola* ne constitue pas une raison persuasive d'interpréter l'al. 11*i*) d'une façon globale. Comme l'a signalé la Cour suprême du R.-U., les motifs des juges majoritaires dans l'arrêt *Scoppola* ne semblent pas reconnaître la distinction cruciale entre les interprétations binaire et globale du droit à un adoucissement de peine. En fait, les juges majoritaires se sont appuyés sur la justification d'un droit *binaire* pour conclure que le par. 7(1) de la *CEDH* devrait être interprété de façon *globale*; ils ont déclaré que le par. 7(1) ne devrait pas permettre l'infliction de peines « que l'État, et la collectivité qu'il représente, considèrent désormais comme excessives » (par. 108 (je souligne)). Je fais mienne la déclaration faite par la Cour suprême du Royaume-Uni dans l'arrêt *Docherty* :

> [TRADUCTION] Il existe une différence très claire entre (1) un principe qui empêche un tribunal d'infliger une peine allant au-delà de l'éventail des peines actuellement jugées appropriées pour le crime par l'État et (2) un principe qui exige d'un tribunal qu'il cible et applique la règle la plus favorable ayant existé à n'importe quel moment depuis la perpétration de l'infraction, même si elle a été abandonnée depuis. Le premier s'inscrirait dans le cadre du raisonnement justifiant d'obliger les tribunaux à s'en tenir à un éventail de peines actuellement considérées comme étant appropriées pour l'infraction; ce ne serait pas le cas du deuxième. La différence entre les deux n'est pas mentionnée, encore moins étudiée, dans l'arrêt *Scoppola*. Par conséquent, il est loin d'être clair que le tribunal avait l'intention d'étendre la portée du principe de la *lex mitior* à l'art. 7 en s'appuyant sur la deuxième proposition. [par. 40]

[107] I further agree with the Supreme Court that the majority decision in *Scoppola* must be read in context. First, it is crucial to note that *Scoppola*'s treatment of art. 7(1) was informed by a provision

[107] Je conviens aussi avec la Cour suprême que la décision des juges majoritaires dans l'arrêt *Scoppola* doit être lue dans son contexte. D'abord, il est crucial de souligner que l'analyse du par. 7(1) faite

2019 SCC 47 (CanLII)

of Italy's criminal legislation that appeared to confer a global right:

> Article 2 of the 1930 Criminal Code, entitled "Succession of criminal laws", reads as follows:
>
> . . .
>
> 3. If the law in force at the time when the offence was committed and later [laws] differ, the law to be applied is the one whose provisions are most favourable to the defendant, except where a final sentence has already been imposed. [Emphasis added.]

(*Scoppola*, at para. 32; see also paras. 106 and 108)

Second, the facts of *Scoppola* were such that a global interpretation of art. 7(1) entitled Mr. Scoppola to a lesser punishment on which he had expressly *relied* in conducting his defence. At the time he committed his offences, the offences were punishable by life imprisonment and were not eligible for trial by summary procedure. A few months after Mr. Scoppola's offences (in January 2000), a legislative change made the summary procedure available for Mr. Scoppola's offences and stipulated that a person convicted of such offences through the summary procedure would be liable to face 30 years' imprisonment, not life. The summary procedure represented a trade-off for the accused who elected it; it entailed a reduction in sentence upon conviction, but came at the expense of important procedural safeguards — such as the ability to present evidence in response to the prosecution's case (para. 134). In reliance on that change, Mr. Scoppola elected to be tried by summary procedure. But a few months after that, on the very day he was convicted and sentenced, yet another legislative amendment entered into force, reverting the punishment for Mr. Scoppola's offences back to life imprisonment. It was in these circumstances that the European Court of Human Rights agreed that Mr. Scoppola's sentence of life imprisonment breached art. 7.

dans l'arrêt *Scoppola* s'appuyait sur une disposition de la législation pénale italienne qui semblait conférer un droit global :

> L'article 2 du code pénal [. . .] de 1930, intitulé « Succession des lois pénales », se lit comme suit :
>
> . . .
>
> 3. Si la loi en vigueur au moment où l'infraction a été commise et les [lois] postérieures sont différentes, on applique celle dont les dispositions sont les plus favorables à l'accusé, sauf s'il y a eu prononcé d'un jugement définitif. [Je souligne.]

(*Scoppola*, par. 32; voir aussi les par. 106 et 108.)

Ensuite, les faits de l'affaire *Scoppola* étaient tels qu'une interprétation globale du par. 7(1) accordait à M. Scoppola le droit au bénéfice de la peine la moins sévère sur laquelle il s'était expressément *appuyé* pour assurer sa défense. Au moment où il a commis ses infractions, celles-ci étaient passibles de l'emprisonnement à perpétuité et inadmissibles à un procès sommaire. Quelques mois après que M. Scoppola eut commis ses infractions (en janvier 2000), une modification législative a rendu possible le recours à la procédure sommaire dans le cas des infractions de M. Scoppola. Cette modification prévoyait qu'une personne reconnue coupable de ces infractions par suite d'une procédure sommaire devenait passible d'une peine d'emprisonnement de 30 ans, mais pas d'une peine d'emprisonnement à perpétuité. La procédure sommaire représentait un compromis pour l'accusé qui la choisissait; elle entraînait une réduction de peine au moment de la condamnation, mais cette réduction était offerte au détriment d'importantes garanties procédurales, notamment la possibilité de présenter des éléments de preuve en réponse à la preuve de la poursuite (par. 134). S'appuyant sur cette modification, M. Scoppola a choisi de subir un procès sommaire. Mais quelques mois plus tard, le jour même où il a été reconnu coupable et condamné, une autre modification législative est entrée en vigueur, ramenant la peine prévue pour les infractions commises par M. Scoppola à l'emprisonnement à perpétuité. C'est dans ces circonstances que la Cour européenne des droits de l'homme a reconnu que la peine d'emprisonnement à perpétuité infligée à M. Scoppola violait l'art. 7.

2019 SCC 47 (CanLII)

[108] In my view, it is significant that the European Court of Human Rights appeared to endorse a global right on such facts. The Court did not adopt a global approach in order to give an offender access to a punishment bearing no connection to the offender's conduct or proceedings. It adopted a global approach in response to a situation in which the offender had reasonably and detrimentally relied on an intervening provision.

[108] À mon avis, il est significatif que la Cour européenne des droits de l'homme ait semblé donner son aval à un droit global au vu des faits relatés ci-dessus. La Cour n'a pas adopté une interprétation globale dans le but de donner à un contrevenant l'accès à une peine n'ayant aucun rapport avec sa conduite ou la poursuite engagée contre lui. Elle a adopté une interprétation globale en réponse à une situation où le contrevenant s'était raisonnablement fondé, à son détriment, sur une disposition entrée en vigueur dans l'intervalle.

[109] Given the legal and factual context in which *Scoppola* was decided, and the absence of any treatment of the distinction between a binary and a global interpretation in the majority's reasons, I do not find that the majority decision lends support to a global interpretation of s. 11(*i*).

[109] Étant donné le contexte juridique et factuel dans lequel l'arrêt *Scoppola* a été rendu, et vu l'absence de tout examen de la distinction entre une interprétation binaire et une interprétation globale dans les motifs des juges majoritaires, j'estime que la décision des juges majoritaires n'appuie pas une interprétation globale de l'al. 11*i*).

(f) *Beyond the Section 11(i) Binary*

f) *Au-delà de l'interprétation binaire de l'al. 11i)*

[110] While *Scoppola* does not justify recognizing a global right under s. 11(*i*) of the *Charter*, it does illustrate a potentially attractive feature of the global approach to s. 11(*i*): the global approach ensures that the offender will have access to lesser, past punishments on which the offender relied in making decisions implicating their liberty. On a strict binary approach to s. 11(*i*), an offender is only entitled to the lesser of the punishments under the laws in force at the time of commission and the time of sentencing. Such an approach prevents the offender from accessing a lesser punishment that was applicable when the offender cooperated with the police or entered a plea, for example.

[110] Bien que l'arrêt *Scoppola* ne justifie pas de reconnaître que l'al. 11*i*) de la *Charte* confère un droit global, il fait ressortir une caractéristique potentiellement attrayante de la conception globale de l'al. 11*i*) : cette conception garantit que le contrevenant aura accès aux peines les moins sévères qui se sont appliquées antérieurement et sur lesquelles il s'est appuyé pour prendre des décisions ayant une incidence sur sa liberté. Selon une interprétation strictement binaire de l'al. 11*i*), le contrevenant n'a droit qu'à la moins sévère des peines prévues par les lois en vigueur au moment de la perpétration de l'infraction et à celui de la sentence. Une telle interprétation empêche le contrevenant de bénéficier d'une peine moins sévère qui s'appliquait, par exemple, au moment où il a coopéré avec la police ou au moment où il a enregistré un plaidoyer.

[111] Concerned with this prospect, the Crown in this case is prepared to accept that, in addition to being entitled to the lesser of the two punishments mentioned in s. 11(*i*), an offender should also be entitled to benefit from any lesser punishment in place from the time of charge to the time of sentencing. In the Crown's view, it would prejudice offenders not to have access to lesser sentences on which they

[111] En l'espèce, soucieux de cette possibilité, le ministère public est disposé à accepter qu'en plus d'avoir le droit de bénéficier de la moins sévère des deux peines mentionnées à l'al. 11*i*), un contrevenant devrait aussi pouvoir bénéficier de toute peine moins sévère qui se serait appliquée entre le moment de l'inculpation et le moment de la sentence. De l'avis du ministère public, il serait préjudiciable aux

2019 SCC 47 (CanLII)

(detrimentally) relied in conducting their defences. While the Crown is only prepared to extend "time of sentencing" to "time of charge", it seems to me that, on the Crown's logic, offenders should also be entitled to benefit from any lesser punishment in place when they turned themselves in to the police, confessed, or otherwise detrimentally relied on the law in inculpating themselves — even pre-charge.

contrevenants de ne pas pouvoir bénéficier des peines les moins sévères sur lesquelles ils se sont appuyés (à leur détriment) pour assurer leur défense. Bien que le ministère public ne soit disposé qu'à étendre la portée de l'expression « moment de la sentence » jusqu'au « moment de l'inculpation », il me semble que, selon la logique du ministère public, les contrevenants devraient aussi pouvoir bénéficier de toute peine moins sévère qui s'appliquait au moment où ils se sont rendus à la police, au moment où ils ont avoué ou à tout autre moment où ils se sont, à leur détriment, appuyés sur la loi pour s'incriminer — même avant l'inculpation.

[112] Whether there is, or ought to be, a rule that offenders are entitled to the benefit of lesser sentences on which they *relied* in conducting their defences or inculpating themselves — either as a matter of s. 11(*i*), another section of the *Charter*, or common law principles — is a question best left for another case. The question does not arise in this case; there is no indication from the record, nor did the parties suggest, that during the time a conditional sentence was applicable to his offences, Mr. Poulin made decisions engaging his liberty in reliance on that sentence. As the facts of this case do not raise this question, the parties have not made the submissions required for this Court to address it judiciously.

[112] La question de savoir s'il existe, ou s'il devrait exister, une règle autorisant les contrevenants à bénéficier des peines les moins sévères sur lesquelles ils se sont *appuyés* pour assurer leur défense ou pour s'incriminer — que ce soit au titre de l'al. 11*i*), d'un autre article de la *Charte* ou de principes de common law — en est une qu'il vaudrait mieux traiter dans une autre affaire. Cette question ne se pose pas en l'espèce; rien dans le dossier n'indique, et les parties ne l'ont pas laissé entendre, que durant la période où une peine d'emprisonnement avec sursis s'appliquait à ses infractions, M. Poulin se soit appuyé sur cette peine pour prendre des décisions mettant en jeu sa liberté. Puisque les faits de l'espèce ne soulèvent pas cette question, les parties n'ont pas formulé les observations nécessaires pour permettre à notre Cour de l'examiner judicieusement.

[113] What is clear is that s. 11(*i*) does not guarantee to every offender the benefit of *every* change in punishment in the interval between the commission of the offence and sentencing. An offender is not entitled to lesser punishments which are wholly unconnected to significant legal events in the proceedings against them. A legitimate concern for granting the offender access to a punishment on which the offender relied does not justify a global interpretation of s. 11(*i*). As explained throughout these reasons, a global s. 11(*i*) would vastly overshoot the purposes of s. 11(*i*). Every single offender should not enjoy the constitutional right to the lowest punishment that has ever applied to their offence since they committed it so that those few offenders who relied on particular lesser punishments can gain access to those

[113] Ce qui est clair, c'est que l'al. 11*i*) ne garantit pas à chaque contrevenant le bénéfice de *chaque* modification apportée à la peine dans l'intervalle entre la perpétration de l'infraction et la sentence. Un contrevenant n'a pas droit au bénéfice des peines les moins sévères qui sont complètement sans rapport avec les principaux événements juridiques de la poursuite engagée contre lui. Une préoccupation légitime concernant le fait d'accorder à un contrevenant l'accès à une peine sur laquelle il s'est appuyé ne justifie pas une interprétation globale de l'al. 11*i*). Comme il a été expliqué tout au long des présents motifs, une interprétation globale de l'al. 11*i*) irait largement au-delà des objets de cet alinéa. Ce ne sont pas tous les contrevenants qui devraient jouir du droit constitutionnel à la peine la moins sévère

2019 SCC 47 (CanLII)

punishments. To read s. 11(*i*) globally for the benefit of those few offenders would be to use a cleaver where a scalpel suffices. The situation of those few offenders may, in a subsequent case, require a tailored response. It does not, in this case, call for an unjustified and non-purposive interpretation of s. 11(*i*).

s'étant appliquée à leur infraction depuis qu'ils l'ont commise de sorte que les quelques contrevenants qui se sont appuyés sur ces peines les moins sévères puissent en bénéficier. Interpréter l'al. 11*i*) de façon globale au profit de ces quelques contrevenants reviendrait à utiliser un couperet alors qu'un simple scalpel suffirait. La situation de ces quelques contrevenants pourrait, dans une affaire subséquente, nécessiter une réponse adaptée, mais en l'espèce, elle ne commande pas une interprétation de l'al. 11*i*) qui ne serait ni justifiée ni téléologique.

[114] I therefore leave for another, more suitable, case the question of whether an offender has any legal entitlement to the benefit of a lesser punishment on which the offender actually relied. The rule of law and fairness considerations of such a case may give rise to a right and remedy under this, or another, section of the *Charter*.

[114] Par conséquent, je vais laisser à un autre juge, dans une affaire qui s'y prêtera mieux, le soin de trancher la question de savoir si un contrevenant a légalement droit au bénéfice de la peine la moins sévère sur laquelle il s'est réellement appuyé. Dans une telle affaire, les principes de la primauté du droit et de l'équité pourraient donner naissance à un droit et à un recours au titre de cette disposition, ou de toute autre disposition, de la *Charte*.

[115] In leaving this question for another case, I am aware that, in *K.R.J.*, a majority of the Court made the following statement:

> Relatedly, retrospective laws implicate fairness. "It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences" (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 754). For example, an accused who declines to consider a plea and is prepared to take the risk of going to trial should not be subsequently ambushed by an increase in the minimum or maximum penalty for the offence. A retrospective law such as this could not only cause unfairness in specific cases, but could also undermine public confidence in the criminal justice system. Instead, fairness in criminal punishment requires rules that are clear and certain. . . . [Emphasis added; para. 25.]

[115] J'estime certes que cette question doit être tranchée dans une autre affaire, mais je suis consciente que, dans l'arrêt *K.R.J.*, les juges majoritaires de la Cour ont déclaré ce qui suit :

> Dans le même ordre d'idées, la disposition d'application rétrospective met en cause l'équité. [TRADUCTION] « Il est injuste de fixer des règles, d'inviter les gens à s'y fier puis de les modifier en cours de route, surtout lorsqu'il en résulte des conséquences négatives » (R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 754). Par exemple, l'accusé qui refuse d'inscrire un plaidoyer de culpabilité et qui est disposé à courir le risque de subir un procès ne devrait pas ensuite se trouver pris au piège par l'accroissement de la peine minimale ou maximale dont est passible l'auteur de l'infraction. Un tel effet rétrospectif pourrait non seulement causer une injustice dans certains cas, mais aussi miner la confiance du public dans le système de justice criminelle. L'équité de la sanction pénale commande plutôt que les règles soient claires et certaines . . . [Je souligne; par. 25.]

[116] I do not take this statement to have said anything conclusive about the binary/global debate, or about whether offenders are entitled to the benefit of punishments on which they relied. This is for two reasons. First, *K.R.J.* was not contemplating

[116] Or, je ne crois pas que cet énoncé ait indiqué quoi que ce soit de concluant au sujet du débat entourant l'interprétation binaire ou globale, ni sur la question de savoir si les contrevenants ont droit au bénéfice des peines sur lesquelles ils se sont appuyés,

2019 SCC 47 (CanLII)

intermediary punishments under the laws in force in the interval between the offence and sentencing. The Court was merely comparing consecutive sentencing provisions (see paras. 9-11). The Court in *K.R.J.* was therefore not addressing the binary/global debate, or the question of reliance. Second, and most tellingly, the Court made this statement in the context of explaining why s. 11(*i*) entitles offenders to the lower punishment applicable when they committed their offence. The statement envisages the situation in which the punishment remains the same from the time of the offence through to the time of the offender's plea, but increases thereafter. As such, the statement does not speak to changes in punishment between the time of commission and sentencing, and whether offenders ought to have access to any of these.

(g) *Summary of Purposive Analysis*

[117] A purposive analysis of s. 11(*i*) leads me to conclude that it confers a binary right, not a global one. In particular, I find that the language and origins of s. 11(*i*) both confirm the purposes set out in *K.R.J.* — namely the rule of law and fairness — and indicate that s. 11(*i*) is intended to confer a binary right consistent with these purposes. It would not respect the purposes of s. 11(*i*) to read the right globally. Nor would it respect Parliament's role in adapting sentencing provisions, or the courts' role in crafting proportionate sentences under those provisions. While s. 11(*i*) embraces a degree of retrospectivity (in allowing the lesser current punishment to replace the harsher punishment at the time of the offence), this principled, purposive retrospectivity does not support an interpretation of s. 11(*i*) that embraces retrospectivity writ large.

et ce, pour deux raisons. D'abord, l'arrêt *K.R.J.* ne portait pas sur les peines intermédiaires prévues par les lois en vigueur dans l'intervalle entre la perpétration de l'infraction et la sentence. Dans cet arrêt, la Cour a simplement comparé des dispositions consécutives sur la détermination de la peine (voir par. 9-11). Elle ne s'est penchée ni sur le débat entourant l'interprétation binaire ou globale ni sur la question de savoir si le contrevenant s'est appuyé sur une disposition particulière. Ensuite, et c'est ce qui est le plus révélateur, la Cour a fait cette affirmation en expliquant pourquoi l'al. 11*i*) accorde aux contrevenants le bénéfice de la peine la moins sévère applicable au moment où ils ont commis leur infraction. L'énoncé envisage une situation où la peine demeurerait la même du moment de la perpétration de l'infraction jusqu'au moment du plaidoyer du contrevenant, mais s'aggraverait par la suite. Ainsi, l'énoncé ne porte pas sur les diverses peines qui se sont appliquées entre le moment de la perpétration de l'infraction et celui de la sentence, ni sur la question de savoir si les contrevenants devraient pouvoir bénéficier de l'une ou l'autre de ces peines.

g) *Résumé de l'analyse téléologique*

[117] Une analyse téléologique de l'al. 11*i*) m'amène à conclure que celui-ci confère un droit binaire et non un droit global. Plus particulièrement, j'estime que tant le libellé que les origines de l'al. 11*i*) confirment les objectifs qui le sous-tendent, lesquels sont énoncés dans l'arrêt *K.R.J.* — soit la primauté du droit et l'équité — et indiquent que l'al. 11*i*) vise à conférer un droit binaire qui s'accorde avec ces objectifs. Une interprétation globale du droit en question ne respecterait pas les objectifs de l'al. 11*i*). Elle ne respecterait pas non plus le rôle du législateur d'adapter les dispositions sur la détermination de la peine, ni le rôle des tribunaux de fixer des peines proportionnelles au titre de ces dispositions. Bien que l'al. 11*i*) prévoie un certain degré de rétrospectivité (en permettant que la peine actuelle moins sévère remplace la peine plus sévère applicable au moment de la perpétration de l'infraction), cette rétrospectivité téléologique, fondée sur des principes, n'appuie pas une interprétation de l'al. 11*i*) qui prévoit une rétrospectivité en termes larges.

2019 SCC 47 (CanLII)

(3) Application of Section 11(*i*) to the Respondent, Mr. Poulin

[118] In light of the parties' agreement that a conditional sentence was not applicable under the sentencing provisions in force either at the time of Mr. Poulin's acts of gross indecency (1979 to 1983) or at the time of his sentencing (May 2017), Mr. Poulin did not have the right to this sentence under s. 11(*i*) of the *Charter*. The courts below therefore erred in imposing it.

[119] The sentencing court was required to impose a sentence in accordance with the lesser punishment as between the punishment applicable at the time of the offence and the punishment applicable at the time of sentencing. In this regard, I note that the sentencing provision in force at the time of Mr. Poulin's gross indecencies would have offered the sentencing judge significant discretion to impose a sentence that would achieve the same objectives as the conditional sentence he ordered. At the time of Mr. Poulin's offences, the sentence for gross indecency was a maximum of five years' imprisonment (*Criminal Code*, R.S.C. 1970, c. C 34, s. 157).

[120] Given that he is now deceased, it is no longer necessary to sentence Mr. Poulin anew. There is no utility in passing a new sentence which the offender cannot serve (see, likewise, *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149, at para. 22; *R.A.R.*, at para. 34).

V. Conclusion

[121] An offender is not entitled to the benefit of a temporary reduction in punishment which occurred in the interval between the time of commission and the time of sentencing. Both the sentencing judge and the Court of Appeal erred in sentencing Mr. Poulin to a punishment applicable under the laws in force only in that interval and upon which Mr. Poulin placed no reliance. I would therefore allow the appeal. However, given Mr. Poulin's recent death, I would decline

(3) Application de l'al. 11*i*) à l'intimé, M. Poulin

[118] Étant donné que les parties conviennent qu'une peine d'emprisonnement avec sursis ne s'appliquait pas suivant les dispositions sur la détermination de la peine en vigueur au moment où M. Poulin a commis ses actes de grossière indécence (de 1979 à 1983) ou au moment de sa sentence (mai 2017), M. Poulin n'avait pas droit à cette peine au titre de l'al. 11*i*) de la *Charte*. Les juridictions inférieures ont donc erré en l'infligeant.

[119] Le tribunal était tenu d'infliger une peine correspondant à la peine la moins sévère entre celle qui s'appliquait au moment de la perpétration de l'infraction et celle qui s'appliquait au moment de la sentence. À cet égard, je souligne que la disposition sur la détermination de la peine qui était en vigueur au moment où M. Poulin a commis ses actes de grossière indécence aurait offert au juge qui déterminait la peine toute la latitude voulue pour infliger une peine qui aurait permis d'atteindre les mêmes objectifs que la peine d'emprisonnement avec sursis qu'il a ordonnée. Au moment où M. Poulin a commis ses infractions, la peine applicable à une infraction de grossière indécence était une peine maximale de cinq ans d'emprisonnement (*Code criminel*, S.R.C. 1970, c. C-34, art. 157).

[120] Puisque M. Poulin est maintenant décédé, il n'est plus nécessaire de le condamner de nouveau. Il est inutile de déterminer une nouvelle peine que le contrevenant ne peut purger (voir, dans la même veine, *R. c. R.N.S.*, 2000 CSC 7, [2000] 1 R.C.S. 149, par. 22; *R.A.R.*, par. 34).

V. Conclusion

[121] Un contrevenant n'a pas droit au bénéfice d'un adoucissement temporaire de la peine survenu dans l'intervalle entre le moment de la perpétration de l'infraction et celui de la sentence. Le juge qui a déterminé la peine et la Cour d'appel ont commis une erreur en condamnant M. Poulin à une peine applicable selon les lois en vigueur uniquement au cours de cet intervalle et sur laquelle M. Poulin ne s'est pas appuyé. J'accueillerais donc le pourvoi.

2019 SCC 47 (CanLII)

to remit the matter to the sentencing court or to pass a different sentence. The parties do not seek costs and I would not order any.

Toutefois, vu le récent décès de M. Poulin, je m'abstiendrais de renvoyer l'affaire au tribunal chargé de la détermination de la peine ou d'infliger une peine différente. Les parties n'ont pas demandé les dépens, et je n'en adjugerais aucuns.

English version of the reasons of Abella, Karakatsanis and Brown JJ. delivered by

Les motifs des juges Abella, Karakatsanis et Brown ont été rendus par

[122] KARAKATSANIS J. (dissenting) — Section 11(*i*) of the *Canadian Charter of Rights and Freedoms* guarantees that any person found guilty of an offence has the right, if the punishment for the offence "has been varied between the time of commission and the time of sentencing", to the benefit of the lesser punishment.

[122] LA JUGE KARAKATSANIS (dissidente) — L'alinéa 11*i*) de la *Charte canadienne des droits et libertés* garantit à toute personne déclarée coupable d'une infraction le droit de bénéficier de la peine la moins sévère lorsque la peine qui sanctionne l'infraction « est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence ».

[123] The conditional sentence did not exist at the time when the respondent committed the criminal acts in this case. This type of punishment was introduced by Parliament almost a decade after the last of the impugned acts. It continued to be available for crimes of this nature for some time, but was revoked before he was charged. Did the respondent accordingly have a right to the benefit of this type of punishment? Canadian courts have consistently answered this question in the affirmative. Unlike my colleagues, I see no reason to authorize the continuation of the appeal despite the fact that it is now moot given the respondent's death, or to depart from this consistent line of authority. I explain this below.

[123] En l'espèce, l'emprisonnement avec sursis n'existait pas lors de la perpétration par l'intimé des gestes criminels concernés. En effet, ce type de peine sera introduit par le Parlement un peu moins d'une dizaine d'années après les derniers gestes reprochés. Elle restera applicable à ce genre de crimes pendant une certaine période, puis sera abrogée pour ce genre de crimes avant que l'intimé ne soit inculpé. En conséquence, l'intimé avait-il le droit de bénéficier de ce type de peine? La jurisprudence canadienne répond de façon constante par l'affirmative à cette question. Contrairement à mes collègues, je ne vois aucune raison d'autoriser la poursuite de l'instance malgré son caractère théorique vu le décès de l'intimé, ou de nous écarter de cette jurisprudence constante. Voici pourquoi.

I. Facts and Proceedings

I. Faits et procédures

[124] Between 1979 and 1987, the respondent committed acts of a sexual nature against a young relative. These acts, which began with touching the young child's genitals, escalated to sodomy when the child reached adolescence. The respondent was charged for the acts in 2014 and was convicted for them only in 2016, before being sentenced in 2017. During the almost 40 years that passed between the commission of the first offence and his sentencing, the legal framework for this type of crime underwent significant changes.

[124] Entre 1979 et 1987, l'intimé s'est livré à des gestes à caractère sexuel sur la personne de son jeune parent. Ces gestes, qui ont d'abord commencé par des attouchements aux parties génitales du jeune enfant, ont progressé jusqu'à la sodomie quand ce dernier est devenu un adolescent. L'intimé est inculpé de ces gestes en 2014, dont il n'est déclaré coupable qu'en 2016, avant de recevoir sa peine en 2017. Dans l'intervalle de presque 40 ans qui sépare la perpétration de la première infraction reprochée et le prononcé de la peine, le cadre juridique applicable à ce genre de crimes évolue de façon considérable.

2019 SCC 47 (CanLII)

[125] At the time of commission, the respondent's criminal acts fell under the offence of gross indecency: *Criminal Code*, R.S.C. 1970, c. C-34, s. 157. That offence did not entail a minimum sentence. The conditional sentence (also known as the "community sentence") did not exist.

[126] In the late 1980s, the offence of gross indecency was abolished, and it was eventually replaced with equivalent present-day offences, such as sexual assault and sexual interference: *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.), s. 4; see also *R. v. L. (J.-J.)*, [1998] R.J.Q. 971 (Que. C.A.).

[127] In 1996, Parliament introduced the conditional sentence: *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22, s. 6. The new s. 742.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which governed the conditional sentence, provided that this type of sentence could be imposed for any offence that was not punishable by a minimum term of imprisonment, which at that time included the offences of sexual assault and sexual interference.

[128] In 2005, Parliament imposed, for the first time, a minimum term of imprisonment for the offence of sexual interference: *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 3. Seven years later, Parliament amended s. 742.1 such that it would no longer apply to the offence of sexual assault: *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 34. When the respondent was charged in 2014, therefore, and when he was convicted in 2016 and sentenced in 2017, the conditional sentence was no longer available as a punishment for the offences corresponding to the ones he had committed.

[129] At the sentencing hearing in 2017, Crown counsel suggested that the appropriate sentence would be a term of imprisonment for three and a half to five years. Defence counsel agreed that a sentence of three

[125] Au moment de la perpétration des infractions, les gestes criminels de l'intimé étaient visés par l'infraction de grossière indécence : *Code criminel*, S.R.C. 1970, c. C-34, art. 157. Cette infraction ne comportait aucune peine minimale. L'emprisonnement avec sursis (aussi appelé « emprisonnement dans la collectivité ») n'existait pas.

[126] Vers la fin des années 1980, l'infraction de grossière indécence est abrogée et, éventuellement, elle est remplacée par des infractions équivalentes contemporaines, telles que l'agression sexuelle et le contact sexuel illicite : *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, L.R.C. 1985, c. 19 (3e suppl.), art. 4; voir aussi : *R. c. L. (J.-J.)*, [1998] R.J.Q. 971 (C.A. Qc).

[127] En 1996, le Parlement instaure des peines d'emprisonnement avec sursis : *Loi modifiant le Code criminel (détermination de la peine) et d'autres lois en conséquence*, L.C. 1995, c. 22, art. 6. Le nouvel art. 742.1 du *Code criminel*, L.R.C. 1985, c. C-46, qui régit l'emprisonnement avec sursis, prévoit alors que ce type de peine peut être appliqué à l'égard de toute infraction qui ne comporte pas de peine minimale, ce qui comprend alors l'agression sexuelle et le contact sexuel illicite.

[128] En 2005, le Parlement impose pour la première fois une peine minimale d'emprisonnement à l'égard de l'infraction de contact sexuel illicite : *Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada*, L.C. 2005, c. 32, art. 3. Sept ans plus tard, il modifie l'art. 742.1 afin de soustraire à son application l'infraction d'agression sexuelle : *Loi sur la sécurité des rues et des communautés*, L.C. 2012, c. 1, art. 34. Ainsi, lors de l'inculpation de l'intimé en 2014, puis de sa déclaration de culpabilité en 2016 et du prononcé de sa peine en 2017, l'emprisonnement avec sursis ne fait plus partie des peines possibles à l'égard des infractions qui correspondent à celles commises par l'intimé.

[129] En 2017, à l'audience de détermination de la peine, la procureure de la Couronne suggère que la peine appropriée est une peine d'emprisonnement de trois ans et demi à cinq ans. Le procureur de la

2019 SCC 47 (CanLII)

and a half years would be appropriate. Because the respondent was in poor health, however, he asked, on an exceptional basis, for a community sentence. In support of this request, he filed a medical report to the effect that he had a variety of physical ailments as well as a degenerative neurological disorder. The judge found that the respondent, who was no longer really autonomous, faced the cessation of treatment and death in either the short- or the medium-term future.

[130] While acknowledging that an offender's poor health is not in itself a decisive sentencing factor, the judge noted that in this case, the respondent would represent a very heavy burden for the penitentiary system. Although prison officials said that they would be able to assume that responsibility, the judge pointed out that the respondent's situation would be [TRANSLATION] "exactly the same" in a penitentiary hospital as in the extended care facility where he was then living.

[131] The judge recognized that the conditional sentence had not existed at the time when the offences were committed. At the hearing, he asked counsel questions about the possibility of imposing such a sentence, which, everyone agreed, is not one that could be imposed without the protection of s. 11(*i*). In their submissions, both counsel avoided the question of the temporal aspect of the application of s. 11(*i*), focusing instead on the various forms taken by the offences and by s. 742.1 itself.

[132] In the end, the judge ruled in the respondent's favour. He found that any offender has a right to the benefit of the lesser punishment that applied between the time of commission of the offence and the time of sentencing, which meant that the conditional sentence was one of the sentences that could be imposed. Being of the view that the exceptional case before him called for an exceptional solution, the judge sentenced the respondent to a term of two years less a day to be served in the community.

[133] The Court of Appeal unanimously affirmed that decision. Dutil J.A. rightly pointed to the great

défense est d'accord pour dire qu'une peine de trois ans et demi serait appropriée. Or, comme son état de santé est précaire, l'intimé demande, à titre de mesure exceptionnelle, une peine d'emprisonnement dans la collectivité. Au soutien de sa demande, il dépose un rapport médical indiquant qu'il souffre de diverses difficultés physiques ainsi que d'une maladie dégénérative neurologique. Le juge conclut que l'intimé, qui n'a plus de réelle autonomie, se dirige vers une cessation des traitements et la mort à court ou à moyen terme.

[130] Tout en reconnaissant que le mauvais état de santé d'un délinquant ne constitue pas en soi un facteur décisif pour déterminer la peine à lui infliger, le juge constate qu'en l'espèce l'intimé représentera un très lourd fardeau pour les institutions pénitentiaires. Quoique les autorités carcérales se disent capables d'assumer cette charge, le juge fait observer que la situation de l'intimé sera « exactement la même », qu'il soit à l'infirmerie du pénitencier ou dans le centre de soins qui l'héberge alors.

[131] Le juge reconnaît que l'emprisonnement avec sursis n'existait pas au moment de la perpétration des infractions. Lors de l'audience, il pose des questions aux procureurs quant à la possibilité d'infliger une telle peine qui, de l'aveu de tous, n'est pas une peine qui pourrait être imposée sans la protection qu'offre l'al. 11*i*). De part et d'autre, les procureurs esquivent dans leurs observations la question de l'aspect temporel de l'application de l'al. 11*i*), et s'attachent plutôt aux multiples moutures des infractions et de l'art. 742.1 lui-même.

[132] Finalement, le juge tranche en faveur de l'intimé. Il estime que tout contrevenant a le droit de bénéficier de la peine la moins sévère qui ait été applicable entre le moment de la perpétration de l'infraction et celui de l'infliction de la peine. En conséquence, l'emprisonnement avec sursis fait partie des peines pouvant être infligées. Étant d'avis que le cas exceptionnel dont il est saisi appelle une solution exceptionnelle, le juge condamne l'intimé à une peine d'emprisonnement de deux ans moins un jour à être purgée dans la collectivité.

[133] La Cour d'appel confirme ce jugement à l'unanimité. La juge Dutil souligne avec justesse la

2019 SCC 47 (CanLII)

deference shown by appellate courts to the decisions of sentencing judges. She acknowledged that the evidence did not justify the sentencing judge's conclusion regarding the respondent's health, but held that this was not an overriding error. Citing *R. v. Belzil*, [1989] R.J.Q. 1117 (Que. C.A.), Dutil J.A. rejected Crown counsel's argument that s. 11(*i*) guarantees the benefit only of the sentences that applied at two specific times, that of commission of the offence and that of sentencing — a position that had not been thoroughly argued at the sentencing hearing. In her view, *Belzil* instead confirms the interpretation to the effect that s. 11(*i*) guarantees that the accused has a right to the benefit of any sentence that applied *between* those two times, [TRANSLATION] "even if there has been only a temporary reduction of the sentence between the time of the offence and that of sentencing": 2018 QCCA 21, 43 C.R. (7th) 216, at para. 33. This meant that it had been open to the sentencing judge to impose a conditional sentence.

grande déférence dont font montre les cours d'appel envers les décisions sur la peine prononcées en première instance. Elle reconnaît que le juge de première instance a conclu au-delà de ce que lui permettait la preuve quant à l'état de santé de l'intimé. Toutefois, selon elle, cette erreur n'est pas déterminante. Citant l'arrêt *R. c. Belzil*, [1989] R.J.Q. 1117 (C.A. Qc), la juge Dutil rejette l'argument du procureur de la Couronne voulant que l'al. 11*i*) ne garantisse que le bénéfice des peines applicables à deux moments précis, soit celui de la perpétration de l'infraction et celui du prononcé de la peine — un argument qui n'avait pas fait l'objet d'un débat approfondi en première instance. De l'avis de la juge Dutil, l'arrêt *Belzil* confirme plutôt l'interprétation selon laquelle l'al. 11*i*) garantit à l'accusé le droit de bénéficier de toute peine applicable *entre* ces deux moments, « même s'il n'y a eu qu'un adoucissement temporaire de la peine survenu entre le moment de l'infraction et celui de l'imposition de la peine » : 2018 QCCA 21, 43 C.R. (7th) 216, par. 33. Par conséquent, il était loisible au premier juge d'infliger une peine d'emprisonnement avec sursis.

[134] This Court granted the Crown's application for leave to appeal in October 2018. The respondent died on February 22, 2019 without having filed his factum. At that time, part of his sentence remained to be served, as a motion to suspend the sentence had been dismissed by Doyon J.A. in July 2017: 2017 QCCA 1137, at para. 12 (CanLII).

[134] En octobre 2018, notre Cour accueille la demande d'autorisation d'appel de la Couronne. L'intimé décède le 22 février 2019, sans avoir déposé son mémoire. Il lui reste toujours une partie de sa peine à purger, la requête sollicitant la suspension de l'exécution de sa peine ayant été rejetée par le juge Doyon de la Cour d'appel en juillet 2017 : 2017 QCCA 1137, par. 12 (CanLII).

[135] A week later, Crown counsel filed a motion for authorization to proceed with the appeal despite the respondent's death. Although he recognized that this Court has a discretion to refuse to hear the case, Crown counsel argued that proceeding with the appeal was in the interests of justice. In his opinion, the question of law in this case is one that is often evasive of appellate review and one that transcends the individual case of the respondent. He submitted that to decline to proceed with the appeal would just postpone this Court's inevitable consideration of the question and would at the same time waste the judicial resources that the Court had already expended on this appeal.

[135] Une semaine plus tard, le procureur de la Couronne dépose une requête en autorisation de poursuivre l'instance malgré le décès de l'intimé. Bien qu'il reconnaisse que la Cour dispose du pouvoir discrétionnaire de refuser de statuer sur la présente affaire, le procureur de la Couronne prétend que l'intérêt de la justice commande la poursuite de l'instance. À son avis, la question de droit en litige échappe souvent à l'examen des tribunaux d'appel et transcende le cas individuel de l'intimé. Selon lui, refuser la poursuite de l'instance ne ferait que repousser à plus tard l'inévitable examen de la question par notre Cour, tout en gaspillant les ressources judiciaires déjà affectées par celle-ci au présent pourvoi.

2019 SCC 47 (CanLII)

[136] A few days after that, counsel for the respondent filed their response to the appellant's motion. In it, they indicated that the executor of the deceased respondent, his daughter, did not wish to proceed with the appeal, but that she had nonetheless instructed them to defend the position the respondent had advanced while still alive should the Court decide to hear the case.

II. Issues

[137] There are two issues in this appeal. First, should the Court exercise its discretion and hear this appeal that has become moot as a result of the respondent's death? Second, should the Court overturn 30 years of consistent case law on the interpretation of s. 11(*i*) of the *Charter*? I would answer both these questions in the negative.

III. Mootness of the Appeal

[138] The Court noted in *Smith* that "cases in which it will be proper to exercise jurisdiction to hear a moot criminal appeal will be rare and exceptional": *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 10. In that case, it listed five "helpful rather than exhaustive" factors that can be considered in deciding whether there are special circumstances that make it in "the interests of justice" to proceed with an appeal that has been rendered moot: para. 50. These five factors are as follows:

1. whether the appeal will proceed in a proper adversarial context;
2. the strength of the grounds of the appeal;
3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
   (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
   (b) a systemic issue related to the administration of justice;

[136] Quelques jours plus tard, les procureurs de l'intimé déposent leur réponse à la requête de l'appelante. Ils y indiquent que l'exécutrice testamentaire du défunt intimé, sa fille, ne souhaite pas poursuivre l'instance, mais leur a néanmoins confié le mandat de défendre la position avancée par l'intimé de son vivant, advenant que la Cour accepte d'entendre l'affaire.

II. Questions en litige

[137] Il y a deux questions en litige dans le présent appel. Premièrement, la Cour devrait-elle exercer son pouvoir discrétionnaire et accepter d'entendre cet appel, devenu théorique par suite du décès de l'intimé? Deuxièmement, la Cour devrait-elle renverser 30 ans de jurisprudence constante sur l'interprétation de l'al. 11*i*) de la *Charte*? Je réponds à ces deux questions par la négative.

III. Le caractère théorique de l'appel

[138] Dans l'arrêt *Smith*, la Cour souligne que « [c]e n'est que rarement et à titre exceptionnel qu'il sera opportun d'exercer le pouvoir d'entendre un appel théorique en matière criminelle » : *R. c. Smith*, 2004 CSC 14, [2004] 1 R.C.S. 385, par. 10. Elle y dresse une liste de cinq facteurs « plutôt utiles qu'exhaustifs » qui peuvent être pris en considération afin de décider si des circonstances spéciales font en sorte qu'il est dans « l'intérêt de la justice » de poursuivre une instance devenue théorique : par. 50. Ces cinq facteurs sont les suivants :

1. l'existence d'un débat contradictoire approprié à la poursuite de l'instance en appel;
2. le sérieux des motifs d'appel;
3. l'existence de circonstances spéciales qui transcendent le décès de l'appelant ou de l'intimé, dont :
   a) une question de droit d'intérêt général, particulièrement s'il s'agit d'une question qui échappe ordinairement à l'examen en appel;
   b) une question de nature systémique ayant trait à l'administration de la justice;

2019 SCC 47 (CanLII)

(c) collateral consequences to the family of the deceased or to other interested persons or to the public;

4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;

5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself. [para. 50]

[139] In my view, this case is one of the "overwhelming number of cases" in which proceeding with the appeal would not be in the "interests of justice": *Smith*, at para. 46.

[140] First, I find it hard to conclude that a real adversarial context exists. Although the sentencing judge did raise the question of the application of s. 11(*i*), the temporal aspect of the application of this paragraph was not argued at the sentencing hearing. The judge's reasons on this point were particularly brief and cited no authorities. And although the Court of Appeal also touched on the question of the interpretation of this *Charter* right at the end of its reasons, it did not discuss this question in detail either.

[141] Moreover, this is hardly surprising given that there have since 1989 been some 15 judicial decisions — including five from courts of appeal — in which a single interpretation of s. 11(*i*) — the one adopted by the Quebec courts in the instant case — has been applied. Where the courts below have followed what is not just a majority but a unanimous line of cases, it seems to me that deference is in order on appeal. As I will explain below, the strength of Crown counsel's grounds of appeal is undermined by the solid reasoning that supports that jurisprudence.

c) les conséquences accessoires pour la famille du défunt, tout autre intéressé ou le public;

4. la question de savoir si la nature de l'ordonnance que pourrait rendre la cour d'appel justifie l'affectation de ses ressources limitées au règlement d'un appel théorique;

5. la question de savoir si, en poursuivant l'instance en appel, la cour n'excède pas la fonction judiciaire, qui est de trancher des différends concrets, et est amenée à se prononcer sur des questions de type législatif autonomes qu'il vaut mieux laisser au législateur. [par. 50]

[139] Je suis d'avis que la présente affaire fait partie de la « très grande majorité des cas » dans lesquels la poursuite de l'instance ne serait pas dans l'« intérêt de la justice » : *Smith*, par. 46.

[140] Premièrement, j'ai de la difficulté à conclure à l'existence d'un véritable débat contradictoire. Bien que le juge de première instance ait soulevé la question de l'application de l'al. 11*i*), l'aspect temporel de l'application de cette disposition n'a pas été débattu lors de l'audience de détermination de la peine. Les motifs du premier juge sur cette question sont des plus brefs et ne font état d'aucune source faisant autorité. Pour sa part, la Cour d'appel effleure elle aussi la question de l'interprétation de ce droit garanti par la *Charte* à la fin de son jugement, mais elle ne se livre pas elle non plus à une analyse fouillée de cette question.

[141] D'ailleurs, ceci n'est guère surprenant si l'on considère qu'environ une quinzaine de décisions judiciaires rendues depuis 1989 — dont cinq qui émanent de cours d'appel — ont appliqué une seule interprétation de l'al. 11*i*), soit celle retenue par les tribunaux québécois dans la présente instance. Lorsque les tribunaux inférieurs ont suivi un courant jurisprudentiel non seulement majoritaire, mais unanime, il me semble que la déférence est de mise en appel. Pour les raisons que j'expose plus loin, le sérieux des motifs d'appel invoqués par le procureur de la Couronne est affaibli par le solide raisonnement qui étaye cette jurisprudence.

2019 SCC 47 (CanLII)

[142] Second, while it is true that any issue concerning the interpretation of a *Charter* provision is always of great importance, there are no special circumstances in this case that transcend the death of the respondent. This Court has frequently exercised its discretion and agreed to hear a moot appeal on an issue that is ordinarily evasive of review by courts or on which there is uncertainty in the case law: see, e.g., *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 360-61. But in light of 30 years of consistent case law on this issue, I cannot accept the argument that we are facing conflicting lines of cases or the argument that the issue before us is one that is ordinarily evasive of appellate review. It became clear that there is no difference of opinion between courts when the only intervener who supports the appellant's interpretation — the only attorney general who saw fit to intervene — was unable to identify a single Canadian authority in support of that interpretation.

[143] Finally, the inequity of proceeding with an appeal against a deceased offender despite opposition from his family seems obvious to me. That doing so is excessive is clear from the conclusions being sought by the Crown in its motion. Rather than seeking a declaration with respect to the interpretation of s. 11(*i*), the Crown asks the Court to set aside a sentence imposed on a deceased man and to substitute for it the sentence the Court considers appropriate before simply staying the new sentence. This appeal should not have been heard.

[144] For the foregoing reasons, I would dismiss the motion to proceed with the appeal.

IV. Interpretation of Section 11(*i*) of the *Charter*

[145] The Crown submits that the Court of Appeal erred in interpreting s. 11(*i*). In the Crown's opinion, s. 11(*i*) provides that any offender has the right to the benefit of the lesser punishment, but *only* between two punishments: the one that applied at the time of commission and the one that applied at the time of sentencing. It argues that the interpretation

[142] Deuxièmement, bien qu'une question portant sur l'interprétation d'une disposition de la *Charte* soit toujours d'une grande importance, il n'existe pas en l'espèce de circonstances spéciales qui transcendent le décès de l'intimé. Notre Cour a fréquemment exercé son pouvoir discrétionnaire et accepté d'entendre un appel théorique lorsque la question en litige échappe ordinairement à l'examen des tribunaux ou fait l'objet d'une incertitude dans la jurisprudence : voir, p. ex., *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, p. 360-361. Or, face à 30 ans de jurisprudence constante sur la question en litige, je ne peux pas me rallier aux arguments selon lesquels nous serions en présence d'une controverse jurisprudentielle ou d'une question qui échappe ordinairement à l'examen des tribunaux d'appel. L'absence de toute controverse jurisprudentielle est devenue évidente lorsque le seul intervenant qui appuie l'interprétation de l'appelante — à savoir le seul procureur général qui a jugé bon d'intervenir — s'est avéré incapable de faire état d'une seule autorité canadienne au soutien de l'interprétation proposée par l'appelante.

[143] Enfin, l'inéquité du fait de poursuivre une instance contre un délinquant décédé, malgré l'opposition de sa famille, me semble évidente. Le caractère démesuré de cette démarche ressort clairement des conclusions recherchées dans la requête de la Couronne. Au lieu de solliciter une déclaration quant à l'interprétation de l'al. 11*i*), cette dernière demande à la Cour d'infirmer la peine qui a été infligée à un homme décédé et d'y substituer la peine qu'elle estime appropriée seulement pour surseoir à cette dernière. Le présent appel n'aurait pas dû être entendu.

[144] Pour les motifs qui précèdent, je rejetterais la requête en poursuite de l'instance.

IV. Interprétation de l'al. 11*i*) de la *Charte*

[145] La Couronne prétend que la Cour d'appel a mal interprété l'al. 11*i*). Selon la Couronne, cet alinéa signifie que tout contrevenant a droit au bénéfice de la peine la moins sévère, mais *seulement* parmi deux peines, soit la peine applicable au moment de la perpétration de l'infraction et celle qui s'appliquait au moment du prononcé de la sentence. À son

2019 SCC 47 (CanLII)

adopted by the courts is contrary to the three objects of s. 11(*i*): (1) protection from the retrospective imposition of a harsher punishment than the one that applied at the time of commission of the offence; (2) preservation of the principle of fairness that enables an accused to make decisions in relation to his or her criminal liability in light of the existing law, which the Crown limits to the times of commission of the offence, of the laying of charges and of sentencing; and (3) the principle that Canadian courts impose punishments that correspond to the stigma that contemporary society associates with the offence.

[146] The respondent contends that the interpretation adopted unanimously by the Canadian courts is the right one. In his opinion, the words of s. 11(*i*) are perfectly clear: an offender is guaranteed the mildest punishment that applied during the period *between* ("*entre*") the time of commission and the time of sentencing. Its wording suggests no limit in the number of variations in punishments that there might be over that period, which could easily have been indicated by replacing the word "between" with "or": the punishment available "at the time of commission of the offence or at the time of sentencing" (R.F., at para. 49 (emphasis in original)). The respondent argues that the interpretation proposed by the appellant, the effect of which would be to unjustifiably separate the various stages of the criminal process for the purpose of applying s. 11(*i*), is impractical.

[147] For 30 years, the Canadian courts have interpreted s. 11(*i*) consistently, holding that it guarantees any offender the benefit of the lesser sentence that applied between the time of commission of the offence and the time of sentencing. This conclusion has been reached in five cases in which courts had directly addressed the question raised in this appeal, that is, the possibility of imposing a conditional sentence for what is described as a "historical" sexual assault: see *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. v. Yusuf*, 2011 BCSC 626; *R. v. G.C.D.*, 2011 MBQB 235, 271 Man. R. (2d) 41; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d)

avis, l'interprétation adoptée par la jurisprudence est contraire aux trois objets de l'al. 11*i*), à savoir : (1) la protection contre l'infliction rétrospective d'une peine plus sévère que celle qui était applicable au moment de la perpétration de l'infraction; (2) la préservation du principe d'équité qui permet à l'inculpé de prendre des décisions concernant sa responsabilité criminelle sur la foi du droit en vigueur — que la Couronne limite aux moments de la perpétration de l'infraction, de l'inculpation et de la sentence; et (3) le principe selon lequel les tribunaux canadiens infligent des peines qui correspondent au degré de réprobation sociale contemporaine associé à l'infraction.

[146] L'intimé avance que l'interprétation retenue par l'ensemble de la jurisprudence canadienne est la bonne. Selon lui, le texte de l'alinéa est limpide : c'est la peine la plus clémente qui ait été applicable dans l'intervalle *entre* (« *between* ») le moment de la perpétration de l'infraction et celui de la sentence qui est garantie au contrevenant. Le libellé ne suggère aucune limite quant au nombre de variations de la peine pouvant survenir dans cet intervalle — ce qui aurait été facile à indiquer en remplaçant le mot « entre » par le mot « ou » : « la peine en vigueur au moment de la commission de l'infraction ou celle en vigueur au moment de l'imposition de la peine » (m.i., par. 49 (souligné dans l'original)). L'intimé qualifie de peu pratique l'interprétation proposée par l'appelante, qui a pour effet de morceler de manière injustifiée les différentes étapes du processus pénal pour l'application de l'al. 11*i*).

[147] Pendant 30 ans, les tribunaux canadiens ont interprété l'al. 11*i*) de façon constante, concluant que cette disposition garantit à tout contrevenant le bénéfice de la peine la moins sévère qui ait été applicable entre le moment de la perpétration de l'infraction et celui de la sentence. Dans cinq décisions, le tribunal est arrivé à cette conclusion après s'être penché directement sur la question soulevée par le présent appel, soit celle de la possibilité d'infliger une peine d'emprisonnement avec sursis pour une agression sexuelle dite « historique » : voir *R. c. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. c. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. c. Yusuf*, 2011 BCSC 626; *R. c. G.C.D.*, 2011 MBQB 235,

2019 SCC 47 (CanLII)

271. In some cases, the same reasoning has been adopted implicitly: *R. v. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. v. E.H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. v. Palacios*, 2012 ONCJ 195. In other cases, the *same* interpretation has been applied in contexts as varied as eligibility for parole after being convicted of murder (*Belzil*), effect of new rules for "faint hope" applications (*R. v. Simmonds*, 2018 BCCA 205, 415 C.R.R. (2d) 88) and changes to the rules applicable to dangerous offenders (*R. v. F.C.*, 2018 ONSC 561). Not to mention, finally, that there have been a series of Ontario cases in which Crown counsel have *conceded* the opposite interpretation to the one the Crown is advancing here: *R. v. Boudreau*, 2012 ONCJ 322, at para. 50 (CanLII); *R. v. D.P.*, 2014 ONSC 386, at para. 10 (CanLII); *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161, at para. 47.

271 Man. R. (2d) 41; *R. c. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271. Dans certaines décisions, le tribunal a adopté le même raisonnement de façon implicite : *R. c. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. c. E.H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. c. Palacios*, 2012 ONCJ 195. Dans d'autres encore, le tribunal a appliqué la *même* interprétation dans des contextes aussi variés que l'admissibilité à une libération conditionnelle suivant une déclaration de culpabilité pour meurtre : *Belzil*; l'application de nouvelles règles à des demandes dites [TRADUCTION] « du faible espoir » : *R. c. Simmonds*, 2018 BCCA 205, 415 C.R.R. (2d) 88; et la modification des règles applicables aux délinquants dangereux : *R. c. F.C.*, 2018 ONSC 561. Sans compter, enfin, une série de décisions ontariennes dans lesquelles les procureurs de la Couronne ont *concédé* l'interprétation opposée à celle avancée par la Couronne dans la présente instance : *R. c. Boudreau*, 2012 ONCJ 322, par. 50 (CanLII); *R. c. D.P.*, 2014 ONSC 386, par. 10 (CanLII); *R. c. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161, par. 47.

[148] The approach taken in the above decisions finds ample support in the words of s. 11(*i*), which suggest a continuum *between* the time of commission and the time of sentencing: see, e.g., *Cadman*, at paras. 31-46. See also: M. Vauclair and T. Desjardins, *Traité général de preuve et de procédure pénales* (26th ed. 2019), at para. 2743. In my opinion, this interpretation is dictated by both the English and the French versions of s. 11(*i*):

[148] L'approche adoptée dans les décisions précitées est amplement appuyée par le texte de l'al. 11*i*), dont la formulation suggère un continuum *entre* le moment de la perpétration de l'infraction et celui de la sentence : voir, notamment, *Cadman*, par. 31-46. Voir aussi : M. Vauclair et T. Desjardins, *Traité général de preuve et de procédure pénales* (26e éd. 2019), par. 2743. À mon avis, tant la version anglaise que la version française de l'al. 11i) exigent cette interprétation :

11. Any person charged with an offence has the right

. . .

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

11. Tout inculpé a le droit :

. . .

11. Tout inculpé a le droit :

. . .

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

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. . .

2019 SCC 47 (CanLII)

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[149] I am not convinced that the English word "lesser" dictates a "binary" interpretation: see, e.g., *Collins Canadian Dictionary* (2010), definition of "lesser", "not as great in quantity, size, or worth"; *Canadian Oxford Dictionary* (2nd ed. 2004), definition of "lesser", "not so great or much as the other or the rest" (emphasis added). A non-binary interpretation of "lesser" corresponds to the French version — "*la peine la moins sévère*" — which is in no way limited to a dual comparison: *Le Petit Robert* (new ed. 2012), definition of "*le moins*", [TRANSLATION] "superlative of *peu* (little, not much)".

[149] Je ne suis pas convaincue que le mot anglais « *lesser* » commande une interprétation dite « binaire » : voir, p. ex., *Collins Canadian Dictionary* (2010), *sub verbo* « *lesser* » : « *not as great in quantity, size, or worth* »; *Canadian Oxford Dictionary* (2e éd. 2004), *sub verbo* « *lesser* » : « *not so great or much as the other or the rest* » (je souligne). Une interprétation non binaire de « *lesser* » correspond à la version française, « la peine la moins sévère » qui n'est aucunement limitée à une comparaison duale : *Le Petit Robert* (nouvelle éd. 2012), *sub verbo* « le moins », « superlatif de *peu* ».

[150] If the legislature had intended to codify the restrictive interpretation proposed by the appellant, a more precise wording would have been necessary. The appellant's submissions clearly show that there was no shortage of examples of such wordings: see, e.g., *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, at paras. 29 et seq.

[150] Si le législateur avait voulu codifier l'interprétation restreinte proposée par l'appelante, une formulation plus précise aurait été nécessaire. Les observations de l'appelante montrent bien que les exemples de formulations plus précises ne manquaient pas : voir, p. ex., *R. c. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, par. 29 et suiv.

[151] A technical construction such as the one proposed by the appellant is contrary to this Court's conclusion that a generous *and* purposive approach must be taken to the interpretation of *Charter* rights: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17. Moreover, the Court has held that the meaning of a *Charter* provision cannot be limited to rights and freedoms that existed before the enactment of the *Charter*, whether by virtue of the common law, international law or otherwise: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 360; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 123; *Big M Drug Mart Ltd.*

[151] L'application d'une interprétation formaliste comme celle avancée par l'appelante va à l'encontre des enseignements de notre Cour voulant que les droits garantis par la *Charte* doivent être interprétés de façon libérale *et* en fonction de l'objet visé : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155-156; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, par. 17. De plus, la Cour a déjà statué que le sens d'une disposition de la *Charte* ne saurait être limité aux droits et libertés qui existaient antérieurement à l'édiction de la *Charte*, que ce soit en vertu de la common law, du droit international ou autrement : *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, p. 360; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, p. 123; *Big M Drug Mart Ltd.*

[152] The interpretation adopted by other Canadian courts reflects two objects of s. 11(*i*) identified by this Court, namely the rule of law and ensuring

[152] L'interprétation adoptée par les autres cours canadiennes reflète deux objets de l'al. 11*i*) dégagés par notre Cour : la primauté du droit et la garantie

2019 SCC 47 (CanLII)

fairness in criminal proceedings (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 27). As Lord Diplock put it, "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 638). A change in the possible consequences of such a course of action could not only cause unfairness in certain cases, but could also undermine public confidence in the criminal justice system: *K.R.J.*, at paras. 23 and 25.

de l'équité des procédures criminelles (*R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, par. 27). Comme le dit lord Diplock, [TRADUCTION] « l'acceptation de la primauté du droit en tant que principe constitutionnel exige qu'un citoyen, avant d'adopter une ligne de conduite, puisse connaître à l'avance les conséquences qui en découleront sur le plan juridique » (*Black-Clawson International Ltd. c. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), p. 638). Un changement aux conséquences qui découleraient d'une telle ligne de conduite pourrait non seulement donner lieu à une injustice dans certains cas, mais pourrait aussi miner la confiance du public dans le système de justice criminelle : *K.R.J.*, par. 23 et 25.

[153] The interpretation proposed by the appellant would limit the application of these objects to two steps in the criminal process. In my view, there is no principled argument that would justify such a limitation, which is undermined by, among other things, the appellant's concession that the time of sentencing includes — possibly — the period after the charge is laid. The example given in *K.R.J.* — of an accused who, on the strength of an existing punishment, declines to enter a guilty plea and is prepared to take the risk of going to trial — was in no way limiting. On the contrary, there are *several* points in the course of a criminal investigation and prosecution — before the time of sentencing — at which an individual might be required to make choices in light of punishments then applicable. Some choices might include, among others, the decision whether to cooperate in an investigation, whether to exercise the right to remain silent, whether to enter a plea or whether to submit a joint submission to the sentencing judge. With respect, it seems artificial to fix at only two specific points in time the moment when knowledge of the applicable rules would be more important for a person who has been or may be charged. In fact, this right is grounded in the very possibility that an accused will be required to make choices in light of the existing law at various points in the criminal process. The protection of s. 11(*i*) cannot be contingent on evidence that the accused relied on the existing law.

[153] L'interprétation préconisée par l'appelante restreindrait l'application de ces objets à deux étapes du processus pénal. À mon avis, aucun argument fondé sur des principes ne justifie une telle restriction, qui est affaiblie, entre autres, par la concession de l'appelante portant que le moment de la sentence comprend — possiblement — la période qui suit l'inculpation. L'exemple fourni dans *K.R.J.* — celui de l'accusé qui, sur la foi d'une peine existante, refuse d'inscrire un plaidoyer de culpabilité et est prêt à courir le risque de subir un procès — n'était aucunement limitatif. Au contraire, il y a, au cours des enquêtes et poursuites pénales — avant l'infliction de la peine —, *plusieurs* moments où un individu peut être appelé à faire des choix sur la foi des peines alors applicables. À titre d'exemple, on peut penser à la décision de coopérer ou non lors d'une enquête, d'exercer ou non son droit de garder le silence, d'inscrire ou non un plaidoyer, de soumettre ou non une suggestion commune au juge de la peine, et j'en passe. Avec égards, il m'apparaît artificiel de fixer à deux points précis dans le temps le moment où la connaissance des règles du jeu serait plus importante pour une personne inculpée ou susceptible de l'être. Car, en effet, c'est précisément la possibilité qu'un inculpé ait, à plusieurs moments du processus pénal, à effectuer des choix sur la foi du droit en vigueur qui est à la base de ce droit. La protection de l'al. 11*i*) ne saurait être conditionnelle à une preuve que l'inculpé s'est fié au droit en vigueur.

[154] Nor am I convinced that the possibility that the interpretation adopted by the courts will

[154] Je ne suis pas davantage persuadée que la possibilité que l'interprétation retenue par la

2019 SCC 47 (CanLII)

complicate the analysis of the applicable punishments should weigh against it. First, counsel for the intervener the Attorney General of Ontario was unaware of any problems arising from the law as it now stands with respect to the interpretation of s. 11(*i*), which has applied for at least 30 years. Second, Canadian courts habitually consider the possibility of less restrictive sanctions — indeed, they are required to by the *Criminal Code*: s. 718.2(d) and (e). All things considered, the time of commission of the offence and the time of sentencing will in most cases not be as far apart as in historical sexual assault cases. The possibility that a punishment will be varied several times in the intervening period is therefore also more remote. I think it would be imprudent to rule out an interpretation that provides offenders with more substantial protection where there is no evidence that there are real difficulties, especially in light of the actual wording of the provision.

[155] Finally, the appellant argues that s. 11(*i*) has a third object: to ensure that the imposed punishment corresponds to the social stigma associated with the offence at the time of sentencing. With respect, this proposal seems to confuse the *availability* of a punishment with its fairness and appropriateness. Crafting a fair and appropriate punishment is a highly individualized exercise that involves a variety of factors, including the gravity of the offence, the extent of the offender's responsibility and the specific circumstances of each case: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58. But the fact that a punishment is available in no way means that it will, if imposed, be fair and appropriate in the case in question. In a case involving multiple incidents in which serious acts of sexual abuse were committed against a young relative, it may be that the conditional sentence was not a fair and appropriate punishment. But that is not the question before the Court.

[156] For these reasons, I would dismiss the appeal on the merits.

Appeal allowed, Abella, Karakatsanis *and* Brown JJ. *dissenting.*

jurisprudence alourdisse l'analyse des peines applicables devrait militer contre celle-ci. D'une part, l'avocat de l'intervenant le procureur général de l'Ontario n'était au fait d'aucun problème que soulève le droit actuel concernant l'interprétation de l'al. 11*i*), interprétation qui s'applique depuis au moins 30 ans. D'autre part, les tribunaux canadiens sont habitués à examiner la possibilité de sanctions moins contraignantes — en effet, c'est ce que leur exige le *Code criminel* : al. 718.2d) et e). Au demeurant, dans la plupart des cas, le moment de la perpétration de l'infraction et celui de la sentence seront moins éloignés dans le temps que dans les affaires d'agressions sexuelles historiques. La possibilité qu'une peine soit modifiée plusieurs fois dans l'intervalle s'en trouve donc aussi amoindrie. Il me semble téméraire d'écarter une interprétation qui offre une protection plus importante aux contrevenants en l'absence de toute preuve de l'existence des difficultés, surtout à la lumière du libellé exprès de la disposition.

[155] Enfin, suivant l'appelante, l'al. 11*i*) a un troisième objet, garantir que la peine infligée corresponde au degré de réprobation sociale associé à l'infraction au moment où la peine est infligée. Avec égards, cette proposition semble confondre la question de la *disponibilité* d'une peine et la nature juste et appropriée de celle-ci. La détermination d'une peine juste et appropriée est un exercice éminemment individualisé, qui fait appel à une panoplie de facteurs dont la gravité de l'infraction, le degré de responsabilité du délinquant et les circonstances particulières de chaque cas : *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089, par. 58. Cependant, la disponibilité d'une peine n'indique aucunement que son infliction sera juste et appropriée dans le cas en question. Dans une affaire concernant de multiples abus sexuels sérieux contre un jeune parent, il se peut que l'emprisonnement avec sursis ne soit pas une peine juste et appropriée. Or, ceci n'est pas la question dont nous sommes saisis.

[156] Pour ces motifs, je rejetterais l'appel sur le fond.

Pourvoi accueilli, les juges Abella, Karakatsanis *et* Brown *sont dissidents.*

2019 SCC 47 (CanLII)

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Longueuil.

Solicitors for the respondent: Poitras, Fournier, Cossette, Granby; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

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

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: Carette Desjardins, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association: Rusonik, O'Connor, Ross, Gorham & Angelini, Toronto; Edward Royle & Partners, Toronto.

Procureur de l'appelante : Directeur des poursuites criminelles et pénales, Longueuil.

Procureurs de l'intimé : Poitras, Fournier, Cossette, Granby; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

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

Procureurs de l'intervenante l'Association québécoise des avocats et avocates de la défense : Carette Desjardins, Montréal.

Procureurs de l'intervenante Criminal Lawyers' Association : Rusonik, O'Connor, Ross, Gorham & Angelini, Toronto; Edward Royle & Partners, Toronto.

2019 SCC 47 (CanLII)

TAB 55

CanLII

R. v. Spencer, 2014 SCC 43 (CanLII), [2014] 2 SCR 212

Source:	Supreme Court of Canada
Date:	2014-06-13
File number:	34644
Other citations:	375 DLR (4th) 255 — 458 NR 24 — [2014] 8 WWR 209 — [2014] EXP 1920 — 438 Sask R 230 — 11 CR (7th) 52 — 312 CCC (3d) 215 — 114 WCB (2d) 282 — 312 CRR (2d) 349 — EYB 2014-238452 — JE 2014-1084 — [2014] SCJ No 43 (QL) — [2014] ACS no 43
Citation:	R. v. Spencer, 2014 SCC 43 (CanLII), [2014] 2 SCR 212, <https://canlii.ca/t/g7dzn>, retrieved on 2026-09-16
Most recent unfavourable mention	R v Tucker, 2026 ABKB 17 (CanLII) [...] [128] **Spencer is distinguishable** from the present case because s 107(5)(a) does not contain a requirement for "lawful authority" nor is there any agreement between importers and CBSA that requires the nondisclosure of personal information. [...]

SUPREME COURT OF CANADA

Citation: R. *v.* Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212

Date: 20140613
Docket: 34644

Between:

Matthew David Spencer

Appellant
and
Her Majesty The Queen
Respondent
and
Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Privacy Commissioner of Canada,
Canadian Civil Liberties Association and
Criminal Lawyers' Association of Ontario
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 87)	Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring)

R. *v.* SPENCER, 2014 SCC 43, [2014] S.C.R. 212

Matthew David Spencer *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Privacy Commissioner of Canada,
Canadian Civil Liberties Association and
Criminal Lawyers' Association of Ontario *Interveners*

Indexed as: R. *v.* Spencer

2014 SCC 43

File No.: 34644.

2013: December 9; 2014: June 13.*

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Search and seizure — Privacy — Police having information that IP address used to access or download child pornography — Police asking Internet service provider to voluntarily provide name and address of subscriber assigned to IP address — Police using information to obtain search warrant for accused's residence — Whether police conducted unconstitutional search by obtaining subscriber information matching IP address — Whether evidence obtained as a result should be excluded — Whether fault element of making child pornography available requires proof of positive facilitation — Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014(1) — Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 7(3)(c.1)(ii) — Canadian Charter of Rights and Freedoms, s. 8.

The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. The request was purportedly made pursuant to s. 7(3)(*c*.1)(ii) of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*). This led them to the accused. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it

available. The Court of Appeal upheld the conviction, however set aside the acquittal on the making available charge and ordered a new trial.

Held: The appeal should be dismissed.

Whether there is a reasonable expectation of privacy in the totality of the circumstances is assessed by considering and weighing a large number of interrelated factors. The main dispute in this case turns on the subject matter of the search and whether the accused's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

When defining the subject matter of a search, courts have looked not only at the nature of the precise information sought, but also at the nature of the information that it reveals. In this case, the subject matter of the search was not simply a name and address of someone in a contractual relationship with the ISP. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage.

The nature of the privacy interest engaged by the state conduct turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. In this case, the primary concern is with informational privacy. Informational privacy is often equated with secrecy or confidentiality, and also includes the related but wider notion of control over, access to and use of information. However, particularly important in the context of Internet usage is the understanding of privacy as anonymity. The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. Subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual's identity as the source, possessor or user of that information. Some degree of anonymity is a feature of much

Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure. In this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized in other circumstances as engaging significant privacy interests.

There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. In this case, the contractual and statutory frameworks overlap and the relevant provisions provide little assistance in evaluating the reasonableness of the accused's expectation of privacy. Section 7(3)(*c.*1)(ii) of *PIPEDA* cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. It would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent. The contractual provisions in this case support the existence of a reasonable expectation of privacy. The request by the police had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. In the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. Therefore, the request by the police that the ISP voluntarily disclose such information amounts to a search.

Whether the search in this case was lawful will be dependent on whether the search was authorized by law. Neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries. *PIPEDA* is a statute whose purpose is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence

of exigent circumstances or a reasonable law, the police do not gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information. The conduct of the search in this case therefore violated the *Charter*. Without the subscriber information obtained by the police, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant and the search of the residence was therefore unlawful and violated the *Charter*.

The police, however, were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute. While the impact of the *Charter*-infringing conduct on the *Charter*-protected interests of the accused weighs in favour of excluding the evidence, the offences here are serious. Society has a strong interest in the adjudication of the case and also in ensuring the justice system remains above reproach in its treatment of those charged with these serious offences. Balancing the three factors, the exclusion of the evidence rather than its admission would bring the administration of justice into disrepute. The admission of the evidence is therefore upheld.

There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require however, that the accused must knowingly, by some positive act, facilitate the availability of the material. The offence is complete once the accused knowingly makes pornography available to others. Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, the error could reasonably be thought to have had a bearing on the trial judge's decision to acquit. The order for a new trial is affirmed.

Cases Cited

Referred to: *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403; *McInerney v. MacDonald*, 1992 CanLII 57 (SCC), [1992] 2 S.C.R. 138; *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30; *R. v. Wise*, 1992 CanLII 125 (SCC), [1992] 1 S.C.R. 527; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265; *R. v. McNeice*, 2010 BCSC 1544 (CanLII); *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014.

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01, s. 29(2)(g).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, ss. 3, 5(3), 7, Sch. 1, cl. 4.3.

Authors Cited

Canada. Report of the Task Force established by the Department of Communications/Department of Justice. *Privacy and Computers*. Ottawa: Information Canada, 1972.

Gleicher, Nathaniel. "Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web" (2009), 118 *Yale L.J.* 1945.

Gutterman, Melvin. "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 *Syracuse L. Rev.* 647.

Hubbard, Robert W., Peter DeFreitas and Susan Magotiaux. "The Internet — Expectations of Privacy in a New Context" (2002), 45 *Crim. L.Q.* 170.

Hunt, Chris D. L. "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 *Queen's L.J.* 167.

Paton-Simpson, Elizabeth. "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305.

Slane, Andrea, and Lisa M. Austin. "What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011), 57 *Crim. L.Q.* 486.

Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1970.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Cameron, Ottenbreit and Caldwell JJ.A.), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, affirming the accused's conviction for possession of child pornography and setting aside the accused's acquittal for making available child pornography entered by Foley J., 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, and ordering a new trial. Appeal dismissed.

Aaron A. Fox, *Q.C.*, and *Darren Kraushaar*, for the appellant.

Anthony B. Gerein, for the respondent.

Ronald C. Reimer and *David Schermbrucker*, for the intervener the Director of Public Prosecutions.

Susan Magotiaux and *Allison Dellandrea*, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Mahmud Jamal, *Patricia Kosseim*, *Daniel Caron* and *Sarah Speevak*, for the intervener the Privacy Commissioner of Canada.

Anil K. Kapoor and *Lindsay L. Daviau*, for the intervener the Canadian Civil Liberties Association.

Jonathan Dawe and *Jill R. Presser*, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The Internet raises a host of new and challenging questions about privacy. This appeal relates to one of them.

[2] The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. This led them to the appellant, Mr. Spencer. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available.

[3] At trial, Mr. Spencer claimed that the police had conducted an unconstitutional search by obtaining subscriber information matching the IP address and that the evidence obtained as a result should be excluded. He also testified that he did not know that others could have access to the shared folder and argued that he therefore did not knowingly make the material in the folder

available to others. The trial judge concluded that there had been no breach of Mr. Spencer's right to be secure against unreasonable searches and seizures. However, he was of the view that the "making available" offence required some "positive facilitation" of access to the pornography, which Mr. Spencer had not done, and further he believed Mr. Spencer's evidence that he did not know that others could access his folder so that the fault element (*mens rea*) of the offence had not been proved. The judge therefore convicted Mr. Spencer of the possession offence, but acquitted him of the making available charge.

[4] The Court of Appeal upheld the conviction for possession of child pornography, agreeing with the trial judge that obtaining the subscriber information was not a search and holding that even if it were a search, it would have been reasonable. The court, however, set aside the acquittal on the making available charge on the basis that the trial judge had been wrong to require proof of positive facilitation of access by others to the material. A new trial was ordered on this charge.

[5] The appeal to this Court raises four issues which I would resolve as follows:

1. Did the police obtaining the subscriber information matching the IP address from the ISP constitute a search?

In my view, it did.

2. If so, was the search authorized by law?

In my view, it was not.

3. If not, should the evidence obtained as a result be excluded?

In my view, the evidence should not be excluded.

4. Did the trial judge err with respect to the fault element of the "making available" offence?

The judge did err and I would uphold the Court of Appeal's order for a new trial.

II. Analysis

A. *Did the Police Obtaining the Subscriber Information Matching the IP Address From the ISP Constitute a Search?*

[6] Mr. Spencer maintains that the police were conducting a search when they obtained the subscriber information associated with the IP address from the ISP, Shaw Communications Inc. The respondent Crown takes the opposite view. I agree with Mr. Spencer on this point. I will first set out a summary of the relevant facts then turn to the legal analysis.

(1) Facts and Judicial History

[7] Mr. Spencer, who lived with his sister, connected to the Internet through an account registered in his sister's name. He used the file-sharing program LimeWire on his desktop

computer to download child pornography from the Internet. LimeWire is a free peer-to-peer file-sharing program that, at the time, anyone could download onto their computer. Peer-to-peer systems such as LimeWire allow users to download files directly from the computers of other users. LimeWire does not have one central database of files, but instead relies on its users to share their files directly with others. It is commonly used to download music and movies and can also be used to download both adult and child pornography. It was Mr. Spencer's use of the file-sharing software that brought him to the attention of the police and which ultimately led to the search at issue in this case.

[8] Det. Sgt. Darren Parisien (then Cst.) of the Saskatoon Police Service, by using publicly available software, searched for anyone sharing child pornography. He could access whatever another user of the software had in his or her shared folder. In other words, he could "see" what other users of the file-sharing software could "see". He could also obtain two numbers related to a given user: the IP address that corresponds to the particular Internet connection through which a computer accesses the Internet at the time and the globally unique identifier (GUID) number assigned to each computer using particular software. The IP address of the computer from which shared material is obtained is displayed as part of the file-sharing process. There is little information in the record about the nature of IP addresses in general or the IP addresses provided by Shaw to its subscribers. There is a description in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 21-26, which also notes some of the differences that may exist among IP addresses. For the purposes of this case, what we know is that the IP address obtained by Det. Sgt. Parisien matched computer activity at the particular point in time that he was observing that activity.

[9] Det. Sgt. Parisien generated a list of IP addresses for computers that had shared what he believed to be child pornography. He then ran that list of IP addresses against a database which matches IP addresses with approximate locations. He found that one of the IP addresses was suspected to be in Saskatoon, with Shaw as the ISP.

[10] Det. Sgt. Parisien then determined that Mr. Spencer's computer was online and connected to LimeWire. As a result, he (along with any LimeWire user) was able to browse the

shared folder. He saw an extensive amount of what he believed to be child pornography. What he lacked was knowledge of where exactly the computer was and who was using it.

[11] To connect the computer usage to a location and potentially a person, investigators made a written "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using that IP address. The request, which was purportedly made pursuant to s. 7(3)(*c*.1)(ii) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*), indicated that police were investigating an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to child pornography and the Internet and that the subscriber information was being sought as part of an ongoing investigation. (The full text of the relevant statutory provisions is set out in an Appendix.) Investigators did not have or try to obtain a production order (i.e. the equivalent of a search warrant in this context).

[12] Shaw complied with the request and provided the name, address and telephone number of the customer associated with the IP address, Mr. Spencer's sister. With this information in hand, the police obtained a warrant to search Ms. Spencer's home (where Mr. Spencer lived) and seize his computer, which they did. The search of Mr. Spencer's computer revealed about 50 child pornography images and two child pornography videos.

[13] Mr. Spencer was charged with possessing child pornography contrary to s. 163.1(4) of the *Criminal Code* and making child pornography available over the Internet contrary to s. 163.1(3). There is no dispute that the images found in his shared folder were child pornography.

[14] At trial, Mr. Spencer sought to exclude the evidence found on his computer on the basis that the police actions in obtaining his address from Shaw without prior judicial authorization amounted to an unreasonable search contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge rejected this contention and convicted Mr. Spencer of the possession count. On appeal, the Saskatchewan Court of Appeal upheld the judge's decision with respect to the search issue.

(2) Was the Request to Shaw a Search?

[15] Under s. 8 of the *Charter*, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, at pp. 292-93; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the *Charter*. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., *Tessling*, at para. 38; *Ward*, at para. 65. The fact that these considerations must be looked at in the "totality of the circumstances" underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

[18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether

this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and *Ward*, at paras. 81-85.

[19] I can deal quite briefly with two aspects of the appeal. The trial judge in this case held that there was no subjective expectation of privacy in this case: 2009 SKQB 341, 361 Sask. R. 1, at para. 18. However, as I will explain below, the trial judge reached this conclusion by incorrectly defining the subject matter of the search. On the proper understanding of the scope of the search, Mr. Spencer's subjective expectation of privacy in his online activities can readily be inferred from his use of the network connection to transmit sensitive information: *Cole*, at para. 43. Mr. Spencer's direct interest in the subject matter of the search is equally clear. Though he was not personally a party to the contract with the ISP, he had access to the Internet with the permission of the subscriber and his use of the Internet was by means of his own computer in his own place of residence.

[20] The main dispute in this case thus turns on the subject matter of the search and whether Mr. Spencer's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

[21] In this case, I have found it helpful to look first at the subject matter of the search, then at the nature of the privacy interests implicated by the state actions and then finally at the governing contractual and statutory framework. While these subjects are obviously interrelated,

approaching the analysis under these broad headings provides a degree of focus while permitting full examination of the "totality of the circumstances".

(a) *The Subject Matter of the Search*

[22] Mr. Spencer alleges that the police request to Shaw is a state action that constitutes a search or seizure for the purposes of s. 8 of the *Charter*. We must therefore consider what the subject matter of that request was in order to be able to identify the privacy interests that were engaged by it.

[23] In many cases, defining the subject matter of the police action that is alleged to be a search is straightforward. In others, however, it is not. This case falls into the latter category. The parties and the courts below have markedly divergent perspectives on this important issue, a divergence which is reflected in the jurisprudence: see, for example, the authorities reviewed in *Ward*, at para. 3.

[24] Mr. Spencer contends that the subject matter of the alleged search was core biographical data, revealing intimate and private information about the people living at the address provided by Shaw which matched the IP address. The Crown, on the other hand, maintains that the subject matter of the alleged search was simply a name, address and telephone number matching a publicly available IP address.

[25] These divergent views were reflected in the decisions of the Saskatchewan courts. The trial judge adopted the Crown's view that what the police sought and obtained was simply generic information that does not touch on the core of Mr. Spencer's biographical information. Ottenbreit J.A. in the Court of Appeal was of largely the same view. For him, the information sought by the police in this case simply established the identity of the contractual user of the IP address. The fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the Internet was, for him, "neither here nor there": 2011 SKCA 144, 377 Sask. R. 280, at para. 110 (see also *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, at paras. 119-24

and 134). In contrast to this approach, Caldwell J.A. (Cameron J.A. concurring on this point) held that in characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address (para. 22). The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered: see also *Trapp*, *per* Cameron J.A., at paras. 33-37.

[26] I am in substantial agreement with Caldwell and Cameron JJ.A. on this point. While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.

[27] A number of decisions of the Court reflect this approach. I begin with *Plant*. There, the Court, dealing with informational privacy, stressed the strong claim to privacy in relation to information that is at the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": p. 293. Importantly, the Court went on to make clear that s. 8 protection is accorded not only to the information which is itself of that nature, but also to "information which <u>tends to reveal</u> intimate details of the lifestyle and personal choices of the individual": *ibid.* (emphasis added).

[28] *Tessling* took the same approach, although it led to a different conclusion. The subject matter of the alleged search was held to be the heat emitted from the surface of a building. The Forward Looking Infra-Red (FLIR) imaging technique was used to help assess the activities that transpired inside a house, but the heat emissions by themselves could not distinguish between one heat source and another. In short, the heat emanations were, on their own, meaningless because they did not permit any inferences about the precise activity giving rise to the heat: paras. 35-36. The critical question was: what inferences about activity inside the home — admittedly a highly private zone — did the FLIR images support?

[29] I turn next to *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and the companion appeal in *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. While the Court divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown's bag constituted a search. As explained by both Deschamps and Bastarache JJ., the dog sniffing at the air in the vicinity of the bag functioned as an investigative procedure that allowed for a "strong, immediate and direct inference" about what was or was not inside the bag: Deschamps J., at paras. 174-75; Bastarache J., at para. 227. Thus, while the "information" obtained by the sniffer dog was simply the smell of the air outside the bag, the dog's reaction to it provided the police with a strong inference as to what was inside. As Binnie J. put it in *A.M.* (which concerned a dog sniff of the accused's backpack), "[b]y use of the dog, the policeman could 'see' through the concealing fabric of the backpack": para. 67.

[30] How to characterize the subject matter of an alleged search was addressed by the Court most recently in *Gomboc*. While the Court was divided on other matters, it was unanimous about the framework that must be applied in considering the subject matter of a "search". The Court considered the strength of the inference between data derived from a digital recording ammeter (DRA) and particular activities going on in a residence in assessing whether use of the DRA constituted a search. Abella J. (Binnie and LeBel JJ. concurring) took into account "the <u>strong and reliable inference</u> that can be made from the patterns of electricity consumption . . . as to the presence within the home of one particular activity": para. 81 (emphasis added). The Chief Justice and Fish J. referred to the fact that the DRA data "sheds light on private activities within the home": para. 119. Deschamps J. (Charron, Rothstein and Cromwell JJ. concurring) spoke in terms of the extent to which the DRA data was revealing of activities in the home: para. 38.

[31] Thus, it is clear that the tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. The correct approach was neatly summarized by Doherty J.A. in *Ward*, at para. 65. When identifying the subject matter of an alleged search, the court must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action": *ibid.*

[32] Applying this approach to the case at hand, I substantially agree with the conclusion reached by Cameron J.A. in *Trapp* and adopted by Caldwell J.A. in this case. The subject matter of the search was not simply a name and address of someone in a contractual relationship with Shaw. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage. As Cameron J.A. put it, at para. 35 of *Trapp*:

> To label information of this kind as mere "subscriber information" or "customer information", or nothing but "name, address, and telephone number information", tends to obscure its true nature. I say this because these characterizations gloss over the significance of an IP address and what such an address, once identified with a particular individual, is capable of revealing about that individual, including the individual's online activity in the home.

[33] Here, the subject matter of the search is the identity of a subscriber whose Internet connection is linked to particular, monitored Internet activity.

(b) *Nature of the Privacy Interest Potentially Compromised by the State Action*

[34] The nature of the privacy interest engaged by the state conduct is another facet of the totality of the circumstances and an important factor in assessing the reasonableness of an expectation of privacy. The Court has previously emphasized an understanding of informational privacy as confidentiality and control of the use of intimate information about oneself. In my view, a somewhat broader understanding of the privacy interest at stake in this case is required to account for the role that anonymity plays in protecting privacy interests online.

[35] Privacy is admittedly a "broad and somewhat evanescent concept": *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at para. 67. Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits: see, e.g., C. D. L. Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 *Queen's L.J.* 167, at pp. 176-77. Notwithstanding these challenges, the Court has described three broad types of privacy interests — territorial, personal, and informational — which, while often

overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations: see, e.g., *Dyment*, at pp. 428-29; *Tessling*, at paras. 21-24. These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.

[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

[37] We are concerned here primarily with informational privacy. In addition, because the computer identified and in a sense monitored by the police was in Mr. Spencer's residence, there is an element of territorial privacy in issue as well. However, in this context, the location where the activity occurs is secondary to the nature of the activity itself. Internet users do not expect their online anonymity to cease when they access the Internet outside their homes, via smartphones, or portable devices. Therefore, here as in *Patrick*, at para. 45, the fact that a home was involved is not a controlling factor but is nonetheless part of the totality of the circumstances: see, e.g., *Ward*, at para. 90.

[38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

[39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g., *McInerney v. MacDonald*, 1992 CanLII 57 (SCC), [1992] 2 S.C.R. 138, at p. 149.

[40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting from *Privacy and Computers*, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected" (pp. 429-30); see also *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, at p. 46.

[41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

[42] The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or to which the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual's name, but the link between the identified individual and the personal information provided anonymously. As the

intervener the Canadian Civil Liberties Association urged in its submissions, "maintaining anonymity can be integral to ensuring privacy": factum, at para. 7.

[43] Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance: pp. 31-32; see A. Slane and L. M. Austin, "What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011), 57 *Crim. L.Q.* 486, at p. 501. The Court's decision in *R. v. Wise*, 1992 CanLII 125 (SCC), [1992] 1 S.C.R. 527, provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle's whereabouts on public highways amounted to a violation of the suspect's reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach.

[44] La Forest J. (who, while dissenting on the issue of exclusion of the evidence under s. 24(2), concurred with respect to the existence of a reasonable expectation of privacy), explained that "[i]n a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. <u>In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the 'situational landscape'</u>": p. 558 (emphasis added), quoting M. Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public. Thus, in order to uphold the protection of privacy rights in some contexts, we must recognize anonymity as one conception of privacy: see E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at pp. 325-26; Westin, at p. 32; Gutterman, at p. 706.

[45] Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage. One form of anonymity, as Westin explained, is what is claimed by an individual who wants to present ideas publicly but does not want to be identified as their author: p. 32. Here, Westin, publishing in 1970, anticipates precisely one of the defining characteristics of some types of Internet communication. The communication may be accessible to millions of people but it is not identified with its author.

[46] Moreover, the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users. Browsing logs, for example, may provide detailed information about users' interests. Search engines may gather records of users' search terms. Advertisers may track their users across networks of websites, gathering an overview of their interests and concerns. "Cookies" may be used to track consumer habits and may provide information about the options selected within a website, which web pages were visited before and after the visit to the host website and any other personal information provided: see N. Gleicher, "Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web" (2009), 118 *Yale L.J.* 1945, at pp. 1948-49; R. W. Hubbard, P. DeFreitas and S. Magotiaux, "The Internet — Expectations of Privacy in a New Context" (2002), 45 *Crim. L.Q.* 170, at pp. 189-91. The user cannot fully control or even necessarily be aware of who may observe a pattern of online activity, but by remaining anonymous — by guarding the link between the information and the identity of the person to whom it relates — the user can in large measure be assured that the activity remains private: see Slane and Austin, at pp. 500-3.

[47] In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. A sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents. DRA readings provide information about what is going on inside a home and therefore may engage the privacy interests relating to those activities. Similarly, subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating

not simply to the person's name or address but to his or her identity as the source, possessor or user of that information.

[48] Doherty J.A. made this point with his usual insight and clarity in *Ward*. "Personal privacy" he wrote "protects an individual's ability to function on a day-to-day basis within society while enjoying a degree of anonymity that is essential to the individual's personal growth and the flourishing of an open and democratic society": para. 71. He concluded that some degree of anonymity is a feature of much Internet activity and that, "[d]epending on the totality of the circumstances, . . . anonymity may enjoy constitutional protection under s. 8": para. 75. I agree. Thus, anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.

[49] The intervener the Director of Public Prosecutions raised the concern that recognizing a right to online anonymity would carve out a crime-friendly Internet landscape by impeding the effective investigation and prosecution of online crime. In light of the grave nature of the criminal wrongs that can be committed online, this concern cannot be taken lightly. However, in my view, recognizing that there *may* be a privacy interest in anonymity depending on the circumstances falls short of recognizing any "right" to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet. In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained.

[50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 3; *Cole*, at para. 47; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 40-45.

[51] I conclude therefore that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy. I agree with Caldwell J.A.'s conclusion on this point:

> . . . a reasonable and informed person concerned about the protection of privacy would expect one's activities on one's own computer used in one's own home would be private. . . . In my judgment, it matters not that the personal attributes of the Disclosed Information pertained to Mr. Spencer's sister because Mr. Spencer was personally and directly exposed to the consequences of the police conduct in this case. As such, the police conduct *prima facie* engaged a personal privacy right of Mr. Spencer and, in this respect, his interest in the privacy of the Disclosed Information was direct and personal. [para. 27]

(c) *Reasonable Expectation of Privacy*

[52] The next question is whether Mr. Spencer's expectation of privacy was reasonable. The trial judge found that there could be no reasonable expectation of privacy in the face of the relevant contractual and statutory provisions (para. 19), a conclusion with which Caldwell J.A. agreed on appeal: para. 42. Cameron J.A., however, was doubtful that the contractual and statutory terms had this effect in the context of this case: para. 98.

[53] In this Court, Mr. Spencer maintains that the contractual and statutory terms did not undermine a reasonable expectation of privacy with respect to the subscriber information. He submits that the contractual provisions do nothing more than suggest that the information will not be provided to police unless required by law and that *PIPEDA*, whose purpose is to protect privacy rights, supports rather than negates the reasonableness of an expectation of privacy in this case. The Crown disagrees and supports the position taken on this point by Caldwell J.A. in the Court of Appeal.

[54] There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. So, for example in *Gomboc*, Deschamps J. writing for four members of the Court, found that the terms governing the relationship between the electricity provider and its customer were "highly

significant" to Mr. Gomboc's reasonable expectation of privacy, but treated it as "one factor amongst many which must be weighed in assessing the totality of the circumstances": paras. 31-32. She also emphasized that when dealing with contracts of adhesion in the context of a consumer relationship, it was necessary to "procee[d] with caution" when determining the impact that such provision would have on the reasonableness of an expectation of privacy: para. 33. The need for caution in this context was pointedly underlined in the dissenting reasons of the Chief Justice and Fish J. in that case: paras. 138-42.

[55] The contractual and statutory frameworks overlap in the present case because the Shaw Joint Terms of Service make reference to *PIPEDA*, and the scope of permitted disclosure under *PIPEDA* turns partly on whether the customer has consented to the disclosure of personal information. I must first set out the details of these schemes before turning to their impact on the reasonable expectations analysis. In doing so, it becomes apparent that the relevant provisions provide little assistance in evaluating the reasonableness of Mr. Spencer's expectation of privacy.

[56] Shaw provides Internet services to its customers under a standard form "Joint Terms of Service" agreement. Additional terms and conditions are provided in Shaw's "Acceptable Use Policy" and its "Privacy Policy". The terms of these agreements are posted online on Shaw's website and change from time to time. The investigators sought the subscriber information for the IP address used on August 31, 2007 in their request to Shaw.

[57] Mr. Spencer was not personally a party to these agreements, as he accessed the Internet through his sister's subscription. It is common practice for multiple users to share a common Internet connection. A reasonable user would be aware that the use of the service would be governed by certain terms and conditions, and those terms and conditions were readily accessible through Shaw's website. This case does not require us to decide whether Mr. Spencer was bound by the terms of the contract with Shaw. Quite apart from contractual liability, the terms on which he gained access to the Internet are a relevant circumstance in assessing the reasonableness of his expectation of privacy. There are three relevant sets of provisions which, taken as a whole, provide a confusing and unclear picture of what Shaw would do when faced with

a police request for subscriber information. The Joint Terms of Service at first blush appear to permit broad disclosure because they provide, among other things, that "Shaw may disclose any information as is necessary to . . . satisfy any legal, regulatory or other governmental request". This general provision, however, must be read in light of the more specific provision relating to disclosure of IP addresses and other identifying information in the context of criminal investigations contained in the Acceptable Use Policy, which in turn is subject to the Privacy Policy.

[58] The Acceptable Use Policy (last updated on June 18, 2007) provides that Shaw is authorized to cooperate with law enforcement authorities in the investigation of criminal violations, including supplying information identifying a subscriber *in accordance with its Privacy Policy*. The provision reads as follows:

> You hereby authorize Shaw to cooperate with (i) law enforcement authorities in the investigation of suspected criminal violations, and/or (ii) system administrators at other Internet service providers or other network or computing facilities in order to enforce this Agreement. Such cooperation may include Shaw providing the username, IP address, or other identifying information about a subscriber, <u>in accordance with the guidelines set out in Shaw's Privacy Policy</u>. [Emphasis added.]

[59] The Privacy Policy in the record (last updated on November 12, 2008) states that Shaw is committed to protecting personal information, which is defined as information about an identifiable individual. One of the ten principles set out in the Privacy Policy deals with limiting the disclosure of personal information (principle 5). The policy limits the circumstances under which personal information will be disclosed without the customer's knowledge or consent to "exceptional circumstances, as permitted by law". Shaw may disclose information to its partners in order to provide its services and, in such cases, the information is governed by "strict confidentiality standards and policies" to keep the information secure and to ensure it is treated in accordance with *PIPEDA*. The Privacy Policy also provides that "Shaw may disclose Customer's Personal Information to: . . . a third party or parties, where the Customer has given Shaw Consent to such disclosure or if disclosure <u>is required by law</u>, in accordance with *The Personal Information Protection and Electronic Documents Act*" (emphasis added).

[60] Whether or not disclosure of personal information by Shaw is "permitted" or "required by law" in turn depends on an analysis of the applicable statutory framework. The contractual provisions, read as a whole, are confusing and equivocal in terms of their impact on a user's reasonable expectation of privacy in relation to police initiated requests for subscriber information. The statutory framework provided by *PIPEDA* is not much more illuminating.

[61] Shaw's collection, use, and disclosure of the personal information of its subscribers is subject to *PIPEDA*, which protects personal information held by organizations engaged in commercial activities from being disclosed without the knowledge or consent of the person to whom the information relates: Sch. 1, clause 4.3. Section 7 contains several exceptions to this general rule and permits organizations to disclose personal information without consent. The exception relied on in this case is s. 7(3)(*c*.1)(ii). It permits disclosure to a government institution that has requested the disclosure for the purpose of law enforcement and has stated its "lawful authority" for the request. The provisions of *PIPEDA* are not of much help in determining whether there is a reasonable expectation of privacy in this case. They lead us in a circle.

[62] Section 7(3)(*c*.1)(ii) allows for disclosure without consent to a government institution where that institution has identified its *lawful authority* to obtain the information. But the issue is whether there was such lawful authority which in turn depends in part on whether there was a reasonable expectation of privacy with respect to the subscriber information. *PIPEDA* thus cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. Given that the purpose of *PIPEDA* is to establish rules governing, among other things, disclosure "of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information" (s. 3), it would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent.

[63] I am aware that I have reached a different result from that reached in similar circumstances by the Ontario Court of Appeal in *Ward*, where the court held that the provisions of *PIPEDA* were a factor which weighed against finding a reasonable expectation of privacy in subscriber information. This conclusion was based on two main considerations. The first was that an ISP has a legitimate interest in assisting in law enforcement relating to crimes committed using its services: para. 99. The second was the grave nature of child pornography offences, which made it reasonable to expect that an ISP would cooperate with a police investigation: paras. 102-3. While these considerations are certainly relevant from a policy perspective, they cannot override the clear statutory language of s. 7(3)(*c.*1)(ii) of *PIPEDA*, which permits disclosure only if a request is made by a government institution with "lawful authority" to request the disclosure. It is reasonable to expect that an organization bound by *PIPEDA* will respect its statutory obligations with respect to personal information. The Court of Appeal in *Ward* held that s. 7(3)(*c.*1)(ii) must be read in light of s. 5(3), which states that "[a]n organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances". This rule of "reasonable disclosure" was used as a basis to invoke considerations such as allowing ISPs to cooperate with the police and preventing serious crimes in the interpretation of *PIPEDA*. Section 5(3) is a guiding principle that underpins the interpretation of the various provisions of *PIPEDA*. It does not allow for a departure from the clear requirement that a requesting government institution possess "lawful authority" and so does not resolve the essential circularity of using s. 7(3)(*c.*1)(ii) as a factor in determining whether a reasonable expectation of privacy exists.

[64] I also note with respect to an ISP's legitimate interest in preventing crimes committed through its services that entirely different considerations may apply where an ISP itself detects illegal activity and of its own motion wishes to report this activity to the police. Such a situation falls under a separate, broader exemption in *PIPEDA*, namely s. 7(3)(*d*). The investigation in this case was begun as a police investigation and the disclosure of the subscriber information arose out of the request letter sent by the police to Shaw.

[65] The overall impression created by these terms is that disclosure at the request of the police would be made only where required or permitted by law. Such disclosure is only permitted

by *PIPEDA* in accordance with the exception in s. 7, which in this case would require the requesting police to have "lawful authority" to request the disclosure. For reasons that I will set out in the next section, this request had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. I conclude that, if anything, the contractual provisions in this case support the existence of a reasonable expectation of privacy, since the Privacy Policy narrowly circumscribes Shaw's right to disclose the personal information of subscribers.

[66] In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

[67] The intervener the Attorney General of Alberta raised a concern that if the police were not permitted to request disclosure of subscriber information, then other routine inquiries that might reveal sensitive information about a suspect would also be prohibited, and this would unduly impede the investigation of crimes. For example, when the police interview the victim of a crime, core biographical details of a suspect's lifestyle might be revealed. I do not agree that this result follows from the principles set out in these reasons. Where a police officer requests disclosure of information relating to a suspect from a third party, whether there is a search depends on whether, in light of the totality of the circumstances, the suspect has a reasonable expectation of privacy in that information: *Plant*, at p. 293; *Gomboc*, at paras. 27-30, *per* Deschamps J. In *Duarte*, the Court distinguished between a person repeating a conversation with a suspect to the police and the police procuring an audio recording of the same conversation. The Court held that the danger is "not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words": at pp. 43-44. Similarly in this case, the police request that the ISP disclose the subscriber information was in effect a request to link Mr. Spencer with precise online activity that had been the subject of monitoring by the

police and thus engaged a more significant privacy interest than a simple question posed by the police in the course of an investigation.

B. *Was the Search Lawful?*

[68] A warrantless search, such as the one that occurred in this case, is presumptively unreasonable: *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265. The Crown bears the burden of rebutting this presumption. A search will be reasonable if (a) it was authorized by law, (b) the law itself was reasonable, and (c) the search was carried out in a reasonable manner: p. 278. Mr. Spencer has not challenged the constitutionality of the laws that purportedly authorized the search. He did raise concerns about the reasonableness of the manner, but in my view, these are groundless. Accordingly, we need only consider whether the search was authorized by law.

[69] The Crown supports the conclusions of Caldwell and Cameron JJ.A. in the Court of Appeal that any search was lawful, relying on the combined effect of s. 487.014 of the *Criminal Code* and s. 7(3)(*c*.1)(ii) of *PIPEDA*. I respectfully do not agree.

[70] Section 487.014(1) of the *Criminal Code* provides that a peace officer does not need a production order "to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing". *PIPEDA* prohibits disclosure of the information unless the requirements of the law enforcement provision are met, including that the government institution discloses a lawful authority *to obtain*, not simply to ask for the information: s. 7(3)(*c*.1)(ii). On the Crown's reading of these provisions, *PIPEDA*'s protections become virtually meaningless in the face of a police request for personal information: the "lawful authority" is a simple request without power to compel and, because there was a simple request, the institution is no longer prohibited by law from disclosing the information.

[71] "Lawful authority" in s. 7(3)(*c*.1)(ii) of *PIPEDA* must be contrasted with s. 7(3)(*c*), which provides that personal information may be disclosed without consent where "required to comply with a subpoena or warrant issued or an order made by a court, person or body with

jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records". The reference to "lawful authority" in s. 7(3)(*c*.1)(ii) must mean something other than a "subpoena or [search] warrant". "Lawful authority" may include several things. It may refer to the common law authority of the police to ask questions relating to matters that are not subject to a reasonable expectation of privacy. It may refer to the authority of police to conduct warrantless searches under exigent circumstances or where authorized by a reasonable law: *Collins*. As the intervener the Privacy Commissioner of Canada submitted, interpreting "lawful authority" as requiring more than a bare request by law enforcement gives this term a meaningful role to play in the context of s. 7(3) and should be preferred over alternative meanings that do not do so. In short, I agree with the Ontario Court of Appeal in *Ward* on this point that neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers: para. 46.

[72] I recognize that this conclusion differs from that of the Saskatchewan Court of Appeal in *Trapp*, at para. 66, and the British Columbia Supreme Court in *R. v. McNeice*, 2010 BCSC 1544 (CanLII), at para. 43. The Court of Appeal in *Trapp* read s. 487.014(1) together with s. 29(2)(g) of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, an analogous provision to s. 7(3)(*c*.1)(ii) of *PIPEDA*, although one from which the "lawful authority" requirement is absent. The court held that s. 487.014(1) gave the police a power to make any inquiries that were not otherwise prohibited by law. The court in *McNeice* took the same approach, although that case concerned s. 7(3)(*c*.1)(ii) of *PIPEDA*, the same provision at issue in this case.

[73] With respect, I cannot accept that this conclusion applies to s. 7(3)(*c*.1)(ii) of *PIPEDA*. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries, as indicated by the fact that the section begins with the phrase "[f]or greater certainty": see *Ward*, at para. 49. *PIPEDA* is a statute whose purpose, as set out in s. 3, is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, I do not see how they could gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information.

[74] The subscriber information obtained by police was used in support of the Information to Obtain which led to the issuance of a warrant to search Ms. Spencer's residence. Without that information, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant, and the search of the residence was therefore unlawful. I conclude, therefore, that the conduct of the search of Ms. Spencer's residence violated the *Charter*: *Plant*, at p. 296; *Hunter v. Southam*, at p. 161. Nothing in these reasons addresses or diminishes any existing powers of the police to obtain subscriber information in exigent circumstances such as, for example, where the information is required to prevent imminent bodily harm. There were no such circumstances here.

C. *Should the Evidence Have Been Excluded*

[75] Neither the trial judge nor the Court of Appeal found a breach of s. 8 in this case and, therefore, did not have to consider the question of whether the evidence obtained in a manner that violated Mr. Spencer's *Charter* rights should be excluded under s. 24(2) of the *Charter*. The question is whether the admission of the evidence would bring the administration of justice into disrepute. I accept, as both Mr. Spencer and the Crown agree, that we can determine this issue on the record before us. However, I disagree with Mr. Spencer's submission that the evidence should be excluded. In my view, it should not.

[76] The test for applying s. 24(2) is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The court must "assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct . . ., (2) the impact of the breach on the *Charter*-protected interests of the accused . . ., and (3) society's interest in the adjudication of the case on its merits": para. 71.

[77] Turning first to the seriousness of the state conduct, my view is that it cannot be characterized as constituting either "[w]ilful or flagrant disregard of the *Charter*": *Grant*, at para. 75. Det. Sgt. Parisien testified that he believed the request to Shaw was authorized by law and that

Shaw could consent to provide the information to him. He also testified, however, that he was aware that there were decisions both ways on the issue of whether this was a legally acceptable practice. While I would not want to be understood to be encouraging the police to act without warrants in "gray areas", in light of the fact that the trial judge and three judges of the Court of Appeal concluded that Det. Sgt. Parisien had acted lawfully, his belief was clearly reasonable. In short, the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. There is no challenge to any other aspect of the information to obtain the search warrant. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute.

[78] The second *Grant* factor is the impact of the *Charter*-infringing conduct on Mr. Spencer's *Charter*-protected interests. That impact here was serious. As discussed above, anonymity is an important safeguard for privacy interests online. The violation of that anonymity exposed personal choices made by Mr. Spencer to be his own and subjected them to police scrutiny as such. This weighs in favour of excluding the evidence.

[79] That brings me to the final factor, society's interest in an adjudication on the merits. As explained in *Grant*,

> while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high. [para. 84]

[80] The offences here are serious and carry minimum prison sentences. Society has both a strong interest in the adjudication of the case and also in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences. If the evidence is excluded, the Crown will effectively have no case. The impugned evidence (the electronic files containing child pornography) is reliable and was admitted by the defence at trial to constitute child pornography. Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children.

[81] Balancing the three factors, my view is that exclusion of the evidence rather than its admission would bring the administration of justice into disrepute, and I would uphold its admission.

D. *The Fault Element of the "Making Available" Offence*

[82] The Court of Appeal ordered a new trial on the "making available" count on the basis that the trial judge had erred in his analysis of the fault requirement for the offence. It found that the trial judge had erred by finding that the making available offence required that Mr. Spencer knew that some positive act on his part facilitated access by others to the pornography. This error, in the Court of Appeal's view, led the judge to fail to consider whether Mr. Spencer had been wilfully blind to the fact that the pornography was being made available to others through the shared folder. I respectfully agree with the Court of Appeal on both points and would affirm the order for a new trial.

[83] There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require, however, as the trial judge suggested, that the accused must knowingly, by some positive act, facilitate the availability of the material. I accept Caldwell J.A.'s conclusion that the offence is complete once the accused knowingly makes pornography available to others. As he put it,

> [i]n the context of a file sharing program, the *mens rea* element of making available child pornography under s. 163.1(3) requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge that the file sharing program makes files available to others. [para. 87]

While the trial judge's reasons may perhaps be open to more than one interpretation on this point, reading his reasons as a whole, I also agree with Caldwell J.A. that the trial judge erred in deciding that a positive act was required to satisfy the *mens rea* component of the making available offence: para. 81.

[84] I further agree with Caldwell J.A. that wilful blindness was a live issue on the evidence and that it was because of the trial judge's error in relation to positive facilitation that he did not turn his mind to the evidence that could support an inference of wilful blindness. Wilful blindness is a substitute for knowledge. As explained by Charron J. in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21,

> [w]ilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, 1995 CanLII 85 (SCC), [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?" [Emphasis added.]

[85] The evidence calling for consideration of wilful blindness included, for example, evidence that in Mr. Spencer's statement to police he acknowledged the following: that LimeWire is a file-sharing program; that he had changed at least one default setting in LimeWire; that when LimeWire is first installed on a computer, it displays information notifying the user that it is a file-sharing program; that at the start of each session, LimeWire notifies the user that it is a file-sharing program and warns of the ramifications of file-sharing; and that LimeWire contains built-in visual indicators that show the progress of the uploading of files by others from the user's computer: paras. 88-89.

[86] Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, I agree with Caldwell J.A. that the error could reasonably be thought to have had a bearing on his decision to acquit: para. 93; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

III. Disposition

[87] I would dismiss the appeal, affirm the conviction on the possession count and uphold the Court of Appeal's order for a new trial on the making available count.

APPENDIX

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

> **7.** . . .
>
> (3) [Disclosure without knowledge or consent] For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is
>
> . . .
>
> (*c*) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;
>
> (*c*.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that
>
> . . .
>
> (ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or
>
> . . .
>
> (*d*) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization
>
> (i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or
>
> (ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

163.1 . . .

(3) [Distribution, etc. of child pornography] Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(*b*) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

. . .

487.014 (1) [Power of peace officer] For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

Appeal dismissed.

Solicitors for the appellant: McDougall Gauley, Regina.

Solicitor for the respondent: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Edmonton and Halifax.

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

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the Privacy Commissioner of Canada: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Dawe & Dineen, Toronto; Schreck Presser, Toronto.

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* A motion to amend the reasons was granted on November 6, 2014, amending para. 12. The amendments are included in these reasons.

TAB 56

Thanh Long Vu *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Alberta, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Vu

2013 SCC 60

File No.: 34687.

2013: March 27; 2013: November 7.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Search and seizure — Validity of search — Police obtaining warrant not specifying grounds for obtaining evidence of ownership or occupancy of residence and not mentioning search of computers and cellular telephones — Whether search warrant properly permitting a search for documents evidencing ownership or occupation — Whether warrant authorized search of computers and cellular telephone — If search was unlawful, whether evidence obtained should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

The appellant was charged with production of marijuana, possession of marijuana for the purpose of trafficking, and theft of electricity. The police had obtained a warrant authorizing the search of a residence for evidence of theft of electricity, including documentation identifying the owners and/or occupants of the residence. Even

Thanh Long Vu *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général de l'Alberta, Association des libertés civiles de la Colombie-Britannique, Association canadienne des libertés civiles et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Vu

2013 CSC 60

N° du greffe : 34687.

2013 : 27 mars; 2013 : 7 novembre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

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

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Validité de la fouille — Obtention par la police d'un mandat ne précisant pas les motifs de la recherche de preuves confirmant l'identité des propriétaires ou occupants d'une résidence et ne mentionnant pas la fouille d'ordinateurs et de téléphones cellulaires — Le mandat de perquisition autorisait-il dûment la recherche de documents confirmant l'identité des propriétaires ou occupants? — Le mandat autorisait-il la fouille des ordinateurs et du téléphone cellulaire? — Si la fouille était illégale, la preuve obtenue devait-elle être écartée? — Charte canadienne des droits et libertés, art. 8, 24(2).

L'appelant a été accusé de production de marijuana, de possession de marijuana en vue d'en faire le trafic et de vol d'électricité. Les policiers ont obtenu un mandat les autorisant à perquisitionner dans une résidence pour y rechercher des preuves de vol d'électricité, y compris des documents identifiant les propriétaires et/ou occupants

2013 SCC 60 (CanLII)

though the Information to Obtain ("ITO") indicated that the police intended to search for "computer generated notes", the warrant did not specifically refer to computers or authorize the search of computers. In the course of their search of the residence, police found marijuana, two computers and a cellular telephone. A search of the devices revealed evidence that the appellant was the occupant. At trial, he claimed that the searches had violated his s. 8 *Charter* rights. The trial judge concluded that the ITO did not establish reasonable grounds to believe that documents identifying the owners and/or occupants would be found in the residence and so the warrant could not authorize the search for them. Further, the police were not authorized to search the personal computers and cellular telephone because those devices were not specifically mentioned in the warrant. She excluded most of the evidence found as a result of these searches and acquitted the appellant of the drug charges. The Court of Appeal set aside the acquittals and ordered a new trial on the grounds that the warrant had properly authorized the searches and that there had been no breach of the appellant's s. 8 *Charter* rights.

de la résidence. Même si la Dénonciation en vue d'obtenir un mandat de perquisition (« Dénonciation ») indiquait que les policiers entendaient chercher « des notes générées par ordinateur », le mandat ne faisait pas expressément mention des ordinateurs et n'autorisait pas non plus la fouille de tels appareils. Durant la perquisition dans la résidence, les policiers ont trouvé de la marijuana, deux ordinateurs et un téléphone cellulaire. La fouille de ces appareils a permis de découvrir des éléments de preuve établissant que l'appelant était l'occupant de la résidence. Au procès, l'appelant a soutenu que les fouilles avaient violé les droits que lui garantit l'art. 8 de la *Charte*. La juge de première instance a conclu que la Dénonciation ne démontrait pas l'existence de motifs raisonnables de croire que des documents confirmant l'identité des propriétaires et/ou occupants seraient trouvés dans la résidence, et qu'en conséquence le mandat ne pouvait autoriser leur recherche. En outre, les policiers n'étaient pas autorisés à fouiller les ordinateurs personnels et le téléphone cellulaire, parce que ces appareils n'étaient pas expressément mentionnés dans le mandat. La juge de première instance a écarté la plupart des éléments de preuve découverts par suite de ces fouilles, et elle a acquitté l'appelant des accusations liées à la drogue. La Cour d'appel a annulé les acquittements et ordonné la tenue d'un nouveau procès, au motif que le mandat avait dûment autorisé les fouilles et qu'il n'y avait eu aucune violation des droits garantis à l'appelant par l'art. 8 de la *Charte*.

Held: The appeal should be dismissed.

Arrêt : Le pourvoi est rejeté.

The traditional legal framework holds that once police obtain a warrant to search a place for certain things, they do not require specific, prior authorization to search in receptacles such as cupboards and filing cabinets. The question in this case is whether this framework is appropriate for computer searches. Computers differ in important ways from the receptacles governed by the traditional framework and computer searches give rise to particular privacy concerns that are not sufficiently addressed by that approach.

Selon le cadre juridique traditionnel, lorsque des policiers obtiennent un mandat les autorisant à perquisitionner dans un lieu et à y chercher certaines choses, ils n'ont pas besoin d'obtenir une autorisation expresse préalable pour fouiller dans des contenants tels que des placards et des classeurs. Il s'agit en l'espèce de déterminer si ce cadre juridique convient à la fouille des ordinateurs. Les ordinateurs diffèrent à bien des égards des contenants visés par le cadre juridique traditionnel, et la fouille des ordinateurs soulève, en matière de respect de la vie privée, des préoccupations particulières dont ne tient pas suffisamment compte cette approche.

The first issue that arises in this case is whether the search warrant properly permitted a search for documents identifying the owners and/or occupants. Although the trial judge found that the ITO did not contain a statement by its author that there were reasonable grounds to believe that such documents would be found in the residence, the ITO set out facts sufficient to allow the authorizing justice to reasonably draw that inference. The search for such

La première question soulevée en l'espèce consiste à déterminer si le mandat de perquisition autorisait dûment la recherche de documents identifiant les propriétaires et/ou occupants. Bien que la juge de première instance ait conclu que la Dénonciation ne contenait aucune déclaration de son auteur indiquant qu'il existait des motifs raisonnables de croire que de tels documents seraient découverts dans la résidence, la Dénonciation énonçait

2013 SCC 60 (CanLII)

material, therefore, did not breach the appellant's rights under s. 8 of the *Charter*.

suffisamment de faits pour permettre au juge de paix saisi de la demande d'autorisation de tirer raisonnablement cette inférence. Les fouilles visant de tels documents n'ont donc pas violé les droits garantis à l'appelant par l'art. 8 de la *Charte*.

The second issue is whether the warrant authorized the search of the computers and cellular telephone. Section 8 of the *Charter* — which gives everyone the right to be free of unreasonable searches and seizures — seeks to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement. This balance is generally achieved in two main ways. First, the police must obtain judicial authorization for a search *before* they conduct it, usually in the form of a search warrant. Second, an authorized search must be conducted in a reasonable manner, ensuring that the search is no more intrusive than is reasonably necessary to achieve its objectives. The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer. Computers potentially give police access to an almost unlimited universe of information that users cannot control, that they may not even be aware of, may have tried to erase and which may not be, in any meaningful sense, located in the place of search. The numerous and striking differences between computers and traditional receptacles call for distinctive treatment under s. 8 of the *Charter*. The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it — simply cannot apply with respect to computer searches.

La deuxième question est de savoir si le mandat autorisait la fouille des ordinateurs et du téléphone cellulaire. L'article 8 de la *Charte* — qui confère à chacun le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives — vise à établir un juste équilibre entre le droit à la protection contre l'ingérence de l'État et la nécessité légitime de faire respecter la loi. Cet équilibre est généralement réalisé grâce à deux moyens principaux. Premièrement, les policiers doivent obtenir des tribunaux l'autorisation d'effectuer une perquisition *avant* de procéder à celle-ci, autorisation qui prend habituellement la forme d'un mandat de perquisition. Deuxièmement, la perquisition ainsi autorisée doit être effectuée d'une manière non abusive, ce qui permet d'éviter que la perquisition ait un caractère plus envahissant que ce qui est raisonnablement nécessaire pour atteindre ses objectifs. Les intérêts en matière de respect de la vie privée que met en jeu la fouille des ordinateurs diffèrent nettement de ceux en cause lors de la fouille de contenants tels des placards et des classeurs. Il est difficile d'imaginer une atteinte plus grave à la vie privée d'une personne que la fouille de son ordinateur personnel. Les ordinateurs sont susceptibles de donner aux policiers accès à un univers presque illimité d'informations sur lesquelles les utilisateurs n'ont aucune maîtrise, dont ils ne connaissent peut-être même pas l'existence, qu'ils peuvent avoir tenté d'effacer, et qui d'ailleurs pourraient fort bien ne pas se trouver concrètement dans le lieu fouillé. Les différences nombreuses et frappantes entre les ordinateurs et les contenants traditionnels commandent que ces objets soient traités différemment pour l'application de l'art. 8 de la *Charte*. L'hypothèse fondamentale à la base de la règle traditionnelle — à savoir que si la perquisition effectuée dans un lieu est justifiée, la fouille des contenants découverts dans ce lieu l'est également — ne peut tout simplement pas s'appliquer à la fouille des ordinateurs.

In effect, the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place. Prior authorization of searches is a cornerstone of our search and seizure law. The purpose of the prior authorization process is to balance the privacy interest of the individual against the interest of the state in investigating criminal activity *before* the state intrusion occurs. Only a specific, prior authorization to search a computer found in the place

En effet, en raison des intérêts en matière de vie privée que soulève la fouille d'un ordinateur, un tel appareil doit, dans une certaine mesure, être traité comme un lieu distinct. L'autorisation préalable des perquisitions constitue une assise fondamentale de notre droit relatif aux fouilles, perquisitions et saisies. L'objectif du processus d'autorisation préalable est de mettre en balance le droit à la vie privée du particulier et l'intérêt de l'État à enquêter sur une activité criminelle, *avant*

2013 SCC 60 (CanLII)

of search ensures that the authorizing justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search. This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer, and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant. In this case, the authorizing justice was not required to impose a search protocol in advance with conditions limiting the manner of the search. While such conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required.

Having found that the search here was unlawful, the final issue is whether the evidence obtained should be excluded. Section 24(2) of the *Charter* requires that evidence obtained in a manner that infringes the rights of an accused under the *Charter* be excluded from the trial if it is established that "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". Here, the ITO did refer to the intention of the officers to search for computer-generated documents and considering that the state of the law with respect to computer searches was uncertain when police carried out their investigation and the otherwise reasonable manner in which the search was conducted, the violation was not serious. Further, there was a clear societal interest in adjudicating on their merits charges of production and possession of marijuana for the purpose of trafficking. Balancing these factors, the evidence should not be excluded. The police believed on reasonable grounds that the search of the computer was authorized by the warrant. While every search of a personal or home computer is a significant invasion of privacy, the search here did not step outside the purposes for which the warrant had been issued.

que l'intrusion de l'État ne se produise. Seule une autorisation expresse préalable de fouiller des ordinateurs susceptibles d'être découverts dans le lieu perquisitionné garantit que le juge de paix qui a statué sur la demande d'autorisation a pris en compte l'ensemble des préoccupations distinctives en matière de vie privée que soulève la fouille de ces appareils, puis déterminé que ce critère était respecté eu égard aux circonstances de la fouille particulière projetée. Cela signifie que, si des policiers entendent fouiller tout ordinateur trouvé dans le lieu qu'ils souhaitent perquisitionner, ils doivent d'abord convaincre le juge de paix saisi de la demande d'autorisation qu'ils possèdent des motifs raisonnables de croire que les ordinateurs qu'ils pourraient découvrir contiendront les choses qu'ils recherchent. Si, durant une perquisition, les policiers trouvent un ordinateur et que leur mandat ne les autorise pas expressément à fouiller les ordinateurs, ils peuvent le saisir et prendre les mesures nécessaires pour assurer l'intégrité des données. Toutefois, s'ils désirent consulter ces données, ils doivent obtenir un mandat distinct. En l'espèce, le juge de paix saisi de la demande d'autorisation n'était pas tenu d'imposer à l'avance un protocole de perquisition assorti de conditions limitant la façon de procéder à la fouille. Quoique de telles conditions puissent convenir dans certains cas, elles ne sont pas, en règle générale, requises par la Constitution.

Comme il a été conclu que la fouille effectuée dans la présente affaire était illégale, la dernière question qui se pose est de savoir si la preuve obtenue devrait être écartée. Le paragraphe 24(2) de la *Charte* exige que les éléments de preuve obtenus d'une manière qui porte atteinte aux droits garantis à l'accusé par la *Charte* soient écartés du procès s'il est établi, « eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice ». En l'espèce, la Dénonciation faisait effectivement mention de l'intention des policiers de rechercher des documents générés par ordinateur et, vu l'état incertain du droit applicable à la fouille d'ordinateurs au moment où les policiers ont effectué leur enquête et la manière par ailleurs non abusive dont la fouille a été effectuée, la violation n'était pas grave. En outre, il était manifestement dans l'intérêt de la société que des accusations de production et de possession de marijuana en vue d'en faire le trafic soient jugées au fond. Il ressort de la mise en balance de ces différents facteurs que les éléments de preuve ne doivent pas être écartés. Les policiers possédaient des motifs raisonnables de croire que la fouille de l'ordinateur était autorisée par le mandat. Bien que toute fouille d'un ordinateur personnel constitue une atteinte importante à la vie privée, la fouille effectuée en l'espèce n'a pas débordé les objectifs pour lesquels le mandat avait été décerné.

2013 SCC 60 (CanLII)

2013 SCC 60 (CanLII)

Cases Cited

Applied: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:** *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196; *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357; *R. v. Allain* (1998), 205 N.B.R. (2d) 201; *R. v. E. Star International Inc.*, 2009 ONCJ 576 (CanLII); *BGI Atlantic Inc. v. Canada (Minister of Fisheries and Oceans)*, 2004 NLSCTD 165, 241 Nfld. & P.E.I.R. 206; *R. v. Charles*, 2012 ONSC 2001, 258 C.R.R. (2d) 33; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Mohamad* (2004), 69 O.R. (3d) 481; *R. v. Boudreau-Fontaine*, 2010 QCCA 1108 (CanLII); *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *United States v. Carey*, 172 F.3d 1268 (1999); *United States v. Burgess*, 576 F.3d 1078 (2009); *United States v. Christie*, 717 F.3d 1156 (2013); *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).
Criminal Code, R.S.C. 1985, c. C-46, ss. 186(4)(*d*), 326(1)(*a*), 487, 487.1, 488, 488.1.
Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Authors Cited

Fontana, James A., and David Keeshan. *The Law of Search and Seizure in Canada*, 8th ed. Markham, Ont.: LexisNexis, 2010.
Gold, Alan D. "Applying Section 8 in the Digital World: Seizures and Searches". Paper prepared for the Law Society of Upper Canada, 7th Annual Six-Minute Criminal Defence Lawyer, June 9, 2007.
Kerr, Orin S. "Ex Ante Regulation of Computer Search and Seizure" (2010), 96 *Va. L. Rev.* 1241.
Kerr, Orin S. "Searches and Seizures in a Digital World" (2005), 119 *Harv. L. Rev.* 531.
LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, 5th ed., vol. 2. St. Paul, Minn.: West, 2012.
Robinton, Lily R. "Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence" (2010), 12 *Yale J.L. & Tech.* 311.

Jurisprudence

Arrêts appliqués : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; **arrêts mentionnés :** *R. c. Araujo*, 2000 CSC 65, [2000] 2 R.C.S. 992; *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253; *R. c. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196; *R. c. Sanchez* (1994), 93 C.C.C. (3d) 357; *R. c. Allain* (1998), 205 R.N.-B. (2e) 201; *R. c. E. Star International Inc.*, 2009 ONCJ 576 (CanLII); *BGI Atlantic Inc. c. Canada (Minister of Fisheries and Oceans)*, 2004 NLSCTD 165, 241 Nfld. & P.E.I.R. 206; *R. c. Charles*, 2012 ONSC 2001, 258 C.R.R. (2d) 33; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34; *R. c. Plant*, [1993] 3 R.C.S. 281; *R. c. Mohamad* (2004), 69 O.R. (3d) 481; *R. c. Boudreau-Fontaine*, 2010 QCCA 1108 (CanLII); *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209; *United States c. Carey*, 172 F.3d 1268 (1999); *United States c. Burgess*, 576 F.3d 1078 (2009); *United States c. Christie*, 717 F.3d 1156 (2013); *R. c. Côté*, 2011 CSC 46, [2011] 3 R.C.S. 215.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 24(2).
Code criminel, L.R.C. 1985, ch. C-46, art. 186(4)*d*), 326(1)*a*), 487, 487.1, 488, 488.1.
Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5.

Doctrine et autres documents cités

Fontana, James A., and David Keeshan. *The Law of Search and Seizure in Canada*, 8th ed. Markham, Ont. : LexisNexis, 2010.
Gold, Alan D. « Applying Section 8 in the Digital World : Seizures and Searches ». Paper prepared for the Law Society of Upper Canada, 7th Annual Six-Minute Criminal Defence Lawyer, June 9, 2007.
Kerr, Orin S. « Ex Ante Regulation of Computer Search and Seizure » (2010), 96 *Va. L. Rev.* 1241.
Kerr, Orin S. « Searches and Seizures in a Digital World » (2005), 119 *Harv. L. Rev.* 531.
LaFave, Wayne R. *Search and Seizure : A Treatise on the Fourth Amendment*, 5th ed., vol. 2. St. Paul, Minn. : West, 2012.
Robinton, Lily R. « Courting Chaos : Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence » (2010), 12 *Yale J.L. & Tech.* 311.

APPEAL from a judgment of the British Columbia Court of Appeal (Low, Levine and Frankel JJ.A.), 2011 BCCA 536, 315 B.C.A.C. 36, 535 W.A.C. 36, 92 C.R. (6th) 15, 250 C.R.R. (2d) 108, 285 C.C.C. (3d) 160, [2011] B.C.J. No. 2487 (QL), 2011 CarswellBC 3551, setting aside the acquittals entered by Bruce J., 2010 BCSC 2012, [2010] B.C.J. No. 2963 (QL), 2010 CarswellBC 4018, and ordering a new trial. Appeal dismissed.

Elizabeth P. Lewis, *Neil L. Cobb* and *Nancy Seto*, for the appellant.

W. Paul Riley and *Martha M. Devlin*, *Q.C.*, for the respondent.

Michal Fairburn and *Lisa Henderson*, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Nader R. Hasan and *Gerald J. Chan*, for the intervener the British Columbia Civil Liberties Association.

David S. Rose and *Allan Manson*, for the intervener the Canadian Civil Liberties Association.

Paul J. I. Alexander, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] In this case, the digital and Internet age meets the law of search and seizure. The encounter raises a novel issue: Does the traditional legal framework require some updating in order to protect the unique privacy interests that are at stake in computer searches? The traditional legal framework

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Low, Levine et Frankel), 2011 BCCA 536, 315 B.C.A.C. 36, 535 W.A.C. 36, 92 C.R. (6th) 15, 250 C.R.R. (2d) 108, 285 C.C.C. (3d) 160, [2011] B.C.J. No. 2487 (QL), 2011 CarswellBC 3551, qui a annulé les acquittements prononcés par la juge Bruce, 2010 BCSC 2012, [2010] B.C.J. No. 2963 (QL), 2010 CarswellBC 4018, et qui a ordonné la tenue d'un nouveau procès. Pourvoi rejeté.

Elizabeth P. Lewis, *Neil L. Cobb* et *Nancy Seto*, pour l'appelant.

W. Paul Riley et *Martha M. Devlin*, *c.r.*, pour l'intimée.

Michal Fairburn et *Lisa Henderson*, pour l'intervenant le procureur général de l'Ontario.

Jolaine Antonio, pour l'intervenant le procureur général de l'Alberta.

Nader R. Hasan et *Gerald J. Chan*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

David S. Rose et *Allan Manson*, pour l'intervenante l'Association canadienne des libertés civiles.

Paul J. I. Alexander, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Dans la présente affaire, l'ère du numérique et d'Internet rencontre le droit relatif aux fouilles, perquisitions et saisies. Cette rencontre soulève une question inédite : Est-il nécessaire de procéder à une certaine actualisation du cadre juridique traditionnel afin de protéger les intérêts uniques en matière

2013 SCC 60 (CanLII)

holds that once police obtain a warrant to search a place for certain things, they can look for those things anywhere in the place where they might reasonably be; the police do not require specific, prior authorization to search in receptacles such as cupboards and filing cabinets. The question before us is whether this framework is appropriate for computer searches; in short, should our law of search and seizure treat a computer as if it were a filing cabinet or a cupboard?

de vie privée que met en jeu la fouille des ordinateurs? Selon le cadre juridique traditionnel, lorsque des policiers obtiennent un mandat les autorisant à perquisitionner dans un lieu et à y chercher certaines choses, ils peuvent fouiller partout dans ce lieu où ces choses pourraient raisonnablement se trouver. Ils n'ont pas besoin d'obtenir une autorisation expresse préalable pour fouiller dans des contenants tels que des placards et des classeurs. La question dont nous sommes saisis en l'espèce est celle de savoir si ce cadre juridique convient à la fouille des ordinateurs. Bref, nos règles de droit régissant les fouilles, les perquisitions et les saisies devraient-elles traiter les ordinateurs comme s'il s'agissait de classeurs ou de placards?

[2] In my view, it should not. Computers differ in important ways from the receptacles governed by the traditional framework and computer searches give rise to particular privacy concerns that are not sufficiently addressed by that approach. One cannot assume that a justice who has authorized the search of a place has taken into account the privacy interests that might be compromised by the search of any computers found within that place. This can only be assured if, as is my view, the computer search requires specific pre-authorization.

[2] À mon sens, elles ne devraient pas. Les ordinateurs diffèrent à bien des égards des contenants visés par le cadre juridique traditionnel, et la fouille des ordinateurs soulève, en matière de respect de la vie privée, des préoccupations particulières dont ne tient pas suffisamment compte cette approche traditionnelle. On ne saurait présumer que le juge de paix ayant autorisé des policiers à perquisitionner dans un lieu a pris en compte les intérêts en matière de vie privée auxquels pourrait porter atteinte la fouille des ordinateurs trouvés dans ce lieu. Le seul moyen propre à assurer la prise en compte de ces intérêts consiste selon moi à exiger que la fouille d'un ordinateur fasse l'objet d'une autorisation expresse préalable.

[3] In practical terms, the requirement of specific, prior authorization means that if police intend to search computers found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If, in the course of a warranted search, police come across a computer that may contain material for which they are authorized to search but the warrant does not give them specific, prior authorization to search computers, they may seize the device but must obtain further authorization before it is searched.

[3] En pratique, voici ce que signifie l'obligation d'obtenir une autorisation expresse préalable : si les policiers ont l'intention de fouiller les ordinateurs se trouvant dans le lieu à l'égard duquel ils sollicitent un mandat, ils doivent convaincre le juge de paix saisi de la demande d'autorisation qu'ils ont des motifs raisonnables de croire que tout ordinateur qu'ils pourraient y trouver contiendra les choses qu'ils recherchent. Si, dans le cours d'une perquisition avec mandat, les policiers trouvent un ordinateur susceptible de contenir des éléments qu'ils sont autorisés à rechercher, et que le mandat dont ils disposent ne les autorise pas de manière expresse et préalable à fouiller des ordinateurs, ils peuvent saisir l'appareil, mais doivent obtenir une autre autorisation avant de le fouiller.

2013 SCC 60 (CanLII)

II. Overview and Issues

[4] The appellant was charged with production of marijuana, possession of marijuana for the purpose of trafficking, and theft of electricity. The police obtained a warrant authorizing the search of a residence for evidence of theft of electricity, including documentation identifying the owners and/or occupants of the residence. Even though the Information to Obtain a Search Warrant ("ITO") indicated that the police intended to search for, among other things, "computer generated notes", the warrant did not specifically refer to computers or authorize the search of computers: A.R., vol. II, at p. 112. In the course of their search of the residence, police found marijuana and they also discovered two computers and a cellular telephone. A search of these devices led to evidence that the appellant was the occupant of the residence.

[5] At trial, the appellant claimed that these searches violated his rights under s. 8 of the *Canadian Charter of Rights and Freedoms* and asked the judge to exclude the evidence found as a result. The judge concluded that the ITO did not establish reasonable grounds to believe that documentation identifying the owners and/or occupants would be found in the residence and so the warrant could not authorize the search for such documents. In addition, the trial judge found that police were not authorized to search the personal computers and cellular telephone because those devices were not specifically mentioned in the warrant. She excluded most of the evidence found as a result of these searches and acquitted the accused of the drug charges (2010 BCSC 2012 (CanLII)).

[6] The Crown appealed and the Court of Appeal set aside the acquittals and ordered a new trial (2011 BCCA 536, 315 B.C.A.C. 36). In the court's view, the warrant had properly authorized the searches and there had been no breach of the appellant's s. 8 *Charter* rights.

II. Aperçu et questions en litige

[4] L'appelant a été accusé de production de marijuana, de possession de marijuana en vue d'en faire le trafic et de vol d'électricité. Les policiers ont obtenu un mandat les autorisant à perquisitionner dans une résidence pour y rechercher des preuves de vol d'électricité, y compris des documents identifiant les propriétaires et/ou occupants de la résidence. Même si la Dénonciation en vue d'obtenir un mandat de perquisition (« Dénonciation ») indiquait que les policiers entendaient chercher notamment [TRADUCTION] « des notes générées par ordinateur », le mandat ne faisait pas expressément mention des ordinateurs et n'autorisait pas non plus la fouille de tels appareils : d.a., vol. II, p. 112. Durant la perquisition dans la résidence, les policiers ont trouvé de la marijuana, en plus de découvrir deux ordinateurs et un téléphone cellulaire. La fouille de ces appareils a permis de découvrir des éléments de preuve établissant que l'appelant était l'occupant de la résidence.

[5] Au procès, l'appelant a soutenu que ces fouilles avaient violé les droits que lui garantit l'art. 8 de la *Charte canadienne des droits et libertés*, et il a demandé à la juge d'exclure les éléments de preuve ainsi découverts. Celle-ci a conclu que la Dénonciation ne démontrait pas l'existence de motifs raisonnables de croire que des documents identifiant les propriétaires et/ou occupants se trouveraient dans la résidence, et qu'en conséquence le mandat ne pouvait autoriser la recherche de tels documents. La juge de première instance a en outre conclu que les policiers n'étaient pas autorisés à fouiller les ordinateurs personnels et le téléphone cellulaire, parce que ces appareils n'étaient pas expressément mentionnés dans le mandat. Elle a écarté la plupart des éléments de preuve découverts par suite de ces fouilles, et elle a acquitté l'accusé des accusations liées à la drogue (2010 BCSC 2012 (CanLII)).

[6] Le ministère public a interjeté appel et la Cour d'appel a annulé les acquittements et ordonné la tenue d'un nouveau procès (2011 BCCA 536, 315 B.C.A.C. 36). De l'avis de la Cour d'appel, le mandat avait dûment autorisé les fouilles et il n'y avait eu aucune violation des droits garantis à l'appelant par l'art. 8 de la *Charte*.

2013 SCC 60 (CanLII)

[7] The appellant's further appeal to this Court raises three issues:

1. Did the search warrant properly permit a search for documentation identifying the owners and/or occupants?

2. Did the warrant authorize the search of the computers and cellular telephone?

3. If the search was unlawful, should the evidence obtained be excluded?

[8] On the first issue, I agree with the Court of Appeal that the ITO established reasonable grounds to believe that relevant documents would be found in the residence. It follows that the warrant properly authorized a search for that sort of material. On the second issue, I agree with the trial judge that the warrant did not authorize the search of the computers and cellular telephone. However, I conclude that the trial judge was wrong to exclude the evidence found as a result. I would therefore dismiss the appeal.

III. Analysis

A. *First Issue: Reasonable Grounds to Search for Ownership or Occupancy Documentation*

[9] I agree with the Court of Appeal that the facts provided in the ITO were sufficient to support a reasonable inference on the part of the issuing justice that documentation evidencing ownership or occupancy would be found in the residence. The trial judge, in concluding otherwise, did not show sufficient deference to the issuing justice's assessment of the evidence. Some background about the ITO and the decisions at trial and on appeal helps to explain my conclusion.

[7] Le pourvoi formé par l'appelant devant notre Cour soulève trois questions :

1. Le mandat de perquisition autorisait-il dûment la recherche de documents identifiant les propriétaires et/ou occupants?

2. Le mandat autorisait-il la fouille des ordinateurs et du téléphone cellulaire?

3. Si la fouille était illégale, la preuve obtenue devait-elle être écartée?

[8] Pour ce qui est de la première question, je souscris à la conclusion de la Cour d'appel selon laquelle la Dénonciation démontrait l'existence de motifs raisonnables de croire que des documents pertinents se trouveraient dans la résidence. Il s'ensuit que le mandat autorisait dûment la recherche de documents de cette nature. Quant à la deuxième question, à l'instar de la juge de première instance, j'estime que le mandat n'autorisait pas la fouille des ordinateurs et du téléphone cellulaire. Toutefois, je conclus que la juge a eu tort d'écarter les éléments de preuve ainsi découverts par suite de cette fouille. Je rejetterais donc le pourvoi.

III. Analyse

A. *Première question : motifs raisonnables de rechercher des documents confirmant l'identité des propriétaires ou occupants*

[9] Je fais mienne la conclusion de la Cour d'appel selon laquelle les faits énoncés dans la Dénonciation étaient suffisants pour permettre au juge de paix qui a décerné le mandat d'inférer raisonnablement que des documents confirmant l'identité des propriétaires ou occupants seraient trouvés dans la résidence. Or, en tirant une conclusion différente, la juge de première instance n'a pas manifesté suffisamment de déférence envers l'appréciation de la preuve par le juge de paix. Un certain nombre de renseignements sur le contexte de la Dénonciation et des décisions rendues au procès et en appel aideront à expliquer ma propre conclusion.

2013 SCC 60 (CanLII)

[10] On August 31, 2007, Mr. Hall, a subcontractor of British Columbia Hydro, informed police that a service check of the hydro meter outside premises on 84 Avenue in Langley showed that electricity was being diverted and used without being recorded for billing purposes. B.C. Hydro records listed Foh Hiong as the subscriber for the electrical service at the property. Having received this information, Constable Carter searched the RCMP computer system and determined that the current owner of the residence was Thanh L. Vu. He found that there was no homeowner grant being claimed for the residence and there was no business licence associated with it. Cst. Carter drove by the residence and made observations of its style (a two-storey house with a basement) and address as well as the location of the hydro-meter. He contacted Mr. Hall on September 6, 2007, to confirm that: no B.C. Hydro employee had removed any hydro-electrical diversion from the residence; Mr. Hall still believed a theft of electricity was ongoing; and the subscriber's name on the B.C. Hydro account was still the same. Using this information, Cst. Carter swore an ITO for the premises for the purpose of locating evidence of a theft of electricity.

[10] Le 31 août 2007, M. Hall, un sous-traitant de British Columbia Hydro, a informé la police qu'une vérification du compteur d'électricité extérieur d'une propriété située sur l'avenue 84 à Langley avait révélé que de l'électricité était détournée et utilisée sans que cette consommation soit enregistrée et facturée. Les dossiers de B.C. Hydro indiquaient que l'abonné aux services d'électricité pour la propriété s'appelait Foh Hiong. Après avoir reçu ces renseignements, l'agent Carter a effectué des recherches dans le système informatique de la GRC et déterminé que le propriétaire de la résidence se nommait Thanh L. Vu. Il a aussi constaté qu'aucune subvention aux propriétaires n'était réclamée à l'égard de la résidence et que celle-ci ne faisait l'objet d'aucun permis d'exploitation commerciale. L'agent Carter est ensuite passé en voiture devant la résidence et a noté des observations sur le type de construction de celle-ci (maison à deux étages avec sous-sol), son adresse ainsi que l'emplacement du compteur. Le 6 septembre 2007, il a communiqué avec M. Hall pour obtenir la confirmation de ce qui suit : aucun employé de B.C. Hydro n'avait enlevé de dispositifs de détournement d'hydro-électricité de la résidence; M. Hall croyait encore qu'un vol d'électricité continuait d'avoir lieu; le nom de l'abonné sur le compte de B.C. Hydro était toujours le même. S'appuyant sur ces renseignements, l'agent Carter a préparé une dénonciation sous serment en vue d'obtenir un mandat de perquisition visant les lieux en question afin d'y rechercher des éléments de preuve de vol d'électricité.

[11] The ITO indicated that Cst. Carter intended to seize any evidence supporting a charge of theft of electricity contrary to s. 326(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. In particular, he intended to seize all equipment and parts utilized to divert electricity, including: ". . . meter bases, the electrical meters, new and used BC Hydro meter seals, typed, written or computer generated notes relative to the theft of the hydro electricity and records and documentation relating to occupancy and control over the property and electrical services supplied": A.R., vol. II, at p. 112.

[11] La Dénonciation indiquait que l'agent Carter entendait saisir tout élément de preuve étayant une accusation de vol d'électricité en violation de l'al. 326(1)*a*) du *Code criminel*, L.R.C. 1985, ch. C-46. En particulier, il entendait saisir tout équipement ou composant utilisé pour détourner l'électricité, y compris : [TRADUCTION] « . . . les socles, les compteurs d'électricité, les sceaux — neufs et usagés — du compteur de B.C. Hydro, les notes dactylographiées, manuscrites ou générées par ordinateur se rapportant au vol d'électricité, ainsi que les relevés et documents relatifs à l'occupation de la propriété et au contrôle exercé sur celle-ci et les services électriques fournis » : d.a., vol. II, p. 112.

2013 SCC 60 (CanLII)

[12] A Justice of the Peace issued a search warrant authorizing seizure of "[a]ll equipment and parts utilized to divert electricity, including the meter bases, electrical meters, electrical wires, hydro bypass connections [as well as] [d]ocumentation identifying ownership and/or occupancy of the property" relevant to an investigation of the offence: A.R., vol. II, at p. 109.

[12] Un juge de paix a délivré un mandat de perquisition autorisant la saisie de [TRADUCTION] « [t]out équipement ou composant utilisé pour détourner l'électricité, y compris les socles, les compteurs d'électricité, les fils électriques, les dispositifs de détournement d'électricité [ainsi que] [l]es documents identifiant les propriétaires et/ou occupants de la propriété » pertinents pour les besoins d'une enquête sur l'infraction : d.a., vol. II, p. 109.

[13] The appellant argued at trial that the search for documents relating to ownership and occupation violated his rights under s. 8 of the *Charter* to be free from unreasonable searches and seizures. He submitted that the warrant should not have authorized a search for that sort of documentation because the ITO did not set out reasonable grounds to believe that ownership documentation would be found in the residence.

[13] Au procès, l'appelant a plaidé que les fouilles effectuées pour chercher des documents permettant d'identifier les propriétaires et occupants avaient violé le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives que lui garantit l'art. 8 de la *Charte*. Il a soutenu que le mandat n'aurait pas dû autoriser les policiers à procéder à des fouilles visant des documents de cette nature, étant donné que la Dénonciation ne faisait pas état de motifs raisonnables de croire que des documents relatifs à l'identité des propriétaires seraient découverts dans la résidence.

[14] On the *voir dire* at trial, Cst. Carter agreed that the ITO contained no statement concerning his grounds to believe that documents evidencing ownership or occupation would be found in the residence. The trial judge found that "[t]he ITO does not contain a statement by its author that there are reasonable grounds to believe that documents evidencing ownership or occupation will be found in the Residence. Nor does the ITO contain any facts to support such a belief by Cst. Carter who drafted the ITO" (*voir dire* decision, 2010 BCSC 1260, 218 C.R.R. (2d) 98, at para. 54). She concluded therefore that the ITO could not support a search warrant for documents evidencing ownership or occupation (para. 54).

[14] Lors du voir-dire au procès, l'agent Carter a reconnu que la Dénonciation ne renfermait aucune déclaration concernant les motifs pour lesquels il croyait que des documents confirmant l'identité des propriétaires ou occupants seraient découverts dans la résidence. La juge de première instance a conclu que [TRADUCTION] « [l]a Dénonciation ne contient aucune déclaration de son auteur indiquant qu'il existe des motifs raisonnables de croire que des documents confirmant l'identité des propriétaires ou occupants seront découverts dans la résidence. La Dénonciation ne mentionne pas non plus de faits appuyant la conviction de l'agent Carter à cet égard, l'auteur de la Dénonciation » (décision sur le voir-dire, 2010 BCSC 1260, 218 C.R.R. (2d) 98, par. 54). Elle a en conséquence conclu que la Dénonciation ne pouvait justifier la délivrance d'un mandat de perquisition permettant de chercher des documents confirmant l'identité des propriétaires ou occupants (par. 54).

[15] The Court of Appeal found that this was an error. According to the court, the trial judge had reweighed the grounds set out in the ITO and substituted her view of the sufficiency of the evidence

[15] La Cour d'appel a jugé qu'il s'agissait là d'une erreur. Selon elle, la juge de première instance avait réévalué les motifs énoncés dans la Dénonciation et substitué son opinion sur le

2013 SCC 60 (CanLII)

for that of the issuing justice. In my respectful view, the Court of Appeal was on firm ground in reaching this conclusion.

[16] The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis deleted); *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious: *R. v. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, at para. 13; *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)), at pp. 364-65; *R. v. Allain* (1998), 205 N.B.R. (2d) 201 (C.A.), at para. 11.

[17] The ITO set out facts sufficient to allow the authorizing justice to reasonably draw the inference that there were reasonable grounds to believe that documents evidencing ownership or occupation would be found in the residence: A.R., vol. II, at p. 112. In particular, the ITO referred to the premises to be searched as a "residence" and as a "two (2) story house" (p. 111). It also indicated that the appellant owned the property and that electricity was being consumed there (pp. 110-11). In my view, it is a reasonable inference that a residence would be the place to look for documents evidencing ownership or occupation. Where else would one expect to find such documents if not in the residence itself? Moreover, I think that the authorizing justice could reasonably infer that a place was being occupied as a residence from the fact that electricity was being consumed at that place and that it had an owner.

caractère suffisant de la preuve à celle du juge de paix qui avait décerné le mandat. À mon humble avis, cette conclusion de la Cour d'appel reposait sur de solides assises.

[16] Le juge qui siège en révision doit trancher la question de savoir « s'il existait quelque élément de preuve fiable auquel le juge aurait pu raisonnablement ajouter foi pour accorder l'autorisation, et non si, de l'avis du juge siégeant en révision, le juge saisi de la demande d'autorisation aurait dû y faire droit » : *R. c. Araujo*, 2000 CSC 65, [2000] 2 R.C.S. 992, par. 54 (soulignement omis); *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253, par. 40. En appliquant ce critère, le juge siégeant en révision doit se rappeler que le juge de paix saisi de la demande d'autorisation peut tirer des inférences raisonnables de la preuve présentée dans la dénonciation; l'auteur de la dénonciation n'est pas tenu de souligner à grands traits ce qui est par ailleurs évident : *R. c. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, par. 13; *R. c. Sanchez* (1994), 93 C.C.C. (3d) 357 (C. Ont. (Div. gén.)), p. 364-365; *R. c. Allain* (1998), 205 R.N.-B. (2e) 201 (C.A.), par. 11.

[17] La Dénonciation énonçait suffisamment de faits pour permettre au juge de paix saisi de la demande d'autorisation d'inférer raisonnablement qu'il existait des motifs raisonnables de croire que des documents confirmant l'identité des propriétaires ou occupants seraient découverts dans la résidence : d.a., vol. II, p. 112. En particulier, la Dénonciation décrivait les lieux visés par la perquisition comme étant une [TRADUCTION] « résidence » et une « maison à deux (2) étages » (p. 111). Elle indiquait également que l'appelant était le propriétaire des lieux et que de l'électricité y était consommée (p. 110-111). À mon avis, il est raisonnable d'inférer qu'une résidence est l'endroit où il faut regarder pour trouver des documents confirmant l'identité de ses propriétaires ou occupants. À quel autre endroit pourrait-on s'attendre à trouver de tels documents, si ce n'est dans la résidence elle-même? Qui plus est, j'estime qu'il était raisonnable pour le juge de paix saisi de la demande d'autorisation d'inférer que la propriété était occupée en tant que résidence, compte tenu du fait que de l'électricité était consommée dans ce lieu et que celui-ci avait un propriétaire.

2013 SCC 60 (CanLII)

[18] I therefore conclude that the authorizing justice could lawfully issue the warrant to search for documents evidencing ownership or occupation of the property. The search for such material did not breach the appellant's rights under s. 8 of the *Charter*.

B. *Second Issue: The Computer Searches*

1. Introduction

[19] I have concluded that the search warrant authorized the police to search for documentation identifying ownership and occupancy. The next issue is whether the warrant permitted the police to search for that sort of documentation on the computers and cellular telephone found in the residence.

[20] The appellant says that a computer search requires specific pre-authorization in the warrant. The Crown maintains that this is not necessary because after-the-fact review of the reasonableness of a computer search provides the protection guaranteed by s. 8 of the *Charter*. I agree with the appellant.

[21] Section 8 of the *Charter* — which gives everyone the right to be free of unreasonable searches and seizures — seeks to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement. In addition to the overriding requirement that a reasonable law must authorize the search, this balance is generally achieved in two main ways.

[22] First, the police must obtain judicial authorization for the search *before* they conduct it, usually in the form of a search warrant. The prior authorization requirement ensures that, before a search is conducted, a judicial officer is satisfied that the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance the goals of law enforcement: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160.

[18] Par conséquent, je conclus que le juge de paix saisi de la demande d'autorisation pouvait légalement décerner le mandat de perquisition autorisant la recherche de documents confirmant l'identité des propriétaires ou occupants de la propriété. Les fouilles visant de tels documents n'ont pas violé les droits garantis à l'appelant par l'art. 8 de la *Charte*.

B. *Deuxième question : la fouille des ordinateurs*

1. Introduction

[19] J'ai conclu que le mandat de perquisition autorisait les policiers à rechercher des documents identifiant les propriétaires et les occupants. Il s'agit maintenant de se demander si le mandat permettait aux policiers de chercher ce genre de documents dans les ordinateurs et le téléphone cellulaire trouvés dans la résidence.

[20] L'appelant affirme que la fouille d'un ordinateur doit faire l'objet d'une autorisation expresse préalable dans le mandat. Pour sa part, le ministère public soutient qu'une telle autorisation n'est pas nécessaire, parce que le contrôle a posteriori du caractère non abusif de la fouille d'un ordinateur permet d'assurer la protection garantie par l'art. 8 de la *Charte*. Je partage l'opinion de l'appelant.

[21] L'article 8 de la *Charte* — qui confère à chacun le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives — vise à établir un juste équilibre entre le droit à la protection contre l'ingérence de l'État et la nécessité légitime de faire respecter la loi. En plus de l'exigence primordiale selon laquelle la perquisition doit être autorisée par une loi non abusive, cet équilibre est généralement réalisé grâce à deux moyens principaux.

[22] Premièrement, les policiers doivent obtenir des tribunaux l'autorisation d'effectuer la perquisition *avant* de procéder à celle-ci, autorisation qui prend habituellement la forme d'un mandat de perquisition. Cette obligation d'obtenir une autorisation préalable fait en sorte que, avant l'exécution de la perquisition, un officier de justice est convaincu que le droit du public de ne pas être importuné par l'État doit céder le pas au droit de ce dernier de s'immiscer dans la vie privée des particuliers afin

2013 SCC 60 (CanLII)

Second, an authorized search must be conducted in a reasonable manner. This ensures that the search is no more intrusive than is reasonably necessary to achieve its objectives. In short, prior authorization *prevents* unjustified intrusions while the requirement that the search be conducted reasonably limits potential abuse of the authorization to search.

de veiller au respect de la loi : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 160. Deuxièmement, la perquisition ainsi autorisée doit être effectuée d'une manière non abusive. Cela permet d'éviter que la perquisition ait un caractère plus envahissant que ce qui est raisonnablement nécessaire pour atteindre ses objectifs. Bref, le fait d'exiger une autorisation préalable *prévient* les intrusions injustifiées, alors que celui d'exiger que la perquisition soit effectuée d'une manière non abusive limite les risques que l'on abuse de l'autorisation de perquisitionner qui a été accordée.

[23] I accept the general proposition, as stated by the Court of Appeal, that "[a] warrant authorizing a search of a specific location for specific things confers on those executing that warrant the authority to conduct a reasonable examination of anything at that location within which the specified things might be found" (para. 63). In other words, specific prior authorization to search anything at that location is not required. The question is whether this general proposition applies to computers or whether specific, prior authorization to search a computer is required.

[23] Je souscris à la proposition générale qu'a formulée dans les termes suivants la Cour d'appel : [TRADUCTION] « Un mandat autorisant une perquisition dans un lieu précis pour chercher des choses précises confère aux personnes qui exécutent ce mandat le pouvoir de procéder à un examen raisonnable de tout élément se trouvant à cet endroit et dans lequel les choses précisées pourraient être découvertes » (par. 63). Autrement dit, une autorisation expresse préalable de fouiller tout ce qui se trouve dans le lieu en question n'est pas requise. Toutefois, la question qui se pose consiste à décider si cette proposition générale s'applique aux ordinateurs ou si la fouille d'un ordinateur requiert l'obtention d'une autorisation expresse préalable.

[24] The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search. These factors, understood in light of the purposes of s. 8 of the *Charter*, call for specific pre-authorization in my view.

[24] Les intérêts en matière de respect de la vie privée que met en jeu la fouille des ordinateurs diffèrent nettement de ceux en cause lors de la fouille de contenants tels des placards et des classeurs. En effet, les ordinateurs sont susceptibles de donner aux policiers accès à de vastes quantités de données sur lesquelles les utilisateurs n'ont aucune maîtrise, dont ils ne connaissent peut-être même pas l'existence ou dont ils peuvent avoir choisi de se départir, et qui d'ailleurs pourraient fort bien ne pas se trouver concrètement dans le lieu fouillé. Je suis d'avis que, considérés au regard des objectifs visés par l'art. 8 de la *Charte*, ces facteurs commandent l'obtention d'une autorisation expresse préalable.

[25] Although I find that specific, prior authorization was necessary before police could search the devices found within the appellant's residence, I would not accept one of the intervener's submissions that the authorizing justice was required, in this

[25] Bien que je conclue que les policiers devaient obtenir une autorisation expresse préalable avant de pouvoir fouiller les appareils trouvés dans la résidence de l'appelant, je ne puis accepter les observations de l'un des intervenants selon lesquelles

2013 SCC 60 (CanLII)

case, to impose a search protocol in advance with conditions limiting the manner of search. While such conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required and were not, in my view, required in this case.

le juge de paix saisi de la demande d'autorisation était tenu, dans le présent cas, d'imposer à l'avance un protocole de perquisition assorti de conditions limitant la façon de procéder à la fouille. Quoique de telles conditions puissent convenir dans certains cas, elles ne sont pas, en règle générale, requises par la Constitution et, à mon sens, elles n'étaient pas nécessaires en l'espèce.

[26] Before turning to my reasons for these conclusions, I must briefly review the facts, decisions and positions of the parties in relation to this issue.

[26] Avant d'exposer les motifs au soutien de ces conclusions, je vais examiner brièvement les faits, les décisions et les thèses des parties relativement à cette question.

2. Facts, Decisions and Positions of the Parties

2. Faits, décisions et thèses des parties

(a) *The Search*

a) *La perquisition*

[27] On September 6, 2007, Cst. Carter and several other officers entered the residence pursuant to the warrant. A cursory search led to the discovery of marijuana growing in the basement. The officers also found two computers and a cellular telephone in the living room. Cst. Carter searched the first computer, which was connected to a security system that monitored the front of the residence by means of a video camera. Examining the footage stored in the computer, he located images of a black Honda CRV in the driveway of the residence. The RCMP's database confirmed that the appellant was the registered owner of a 2007 black Honda CRV, that he had a B.C. driver's licence, and that he had a registered address on Quintette Crescent in Coquitlam, B.C.

[27] Le 6 septembre 2007, l'agent Carter et plusieurs autres agents sont entrés dans la résidence sous l'autorité du mandat. Une fouille sommaire a permis de découvrir une culture de marijuana au sous-sol. Les agents ont également trouvé deux ordinateurs et un téléphone cellulaire dans le salon. L'agent Carter a fouillé le premier ordinateur, lequel était connecté à un système de sécurité qui surveillait le devant de la résidence au moyen d'une caméra vidéo. En examinant la vidéo archivée dans l'ordinateur, il a repéré des images d'une Honda CRV noire dans l'entrée de la résidence. La base de données de la GRC a confirmé que l'appelant était enregistré à titre de propriétaire d'une Honda CRV noire 2007, qu'il était titulaire d'un permis de conduire de la C.-B. et qu'il possédait une adresse légale sur Quintette Crescent à Coquitlam, en C.-B.

[28] Cst. George searched the second computer which was running an online chat program called MSN. The last user was still signed in and by activating the MSN icon and bringing up the open file Cst. George was able to see that the user was signed in with the email address raymondvu@hotmail.com. A Facebook account in the name of Raymond Vu was also open. Cst. George searched the computer's database for photographs by using the "Start" menu and the "Search" function which permits a search for any photographs or video files. He also searched for any relevant documents on MS-DOS

[28] L'agent George a fouillé le second ordinateur sur lequel un logiciel de clavardage en ligne appelé MSN était en marche. Le dernier utilisateur était toujours connecté et, en activant l'icône MSN et en cliquant sur le document ouvert, l'agent George a pu voir que l'utilisateur était connecté au moyen de l'adresse électronique raymondvu@hotmail.com. Un compte Facebook au nom de Raymond Vu était également ouvert. En utilisant le menu « Démarrer » et la fonction « Rechercher », laquelle permet de rechercher des documents photo ou vidéo, l'agent a aussi fouillé dans la base de données de l'ordinateur

2013 SCC 60 (CanLII)

or WordPerfect. The search turned up the résumé of Raymond Vu, of which another officer took a photograph. Cst. George did not take many notes during his search and could not recall the steps he took in the process.

à la recherche de photos. Il a également recherché tout document pertinent dans MS-DOS ou WordPerfect. Cette recherche a permis de découvrir le curriculum vitae de Raymond Vu, dont un autre agent a pris une photo. L'agent George n'a pas pris beaucoup de notes durant sa fouille et il ne pouvait se souvenir des différentes opérations qu'il avait effectuées à l'occasion de celle-ci.

[29] On October 18, 2007, Cst. George obtained the serial number for a computer modem found at the residence and filed a request under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, to obtain the name of the subscriber. His report to the Crown indicated that the subscriber was Luan Vu, although Cst. George acknowledged that this person was not a current subscriber.

[29] Le 18 octobre 2007, l'agent George a obtenu le numéro de série d'un modem d'ordinateur trouvé dans la résidence et il a déposé, en vertu de la *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, ch. 5, une demande en vue d'obtenir le nom de l'abonné. Dans le rapport qu'il a présenté au ministère public, il a indiqué que l'abonné s'appelait Luan Vu, reconnaissant toutefois que cette personne n'était pas un abonné à ce moment.

[30] Cst. Carter searched the Sony Ericsson model cellular telephone found in the living room. Stored in the phone's database, he discovered a photo of an Asian male, whom Cst. Carter identified as the appellant.

[30] L'agent Carter a fouillé le téléphone cellulaire (de modèle Sony Ericsson) trouvé dans le salon de la résidence. Dans la base de données du téléphone, il a découvert la photo d'un homme asiatique, qu'il a identifié comme étant l'appelant.

[31] Cst. MacNeil was the exhibits officer for the search. He seized the two computers, the cellular telephone, a power cord for the phone, and a zip drive (a portable computer storage device). He applied for and obtained a detention order to permit the RCMP to retain the two computers and the cellular telephone. The detention order was valid for a period of 90 days unless charges were laid before its expiry.

[31] L'agent MacNeil, qui était l'agent chargé des pièces à conviction lors de la perquisition, a saisi les deux ordinateurs, le téléphone cellulaire, le cordon d'alimentation du téléphone ainsi qu'un lecteur zip (dispositif de stockage portable pour ordinateur). Il a demandé et obtenu une ordonnance de détention pour permettre à la GRC de conserver les deux ordinateurs et le téléphone cellulaire. Cette ordonnance était valide pour 90 jours à moins que des accusations ne soient portées avant l'expiration de cette période.

[32] On January 6, 2008, a few days after the detention order had expired, Sgt. Wilde carried out a second search of the security computer. Cst. George had made a DVD of all the footage in the database but it had been lost. Sgt. Wilde prepared a number of still shots which depicted a vehicle arriving at the residence and a male attending the residence in the five days preceding the execution of the search warrant. Sgt. Wilde admitted that he intentionally had not made any notes of his search of the

[32] Le 6 janvier 2008, quelques jours après l'expiration de l'ordonnance de détention, le sergent Wilde a fouillé une deuxième fois l'ordinateur du système de sécurité. L'agent George avait transféré sur un DVD toutes les images figurant dans la base de données, mais ce DVD avait été égaré. Le sergent Wilde a préparé un certain nombre de photos qui montraient un véhicule arrivant à la résidence et un homme se présentant à celle-ci dans les cinq jours qui ont précédé l'exécution du mandat

2013 SCC 60 (CanLII)

computers at the residence to ensure he would not have to testify in court about the search.

(b) *Decisions*

[33] The trial judge concluded that the warrant that police had obtained to search the residence did not authorize the search of the laptop computer or the cellular telephone found therein. In her view:

> . . . it is no longer conceivable that a search warrant for a residence could implicitly authorize the search of a computer (or a cellular telephone containing a memory capacity akin to a computer) that may be found in the premises even where the warrant specifically grants an authority to search for documentary evidence of occupation or ownership. [Emphasis deleted; *voir dire* decision, at para. 65.]

[34] The Court of Appeal disagreed with the trial judge's ruling on the *voir dire*. It found that computers and cellular telephones were likely repositories of "[d]ocumentation identifying ownership and/or occupancy of the property", and as such they could be searched under the warrant. The court concluded that there is nothing in the nature of electronic devices that requires the law of search and seizure to treat them differently from other receptacles found on premises for which a search has been authorized.

(c) *Positions of the Parties*

[35] The appellant, with the support of certain interveners, submits that authorization to search a residence for documents does not include authorization to search computers and cellular telephones found in that place. The appellant maintains that searches of these devices engage more important privacy interests than searches of other receptacles that may be found in a place, such as drawers in a

de perquisition. Le sergent Wilde a admis qu'il avait intentionnellement omis de prendre des notes concernant la fouille des ordinateurs à la résidence pour s'assurer de ne pas avoir à témoigner en cour à ce sujet.

b) *Décisions*

[33] La juge de première instance a conclu que le mandat obtenu par les policiers pour perquisitionner à la résidence n'autorisait pas la fouille de l'ordinateur portable et du téléphone cellulaire qui y ont été trouvés. À son avis :

> [TRADUCTION] . . . il n'est désormais plus possible de penser qu'un mandat de perquisition visant une résidence puisse implicitement autoriser la fouille d'un ordinateur (ou d'un téléphone cellulaire comportant une capacité de mémoire semblable à celle d'un ordinateur) qui pourrait être découvert sur les lieux, même lorsque le mandat accorde expressément le pouvoir de chercher des éléments de preuve documentaire confirmant l'identité des occupants ou propriétaires. [Italiques omis; décision sur le voir-dire, par. 65.]

[34] La Cour d'appel n'a pas souscrit à la décision rendue par la juge de première instance au terme du voir-dire. Elle a plutôt conclu que les ordinateurs et téléphones cellulaires constituent des endroits où il est plausible que soient conservés des [TRADUCTION] « documents identifiant les propriétaires et/ou occupants de la propriété » et, pour cette raison, qu'ils peuvent être fouillés en vertu du mandat. La Cour d'appel a également jugé que rien dans la nature des appareils électroniques n'a pour effet d'exiger que le droit relatif aux fouilles, perquisitions et saisies traite ces appareils différemment des autres contenants trouvés dans des lieux où une perquisition a été autorisée.

c) *Thèses des parties*

[35] L'appelant soutient, avec l'appui de certains intervenants, qu'une autorisation de fouiller une résidence en vue d'y chercher des documents n'emporte pas l'autorisation de fouiller les ordinateurs et les téléphones cellulaires découverts dans cet endroit. Il affirme que la fouille de tels appareils met en jeu des intérêts plus importants en matière de vie privée que la fouille d'autres contenants

2013 SCC 60 (CanLII)

desk or a filing cabinet. These unique features challenge the efficacy of standard limitations on searches articulated in terms of place, time, and subject matter. The appellant therefore submits that specific authorization is required before police can search a computer.

susceptibles de se trouver dans un lieu, par exemple les tiroirs d'un bureau ou d'un classeur. Ces caractéristiques uniques compromettent l'efficacité des restrictions qui sont normalement imposées quant au lieu, à la durée et à l'objet d'une perquisition. En conséquence, l'appelant prétend que les policiers doivent obtenir une autorisation expresse avant de pouvoir fouiller un ordinateur.

[36] In contrast, the Crown maintains that established principles of search and seizure are sufficient to meet the challenges posed by new technologies; there is no need for a special regime requiring specific authorization for "computer searches": R.F., at para. 93. If a warrant authorizes the search of a place for documents, police are authorized to search computers found in that place if those computers might reasonably contain the documents for which the search was authorized. A special regime for computer searches is not advisable because technology is constantly changing and not all computers are used in a manner that engages important privacy interests. Moreover, computer searches are not all alike and different principles of search and seizure may be engaged depending on the circumstances in which the authorities encounter a computer. The Crown warns that requiring specific authority to search computers would restrict access to valuable information and undermine legitimate investigations.

[36] En revanche, le ministère public plaide que les principes bien établis du droit relatif aux fouilles, perquisitions et saisies permettent de répondre aux défis que soulèvent les nouvelles technologies; qu'il n'est pas nécessaire d'instituer un régime particulier exigeant l'obtention d'une autorisation expresse pour [TRADUCTION] « les fouilles d'ordinateurs » : m.i., par. 93. Si un mandat autorise les policiers à perquisitionner dans un lieu en vue d'y chercher des documents, ces derniers sont autorisés à fouiller les ordinateurs découverts dans ce lieu si ces appareils peuvent raisonnablement contenir les documents à l'égard desquels la perquisition a été autorisée. Il ne serait pas souhaitable d'instaurer un régime particulier pour les fouilles d'ordinateurs, car la technologie évolue constamment et les ordinateurs ne sont pas tous utilisés d'une manière qui soulève des intérêts importants en matière de respect de la vie privée. De plus, les fouilles d'ordinateurs ne sont pas toutes pareilles, et différents principes relatifs aux fouilles, perquisitions et saisies peuvent entrer en jeu selon les circonstances dans lesquelles les autorités trouvent des ordinateurs. Le ministère public souligne que le fait d'exiger une autorisation expresse à l'égard de la fouille des ordinateurs limiterait l'accès à des renseignements très utiles et compromettrait des enquêtes légitimes.

3. Authorizing the Search of Computers Found in a Place of Search

3. Autorisation de fouiller les ordinateurs découverts dans un lieu perquisitionné

[37] I agree with the appellant and the trial judge that computer searches require specific, prior authorization.

[37] Tout comme l'appelant et la juge de première instance, je suis d'avis que la fouille d'un ordinateur exige l'obtention d'une autorisation expresse préalable.

[38] I do not distinguish, for the purposes of prior authorization, the computers from the cellular telephone in issue here. Although historically cellular telephones were far more restricted than

[38] En ce qui a trait à l'autorisation préalable, je ne fais aucune distinction entre les ordinateurs et le téléphone cellulaire en litige dans la présente affaire. Il est vrai que, dans le passé, le volume et le genre

2013 SCC 60 (CanLII)

computers in terms of the amount and kind of information that they could store, present day phones have capacities that are, for our purposes, equivalent to those of computers. The trial judge found that the cellular telephone in this case, for example, had a "memory capacity akin to a computer": *voir dire* decision, at para. 65. In these reasons, then, when I referred to "computers", I include within that term the cellular telephone.

de données qu'il était possible de stocker dans les téléphones cellulaires étaient bien plus limités que dans les ordinateurs, mais les cellulaires modernes disposent de capacités qui, pour les fins qui nous occupent, équivalent à celles des ordinateurs. La juge de première instance a conclu que, par exemple, le téléphone cellulaire saisi en l'espèce possédait [TRADUCTION] « une capacité de mémoire analogue à celle d'un ordinateur » : décision sur le voir-dire, par. 65. Par conséquent, lorsque je fais mention des « ordinateurs » dans les présents motifs, je vise également le téléphone cellulaire.

(a) *Specific, Prior Authorization Is Required for Computer Searches*

a) *Nécessité d'une autorisation expresse préalable en cas de fouille d'ordinateurs*

[39] As noted earlier, the general principle is that authorization to search a place includes authorization to search places and receptacles within that place: J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (8th ed. 2010), at p. 1181; see, for example, *R. v. E. Star International Inc.*, 2009 ONCJ 576 (CanLII), at para. 17; *BGI Atlantic Inc. v. Canada (Minister of Fisheries and Oceans)*, 2004 NLSCTD 165, 241 Nfld. & P.E.I.R. 206, at paras. 70-72; *R. v. Charles*, 2012 ONSC 2001, 258 C.R.R. (2d) 33, at para. 61. This general rule is based on the assumption that, if the search of a place for certain things is justified, so is the search for those things in receptacles found within that place. However, this assumption is *not* justified in relation to computers because computers are not like other receptacles that may be found in a place of search. The particular nature of computers calls for a specific assessment of whether the intrusion of a computer search is justified, which in turn requires prior authorization.

[39] Comme il a été indiqué précédemment, suivant le principe général applicable, l'autorisation de perquisitionner dans un lieu emporte celle de fouiller les espaces et contenants se trouvant dans ce lieu : J. A. Fontana et D. Keeshan, *The Law of Search and Seizure in Canada* (8e éd. 2010), p. 1181; voir, par exemple, *R. c. E. Star International Inc.*, 2009 ONCJ 576 (CanLII), par. 17; *BGI Atlantic Inc. c. Canada (Minister of Fisheries and Oceans)*, 2004 NLSCTD 165, 241 Nfld. & P.E.I.R. 206, par. 70-72; *R. c. Charles*, 2012 ONSC 2001, 258 C.R.R. (2d) 33, par. 61. Cette règle générale repose sur l'hypothèse selon laquelle, si l'exécution d'une perquisition dans un lieu pour y chercher certaines choses est justifiée, la recherche de ces choses dans les contenants découverts dans ce lieu est elle aussi justifiée. Toutefois, cette hypothèse *n'*est *pas* justifiée dans le cas des ordinateurs, étant donné que ceux-ci ne sont pas assimilables aux autres contenants susceptibles de se trouver dans le lieu perquisitionné. La nature particulière des ordinateurs commande une analyse distincte de la question de savoir si l'intrusion que représente la fouille d'un ordinateur est justifiée, auquel cas une autorisation préalable est nécessaire.

(i) Computers Are Different From Other "Receptacles"

(i) Existence de différences entre les ordinateurs et les autres « contenants »

[40] It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer: *Morelli*, at para. 105; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 3. Computers are

[40] Il est difficile d'imaginer une atteinte plus grave à la vie privée d'une personne que la fouille de son ordinateur personnel : *Morelli*, par. 105; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 3.

2013 SCC 60 (CanLII)

"a multi-faceted instrumentality without precedent in our society": A. D. Gold, "Applying Section 8 in the Digital World: Seizures and Searches", prepared for the 7th Annual Six-Minute Criminal Defence Lawyer (June 9, 2007), at para. 3 (emphasis added). Consider some of the distinctions between computers and other receptacles.

[41] First, computers store immense amounts of information, some of which, in the case of personal computers, will touch the "biographical core of personal information" referred to by this Court in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. The scale and variety of this material makes comparison with traditional storage receptacles unrealistic. We are told that, as of April 2009, the highest capacity commercial hard drives were capable of storing two terabytes of data. A single terabyte can hold roughly 1,000,000 books of 500 pages each, 1,000 hours of video, or 250,000 four-minute songs. Even an 80-gigabyte desktop drive can store the equivalent of 40 million pages of text: L. R. Robinton, "Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence" (2010), 12 *Yale J.L. & Tech.* 311, at pp. 321-22. In light of this massive storage capacity, the Ontario Court of Appeal was surely right to find that there is a significant distinction between the search of a computer and the search of a briefcase found in the same location. As the court put it, a computer "can be a repository for an almost unlimited universe of information": *R. v. Mohamad* (2004), 69 O.R. (3d) 481, at para. 43.

[42] Second, as the appellant and the intervener the Criminal Lawyers' Association (Ontario) point out, computers contain information that is automatically generated, often unbeknownst to the user. A computer is, as A. D. Gold put it, a "fastidious record keeper" (para. 6). Word-processing programs will often automatically generate temporary files that permit analysts to reconstruct the development

L'ordinateur constitue [TRADUCTION] « un instrument aux multiples facettes sans précédent dans notre société » : A. D. Gold, « Applying Section 8 in the Digital World : Seizures and Searches », document préparé pour le 7th Annual Six-Minute Criminal Defence Lawyer (9 juin 2007), par. 3 (je souligne). Considérons maintenant certaines des distinctions qui existent entre les ordinateurs et les autres contenants.

[41] Premièrement, les ordinateurs stockent d'immenses quantités de données, dont certaines, dans le cas des ordinateurs personnels, touchent à l'« ensemble de renseignements biographiques d'ordre personnel » qu'a mentionné notre Cour dans *R. c. Plant*, [1993] 3 R.C.S. 281, p. 293. L'ampleur et la variété de cette information rendent irréalistes les comparaisons avec les contenants traditionnels de stockage. On nous dit que, en avril 2009, les lecteurs de disque dur commerciaux dotés de la plus importante capacité de mémoire pouvaient stocker deux téraoctets de données. Or, un seul téraoctet peut contenir à peu près 1 000 000 de livres de 500 pages chacun, 1 000 heures de vidéo ou 250 000 chansons de quatre minutes. Même le disque dur de 80 gigaoctets d'un ordinateur de bureau peut stocker l'équivalent de 40 millions de pages de texte : L. R. Robinton, « Courting Chaos : Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence » (2010), 12 *Yale J.L. & Tech.* 311, p. 321-322. Compte tenu de cette capacité phénoménale de stockage, la Cour d'appel de l'Ontario a certainement eu raison de conclure qu'il existe une différence importante entre la fouille d'un ordinateur et celle d'une mallette trouvée au même endroit. Comme l'a exprimé la Cour d'appel, un ordinateur [TRADUCTION] « peut abriter un univers presque illimité d'informations » : *R. c. Mohamad* (2004), 69 O.R. (3d) 481, par. 43.

[42] Deuxièmement, comme le soulignent l'appelant et l'intervenante la Criminal Lawyers' Association (Ontario), les ordinateurs renferment des données qui sont générées automatiquement, souvent à l'insu de l'utilisateur. Comme l'a dit A. D. Gold, l'ordinateur [TRADUCTION] « tient les dossiers de façon très méticuleuse » (par. 6). En effet, il arrive souvent que les logiciels de traitement de texte

2013 SCC 60 (CanLII)

of a file and access information about who created and worked on it. Similarly, most browsers used to surf the Internet are programmed to automatically retain information about the websites the user has visited in recent weeks and the search terms that were employed to access those websites. Ordinarily, this information can help a user retrace his or her cybernetic steps. In the context of a criminal investigation, however, it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly: O. S. Kerr, "Searches and Seizures in a Digital World" (2005), 119 *Harv. L. Rev.* 531, at pp. 542-43. This kind of information has no analogue in the physical world in which other types of receptacles are found.

[43] Third, and related to this second point, a computer retains files and data even after users think that they have destroyed them. Oft-cited American scholar O. S. Kerr explains:

> . . . marking a file as "deleted" normally does not actually delete the file; operating systems do not "zero out" the zeros and ones associated with that file when it is marked for deletion. Rather, most operating systems merely go to the Master File Table and mark that particular file's clusters available for future use by other files. If the operating system does not reuse that cluster for another file by the time the computer is analyzed, the file marked for deletion will remain undisturbed. Even if another file is assigned to that cluster, a tremendous amount of data often can be recovered from the hard drive's "slack space," space within a cluster left temporarily unused. It can be accessed by an analyst just like any other file. [p. 542]

Computers thus compromise the ability of users to control the information that is available about them in two ways: they create information without the

génèrent automatiquement des fichiers temporaires permettant aux analystes de reconstituer l'élaboration d'un fichier et d'avoir accès à des renseignements indiquant qui a créé le fichier et qui y a travaillé. De même, la plupart des navigateurs utilisés pour consulter Internet sont programmés pour conserver automatiquement des renseignements concernant les sites Web que l'utilisateur a visités dans les semaines précédentes, ainsi que les syntagmes de recherche qu'il a utilisés pour y accéder. Normalement, ces renseignements peuvent aider l'utilisateur à retracer ses démarches cybernétiques. Dans le contexte d'une enquête criminelle, toutefois, ils peuvent également permettre aux enquêteurs d'avoir accès à des détails intimes concernant les intérêts, les habitudes et l'identité de l'utilisateur, à partir d'un dossier que ce dernier a créé sans le savoir : O. S. Kerr, « Searches and Seizures in a Digital World » (2005), 119 *Harv. L. Rev*. 531, p. 542-543. Les renseignements de ce genre ne possèdent pas d'équivalents dans le monde concret qui est celui des autres types de contenants.

[43] Troisièmement — et ce point est d'ailleurs lié au second —, l'ordinateur conserve des fichiers et des données même après que les utilisateurs croient les avoir détruits. Comme l'explique un auteur américain fréquemment cité, O. S. Kerr :

> [TRADUCTION] . . . le fait qu'un fichier ait été sélectionné et « supprimé » ne signifie pas normalement qu'il a effectivement été supprimé; les systèmes d'exploitation n'« éliminent » pas les zéros et les un associés à ce fichier lorsqu'il est sélectionné pour suppression. La plupart des systèmes d'exploitation modifient plutôt la table de fichiers principale pour indiquer que le bloc de mémoire de ce fichier est libre pour accueillir dans le futur d'autres fichiers. Si le système d'exploitation ne réutilise pas ce bloc pour un autre fichier au moment où l'ordinateur est analysé, le fichier qui a été sélectionné pour suppression reste en mémoire et peut être récupéré. Même si un autre fichier est inséré dans ce bloc de mémoire, une quantité phénoménale de données peut souvent être récupérée dans l'espace libre sur le disque dur, soit l'espace dans un bloc de mémoire temporairement non utilisé. Un analyste peut accéder à ce fichier comme à tout autre fichier. [p. 542]

Les ordinateurs compromettent ainsi de deux façons la capacité des personnes qui les utilisent de rester maîtres des renseignements disponibles à

2013 SCC 60 (CanLII)

users' knowledge and they retain information that users have tried to erase. These features make computers fundamentally different from the receptacles that search and seizure law has had to respond to in the past.

leur sujet : ils créent de l'information à l'insu des utilisateurs et ils conservent des données que ces derniers ont tenté d'effacer. En raison de ces caractéristiques, les ordinateurs sont fondamentalement différents des contenants que le droit relatif aux fouilles, perquisitions et saisies a dû régir par le passé.

[44] Fourth, limiting the location of a search to "a building, receptacle or place" (s. 487(1) of the *Code*) is not a meaningful limitation with respect to computer searches. As I have discussed earlier, search warrants authorize the search for and seizure of things in "a building, receptacle or place" and "permit the search of receptacles such as filing cabinets, *within* that place . . . . The physical presence of the receptacle upon the premises permits the search": Fontana and Keeshan, at p. 1181 (italics in original; underlining added). Ordinarily, then, police will not have access to items that are not physically present in the building, receptacle or place for which a search has been authorized. While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer. The intervener the Canadian Civil Liberties Association notes that, when connected to the Internet, computers serve as portals to an almost infinite amount of information that is shared between different users and is stored almost anywhere in the world. Similarly, a computer that is connected to a network will allow police to access information on other devices. Thus, a search of a computer connected to the Internet or a network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized.

[44] Quatrièmement, limiter l'endroit où la fouille se déroule à « un bâtiment, contenant ou lieu » (par. 487(1) du *Code*) ne constitue pas une restriction utile en ce qui concerne la fouille des ordinateurs. Comme je l'ai expliqué plus tôt, les mandats de perquisition autorisent les policiers à rechercher des choses dans « un bâtiment, contenant ou lieu » et à les saisir, et [TRADUCTION] « permettent de fouiller des contenants, tels des classeurs, *dans* le lieu perquisitionné [. . .] La présence physique du contenant sur les lieux permet d'effectuer une telle fouille » : Fontana et Keeshan, p. 1181 (italiques dans l'original; je souligne). Ordinairement, les policiers n'ont pas accès aux objets qui ne se trouvent pas physiquement dans le bâtiment, contenant ou lieu où la perquisition a été autorisée. Bien que les documents physiques auxquels on a accès dans un classeur se trouvent toujours au même endroit que le classeur lui-même, on ne peut en dire autant des renseignements auxquels on peut avoir accès au moyen d'un ordinateur. L'intervenante l'Association canadienne des libertés civiles souligne que les ordinateurs qui sont connectés à Internet servent de portails à une quantité presque infinie de données qui sont partagées entre différents utilisateurs et stockées presque n'importe où dans le monde. De même, un ordinateur connecté à un réseau permettra à la police d'avoir accès à des renseignements se trouvant dans d'autres appareils. Par conséquent, la fouille d'un ordinateur connecté à Internet ou à un réseau permet d'avoir accès à des données et à des documents qui ne se trouvent pas concrètement dans le lieu où la fouille est autorisée.

[45] These numerous and striking differences between computers and traditional "receptacles" call for distinctive treatment under s. 8 of the *Charter*. The animating assumption of the traditional rule — that if the search of a place is justified, so is the

[45] Ces différences nombreuses et frappantes entre les ordinateurs et les « contenants » traditionnels commandent que ces objets soient traités différemment pour l'application de l'art. 8 de la *Charte*. L'hypothèse fondamentale à la base de la

2013 SCC 60 (CanLII)

search of receptacles found within it — simply cannot apply with respect to computer searches.

(ii) Prior Authorization Is Required

[46] Prior authorization of searches is a cornerstone of our search and seizure law. As the Court affirmed in *Hunter*, the purpose of s. 8 is "to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen . . . . This, in my view, can only be accomplished by a system of prior authorization" (p. 160 (emphasis in original)). Dickson J. went on in *Hunter* to say that the requirement of prior authorization "puts the onus on the state to demonstrate the superiority of its interest to that of the individual" (*ibid.*). The purpose of the prior authorization process is thus to balance the privacy interest of the individual against the interest of the state in investigating criminal activity *before* the state intrusion occurs.

[47] I have found that privacy interests in computers are different — markedly so — from privacy interests in other receptacles that are typically found in a place for which a search may be authorized. For this reason, I do not accept that a justice who has considered the privacy interests arising from the search of a place should be assumed to have properly considered the particular interests that could be compromised by a computer search. The distinctive privacy concerns that are at stake when a computer is searched must be considered in light of the purposes of s. 8 of the *Charter*. This calls for a specific assessment of "whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement": *Hunter*, at pp. 159-60. That is the threshold demanded by s. 8 of the *Charter*. Only a specific authorization to search a computer found

règle traditionnelle — à savoir que si la perquisition effectuée dans un lieu est justifiée, la fouille des contenants découverts dans ce lieu l'est également — ne peut tout simplement pas s'appliquer à la fouille des ordinateurs.

(ii) Nécessité de l'autorisation préalable

[46] L'autorisation préalable des perquisitions constitue une assise fondamentale de notre droit relatif aux fouilles, perquisitions et saisies. Comme l'a confirmé la Cour dans l'arrêt *Hunter*, l'art. 8 a pour but « de protéger les particuliers contre les intrusions injustifiées de l'État dans leur vie privée. Ce but requiert un moyen de prévenir les fouilles et les perquisitions injustifiées avant qu'elles ne se produisent [. . .] Cela ne peut se faire, à mon avis, que par un système d'autorisation préalable » (p. 160 (souligné dans l'original)). Le juge Dickson a ajouté, dans ce même arrêt, que l'exigence relative à l'autorisation préalable « impose à l'État l'obligation de démontrer la supériorité de son droit par rapport à celui du particulier » (*ibid.*). L'objectif du processus d'autorisation préalable est donc de mettre en balance le droit à la vie privée du particulier et l'intérêt de l'État à enquêter sur une activité criminelle, *avant* que l'intrusion de l'État ne se produise.

[47] J'ai conclu que les intérêts en matière de vie privée soulevés par les ordinateurs diffèrent — et ce nettement — de ceux que mettent en jeu d'autres contenants se trouvant habituellement dans les lieux où des perquisitions peuvent être autorisées. Pour cette raison, je ne peux admettre qu'il faille présumer qu'un juge de paix ayant considéré les intérêts en matière de vie privée que soulève la perquisition envisagée dans un lieu a dûment tenu compte des intérêts particuliers auxquels pourrait porter atteinte la fouille d'un ordinateur. Les préoccupations distinctives en matière de vie privée qui sont en jeu lors de la fouille d'un ordinateur doivent être examinées au regard des objectifs de l'art. 8 de la *Charte*. Il est donc nécessaire de se demander de façon particulière « si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment,

2013 SCC 60 (CanLII)

in the place of search ensures that the authorizing justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search.

d'assurer l'application de la loi » : *Hunter*, p. 159-160. Voilà en quoi consiste le critère d'application de l'art. 8 de la *Charte*. Seul un mandat autorisant expressément la fouille des ordinateurs susceptibles d'être découverts dans le lieu perquisitionné garantit que le juge de paix qui a statué sur la demande d'autorisation a pris en compte l'ensemble des préoccupations distinctives en matière de vie privée que soulève la fouille de ces appareils, puis déterminé que ce critère était respecté eu égard aux circonstances de la fouille particulière projetée.

[48] Specific, prior authorization means, in practical terms, that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. They need not, however, establish that they have reasonable grounds to believe that computers will be found in the place, although they clearly should disclose this if it is the case. I would add here that once a warrant to search computers is obtained, police have the benefit of s. 487(2.1) and (2.2) of the *Code*, which allows them to search, reproduce, and print data that they find.

[48] Concrètement, une telle autorisation expresse préalable signifie que, si des policiers entendent fouiller tout ordinateur trouvé dans le lieu qu'ils souhaitent perquisitionner, ils doivent d'abord convaincre le juge de paix saisi de la demande d'autorisation qu'ils possèdent des motifs raisonnables de croire que les ordinateurs qu'ils pourraient découvrir contiendront les choses qu'ils recherchent. Les policiers ne sont toutefois pas tenus de démontrer qu'ils ont des motifs raisonnables de croire que des ordinateurs seront découverts dans le lieu concerné, mais ils devraient clairement dévoiler ce fait si c'est le cas. J'ajouterais ici que les policiers qui ont obtenu un mandat autorisant la fouille d'ordinateurs peuvent ensuite se prévaloir des par. 487(2.1) et (2.2) du *Code*, dispositions qui les autorisent à fouiller, à reproduire et à imprimer les données qu'ils trouvent.

[49] If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer (assuming it may reasonably be thought to contain the sort of things that the warrant authorizes to be seized), and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.

[49] Si, durant une perquisition, les policiers trouvent un ordinateur et que leur mandat ne les autorise pas expressément à fouiller les ordinateurs, ils peuvent le saisir (pour autant qu'il soit raisonnable de croire que l'appareil contient le genre de choses que le mandat autorise à saisir) et prendre les mesures nécessaires pour assurer l'intégrité des données. Toutefois, s'ils désirent consulter ces données, ils doivent obtenir un mandat distinct.

(iii) After-the-Fact Review Is Not Sufficient

(iii) Insuffisance du contrôle a posteriori

[50] The Crown and intervening Attorneys General submit that specific, prior authorization to search computers is not necessary because an after-the-fact review of the manner in which a search is conducted provides sufficient protection for the

[50] Le ministère public et les procureurs généraux intervenants soutiennent que l'obtention d'une autorisation expresse préalable de fouiller des ordinateurs n'est pas nécessaire, parce que le contrôle a posteriori de la manière dont la fouille a

2013 SCC 60 (CanLII)

privacy rights that are at stake when a computer is searched. I disagree.

[51] As I explained above, if computers give rise to particular privacy interests that distinguish them from other receptacles typically found in a place, then s. 8 requires those interests to be taken into account *before* the search takes place, not just after-the-fact, in order to ensure that the state's interest in conducting the search justifies the intrusion into individual privacy. In effect, the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place.

[52] As a result, I reject the Crown's submission that leaving the reasonableness of a computer search to after-the-fact review alone is compliant with the requirements of s. 8 of the *Charter*. As I explain next, however, I find the Crown's submissions to be more convincing with respect to the issue of whether authorizing justices should be constitutionally required to include search protocols in warrants authorizing the search of a computer.

(b) *A Warrant Authorizing the Search of Computers in the Circumstances of This Case Would Not Constitutionally Require the Imposition of Conditions Limiting How the Computers Were to Be Searched*

[53] The intervener the British Columbia Civil Liberties Association ("B.C.C.L.A.") submits that, in addition to a requirement that searches of computers be specifically authorized by a warrant, this Court should also find that these warrants must, as a rule, set out detailed conditions, sometimes called "*ex ante* conditions" or "search protocols", under which the search may be carried out. According to the B.C.C.L.A., search protocols are necessary because they allow authorizing justices to limit the way in which police carry out their

été effectuée protège suffisamment les droits en matière de vie privée que met en jeu la fouille d'un ordinateur. Je ne suis pas d'accord.

[51] Comme je l'ai expliqué précédemment, si les ordinateurs soulèvent des intérêts particuliers en matière de vie privée qui les distinguent des autres contenants habituellement trouvés dans un lieu, l'art. 8 commande alors que ces intérêts soient pris en compte *avant* l'exécution de la fouille — et non pas seulement après celle-ci — si l'on veut s'assurer que l'intérêt de l'État à effectuer la fouille justifie l'intrusion dans la vie privée de la personne concernée. En effet, en raison des intérêts en matière de vie privée que soulève la fouille d'un ordinateur, un tel appareil doit, dans une certaine mesure, être traité comme un lieu distinct.

[52] Par conséquent, je rejette l'argument du ministère public selon lequel le contrôle a posteriori du caractère non abusif de la fouille d'un ordinateur permet à lui seul d'assurer le respect des exigences de l'art. 8 de la *Charte*. Cependant, comme je vais l'expliquer ci-après, j'estime que les prétentions du ministère public sont plus convaincantes relativement à la question de savoir si les juges de paix saisis des demandes d'autorisation doivent être considérés comme tenus par la Constitution d'insérer des protocoles de perquisition dans les mandats autorisant la fouille d'ordinateurs.

b) *La Constitution n'exige pas qu'un mandat autorisant la fouille d'ordinateurs dans des circonstances comme celles qui nous occupent impose des conditions limitant la façon dont les ordinateurs doivent être fouillés*

[53] L'intervenante l'Association des libertés civiles de la Colombie-Britannique (« A.L.C.C.-B. ») soutient que, en plus d'exiger que la fouille des ordinateurs soit expressément autorisée par un mandat, notre Cour devrait également conclure qu'un tel mandat doit, en règle générale, énoncer des conditions détaillées — parfois appelées « conditions préalables » ou « protocoles de perquisition » — aux termes desquelles la perquisition peut être exécutée. Selon l'A.L.C.C.-B., les protocoles de perquisition sont nécessaires, parce qu'ils

2013 SCC 60 (CanLII)

searches, protecting certain areas of a computer from the eyes of the investigators. The Crown and intervening Attorneys General oppose this sort of requirement, arguing that it is contrary to principle and impractical. While I am not convinced that these sorts of special directions should be rejected as a matter of principle, my view is that they are not, as a general rule, constitutionally required and that they would not have been required in this case.

permettent au juge de paix saisi de la demande d'autorisation d'encadrer la façon dont les policiers effectuent leurs fouilles et de protéger ainsi certaines parties des ordinateurs du regard des enquêteurs. Pour leur part, le ministère public et les procureurs généraux intervenants s'opposent à une exigence de ce genre, plaidant qu'elle serait contraire aux principes pertinents et impossible à appliquer. Même si je ne suis pas convaincu que des directives spéciales de cette nature devraient par principe être écartées, je suis néanmoins d'avis que de telles directives ne sont pas, en règle générale, requises par la Constitution, et qu'elles n'auraient pas été nécessaires en l'espèce.

[54] While I propose, in effect, to treat computers in some respects as if they were a separate place of search necessitating distinct prior authorization, I am not convinced that s. 8 of the *Charter* requires, in addition, that the manner of searching a computer must always be spelled out in advance. That would be a considerable extension of the prior authorization requirement and one that in my view will not, in every case, be necessary to properly strike the balance between privacy and effective law enforcement. I reach this conclusion for two reasons.

[54] Bien que je propose, dans les faits, de considérer qu'à certains égards un ordinateur constitue un lieu de fouille séparé nécessitant une autorisation préalable distincte, je ne suis pas persuadé que l'art. 8 de la *Charte* requiert en outre que la manière de fouiller un ordinateur soit toujours précisée à l'avance. Une telle condition aurait pour effet d'élargir considérablement l'obligation d'obtenir une autorisation préalable, et, à mon sens, elle ne serait pas nécessaire dans tous les cas pour établir un juste équilibre entre la protection de la vie privée et l'application efficace de la loi. J'arrive à cette conclusion pour deux raisons.

[55] First, the manner of search is generally reviewed after the fact. That sort of detailed review with evidence and argument from both sides is better suited to developing new rules about how searches are to be conducted than is the *ex parte* procedure by which warrants are issued. *R. v. Boudreau-Fontaine*, 2010 QCCA 1108 (CanLII), is a good example of a case where the scope of a computer search was found to be unreasonable after the fact. The police had a search warrant authorizing them to examine a computer for evidence that the respondent had accessed the Internet. The Quebec Court of Appeal found that the police were not, by virtue of the warrant, authorized to scour the computer for evidence that the accused had engaged in the crime of distributing child pornography (para. 53). Thus, an *ex post* review of the reasonableness of a computer search in a particular case can signal to police how they should limit their

[55] Premièrement, la manière dont la perquisition a été exécutée fait généralement l'objet d'un contrôle a posteriori. Ce genre de contrôle minutieux, où les deux parties présentent des éléments de preuve et des arguments, est plus propice à l'élaboration de nouvelles règles sur la façon d'effectuer les fouilles que ne l'est la procédure *ex parte* de délivrance des mandats. L'arrêt *R. c. Boudreau-Fontaine*, 2010 QCCA 1108 (CanLII), constitue un bon exemple de situation où l'étendue de la fouille d'un ordinateur a, a posteriori, été jugée abusive. Les policiers étaient munis d'un mandat de perquisition les autorisant à fouiller un ordinateur afin d'y chercher des éléments de preuve indiquant que l'intimé avait accédé à Internet. La Cour d'appel du Québec a conclu que les policiers n'étaient pas autorisés par ce mandat à passer l'ordinateur au peigne fin à la recherche de preuves de la perpétration par l'accusé du crime

2013 SCC 60 (CanLII)

searches in future cases. Moreover, as has occurred in other areas of search law, after-the-fact review may lead courts to set out specific rules according to which searches must be conducted, as this Court did, for example, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 889-92.

de distribution de pornographie juvénile (par. 53). En conséquence, le contrôle a posteriori du caractère non abusif d'une fouille d'ordinateur dans un cas particulier peut indiquer aux policiers la façon dont ils devraient circonscrire leurs perquisitions dans de futures affaires. En outre, comme cela s'est produit dans d'autres domaines du droit en matière de perquisitions et de fouilles, le contrôle a posteriori peut amener les tribunaux à établir des règles précises sur la manière dont les fouilles et perquisitions doivent être effectuées, comme l'a fait notre Cour dans l'arrêt *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, p. 889-892.

[56] Of course, developments in the case law may also spur parliamentary action aimed at tackling the issues more comprehensively. The *Criminal Code* contains certain rules which impose conditions, or require the authorizing justice to impose conditions, relating to the manner in which searches may be conducted. For example, s. 488 of the *Code* stipulates that a warrant (issued under s. 487 or s. 487.1) shall generally be executed by day. Also, the *Code* and this Court have set out special rules governing the manner of search — in effect, search protocols — in relation to documents for which solicitor-client privilege is claimed: s. 488.1; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49. Similarly, s. 186(4)(*d*) requires a judge who issues an intercept authorization to impose such terms and conditions as are advisable in the public interest. I would not at this point foreclose similar developments with respect to computer searches as the law evolves through reviews of searches at trial and, if Parliament is so inclined, through legislative action.

[56] Il va de soi que l'évolution de la jurisprudence peut également inciter le législateur à intervenir en vue de régler certaines questions de façon plus globale. Le *Code criminel* comporte en effet certaines règles qui assujettissent l'exécution des fouilles au respect de certaines conditions ou qui obligent le juge de paix saisi de la demande d'autorisation à imposer des conditions. Par exemple, l'art. 488 du *Code* précise qu'un mandat (décerné en vertu de l'art. 487 ou 487.1) doit généralement être exécuté de jour. De plus, le *Code* et notre Cour ont énoncé des règles particulières régissant la manière d'effectuer les perquisitions — en fait, des protocoles de perquisition — dans le cas de documents à l'égard desquels le privilège des communications entre client et avocat est invoqué : art. 488.1; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 49. De même, l'al. 186(4)*d*) oblige le juge qui accorde une autorisation d'intercepter des communications privées à imposer les modalités qu'il estime opportunes dans l'intérêt public. À ce stade-ci, je n'écarte pas la possibilité que les règles encadrant la fouille des ordinateurs connaissent des développements analogues, à mesure que le droit évolue par suite soit du contrôle des fouilles lors des procès, soit des interventions du législateur, lorsque celui-ci sent le besoin de le faire.

[57] Second, requiring search protocols to be imposed as a general rule in advance of the search would likely add significant complexity and practical difficulty at the authorization stage. At that point, an authorizing justice is unlikely to be able

[57] Deuxièmement, le fait d'exiger que soient en règle générale imposés des protocoles de perquisition avant l'exécution de la fouille rendrait vraisemblablement l'étape de l'autorisation beaucoup plus complexe, en plus de créer des difficultés d'ordre

2013 SCC 60 (CanLII)

to predict, in advance, the kinds of investigative techniques that police can and should employ in a given search or foresee the challenges that will present themselves once police begin their search. In particular, the ease with which individuals can hide documents on a computer will often make it difficult to predict where police will need to look to find the evidence they are searching for. For example, an authorizing justice's decision to limit a search for child pornography to image files may cause police to miss child pornography that is stored as a picture in a Word document. In short, attempts to impose search protocols during the authorization process risk creating blind spots in an investigation, undermining the legitimate goals of law enforcement that are recognized in the pre-authorization process. These problems are magnified by rapid and constant technological change.

pratique. En effet, à cette étape le juge de paix saisi de la demande d'autorisation n'est probablement pas capable de prédire le genre de techniques d'enquête que les policiers pourront et devront utiliser dans le cadre d'une perquisition donnée, ou encore de prévoir les défis qui surgiront une fois que les policiers commenceront leur perquisition. En particulier, vu la facilité avec laquelle les gens peuvent cacher des documents dans un ordinateur, il est souvent difficile de prédire l'endroit où les policiers devront fouiller pour trouver la preuve recherchée. Par exemple, si le juge de paix saisi de la demande d'autorisation dans une affaire de pornographie juvénile décide de limiter la perquisition aux fichiers images, les policiers pourraient passer à côté de photos pornographiques d'enfants insérées dans un document Word. Bref, les tentatives en vue d'imposer des protocoles de perquisition à l'étape de l'autorisation risquent de créer des angles morts dans une enquête et de contrecarrer les objectifs légitimes de l'application de la loi dont tient compte le processus d'autorisation préalable. Ces problèmes sont d'ailleurs amplifiés par l'évolution rapide et constante de la technologie.

[58] Courts in the United States have acknowledged the difficulty of predicting in advance where relevant files might be found on a computer. While the Tenth Circuit once suggested that police should be restricted to searching computers by file types, titles, or key words (see *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), at p. 1276), later cases have moved away from this approach: W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed. 2012), vol. 2, at pp. 968-69. For example, in *United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009), decided 10 years after *Carey*, the same court held that "[i]t is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods . . . . [S]uch limits would unduly restrict legitimate search objectives" (pp. 1093-94). More recently, in *United States v. Christie*, 717 F.3d 1156 (10th Cir. 2013), the court found that "[c]omputer files can be misnamed by accident, disguised by intention, or hidden altogether, leaving investigators at a loss to know *ex ante* what sort of search will prove sufficient to ferret out the evidence they legitimately seek": p. 1166; see generally O. S. Kerr, "Ex Ante Regulation of

[58] Aux États-Unis, les tribunaux ont reconnu la difficulté de prédire où les dossiers pertinents peuvent se trouver dans un ordinateur. Bien que la Tenth Circuit Court ait déjà suggéré que les policiers ne devraient être autorisés à fouiller les ordinateurs que par types de fichier, par titres ou par mots clés (voir *United States c. Carey*, 172 F.3d 1268 (10th Cir. 1999), p. 1276), des décisions postérieures se sont éloignées de cette approche : W. R. LaFave, *Search and Seizure : A Treatise on the Fourth Amendment* (5e éd. 2012), vol. 2, p. 968-969. À titre d'exemple, dans *United States c. Burgess*, 576 F.3d 1078 (10th Cir. 2009), affaire décidée 10 ans après *Carey*, le même tribunal a tiré la conclusion qu'[TRADUCTION] « [i]l est irréaliste de s'attendre à ce qu'un mandat limite de façon prospective l'étendue d'une fouille par répertoires, noms de fichier ou extensions, ou tente de structurer des méthodes de fouille [. . .] [D]e telles limites restreindraient indûment les objectifs légitimes des fouilles » (p. 1093-1094). Plus récemment, dans *United States c. Christie*, 717 F.3d 1156 (10th Cir. 2013), la Tenth Circuit Court a conclu qu'[TRADUCTION] « [i]l peut arriver que des fichiers informatiques soient accidentellement mal désignés, intentionnellement camouflés ou

2013 SCC 60 (CanLII)

Computer Search and Seizure" (2010), 96 *Va. L. Rev.* 1241, at p. 1277.

encore tout simplement cachés, autant de situations qui empêchent les enquêteurs de savoir d'avance quel genre de fouille leur permettra de dénicher les preuves qu'ils recherchent légitimement » : p. 1166; voir, en général, O. S. Kerr, « Ex Ante Regulation of Computer Search and Seizure » (2010), 96 *Va. L. Rev.* 1241, p. 1277.

[59] For these reasons, my view is that search protocols are not, as a general rule, constitutionally required for pre-authorization of computer searches. Nor, in my view, were they constitutionally required in this case.

[59] Pour ces raisons, je suis d'avis que les protocoles de perquisition ne sont, en règle générale, pas requis par la Constitution en cas d'autorisation préalable de la fouille d'un ordinateur. De plus, aucun protocole de la sorte n'était constitutionnellement requis dans les circonstances de la présente affaire.

[60] The computer searches here were aimed at evidence of ownership and occupation of a dwelling. There is nothing in the record that would assist us in formulating a practical and appropriate search protocol that could have been imposed in this case. Depending on how the computer was used, which police could not have known until they looked at the device, this evidence could have been found almost anywhere in the computer. For example, an address or image of the occupant could have been in a Word document, an Excel file, a tax-filing program, image or video files, various online accounts, etc. Moreover, a search of any one of these types of programs or files would not have assured access to the sought-after information. Finally, the police did not indicate any intention to use sophisticated forensic search methods to scour the device and they made no attempt to do so. In my view, there were no circumstances that pointed to a need for a search protocol to be included in a warrant authorizing the search of computers, should they be found in the residence.

[60] En l'espèce, la fouille des ordinateurs visait des éléments de preuve confirmant l'identité des propriétaires et occupants d'une habitation. Il n'y a rien au dossier qui puisse nous aider à formuler un protocole de perquisition qui soit à la fois pratique et approprié, et qui aurait pu être imposé dans la présente affaire. Selon la façon dont les ordinateurs étaient utilisés — facteur que les policiers ne pouvaient connaître avant d'examiner les appareils — la preuve recherchée aurait pu être découverte à peu près n'importe où dans ceux-ci. Par exemple, l'adresse de l'occupant ou une photo de celui-ci aurait pu figurer dans un document Word, un fichier Excel, un logiciel de production de déclarations de revenus, des fichiers images ou vidéos, divers comptes en ligne, etc. En outre, la fouille de l'un ou l'autre de ces types de logiciels ou de fichiers n'aurait pas nécessairement permis de trouver l'information recherchée. Enfin, les policiers n'avaient d'aucune façon indiqué qu'ils entendaient recourir à des techniques d'investigation criminalistique perfectionnées pour passer l'appareil au peigne fin, et ils n'ont d'ailleurs fait aucune tentative de la sorte. À mon avis, aucune circonstance ne tendait à indiquer qu'il était nécessaire d'inclure un protocole de perquisition dans un mandat autorisant la fouille d'ordinateurs, au cas où de tels appareils seraient découverts dans la résidence.

[61] By now it should be clear that my finding that a search protocol was not constitutionally required in this case does not mean that once police had the warrant in hand, they had a licence to scour

[61] Il est sans doute évident, à ce point-ci, que ma conclusion selon laquelle aucun protocole de perquisition n'était requis par la Constitution en l'espèce ne signifie pas que, une fois munis d'un

2013 SCC 60 (CanLII)

the devices indiscriminately. They were bound, in their search, to adhere to the rule that the manner of the search must be reasonable. Thus, if, in the course of their search, the officers realized that there was in fact no reason to search a particular program or file on the device, the law of search and seizure would require them not to do so.

mandat, les policiers étaient pour autant autorisés à passer sans discernement les appareils au peigne fin. En effet, ils demeuraient quand même tenus de se conformer à la règle requérant que la manière de procéder à la perquisition ne soit pas abusive. Par conséquent, s'ils s'étaient rendu compte durant la perquisition qu'il n'existait en fait aucune raison de fouiller un logiciel ou un fichier spécifique dans l'appareil, le droit relatif aux fouilles, perquisitions et saisies exigeait qu'ils s'abstiennent de le faire.

[62] Although I do not find that a search protocol was required on the particular facts of this case, authorizing justices must assure themselves that the warrants they issue fulfil the objectives of prior authorization as established in *Hunter*. They also have the discretion to impose conditions to ensure that they do. If, for example, an authorizing justice were faced with confidential intellectual property or potentially privileged information, he or she might find it necessary and practical to impose limits on the manner in which a computer could be searched. In some cases, authorizing justices may find it practical to impose conditions when police first request authorization to search. In others, they might prefer a two-stage approach where they would first issue a warrant authorizing the seizure of a computer and then have police return for an additional authorization to search the seized device. This second authorization might include directions concerning the manner of search. Moreover, I would not foreclose the possibility that our developing understanding of computer searches and changes in technology may make it appropriate to impose search protocols in a broader range of cases in the future. Without expressing any firm opinion on these points, it is conceivable that proceeding in this way may be appropriate in some circumstances.

[62] Bien que j'estime qu'aucun protocole de perquisition n'était requis au vu des faits particuliers de la présente affaire, les juges de paix saisis d'une demande d'autorisation doivent s'assurer que les mandats qu'ils décernent répondent aux objectifs de la procédure d'autorisation préalable établis dans l'affaire *Hunter*. De plus, ils possèdent le pouvoir discrétionnaire d'imposer des conditions à cette fin. Si, par exemple, le juge de paix est en présence de renseignements concernant des droits de propriété intellectuelle confidentiels ou encore des renseignements susceptibles d'être protégés par un privilège, il pourrait décider qu'il est nécessaire et pratique d'imposer des limites quant à la manière dont un ordinateur peut être fouillé. Dans certains cas, le juge de paix peut estimer pratique d'imposer des conditions lorsque les policiers présentent leur demande d'autorisation de perquisitionner initiale. Dans d'autres circonstances, il pourrait préférer une démarche en deux temps, où il décernerait d'abord un mandat autorisant la saisie d'un ordinateur et exigerait que les policiers reviennent ensuite devant lui afin d'obtenir une autorisation supplémentaire leur permettant de fouiller l'appareil saisi. Cette seconde autorisation pourrait comporter des directives sur la manière de procéder à la fouille. En outre, je n'écarte pas la possibilité que l'amélioration de nos connaissances en matière de fouille d'ordinateurs ainsi que l'évolution des technologies puissent justifier, dans le futur, d'imposer des protocoles de perquisition dans un plus large éventail de situations. Je ne me prononce pas de façon ferme sur ces questions, mais il est par ailleurs concevable, selon moi, qu'une telle procédure puisse s'avérer appropriée dans certaines circonstances.

2013 SCC 60 (CanLII)

(c) *The Scope of These Reasons*

[63] It is not my intention to create a regime that applies to all computers or cellular telephones that police come across in their investigations, regardless of context. As the respondent correctly points out, police may discover computers in a range of situations and it will not always be appropriate to require specific, prior judicial authorization before they can search those devices. For example, I do not, by way of these reasons, intend to disturb the law that applies when a computer or cellular telephone is searched incident to arrest or where exigent circumstances justify a warrantless search. Rather, these reasons relate to those situations where a warrant is issued for the search of a place and police want to search a computer within that place that they reasonably believe will contain the things for which the search was authorized. As noted earlier, it is not necessary that the police present reasonable grounds that a computer will be found in order to obtain a warrant that includes authorization to search a computer found in the premises.

[64] While the scope of these reasons is restricted to warranted searches of a place, they apply equally to all computers found within a place with respect to which a search warrant has been issued. Put differently, any time that police intend to search the data stored on a computer found within a place for which a search has been authorized, they require specific authorization to do so. I find no reason, for the purposes of prior authorization, to treat computers differently on the basis of the particular use to which they have been put. For example, in this case, I make no distinction between the "personal" computer and the "security" computer for the purposes of prior authorization because both were capable of storing personal information. Computers do not distinguish between personal data and non-personal data; if information can be reduced to a series of ones and zeros, it can be stored on any computer. Moreover, decisions about whether or not to search the data

c) *Portée des présents motifs*

[63] Je n'ai pas l'intention de créer un régime applicable à tous les ordinateurs et téléphones cellulaires que trouvent les policiers au cours de leurs enquêtes, indépendamment du contexte. Comme le souligne à juste titre l'intimée, les policiers peuvent découvrir des ordinateurs dans des situations variées et il ne sera pas toujours indiqué d'exiger qu'ils obtiennent au préalable une autorisation judiciaire expresse avant de pouvoir fouiller les appareils. Par exemple, je n'entends pas, par les présents motifs, modifier le droit applicable lorsqu'un ordinateur ou un téléphone cellulaire est fouillé de façon incidente lors d'une arrestation, ou lorsque des circonstances pressantes justifient l'exécution d'une fouille sans mandat. Les présents motifs visent plutôt les situations où un mandat est décerné en vue d'autoriser une perquisition dans un lieu et où les policiers souhaitent pouvoir fouiller les ordinateurs qu'ils pourraient y trouver, parce qu'ils croient raisonnablement que ceux-ci contiendront les choses pour lesquelles la perquisition a été autorisée. Comme je l'ai souligné précédemment, il n'est pas nécessaire que les policiers qui désirent obtenir un mandat de perquisition autorisant aussi la fouille de tout ordinateur qui serait trouvé dans les lieux perquisitionnés présentent des motifs raisonnables de croire qu'un ordinateur sera découvert dans ceux-ci.

[64] Bien que la portée des présents motifs se limite aux perquisitions visant un lieu et autorisées par un mandat, les motifs s'appliquent également à tous les ordinateurs découverts dans le lieu à l'égard duquel un mandat de perquisition a été décerné. Autrement dit, chaque fois que les policiers ont l'intention de fouiller les données stockées dans un ordinateur découvert dans le lieu où une perquisition a été autorisée, ils ont besoin d'une autorisation expresse pour le faire. Je ne vois aucune raison, pour les besoins du processus d'autorisation préalable, de traiter les ordinateurs différemment les uns des autres selon l'utilisation particulière qui est faite de chacun. Par exemple, relativement à la délivrance de l'autorisation préalable, je ne fais aucune distinction en l'espèce entre l'ordinateur « personnel » et l'ordinateur de « sécurité », puisque les deux permettaient de stocker des renseignements personnels. Les ordinateurs ne distinguent pas les

2013 SCC 60 (CanLII)

on a device must be made before police know exactly what it contains. Rare will be the case where police know, at the authorization stage before they search a device, whether a computer is used for personal purposes or not. When it comes to authorization, then, I would treat all computers in the same way.

C. *Third Issue: Exclusion of the Evidence*

[65] In this case, the search warrant did not authorize the search of the computers found in the residence. As a result, the searches of those devices were not authorized by law and violated the appellant's right to be free of unreasonable search and seizure under s. 8 of the *Charter*. I must therefore address the question of whether the evidence found as a result of those searches was properly excluded at trial.

[66] The trial judge admitted the evidence obtained from the security computer but excluded the evidence derived from the search of the personal computer and the cellular telephone. The appellant is asking that the decision of the trial judge be restored and he does not contest her decision to admit the evidence from the security computer. My s. 24(2) *Charter* analysis is therefore limited to the evidence derived from the search of the personal computer and the cellular telephone.

[67] Although in general, a reviewing court should defer to a trial judge's s. 24(2) determination, I find I cannot do so in this case. In *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, the majority of this Court found that "[w]here a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review" (para. 44). However, where relevant factors have been overlooked or the trial judge has made an error, a fresh s. 24(2) analysis is necessary: *Cole*,

données qui sont personnelles de celles qui ne le sont pas; si des renseignements peuvent être réduits à une série de un et de zéros, ils peuvent être stockés dans n'importe quel ordinateur. Qui plus est, la décision de fouiller ou non les données se trouvant dans un appareil est nécessairement prise avant que les policiers sachent exactement ce que contient celui-ci. Il arrive rarement que les policiers sachent, à l'étape de l'autorisation précédant la fouille d'un ordinateur, si cet appareil est utilisé à des fins personnelles ou non. Par conséquent, pour ce qui concerne l'autorisation, je traiterais tous les ordinateurs de la même façon.

C. *Troisième question : exclusion de la preuve*

[65] En l'espèce, le mandat de perquisition n'autorisait pas la fouille des ordinateurs découverts dans la résidence. Par conséquent, la fouille de ces appareils n'était pas autorisée par la loi et violait le droit de l'appelant à la protection contre les fouilles, les perquisitions et les saisies abusives que lui garantit l'art. 8 de la *Charte*. Je dois donc décider si les éléments de preuve recueillis par suite de cette fouille ont à juste titre été écartés au procès.

[66] La juge de première instance a admis la preuve tirée de l'ordinateur de sécurité, mais écarté celle découlant de la fouille de l'ordinateur personnel et du téléphone cellulaire. L'appelant demande le rétablissement de la décision de la juge de première instance, mais ne conteste pas la décision de cette dernière d'admettre la preuve provenant de l'ordinateur de sécurité. En conséquence, mon analyse fondée sur le par. 24(2) de la *Charte* se limite à la preuve résultant de la fouille de l'ordinateur personnel et du téléphone cellulaire.

[67] Bien que, en règle générale, le tribunal siégeant en révision doive faire montre de déférence envers la décision rendue par le juge de première instance en vertu du par. 24(2), j'estime ne pas pouvoir le faire en l'espèce. Dans *R. c. Côté*, 2011 CSC 46, [2011] 3 R.C.S. 215, notre Cour a statué à la majorité que, « [l]orsque le juge du procès a pris en compte les considérations applicables et n'a tiré aucune conclusion déraisonnable, sa décision justifie une grande déférence en appel » (par. 44). Toutefois, lorsque des facteurs pertinents ont été

2013 SCC 60 (CanLII)

at para. 82. In her decision to exclude evidence in this case, the trial judge relied heavily on her finding that the ITO contained no facts supporting a warrant to search for documents evidencing ownership or occupation of the residence. For the reasons I set out in relation to the first issue on appeal, I conclude that this finding was erroneous. I must therefore undertake my own s. 24(2) analysis, of course accepting all of the trial judge's findings which are not tainted by any error.

négligés ou que le juge du procès a commis une erreur, une nouvelle analyse fondée sur le par. 24(2) s'impose : *Cole*, par. 82. La décision de la juge de première instance écartant des éléments de preuve en l'espèce repose considérablement sur sa conclusion que la Dénonciation ne faisait état d'aucun fait justifiant la délivrance d'un mandat de perquisition en vue de chercher des documents confirmant l'identité des propriétaires ou occupants de la résidence. Pour les motifs que j'ai énoncés au sujet de la première question soulevée par le présent pourvoi, j'estime que cette conclusion était erronée. En conséquence, je dois effectuer ma propre analyse fondée sur le par. 24(2), en faisant miennes, bien sûr, toutes les conclusions de la juge de première instance qui ne sont pas viciées par une erreur.

[68] Section 24(2) of the *Charter* requires that evidence obtained in a manner that infringes the rights of an accused under the *Charter* be excluded from the trial if it is established that "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". The burden is on the party seeking exclusion to persuade the court that this is the case. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the Court established that

> [w]hen faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. [para. 71]

[68] Le paragraphe 24(2) de la *Charte* exige que les éléments de preuve obtenus d'une manière qui porte atteinte aux droits garantis à l'accusé par la *Charte* soient écartés du procès s'il est établi, « eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice ». Il incombe à la partie qui sollicite l'exclusion des éléments de preuve de persuader le tribunal que c'est le cas. Dans l'arrêt *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, la Cour a formulé l'analyse en ces termes :

> Ainsi, le tribunal saisi d'une demande d'exclusion fondée sur le par. 24(2) doit évaluer et mettre en balance l'effet que l'utilisation des éléments de preuve aurait sur la confiance de la société envers le système de justice en tenant compte de : (1) la gravité de la conduite attentatoire de l'État (l'utilisation peut donner à penser que le système de justice tolère l'inconduite grave de la part de l'État), (2) l'incidence de la violation sur les droits de l'accusé garantis par la *Charte* (l'utilisation peut donner à penser que les droits individuels ont peu de poids) et (3) l'intérêt de la société à ce que l'affaire soit jugée au fond. [par. 71]

[69] Turning to the first factor, I conclude that the *Charter*-infringing state conduct was not serious. Although the trial judge characterized the conduct as "egregious", that conclusion is inextricably tied to her erroneous conclusion that the warrant did not authorize the search for documents relating to ownership and occupancy. When that finding is removed from the analysis, we are, in my view, left

[69] Pour ce qui est du premier facteur, je conclus que la conduite attentatoire de l'État n'était pas grave. Quoique la juge de première instance ait qualifié cette conduite d'[TRADUCTION] « indigne », cette conclusion est inextricablement liée à sa conclusion erronée selon laquelle le mandat n'autorisait pas la recherche de documents concernant l'identité des propriétaires et occupants.

2013 SCC 60 (CanLII)

with a search of a computer that was not expressly authorized by the search warrant but for which the police had reasonable grounds. It is also important, at this stage, to acknowledge that the ITO did refer to the intention of the officers to search for computer-generated documents and that the state of the law with respect to the search of a computer found inside premises was uncertain when police carried out their investigation. The Langley department had a policy of searching computers found on premises and there was no clear law prohibiting them from doing so. Indeed, the trial judge found that "the officers carried out the search in the belief that they were acting under the lawful authority of the warrant granted by the justice": *voir dire* decision, at para. 77. This case should serve to clarify the law on this point and prevent this kind of confusion in the future.

Une fois cette constatation écartée de l'analyse, il ne reste, à mon avis, qu'une fouille d'ordinateur qui n'était pas expressément autorisée par le mandat de perquisition, mais que les policiers avaient des motifs raisonnables d'exécuter. Il importe également, à cette étape-ci, de reconnaître que la Dénonciation faisait effectivement mention de l'intention des policiers de rechercher des documents générés par ordinateur et que l'état du droit relativement à la fouille d'ordinateurs découverts dans un lieu était incertain au moment où les policiers ont effectué leur enquête. Le service de police de Langley disposait d'une politique sur la fouille des ordinateurs trouvés sur les lieux d'une perquisition, et aucune règle de droit n'empêchait explicitement les policiers de se livrer à de telles fouilles. D'ailleurs, la juge de première instance a conclu que « les agents ont effectué la fouille en croyant agir sous l'autorité légitime du mandat décerné par le juge de paix » : décision sur le voir-dire, par. 77. La présente affaire devrait permettre de clarifier le droit sur cette question et de prévenir ce genre de confusion à l'avenir.

[70] That said, there are two somewhat disquieting aspects of the search of the computer. First, Sgt. Wilde admitted in his testimony that he intentionally did not take notes during the search so he would not have to testify about the details. This is clearly improper and cannot be condoned. Although I do not decide here that they are a constitutional prerequisite, notes of how a search is conducted should, in my view, be kept, absent unusual or exigent circumstances. Notes are particularly desirable when searches of computers are involved because police may not be able to recall the details of how they proceeded with the search. Second, I share the trial judge's concern that Sgt. Wilde obtained evidence by searching one of the seized computers after the detention order had expired. That search related to the security computer, however, and the evidence obtained as a result of that search is not in issue under s. 24(2), as I explained earlier.

[70] Cela dit, la fouille des ordinateurs en l'espèce présente toutefois deux aspects assez troublants. Premièrement, le sergent Wilde a admis dans son témoignage qu'il avait intentionnellement omis de prendre des notes durant cette fouille afin de ne pas avoir à témoigner sur les détails de celle-ci. Il s'agit là d'une conduite clairement répréhensible, qui ne saurait être tolérée. Bien que je ne décide pas, en l'espèce, que de telles notes sont requises sur le plan constitutionnel, les policiers devraient à mon avis prendre des notes sur la façon dont la fouille est effectuée, sauf en cas de situations pressantes ou inhabituelles. La prise de notes est particulièrement souhaitable lors de la fouille d'ordinateurs, étant donné que les policiers pourraient ne pas être en mesure de se rappeler en détail comment ils y ont procédé. Deuxièmement, tout comme la juge de première instance, je suis préoccupé par le fait que le sergent Wilde a obtenu des éléments de preuve en fouillant, après l'expiration de l'ordonnance de détention, l'un des ordinateurs qui avaient été saisis. Cette fouille visait toutefois l'ordinateur de sécurité, et la preuve ainsi recueillie n'est pas contestée en vertu du par. 24(2), comme je l'ai expliqué précédemment.

2013 SCC 60 (CanLII)

[71] Given the uncertainty in the law at the time and the otherwise reasonable manner in which the search was carried out, I conclude that the violation was not serious. The trial judge's opposite conclusion was clearly premised on her legal error respecting authorization to search for documents relating to ownership and occupation.

[71] Comme le droit applicable était incertain au moment des faits pertinents et vu la manière par ailleurs non abusive dont la fouille a été effectuée, je conclus que la violation n'était pas grave. La conclusion contraire de la juge de première instance découlait manifestement de son erreur de droit concernant l'autorisation de rechercher des documents se rapportant à l'identité des propriétaires et occupants.

[72] I turn to the second stage of the inquiry. I accept the trial judge's finding that the privacy interests that are at stake in computer searches are of the highest order and that the search conducted here was "very intrusive and comprehensive": *voir dire* decision, at para. 83. At the same time, the record does not indicate that the police gained access to any more information than was appropriate, given the fairly modest objectives of the search as defined by the terms of the warrant. As the trial judge pointed out, the computers in this case were not forensically examined as they were in *Morelli*. On balance, this factor favours exclusion, but not strongly so.

[72] Je passe maintenant à la deuxième étape de l'analyse. J'accepte la conclusion de la juge de première instance selon laquelle les intérêts en matière de vie privée que met en jeu la fouille d'un ordinateur sont extrêmement importants et que la fouille effectuée dans la présente affaire était [TRADUCTION] « très large et envahissante » : décision sur le voir-dire, par. 83. Par ailleurs, le dossier n'indique toutefois pas que les policiers ont eu accès à plus d'informations que ce qui était opportun, eu égard aux objectifs assez modestes de la fouille décrits dans le mandat. Comme l'a souligné la juge de première instance, en l'espèce les ordinateurs n'ont pas été fouillés par des experts comme l'avaient été ceux en cause dans l'affaire *Morelli*. Globalement, le présent facteur milite en faveur de l'exclusion, mais pas de façon déterminante.

[73] The third stage of the s. 24(2) inquiry requires the Court to consider society's interest in the adjudication of the case on its merits. The relevant question here is whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion: *Grant*, at para. 79. The factors to be considered are the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence, although this consideration has the potential to cut both ways: *Grant*, at paras. 81 and 83-84. The trial judge found that all the documents and photographs retrieved from the hard drives of the computers and the cellular telephone are reliable, real evidence. She also found that the evidence was required to establish knowledge of and control over the marijuana found growing in the basement of the residence. When the case was heard, the absence of this evidence substantially weakened the Crown's

[73] À la troisième étape de l'analyse fondée sur le par. 24(2), la Cour doit considérer l'intérêt de la société à ce que l'affaire soit jugée au fond. La question pertinente en l'espèce consiste à se demander si la fonction de recherche de la vérité que remplit le procès criminel serait mieux servie si on permettait l'utilisation de la preuve que si on l'écartait : *Grant*, par. 79. Les facteurs à prendre en compte sont la fiabilité des éléments de preuve, leur importance pour le ministère public et la gravité de l'infraction, quoique ce dernier facteur puisse jouer dans les deux sens : *Grant*, par. 81 et 83-84. La juge de première instance a conclu que l'ensemble des documents et des photos extraits des lecteurs de disque dur des ordinateurs et du téléphone cellulaire constituent des preuves matérielles fiables. Elle a également conclu que cette preuve était nécessaire pour établir la connaissance de l'existence de la marijuana cultivée dans le sous-sol de la résidence et le contrôle exercé sur celle-ci. Lorsque l'affaire

2013 SCC 60 (CanLII)

case. Finally, with respect to the third factor, I agree with the trial judge that there is a clear societal interest in adjudicating on their merits charges of production and possession of marijuana for the purpose of trafficking.

a été instruite, l'absence de ces éléments a considérablement affaibli la preuve du ministère public. Enfin, pour ce qui est du troisième facteur, tout comme la juge de première instance j'estime qu'il est manifestement dans l'intérêt de la société que des accusations de production et de possession de marijuana en vue d'en faire le trafic soient jugées au fond.

[74] Balancing these factors, I am of the view that the evidence should not be excluded. The police believed on reasonable grounds that the search of the computer was authorized by the warrant. While every search of a personal or home computer is a significant invasion of privacy, the search here did not step outside the purposes for which the warrant had been issued and it did not include forensic examination. The evidence obtained was reliable, real evidence which was important to the adjudication of the charges on their merits.

[74] Après avoir soupesé ces différents facteurs, je suis d'avis que les éléments de preuve ne doivent pas être écartés. Les policiers possédaient des motifs raisonnables de croire que la fouille des ordinateurs était autorisée par le mandat. Bien que toute fouille d'un ordinateur personnel constitue une atteinte importante à la vie privée, la fouille effectuée en l'espèce n'a pas débordé les objectifs pour lesquels le mandat avait été décerné et elle n'a pas donné lieu à une analyse criminalistique. Les éléments recueillis étaient des preuves matérielles fiables, qui étaient importantes pour permettre au tribunal de juger les accusations au fond.

IV. Disposition

[75] I would dismiss the appeal and uphold the order of the Court of Appeal setting aside the acquittals entered after trial and directing a new trial.

Appeal dismissed.

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Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

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

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the British Columbia Civil Liberties Association: Ruby Shiller Chan Hasan, Toronto.

IV. Dispositif

[75] Je rejetterais le pourvoi et je confirmerais l'ordonnance de la Cour d'appel annulant les acquittements inscrits à l'issue du procès et ordonnant la tenue d'un nouveau procès.

Pourvoi rejeté.

Procureurs de l'appelant : Cobb St. Pierre Lewis, Vancouver.

Procureur de l'intimée : Service des poursuites pénales du Canada, Vancouver.

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

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Ruby Shiller Chan Hasan, Toronto.

2013 SCC 60 (CanLII)

Solicitors for the intervener the Canadian Civil Liberties Association: Neuberger Rose, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Neuberger Rose, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Rosen Naster, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Rosen Naster, Toronto.

2013 SCC 60 (CanLII)

Tab 57

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R.R. v. Vancouver Aboriginal Child and Family Services Society,* 2024 BCCA 342

Date: 20241008
Docket: CA49675

2024 BCCA 342 (CanLII)

Between:

R.R.

Appellant/
Respondent on Cross-Appeal
(Respondent)

And

Vancouver Aboriginal Child and Family Services Society

Respondent/
Appellant on Cross-Appeal
(Petitioner)

And

British Columbia Human Rights Tribunal,
and Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 22, 2024 (*Vancouver Aboriginal Child and Family Services Society v. R.R.*, 2024 BCSC 97, Vancouver Docket S230534).

Counsel for the Appellant/Respondent on Cross-Appeal:	J.G. Blair D. Sabelli
Counsel for the Respondent/Appellant on Cross-Appeal:	C.V. van Wiltenburg P.S. Jon
Counsel for the Respondent, British Columbia Human Rights Tribunal:	S. Monchalin
Counsel for the Respondent, Attorney General of British Columbia:	L.P. Witten E.C. Lapper

Counsel for the Proposed Intervener, West Coast Legal Education and Action Fund Association:	E. Ronsley
Counsel for the Proposed Intervener, British Columbia's Human Rights Commissioner:	S.Y. Khan, K.C. M.N. Sokolova
Counsel for the Proposed Intervener, Union of British Columbia Indian Chiefs:	J.B. Gratl
Place and Date of Hearing:	Vancouver, British Columbia October 2, 2024
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia October 3, 2024
Place and Date of Written Reasons:	Vancouver, British Columbia October 8, 2024

2024 BCCA 342 (CanLII)

Summary:

Three public interest groups, the BC Human Rights Commissioner, West Coast LEAF, and the Union of BC Indian Chiefs apply for intervener status. The appeal arises from the judicial review of a BC Human Rights Tribunal's decision finding the Vancouver Aboriginal Child and Family Services Society ("Society") discriminated against the appellant R.R. pursuant to the Human Rights Code. The Society and Attorney General of BC ("AGBC") dispute the scope of argument put forward by the applicants, citing concerns of duplication and expansion of the appeal.

Held: Applications of all three applicants granted, with limitations on the scope and form of their factums to assist the Court with unique perspectives without expanding the scope of the appeal. The AGBC, the Society, and R.R. are permitted to reply to the interveners with conditions.

2024 BCCA 342 (CanLII)

Introduction

[1] Three parties bring applications for intervener status in the context of an appeal from a chambers judgment setting aside a decision of the British Columbia Human Rights Tribunal (the "Tribunal") finding that the Vancouver Aboriginal Child and Family Services Society (the "Society") had discriminated against R.R., the appellant. The judgment under appeal is indexed at 2024 BCSC 97 (the "BCSC Decision").

[2] On October 3, 2024 I announced in Chambers my conclusion as to the results of the applications, with reasons to follow. These are my reasons.

[3] In order to protect important privacy interests of vulnerable children, which in this case outweigh the public interest in an open court process, I order that there be no publication of the name of the appellant or her children. This relatively minor intrusion on the open court principle is necessary in this case because of the particular vulnerability of the children. I understand there may be pending applications for sealing orders also to protect their privacy.

[4] There are three proposed interveners in this matter: the Human Rights Commissioner of British Columbia (the "Commissioner"), West Coast Legal Education Action Fund Association ("LEAF"), and the Union of British Columbia Indian Chiefs ("UBCIC").

[5] The respondents named as parties to the appeal are the Society, the Tribunal, and the Attorney General of British Columbia ("AGBC"). So far only the Society has filed a respondent's factum. However, the Tribunal and AGBC intend to file factums.

[6] Thus, there are four parties to the appeal. If the three interveners are added, R.R., the Society, and AGBC seek leave to file reply factums to the interveners' factums.

Background and Procedural History

[7] The Society is a society founded by First Nations leaders to assume child protection responsibilities over urban Indigenous children. It operates in the context of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 [*Act*] which governs child protection in BC and which applied to its interactions between R.R. and her children.

[8] R.R. identifies as an Afro-Indigenous woman. She is the single mother of five children, one of whom passed away, and three of whom have complex needs.

[9] In summary, R.R. and the Society had interactions related to R.R.'s children and some appearances in the Provincial Court related to child protection, access and custody, with some court orders made in this regard pursuant to the *Act*.

[10] R.R.'s children were apprehended by the Society in August 2016. The children were returned to her care over the summer and early Fall 2019 after mediation between the Society and R.R., supervised by a Provincial Court Judge.

[11] R.R. brought a claim under section s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 ["*Code*"] alleging that the Society discriminated against her on the basis of race, ancestry, and mental disability in its decisions to maintain custody of and limit her access to her children between April 2017 and December 2018.

2024 BCCA 342 (CanLII)

Tribunal Decision

[12] The hearing of R.R.'s claim took place before a Member of the British Columbia Human Rights Tribunal over 21 non-consecutive days, commencing in February 2020 and continuing in 2021, with final appearances in 2022. The Tribunal Decision was made November 22, 2022, and is indexed at 2022 BCHRT 116.

[13] The Tribunal found that R.R. had made out a prima facie case of discrimination by the Society in their provision of services and that this discrimination was not justified. First, the Tribunal found that R.R. was protected from discrimination on the basis of race and ancestry (by virtue of being Afro-Indigenous) and on the basis of mental disability (by virtue of experiencing trauma as manifested in anxiety, depression, and PTSD, and by virtue of the Society's perception that R.R. had an alcohol use disorder): paras. 283–287.

[14] Second, the Tribunal found that R.R. was adversely impacted by the Society's conduct, because it separated her from her children. On this point, the Society argued that the Tribunal did not have jurisdiction to consider whether the Society's ongoing custody of R.R.'s children violated the *Code*, because the Tribunal cannot review decisions made by the Provincial Court in relation to custody or access. The Tribunal rejected this argument. The Member found that because the Provincial Court orders that governed the children's care in this case were all entered into on consent, they did not constitute a finding by the Provincial Court that R.R.'s children were in need of protection. The Tribunal found that the court had never issued a decision or made a finding that R.R.'s children were in need of protection during the time. It was therefore open to her to make a decision on this, without it being a collateral attack on a decision of the Provincial Court: paras. 291–296.

[15] The Tribunal also found that in addition to the ongoing separation from her children, the Society made a number of decisions which negatively impacted R.R. in her relationship with her children, including decisions to reduce or suspend access, supervise and restrict visit activities, and exclude her from important aspects of her children's lives: para. 297.

2024 BCCA 342 (CanLII)

[16] Finally, the Tribunal found that these adverse impacts were connected to R.R.'s protected grounds. While the Member found that no one at the Society intentionally discriminated against R.R., their decisions were at times based on stereotypes and prejudice and they failed to accommodate her protected characteristics. The Member found that there was systemic discrimination, based in part on the evidence of Dr. Mary Ellen Turpel-Lafond, who was qualified to testify as an expert about the social and historical background of First Nations people interacting with the child welfare system: para. 20.

[17] The Tribunal also found that the discrimination was not justified, because the Society did not have a reasonable basis to conclude that R.R.'s children were in need of protection during the complaint period. In the alternative that the children were in need of protection, the Member found that the Society did not show that the requirements it set for R.R. to regain care of the children were reasonably necessary and that it had accommodated R.R. to the point of undue hardship.

[18] This point, the question of whether the discrimination was justified, became an important issue in the subsequent judicial review decision, and will be an issue on appeal. It raises important questions regarding the interplay between the child protection system under the *Act* and the role of the Provincial Court; and the *Code* and the role of the Tribunal.

[19] The Tribunal awarded R.R. $150,000 for injury to her dignity, and $5,000 for costs related to the discrimination.

BCSC Decision

[20] The Society brought a petition seeking judicial review of the Tribunal Decision.

[21] In the BCSC Decision, Justice Gomery found that the Tribunal process was not procedurally fair, because the Society was not given notice that it might have to address the legal and factual basis for the removal of R.R.'s children in August 2016. The chambers judge found that the Society "cannot be faulted for failing to adduce

2024 BCCA 342 (CanLII)

before the Tribunal uncontroversial material, in particular, the 2016 Provincial Court orders": para. 91. He admitted those orders in the judicial review hearing.

[22] The chambers judge found that Provincial Court orders from May 4 and June 15, 2016 required that the children be removed if R.R. had not complied with her obligations under them. The judge found that the Tribunal was unaware of the orders. Therefore, in determining whether the Society's removal of the children was justified, the Tribunal erred in law by not considering whether the Society had reasonable grounds to believe that R.R. had not complied with her obligations under the orders in place, pursuant to s. 42(1)(b) of the *Act*: paras. 115–116, 126.

[23] The chambers judge also found that the Tribunal had erred in law by finding that a critical consent order made in Provincial Court on January 18, 2017, giving temporary custody to the Society, did not reflect an adjudication of rights. He found that the consent order "carried justificatory weight by virtue of the court's approval, and the Society was entitled to rely upon that approval as an indication that its removal of the children was legally justified, at least when the order was made": para. 123. However, he noted that this did not mean that the Tribunal had no jurisdiction to adjudicate the complaint, because R.R. could still demonstrate that the basis of the order no longer applied due to a material change in circumstances: paras. 125, 127.

[24] Further, the chambers judge found that at the justification stage, the Tribunal erred in law by not applying the *Act* as a Provincial Judge would apply it. Under this framework, the correct determination was not whether the children were in fact at risk in R.R.'s care, but whether the Society had reasonable grounds to believe what they did at the time: paras. 150–154.

[25] In addition, the chambers judge rejected the argument advanced by the Society, that the Tribunal adjudicated a matter within the exclusive jurisdiction of the Provincial Court under the *Act*: paras. 92, 95–96. The judge found that there was concurrent jurisdiction between the Provincial Court and the Tribunal: para. 97.

2024 BCCA 342 (CanLII)

[26] The chambers judge decided that the case should be remitted to the Tribunal for further consideration, and that the Society could make an application pursuant to s. 27(1)(f) of the *Code* to dismiss R.R.'s complaint on the ground that it had been appropriately dealt with in another proceeding, namely, the Provincial Court proceeding: para. 105.

[27] LEAF intervened before both the Tribunal and chambers judge. The UBCIC and the Commissioner each intervened at the judicial review hearing.

Positions of the Parties on Appeal

[28] Each of the appellant and the Society have filed factums; accordingly, we know the arguments they will advance on appeal. The other respondents, the Tribunal and AGBC, intend to file factums but have not yet done so.

[29] It is helpful to understand the positions being advanced by the appellant and the Society in their factums.

Appellant

[30] The appellant seeks to set aside the BCSC Decision and reinstate the Tribunal Decision.

[31] In her factum, the appellant lists seven alleged errors in the BCSC Decision, as follows:

> 15. The chambers judge erred by concluding that the Tribunal had breached the duty of procedural fairness and made errors of law. In particular, he erred:
>
> a. By going beyond the proper role of the court on judicial review in admitting new evidence, reweighing the evidence before the Tribunal, challenging undisputed findings of fact, and making new findings of fact;
>
> b. By finding that the Tribunal expanded the scope of the Complaint during the Hearing without notice to the [Society];
>
> c. By finding that the Tribunal erred in its assessment of consent orders under the [*Act*];

2024 BCCA 342 (CanLII)

d. By implicitly treating RR's and VACFSS's interests as competing and requiring the Tribunal to apply the analytic framework of the [*Act*] like a Provincial Court judge;

e. By finding the Tribunal's reliance on expert social and historical context evidence to be a "distraction";

f. By accepting unsupported assumptions that the HRT Decision would have a chilling effect on social workers in the child welfare system; and

g. By finding assessments made in good faith cannot be discriminatory.

2024 BCCA 342 (CanLII)

[32] The appellant argues that the Society could have put the 2016 Provincial Court orders before the Tribunal member and was urged to do so on several occasions, and therefore the Society's strategic decision not to introduce this evidence did not create a procedural fairness issue. She argues that the chambers judge was incorrect about the effect of the orders, because even if a child's removal is justified, the Tribunal could still find that the child protection workers acted discriminatorily in the process. She says it would be inappropriate for the Tribunal to apply the same framework as the *Act*, because an inquiry into whether discrimination has occurred is effects based and not fault based. She argues that treating a social worker's good faith belief that a child is at risk as a bar to a finding of discrimination is inconsistent with human rights jurisprudence and undermines the scheme of the *Code*. Finally, she takes issue with comments made by the chambers judge in his decision that social science evidence in this case "distracted" the decision maker from the issue at hand, and that a failure to adopt the *Act*'s framework would deter social workers from making justified interventions.

Respondent — the Society

[33] The Society takes issue with the appellant's position on appeal and cross-appeals from the order.

[34] The Society submits on the main appeal that the following questions arise, and must be answered in the affirmative, as set out at para. 15 of its factum:

(1) Was the Tribunal's process unfair?

> (2) Did the Tribunal err in law by disregarding Provincial Court orders and misapplying the [*Act*]?
>
> (3) Did the Tribunal err in law by assuming jurisdiction over the complaint?

[35] On the cross-appeal, the Society summarizes the alleged errors in the chambers judgment as follows, at paras. 112–13:

> 112. Although the chambers judge properly quashed the Tribunal's decision, he erred in principle by remitting the complaint to the Tribunal. In the circumstances, the complaint should not be remitted because:
>
> > a. Contrary to the chambers judge's conclusion, the Tribunal does not have jurisdiction to consider the complaint; and
> >
> > b. The complaint entails the re-adjudication of custody and access issues and would inevitably be dismissed under s. 27(1)(f) of the *Code*.
>
> 113. Regardless of whether this Court determines that the Tribunal lacks jurisdiction or is precluded from exercising it, the result is the same: Parliament has entrusted custody and access disputes to the Provincial Court and not the Tribunal, and upon remittal, the complaint will inevitably be dismissed.

Legal Framework

[36] Section 30(f) of the *Court of Appeal Act,* S.B.C. 2021, c. 6 and Rule 61 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 gives a judge in chambers the authority to grant intervener status on appeal.

[37] An applicant can seek intervener status either on the grounds of private or public interest: *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at paras. 12–13 (Chambers). Here, all of the applicants rely on the public interest ground.

[38] When an applicant seeks intervener status on the public interest ground, the relevant factors are:

a) Does the proposed intervener have a broad representative base?

b) Does the case legitimately engage the proposed intervener's interests in the public law issue raised on appeal?

2024 BCCA 342 (CanLII)

c) Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCCA 282 at para. 14 (Chambers).

[39] The role of interveners is to "make principled submissions on pertinent points of law", not to support the position of a party: *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 at para. 15 (Chambers). Courts typically grant the right to intervene on discrete issues only: *Beaudoin*, at para. 17. The test to intervene must be met at each level—intervener status in the hearing below does not provide an automatic right to that status in this Court: *Beaudoin*, at para. 18.

[40] The decision to grant intervener status is highly discretionary. The Court must be aware of the "real danger that interveners that do not propose to do more than point out the importance of the Court's decision will simply be a burden to the parties and the Court": *Linkletter v. Proctorio, Incorporated*, 2022 BCCA 313 at para. 16 (Chambers), quoting *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 12. Courts are often capable, without the contribution of interveners, of understanding the "broad ramifications" of their decisions: *Linkletter* at para. 16.

Analysis

[41] None of the parties oppose the interveners' applications, but two respondents on appeal, the AGBC and the Society, submit that the intended arguments of West Coast LEAF and the UBCIC should be more limited than what these interveners propose.

[42] I accept, and it is not contested, that all the proposed interveners meet the first two factors for intervention on the public interest ground: they each have a

2024 BCCA 342 (CanLII)

broad representative base and the case engages their interests in the public law issues raised on appeal.

[43] At issue is whether the last two criteria are met: whether the submissions of each proposed intervener will bring a unique and different perspective that will assist the Court without expanding the scope of the appeal. There is a fine balance between an intervener bringing a unique perspective on a legal issue, and an intervener merely taking the same position as a party and attempting to buttress that party's position.

[44] As an overview, I recognize that there are important issues on this appeal that concern each of the parties and the proposed interveners. Broadly speaking, the appeal raises questions about the proper legal analysis that applies when facts giving rise to a human rights complaint before the Tribunal are also the subject of Provincial Court child protection proceedings under the *Act*. Each of the interveners seek to bring to bear on the legal issues their special perspectives on the historic and present-day context as it relates to child protection matters and Indigenous parents, and Indigenous women in particular, and intend to shed light on what they say is the proper legal analysis in claims that allege child protection workers engaged in discriminatory practices with such a parent.

[45] After hearing the proposed interveners' submissions, I accept that each has a unique perspective that may assist the Court in determining the legal issues in the case.

[46] However, I note that in an effort by each intervener to distinguish their position from one another or from a party, there seem to be several arguments advancing multiple shades of grey, all on the same issue. On top of this, other parties wish an opportunity to reply to any interveners' factums. I am concerned that all of this material might not assist but will instead burden the Court in resolving the issues raised by the parties. At the same time, I am concerned about the total number of parties on appeal simply making the appeal more complicated while taking control of the appeal away from the parties.

2024 BCCA 342 (CanLII)

[47] Because of this, I have determined that the interveners need to narrow their proposed arguments and should be limited in the number of pages of argument they may file, and any reply factums should also be limited. I will address these terms below. I also note that after discussion during the course of the hearing of these applications, the parties have agreed to attempt to prepare a single document that in a very succinct way identifies each parties' positions on each issue, (two or three sentences per issue), and to provide it to the Court in advance of the hearing of the appeal.

[48] I turn to my analysis of the positions of each of the proposed interveners now.

The Commissioner

[49] The Commissioner is an independent officer of the Legislature appointed pursuant to s. 47.01 of the *Code*. She is independent of the Tribunal. The Commissioner says that the legal issues that arise on this appeal go to the core of her mandate to promote and protect human rights in the province. She says that she has a unique perspective to bring to bear on human rights issues and human rights jurisprudence, that will be relevant to the legal issues on appeal.

[50] The Commissioner seeks leave to make the following arguments: (1) the British Columbia Supreme Court did not consider the quasi-constitutional nature of the *Code* and its broad, liberal, and purposive interpretation, (2) the effect of the BCSC Decision was to implicitly find that the *Act*'s decision-making framework incorporates accommodation to the point of undue hardship, making any good faith decisions under the framework non-discriminatory in law, (3) intent must not be reintroduced to the discrimination analysis, which would be the effect of accepting the chambers' judge's analysis that a risk assessment under the *Act* can be discriminatory if made in good faith, (4) the Provincial Court and the Tribunal do not have concurrent jurisdiction, but rather overlapping jurisdiction, and therefore Provincial Court proceedings on custody and access are not "another proceeding" for the purposes of s. 27(1)(f) of the *Code.*

2024 BCCA 342 (CanLII)

[51] None of the parties take issue with the Commissioner's participation or the arguments she intends to raise. While that goes some distance, nevertheless I am not persuaded that all of these arguments offer a sufficiently unique perspective from that advanced by the appellant.

[52] In her factum, the appellant argues (1) that the chambers judge failed to take account of the *Code*'s quasi-constitutional status: Appellant's Factum, at paras. 64–66; (2) that requiring the Tribunal to apply the *Act*'s analytical framework is not sufficient to address discriminatory decision making by child welfare service providers: Appellant's Factum, at para. 70; and (3) intention is irrelevant to the discrimination analysis: Appellant's Factum, at paras. 90–95. I consider the appellant well represented to advance these arguments. I am not persuaded additional submissions by the Commissioner on these points will assist the Court.

[53] In my view, only the last proposed argument of the Commissioner is not duplicative, as the Appellant argues that there is concurrent jurisdiction between the Tribunal and the provincial court, and the Society argues that the Tribunal lacks jurisdiction to decide R.R.'s complaint. I would grant leave to the Commissioner to intervene to advance the Commissioner's fourth proposed argument, namely, the submission that there is overlapping jurisdiction between the Tribunal and the Court.

West Coast LEAF

[54] LEAF is a non-profit organization with a long history of advocating for gender equality through litigation, law reform and public legal education. It has done considerable work to support families engaged in the child protection system, with a focus on addressing the over-representation of Indigenous families.

[55] LEAF seeks leave to intervene to make the following arguments: (1) the Society's arguments on cross-appeal that the Tribunal lacks jurisdiction for custody and access cases would limit human rights oversight and remedies in an area where Indigenous people are known to be subject to systemic discrimination, (2) the Tribunal properly considered discriminatory impacts of child protection risk assessment practices or tools and that "it was incumbent on the Tribunal to consider

2024 BCCA 342 (CanLII)

how these facially neutral practices can result in unjustified discrimination against Indigenous families", (3) the Court's analysis of the legal and factual relevance of consent orders under the *Act* must be informed by the extreme power imbalance between the Director and the parent; and (4) there is no practical or legal conflict between social workers' obligations to protect children's safety under the *Act* and their obligations not to unjustifiably discriminate under the *Code*.

[56] The AGBC opposes LEAF being granted leave to argue its third and fourth proposed submissions. On LEAF's third argument, the AGBC argues that both the appellant and respondent Society have addressed the appropriate context of consent orders, and should the Court need any assistance in understanding their nature, legal significance, or relevance, the parties are well positioned to fully address this issue. On LEAF's last argument, the AGBC argues that it is duplicative of the arguments raised by the appellant, who argues that there is no conflict of rights in this case and it was an error of the chambers judge to imply there was. The respondent Society also takes the position that LEAF's last argument is duplicative and does not offer any unique perspective.

[57] LEAF submits that its proposed submissions on the third argument, regarding consent orders under the *Act*, are unique. It says the proper legal interpretation of s. 60 of the *Act* is that the formal requirements of consent orders are meant to protect parents, and therefore any defects in the procedural requirements should not be held against the parent. I agree this appears a unique take on the issue.

[58] LEAF also explains that its fourth proposed argument does offer a different view of how to resolve the purported conflict between human rights for parents and child protection. It intends to argue that the Tribunal properly takes into account the best interests of the child when engaging in the justification analysis under s. 8. However, the appellant approaches this issue by submitting that paramountcy of the *Code* applies.

[59] I accept that LEAF's four proposed arguments are distinct and offer a different perspective that may be of assistance to the Court.

2024 BCCA 342 (CanLII)

[60] I would therefore grant LEAF's application to intervene to advance its four proposed arguments.

UBCIC

[61] The UBCIC is a representative organization of First Nations in BC that is dedicated to promoting and supporting efforts to ensure that Indigenous political, social, economic and spiritual institutions and rights be strengthened and respected by both Indigenous people and the larger Canadian community. Its council is made up of representative Chiefs elected by band councils in BC. It engages in advocacy, research and public education, including on the subjects of Indigenous children and the rights of parents, children and communities.

[62] The UBCIC seeks leave to make two arguments: (1) the function of the Tribunal in addressing the stereotyping of Indigenous parents is compatible with the role of social workers in assessing and addressing risk to Indigenous children, and (2) the chambers judge below failed to grapple with the Tribunal's finding that R.R.'s access to her children was decreased by the Society in retaliation for R.R.'s Indigenous political activism.

[63] The AGBC objects to the UBCIC's written memorandum of argument in the way it deals with the findings of the Tribunal and the BCSC Decision, and in the way it appears to advocate for the appellant. However, the AGBC does not otherwise oppose UBCIC addressing the first issue. However, it opposes UBCIC's second submission in entirety, as it argues that allowing the submission would introduce new issues not raised by the parties and impermissibly expand the scope of the appeal.

[64] The Society opposes both of UBCIC's arguments. On the first, it argues that UBCIC does not propose any unique perspective on how to reconcile child protection and human rights matters. On the second, it takes the same position as the AGBC, that the argument expands the scope of the appeal by introducing an issue that is not raised by any of the parties.

2024 BCCA 342 (CanLII)

[65] In my view, on the first issue, much of the UBCIC's Memorandum of Argument is written as a detailed review of the findings of fact of the Tribunal, contrasting those findings with the Reasons for Judgment of the chambers judge, advocating that the chambers judge was in error. I do not consider that this Court will be assisted by such an approach. An intervener's role is more neutral, to assist the Court in understanding legal issues rather than to advocate for one party's position.

[66] However, I accept that the UBCIC, as an Indigenous organization, has a unique perspective on the first issue. This case involves a Society founded by First Nations leaders to address child welfare issues in the Vancouver urban Indigenous community, and an Indigenous family. UBCIC submits it takes a different approach to the first issue than does the appellant, as to where in the legal analysis it is appropriate for the Tribunal to take into account child protection issues. In my view, it could be helpful to the Court to receive a submission from the UBCIC on the first issue, focussed on the legal issue of what is the proper legal approach of the Tribunal when child protection issues are involved and an Indigenous parent alleges discrimination by child protection workers. I grant it leave to intervene on this issue. However, I caution UBCIC not to "get into the weeds" on factual and evidentiary matters and not to see its role as an advocate for the appellant's position. The appellant is well-represented by her own counsel.

[67] In my view, UBCIC's second argument expands the scope of the appeal in an unhelpful way. None of the parties argue that it would be appropriate for child protection workers to retaliate against a parent merely because the parent was also engaged in protest. In my view, framing an argument this way could take away the focus on appeal from the issues that are raised by the appellant and the respondents. I do not see that argument on this issue will advance the Court's understanding of the issues raised by the parties on the appeal and cross-appeal. I do not grant UBCIC leave to intervene on the second argument it wishes to raise.

2024 BCCA 342 (CanLII)

Terms and Conditions

[68] Rule 61 sets out certain default terms if a leave to intervene application is granted, such as a 10-page factum. I would vary these terms to make this appeal more manageable, given the number of parties and interveners.

[69] Given that I have granted a more limited right to intervene than sought by the Commissioner and UBCIC, I will grant each of them a right to file a five-page factum only. I will grant LEAF the right to file a seven-page factum only. Even though it has leave to address more issues than the other interveners, I am considering the burden on the Court to consider all of these factums and therefore limiting the page length. I am hoping a condensed factum will cause the interveners to focus on arguments that are truly not duplicative of other parties' positions. In accordance with a time frame that has already been agreed, these factums will be due to be filed on November 1, 2024.

[70] As for reply factums, the appellant and the Society have a right to file a five-page reply factum on the appeal and cross-appeal on November 8, 2024. To the extent they disagree with any point made in an intervener's factum, I give them leave to address this in their reply factums. I extend the deadline for filing of these reply factums to November 12, 2024 and I direct that they may have 10 pages in total to reply to the interveners' factums. In other words, the total length of the reply factums will be 15 pages; of which five pages is reply to the parties on the appeal and cross-appeal and 10 pages is to reply to the interveners. To the extent you agree with an intervener's position, you may briefly identify this position in your reply factum but I expect you to keep in mind not to split your case and not to add additional argument as to why you say the intervener's position is correct.

[71] The AGBC will also have the right to file a reply factum to the intervener's factums, of 10 pages in length, due November 12, 2024.

2024 BCCA 342 (CanLII)

2024 BCCA 342 (CanLII)

Disposition

[72] In summary:

a) I allow the application of the Commissioner to intervene to advance one argument, the Commissioner's fourth proposed argument identified in its Memorandum of Argument, namely, on the point that there is overlapping jurisdiction between the Tribunal and Court;

   i. The Commissioner will be limited to filing a five-page factum;

b) I allow the application of West Coast LEAF to intervene to advance the four arguments it identifies in its Memorandum of Argument,

   i. West Coast LEAF will be limited to filing a seven-page factum;

c) I allow the application of UBCIC to intervene to advance one argument, the first issue it identifies in its Memorandum of Argument, namely on the legal issue of what is the proper approach of the Tribunal, when child protection issues are involved and an Indigenous parent alleges discrimination by child protection workers;

   i. UBCIC will be limited to filing a five-page factum;

d) The interveners factums must be filed by November 1, 2024;

e) No intervener will be permitted to make oral submissions without leave of the division hearing the appeal;

f) The interveners will bear their own costs on appeal;

g) The appellant and the Society will file their reply factums by November 12, 2024, and the length of those factums will be extended from five pages by an additional 10 pages to allow for any argument in reply to the interveners' factums; for a total of no more than 15 pages;

h) The AGBC will be permitted to file a 10-page reply factum to the interveners' factums, by November 12, 2024.

"The Honourable Justice Griffin"

2024 BCCA 342 (CanLII)

TAB 58

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Snaw-Naw-As First Nation v. Canada (Attorney General),* 2021 BCCA 89

Date: 20210301
Docket: CA46943

2021 BCCA 89 (CanLII)

Between:

Snaw-Naw-As First Nation

Appellant
(Plaintiff)

And

Attorney General of Canada and Island Corridor Foundation

Respondents
(Defendants)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2020 (*Snaw-Naw-As First Nation v. Attorney General of Canada*, 2020 BCSC 979, Victoria Docket 154903).

Counsel for the Appellant (via teleconference):	K. Brooks J. Harman
Counsel for the Respondent, Attorney General of Canada (via teleconference):	J. Chow, Q.C.
Counsel for the Respondent, Island Corridor Foundation (via teleconference):	G. Plant, Q.C.
Counsel for the Proposed Intervenors, Cowichan Tribes (via teleconference):	P.W. Jones G. Grant
Place and Date of Hearing:	Vancouver, British Columbia February 12, 2021
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2021

Summary:

Application by Cowichan Tribes for public interest intervention dismissed. As a single First Nation, Cowichan does not have a sufficiently broad representative base to be a public interest intervenor in this appeal, especially in the context of similar litigation it has brought in which it seeks the same relief against the same defendants. Further, the broad interpretive principles advocated by Cowichan can be adequately presented by the appellant.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The applicant, Cowichan Tribes (Cowichan) seeks leave to intervene in this appeal by the Snaw-Naw-As First Nation (SFN) concerning the status of a railway right of way that runs through the SFN reserve.

[2] SFN sought declarations that the lands subject to the right of way were no longer being used for railway purposes, and reverted to the administration and control of Canada for the use and benefit of SFN as part of its reserve. The judge found that the right of way had not ceased to be used for railway purposes, and dismissed SFN's claim.

[3] SFN consents to Cowichan's application and the respondent Attorney General of Canada takes no position. The respondent Island Corridor Foundation (ICF) opposes the application on the basis that Cowichan does not meet the requirements for a public interest intervention.

Background

[4] The dispute underlying the order on appeal concerns the E&N Railway on Vancouver Island and the grant of a right of way through reserve lands, described in the reasons for judgment in the court below, indexed at 2020 BCSC 979:

> [1] The E&N Railway (the "Railway") on Vancouver Island runs from Victoria to Courtenay, with a branch line from Parksville to Port Alberni and a spur from the main line in Nanaimo to a rail yard and barge loading facility. The Railway, now owned and operated by the defendant Island Corridor Foundation ("ICF"), transects 1.3 km of the plaintiff First Nation's reserve lands in Nanoose. This strip of land (the "Lands") is subject to a right of way in favour of ICF (the "ROW").

2021 BCCA 89 (CanLII)

> [2] At issue is whether the Lands remain alienated from the plaintiff and subject to the ROW given the Railway infrastructure has deteriorated and rail service has been discontinued except for freight traffic on the Nanaimo spur line.

[5] When British Columbia joined Canada in 1879, one of the terms of union required Canada to build a rail line across the province. In 1883, British Columbia granted to Canada the land necessary to construct the railway on Vancouver Island, exempting Indian reserves from the grant. In or about 1905, Canadian Pacific Railway (CP) acquired the Esquimalt & Nanaimo Railway Company (E&N).

[6] To facilitate the extension of the E&N Railway line from Nanaimo to Port Alberni, E&N sought the consent of the Governor in Council for a right of way across a strip of land in the SFN reserve. The taking of a right of way over reserve land was governed by the *Railway Act*, R.S.C. 1906, c. 37 and the *Indian Act*, R.S.C. 1906, c. 81. Section 172(3) of the *Railway Act* provided that a railway company acquiring Crown lands “may not alienate any such lands so taken, used or occupied”. Section 46 of the *Indian Act* permitted the taking of reserve lands for “the purposes of any railway” with the consent of the Governor in Council.

[7] In 1912, a federal Order in Council granted consent to the E&N for the taking of the right of way as “actually required for Railway purposes”. E&N (then a subsidiary of CP) built the railway and operated it for many years. In 1979 VIA Rail operated the passenger service. In 1998, CP divested all operations of the railway to RailAmerica. RailAmerica purchased the Port Alberni to Nanaimo section and leased the Nanaimo to Victoria/Parksville to Courtenay sections.

[8] In 2003, RailAmerica announced its intention to shut down its rail service, sell its assets and leave Vancouver Island. In response, the Vancouver Island Rail Corporation (VIRC) was formed to maintain and operate the rail system, and the respondent ICF was established to own and control the railway corridor. ICF is comprised of the affected regional governments and First Nations. As of 2006, ICF has owned the entire railway and branch lines. It then contracted with Southern Railway of Vancouver Island (SVI) to operate the rail line.

2021 BCCA 89 (CanLII)

[9] In 2011, passenger rail service was decommissioned, and in 2014 the remaining freight service between Duncan and Parksville was discontinued. Since then, SVI has operated freight traffic for shipments that arrive by barge to destinations in the Nanaimo area.

The trial judgment

[10] Against this background, SFN sought a declaration that its lands subject to the right of way were no longer being used for railway operations and purposes, and a corresponding declaration that the lands revert to the administration and control of Canada for the use and benefit of SFN as part of the SFN reserve. SFN asserted that in a practical sense, the railway corridor was not being used for railway purposes, had been abandoned, and there was no business case for the ICF to restore and operate it.

[11] The trial judge accepted that the grant contained two limiting conditions: (a) non-alienation, and (b) use for railway purposes. He refused to consider whether the alienation of the lands from CP to ICF breached the first limiting condition on the basis of the pleadings. In concluding that the right of way had not ceased to be used for railway purposes, the judge held that the principle of minimal impairment (as applied in *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85) did not apply to this question. He considered that a mere cessation of rail traffic did not necessarily result in a reversion of the right of way. He found that there had been no formal abandonment of the railway, as ICF had not abandoned efforts to fulfill its mandate despite lack of funds, and was maintaining the railway corridor to the extent possible.

Issues on appeal

[12] In this appeal, the SFN alleges the following errors of law by the trial judge:

> a. refusing to consider legal argument regarding the alienation of the lands from CP to ICF, that, on consideration, shows that the alienation breached the Limiting Conditions, extinguishing the right-of-way and restoring the Lands to the Snaw-naw-as; and,

2021 BCCA 89 (CanLII)

> b. failing to apply an objective test for whether the right-of-way was needed for railway purposes but instead applying a subjective test, contrary to:
>
> > i. the legal principles governing the interpretation of Railway Purposes conditions generally; and
> >
> > ii. the legal principles requiring that a Nation's interest in its reserve lands be minimally impaired when being expropriated.

2021 BCCA 89 (CanLII)

Cowichan

[13] Cowichan is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 with reserve lands in and around the Cowichan Valley on Vancouver Island. It is a large First Nation with over 5,000 members.

[14] Similar to SFN, the E&N Railway Corridor passes through Cowichan's reserve lands, and there is a right of way through Cowichan Indian Reserve #1. Cowichan is also a member of ICF.

[15] In October 2016, Cowichan commenced litigation in the Supreme Court of British Columbia, making similar claims to SFN. Cowichan did not advance its action, as it was waiting for the outcome of the SFN litigation.

[16] Cowichan seeks to intervene on a public interest basis to make submissions on the principles that should guide the court's interpretation of the interests at stake in light of the character of the right of way as Indigenous lands.

The test for granting intervention

[17] Section 10(2)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 provides that a justice may make an order granting leave to intervene as an order incidental to an appeal. Pursuant to Rule 36(1) of the *Court of Appeal Rules*, B.C. Reg. 297/2001, "[a]ny person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine".

[18] A justice's discretion to grant intervenor status is governed by the following principles, set out in *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191 at para. 5 (Chambers):

> a) the applicant must have a direct interest in the matter; or
>
> b) the applicant must have a public interest in a public law issue in question, and
>
> c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

2021 BCCA 89 (CanLII)

[19] An applicant has a direct interest in the proceeding when its own legal rights or legal obligations are affected by the proceedings. This requires more than a concern about how the precedential value of a decision might affect an applicant or bear upon an applicant's own circumstances or case: *Halalt First Nation* at para. 6; *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2010 BCCA 113 at para. 12; *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 405 at para. 6 (Chambers); *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 6 (Chambers).

[20] The factors to consider for applications in the public interest were set out in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers):

> a) Does the proposed intervenor have a broad representative base?
>
> b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
>
> c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
>
> d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[21] Cowichan does not claim to have a direct interest in this appeal and acknowledges the importance of the decision as precedential value in its own case. As a proposed public interest intervenor, it must have a distinctive perspective on the interpretation of the right of way that would be of assistance to the court. In *Equustek Solutions*, Groberman J.A. discussed the court's different approaches on applications to intervene (at para. 8):

> … Where a person is directly affected by an appeal, the focus will be on the interests of the prospective intervenor and on whether fairness dictates that the person have the opportunity to make submissions before the Court.

> Where the intervention is on the basis of public interest, the Court is not concerned with fairness to the intervenor, but rather with the comprehensiveness of the resources available to it on the appeal. Its concern will be with the advisability of obtaining submissions that go beyond those that the parties can effectively make. In allowing persons to intervene on appeals on this second basis, the Court is attempting to ensure that important points of view are not overlooked. Intervenors on this basis must demonstrate that it is in the Court's interest (or, more broadly, in the public interest), rather than their own, for them to be heard.
>
> [Emphasis added.]

[22] While an intervenor's submission may support one party's position, the intervenor's role is not to support the position of a party. Rather, its role is to make principled submissions on pertinent points of law: see *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402 at para. 12 (Chambers). Repetition is to be avoided and the appeal must remain focused on the issues raised by the parties: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2012 BCCA 330 at para. 32 (Chambers); *British Columbia Civil Liberties Association* at para. 14.

Submissions

[23] Cowichan submits that the question of when historical takings of reserve land revert back to First Nations is significant to First Nations generally, stemming from the constitutional character of Indigenous land interests. It proposes to make submissions only about interpretative principles that should apply to the question of the railway purposes condition. It says its submissions will be useful to the court, as they will provide the perspective of another, distinct First Nation with its own language, culture and traditions, whose reserve lands have also been historically impacted by the E&N railway corridor.

[24] Cowichan submits that it is an appropriate public interest intervenor because it has a broad representative base of over 5,000 members, a large governance structure, and unique problems associated with the right of way given its urban location.

2021 BCCA 89 (CanLII)

[25] If granted leave to intervene, Cowichan proposes to make submissions in three areas, which they say will not expand the appeal but will highlight the broader context of the principles at play:

1) Cowichan will argue that the right of way always retained its character as Indigenous lands, and the interest conveyed to the E&N was conditional and always less than fee simple absolute. Accordingly, SFN always retained an interest in the right of way as reversionary reserve land and the interests at stake must be considered in light of this essential fact.

2) Cowichan will also argue that the *sui generis* nature of Indigenous lands gives rise to unique considerations that must be taken into account when interpreting interests like the right of way, and these principles apply whether the lands involved are reserve lands or Aboriginal title lands. Interpretative principles that favour a liberal construction and protection of the Indigenous interest should be applied, as well as the duty of minimal impairment. Cowichan contends that the trial judge failed to engage these Indigenous perspectives of interests.

3) Finally, Cowichan will argue that the involvement of private parties does not detract from the focus on the lands as Indigenous lands and the application of the same interpretative principles discussed above. The principles of reconciliation support this in light of the history of inadequate protection of Indigenous land interests. It is also questionable whether disputes involving Indigenous lands are ever really “private” given their collective and constitutional nature, especially in the context of this case where the SFN right of way was taken for a “public purpose”.

[26] In consenting to this application, SFN submits that the decision below did not engage the Indigenous perspective, and hearing from another First Nation at the appellate level would assist the court to understand the nuance and contours of the Indigenous perspective.

2021 BCCA 89 (CanLII)

[27] In ICF's submission, Cowichan is not an appropriate public interest intervenor because it does not have a broad representative base as a single First Nation, regardless of its size. This is especially the case here, where Cowichan also commenced an action making the same claims as SFN that it chose not to litigate. ICF suggests that granting leave to intervene would provide Cowichan a risk-free opportunity to argue that the decision in this case was wrong, as it will not be bound by a decision on this appeal.

[28] ICF also submits that Cowichan does not have a unique perspective to the issues that would assist the court. It points out that this case is fundamentally about statutory interpretation, not broad constitutional rights, and while the nature of the land in issue as reserve land will inform the exercise, another First Nation's relationship with its own traditional or reserve land will be of little assistance. ICF says that Cowichan is in no better position to speak to the unique character of Indigenous lands than SFN.

[29] ICF further submits that Cowichan's proposed submissions duplicate those made by SFN and also expand the scope of the litigation. It says that to the extent these submissions differ from the issues raised by SFN, they drastically reframe the matter by overwhelmingly focusing on the land as Indigenous land and arguing that the analysis must be informed by this characterization.

Discussion

[30] Although Cowichan seeks only public interest intervention, its own interest in this litigation distorts the basis for this application. This is reflected in the affidavit of Chief William Seymour:

> 40. Cowichan Tribes is interested in part in the outcome of this appeal because of its similarity to the Cowichan Action. Indeed, both seek a similar outcome (i.e. the return of reserve lands from a railway right of way), involve the same rail line, involve many of the same historical facts, and has the same defendants, who have taken similar positions in both this appeal and the Cowichan Action. For those reasons, Cowichan Tribes has also held back from taking steps in the Cowichan Action pending the outcome of Snaw-naw-as' action.

2021 BCCA 89 (CanLII)

> 41. However, this is not the extent of Cowichan Tribe's interest in this appeal. While the outcome of this appeal will very likely have an impact on the Cowichan Action, it raises broader questions of how courts will interpret and resolve disputes of historical takings of reserve land, including where private parties are involved, and under what circumstances they will revert back to the Indigenous community whose reserve lands have been taken. These questions are especially important to Cowichan for many reasons, including:
>
> > a) There is a limited quantity of reserve land available (which I described earlier in this Affidavit), and any lands returned to reserve status make a big difference in the well-being of our community, from a cultural, socioeconomic, and practical perspective;
> >
> > b) Our perspective may, and often does not align with the desires of other stakeholders who may want to use rights of way or other expropriated lands for certain purposes. For example, I am aware that portions of the E&N Railway are presently used for or are being proposed as trails, which I have described earlier in my Affidavit as something that Cowichan opposes; and
> >
> > c) The long and controversial history of the E&N Railway, and particularly difficulties which the original E&N Grant has caused over a century of lost use and connection to the Cowichan Right of Way to practice our Aboriginal rights, and with our ability to reconcile our Aboriginal title through the BC Treaty process (also described earlier in my affidavit).
>
> 42. The unique nature and importance of reserve land to Cowichan cannot be understated.
>
> 43. The prejudice to Cowichan Tribes if it is not allowed to intervene is that it will lose a crucial opportunity to present this court with its distinct and unique perspective on the legal issues before the court, including the principles of interpretation of historical takings on reserve land, and the implications of this decision on Cowichan Tribes and First Nations more broadly.

[31] It must be remembered that in assessing a proposed public interest intervenor, the court's focus is not on the interest of the intervenor but on the court's interest in ensuring that important points of view are not overlooked. That said, I appreciate that Cowichan has a legitimate interest in the public law aspect of the issue raised in this appeal, but I am not satisfied that its distinct perspective about the principles of interpretation of historical takings will be of assistance to the court.

[32] First, I agree with ICF that Cowichan as a single First Nation does not have a sufficiently broad representative base to be a public interest intervenor, regardless of its size. This is especially so in the context of its own litigation in which it seeks the

2021 BCCA 89 (CanLII)

same relief against the same defendants respecting the same right of way. In this sense, its own interests appear to take precedence over the public interest.

[33] Second, I am satisfied that the broader interpretive principles can be adequately presented by SFN. In its factum, SFN addresses the impact of the right of way on its ability to develop its reserve lands, the *sui generis* nature of the land and the application of the principles of minimal impairment (per *Osoyoos*), and the role of reconciliation in returning lands to First Nations when rights of way no longer serve their purpose. While I do not see Cowichan's proposed submissions to "drastically re-frame" the issues on appeal, I do see them as largely duplicative of those of SFN. I find it noteworthy that the principles emerging from *Osoyoos*, on which SFN relies, form the basis for much of Cowichan's proposed argument.

[34] Moreover, the constitutional and public law aspects of this case have a narrower focus than those in cases such as *Ahousaht* and *Stoney Creek Indian Band v. Alcan Aluminum Ltd.*, 1999 BCCA 293 (Chambers). *Ahousaht* involved claims to commercial Aboriginal fishing rights, and *Stoney Creek* involved the constitutional applicability of the provincial *Limitation Act*, R.S.B.C. 1996, c. 266 to Aboriginal rights claims. The focus in this appeal will be the interpretation of the limiting conditions of the right of way in the context of the *sui generis* nature of reserve lands.

[35] In all of these circumstances, I am not satisfied that Cowichan meets the criteria for public interest intervention.

[36] The application is therefore dismissed.

"The Honourable Madam Justice Fisher"

2021 BCCA 89 (CanLII)

TAB 59

James Edward Sellars *Appellant*;

and

Her Majesty The Queen *Respondent.*

1979: December 5; 1980: February 7.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Charge to jury — Testimony of an accessory after the fact — Rule of caution applicable — Opinion expressed by the Court earlier — Authority of this opinion — Obiter dictum — No substantial wrong or miscarriage of justice — Criminal Code, s. 613(1)(b)(iii).

Appellant was found guilty of murder after being tried by a court consisting of a judge and jury. At the hearing, the prosecution called as a witness one Welch who was admittedly an accessory after the fact. A majority of the Court of Appeal of Quebec upheld the guilty verdict. In this Court appellant raised only one question: he argued that the rule requiring a judge to warn the jury of the risk of basing a guilty verdict on the uncorroborated testimony of an accomplice extends to an accessory after the fact. Respondent contended that even if appellant was correct on this point, the appeal should be dismissed in accordance with s. 613(1)(*b*)(iii) of the *Criminal Code*, which provides that "nothwithstanding that the Court is of the opinion that ... the appeal might be decided in favour of the appellant", on the ground that the trial judgment constituted an erroneous decision on a point of law, it may dismiss the appeal if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred".

Held: The appeal should be dismissed.

Appellant's argument must be admitted on the first point. In *Paradis v. The Queen*, [1978] 1 S.C.R. 264, this Court in fact held that the same rule of caution must be applied to the testimony of an accessory after the fact as to that of an accomplice. Although it was not absolutely necessary to do so in order to dispose of the appeal, the Court has ruled on the point and this interpretation must be followed.

However, in light of the evidence and taking into consideration all the circumstances of the case, respondent's argument based on s. 613(1)(*b*)(iii) Cr.C. must be allowed. Although the trial judge did not apply the rule of caution mentioned above to the testimony of an

James Edward Sellars *Appelant;*

et

Sa Majesté La Reine *Intimée.*

1979: 5 décembre; 1980: 7 février.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et Chouinard.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Directives au jury — Témoignage d'un complice après le fait — Règle de prudence applicable — Opinion exprimée antérieurement par le tribunal — Autorité de cette opinion — Obiter dictum — Absence de tort important ou d'erreur judiciaire grave — Code criminel, art. 613(1)b)(iii).

L'appelant a été déclaré coupable de meurtre après avoir subi son procès devant une cour composée d'un juge et d'un jury. A l'enquête, le ministère public a fait entendre comme témoin un certain Welch qui, il est admis, est un complice après le fait. La majorité de la Cour d'appel du Québec a confirmé le verdict de culpabilité. Devant cette Cour l'appelant soulève une seule question: il prétend que la règle qui exige que le juge prévienne le jury du danger qu'il y a de fonder un verdict de culpabilité sur le témoignage non corroboré d'un complice, s'étend au complice après le fait. L'intimée plaide que même si l'appelant avait raison sur ce point, le pourvoi devrait être rejeté en application du sous-al. 613(1)(*b*)(iii) du *Code criminel* qui prévoit que «bien que la Cour estime que l'appel pourrait être décidé en faveur de l'appelant» pour le motif que le jugement de première instance constitue une décision erronée sur une question de droit, elle peut rejeter l'appel si «elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit».

Arrêt: Le pourvoi doit être rejeté.

Il faut donner raison à l'appelant sur le premier point. Cette Cour a en effet énoncé dans *Paradis c. La Reine*, [1978] 1 R.C.S. 264, qu'il faut appliquer au témoignage du complice après le fait la même règle de prudence qu'à celui du complice du fait. Même s'il n'était pas indispensable de le faire pour disposer du pourvoi, la Cour s'étant prononcée sur la question, cette interprétation doit prévaloir.

Toutefois, à la lumière de la preuve et compte tenu de toutes les circonstances de cette cause, l'argument de l'intimée fondé sur l'al. 613(1)*b*)(iii) *C.c.* doit être accueilli. Bien que le juge de première instance n'ait pas appliqué au complice après le fait la règle de prudence

1980 CanLII 166 (SCC)

accessory after the fact, he nonetheless instructed the jury on the credibility of witnesses and the factors by which it may be affected. In particular, he asked the jury to consider Welch's character, his reputation, in conjunction with his past conduct and his action in the case at bar. Urging the jurors to caution because Welch was an accessory after the fact would not have had a different effect on them from that produced by the caution contained in the judge's remarks. Accordingly, no substantial wrong or miscarriage of justice occurred. Moreover, apart from Welch's testimony, the evidence appears to be overwhelming.

Paradis v. The Queen, [1978] 1 S.C.R. 264, applied; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Schwartz v. The Queen*, [1977] 1 S.C.R. 673; *Switzman v. Elbling*, [1957] S.C.R. 285; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305; *Patterson v. The Queen*, [1970] S.C.R. 409; *Ottawa v. Nepean Township et al.*, [1943] 3 D.L.R. 802; *Avon v. The Queen*, [1971] S.C.R. 650; *Re Depagie and The Queen* (1976), 32 C.C.C. (2d) 89, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1], affirming a guilty verdict renderd by a jury of the Superior Court, criminal side. Appeal dismissed.

Jean R. Salois, for the appellant.

Ronald Schachter, for the respondent.

English version of the judgment of the Court delivered by

CHOUINARD J.—Only one question is raised by appellant, namely whether the rule requiring a judge to warn the jury of the risk of basing a guilty verdict on the uncorroborated testimony of an accomplice extends to an accessory after the fact.

The justification for this rule is the interest which an accomplice is presumed to have in attributing responsibility for a crime to another person in order thereby to exculpate himself. Some believe that an accessory after the fact lacks this interest, since his crime is distinct and subsequent and he escapes all liability if the person he helped is acquitted. Others take the view that he may nonetheless have an interest likely to lessen his

[1] [1978] C.A. 469.

mentionnée plus haut, il a néanmoins instruit le jury au sujet de la crédibilité des témoins et des facteurs qui peuvent l'entacher. Notamment il a invité le jury à s'interroger sur le caractère, la réputation de Welch en regard de sa conduite passée et de son comportement dans cette affaire. Inviter les jurés à la prudence parce que Welch était un complice après le fait n'aurait pas produit sur eux un effet différent de celui qu'a pu produire la mise en garde contenue dans les remarques du juge. Aucun tort important ni aucune erreur judiciaire grave ne s'est donc produit. De plus, mis à part le témoignage de Welch, la preuve paraît accablante.

Jurisprudence: *Paradis c. La Reine*, [1978] 1 R.C.S. 264 (arrêt appliqué); *Provincial Secretary of Prince Edward Island c. Egan*, [1941] R.C.S. 396; *Schwartz c. La Reine*, [1977] 1 R.C.S. 673; *Switzman c. Elbling*, [1957] R.C.S. 285; *R. c. Zelensky*, [1978] 2 R.C.S. 940; *Procureur général du Québec c. Cohen*, [1979] 2 R.C.S. 305; *Patterson c. La Reine*, [1970] R.C.S. 409; *Ottawa v. Nepean Township et al.*, [1943] 3 D.L.R. 802; *Avon c. La Reine*, [1971] R.C.S. 650; *Re Depagie and The Queen* (1976), 32 C.C.C. (2d) 89.

POURVOI contre un arrêt de la Cour d'appel du Québec[1] confirmant une déclaration de culpabilité prononcée par un jury de la Cour supérieure de juridiction criminelle. Pourvoi rejeté.

Jean R. Salois, pour l'appelant.

Ronald Schachter, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE CHOUINARD—Une seule question est soulevée par l'appelant, à savoir si la règle qui exige que le juge prévienne le jury du danger qu'il y a de fonder un verdict de culpabilité sur le témoignage non corroboré d'un complice, s'étend au complice après le fait.

Cette règle a pour raison d'être l'intérêt présumé qu'a un complice d'attribuer la responsabilité d'un crime à un autre pour du même coup se disculper. Pour certains le complice après le fait n'a pas cet intérêt puisque son crime est distinct et postérieur et il échappe à toute responsabilité si celui qu'il a aidé est acquitté. Pour d'autres il peut quand même avoir un intérêt qui entache sa crédibilité, celui par exemple de coopérer avec la poursuite

[1] [1978] C.A. 469.

1980 CanLII 166 (SCC)

credibility, as for example in co-operating with the prosecution in the hope of a lighter sentence. Briefly stated, these are the two approaches between which opinion has long been divided.

However, in *Paradis v. The Queen*[2], a majority of this Court expressed the opinion that the same rule of caution must be applied to the testimony of an accessory after the fact as to that of an accomplice, and in my opinion, therefore, this is the interpretation that must prevail.

As it does from time to time, the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal.

In *Provincial Secretary of Prince Edward Island v. Egan*[3], which has since been followed on the constitutional question decided in that case, Rinfret J., as he then was, wrote at pp. 411 and 412:

> The Supreme Court *en banc*, however, thought it advisable to deal with the question of the constitutionality of section 84(1) of the *Highway Traffic Act, 1936*, since the *Criminal Code* has enacted sec. 285, subs. 7, amended by sec. 6 of ch. 30 of the Statutes of Canada, 3 Geo. VI (1939). And that Court declared *ultra vires* the provision of the *Highway Traffic Act* "as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated."
>
> It is because of the declaration on that point that the Attorney-General of Prince Edward Island has carried his appeal to this Court and that the Attorney-General of Canada and the Attorney-General for Ontario have been allowed to intervene. It was represented to us that this declaration has an important and wide consequence and that, while only an *obiter dictum*, it might affect the jurisprudence not only in Prince Edward Island but also in other provinces. It appears desirable, therefore, that this Court should express its opinion upon the matter.

Similarly, in *Schwartz v. The Queen*[4], the Court, although this was not necessary to its decision, expressed a majority opinion on the meaning of the word "wrong" in s. 16(2) of the *Criminal Code*. Martland J. wrote at pp. 694 and 695:

[2] [1978] 1 S.C.R. 264.
[3] [1941] S.C.R. 396.
[4] [1977] 1 S.C.R. 673.

dans l'espoir d'un traitement moins rigoureux. C'est en bref suivant ces deux lignes de pensée que pendant longtemps les opinions se sont partagées.

Cependant dans *Paradis c. La Reine*[2], cette Cour a exprimé l'opinion majoritaire qu'il faut appliquer au témoignage du complice après le fait la même règle de prudence qu'à celui du complice du fait et on doit donc, me semble-t-il, tenir que telle est l'interprétation qui prévaut.

La Cour, comme elle le fait à l'occasion, s'est ainsi prononcée sur la question, même s'il n'était pas indispensable de le faire pour disposer du pourvoi.

Dans *Provincial Secretary of Prince Edward Island c. Egan*[3], qui fait autorité depuis lors sur la question constitutionnelle qui y fut décidée, le juge Rinfret, comme il était alors, écrivait aux pp. 411 et 412:

> [TRADUCTION] Toutefois, la Cour suprême en banc a jugé utile d'étudier la question de la constitutionnalité du par. 84(1) de la *Highway Traffic Act, 1936*, vu le par. 285(7) du *Code criminel*, modifié par l'art. 6 du chap. 30 des Statuts du Canada, 3 Geo. VI (1939). Cette Cour a jugé *ultra vires* la disposition de la *Highway Traffic Act* portant «sur l'annulation d'un permis par suite d'une condamnation pour avoir conduit une automobile en état d'ébriété».
>
> Vu l'énoncé sur ce point, le procureur général de l'Île-du-Prince-Édouard a interjeté appel devant cette Cour et la permission d'intervenir a été accordée au procureur général du Canada et au procureur général de l'Ontario. On a fait valoir devant nous la conséquence importante et étendue de cet énoncé et le fait que même s'il ne s'agit que d'un *obiter dictum*, un tel énoncé peut influencer la jurisprudence non seulement de l'Île-du-Prince-Édouard mais des autres provinces. Par conséquent, il apparaît judicieux à cette Cour de donner son opinion sur la question.

De même dans *Schwartz c. La Reine*[4], la Cour, bien que cela ne fût pas nécessaire pour trancher, exprimait une opinion majoritaire sur le sens du mot «mauvais» à l'art. 16(2) du *Code criminel*. Le juge Martland écrivait aux pp. 694 et 695:

[2] [1978] 1 R.C.S. 264.
[3] [1941] R. C. S. 396.
[4] [1977] 1 R.C.S. 673.

1980 CanLII 166 (SCC)

In my opinion the judge's charge upon the meaning of the word "wrong" in s. 16(2) was not erroneous. I propose to deal with this issue only because the matter was fully argued before us, and it would be desirable that an expression of opinion on this point by this Court should be made.

See also *Switzman v. Elbling*[5], and *R. v. Zelensky*[6].

In *Attorney General for the Province of Quebec v. Cohen*[7], the Court affirmed the authority of a statement of principle contained in one of its decisions. Pigeon J., speaking for the Court, wrote at p. 308:

I cannot accept that what was said in *Patterson* by the two judges who disagreed with Judson J. on what he said in the last quoted paragraph, although one of them agreed on the conclusion, in any way detracts from the authority of this statement of principle approved by a majority of this Court.

The *Patterson*[8] decision, was also followed by the Court of Appeal of Alberta in *Re Depagie and The Queen*[9], in which McDermid J., citing the same passage as Pigeon J. in *Cohen*, wrote on behalf of the majority, at p. 92:

... However, even if the last paragraph of the judgment I have quoted is *obiter*, as stated by Bouck, J., in *R. v. Hubbard et al.*, [1976] 3 W.W.R. 152, I would not feel justified in not following it even if I thought it was not in accord with the previous authorities.

In *Ottawa v. Nepean Township et al.*[10], Robertson C.J. wrote for the Court of Appeal of Ontario, at p. 804:

... What was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it even if we are not strictly bound by it.

In the case at bar the trial judge did not apply the foregoing rule, as in his opinion it did not apply to the testimony of an accessory after the fact. He said the following in his charge to the jury:

[5] [1957] S.C.R. 285.
[6] [1978] 2 S.C.R. 940.
[7] [1979] 2 S.C.R. 305.
[8] *sub. nom. Patterson v. The Queen*, [1970] S.C.R. 409.
[9] (1976), 32 C.C.C. (2d) 89.
[10] [1943] 3 D.L.R. 802.

A mon avis, les directives du juge sur le sens du mot «mauvais» à l'art. 16(2) n'étaient pas erronées. Si je traite de cette question, c'est qu'elle a été pleinement débattue devant nous et qu'il est souhaitable que la Cour exprime son opinion là-dessus.

Voir aussi *Switzman c. Elbling*[5], et *R. c. Zelensky*[6].

Dans *Procureur général de la province de Québec c. Cohen*[7], la Cour affirmait l'autorité d'un énoncé de principe contenu dans une de ses décisions. Au nom de la Cour, le juge Pigeon écrivait à la p. 308:

Au sujet du dernier alinéa cité, je ne puis admettre que, dans l'affaire *Patterson*, l'avis contraire de deux juges dont l'un a néanmoins endossé la conclusion du juge Judson, amoindrit de quelque façon l'autorité de cet énoncé de principe approuvé par la majorité de la Cour.

Ce même arrêt *Patterson*[8] fut suivi par la Cour d'appel de l'Alberta dans *Re Depagie and The Queen*[9] où le juge McDermid, citant le même passage que le juge Pigeon dans l'affaire *Cohen*, écrivait au nom de la majorité, à la p. 92:

[TRADUCTION] ... Toutefois, même si le dernier alinéa du jugement que j'ai cité est un *obiter*, comme l'a déclaré le juge Bouck dans *R. v. Hubbard et al.*, [1976] 3 W.W.R. 152, je ne vois pas de raison de ne pas le suivre même à supposer qu'il soit incompatible avec la jurisprudence antérieure.

Dans *Ottawa v. Nepean Township et al.*[10], le juge en chef Robertson écrivait pour la Cour d'appel de l'Ontario, à la p. 804:

[TRADUCTION] ... Ce qui a été énoncé constitue peut-être un *obiter*; mais il s'agit d'une opinion motivée de la Cour suprême du Canada et nous devons la respecter et la suivre, même si strictement nous ne sommes pas liés.

Dans l'espèce le juge de première instance n'a pas appliqué la règle ci-dessus, étant d'avis qu'elle ne s'appliquait pas au témoignage du complice après le fait. Voici comment il s'en est exprimé à l'intention du jury:

[5] [1957] R.C.S. 285.
[6] [1978] 2 R.C.S. 940.
[7] [1979] 2 R.C.S. 305.
[8] *sub nom. Patterson c. La Reine*, [1970] R.C.S. 409.
[9] (1976), 32 C.C.C. (2d) 89.
[10] [1943] 3 D.L.R. 802.

1980 CanLII 166 (SCC)

... Witness Welch was not an accomplice because he was not one who knowingly and voluntarily cooperated with or assisted or advised or encouraged another to commit a crime.

If and it would appear that he was an accessory after the fact, he is not an accomplice in the sense that I must warn you of the danger of condemning the accused on the strength of his uncorroborated testimony.

It should be mentioned that the judge's charge dates back to July 5, 1976, before the judgment of this Court in *Paradis*, which was handed down on February 8, 1977. The trial judge properly relied on the judgment of the Court of Appeal in the same case, handed down on January 7, 1975.

However, in the case at bar, a majority judgment of the Court of Appeal of Quebec dismissed the ground of appeal based on the failure to apply this rule.

In view of the foregoing conclusion that, as determined by this Court in *Paradis*, the same rule must be applied to the testimony of an accessory after the fact, appellant's argument on this point must be upheld.

However, respondent contended that the appeal should be dismissed nonetheless, pursuant to s. 613(1)(*b*)(iii) of the *Criminal Code*, which reads:

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(*a*) ...

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

In light of the evidence, and taking into consideration all the circumstances of this case, I would dismiss the appeal on this ground.

[TRADUCTION] ... Le témoin Welch n'est pas un complice car il n'a pas sciemment et volontairement collaboré avec quelqu'un en vue de commettre un acte criminel, ni assisté, conseillé ou encouragé quelqu'un à commettre un tel acte.

S'il est un complice après le fait, et cette conclusion semble plausible, ce n'est pas un complice dans le sens où il doit faire l'objet d'une directive de ma part vous mettant en garde contre le danger de condamner l'accusé sur la foi de son témoignage non corroboré.

Il convient de signaler que les directives du juge remontent au 5 juillet 1976, avant le jugement de cette Cour dans l'affaire *Paradis* qui fut prononcé le 8 février 1977. Le juge de première instance se fondait à bon droit sur le jugement de la Cour d'appel dans la même affaire, prononcé le 7 janvier 1975.

Cependant, dans la présente instance, à la majorité la Cour d'appel du Québec a rejeté le grief d'appel fondé sur le défaut d'appliquer cette règle.

Vu la conclusion ci-dessus qu'il faut, tel que déterminé par cette Cour dans l'affaire *Paradis*, appliquer la même règle au témoignage du complice après le fait, l'on doit donner raison à l'appelant sur ce point.

L'intimée a toutefois plaidé que le pourvoi devrait quand même être rejeté en application de l'art. 613(1)*b*)(iii) du *Code criminel* qui se lit:

613. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict portant que l'appelant est incapable de subir son procès, pour cause d'aliénation mentale, ou d'un verdict spécial de non-culpabilité pour cause d'aliénation mentale, la cour d'appel

a) ...

b) peut rejeter l'appel si

. . .

(iii) bien que la cour estime que, pour tout motif mentionné au sous-alinéa *a*(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

A la lumière de la preuve et compte tenu de toutes les circonstances de cette cause je suis d'avis de rejeter le pourvoi pour ce motif.

1980 CanLII 166 (SCC)

The facts are summarized by Dubé J. of the Court of Appeal as follows:

[TRANSLATION] Pierre Côté, a bachelor, residing at 34 rue Claudel, Lévis, was last seen alive on August 23, 1975 at Lévis by his sister-in-law, Mrs. Hélène Carrier Côté; at the time he was in possession of his car, a yellow-gold 1972 Mustang, registered in his name with licence number 254A671.

On October 4, 1975, at St-Philippe de Néri, ninety-five (95) miles east of Quebec City, a youth named Philippe Bélanger found a body in an advanced state of decomposition in the forest: subsequent research showed the body to be that of Pierre Côté.

Pierre Côté's cause of death was attributed to two 22-calibre revolver bullets found in the skull of the victim.

On February 3, 1976, a car which was subsequently identified as that of Pierre Coté was seen on a parking lot at Fredericton in New Brunswick; Joseph-Pierre Chauvin, a member of the RCMP disguised as an ordinary citizen, met with appellant Sellars who lived in Fredericton, and the latter told him that he had the car in question for sale for the sum of $1,500 from the real owner, who was planning to report his car as stolen and so claim the amount from his insurance company.

The foregoing facts are not in dispute and no evidence was presented to rebut them.

At the hearing, one Ralph Welch testified that he was a friend of Sellars and that he had sold him an old 22-calibre revolver in July 1975. He stated that he saw Sellars in possession of Pierre Côté's automobile in Fredericton during the weekend before the Labour Day holiday, that is at the end of August; Sellars told him that he had received the car in payment of a debt, but that he had no registration; Welch further stated in his testimony that Sellars told him that he had killed a man with the 22 revolver which he had bought from him, and had subsequently gotten rid of the revolver by throwing it away.

Welch stated that he helped Sellars clean up Pierre Côté's car and found in it a watch, which he gave to one of his friends who had apparently since lost it; he also discovered a case used to keep identification papers, which he turned over to the RCMP.

Ralph Welch stated that he had previously been found guilty of unlawful possession of alcoholic bever-

Les faits sont résumés comme suit par le juge Dubé de la Cour d'appel:

Pierre Côté, célibataire, résidant au numéro 34, rue Claudel, Lévis, fut vu vivant pour la dernière fois le 23 août 1975 à Lévis par sa belle-sœur Madame Hélène Carrier Côté; il était alors en possession de son automobile, une Mustang de l'année 1972 couleur jaune-or, enregistrée à son nom sous le numéro d'immatriculation 254A671.

Le 4 octobre 1975, à St-Philippe de Néri, à quatre-vingt-quinze (95) milles à l'est de Québec, un jeune garçon du nom de Philippe Bélanger trouva dans la forêt un cadavre en état avancé de décomposition: les recherches subséquentes démontrèrent que le cadavre était celui de Pierre Coté.

La cause de la mort de Pierre Côté fut attribuée à deux projectiles d'arme à feu de calibre 22 retrouvés dans le crâne de la victime.

Le 3 février 1976, un véhicule-automobile, subséquemment identifié comme étant celui de Pierre Côté, fut vu sur un terrain de stationnement à Frédéricton au Nouveau-Brunswick; alors Joseph-Pierre Chauvin, membre de la Gendarmerie Royale du Canada déguisé en citoyen ordinaire, rencontrera l'appelant Sellars qui résidait à Frédéricton et ce dernier lui dit qu'il avait la voiture en question à vendre pour la somme de $1,500.00 du véritable propriétaire lequel avait l'intention de déclarer que son véhicule avait été volé et en conséquence d'en réclamer le montant à son assurance.

Les faits ci-dessus ne sont pas contestés et aucune preuve n'a été faite à l'encontre.

A l'enquête, un certain Ralph Welch témoigna à l'effet qu'il était un ami de Sellars et qu'il lui avait vendu un vieux revolver de calibre 22 au cours du mois de juillet 1975. Il déclare avoir vu Sellars en possession de l'automobile de Pierre Côté à Frédéricton au cours de la fin de semaine avant la fête du travail, soit à la fin du mois d'août; Sellars lui aurait dit qu'il avait obtenu ce véhicule en paiement d'une dette, mais qu'il n'avait pas d'enregistrement; Welch continue son témoignage à l'effet que Sellars lui a avoué avoir tué un homme avec le revolver 22 qu'il avait acheté de lui et s'être ensuite débarrassé du revolver en le jetant.

Welch déclare avoir aidé Sellars à nettoyer le véhicule de Pierre Côté et y avoir trouvé une montre qu'il a donnée à un de ses amis lequel l'aurait perdue depuis; il a aussi découvert un étui servant à garder des documents d'identification qu'il a remis à la Gendarmerie Royale.

Ralph Welch avoue avoir déjà été trouvé coupable de possession illégale de boissons alcooliques et il avoue

1980 CanLII 166 (SCC)

ages, and stated that he had obtained by theft the revolver which he sold to Sellars.

An expert witness for the Crown on firearms, a physicist named Antoons, stated that the two bullets found in the head of the victim, Pierre Côté, came from two different weapons; however, in a subsequent report Antoons added that it was possible for the two bullets to have been fired by the same weapon, if the weapon was an old and defective revolver. Welch stated that the weapon he sold Sellars was "sound, but it was very old and dirty".

Appellant did not testify and called no witnesses.

While the judge did not apply the rule mentioned above to the testimony of an accessory after the fact, he nonetheless instructed the jury on the credibility of witnesses and the factors by which it may be affected, in particular the interest which a witness may have, and in the case of Welch in particular, his reputation.

To begin with, he said:

The next subject I am going to speak to you about is the credibility or truthfulness of witnesses. You have had in this case an opportunity of hearing evidence by various witnesses; giving accounts of what occurred. You must bring to bear upon the question of credibility or the truthfulness of a witness your experience as men and women in the ordinary affairs of life. You may believe all the evidence given by a witness, a part of the evidence given by the witness or none of the evidence given by a witness.

When deciding upon the credibility of a witness or the weight you are going to give to the evidence of a witness you should consider what chance the witness had to observe the facts to which he or she testified and how capable the witness is of giving an accurate account of what he or she saw or heard. You must also decide whether the witness is biased or prejudiced. Whether the witness has any interest in the case. These are the principal factors which must be considered when deciding upon the credibility or the truthfulness of a witness or the weight to be attached to the evidence of a witness.

He later stated, with respect to Welch:

I want to say a word about Welch and how you should consider his testimony. Witness Welch was not an accomplice because he was not one who knowingly and voluntarily co-operated with or assisted or advised or

qu'il avait obtenu par vol le revolver qu'il a vendu à Sellars.

Le témoin expert de la Couronne en matière d'arme à feu, un physicien du nom de Antoons, déclare que les deux projectiles trouvés dans la tête de la victime Pierre Côté provenaient de deux armes différentes; cependant dans un rapport subséquent Antoons ajoute qu'il est possible que les deux projectiles aient été tirés par la même arme à feu si cette arme à feu était un revolver usé et défectueux. D'après Welch l'arme qu'il a vendue à Sellars était [TRADUCTION] . . .«en bon état mais très vieille et très sale».

L'appelant n'a pas témoigné et n'a fait entendre aucun témoin.

Si le juge n'a pas appliqué au témoignage du complice après le fait la règle mentionnée plus haut, il a néanmoins instruit le jury au sujet de la crédibilité des témoins et des facteurs qui peuvent l'entacher, notamment l'intérêt que peut avoir un témoin, et dans le cas de Welch en particulier, sa réputation.

En un premier temps il dit ceci:

[TRADUCTION]—Le prochain sujet dont je vais vous parler concerne la crédibilité ou la bonne foi des témoins. Vous avez eu l'occasion au cours de la présente affaire d'entendre différents témoins donner leur compte rendu des événements en cause. Vous devez sur cette question de la crédibilité ou de la bonne foi d'un témoin, faire appel à votre expérience en tant qu'hommes et femmes dans les choses courantes de la vie. Vous pouvez croire toute la déposition d'un témoin, une partie de sa déposition, ou vous pouvez la rejeter au complet.

Pour décider de la crédibilité d'un témoin ou du poids à accorder à la déposition d'un témoin, vous devez tenir compte des possibilités que le témoin a eues d'observer les faits dont il témoigne et de sa capacité de donner un compte rendu exact de ce qu'il a vu ou entendu. Vous devez également déterminer si le témoin est partial ou a des préjugés ou s'il a un intérêt dans l'affaire. Ce sont les facteurs principaux dont il faut tenir compte lorsqu'il s'agit d'établir la crédibilité ou la bonne foi d'un témoin ou le poids à accorder à la déposition d'un témoin.

Et plus loin, au sujet de Welch:

[TRADUCTION]—Je désire dire quelques mots au sujet de Welch et de la manière dont vous devez envisager son témoignage. Le témoin Welch n'est pas un complice car il n'a pas sciemment et volontairement

1980 CanLII 166 (SCC)

encouraged another to commit a crime.

If and it would appear that he was an accessory after the fact, he is not an accomplice in the sense that I must warn you of the danger of condemning the accused on the strength of his uncorroborated testimony. But there have been statements by our higher Courts to the effect that evidence given by a disreputable person even though he is not an accomplice must be scrutinized and weighed with the greatest care. Is Welch a disreputable person in the eye of the law? Is he disreputable because he was convicted at an early age of possessing liquor? It is true he admitted that he stole the revolver in question and that he tried also to sell the automobile which he must have known did not come from the lawful owner.

I make those remarks about Welch's testimony. I leave it to you to decide how much credit you will place on his testimony after seeing him in the witness box.

In my opinion, the judge's remarks constitute a caution. In particular, the judge alluded to the interest which a witness may have, and this is the justification for the rule of caution regarding the uncorroborated testimony of an accomplice. He further asked the jury to consider Welch's character, his reputation, in conjunction with his past conduct and his actions in the case at bar, after telling them "evidence given by a disreputable person even though he is not an accomplice must be scrutinized and weighed with the greatest care". The judge then stated that he left it to the jury to determine the credibility of the witness. I do not consider that urging the jurors to caution because Welch was an accessory after the fact would have had a different effect on them from that produced by the foregoing remarks, and I have no hesitation in concluding that, in my opinion, no substantial wrong or miscarriage of justice occurred.

This conclusion is strengthened by the fact that, quite apart from Welch's testimony, the evidence appears to be overwhelming in the absence of some explanation: in particular, the possession of the victim's car, the attempt to sell it to a member of the RCMP, and the reasons given to the latter for selling it.

collaboré avec quelqu'un en vue de commettre un acte criminel, ni assisté, conseillé ou encouragé quelqu'un à commettre un tel acte.

S'il est un complice après le fait, et cette conclusion semble plausible, ce n'est pas un complice dans le sens où il doit faire l'objet d'une directive de ma part vous mettant en garde contre le danger de condamner l'accusé sur la foi de son témoignage non corroboré. Mais nos tribunaux d'instance supérieure ont déclaré que le témoignage d'une personne de mauvaise réputation, même si elle n'est pas un complice, doit être étudié et pesé avec le plus grand soin. Aux yeux de la loi, Welch est-il une personne de mauvaise réputation? L'est-il parce qu'il a été déclaré coupable, à un très jeune âge, de possession illégale de boissons alcooliques? Il est vrai qu'il a admis avoir volé le revolver en question et avoir également tenté de vendre l'automobile qu'il savait certes ne pas provenir de son propriétaire légitime.

Ces remarques portent sur le témoignage de Welch. Je vous laisse le soin de décider de la crédibilité de son témoignage après l'avoir entendu à la barre des témoins.

Les remarques du juge constituent à mon sens une mise en garde. Le juge fait allusion en particulier à l'intérêt que peut avoir un témoin, ce qui est la raison d'être de la règle de prudence relative au témoignage non corroboré d'un complice. Il invite en outre le jury à s'interroger sur le caractère, la réputation de Welch en regard de sa conduite passée et de son comportement dans cette affaire, après leur avoir dit [TRADUCTION] «le témoignage d'une personne de mauvaise réputation, même si elle n'est pas un complice, doit être étudié et pesé avec le plus grand soin». Puis le juge laisse au jury, dit-il, le soin de déterminer la crédibilité du témoin. Je ne crois pas que d'inviter les jurés à la prudence parce que Welch était un complice après le fait aurait produit sur eux un effet différent de celui qu'ont pu produire les remarques ci-dessus et je n'hésite pas à conclure qu'à mon avis aucun tort important ou aucune erreur judiciaire grave ne s'est produit.

D'autant plus que, mis à part le témoignage de Welch, la preuve me paraît accablante en l'absence d'une explication, en particulier la possession de la voiture de la victime, la tentative de la vendre à un membre de la Gendarmerie Royale et les raisons données à celui-ci pour la vendre.

1980 CanLII 166 (SCC)

In *Avon v. The Queen*[1], Fauteux C.J., speaking for the majority, wrote at pp. 656 and 657 a passage which I think it is appropriate to cite:

As far as the second grievance raised by appellant is concerned, namely the trial judge's failure to instruct the jury on an accomplice's testimony, Owen J. speaking on behalf of all his colleagues on the Court of Appeal, stated:

However, after considering the record I am of the opinion that a reasonable jury, after being properly directed, would necessarily have found the Appellant guilty of non-capital murder. Therefore, I think this is a case for the application of the provisions of Section 592(1)(*b*)(iii) Cr.C. In my opinion no substantial wrong or miscarriage of justice has occurred by reason of the defective charge with respect to accomplices.

I respectfully agree with these views, and would only add this passage taken from the reasons of Sloan C.J. in *The Queen v. Pavlukoff* (1953), 106 C.C.C. 249, 17 C.R. 215, 10 W.W.R. (N.S.) 26:

... the fact that accused did not testify in the face of inculpatory facts was a matter which the Court of Appeal could place on the scale in applying s. 1014(2).

For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Jean R. Salois, Montreal.

Solicitor for the respondent: Ronald Schachter, Montreal.

[1] [1971] S.C.R. 650.

Dans *Avon c. La Reine*[1], le juge en chef Fauteux au nom de la majorité écrivait aux pp. 656 et 657 ce passage qu'il me paraît pertinent de citer:

En ce qui concerne le second grief soulevé par l'appelant, soit l'omission du juge de première instance d'instruire le jury sur le témoignage d'un complice, M. le juge Owen, parlant pour tous ses collègues de la Cour d'appel, déclara:

[TRADUCTION] Toutefois, après examen du dossier, je suis d'avis qu'un jury raisonnable auquel de bonnes directives ont été données aurait nécessairement conclu que l'appelant était coupable de meurtre non qualifié. Par conséquent, à mon avis, il y a lieu en l'espèce d'appliquer l'article 592(1)(b)(iii) C.Cr. A mon avis, aucun tort important ou aucune erreur judiciaire grave ne s'est produite par suite de directives insuffisantes en ce qui concerne les complices.

Avec ces vues, je suis respectueusement d'accord et me contenterai d'ajouter ce passage extrait des motifs de jugement de M. le juge en chef Sloan dans *Regina v. Pavlukoff* (1953), 106 C.C.C. 249, 17 C.R. 215, 10 W.W.R. (N.S.) 26:

[TRADUCTION] ... que l'accusé n'ait pas témoigné quand des faits l'inculpaient, c'est une question que la Cour d'appel pouvait faire entrer en ligne de compte lorsqu'il s'est agi d'appliquer l'art. 1014(2).

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

Pourvoi rejeté.

Procureur de l'appelant: Jean R. Salois, Montréal.

Procureur de l'intimée: Ronald Schachter, Montréal.

[1] [1971] R.C.S. 650.

1980 CanLII 166 (SCC)

Tab 60

Teal Cedar Products Ltd. *Appellant*

v.

Her Majesty the Queen in Right of the Province of British Columbia *Respondent*

- and -

Teal Cedar Products Ltd. *Appellant*

v.

Her Majesty the Queen in Right of the Province of British Columbia *Respondent*

Teal Cedar Products Ltd. *Appelante*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée*

- et -

Teal Cedar Products Ltd. *Appelante*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée*

Indexed as: Teal Cedar Products Ltd. *v.* British Columbia

2017 SCC 32

File No.: 36595.

2016: November 1; 2017: June 22.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : Teal Cedar Products Ltd. *c.* Colombie-Britannique

2017 CSC 32

N° du greffe : 36595.

2016 : 1er novembre; 2017 : 22 juin.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Jurisdiction — Standard of review — Commercial arbitration awards — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties disagreeing as to amount of compensation owed to forestry company and entering into arbitration — Leave to appeal award sought by parties pursuant to s. 31(2) of the Arbitration Act — Appeal of award dismissed in part but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in construing issues decided by arbitrator as questions of law subject to appellate review — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31.

Contracts — Interpretation — Use of factual matrix — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties entering into agreement to negotiate compensation owed to forestry company for loss of access

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

Arbitrage — Appels — Compétence — Norme de contrôle — Sentences arbitrales commerciales — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Désaccord des parties sur le montant de l'indemnité due à l'entreprise forestière et recours par celles-ci à l'arbitrage — Parties demandant l'autorisation d'interjeter appel de la sentence en vertu de l'art. 31(2) de l'Arbitration Act — Appel de la sentence rejeté en partie mais rejet infirmé par la Cour d'appel — La Cour d'appel a-t-elle fait erreur en considérant les questions tranchées par l'arbitre comme des questions de droit susceptibles de contrôle en appel? — Arbitration Act, R.S.B.C. 1996, c. 55, art. 31.

Contrats — Interprétation — Recours au fondement factuel — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Conclusion par les parties d'une convention en vue de

2017 SCC 32 (CanLII)

to improvements — Agreement precluding payment of interest as part of compensation — Parties disagreeing as to amount of compensation and entering into arbitration — Whether legal question arises from arbitrator's contractual interpretation of forestry company's entitlement to interest.

Natural resources — Forests — Permits and licences — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties disagreeing as to amount of compensation owed to forestry company and entering into arbitration — Whether arbitrator's conclusion that forestry company's losses may be valued on basis of depreciation replacement cost method was reasonable — Forestry Revitalization Act, S.B.C. 2003, c. 17, s. 6(4).

T, a forestry company, holds licences to harvest Crown timber in the province of British Columbia. When the province reduced the volume of T's allowable harvest and deleted certain areas from the related Crown land base, the parties were unable to settle how much compensation the province owed to T for reducing the latter's access to certain improvements such as roads and bridges which T used to harvest the timber. Consequently, their dispute was submitted to arbitration in accordance with the *Forestry Revitalization Act* ("*Revitalization Act*"). The arbitrator was seized of an issue of statutory interpretation to determine the proper valuation method for the improvements pursuant to the *Revitalization Act*, which he found to be the depreciation replacement cost method. The arbitrator also ruled on an issue of contractual interpretation, concluding that an agreement reached by the parties prior to arbitration did not exclude interest from the province's payment of compensation to T for the improvements. Finally, on an issue of statutory application, the arbitrator determined that T was not entitled to compensation for the improvements to which it did not lose access. On appeal, the application judge upheld the arbitrator's award except in connection with the statutory application issue, which was remitted to the arbitrator and resulted in an additional award in an amount equal to the value of the improvements. A majority of the Court of Appeal reversed the application judge's decision, finding that the arbitrator had erred on both the statutory interpretation and contractual interpretation issues, as well as in making his subsequent ruling regarding the statutory application issue. On remand for disposition in accordance with *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2

négocier l'indemnité due à l'entreprise forestière pour la perte de l'accès à des améliorations — Convention écartant le paiement d'intérêts sur l'indemnité — Désaccord des parties sur le montant de l'indemnité et recours par celles-ci à l'arbitrage — Une question de droit découle-t-elle de l'interprétation contractuelle donnée par l'arbitre au droit de l'entreprise forestière de toucher des intérêts?

Ressources naturelles — Forêts — Permis et licences — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Désaccord des parties sur le montant de l'indemnité due à l'entreprise forestière et recours par celles-ci à l'arbitrage — La conclusion de l'arbitre selon laquelle il est possible d'évaluer les pertes de l'entreprise forestière selon la méthode du coût de remplacement déprécié était-elle raisonnable? — Forestry Revitalization Act, S.B.C. 2003, c. 17, art. 6(4).

T, une entreprise forestière, détient des permis de coupe de bois sur des terres de la Couronne dans la province de la Colombie-Britannique. Quand la province a réduit le volume de la coupe autorisée de T et retranché certaines zones du territoire de la Couronne en question, les parties n'ont pas été en mesure de s'entendre sur le montant de l'indemnité que la province devait à T en contrepartie de la réduction de son accès à certaines améliorations, comme des routes et des ponts, qu'utilisait T pour couper le bois. Leur différend a donc été soumis à l'arbitrage conformément à la *Forestry Revitalization Act* (« *Revitalization Act* »). L'arbitre a été saisi d'une question d'interprétation législative pour qu'il choisisse la bonne méthode d'évaluation dans le cas des améliorations en application de la *Revitalization Act* et il a jugé que cette méthode était celle du coût de remplacement déprécié. L'arbitre a également statué sur une question d'interprétation contractuelle, concluant qu'une convention intervenue entre les parties avant l'arbitrage n'excluait pas l'ajout d'intérêts sur le paiement, par la province, d'une indemnité à T pour les améliorations. Enfin, sur une question d'application de la loi, l'arbitre a décidé que T n'avait pas droit à une indemnité pour les améliorations auxquelles elle n'avait pas perdu accès. En appel, le juge saisi de la requête a confirmé la sentence de l'arbitre, sauf relativement à la question de l'application de la loi qui a été renvoyée à l'arbitre et qui a entraîné une sentence additionnelle accordant une somme égale à la valeur des améliorations. Les juges majoritaires de la Cour d'appel ont infirmé la décision du juge saisi de la requête, estimant que l'arbitre avait fait erreur à la fois sur la question d'interprétation législative et celle de l'interprétation

2017 SCC 32 (CanLII)

S.C.R. 633, a unanimous Court of Appeal held that its disposition of the appeal was unaltered by *Sattva*, reaffirming its conclusion that the issues ruled upon by the arbitrator are questions of law subject to appellate review, and that the arbitrator was in error regardless of the standard of review applied.

Held (Moldaver, Côté, Brown and Rowe JJ. dissenting in part): The appeal is allowed in part.

Per McLachlin C.J. and Abella, Karakatsanis, Wagner and Gascon JJ.: The Court of Appeal's decision on remand cannot stand in light of *Sattva*. The process for characterizing a question as one of three principal types — legal, factual, or mixed — is well-established, as confirmed in *Sattva*: legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and mixed questions are questions about whether the facts satisfy the legal test. While the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. Such a legal question, if alleged in the context of a dispute under the *Arbitration Act*, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These extricable questions of law are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions.

Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of

contractuelle de même qu'en rendant sa décision subséquente concernant la question de l'application de la loi. Lorsque l'affaire a été renvoyée à la Cour d'appel pour qu'elle la tranche conformément à *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, la Cour d'appel a jugé à l'unanimité que cet arrêt ne changeait rien à sa décision sur l'appel, répétant sa conclusion que les questions tranchées par l'arbitre sont des questions de droit susceptibles de contrôle en appel et que l'arbitre avait erré, peu importe la norme de contrôle appliquée.

Arrêt (les juges Moldaver, Côté, Brown et Rowe sont dissidents en partie) : Le pourvoi est accueilli en partie.

La juge en chef McLachlin et les juges Abella, Karakatsanis, Wagner et Gascon : La décision rendue par la Cour d'appel à la suite du renvoi ne tient pas eu égard à *Sattva*. La marche à suivre pour qualifier une question selon l'une des trois catégories principales — questions de droit, questions de fait ou questions mixtes — est bien établie, comme le confirme *Sattva* : les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties; et les questions mixtes consistent à déterminer si les faits satisfont au critère juridique. Bien que l'application d'un critère juridique à un ensemble de faits soit une question mixte, si, durant cette application, le critère juridique sous-jacent a pu être altéré, une question de droit se pose. Pareille question de droit, si elle est alléguée dans le contexte d'un différend relevant de l'*Arbitration Act*, et en supposant que les autres exigences relatives à la compétence de cette loi sont satisfaites, est susceptible de contrôle en appel. Il est plus juste d'affirmer que ces questions de droit isolables sont une forme cachée de question de droit — où le critère juridique sur lequel se fonde le juge (ou l'arbitre) peut être déduit de son application au lieu d'être énoncé clairement dans sa description — et non une quatrième catégorie, distincte, de questions.

Les tribunaux doivent cependant faire preuve de prudence lorsqu'ils relèvent des questions de droit isolables parce que les questions mixtes, par définition, comportent des aspects de droit. Les motivations pour lesquelles l'avocat qualifie stratégiquement une question mixte de question de droit — par exemple pour pouvoir saisir un tribunal de l'appel d'une sentence arbitrale ou pour faire appliquer une norme de contrôle favorable dans l'appel d'un jugement en matière civile — sont limpides. Une conception étroite des questions de droit isolables s'accorde avec le caractère définitif de l'arbitrage commercial et, de façon plus générale, avec la déférence à l'égard des conclusions de fait. Les tribunaux doivent

2017 SCC 32 (CanLII)

law), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

se montrer vigilants lorsqu'il s'agit de faire une distinction entre une partie qui allègue que le critère juridique a pu être altéré lors de son application (une question de droit isolable) et une partie qui allègue que le critère juridique, qui n'a pas été altéré, aurait dû, lors de son application, donner lieu à un résultat différent (une question mixte).

The characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction under the *Arbitration Act.* In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review.

Le fait de qualifier une question à l'examen de question mixte plutôt que de question de droit entraîne des différences considérables entre les appels interjetés à l'encontre d'une sentence arbitrale et ceux interjetés à l'encontre d'un jugement en matière civile. L'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'une sentence arbitrale fait échec à la compétence du tribunal en appel suivant l'*Arbitration Act*. À l'inverse, l'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'un jugement en matière civile ne fait que mener à l'application d'une norme de contrôle plus rigoureuse.

Given these principles as confirmed in *Sattva*, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions, and characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix).

Compte tenu de ces principes confirmés dans *Sattva*, la question d'interprétation législative est habituellement qualifiée de question de droit. À l'inverse, le fait de dire qu'une question en est généralement une d'interprétation contractuelle n'établit pas nécessairement la nature de la question en cause. L'interprétation contractuelle met en jeu des questions de fait, des questions de droit et des questions mixtes. Donc, il faut examiner avec délicatesse la question étroite en litige pour qualifier la nature de la question précise posée au tribunal. En général, l'interprétation contractuelle demeure une question mixte et non une question de droit; elle suppose l'application du droit des contrats (principes du droit des contrats) à des faits d'ordre contractuel (le contrat lui-même et son fondement factuel).

In the present case, the statutory interpretation issue, i.e. the issue of selecting a valuation method that complies with the *Revitalization Act*, involves two types of questions: (1) questions about the broad category of methods that are acceptable under the terms of the *Revitalization Act*; and (2) questions about the specific method, within that broad category of acceptable methods, that should ultimately be applied. The former questions — the methods that are acceptable under the *Revitalization Act* — are a matter of statutory interpretation and, accordingly, are questions of law. As a result, the courts have jurisdiction to review the arbitrator's resolution of the issue in so far as that resolution involves identifying a pool of methodologies consistent with the *Revitalization Act*.

En l'espèce, la question d'interprétation législative, — c'est-à-dire la question de choisir une méthode d'évaluation conforme à la *Revitalization Act* — fait entrer en jeu deux types de questions : (1) les questions relatives à la catégorie générale de méthodes qui sont acceptables selon la *Revitalization Act*; et (2) les questions liées à la méthode précise, faisant partie de cette catégorie générale de méthodes acceptables, qui devrait être appliquée en fin de compte. Les premières questions — les méthodes acceptables suivant la *Revitalization Act* — concernent l'interprétation législative et, par conséquent, sont des questions de droit. Ainsi, les tribunaux ont compétence pour contrôler la décision de l'arbitre sur la question dans la mesure où cette décision consistait à cerner un ensemble de méthodes conformes à la *Revitalization Act*.

2017 SCC 32 (CanLII)

The latter questions — the preferable method among those that are consistent with the *Revitalization Act* — are inextricably linked to the evidentiary record at the arbitration hearing, where various experts opined on the virtues of conflicting valuation methodologies. They are mixed questions, if not pure questions of fact. Therefore, the courts lack jurisdiction to review the arbitrator's selection of a specific methodology among the pool of methodologies which are consistent with the *Revitalization Act*.

As for the contractual interpretation issue, the courts have no jurisdiction to review the arbitrator's decision in this regard. The arbitrator, after a lengthy and complex hearing, was best situated to weigh the factual matrix in his interpretation of the parties' agreement regarding the payment of interest. The fact that he may have placed significant weight on that evidence in interpreting the agreement does not engage a legal question conferring jurisdiction on the courts under the *Arbitration Act* as it does not alter the underlying test he applied in this case. Further, the arbitrator's interpretation was rooted in the words of the contract, not overwhelmed by them. While the arbitrator may have placed significant weight on the factual matrix when interpreting the meaning of "compensation", there is no arguable merit to the claim that he interpreted that matrix isolated from the contract's words so as to effectively create a new agreement.

Likewise, on the statutory application issue, the courts have no jurisdiction to review the arbitrator's decision in this regard. The question implicated — whether the arbitrator correctly applied the valuation methodology to a licence — is a mixed question. As such, it is beyond the scope of appellate review.

It follows that the courts' jurisdiction is limited to the statutory interpretation issue of identifying a pool of methodologies consistent with the *Revitalization Act.* The decision made on this issue was rendered in an arbitral context pursuant to the *Arbitration Act.* As confirmed in *Sattva*, the standard of review on legal questions arising from the arbitrator's analysis of this statutory interpretation issue is reasonableness, which is almost always the applicable standard when reviewing commercial arbitration awards. This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. And this preference is not negated here in light of the nature

Les dernières questions — la meilleure méthode parmi celles qui respectent la *Revitalization Act* — sont inextricablement liées au dossier de preuve présenté à l'audience d'arbitrage, où différents experts se sont prononcés sur les vertus de méthodes d'évaluation incompatibles. Ce sont des questions mixtes, voire des questions de fait pures. Par conséquent, les tribunaux n'ont pas compétence pour contrôler la méthode précise choisie par l'arbitre parmi l'ensemble des méthodes conformes à la *Revitalization Act*.

Pour ce qui est de la question de l'interprétation contractuelle, les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre à ce sujet. L'arbitre — après une audience longue et complexe — était le mieux placé pour soupeser le fondement factuel dans son interprétation de la convention intervenue entre les parties à propos du paiement d'intérêts. La possibilité qu'il ait accordé beaucoup de poids à cette preuve dans son interprétation du contrat en question ne soulève pas une question de droit conférant compétence aux tribunaux suivant l'*Arbitration Act*, car cela n'altère pas le critère sous-jacent qu'il a appliqué en l'espèce. En outre, l'interprétation de l'arbitre reposait sur les termes du contrat et n'était pas supplantée par ceux-ci. Bien qu'il ait peut-être accordé beaucoup d'importance au fondement factuel quand il a interprété le sens d'« indemnité », la prétention selon laquelle l'arbitre n'a pas interprété ce fondement séparément des termes du contrat de manière à créer effectivement une nouvelle convention est dépourvue de fondement défendable.

De même, sur la question de l'application de la loi, les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre à ce sujet. La question en cause, qui consiste à savoir si l'arbitre a bien appliqué la méthode d'évaluation à un permis, est une question mixte. Elle échappe donc à la portée du contrôle en appel.

Par conséquent, les tribunaux ont uniquement compétence sur la question de l'interprétation de la loi qui consiste à cerner un ensemble de méthodes conformes à la *Revitalization Act.* La décision sur ce point a été rendue dans un contexte arbitral en application de l'*Arbitration Act.* Comme le confirme l'arrêt *Sattva*, la norme de contrôle applicable aux questions de droit découlant de l'analyse de cette question d'interprétation de la loi effectuée par l'arbitre est celle de la décision raisonnable, la norme qui s'applique presque toujours lorsqu'il s'agit de contrôler des sentences arbitrales commerciales. Ce penchant en faveur de la norme de la décision raisonnable concorde avec les principaux objectifs de politique

2017 SCC 32 (CanLII)

of the question at issue and the arbitrator's presumed expertise.

générale de l'arbitrage commercial, à savoir l'efficacité et le caractère définitif. Et ce penchant n'est pas exclu dans la présente affaire vu la nature de la question en litige et l'expertise présumée de l'arbitre.

It would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. In contrast, where the decision under review is, for example, a civil litigation judgment, the nature of the question is dispositive of the standard of review, with factual and mixed questions being reviewed for palpable and overriding error and legal questions — including extricable questions of law — being reviewed for correctness. It is therefore critical to bear these distinctions in mind when determining the appropriate standard of review in any given case.

Il serait erroné d'affirmer que toutes les interprétations législatives d'un arbitre commandent l'application de la norme de la décision correcte simplement parce qu'elles font intervenir une question de droit. En revanche, lorsque la décision faisant l'objet du contrôle est, par exemple, un jugement en matière civile, la nature de la question permet d'établir la norme de contrôle applicable, puisque les questions de fait et les questions mixtes sont examinées selon la norme de l'erreur manifeste et déterminante et les questions de droit — y compris les questions de droit isolables — doivent l'être en fonction de la norme de la décision correcte. Il est donc crucial de garder ces distinctions à l'esprit lorsque l'on détermine la norme de contrôle applicable dans un cas donné.

The Court of Appeal erroneously held that the standard of review should be correctness for the statutory interpretation issue. Its decision appears to suggest that questions of law, such as statutory interpretation, necessarily attract a correctness standard of review. In so far as the Court of Appeal intended to make this suggestion, it is incorrect. While the nature of the question (legal, mixed, or fact) is dispositive of the standard of review in the civil litigation context, it is not in the arbitration context.

La Cour d'appel a conclu à tort que la norme de contrôle applicable à la question d'interprétation législative devait être celle de la décision correcte. Sa décision semble suggérer que les questions de droit, comme l'interprétation des lois, appellent toujours la norme de la décision correcte. Dans la mesure où la Cour d'appel a voulu faire cette suggestion, celle-ci est erronée. Si la nature de la question (de droit, mixte ou de fait) permet de déterminer la norme de contrôle applicable dans le contexte d'un litige civil, elle ne permet pas de le faire dans le contexte de l'arbitrage commercial.

With respect to the review step of the analysis, the arbitrator's determination that the depreciation replacement cost method was consistent with the *Revitalization Act* was reasonable. This decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law, and the decision was justified, transparent, intelligible, and defensible. The claim that this method results in a windfall begs the question, i.e. it assumes that compensation equal to the value of all improvements is excessive in the course of explaining that excess. And the basis for claiming that excessive compensation was paid in this case is the assumption that it was inappropriate for the arbitrator to order compensation in excess of T's actual costs, despite the absence of any reference in the *Revitalization Act* limiting T's compensation to its actual costs or expenses. The full "value of improvements made to Crown land" is the language chosen by the legislature as the quantum for the compensation provision. If the provincial legislature had wanted to pay companies less than the "value of improvements made to Crown land", it would not have set the amount

En ce qui concerne l'étape du contrôle de l'analyse, la conclusion de l'arbitre selon laquelle la méthode du coût de remplacement déprécié respectait la *Revitalization Act* était raisonnable. Cette décision appartenait aux issues possibles acceptables pouvant se justifier au regard des faits et du droit, et la décision était justifiée, transparente, intelligible et défendable. La prétention selon laquelle cette méthode donne lieu à un gain fortuit élude la question, en ce qu'on tient ainsi pour acquis qu'une indemnité égale à la valeur de toutes les améliorations est excessive alors qu'on est en train d'expliquer cet excès. Et la prétention voulant qu'une indemnité excessive ait été payée en l'espèce repose sur la supposition selon laquelle il ne convenait pas que l'arbitre ordonne le paiement d'une indemnité supérieure aux frais réels de T, malgré l'absence dans la *Revitalization Act* de toute disposition limitant l'indemnité de T à ses frais ou dépenses réels. La pleine « valeur des améliorations apportées aux terres de la Couronne » est l'expression choisie par le législateur pour désigner le montant de l'indemnité dans la disposition d'indemnisation. Si le législateur

2017 SCC 32 (CanLII)

of compensation "equal to" it. As a consequence, the arbitrator's reasoning is hardly indefensible, particularly when the wording of the compensation provision so clearly fixes compensation at the specific amount chosen by the arbitrator. In the end, the legislature is entitled to provide forestry companies with statutory compensation that is not quantified on the basis of the nature of their interests in the Crown land at issue and the arbitrator's interpretation of the compensation provision is accordingly entitled to deference.

provincial avait voulu verser aux entreprises une indemnité inférieure à la « valeur des améliorations apportées aux terres de la Couronne », il n'aurait pas prévu une indemnité « égale à » celle-ci. Le raisonnement de l'arbitre n'est donc guère indéfendable, d'autant plus que le libellé de la disposition d'indemnisation fixe clairement l'indemnité au montant précisément établi par l'arbitre. Au bout du compte, le législateur a le droit d'offrir aux entreprises forestières une indemnité prévue par la loi dont le montant n'est pas fonction de la nature de leur intérêt dans la terre de la Couronne en cause et l'interprétation donnée par l'arbitre à la disposition d'indemnisation commande donc la déférence.

Per Moldaver, Côté, Brown and Rowe JJ. (dissenting in part): Regardless of the applicable standard of review, the arbitrator's interpretation of s. 6(4) of the *Revitalization Act* cannot stand. The only interpretation of s. 6(4) that withstands scrutiny on either standard of review is that T, as a licence holder, was entitled to receive compensation only for its limited interest in the improvements. In valuing the improvements under s. 6(4), the arbitrator was required to take into account that T, as a licence holder, did not own the improvements, which belonged to the Crown.

Les juges Moldaver, Côté, Brown et Rowe (dissidents en partie) : Peu importe la norme de contrôle applicable, l'interprétation que l'arbitre a donnée au par. 6(4) de la *Revitalization Act* ne tient pas. La seule interprétation du par. 6(4) qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle T, en tant que titulaire de permis, n'avait le droit de recevoir une indemnité que pour son intérêt limité dans les améliorations. En évaluant les améliorations en vertu du par. 6(4), l'arbitre devait tenir compte du fait que T, en tant que titulaire de permis, n'était pas propriétaire des améliorations, lesquelles appartenaient à la Couronne.

The plain and ordinary meaning of s. 6(4) is that T is entitled to be compensated on a basis that reflects its limited interest in the improvements as a licence holder. This plain meaning of s. 6(4) is consistent with the purpose of the *Revitalization Act* and its expropriation context. The *Revitalization Act*'s purpose is to reduce the rights of licence holders — specifically, their rights to harvest timber and use the improvements — and to provide licence holders with compensation for these reductions. As a result of the takebacks at issue, reductions were made to T's rights to use the improvements — not ownership rights over such improvements. It runs counter to the purpose of the *Revitalization Act* to award T compensation that exceeds the value of what it lost due to the takebacks.

Le sens ordinaire du par. 6(4) est le suivant : T a le droit d'être indemnisée sur une base reflétant l'intérêt limité qu'elle possède dans les améliorations en tant que titulaire de permis. Ce sens ordinaire du par. 6(4) est compatible avec l'objet de la *Revitalization Act* et son contexte d'expropriation. La *Revitalization Act* vise à réduire les droits des titulaires de permis, plus particulièrement leurs droits de couper du bois et d'utiliser les améliorations, et à indemniser les titulaires de permis pour ces réductions. À la suite des reprises en litige, T a perdu une partie de son droit d'utiliser les améliorations, et non des droits de propriété sur celles-ci. Il va à l'encontre de l'objet de la *Revitalization Act* d'accorder à T une indemnité excédant la valeur de ce qu'elle a perdu en raison des reprises.

The cost savings approach applied by the arbitrator may be an appropriate methodology in the context of privately owned land. But the roads and bridges at issue in this case belonged to the Crown. Given that T did not own the improvements and had only a limited interest in the improvements as a licence holder, it cannot be said that it lost the replacement cost of the improvements when the province made reductions to the land base under its licences, nor can it be said that T would pay the full cost to replace the network of improvements at issue.

L'approche fondée sur les économies de coûts adoptée par l'arbitre peut constituer une méthode adéquate dans le cas des terres privées, mais les routes et les ponts en cause appartenaient à la Couronne. Puisque T n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci en tant que titulaire de permis, on ne saurait affirmer qu'elle a perdu le coût de remplacement des améliorations lorsque la province a réduit le territoire visé par ses permis, et on ne peut pas non plus dire que T paierait le coût total du remplacement du réseau d'améliorations en cause.

2017 SCC 32 (CanLII)

The arbitrator construed s. 6(4) of the *Revitalization Act* too narrowly in concluding that the distinction drawn by this provision between the value of the improvements and the value of the harvesting rights means that the market value of the tenure as a whole cannot be considered when determining the value of the improvements. There is nothing in the language or context of the Act to support this unduly restrictive reading of s. 6(4). On the contrary, it was open to the arbitrator to select any valuation method that could evaluate the value of the improvements to T as a licence holder, as long as the approach valued the improvements as separate and distinct from the harvesting rights.

The market value method was available to the arbitrator under s. 6(4) of the *Revitalization Act*, and yet the arbitrator chose to apply a method that was inconsistent with this provision. This resulted in a substantial windfall for T. The matter of compensation for the improvements relating to the three licences at issue should accordingly be remitted to the arbitrator for reconsideration.

Cases Cited

By Gascon J.

Applied: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; **referred to:** *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

L'arbitre a interprété trop restrictivement le par. 6(4) de la *Revitalization Act* en concluant que la distinction établie par cette disposition entre la valeur des améliorations et celle des droits de coupe signifie que la valeur marchande de l'ensemble de la tenure ne peut être prise en compte pour déterminer la valeur des améliorations. Rien dans le texte ou le contexte de la *Revitalization Act* n'appuie cette interprétation trop restrictive du par. 6(4). Au contraire, il était loisible à l'arbitre de choisir une méthode d'évaluation qui permettait de fixer la valeur des améliorations pour T en tant que titulaire d'un permis, pourvu que l'approche choisie serve à évaluer les améliorations comme élément séparé et distinct des droits de coupe.

L'arbitre pouvait utiliser la méthode de la valeur marchande en vertu du par. 6(4) de la *Revitalization Act*. Pourtant, il a choisi de recourir à une méthode incompatible avec cette disposition, ce qui a permis à T de réaliser un gain fortuit substantiel. La question de l'indemnité pour les améliorations concernant les trois permis en litige doit donc être renvoyée à l'arbitre pour nouvel examen.

Jurisprudence

Citée par le juge Gascon

Arrêt appliqué : *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633; **arrêts mentionnés :** *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306; *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135; *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. c. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32; *Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770.

2017 SCC 32 (CanLII)

By Moldaver and Côté JJ. (dissenting in part)

CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *British Columbia (Forests) v. Teal Cedar Products Ltd.*, 2013 SCC 51, [2013] 3 S.C.R. 301; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712; *MacMillan Bloedel Ltd. v. British Columbia* (1995), 12 B.C.L.R. (3d) 134.

Statutes and Regulations Cited

Arbitration Act, R.S.B.C. 1996, c. 55, s. 31.
Forest Act, R.S.B.C. 1996, c. 157.
Forest Planning and Practices Regulation, B.C. Reg. 14/2004, s. 79(2).
Forestry Revitalization Act, S.B.C. 2003, c. 17, ss. 6, 13.

Authors Cited

British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess., 37th Parl., March 27, 2003, p. 5682.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed. Toronto: LexisNexis, 2016.
Mullan, David. "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1.
Shorter Oxford English Dictionary on Historical Principles, 6th ed. by Angus Stevenson. Oxford: Oxford University Press, 2007, "compensation".
Todd, Eric C. E. *The Law of Expropriation and Compensation in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1992.

APPEAL from a judgment of the British Columbia Court of Appeal (Lowry, Chiasson and MacKenzie JJ.A.), 2015 BCCA 263, 70 B.C.L.R. (5th) 320, 373 B.C.A.C. 211, 641 W.A.C. 211, 386 D.L.R. (4th) 40, 115 L.C.R. 1, [2015] B.C.J. No. 1180 (QL), 2015 CarswellBC 1550 (WL Can.), affirming on remand a judgment of the British Columbia Court of Appeal (Finch C.J. and Lowry and MacKenzie JJ.A.), 2013 BCCA 326, 46 B.C.L.R.

Citée par les juges Moldaver et Côté (dissidents en partie)

CanadianOxy Chemicals Ltd. c. Canada (Procureur général), [1999] 1 R.C.S. 743; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *Colombie-Britannique (Forêts) c. Teal Cedar Products Ltd.*, 2013 CSC 51, [2013] 3 R.C.S. 301; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160; *Diggon-Hibben, Ltd. c. The King*, [1949] R.C.S. 712; *MacMillan Bloedel Ltd. c. British Columbia* (1995), 12 B.C.L.R. (3d) 134.

Lois et règlements cités

Arbitration Act, R.S.B.C. 1996, c. 55, art. 31.
Forest Act, R.S.B.C. 1996, c. 157.
Forest Planning and Practices Regulation, B.C. Reg. 14/2004, art. 79(2).
Forestry Revitalization Act, S.B.C. 2003, c. 17, art. 6, 13.

Doctrine et autres documents cités

Colombie-Britannique. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess., 37th Parl., March 27, 2003, p. 5682.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983.
Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed., Toronto, LexisNexis, 2016.
Mullan, David. « Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen! » (2013), 42 *Adv. Q.* 1.
Shorter Oxford English Dictionary on Historical Principles, 6th ed. by Angus Stevenson, Oxford, Oxford University Press, 2007, « *compensation* ».
Todd, Eric C. E. *The Law of Expropriation and Compensation in Canada*, 2nd ed., Scarborough (Ont.), Carswell, 1992.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Lowry, Chiasson et MacKenzie), 2015 BCCA 263, 70 B.C.L.R. (5th) 320, 373 B.C.A.C. 211, 641 W.A.C. 211, 386 D.L.R. (4th) 40, 115 L.C.R. 1, [2015] B.C.J. No. 1180 (QL), 2015 CarswellBC 1550 (WL Can.), qui a confirmé après renvoi un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Finch et les juges Lowry et MacKenzie), 2013 BCCA

2017 SCC 32 (CanLII)

(5th) 272, 340 B.C.A.C. 256, 579 W.A.C. 256, 364 D.L.R. (4th) 465, 109 L.C.R. 276, [2013] B.C.J. No. 1480 (QL), 2013 CarswellBC 2059 (WL Can.), setting aside a decision of Bauman C.J., 2012 BCSC 543, [2012] B.C.J. No. 735 (QL), 2012 CarswellBC 1054 (WL Can.), which partially upheld an arbitrator's decision. Appeal allowed in part, Moldaver, Côté, Brown and Rowe JJ. dissenting in part.

John J. L. Hunter, *Q.C.*, *Mark S. Oulton* and *K. Michael Stephens*, for the appellant.

Karen A. Horsman, *Q.C.*, *Barbara A. Carmichael* and *Micah Weintraub*, for the respondent.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner and Gascon JJ. was delivered by

Gascon J. —

I. Overview

[1] In British Columbia, the scope of appellate intervention in commercial arbitration is narrow in two key ways. First, there is limited jurisdiction for appellate review of arbitration awards because that jurisdiction is statutorily limited to questions of law (*Arbitration Act*, R.S.B.C. 1996, c. 55, s. 31). Second, even where such jurisdiction exists, our Court recently held that a deferential standard of review — reasonableness — "almost always" applies to arbitration awards (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 75, 104 and 106). Together, limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality.

[2] The Province of British Columbia ("BC") and a forestry company, Teal Cedar Products Ltd. ("Teal Cedar"), were unable to settle how much compensation BC owed to Teal Cedar for reducing the latter's access to certain improvements on Crown land — such as roads and bridges — which it used to harvest

326, 46 B.C.L.R. (5th) 272, 340 B.C.A.C. 256, 579 W.A.C. 256, 364 D.L.R. (4th) 465, 109 L.C.R. 276, [2013] B.C.J. No. 1480 (QL), 2013 CarswellBC 2059 (WL Can.), lequel avait infirmé une décision du juge en chef Bauman, 2012 BCSC 543, [2012] B.C.J. No. 735 (QL), 2012 CarswellBC 1054 (WL Can.), confirmant en partie une sentence arbitrale. Pourvoi accueilli en partie, les juges Moldaver, Côté, Brown et Rowe sont dissidents en partie.

John J. L. Hunter, *c.r.*, *Mark S. Oulton* et *K. Michael Stephens*, pour l'appelante.

Karen A. Horsman, *c.r.*, *Barbara A. Carmichael* et *Micah Weintraub*, pour l'intimée.

Version française du jugement de la juge en chef McLachlin et des juges Abella, Karakatsanis, Wagner et Gascon rendu par

Le juge Gascon —

I. Aperçu

[1] En Colombie-Britannique, la portée de l'intervention d'une cour d'appel dans les arbitrages commerciaux est circonscrite par deux facteurs principaux. D'abord, la loi prévoit que le contrôle en appel des sentences arbitrales ne doit porter que sur des questions de droit (*Arbitration Act*, R.S.B.C. 1996, c. 55, art. 31). Ensuite, même lorsqu'une telle compétence existe, notre Cour a récemment conclu qu'une norme de contrôle empreinte de déférence, soit la norme de la décision raisonnable, s'applique « presque toujours » aux sentences arbitrales (*Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, par. 75, 104 et 106). Ensemble, la compétence limitée et le contrôle empreint de déférence contribuent à la réalisation des objectifs fondamentaux de l'arbitrage commercial : l'efficacité et le caractère définitif.

[2] La province de la Colombie-Britannique (« C.-B. ») et Teal Cedar Products Ltd. (« Teal Cedar »), une entreprise forestière, n'ont pas été en mesure de s'entendre sur le montant de l'indemnité que la Colombie-Britannique devait à Teal Cedar en contrepartie de la réduction de son accès à certaines

2017 SCC 32 (CanLII)

timber. Consequently, their dispute was submitted to arbitration as required by the applicable legislation, the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 ("*Revitalization Act*"). Teal Cedar, for the most part, won. Three questions arising from the arbitrator's award are the subject of this appeal.

[3] First, there is a question of statutory interpretation: whether the arbitrator erred in selecting a valuation method that was allegedly inconsistent with the section of the *Revitalization Act* providing Teal Cedar with compensation. In my opinion, this is a question of law falling within the scope of appellate review permitted under the *Arbitration Act*. However, the arbitrator, who relied on the plain meaning of the statute prescribing that valuation, reasonably selected a suitable valuation method. Accordingly, I find that his award in this regard cannot be overturned.

[4] Second, there is a question of contractual interpretation: whether the arbitrator let the factual matrix overwhelm the words of the contract when he interpreted an amended settlement agreement between the parties in light of the factual matrix of their failed negotiations. This question may be formulated in two ways: (1) whether the arbitrator allocated excessive weight to the factual matrix; or (2) whether the arbitrator's interpretation of the factual matrix was isolated from the words of the contract. The former formulation is a question of mixed fact and law and thus falls outside the scope of appellate review permitted under the *Arbitration Act*. The latter formulation, while it raises a question of law, lacks arguable merit in this case because the arbitrator's interpretation was clearly anchored in the words of the contract, which he interpreted in light of the factual matrix. Without arguable merit, this formulation also fails to confer appellate review jurisdiction under the *Arbitration Act*.

[5] Third, there is a question of statutory application: whether the arbitrator erred in denying compensation to Teal Cedar relating to the improvements

améliorations sur des terres de la Couronne (comme des routes et des ponts) qu'utilisait Teal Cedar pour couper du bois. Leur différend a donc été soumis à l'arbitrage, comme l'exige la loi applicable, la *Forestry Revitalization Act*, S.B.C. 2003, c. 17 (« *Revitalization Act* »). Teal Cedar a eu gain de cause en majeure partie. Trois questions découlant de la sentence de l'arbitre font l'objet du présent pourvoi.

[3] La première question porte sur l'interprétation de la loi : l'arbitre a-t-il commis une erreur en choisissant une méthode d'évaluation qui serait incompatible avec l'article de la *Revitalization Act* accordant une indemnité à Teal Cedar? Selon moi, il s'agit d'une question de droit relevant du contrôle en appel autorisé par l'*Arbitration Act*. Cependant, l'arbitre, qui s'est fondé sur le sens ordinaire de la loi prévoyant une telle évaluation, a choisi de manière raisonnable une méthode d'évaluation convenable. En conséquence, j'estime que sa sentence à cet égard ne peut être infirmée.

[4] La deuxième question en est une d'interprétation contractuelle : l'arbitre a-t-il laissé le fondement factuel supplanter les termes du contrat lorsqu'il a interprété une convention de règlement modifiée intervenue entre les parties eu égard au fondement factuel de l'échec de leurs négociations? Cette question peut être formulée de deux façons : (1) l'arbitre a-t-il accordé trop de poids au fondement factuel; ou (2) l'arbitre a-t-il interprété le fondement factuel séparément des termes du contrat? La première formulation est une question mixte de fait et de droit qui échappe de ce fait à la portée du contrôle en appel autorisé par l'*Arbitration Act*. Bien qu'elle soulève une question de droit, la deuxième formulation est dépourvue de fondement défendable en l'espèce parce que l'interprétation de l'arbitre se fondait clairement sur les termes du contrat qu'il a interprétés à la lumière du fondement factuel. Sans fondement défendable, cette formulation ne confère pas non plus de compétence pour procéder à un contrôle en appel selon l'*Arbitration Act*.

[5] La troisième question a trait à l'application de la loi : l'arbitre a-t-il commis une erreur en refusant que Teal Cedar touche une indemnité

2017 SCC 32 (CanLII)

associated with one of its licences because it never lost access to those improvements, in contrast with the other licences where it lost such access. Teal Cedar's licence for that area is referred to in these reasons as the Lillooet Licence. This question involves the application of a specific valuation methodology to the intricate facts before the arbitrator, which qualitatively distinguished the Lillooet Licence from the other licences in dispute. On that basis, I consider that this a question of mixed fact and law outside the scope of appellate review permitted under the *Arbitration Act*.

[6] As the Court of Appeal below reached the opposite conclusion on the first two questions, I would allow the appeal in part. Like the application judge, I would confirm the arbitrator's award on these two questions. However, on the third question, like the Court of Appeal this time, I would restore the arbitrator's original ruling that BC owed Teal Cedar no compensation relating to improvements for the Lillooet Licence.

II. Context

A. *The Timber Licences and the Revitalization Act*

[7] In British Columbia, forestry companies hold licences which regulate how those companies may harvest Crown timber. The appellant, Teal Cedar, is one such forestry company. Three of Teal Cedar's licences are relevant to the current dispute, namely: (1) Forest Licence A19201 in the Fraser Timber Supply Area; (2) Tree Farm Licence 46 located on Vancouver Island; and (3) Forest Licence A18699 in the Lillooet Timber Supply Area ("Lillooet Licence"). In general terms, these licences entitle Teal Cedar to harvest timber and to use improvements, such as roads and bridges, to access timber.

relativement aux améliorations liées à l'un de ses permis parce qu'elle n'a jamais perdu son accès à ces améliorations, contrairement aux autres permis à l'égard desquels elle a perdu cet accès? Le permis de Teal Cedar visant cette zone est appelé le permis Lillooet dans les présents motifs. Cette question implique l'application d'une méthode d'évaluation précise aux faits complexes présentés à l'arbitre, qui a établi une distinction sur le plan qualitatif entre le permis Lillooet et les autres permis en cause. Pour cette raison, j'estime qu'il s'agit d'une question mixte de fait et de droit qui échappe à la portée du contrôle en appel autorisé par l'*Arbitration Act*.

[6] Puisque la Cour d'appel est parvenue à la conclusion contraire sur les deux premières questions, j'accueillerais le pourvoi en partie. À l'instar du juge saisi de la requête, je suis d'avis de confirmer la sentence de l'arbitre sur ces deux questions. Cependant, en ce qui concerne la troisième question, à l'instar de la Cour d'appel cette fois-ci, je suis d'avis de rétablir la décision initiale de l'arbitre selon laquelle la C.-B. ne devait aucune indemnité à Teal Cedar relativement aux améliorations liées au permis Lillooet.

II. Contexte

A. *Les permis d'exploitation et la Revitalization Act*

[7] En Colombie-Britannique, les entreprises forestières détiennent des permis précisant la manière dont elles peuvent couper du bois sur les terres de la Couronne. L'appelante, Teal Cedar, est l'une de ces entreprises. Le litige actuel concerne trois des permis de Teal Cedar, soit : (1) le permis d'exploitation forestière A19201 dans la zone d'approvisionnement en bois de Fraser; (2) le permis de ferme forestière 46 sur l'île de Vancouver; (3) le permis d'exploitation forestière A18699 dans la zone d'approvisionnement en bois de Lillooet (« permis Lillooet »). De façon générale, ces permis autorisent Teal Cedar à couper du bois et à utiliser les améliorations comme les routes et les ponts pour s'y rendre.

2017 SCC 32 (CanLII)

[8] In 2003, the respondent, BC, enacted the *Revitalization Act*. This Act changed forestry companies' rights under their licences by deleting areas from their land base and reducing the volume of their allowable harvest. In particular, Teal Cedar's licences were affected as follows:

(a) The Fraser Timber Supply Area licence's allowable harvest was reduced by 37,500 cubic metres and many of Teal Cedar's chart areas were removed from the associated land base.

(b) The Vancouver Island licence's allowable harvest was reduced by 130,637 cubic metres and many of Teal Cedar's operating areas were removed from the associated land base.

(c) The Lillooet Licence's allowable harvest was reduced by 48,078 cubic metres, but, unlike the other two licences, this licence never lost any areas in its associated land base.

[9] In response to these changes, the *Revitalization Act* provided compensation to forestry companies. The amount of that statutory compensation is at the heart of the dispute between BC and Teal Cedar. The relevant compensation provision is s. 6 and, in particular, subs. (4), which provides forestry companies with "compensation from the government in an amount equal to the value of improvements made to Crown land":

Compensation

6 (1) Each holder of an ungrouped licence is entitled to compensation from the government for a reduction under section 2 (1) of the allowable annual cut of the ungrouped licence, in an amount equal to the value, for the unexpired portion of the term of the licence, of the harvesting rights taken by means of the reduction.

[8] En 2003, l'intimée, la C.-B., a adopté la *Revitalization Act*, qui a modifié les droits que conféraient aux entreprises forestières leurs permis en retranchant des zones de leur territoire et en réduisant le volume de leur coupe autorisée. Tout particulièrement, voici comment ont été touchés les permis de Teal Cedar :

a) Le volume de la coupe autorisée par le permis visant la zone d'approvisionnement en bois de Fraser a été réduit de 37 500 mètres cubes et de nombreuses zones de Teal Cedar ont été retranchées du territoire qui s'y rattache.

b) Le volume de la coupe autorisée par le permis visant l'île de Vancouver a été réduit de 130 637 mètres cubes et de nombreuses zones où Teal Cedar exerçait ses activités ont été retranchées du territoire qui s'y rattache.

c) Le volume de la coupe autorisée par le permis Lillooet a été réduit de 48 078 mètres cubes, mais, contrairement aux deux autres permis, aucune zone du territoire se rattachant à ce permis n'a été perdue à quelque moment que ce soit.

[9] En raison des changements susmentionnés, la *Revitalization Act* a accordé une indemnité aux entreprises forestières. Le montant de cette indemnité prévue par la loi est au cœur du litige opposant la C.-B. à Teal Cedar. La disposition pertinente en la matière est l'art. 6, tout particulièrement le par. (4) selon lequel les entreprises forestières ont droit, [TRADUCTION] « de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne » :

[TRADUCTION]

Indemnité

6 (1) Chaque titulaire d'un permis distinct a droit, de la part du gouvernement, à une indemnité pour la réduction, prévue au paragraphe 2 (1), de la coupe annuelle autorisée par le permis distinct; le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de la réduction pour la partie non écoulée de la durée du permis.

2017 SCC 32 (CanLII)

(2) Each holder of a timber licence is entitled to compensation from the government in respect of the part, if any, of a reduction in the area of Crown land described in the timber licence that is made under section 2 (2) and that is attributed under section 3 (1) to that licence in an amount equal to the value of the harvesting rights taken by means of the reduction.

(3) Each holder of a licence in a group of licences is entitled to compensation from the government in respect of the part, if any, of a reduction of the allowable annual cut of the licence that is made under section 2 (3) and that is attributed under section 3 (2) to that licence, in an amount equal to the value, for the unexpired portion of the term of the licence, of the harvesting rights taken by means of the reduction.

(4) In addition to the compensation to which the holder of an ungrouped licence, a timber licence or a licence in a group of licences is entitled under subsection (1), (2) or (3), the holder is entitled to compensation from the government in an amount equal to the value of improvements made to Crown land that

(a) are, or have been, authorized by the government,

(b) are not improvements to which section 174 of the *Forest Practices Code of British Columbia Act* applies, and

(c) are not, or have not been, paid for by the government under the *Forest Act* or the former Act as defined in the *Forest Act*.

(4.1) Subsection (4) also applies to a holder of a tree farm licence that is subject to a deletion of Crown land from the tree farm licence area under section 39.1 of the *Forest Act*, if the deletion

(a) is in respect of a reduction of allowable annual cut under section 3 (3) of this Act, and

(b) is made before the date this subsection comes into force.

(5) An entitlement to compensation under this section vests in the holder to which it applies on March 31, 2003.

(2) Chaque titulaire d'un permis d'exploitation a droit, de la part du gouvernement, à une indemnité pour la partie, attribuée en vertu du paragraphe 3 (1) à ce permis, s'il en est, de l'amputation des terres de la Couronne décrites dans le permis de coupe qui est faite en vertu du paragraphe 2 (2); le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de l'amputation.

(3) Chaque titulaire d'un permis faisant partie d'un groupe de permis a droit, de la part du gouvernement, à une indemnité pour la partie, attribuée en vertu du paragraphe 3 (2) à ce permis, s'il en est, de la réduction, en vertu du paragraphe 2 (3), de la coupe annuelle autorisée par le permis; le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de la réduction pour la partie non écoulée de la durée du permis.

(4) Outre l'indemnité à laquelle a droit le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis en vertu du paragraphe (1), (2) ou (3), le titulaire a droit, de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne :

(a) qui sont ou ont été autorisées par le gouvernement,

(b) auxquelles ne s'applique pas l'article 174 du *Forest Practices Code of British Columbia Act*, et

(c) qui ne sont pas ou n'ont pas été payées par le gouvernement conformément à la *Forest Act* ou à l'ancienne loi au sens de la *Forest Act*.

(4.1) Le paragraphe (4) s'applique également au titulaire d'un permis de ferme forestière assujetti au retranchement de terres de la Couronne de l'aire visée par ce permis selon l'article 39.1 de la *Forest Act*, si le retranchement

(a) a trait à une réduction, prévue par le paragraphe 3 (3) de la présente loi, de la coupe annuelle autorisée et

(b) se fait avant la date d'entrée en vigueur du présent paragraphe.

(5) Le droit à une indemnité conféré par le présent article est dévolu au titulaire à qui il revient le 31 mars 2003.

2017 SCC 32 (CanLII)

(6) A dispute between the minister and the holder of an ungrouped licence, a timber licence or a licence in a group of licences as to the amount of the compensation to which the holder is entitled under this section must be submitted to arbitration under the *Arbitration Act*.

[10] Conceptually, s. 6 provides for two types of compensation, namely compensation for: (1) reductions to harvesting rights ("Rights Compensation", provided for in subss. (1) to (3)); and (2) the value of improvements made to Crown land ("Improvements Compensation", provided for in s. 6(4)).

[11] The *Revitalization Act* permits the Lieutenant Governor in Council to make regulations concerning, among other things, this compensation provision:

Regulations

13 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) defining a word or expression not otherwise defined in this Act, and

(b) for the purposes of section 6, prescribing respecting value, including but not limited to

(i) determining value and defining the components that comprise value,

(ii) prescribing methods of evaluation for use in determining value,

(iii) prescribing factors to be taken into account in an evaluation,

(iv) defining the role of evaluators in a determination of value and prescribing qualifications for evaluators that are prerequisite to their participation in the determination of value, and

(v) prescribing requirements for the selection of arbitrators.

(6) Le litige opposant le ministre et le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis quant au montant de l'indemnité à laquelle a droit le titulaire en vertu du présent article est soumis à l'arbitrage selon l'*Arbitration Act*.

[10] Sur le plan conceptuel, l'art. 6 accorde deux types d'indemnité, à savoir une indemnité pour : (1) la réduction des droits de coupe (« indemnité visant les droits », prévue aux par. 6(1) à (3)); et (2) la valeur des améliorations apportées aux terres de la Couronne (« indemnité visant les améliorations » prévue au par. 6(4)).

[11] La *Revitalization Act* permet au lieutenant-gouverneur en conseil de prendre des règlements concernant entre autres cette disposition d'indemnisation :

[TRADUCTION]

Règlements

13 (1) Le lieutenant-gouverneur en conseil peut prendre les règlements visés à l'article 41 de l'*Interpretation Act*.

(2) Sans limiter la portée du paragraphe précédent, le lieutenant-gouverneur en conseil peut prendre des règlements

(a) définissant un mot ou une expression que la présente loi ne définit pas autrement,

(b) prescrivant entre autres ce qui suit quant à la valeur pour l'application de l'article 6 :

(i) la détermination de la valeur et la définition de ses éléments,

(ii) les méthodes d'évaluation à utiliser pour déterminer la valeur,

(iii) les facteurs à prendre en considération dans une évaluation,

(iv) la définition du rôle joué par les évaluateurs dans la détermination de la valeur et les qualifications qu'ils doivent posséder pour participer à la détermination de la valeur, et

(v) les exigences liées à la sélection des arbitres.

2017 SCC 32 (CanLII)

Accordingly, while s. 6(4) of the *Revitalization Act* provides for Improvements Compensation "in an amount equal to the value of improvements made to Crown land", s. 13(2)(b)(ii) anticipates regulations "prescribing methods of evaluation for use in determining" that value. However, neither at the time of the dispute nor at the time of the hearing before this Court had any regulations been passed prescribing those valuation methods.

[12] Lastly, in terms of process, s. 6(6) of the *Revitalization Act* provides that disputes relating to the amount of compensation BC owes to a forestry company must be submitted to arbitration. Again, the *Revitalization Act* permits the Lieutenant Governor in Council to make regulations "prescribing requirements for the selection of arbitrators" (s. 13(2)(b)(v)). As with the anticipated regulations concerning valuation methods, neither at the time of the dispute nor at the time of the hearing before this Court had any regulations been passed prescribing arbitrator selection requirements. Consequently, up until the time of the hearing before this Court, arbitrations regarding compensation under the *Revitalization Act* were presided over by arbitrators chosen by consent of the parties. There was no list of arbitrators limiting party autonomy in this respect.

B. *The Dispute Between Teal Cedar and British Columbia*

[13] Teal Cedar suffered compensable losses under the *Revitalization Act*. It negotiated the value of those losses with BC and the parties reached a partial settlement. They were able to settle the value of the Rights Compensation owed to Teal Cedar, but they were unable to settle the value of the Improvements Compensation.

[14] To confirm their partial settlement and provide guidelines for their ongoing negotiations, the parties executed a Settlement Framework Agreement. That agreement contained a "No Interest Clause", which precluded interest payments to Teal Cedar:

En conséquence, alors que le par. 6(4) de la *Revitalization Act* accorde une indemnité visant les améliorations « égale à la valeur des améliorations apportées aux terres de la Couronne », le sous-al. 13(2)(b)(ii) anticipe des règlements « prescrivant [. . .] les méthodes d'évaluation à utiliser pour déterminer » cette valeur. Or, aucun règlement prescrivant ces méthodes d'évaluation n'a été pris, que ce soit au moment du litige ou au moment de l'audience devant la Cour.

[12] En dernier lieu, pour ce qui est du processus, le par. 6(6) de la *Revitalization Act* dispose que le litige relatif au montant de l'indemnité que doit la C.-B. à une entreprise forestière doit être soumis à l'arbitrage. Encore une fois, la *Revitalization Act* permet au lieutenant-gouverneur en conseil de prendre des règlements « prescrivant [. . .] les exigences liées à la sélection des arbitres » (sous-al. 13(2)(b)(v)). Tout comme dans le cas des règlements anticipés sur les méthodes d'évaluation, aucun règlement prescrivant les exigences liées à la sélection des arbitres n'a été pris, que ce soit au moment du litige ou au moment de l'audience devant la Cour. Par conséquent, avant l'audience devant la Cour, les arbitrages sur une indemnité visée par la *Revitalization Act* étaient présidés par des arbitres désignés sur consentement des parties. Aucune liste d'arbitres ne restreignait l'autonomie des parties en la matière.

B. *Le litige opposant Teal Cedar à la Colombie-Britannique*

[13] Teal Cedar a subi des pertes indemnisables au sens de la *Revitalization Act*. Elle a négocié la valeur de ces pertes avec la C.-B. et les parties sont parvenues à un règlement partiel. Elles sont arrivées à s'entendre sur la valeur de l'indemnité visant les droits due à Teal Cedar, mais elles n'ont pu s'entendre sur la valeur de l'indemnité visant les améliorations.

[14] Pour confirmer leur règlement partiel et établir des lignes directrices en vue de la poursuite de leurs négociations, les parties ont signé une convention cadre de règlement. Cette convention contenait une « clause zéro intérêt » qui empêchait de verser des intérêts à Teal Cedar :

2017 SCC 32 (CanLII)

No interest shall be payable by [BC] in respect to this or any other compensation that may be due to [Teal Cedar] under the [*Revitalization Act*].

(A.R., vol. I, at p. 225)

[15] Negotiations about the value of the Improvements Compensation were ultimately unsuccessful. Accordingly, 10 months after the Settlement Framework Agreement was first executed, the parties signed an amendment to that agreement ("Amendment"), resulting in a new agreement combining the Settlement Framework Agreement with the Amendment ("Amended Agreement"). The Amended Agreement provided that the parties were unable to agree on the proper amount of compensation, and thus, would submit the valuation of "compensation" to arbitration ("Arbitration Clause"):

[BC] hereby acknowledges that a dispute exists between the Parties and [Teal Cedar] intends to submit the dispute between the Parties as to the amount of the compensation for the Improvements to which it is entitled for arbitration pursuant to Section 6(6) of the [*Revitalization Act*].

(A.R., vol. I, at p. 228)

[16] As there were no regulations prescribing the requirements for arbitrators, the parties were free to choose who would preside over the arbitration. They ultimately selected Thomas Braidwood, Q.C., a former Justice of the British Columbia Court of Appeal.

III. Judicial History

[17] At the initial arbitration, there were two primary questions of interpretation, which have remained contested up to and including the appeal before this Court. Those questions of interpretation — one statutory and one contractual — are the following:

(a) What valuation methods for Improvements Compensation are consistent with the *Revitalization Act*? ("Valuation Issue")

[TRADUCTION] La [C.-B.] n'est tenue de payer aucun intérêt à l'égard de cette indemnité ou de toute autre indemnité qui pourrait être due à [Teal Cedar] selon la [*Revitalization Act*].

(d.a., vol. I, p. 225)

[15] Les négociations sur la valeur de l'indemnité visant les améliorations n'ont finalement pas abouti. Par conséquent, 10 mois après la conclusion de la convention cadre de règlement, les parties ont signé une modification de cette convention (« Modification »), ce qui a fait naître une nouvelle convention regroupant la convention cadre de règlement et la Modification (« convention modifiée »). La convention modifiée précisait que les parties n'étaient pas parvenues à s'entendre sur le juste montant de l'indemnité et qu'elles soumettraient donc à l'arbitrage l'évaluation de « l'indemnité » (« clause d'arbitrage ») :

[TRADUCTION] [La C.-B.] reconnaît par les présentes qu'il y a un différend entre les parties et [Teal Cedar] compte soumettre à l'arbitrage, selon le paragraphe 6 (6) de la [*Revitalization Act*], le litige quant au montant de l'indemnité visant les améliorations à laquelle elle a droit.

(d.a., vol. I, p. 228)

[16] Puisqu'aucun règlement ne prescrivait les exigences applicables aux arbitres, les parties pouvaient choisir la personne qui présiderait l'arbitrage. Elles ont fini par sélectionner Thomas Braidwood, c.r., un ancien juge de la Cour d'appel de la Colombie-Britannique.

III. Historique judiciaire

[17] À l'arbitrage initial, deux principales questions d'interprétation se posaient, et elles sont demeurées en litige jusqu'au présent pourvoi. Ces questions d'interprétation — l'une législative et l'autre contractuelle — sont les suivantes :

a) Quelles méthodes d'évaluation de l'indemnité visant les améliorations sont conformes à la *Revitalization Act*? (« question de l'évaluation »)

2017 SCC 32 (CanLII)

(b) Does the "compensation" for improvements submitted to arbitration under the Amended Agreement include interest? ("Interest Issue")

[18] In addition, another question emerged concerning Teal Cedar's entitlement to compensation for improvements losses relating to the Lillooet Licence ("Lillooet Issue").

A. *Arbitration Award (Thomas Braidwood, Q.C. — April 27, 2011, Amended June 30, 2011)*

[19] On the Valuation Issue, the arbitrator had to determine the proper valuation method for Improvements Compensation because no regulations prescribing such a method had been passed. During a "lengthy and complex hearing" (as noted by the application judge, at para. 7), he was presented with three "generally recognized valuation approaches" (para. 112):

(a) the "Market Value Method", which the arbitrator rejected because the method is based on determining the market value of the improvements, and BC's own expert conceded that no such market value exists in respect of improvements on Crown land (para. 113);

(b) the "Income Method", which the arbitrator similarly rejected because the method is based on determining the income generated by the improvements, and BC's own expert conceded that no such income exists in respect of improvements on Crown land (para. 113); and

(c) the "Depreciation Replacement Cost Method", which the arbitrator accepted (paras. 93-94). This method, in simplified terms, valuates Improvements Compensation by estimating the notional cost of rebuilding the improvements from scratch (replacement) to their current degraded condition (depreciation). The arbitrator accepted this method in part because it was the only valuation methodology presented which determined

b) L'« indemnité » visant les améliorations soumise à l'arbitrage en vertu de la convention modifiée inclut-elle des intérêts? (« question des intérêts »)

[18] De plus, une autre question a été soulevée en ce qui a trait au droit de Teal Cedar à une indemnité pour les pertes liées aux améliorations se rapportant au permis Lillooet (« question du permis Lillooet »).

A. *Sentence arbitrale (Thomas Braidwood, c.r. — 27 avril 2011, modifiée le 30 juin 2011)*

[19] En ce qui concerne la question de l'évaluation, l'arbitre devait choisir la bonne méthode à employer pour évaluer l'indemnité visant les améliorations parce qu'aucun règlement prescrivant pareille méthode n'avait été pris. Au cours d'une « audience longue et complexe » (comme l'a noté le juge saisi de la requête, au par. 7), on lui a proposé trois [TRADUCTION] « méthodes d'évaluation généralement reconnues » (par. 112) :

a) La « méthode de la valeur marchande », que l'arbitre a rejetée parce qu'elle consiste à déterminer la valeur marchande des améliorations, et le propre expert de la Colombie-Britannique a concédé que les améliorations sur les terres de la Couronne n'avaient aucune valeur marchande (par. 113);

b) La « méthode fondée sur le revenu », que l'arbitre a rejetée elle aussi car elle consiste à déterminer le revenu généré par les améliorations, et le propre expert de la Colombie-Britannique a concédé que les améliorations sur les terres de la Couronne ne génèrent pas de revenu (par. 113);

c) La « méthode du coût de remplacement déprécié », que l'arbitre a retenue (par. 93-94). En termes simples, cette méthode consiste à évaluer l'indemnité visant les améliorations en estimant le coût théorique de la remise des améliorations à leur état actuel de dégradation (dépréciation), à partir de zéro (remplacement). L'arbitre a retenu cette méthode notamment parce que c'était la seule méthode d'évaluation proposée qui servait

2017 SCC 32 (CanLII)

Improvements Compensation separately from Rights Compensation, in keeping with their separate treatment in the *Revitalization Act* (para. 94; see *Revitalization Act*, ss. 6(1) to (3) and 6(4)).

[20] On the Interest Issue, the arbitrator held that Teal Cedar was entitled to interest on the Improvements Compensation, despite the No Interest Clause, in light of the factual matrix. Specifically, he found that, at the time of the Settlement Framework Agreement, when the No Interest Clause was drafted, the parties were "hopeful" and in the midst of ongoing negotiations to resolve the Valuation Issue (para. 180). In contrast, at the time of the Amendment, when the Arbitration Clause was drafted, the parties had just endured 10 months of failed negotiations, and had come to terms with the need to resolve the Valuation Issue — including interest — through arbitration (para. 181).

[21] Lastly, on the Lillooet Issue, the arbitrator ruled that Teal Cedar was not entitled to Improvements Compensation for the Lillooet Licence because it "had not lost any opportunity to use the roads" (paras. 169-70). Put differently, the arbitrator opined that BC owed no Improvements Compensation to Teal Cedar for the Lillooet Licence since the latter never lost access to any improvements associated with that licence.

B. *British Columbia Supreme Court (2012 BCSC 543, Bauman C.J.)*

[22] The courts reviewing the Arbitration Award had the additional burden of addressing their jurisdiction to review the award in the first place ("Jurisdiction Issue"). Specifically, the arbitration proceeded under the *Arbitration Act*, which limits appeals to questions of law (s. 31). The courts reviewing the Arbitration Award were consequently confronted with the threshold issue of whether the Valuation, Interest and Lillooet Issues involved questions of law — the sole type of question over which the courts have appellate review jurisdiction in commercial arbitration cases. As additional context, this Court's decision in *Sattva* — where we clarified the

à fixer l'indemnité visant les améliorations séparément de celle visant les droits, ce qui concorde avec le traitement distinct que leur réserve la *Revitalization Act* (par. 94; voir *Revitalization Act*, par. 6(1) à (3) et 6(4)).

[20] Sur la question des intérêts, l'arbitre a jugé que Teal Cedar avait le droit de toucher des intérêts sur l'indemnité visant les améliorations, malgré la clause zéro intérêt, en raison du fondement factuel. Plus précisément, il a conclu qu'à l'époque de la convention cadre de règlement, lorsque cette clause a été rédigée, les parties étaient [TRADUCTION] « optimistes » et au beau milieu de négociations en cours dans le but de résoudre la question de l'évaluation (par. 180). En revanche, à l'époque de la Modification, lorsque la clause d'arbitrage a été rédigée, les parties venaient de vivre 10 mois de négociations avortées et avaient reconnu la nécessité de résoudre la question de l'évaluation, y compris des intérêts, par l'arbitrage (par. 181).

[21] Enfin, pour ce qui est de la question du permis Lillooet, l'arbitre a décidé que Teal Cedar n'avait pas droit à l'indemnité visant les améliorations pour ce permis parce qu'elle [TRADUCTION] « n'avait perdu aucune possibilité d'utiliser les routes » (par. 169-170). Autrement dit, l'arbitre a estimé que la C.-B. ne devait aucune indemnité visant les améliorations à Teal Cedar pour le permis Lillooet parce que cette dernière n'avait jamais perdu son accès aux améliorations relatives à ce permis.

B. *Cour suprême de la Colombie-Britannique (2012 BCSC 543, le juge en chef Bauman)*

[22] Les tribunaux qui ont contrôlé la sentence arbitrale devaient en outre décider d'entrée de jeu s'ils avaient compétence pour le faire (« question de la compétence »). Plus précisément, l'arbitrage s'est déroulé en conformité avec l'*Arbitration Act*, selon laquelle il ne peut être interjeté appel que sur des questions de droit (art. 31). Les tribunaux ayant contrôlé la sentence arbitrale devaient par conséquent trancher la question préliminaire de savoir si l'évaluation, les intérêts et le permis Lillooet constituaient des questions de droit — le seul type de point sur lequel les tribunaux ont compétence pour procéder à un contrôle en appel

2017 SCC 32 (CanLII)

general characterization of contract interpretation as a question of mixed fact and law — was not released until after the first decision in this case by the British Columbia Court of Appeal. As a result, the decision of the British Columbia Supreme Court and initial decision of the British Columbia Court of Appeal were issued without this Court's guidance in *Sattva*.

en matière d'arbitrage commercial. Autre élément contextuel, l'arrêt *Sattva* — dans lequel nous avons précisé la qualification générale de l'interprétation des contrats comme question mixte de fait et de droit — n'a été prononcé qu'après la première décision rendue en l'espèce par la Cour d'appel de la Colombie-Britannique. Ainsi, la décision de la Cour suprême de la Colombie-Britannique et la première décision de la Cour d'appel ont été rendues sans que ces cours ne bénéficient des enseignements de notre Cour dans *Sattva*.

[23] On the Jurisdiction Issue, the application judge, Bauman C.J. (now Bauman C.J.B.C.), held that the Valuation Issue subsumed questions of law and questions of mixed fact and law. Specifically, the determination of whether the valuation method chosen was consistent with the *Revitalization Act* was a matter of "statutory construction" (para. 49 (CanLII)) and thus a question of law within his jurisdiction (para. 57). In contrast, he found that the application of that method to quantify the value of the Improvements Compensation involved questions of fact or of mixed fact and law outside his jurisdiction (para. 57). Similarly, he determined that the Interest Issue involved interpreting the Amended Agreement "in the context of the factual matrix" — a question of mixed fact and law outside his jurisdiction (para. 81). Finally, he held that the Lillooet Issue was a "question of law" because the arbitrator's chosen methodology, when applied to the Lillooet Licence (which contains improvements), should have resulted in Improvements Compensation for Teal Cedar (para. 84).

[23] Sur la question de la compétence, le juge saisi de la requête, le juge en chef Bauman, de la Cour suprême (maintenant Juge en chef de la Cour d'appel), a statué que l'évaluation regroupait des questions de droit ainsi que des questions mixtes de fait et de droit. Tout particulièrement, le fait de décider si la méthode d'évaluation retenue était conforme à la *Revitalization Act* constituait une question d'[TRADUCTION] « interprétation législative » (par. 49 (CanLII)) et, par le fait même, une question de droit relevant de sa compétence (par. 57). Par contre, il a conclu que le fait d'utiliser cette méthode pour calculer la valeur de l'indemnité visant les améliorations soulevait des questions de fait ou des questions mixtes de fait et de droit qui outrepassaient sa compétence (par. 57). De même, il a décidé que la question des intérêts supposait que l'on interprète la convention modifiée « eu égard au fondement factuel », une question mixte de fait et de droit outrepassant sa compétence (par. 81). En dernier lieu, il a conclu que la question du permis Lillooet constituait une « question de droit » parce que l'application de la méthode retenue par l'arbitre au permis Lillooet (qui comporte des améliorations) aurait dû entraîner l'octroi d'une indemnité visant les améliorations à Teal Cedar (par. 84).

[24] On the Valuation Issue, Bauman C.J. concluded that the arbitrator's reliance on the Depreciation Replacement Cost Method was not only proper but correct (para. 57). He noted that the arbitrator, "in the absence of any regulatory guidance", had been forced to interpret the plain words of s. 6(4) (para. 46). Further, he opined that the arbitrator had interpreted s. 6(4) "in a manner open to him in light of the applicable rules of statutory interpretation" (para. 50).

[24] En ce qui concerne la question de l'évaluation, le juge en chef Bauman est parvenu à la conclusion que le recours par l'arbitre à la méthode du coût de remplacement déprécié était non seulement approprié, mais fondé (par. 57). Il a souligné [TRADUCTION] « qu'en l'absence de balise règlementaire », l'arbitre avait été contraint d'interpréter les termes clairs du par. 6(4) (par. 46). De plus, il s'est dit d'avis que l'arbitre avait donné à ce paragraphe « une interprétation qui s'offrait à lui compte tenu des règles applicables d'interprétation législative » (par. 50).

2017 SCC 32 (CanLII)

[25] Lastly, on the Lillooet Issue, Bauman C.J. remitted the issue of Improvements Compensation to the arbitrator because of "uncertainty" in his reasons (para. 88). Bauman C.J. felt the arbitrator was "not clear" as to why he denied Improvements Compensation for the Lillooet Licence (para. 85). He reasoned that, since the Lillooet Licence had associated improvements and the arbitrator's methodology assumed that all improvements would be fully used (para. 86), then Improvements Compensation was apparently owed in respect of those improvements, just as such compensation was owed in respect of the improvements associated with the other two licences in dispute. On that basis, the application judge remitted the value of compensation for Teal Cedar's losses in respect of the Lillooet Licence to the arbitrator "for reconsideration in light of the valuation methodology he has adopted" (para. 88).

C. *Additional Arbitration Award (Thomas Braidwood, Q.C. — July 3, 2012, amended August 17, 2012)*

[26] In view of Bauman C.J.'s ruling on the Lillooet Issue, the arbitrator issued an additional award "to an amount equal to the value of the improvements" relating to the Lillooet Licence (p. 10). He rendered this decision despite his initial holding that Teal Cedar's right to Improvements Compensation was never triggered since it never factually lost its ability to use those improvements.

D. *British Columbia Court of Appeal Decision #1 (2013 BCCA 326, 364 D.L.R. (4th) 465)*

[27] The matter came twice before the British Columbia Court of Appeal. The first time, the Court of Appeal issued two opinions with diametrically opposed conclusions.

[25] Enfin, pour ce qui est de la question du permis Lillooet, le juge en chef Bauman a renvoyé à l'arbitre la question de l'indemnité visant les améliorations en raison du [TRADUCTION] « caractère incertain » de ses motifs (par. 88). Le juge en chef Bauman a estimé que l'arbitre n'avait pas « indiqué clairement » pourquoi il avait refusé d'accorder une indemnité visant les améliorations pour le permis Lillooet (par. 85). Il a conclu qu'étant donné que des améliorations se rapportaient au permis Lillooet et que la méthode utilisée par l'arbitre tenait pour acquis que toutes les améliorations seraient entièrement utilisées (par. 86), une indemnité visant les améliorations était apparemment due relativement à ces améliorations, tout comme une telle indemnité était due à l'égard des améliorations liées aux deux autres permis en cause. Pour cette raison, le juge saisi de la requête a renvoyé à l'arbitre la question de la valeur de l'indemnité pour les pertes subies par Teal Cedar à l'égard du permis Lillooet « pour qu'il la réexamine à la lumière de la méthode d'évaluation qu'il avait retenue » (par. 88).

C. *Sentence arbitrale additionnelle (Thomas Braidwood, c.r. — 3 juillet 2012, modifiée le 17 août 2012)*

[26] Vu la décision du juge en chef Bauman sur la question du permis Lillooet, l'arbitre a octroyé une somme additionnelle [TRADUCTION] « égale à la valeur des améliorations » touchant le permis Lillooet (p. 10). Il a rendu cette décision malgré sa conclusion initiale selon laquelle le droit de Teal Cedar à une indemnité visant les améliorations n'avait jamais pris naissance puisqu'elle n'avait jamais, dans les faits, perdu sa faculté d'utiliser ces améliorations.

D. *Décision n° 1 de la Cour d'appel de la Colombie-Britannique (2013 BCCA 326, 364 D.L.R. (4th) 465)*

[27] L'affaire a été instruite deux fois par la Cour d'appel de la Colombie-Britannique. La première fois, la Cour d'appel a exprimé deux avis dans lesquels elle est parvenue à des conclusions diamétralement opposées.

2017 SCC 32 (CanLII)

(1) Majority (MacKenzie J.A., Lowry J.A. concurring)

[28] The majority allowed BC's appeal for the most part. On the Jurisdiction Issue, MacKenzie J.A. held that the Valuation Issue (statutory interpretation) and the Interest Issue (contractual interpretation) were both questions of law and thus fell within the scope of appellate review of an arbitration award (paras. 57 and 114). In addition, while not explicit in this respect, the majority appeared to rule that the Lillooet Issue was within the courts' reviewing jurisdiction because it related to "whether the arbitrator used the correct method of valuation in this case", a question of law (paras. 55-57).

[29] On the Valuation Issue, MacKenzie J.A. found that the arbitrator had erred in law by selecting the Depreciation Replacement Cost Method (paras. 131-33). Specifically, she noted that this method failed to recognize Teal Cedar's actual interest in the improvements (para. 68) by compensating Teal Cedar as if it owned the improvements, whereas Teal Cedar had lost only its right to use the improvements — which, in reality, were owned by the Crown (paras. 68 and 73).

[30] On the Interest Issue, MacKenzie J.A. held that the arbitrator had erred in law by letting the factual matrix overwhelm the words of the contract (paras. 125 and 129). Specifically, she concluded that the arbitrator had erred by interpreting the Amended Agreement as including interest in Teal Cedar's "compensation" submitted to arbitration (para. 136). On my reading, MacKenzie J.A.'s reasoning on this issue (at paras. 105-30) can be interpreted in two ways. Either she found that the arbitrator allocated excessive weight to the factual matrix or that the arbitrator interpreted the factual matrix isolated from the words of the contract.

[31] Lastly, on the Lillooet Issue, MacKenzie J.A. concluded that Bauman C.J. had erred in remitting the issue of compensation for the Lillooet Licence

(1) Juges majoritaires (juge MacKenzie, avec l'accord du juge Lowry)

[28] Les juges majoritaires ont accueilli l'appel de la C.-B. en majeure partie. Sur la question de la compétence, la juge MacKenzie a statué que la question de l'évaluation (interprétation législative) et celle des intérêts (interprétation contractuelle) étaient deux questions de droit et qu'elles relevaient donc du contrôle en appel d'une sentence arbitrale (par. 57 et 114). De plus, bien qu'ils ne se soient pas prononcés expressément à ce sujet, les juges majoritaires semblent avoir conclu que la question du permis Lillooet ressortissait au pouvoir de contrôle des tribunaux parce qu'elle touchait le point de savoir [TRADUCTION] « si l'arbitre a[vait] utilisé la bonne méthode d'évaluation en l'espèce », une question de droit (par. 55-57).

[29] Sur la question de l'évaluation, la juge MacKenzie a conclu que l'arbitre avait commis une erreur de droit en retenant la méthode du coût de remplacement déprécié (par. 131-133). Plus précisément, elle a signalé que cette méthode ne tenait pas compte du véritable intérêt de Teal Cedar dans les améliorations (par. 68) en l'indemnisant comme si elle en était propriétaire, alors qu'elle avait uniquement perdu le droit de se servir des améliorations qui, en fait, appartenaient à la Couronne (par. 68 et 73).

[30] Pour ce qui est de la question des intérêts, la juge MacKenzie a statué que l'arbitre avait commis une erreur de droit en laissant le fondement factuel supplanter les termes du contrat (par. 125 et 129). Tout particulièrement, elle a conclu que l'arbitre avait erré en considérant que la convention modifiée ajoutait des intérêts à l'[TRADUCTION] « indemnité » de Teal Cedar soumise à l'arbitrage (par. 136). D'après moi, le raisonnement de la juge MacKenzie sur ce point (par. 105-130) peut s'interpréter de deux façons. Soit elle a conclu que l'arbitre avait accordé trop de poids au fondement factuel, soit elle a statué que l'arbitre avait interprété le fondement factuel séparément des termes du contrat.

[31] Enfin, sur la question du permis Lillooet, la juge MacKenzie a conclu que le juge en chef Bauman avait fait erreur en renvoyant à l'arbitre

2017 SCC 32 (CanLII)

to the arbitrator. MacKenzie J.A. found that the arbitrator had correctly denied Teal Cedar compensation for a licence in respect of which it had suffered no actual loss (paras. 78-79). As a result, she restored the arbitrator's original decision to award Teal Cedar no compensation in respect of the Lillooet Licence (para. 134).

(2) Dissent (Finch C.J.)

[32] For his part, Finch C.J., the dissenting judge, agreed with Bauman C.J. and would have dismissed the appeal in its entirety. On the Valuation Issue, he held that the arbitrator had not erred in law or otherwise (paras. 140-43), and thus he would have maintained the arbitrator's selection of the Depreciation Replacement Cost Method. On the Interest Issue, he agreed with Bauman C.J. that the arbitrator's interpretation of the Amended Agreement in light of the factual matrix was a question of mixed fact and law outside the scope of appellate review of an arbitration award (paras. 144-45). Finally, on the Lillooet Issue, he found that Bauman C.J. had made "no error of law" in remitting the valuation of compensation for the Lillooet Licence to the arbitrator (paras. 146-48).

E. *British Columbia Court of Appeal Decision #2 (Remanded Post-Sattva) (2015 BCCA 263, 386 D.L.R. (4th) 40, Lowry, Chiasson and MacKenzie JJ.A.)*

[33] In 2013, Teal Cedar sought leave to appeal to the Court from the British Columbia Court of Appeal's decision. However, in the intervening period, the Court released *Sattva* in 2014. Consequently, the Court remanded the case to the British Columbia Court of Appeal for disposition in accordance with *Sattva* (file No. 35563, October 23, 2014, [2014] S.C.C. Bull. 1637).

[34] On remand, a unanimous British Columbia Court of Appeal held that MacKenzie J.A.'s pre-*Sattva* disposition of the appeal (concurred in by Lowry J.A.) was unaltered by *Sattva* (para. 60).

l'indemnité relative à ce permis. Selon elle, l'arbitre a refusé à bon droit à Teal Cedar une indemnité pour un permis à l'égard duquel elle n'avait subi aucune perte réelle (par. 78-79). Par conséquent, elle a rétabli la décision initiale de l'arbitre de n'accorder à Teal Cedar aucune indemnité pour le permis Lillooet (par. 134).

(2) Juge dissident (juge en chef Finch)

[32] Pour sa part, le juge en chef Finch, dissident, partageait l'avis du juge en chef Bauman et aurait rejeté l'appel dans sa totalité. En ce qui a trait à la question de l'évaluation, il a statué que l'arbitre n'avait commis aucune erreur de droit ou autre erreur (par. 140-143) et il aurait donc confirmé la décision de l'arbitre de retenir la méthode du coût de remplacement déprécié. Pour ce qui est de la question des intérêts, il a convenu avec le juge en chef Bauman que l'interprétation donnée par l'arbitre à la convention modifiée eu égard au fondement factuel était une question mixte de fait et de droit dépassant la portée du contrôle en appel d'une sentence arbitrale (par. 144-145). Finalement, sur la question du permis Lillooet, il a conclu que le juge en chef Bauman n'avait commis [TRADUCTION] « aucune erreur de droit » en renvoyant à l'arbitre l'évaluation de l'indemnité touchant ce permis (par. 146-148).

E. *Décision n° 2 de la Cour d'appel de la Colombie-Britannique (renvoi après l'arrêt Sattva) (2015 BCCA 263, 386 D.L.R. (4th) 40, les juges Lowry, Chiasson et MacKenzie)*

[33] En 2013, Teal Cedar a demandé l'autorisation d'interjeter appel de la décision de la Cour d'appel de la Colombie-Britannique devant notre Cour. Mais dans l'intervalle, notre Cour a rendu son arrêt *Sattva* en 2014. Par conséquent, notre Cour a renvoyé l'affaire à la Cour d'appel de la Colombie-Britannique pour qu'elle la tranche conformément à *Sattva* (n^o^ du greffe 35563, 23 octobre 2014, [2014] C.S.C. Bull. 1637).

[34] Après le renvoi, la Cour d'appel de la Colombie-Britannique a jugé à l'unanimité que la décision rendue sur l'appel par la juge MacKenzie (avec l'accord du juge Lowry) avant *Sattva* n'avait pas été modifiée par cet arrêt (par. 60).

2017 SCC 32 (CanLII)

[35] On the Valuation Issue, the Court of Appeal held that the standard of review was correctness because the arbitrator lacked specialized expertise in forestry statutes (para. 35), the parties were statutorily compelled to resolve their dispute through arbitration (para. 35), and the Valuation Issue was (1) important to compensation statutes generally (para. 35) and (2) a question of law attracting a correctness standard (paras. 36-37). Further, the Court of Appeal ruled that the arbitrator's award was, in this respect, both incorrect (para. 37) and unreasonable (para. 38) because it provided a "substantial publicly financed windfall" (para. 38) divorced from Teal Cedar's "actual financial loss" (para. 39).

[35] Sur la question de l'évaluation, la Cour d'appel a statué que la norme de contrôle applicable était celle de la décision correcte puisque l'arbitre ne possédait pas d'expertise spécialisée dans les lois sur les forêts (par. 35), les parties étaient contraintes par la loi de résoudre leur différend par l'arbitrage (par. 35) et la question de l'évaluation était (1) importante pour les lois sur l'indemnisation en général (par. 35) et (2) une question de droit commandant l'application de la norme de la décision correcte (par. 36-37). Elle a aussi décidé que la sentence de l'arbitre était à la fois incorrecte (par. 37) et déraisonnable (par. 38) sur ce point parce qu'elle permettait à Teal Cedar de tirer un [TRADUCTION] « gain fortuit substantiel à même les fonds publics » (par. 38) qui ne correspondait à sa « véritable perte financière » (par. 39).

[36] On the Interest Issue, the Court of Appeal opined that the arbitrator had made a legal error that gave the courts jurisdiction (para. 46) because he let the factual matrix overwhelm the contract (para. 52), despite its clear wording (para. 59). On my reading, the Court of Appeal's second decision, like its first, supports two interpretations of what it means for the factual matrix to "overwhelm" a contract: (1) weighing that matrix excessively; or (2) considering that matrix in isolation from the words of the contract.

[36] Sur la question des intérêts, la Cour d'appel s'est dite d'avis que l'arbitre avait commis une erreur de droit conférant compétence au tribunal (par. 46), car il avait laissé le fondement factuel supplanter le contrat (par. 52) en dépit de son libellé clair (par. 59). D'après moi, la seconde décision de la Cour d'appel, tout comme sa première, étaye deux interprétations de ce qu'il faut entendre par un fondement factuel « supplantant » un contrat : (1) accorder trop de poids à ce fondement; ou (2) examiner ce fondement séparément des termes du contrat.

[37] The decision of the Court of Appeal on remand was silent in respect of the Lillooet Issue.

[37] La décision que la Cour d'appel a rendue à la suite du renvoi était muette sur la question du permis Lillooet.

IV. Issues

[38] In the end, this appeal involves two key interpretation issues, one statutory and one contractual, namely whether the arbitrator erred in law by: (1) interpreting the Depreciation Replacement Cost Method as being consistent with the *Revitalization Act* (the Valuation Issue); and (2) interpreting the Amended Agreement as including interest in BC's Improvements Compensation payment to Teal Cedar (the Interest Issue). This appeal also involves a statutory application issue, namely whether the arbitrator erred in law by denying Improvements Compensation to Teal Cedar when he applied his chosen methodology to the Lillooet Licence (the Lillooet Issue).

IV. Questions en litige

[38] En dernière analyse, le présent pourvoi porte sur deux principales questions d'interprétation, l'une législative et l'autre contractuelle, à savoir si l'arbitre a commis une erreur de droit en (1) considérant que la méthode du coût de remplacement déprécié était conforme à la *Revitalization Act* (la question de l'évaluation); et (2) en estimant que la convention modifiée ajoutait des intérêts à l'indemnité visant les améliorations versée par la C.-B. à Teal Cedar (la question des intérêts). Le présent pourvoi porte également sur une question d'application de la loi : l'arbitre a-t-il commis une erreur de droit en refusant à Teal Cedar une indemnité

2017 SCC 32 (CanLII)

Whether the courts have jurisdiction to review these issues, and if so, the applicable standard of review, are also in dispute.

V. Analysis

[39] According to the application judge, other than there being a "question" or "point" of law in dispute (see ss. 31(1)(b) and 31(2)), the requirements for leave under the *Arbitration Act* were met in this case on the Valuation Issue (para. 43). Those findings are not challenged before this Court, though I note that the application judge was silent with respect to these requirements on the Interest Issue, which he resolved on the basis of that issue not raising a question of law (para. 81). Similarly, once the statutory preconditions are met, granting leave to appeal an award under the *Arbitration Act* is a matter of judicial discretion: ". . . the court may grant leave . . ." (*Arbitration Act*, s. 31(2)). The application judge's exercise of discretion in this regard is also not contested before us. As a result, per *Sattva* (paras. 38, 102 and 107), a three-step analysis for appellate review of the arbitration award below remains, namely:

(a) Jurisdiction: Whether the appellate court has jurisdiction to review the alleged error.

(b) Standard of review: If so, whether the standard for the review is reasonableness or correctness.

(c) Review: Whether the arbitration award withstands scrutiny under that standard of review (i.e. whether the award is reasonable or correct).

[40] My analysis will proceed on the basis of this logical framework.

visant les améliorations lorsqu'il a appliqué la méthode qu'il a retenue au permis Lillooet (la question du permis Lillooet)? Les points de savoir si les tribunaux ont compétence pour examiner ces questions et, dans l'affirmative, quelle est la norme de contrôle applicable sont eux aussi en litige.

V. Analyse

[39] Selon le juge saisi de la requête, outre la présence d'une [TRADUCTION] « question » ou d'un « point » de droit en litige (voir l'al. 31(1)(b) et le par. 31(2)), les conditions d'autorisation établies par l'*Arbitration Act* étaient remplies en l'espèce pour ce qui est de la question de l'évaluation (par. 43). Ces conclusions ne sont pas contestées devant notre Cour, mais je note que le juge saisi de la requête ne s'est pas prononcé sur l'application de ces conditions à la question des intérêts, qu'il a tranchée en affirmant qu'elle ne soulève pas une question de droit (par. 81). De même, une fois que les conditions préalables établies par la loi sont remplies, le fait d'accorder l'autorisation d'interjeter appel d'une sentence en vertu de l'*Arbitration Act* relève du pouvoir discrétionnaire du tribunal : [TRADUCTION] « . . . le tribunal peut accorder l'autorisation . . . » (*Arbitration Act*, par. 31(2)). L'exercice du pouvoir discrétionnaire du juge saisi de la requête à cet égard n'est pas contesté non plus. Par conséquent, conformément à l'arrêt *Sattva* (par. 38, 102 et 107), il reste à effectuer une analyse en trois étapes pour contrôler en appel la sentence arbitrale, soit :

a) Compétence : La cour d'appel a-t-elle compétence pour examiner l'erreur reprochée?

b) Norme de contrôle : Dans l'affirmative, la norme applicable à ce contrôle est-elle celle de la décision raisonnable ou celle de la décision correcte?

c) Contrôle : La sentence arbitrale résiste-t-elle à l'examen selon cette norme de contrôle (en d'autres termes, la sentence était-elle raisonnable ou correcte)?

[40] Mon analyse reposera sur ce cadre logique.

2017 SCC 32 (CanLII)

A. *Jurisdiction*

(1) Jurisdiction to Review Commercial Arbitration Awards

[41] The scope of jurisdiction in respect of a commercial arbitration award, such as the one at issue, is now well-established in the jurisprudence (*Sattva*, at para. 104). Here, as in *Sattva*, the arbitration was conducted under the *Arbitration Act*, which limits a reviewing court's jurisdiction to questions of law:

31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

[42] Unlike privative clauses which merely "signa[l]" deference in the context of judicial review of administrative tribunal decisions, statutory limitations on the scope of appellate review of arbitration awards are "absolute" (*Sattva*, at para. 104). In consequence, a finding that the questions on appeal — the Valuation, Interest and Lillooet Issues — are not questions of law would wholly dispose of the issue of the courts' jurisdiction to review those questions.

A. *Compétence*

(1) Pouvoir de contrôler les sentences arbitrales commerciales

[41] La portée de la compétence susceptible d'être exercée à l'égard d'une sentence arbitrale commerciale comme celle en cause est désormais bien établie dans la jurisprudence (*Sattva*, par. 104). Tout comme dans *Sattva*, l'arbitrage en l'espèce s'est déroulé conformément à l'*Arbitration Act*, qui restreint la compétence de la cour de révision aux questions de droit :

[TRADUCTION]

31 (1) Une partie à un arbitrage ne portant pas sur un différend de droit de la famille peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

[42] Contrairement aux clauses privatives qui « signale[nt] » tout simplement que la déférence est de mise dans le contrôle judiciaire des décisions des tribunaux administratifs, les limites fixées par la loi à la portée du contrôle en appel des sentences arbitrales sont « absolue[s] » (*Sattva*, par. 104). En conséquence, la conclusion selon laquelle les points soulevés — l'évaluation, les intérêts et le permis — ne sont pas des questions de droit règlerait entièrement la question du pouvoir des tribunaux d'examiner ces points.

2017 SCC 32 (CanLII)

[43] The process for characterizing a question as one of three principal types — legal, factual, or mixed — is also well-established in the jurisprudence (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. As the Court explained in *Southam*, at para. 39:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (*Sattva*, at para. 53; *Housen*, at paras. 31 and 34-35). Accordingly, such a legal question, if alleged in the context of a dispute under the *Arbitration Act*, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of

[43] La marche à suivre pour qualifier une question selon l'une des trois catégories principales — questions de droit, questions de fait ou questions mixtes — est aussi bien établie dans la jurisprudence (*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35). En particulier, personne ne conteste que les questions de droit « concernent la détermination du critère juridique applicable » (*Sattva*, par. 49, citant *Southam*, par. 35); les questions de fait « portent sur ce qui s'est réellement passé entre les parties » (*Southam*, par. 35; *Sattva*, par. 58); et les questions mixtes « consistent à déterminer si les fait satisfont au critère juridique » ou, en d'autres termes, supposent « l'application d'une norme juridique à un ensemble de faits » (*Southam*, par. 35; *Sattva*, par. 49, citant *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235).

[44] Cela dit, bien que l'application d'un critère juridique à un ensemble de faits soit une question mixte, si, durant cette application, le critère juridique sous-jacent a pu être altéré, une question de droit se pose. Par exemple, si une partie allègue que le juge (ou l'arbitre), en appliquant un critère juridique, a négligé un élément essentiel de ce critère, cette partie allègue que le juge (ou l'arbitre) a en fait retranché cet élément du critère et l'a altéré du même coup. Comme l'a expliqué la Cour dans *Southam*, par. 39 :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Une telle allégation soulève en définitive la question de savoir si le juge (ou l'arbitre) s'est fondé sur le bon critère juridique, ce qui constitue une question de droit (*Sattva*, par. 53; *Housen*, par. 31 et 34-35). En conséquence, pareille question de droit, si elle est alléguée dans le contexte d'un différend relevant de l'*Arbitration Act*, et en supposant que les autres exigences relatives à la compétence de cette loi sont

2017 SCC 32 (CanLII)

law" are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions.

satisfaites, est susceptible de contrôle en appel. Il est plus juste d'affirmer que ces « questions de droit isolables » sont une forme cachée de question de droit — où le critère juridique sur lequel se fonde le juge (ou l'arbitre) peut être déduit de son application au lieu d'être énoncé clairement dans sa description — et non une quatrième catégorie, distincte, de questions.

[45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[45] Les tribunaux doivent cependant faire preuve de prudence lorsqu'ils relèvent des questions de droit isolables parce que les questions mixtes, par définition, comportent des aspects de droit. Les motivations pour lesquelles l'avocat qualifie stratégiquement une question mixte de question de droit — par exemple pour pouvoir saisir un tribunal de l'appel d'une sentence arbitrale ou pour faire appliquer une norme de contrôle favorable dans l'appel d'un jugement en matière civile — sont limpides (*Sattva*, par. 54; *Southam*, par. 36). Une conception étroite des questions de droit isolables s'accorde avec le caractère définitif de l'arbitrage commercial et, de façon plus générale, avec la déférence à l'égard des conclusions de fait. Les tribunaux doivent se montrer vigilants lorsqu'il s'agit de faire une distinction entre une partie qui allègue que le critère juridique a pu être altéré lors de son application (une question de droit isolable; *Sattva*, par. 53) et une partie qui allègue que le critère juridique, qui n'a pas été altéré, aurait dû, lors de son application, donner lieu à un résultat différent (une question mixte).

[46] From this standpoint, the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (*Housen*, at para. 36).

[46] Vu sous cet angle, le fait de qualifier une question à l'examen de question mixte plutôt que de question de droit entraîne des différences considérables entre les appels interjetés à l'encontre d'une sentence arbitrale et ceux interjetés à l'encontre d'un jugement en matière civile. L'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'une sentence arbitrale fait échec à la compétence du tribunal de procéder à un contrôle en appel (*Arbitration Act*, art. 31; *Sattva*, par. 104). À l'inverse, l'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'un jugement en matière civile ne fait que mener à l'application d'une norme de contrôle plus rigoureuse (*Housen*, par. 36).

2017 SCC 32 (CanLII)

[47] Given these principles, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions. In consequence, characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, though, as the Court recently explained in *Sattva*, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix) (para. 50).

[47] Compte tenu de ces principes, une question d'interprétation législative est habituellement qualifiée de question de droit. À l'inverse, le fait de dire qu'une question en est généralement une d'interprétation contractuelle n'établit pas nécessairement la nature de la question en cause. L'interprétation contractuelle met en jeu des questions de fait, des questions de droit et des questions mixtes. Donc, il faut examiner avec délicatesse la question étroite en litige pour qualifier la nature de la question précise posée au tribunal. En général toutefois, comme l'a récemment expliqué la Cour dans *Sattva*, l'interprétation contractuelle demeure une question mixte et non une question de droit puisqu'elle suppose l'application du droit des contrats (principes du droit des contrats) à des faits d'ordre contractuel (le contrat lui-même et son fondement factuel) (par. 50).

(2) Jurisdiction in the Instant Case

(2) Compétence en l'espèce

[48] On that basis, jurisdiction in this case can be readily ascertained. First, I will explain the courts' partial jurisdiction over the Valuation Issue. Second, I will explain the courts' lack of jurisdiction over the Interest and Lillooet Issues.

[48] Cela étant, il est facile de déterminer la compétence en l'espèce. Tout d'abord, j'expliquerai pourquoi les tribunaux ont compétence en partie sur la question de l'évaluation. Ensuite, j'expliquerai pourquoi les tribunaux n'ont pas compétence sur les questions des intérêts et du permis Lillooet.

(a) *Jurisdiction Over the Valuation Issue*

a) *Compétence sur la question de l'évaluation*

[49] As held by Bauman C.J. (at para. 57) and Finch C.J., dissenting (at paras. 140 and 143), the Valuation Issue — i.e. the issue of selecting a valuation method that complies with the *Revitalization Act* — involves a chain of issues, some raising legal questions and others raising mixed questions. Specifically, two types of questions are engaged by the Valuation Issue: (1) questions about the broad category of methods that are acceptable under the terms of the *Revitalization Act*; and (2) questions about the specific method, within that broad category of acceptable methods, that should ultimately be applied.

[49] Comme l'ont conclu le juge en chef Bauman (par. 57) et le juge en chef Finch, dissident (par. 140 et 143), la question de l'évaluation — c'est-à-dire la question de choisir une méthode d'évaluation conforme à la *Revitalization Act* — fait intervenir une série de points, dont certains soulèvent des questions de droit tandis que d'autres soulèvent des questions mixtes. Plus précisément, la question de l'évaluation fait entrer en jeu deux types de questions : (1) les questions relatives à la catégorie générale de méthodes qui sont acceptables selon la *Revitalization Act*; et (2) les questions liées à la méthode précise, faisant partie de cette catégorie générale de méthodes acceptables, qui devrait être appliquée en fin de compte.

[50] The former questions — the methods that are acceptable under the *Revitalization Act* — are a matter of statutory interpretation and, accordingly,

[50] Les premières questions — les méthodes acceptables suivant la *Revitalization Act* — concernent l'interprétation législative et, par conséquent, sont

2017 SCC 32 (CanLII)

are questions of law (*Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 23, citing *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As a result, the courts have jurisdiction to review the arbitrator's resolution of the Valuation Issue in so far as that resolution involves identifying a pool of methodologies consistent with the *Revitalization Act*.

[51] The latter questions — the preferable method among those that are consistent with the *Revitalization Act* — are inextricably linked to the evidentiary record at the arbitration hearing, where various experts opined on the virtues of conflicting valuation methodologies. They are mixed questions, if not pure questions of fact. Therefore, the courts lack jurisdiction to review the arbitrator's selection of a specific methodology among the pool of methodologies which are consistent with the *Revitalization Act*.

[52] The majority of the Court of Appeal in its first decision appears to have merged the two types of questions above and held that both were questions of law (para. 57). This is an error because selection among various technical methodologies which all comply with the compensation provision is undeniably linked to the complex evidentiary record before the arbitrator and engages at the very least mixed questions. The decision of the Court of Appeal on remand does not independently analyze jurisdiction, but it does describe the interpretation of the compensation provision as a question of law (para. 37). In so far as that decision recognizes that the courts' jurisdiction is limited to determining methods that are consistent with the compensation provision and does not extend to choosing among those methods, it properly construes the courts' jurisdiction over the Valuation Issue here.

(b) *Jurisdiction Over the Interest Issue*

[53] In contrast, as Bauman C.J. and Finch C.J., dissenting, both found, I conclude that the courts

des questions de droit (*Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 23, citant *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 33). Ainsi, les tribunaux ont compétence pour contrôler la décision de l'arbitre sur la question de l'évaluation dans la mesure où cette décision consistait à cerner un ensemble de méthodes conformes à la *Revitalization Act*.

[51] Les dernières questions — la meilleure méthode parmi celles qui respectent la *Revitalization Act* — sont inextricablement liées au dossier de preuve présenté à l'audience d'arbitrage, où différents experts se sont prononcés sur les vertus de méthodes d'évaluation incompatibles. Ce sont des questions mixtes, voire des questions de fait pures. Par conséquent, les tribunaux n'ont pas compétence pour contrôler la méthode précise choisie par l'arbitre parmi l'ensemble des méthodes conformes à la *Revitalization Act*.

[52] Les juges majoritaires de la Cour d'appel dans sa première décision semblent avoir fusionné les deux types de questions susmentionnées et conclu que les deux étaient des questions de droit (par. 57). Il s'agit d'une erreur puisque choisir parmi plusieurs méthodes techniques qui sont toutes conformes à la disposition d'indemnisation est indéniablement lié au dossier de preuve complexe dont disposait l'arbitre et fait entrer en jeu à tout le moins des questions mixtes. Dans sa décision faisant suite au renvoi, la Cour d'appel n'analyse pas séparément la compétence, mais elle indique effectivement que l'interprétation de la disposition d'indemnisation est une question de droit (par. 37). Dans la mesure où la Cour d'appel y reconnaît que les tribunaux ont uniquement compétence pour décider des méthodes qui sont conformes à la disposition d'indemnisation et qu'ils ne peuvent faire un choix parmi ces méthodes, la Cour d'appel interprète bien la compétence des tribunaux sur la question de l'évaluation en l'espèce.

b) *Compétence sur la question des intérêts*

[53] En revanche, à l'instar du juge en chef Bauman et du juge en chef Finch, dissident, je

2017 SCC 32 (CanLII)

have no jurisdiction to review the arbitrator's resolution of the Interest Issue.

[54] In this case, the arbitrator interpreted the Amended Agreement — including its No Interest Clause, which originated in the Settlement Framework Agreement and was unchanged by the Amendment — in light of the factual matrix. That was the correct legal test (*Sattva*, at para. 50).

[55] Still, BC argues that the arbitrator let the factual matrix overwhelm the words of the contract, which raises an extricable question of law. In my view, this "overwhelming" principle is subject to two formulations, neither of which confers appellate review jurisdiction in this case, albeit for different reasons.

[56] The first formulation of this "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is weighed excessively. This formulation fails to confer appellate review jurisdiction here because it is a mixed question.

[57] The goal of contractual interpretation is ascertaining "the objective intentions of the parties", an "inherently fact specific" exercise (*Sattva*, at para. 55). In interpreting the parties' intentions, the arbitrator weighed the factual matrix with the words of the Amended Agreement. He was alive to BC's submission that the No Interest Clause, in isolation, precluded interest payments (paras. 178-79). Indeed, the arbitrator, on a preliminary basis, accepted this submission (para. 179). But he ultimately held that "[t]he context applying here" revealed a different objective intent, namely to suspend interest only for the duration of negotiations (paras. 180-81). Specifically, the arbitrator assessed the evolving circumstances between the execution of the Settlement Framework Agreement (when the parties were "hopeful" the dispute would be resolved by negotiation and inserted the No Interest Clause in respect of compensation owed) and the execution of the Amended Agreement (when the parties knew negotiations had failed and

conclus que les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre sur la question des intérêts.

[54] En l'espèce, l'arbitre a interprété la convention modifiée — y compris sa clause zéro intérêt, qui prend sa source dans la convention cadre de règlement et est demeurée telle quelle à la suite de la Modification — à la lumière du fondement factuel. Il s'agit là du bon critère juridique (*Sattva*, par. 50).

[55] Malgré cela, la C.-B. soutient que l'arbitre a laissé le fondement factuel supplanter les termes du contrat, ce qui soulève une question de droit isolable. À mon avis, ce principe de la « supplantation » se prête à deux formulations et aucune d'entre elles ne confère compétence pour procéder à un contrôle en appel dans le cas présent, quoique pour des raisons différentes.

[56] La première formulation de ce principe de la « supplantation » est la suivante : le fondement factuel supplante les termes d'un contrat lorsqu'on lui accorde trop de poids. Cette formulation ne confère pas compétence pour procéder à un contrôle en appel dans le cas présent parce qu'il s'agit d'une question mixte.

[57] L'objectif de l'interprétation contractuelle est de déterminer « l'intention objective des parties », une opération, « de par sa nature même, axé[e] sur les faits » (*Sattva*, par. 55). Lorsqu'il a interprété les intentions des parties, l'arbitre a soupesé le fondement factuel et les termes employés dans la convention modifiée. Il était sensible à l'observation de la C.-B. selon laquelle la clause zéro intérêt, prise isolément, interdisait le paiement d'intérêts (par. 178-179). En effet, l'arbitre a retenu a priori cette observation (par. 179). Par contre, il a conclu en dernière analyse que [TRADUCTION] « [l]e contexte qui s'applique en l'espèce » dévoilait une autre intention objective, à savoir suspendre les intérêts uniquement pour la durée des négociations (par. 180-181). Plus précisément, l'arbitre a apprécié l'évolution de la situation entre la signature de la convention cadre de règlement (lorsque les parties avaient « espoir » que le différend soit réglé par la négociation et qu'elles ont inséré la clause zéro intérêt relativement à

2017 SCC 32 (CanLII)

submitted the value of "compensation" to arbitration). He held that the parties, by submitting "compensation" to arbitration, had intended compensation, interest included, to be within his jurisdiction (para. 181).

l'indemnité due) et la signature de la convention modifiée (lorsque les parties savaient que les négociations avaient avorté et qu'elles ont soumis la question de la valeur de l'« indemnité » à l'arbitrage). Il a conclu que les parties, en soumettant l'« indemnité » à l'arbitrage, voulaient en fait que l'indemnité, y compris les intérêts, relève de sa compétence (par. 181).

[58] The arbitrator, after a lengthy and complex hearing, was best situated to weigh the factual matrix in his interpretation of the Amended Agreement. The fact that he may have placed significant weight on that evidence in interpreting the agreement does not engage a legal question conferring jurisdiction on the courts under the *Arbitration Act* as it does not alter the underlying test he applied in this case.

[58] L'arbitre — après une audience longue et complexe — était le mieux placé pour soupeser le fondement factuel dans son interprétation de la convention modifiée. La possibilité qu'il ait accordé beaucoup de poids à cette preuve dans son interprétation de la convention ne fait pas intervenir une question de droit conférant compétence aux tribunaux suivant l'*Arbitration Act*, car cela n'altère pas le critère sous-jacent qu'il a appliqué en l'espèce.

[59] In the Court of Appeal's first decision, the majority at times appears to follow the first formulation of the "overwhelming" principle, and seems to imply that the arbitrator erred in law by placing excessive emphasis on the factual matrix (para. 125), even though that matrix had never been manifested in an "express provision" in the contract (para. 127). If this is the approach the majority chose, it improperly conflates questions of law (needed at the leave stage for jurisdiction) and errors of law (considered at the merits stage, once jurisdiction has been established). The identification of an alleged legal error should be based on the arbitrator's application of the wrong test, not on the fact that one would have applied the appropriate legal test differently. Otherwise, it does not raise a legal question conferring jurisdiction on the courts to review the arbitration award (*Sattva*, at paras. 63-66); rather, it skips the jurisdiction stage and immediately proceeds with a review of the arbitrator's analysis of a mixed question.

[59] Dans la première décision de la Cour d'appel, les juges majoritaires semblent parfois faire leur la première formulation du principe de « supplantation » et semblent laisser sous-entendre que l'arbitre a commis une erreur de droit en accordant une trop grande importance au fondement factuel (par. 125), même si ce fondement ne s'était jamais traduit en une [TRADUCTION] « disposition expresse » dans le contrat (par. 127). Si c'est là l'approche qu'ont retenue les juges majoritaires, elle confond à tort les questions de droit (nécessaires à l'étape de l'autorisation d'appel pour établir la compétence) et les erreurs de droit (prises en compte à l'étape de l'examen au fond, une fois que la compétence a été établie). La conclusion qu'il existerait une erreur de droit doit reposer sur l'application, par l'arbitre, du mauvais critère, et non sur le fait qu'on aurait appliqué différemment le bon critère juridique. Sinon, cela ne soulève pas une question de droit qui accorde aux tribunaux le pouvoir de contrôler la sentence arbitrale (*Sattva*, par. 63-66); au contraire, on saute ainsi l'étape de l'établissement de la compétence pour procéder immédiatement au contrôle de l'analyse d'une question mixte effectuée par l'arbitre.

[60] Likewise, it is improper to claim that a court should have jurisdiction to review the arbitrator's contractual analysis merely on the basis that it was allegedly incorrect. Indeed, it would even be improper

[60] De même, il est inexact d'affirmer qu'un tribunal devrait avoir compétence pour contrôler l'analyse contractuelle de l'arbitre du seul fait que cette analyse serait incorrecte. En effet, un tribunal aurait

2017 SCC 32 (CanLII)

to claim jurisdiction to review an arbitrator's analysis merely on the basis that it was unreasonable. A court looking at the Amended Agreement could have held that the No Interest Clause precluded interest payments and that the Arbitration Clause incorporated that preclusion when it submitted "compensation" (without interest) to arbitration. But to immediately launch into the merits of the arbitrator's contractual analysis — whether it is incorrect or unreasonable — is to put the cart before the horse. His analysis must first be characterized as raising a legal question. And only on the basis of that characterization may his analysis then be reviewed.

[61] Here, the relevant legal principle required the arbitrator to interpret the Amended Agreement "in light of the factual matrix" (*Sattva*, at para. 50). That is precisely what he did. It cannot be found that the arbitrator changed this legal principle simply because someone else might have applied it differently in this case.

[62] The second formulation of the "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is interpreted in isolation from the words of the contract, effectively creating a new agreement between the parties. This formulation of the "overwhelming" principle raises a legal question, but it lacks arguable merit here. As a result, it also fails to confer appellate review jurisdiction in this case.

[63] In *Sattva*, this Court accepted that, in rare circumstances, the application of an incorrect principle or the failure to apply a principle could give rise to an extricable question of law (paras. 53 and 62-64; see also *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21, citing *Housen*, at para. 36). As the Court recognized in *Sattva*, the use of the factual matrix in contractual interpretation is limited by the legal principle that contractual interpretation must remain grounded in the text of the contract so as to avoid effectively creating a new agreement between the parties (para. 57; see also *Hayes Forest*

même tort de se déclarer compétent pour contrôler l'analyse d'un arbitre du seul fait que cette analyse était déraisonnable. Par exemple, le tribunal qui aurait examiné la convention modifiée aurait pu conclure que la clause zéro intérêt interdisait le paiement d'intérêts et que la clause d'arbitrage prévoyait cette interdiction lorsque la question de l'« indemnité » (sans intérêt) a été soumise à l'arbitrage. Mais se pencher immédiatement sur le bien-fondé de l'analyse contractuelle de l'arbitre — qu'elle soit incorrecte ou déraisonnable — revient à mettre la charrue devant les bœufs. Il faut d'abord décider que son analyse soulève une question de droit. Et c'est seulement sur la base de cette décision que son analyse peut ensuite être contrôlée.

[61] En l'espèce, le principe juridique applicable exigeait de l'arbitre qu'il interprète la convention modifiée « à la lumière du fondement factuel » (*Sattva*, par. 50). C'est précisément ce qu'il a fait. On ne saurait conclure que l'arbitre a modifié ce principe juridique simplement parce que quelqu'un d'autre aurait pu l'appliquer différemment en l'espèce.

[62] La seconde formulation du principe de la « supplantation » est la suivante : le fondement factuel supplante les termes d'un contrat lorsqu'on l'interprète séparément de ses termes, créant dans les faits une nouvelle convention entre les parties. Cette formulation du principe en cause soulève une question de droit, mais elle est dépourvue de fondement défendable en l'espèce. Ainsi, elle ne confère pas non plus compétence pour procéder à un contrôle en appel dans l'affaire qui nous occupe.

[63] Dans *Sattva*, notre Cour a accepté que, dans de rares cas, l'application d'un mauvais principe ou l'omission d'appliquer un principe peut soulever une question de droit isolable (par. 53 et 62-64; voir aussi *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23, par. 21, citant *Housen*, par. 36). Comme l'a reconnu la Cour dans *Sattva*, le principe juridique selon lequel l'interprétation d'un contrat doit toujours s'appuyer sur le texte de celui-ci limite le recours au fondement factuel dans son interprétation afin d'éviter de créer dans les faits une nouvelle convention entre les parties (par. 57; voir

2017 SCC 32 (CanLII)

Services Ltd. v. Weyerhaeuser Co., 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 33).

[64] Whether the arbitrator failed to apply the foregoing principle raises a legal question. That said, merely raising a legal question does not exhaust the requirements for jurisdiction under s. 31 of the *Arbitration Act*. To grant leave on such a question of law, the court must be satisfied that the ground of appeal has "arguable merit" (*Sattva*, at para. 74; *Arbitration Act*, s. 31(2)(a)). In my view, if the Court of Appeal on remand had properly conducted a "preliminary examination of the question of law" in light of the reasonableness standard to be applied (*Sattva*, at paras. 74-75 and 106), it would have concluded that there is no arguable merit to this alleged legal error. The arbitrator's interpretation was rooted in the words of the contract, not overwhelmed by them. While the arbitrator may have placed significant weight on the factual matrix when interpreting the meaning of "compensation", there is no arguable merit to the claim that he interpreted that matrix isolated from the contract's words so as to effectively create a new agreement (*Sattva*, at para. 57; Hall, at pp. 33-34).

[65] Again, contractual interpretation is a fact-specific exercise. It follows that a question of law premised on the failure to apply the principle that the factual matrix must not be interpreted in isolation from the words of the contract will be very difficult to extricate in practice. On closer examination, it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix — in effect, a disagreement about *how* the decision-maker interpreted the words of a contract in light of the factual matrix (*Sattva*, at paras. 50 and 65). In short, the supposed question of law will often reveal itself to be a question about whether the decision-maker applied the principle properly — a

aussi *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. c. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; G. R. Hall, *Canadian Contractual Interpretation Law* (3e éd. 2016), p. 33).

[64] Le point de savoir si l'arbitre n'a pas appliqué le principe susmentionné constitue une question de droit. Cela dit, le simple fait de soulever une question de cette nature n'évacue pas toutes les conditions de compétence établies à l'art. 31 de l'*Arbitration Act*. Pour accorder l'autorisation d'appel sur la base d'une telle question de droit, le tribunal doit être convaincu que le moyen d'appel a un « fondement défendable » (*Sattva*, par. 74; *Arbitration Act*, al. 31(2)(a)). À mon avis, si la Cour d'appel, à la suite du renvoi, avait procédé comme il se doit à un « examen préliminaire de la question de droit » en fonction de la norme de la décision raisonnable à appliquer (*Sattva*, par. 74-75 et 106), elle aurait conclu que cette erreur de droit reprochée est dénuée de fondement défendable. L'interprétation de l'arbitre reposait sur les termes du contrat et n'était pas supplantée par ceux-ci. Bien qu'il ait peut-être accordé beaucoup d'importance au fondement factuel quand il a interprété le sens d'« indemnité », la prétention selon laquelle il a interprété ce fondement séparément des termes du contrat de manière à créer effectivement une nouvelle convention est dénuée de fondement défendable (*Sattva*, par. 57; Hall, p. 33-34).

[65] Je le répète, l'interprétation contractuelle est tributaire des faits. Ainsi, il sera très difficile de dégager en pratique une question de droit fondée sur le défaut d'appliquer le principe interdisant d'interpréter le fondement factuel séparément des termes du contrat. Un examen plus attentif montrera que ce n'est souvent rien de plus qu'une plainte au sujet du poids accordé au fondement factuel — en fait, un désaccord sur l'*interprétation* donnée par le décideur aux termes d'un contrat à la lumière du fondement factuel (*Sattva*, par. 50 et 65). Bref, la supposée question de droit se révèle fréquemment une question de savoir si le décideur a appliqué le principe comme il se doit — une question mixte

2017 SCC 32 (CanLII)

mixed question — and not about whether the decision-maker applied the proper principle. To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement. There is no arguable merit to the claim that the arbitrator's analysis here adopted such a flawed approach.

— et non de savoir si le décideur a appliqué le bon principe. Pour dégager une question de droit fondée sur la prétendue erreur d'avoir supplanté le contrat, la cour de révision doit être convaincue que le décideur a interprété le fondement factuel séparément des termes du contrat, une approche qui peut effectivement déboucher sur la création d'une nouvelle convention. La prétention selon laquelle l'arbitre a adopté une approche ainsi viciée dans son analyse est dépourvue de fondement défendable en l'espèce.

[66] Accordingly, on either formulation of the "overwhelming" principle, the majority of the Court of Appeal (in its first decision) and the unanimous Court of Appeal (in its second decision) erred in finding that the courts had jurisdiction to review the Interest Issue.

[66] En somme, peu importe la formulation du principe de « supplantation » que l'on adopte, les juges majoritaires de la Cour d'appel (dans sa première décision) et la Cour d'appel à l'unanimité (dans sa seconde décision) ont conclu à tort que les tribunaux avaient compétence pour examiner la question des intérêts.

(c) *Jurisdiction Over the Lillooet Issue*

c) *Compétence sur la question du permis Lillooet*

[67] The courts similarly lack jurisdiction over the Lillooet Issue because it does not raise a question of law. The majority of the Court of Appeal did not explicitly discuss jurisdiction over the Lillooet Issue, but found that the arbitrator had correctly denied Teal Cedar compensation for the Lillooet Licence. In contrast, the application judge reasoned that he had jurisdiction over the Lillooet Issue. I disagree with both the application judge's finding of jurisdiction and his decision to remit the issue to the arbitrator for reconsideration.

[67] Les tribunaux n'ont pas non plus compétence sur la question du permis Lillooet parce que celle-ci ne soulève pas une question de droit. Les juges majoritaires de la Cour d'appel n'ont pas abordé explicitement la compétence sur la question du permis Lillooet, mais ils ont conclu que l'arbitre avait eu raison de refuser à Teal Cedar une indemnité pour le permis Lillooet. Le juge saisi de la requête a pour sa part déterminé qu'il avait compétence sur la question du permis Lillooet. Je suis en désaccord tant avec sa déclaration de compétence qu'avec sa décision de renvoyer la question à l'arbitre pour nouvel examen.

[68] Bauman C.J. held that the arbitrator's application of his chosen methodology to the Lillooet Licence raised a pure question of law (para. 84):

> Teal argues that as there were improvements associated with the lost volumes in the Lillooet [Timber Supply Area], in light of the methodology adopted by the Arbitrator, it is an error on a pure question of law to deny Teal any compensation for the improvements. I agree that this raises a question of law . . . .

[68] Le juge en chef Bauman a statué que l'application par l'arbitre de la méthode qu'il avait retenue au permis Lillooet soulevait une pure question de droit (par. 84) :

> [TRADUCTION] Teal soutient que, comme des améliorations se rapportaient aux volumes perdus dans la zone d'approvisionnement en bois de Lillooet, eu égard à la méthode retenue par l'arbitre, c'est commettre une erreur sur une pure question de droit que de refuser à Teal une indemnité pour les améliorations. Je conviens que cela soulève une question de droit . . .

2017 SCC 32 (CanLII)

[69] In my respectful view, this approach improperly conflates jurisdiction with review. The alleged presence of an error in applying the methodology (review) does not necessarily translate into a question of law (jurisdiction). Rather, the question implicated — whether the arbitrator correctly applied the valuation methodology to the Lillooet Licence — is a mixed question. As such, it is beyond the scope of appellate review. A deeper consideration of the arbitrator's reasoning reveals how the nature of the question raised here by the Lillooet Issue is mixed rather than legal.

[70] In his initial award, the arbitrator denied Teal Cedar Improvements Compensation for the Lillooet Licence based on its unique factual attributes. He found that Teal Cedar lost no areas associated with that licence, and accordingly, suffered no loss of value in respect of improvements linked to that licence, all of which it was still free to use. In the arbitrator's view, this distinguished the Lillooet Licence from the other two licences, where BC deleted areas, and therefore denied Teal Cedar access to certain improvements associated with those other licences.

[71] In effect, the arbitrator reasoned that the Depreciation Replacement Cost Method, when applied, involves a preliminary assessment of some loss of access to improvements, in fact, before determining the value associated with that loss, in law. Consequently, the parties' dispute in respect of Improvements Compensation for the Lillooet Licence relates to the arbitrator's application of his chosen valuation methodology, a mixed question beyond the courts' jurisdiction.

[72] Indeed, the arbitrator's basis for denying Improvements Compensation for the Lillooet Licence — that BC never took any areas, and thus never took any improvements, relating to that licence — is a factual inquiry best left to the expertise of the arbitrator whose greater proximity to the complex facts in this case leaves him best-situated to adjudicate this matter.

[69] À mon humble avis, cette approche confond à tort la compétence et le contrôle. La présence alléguée d'une erreur dans l'application de la méthode (contrôle) ne se traduit pas nécessairement par une question de droit (compétence). La question en cause, qui consiste à savoir si l'arbitre a bien appliqué la méthode d'évaluation au permis Lillooet, est plutôt une question mixte. Elle échappe donc à la portée du contrôle en appel. Un examen plus approfondi du raisonnement de l'arbitre révèle en quoi la nature de la question soulevée en l'espèce par le permis Lillooet est mixte plutôt que juridique.

[70] Dans sa sentence initiale, l'arbitre a refusé à Teal Cedar l'indemnité visant les améliorations pour le permis Lillooet en raison de ses caractéristiques factuelles uniques. Il a conclu que Teal Cedar n'avait perdu aucune zone se rattachant à ce permis et qu'elle n'avait par conséquent subi aucune perte de valeur relativement aux améliorations liées à ce permis, améliorations qu'il lui était encore loisible d'utiliser en totalité. Selon l'arbitre, cela distinguait le permis Lillooet des deux autres permis, à l'égard desquels la C.-B. avait retranché des zones, empêchant ainsi Teal Cedar d'avoir accès à certaines améliorations se rapportant à ces autres permis.

[71] En réalité, l'arbitre a estimé que l'application de la méthode du coût de remplacement déprécié impliquait une évaluation préliminaire d'une certaine perte d'accès aux améliorations, en fait, avant de déterminer, en droit, la valeur liée à cette perte. Par conséquent, le différend des parties quant à l'indemnité visant les améliorations pour le permis Lillooet porte sur l'application par l'arbitre de la méthode d'évaluation qu'il a retenue, une question mixte qui échappe à la compétence des tribunaux.

[72] D'ailleurs, la raison pour laquelle l'arbitre a refusé d'accorder l'indemnité visant les améliorations pour le permis Lillooet, à savoir que la C.-B. n'a jamais pris de zones, et n'a donc jamais pris d'améliorations, se rapportant à ce permis, participe de l'examen des faits qu'il vaut mieux laisser à l'expertise de l'arbitre dont la proximité plus étroite avec les faits complexes de la présente affaire fait en sorte qu'il est mieux placé pour trancher cette question.

2017 SCC 32 (CanLII)

[73] Having explained why the courts' jurisdiction is limited to the Valuation Issue, I will now consider the two remaining steps in the framework for review of commercial arbitration awards — the standard of review and the review itself — for that issue alone.

B. *Standard of Review*

(1) Standard of Review for Commercial Arbitration Awards

[74] In an arbitral context like this one, where the decision under review is an award under the *Arbitration Act*, *Sattva* establishes that the standard of review is "almost always" reasonableness (para. 75). This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. In *Sattva*, Rothstein J. emphasizes that in "commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard" (para. 106). He suggests that this may arise only in rare circumstances, such as where a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise is at issue (paras. 75 and 106).

[75] It follows that the nature of the question under review — i.e. legal, factual, or mixed — may inform whether one of those circumstances is present, but it is not dispositive, in itself, of the applicable standard of review. For instance, it would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. While statutory interpretation is a legal question (*Heritage*, at para. 23, citing *Canadian National Railway*, at para. 33), the mere presence of a legal question does not, on its own,

[73] Ayant expliqué pourquoi les tribunaux ont uniquement compétence sur la question de l'évaluation, je me pencherai maintenant sur les deux étapes restantes du cadre de contrôle des sentences arbitrales commerciales — la norme de contrôle et le contrôle lui-même — pour cette question seulement.

B. *Norme de contrôle*

(1) Norme de contrôle des sentences arbitrales commerciales

[74] Dans un contexte arbitral comme celui qui nous occupe, où la décision faisant l'objet du contrôle est une sentence rendue sur la base de l'*Arbitration Act*, l'arrêt *Sattva* établit que la norme de contrôle applicable est « presque toujours » celle de la décision raisonnable (par. 75), laquelle concorde avec les principaux objectifs de politique générale de l'arbitrage commercial, à savoir l'efficacité et le caractère définitif. Dans *Sattva*, le juge Rothstein souligne qu'en « matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte » (par. 106). Il indique que cette norme ne s'applique que dans de rares circonstances, comme lorsqu'une question constitutionnelle ou une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise de l'arbitre est en cause (par. 75 et 106).

[75] La nature de la question à l'examen — c'est-à-dire de droit, de fait ou mixte — peut donc indiquer si l'une de ces circonstances est présente, mais elle ne permet pas, à elle seule, d'établir la norme de contrôle applicable. Par exemple, il serait erroné d'affirmer que toutes les interprétations législatives d'un arbitre commandent l'application de la norme de la décision correcte simplement parce qu'elles font intervenir une question de droit. Bien que l'interprétation législative soit une question de droit (*Heritage*, par. 23, citant *Compagnie des chemins de*

2017 SCC 32 (CanLII)

preclude the application of a reasonableness review in a commercial arbitration context. *Sattva* is clear in this regard.

[76] In contrast, where the decision under review is, for example, a civil litigation judgment, the nature of the question is dispositive of the standard of review, with factual and mixed questions being reviewed for palpable and overriding error (*Housen*, at paras. 10 and 36) and legal questions — including extricable questions of law — being reviewed for correctness (*Housen*, at paras. 8 and 36). It is therefore critical to bear these distinctions in mind when determining the appropriate standard of review in any given case.

(2) Standard of Review for the Valuation Issue

[77] The decisions below, other than that of the Court of Appeal on remand, largely avoid the question of the standard of review. Bauman C.J. held that the arbitrator had "correctly answered" the Valuation Issue, suggesting a correctness standard of review (para. 57). Similarly, the majority employed correctness language in their reasoning (para. 57). In dissent, Finch C.J. simply noted the absence of errors in Bauman C.J.'s Valuation Issue analysis, making the appropriate standard of review immaterial to his holding (para. 143). To be fair, these decisions predated *Sattva* and lacked this Court's guidance on standard of review in a commercial arbitration context such as this one.

[78] However, on remand, the Court of Appeal had the benefit of *Sattva*, and its decision was specifically directed toward reconsidering the majority's decision in light of *Sattva*. In my view, the Court of Appeal erroneously held that the standard of review should be correctness for the Valuation Issue (paras. 35-37).

fer nationaux du Canada, par. 33), la simple présence d'une question de droit n'empêche pas, à elle seule, d'appliquer la norme de la décision raisonnable dans un contexte d'arbitrage commercial. L'arrêt *Sattva* est clair à ce sujet.

[76] En revanche, lorsque la décision faisant l'objet du contrôle est, par exemple, un jugement en matière civile, la nature de la question permet d'établir la norme de contrôle applicable, puisque les questions de fait et les questions mixtes sont examinées selon la norme de l'erreur manifeste et déterminante (*Housen*, par. 10 et 36) et les questions de droit — y compris les questions de droit isolables — doivent l'être en fonction de la norme de la décision correcte (*Housen*, par. 8 et 36). Il est donc crucial de garder ces distinctions à l'esprit lorsque l'on détermine la norme de contrôle applicable dans un cas donné.

(2) Norme de contrôle applicable à la question de l'évaluation

[77] Les décisions des juridictions inférieures, mis à part celle rendue par la Cour d'appel à la suite du renvoi, éludent en grande partie la question de la norme de contrôle. Le juge en chef Bauman a conclu que l'arbitre [TRADUCTION] « a[vait] correctement répondu » à la question de l'évaluation, laissant ainsi supposer qu'il a appliqué la norme de la décision correcte (par. 57). De même, les juges majoritaires emploient le terme « correct » dans leur raisonnement (par. 57). Le juge en chef Finch, dissident, n'a fait que souligner l'absence d'erreurs dans l'analyse de la question de l'évaluation à laquelle s'était livré le juge en chef Bauman, ce qui rend la norme de contrôle sans importance pour sa conclusion (par. 143). En toute justice, ces décisions précèdent l'arrêt *Sattva* et leurs auteurs ne bénéficiaient pas alors des directives de notre Cour sur la norme de contrôle applicable dans un contexte d'arbitrage commercial comme celui qui nous occupe.

[78] Toutefois, à la suite du renvoi, la Cour d'appel avait connaissance de l'arrêt *Sattva* et sa décision avait expressément pour objet de revoir la décision des juges majoritaires à la lumière de cet arrêt. À mon sens, la Cour d'appel a conclu à tort que la norme de contrôle applicable à la question de

2017 SCC 32 (CanLII)

Its decision appears to suggest that questions of law, such as statutory interpretation, necessarily attract a correctness standard of review (paras. 36-37). In so far as the Court of Appeal intended to make this suggestion, it is incorrect. As stated before, while the nature of the question (legal, mixed, or fact) is dispositive of the standard of review in the civil litigation context (*Housen*, at paras. 8, 10 and 36), it is not in the commercial arbitration context (*Sattva*, at paras. 75 and 106).

l'évaluation devait être celle de la décision correcte (par. 35-37). Sa décision semble suggérer que les questions de droit, comme l'interprétation des lois, appellent toujours la norme de la décision correcte (par. 36-37). Dans la mesure où la Cour d'appel a voulu faire cette suggestion, celle-ci est erronée. Comme je l'ai déjà mentionné, si la nature de la question (de droit, mixte ou de fait) permet de déterminer la norme de contrôle applicable dans le contexte d'un litige civil (*Housen*, par. 8, 10 et 36), elle ne permet pas de le faire dans le contexte de l'arbitrage commercial (*Sattva*, par. 75 et 106).

[79] Rather, the standard of review on the legal questions arising from the arbitrator's analysis of the Valuation Issue is reasonableness. As discussed, under *Sattva*, reasonableness review is almost always applied in commercial arbitration (para. 75). That preference is not negated here in light of the nature of the question at issue and the arbitrator's presumed expertise.

[79] La norme de contrôle applicable aux questions de droit découlant de l'analyse de la question de l'évaluation effectuée par l'arbitre est plutôt celle de la décision raisonnable. Comme nous l'avons vu, d'après l'arrêt *Sattva*, le contrôle selon la norme de la décision raisonnable s'applique presque toujours en matière d'arbitrage commercial (par. 75). Ce penchant n'est pas exclu en l'espèce vu la nature de la question en litige et l'expertise présumée de l'arbitre.

[80] The question at issue — determining the category of appropriate valuation methodologies under a BC forestry statute — is not a previously recognized exceptional question identified in *Sattva* (paras. 75 and 106). It is clearly not a constitutional question. Similarly, it is neither of central importance to the legal system as a whole (limited, as it is, to a single province and a single industry) nor is it outside the expertise of the arbitrator (whom the parties chose to adjudicate this very dispute and whose expertise is therefore presumed). Further, the relevant portions of the *Dunsmuir* analysis (as per *Sattva*, at para. 106) favour reasonableness review.

[80] La question en litige, qui consiste à déterminer la catégorie de méthodes d'évaluation conformes à une loi forestière de la C.-B., n'est pas une exception déjà reconnue mentionnée dans l'arrêt *Sattva* (par. 75 et 106). Ce n'est manifestement pas une question constitutionnelle. De même, elle ne revêt pas une importance capitale pour le système juridique dans son ensemble (puisqu'elle concerne une seule province et une seule industrie) et n'est pas non plus étrangère au domaine d'expertise de l'arbitre (qui a été choisi par les parties pour trancher ce différend précis et qui est donc présumé posséder l'expertise requise). De plus, les éléments pertinents de l'analyse établie dans *Dunsmuir* (*Sattva*, par. 106) militent en faveur d'un contrôle selon la norme de la décision raisonnable.

[81] For example, specialized expertise supports reasonableness review here. As discussed, the parties selected the arbitrator to adjudicate this exact issue, hence unambiguously affirming their acceptance of his sufficient expertise. Despite this, in its decision on remand, the Court of Appeal held that the arbitrator's lack of expertise regarding forestry statutes favoured a correctness standard of review (para. 35).

[81] Par exemple, l'expertise spécialisée appuie le contrôle selon la norme de la décision raisonnable en l'espèce. Comme nous l'avons vu, les parties ont choisi l'arbitre pour trancher précisément cette question, confirmant ainsi de façon non équivoque leur reconnaissance de son expertise. Malgré cela, dans la décision qu'elle a rendue à la suite du renvoi, la Cour d'appel a conclu que le manque d'expertise de

2017 SCC 32 (CanLII)

With respect, that disregards this Court's guidance in *Sattva* that arbitrators chosen by the parties "may be presumed . . . chosen either based on their expertise in the area which is the subject of dispute or . . . otherwise qualified in a manner that is acceptable to the parties" (para. 105). The Court of Appeal's reasoning also disregards the practical reality that, to weigh an arbitrator's actual (as opposed to presumed) expertise in every arbitration would require some sort of preliminary assessment of the arbitrator's level of expertise with a view to establishing the standard of review for every particular hearing — which would be antithetical to the efficiencies meant to be gained through the arbitration process.

l'arbitre en ce qui concerne les lois forestières militait en faveur de la norme de la décision correcte (par. 35). Soit dit en tout respect, cette conclusion ne tient pas compte de la directive donnée par la Cour dans l'arrêt *Sattva*, selon laquelle, quand les parties choisissent leur arbitre, « on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable » (par. 105). Le raisonnement de la Cour d'appel fait également abstraction de la réalité concrète selon laquelle l'appréciation de l'expertise réelle (plutôt que présumée) de l'arbitre dans chaque arbitrage nécessiterait une certaine évaluation préliminaire du degré d'expertise de l'arbitre en vue d'établir la norme de contrôle applicable à chaque audience — ce qui ferait obstacle aux gains en efficacité que l'on cherche à réaliser par la procédure d'arbitrage.

[82] Of course, the presumed expertise of a decision-maker remains a "contextual" consideration (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 64). In *Sattva*, the arbitration was voluntary (para. 9), whereas arbitration in this case was statutorily imposed (*Revitalization Act*, s. 6(6)), a point specifically made by the Court of Appeal in its decision on remand (para. 35). But that distinction does not amount to much. The parties in this case still had complete control over the choice of their arbitrator; despite anticipated regulations "prescribing requirements for the selection of arbitrators" (*Revitalization Act*, s. 13(2)(b)(v)), no such regulations had been enacted at the time the arbitration arose. In addition, as noted, the arbitrator here considered the very issue he was mandated to address by both statute and party consent. If an issue were to arise in the course of an arbitration that was beyond the foreseeable scope of an arbitrator's mandate, that could well undermine an arbitrator's presumed expertise. But that is simply not the case before us.

[82] Bien entendu, l'expertise présumée du décideur demeure un élément « contextue[l] » (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 64). Dans *Sattva*, l'arbitrage était volontaire (par. 9), alors qu'en l'espèce, l'arbitrage était imposé par la loi (*Revitalization Act*, par. 6(6)), un point que la Cour d'appel a explicitement fait valoir dans la décision qu'elle a rendue à la suite du renvoi (par. 35). Or, cette distinction porte peu à conséquence. Les parties en l'espèce exerçaient toujours un contrôle complet sur le choix de leur arbitre; même si on s'attendait à la prise d'un règlement [TRADUCTION] « prescrivant [. . .] les exigences liées à la sélection des arbitres » (*Revitalization Act*, sous-al. 13(2)(b)(v)), aucun règlement de ce genre n'avait encore été adopté au moment où a eu lieu l'arbitrage. De plus, comme je l'ai souligné, l'arbitre a examiné en l'espèce la question même qu'il était chargé d'étudier en vertu de la loi et sur consentement des parties. Si une question débordant le cadre prévisible du mandat d'un arbitre devait être soulevée au cours d'un arbitrage, cela pourrait fort bien miner l'expertise présumée de l'arbitre, mais ce n'est tout simplement pas le cas en l'espèce.

[83] In closing on this point, I observe that the applicability of a reasonableness standard of review in this case is hardly disputable. We are, after all, in

[83] Pour conclure sur ce point, je ferai remarquer que l'applicabilité de la norme de la décision raisonnable en l'espèce n'est guère contestable. Nous

2017 SCC 32 (CanLII)

a commercial arbitration context, in which, from a policy perspective, the deliberate aim is to maximize efficiency and finality. Further, the arbitrator was specifically assigned jurisdiction over the discrete issue of valuation by the *Revitalization Act* (s. 6(6)), an issue in which he, having been chosen by consent of the parties, is expected to have specialized expertise. This merits deferential review.

C. *Review of the Valuation Issue*

[84] Turning to the review step of the analysis, like the application judge and the dissent at the Court of Appeal, I find that the arbitrator's determination that the Depreciation Replacement Cost Method was consistent with the *Revitalization Act* was reasonable. This decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law, and the decision was justified, transparent, intelligible, and defensible (*Dunsmuir*, at para. 47). In my view, the broad and open-ended language of the *Revitalization Act* does not inevitably lead to "a single reasonable interpretation" (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 38) such as the market value approach endorsed by my colleagues' reasons (paras. 133-34).

(1) Background Observations

[85] Two background observations reinforce the reasonableness of the arbitrator's decision in this case and should be discussed before the arbitrator's specific line of reasoning is explored.

[86] First, the *Revitalization Act* anticipated the Lieutenant Governor in Council passing regulations "prescribing methods of evaluation for use in determining value" (*Revitalization Act*, s. 13(2)(b)(ii)), but no such regulations had been passed at the time of dispute, or even at the time of the hearing before this Court (transcript, at p. 9). In the absence of such regulations, the legislative scheme acknowledges that determining "value" in these circumstances gives rise to a range of reasonable

nous trouvons, après tout, dans un contexte d'arbitrage commercial qui, en principe, vise délibérément à maximiser l'efficacité et le caractère définitif. En outre, l'arbitre s'est expressément vu attribuer une compétence sur la question distincte de l'évaluation par la *Revitalization Act* (par. 6(6)), une question sur laquelle on s'attend à ce qu'il possède une expertise spécialisée, ayant été choisi sur consentement des parties. Cela commande un contrôle empreint de déférence.

C. *Contrôle de la question de l'évaluation*

[84] En ce qui concerne maintenant l'étape du contrôle de l'analyse, à l'instar du juge saisi de la requête et du juge dissident en Cour d'appel, j'estime que la conclusion de l'arbitre selon laquelle la méthode du coût de remplacement déprécié respectait la *Revitalization Act* était raisonnable. Cette décision appartenait aux issues possibles acceptables pouvant se justifier au regard des faits et du droit, et la décision était justifiée, transparente, intelligible et défendable (*Dunsmuir*, par. 47). J'estime que le libellé large et non limitatif de la *Revitalization Act* ne mène pas inévitablement à « une seule interprétation raisonnable » (*McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, par. 38) telle l'approche fondée sur la valeur marchande qu'ont retenue mes collègues dans leurs motifs (par. 133-134).

(1) Observations générales

[85] Il convient de formuler deux observations générales renforçant le caractère raisonnable de la décision de l'arbitre en l'espèce avant de se pencher sur son raisonnement précis.

[86] Tout d'abord, la *Revitalization Act* prévoyait que le lieutenant-gouverneur en conseil prendrait un règlement [TRADUCTION] « prescrivant [. . .] les méthodes d'évaluation à utiliser pour déterminer la valeur » (*Revitalization Act*, sous-al. 13(2)(b)(ii)), mais aucun règlement de ce genre n'avait été pris au moment du litige, ni même au moment de l'audience devant notre Cour (transcription, p. 9). En l'absence d'un tel règlement, le régime législatif reconnaît que la détermination de la « valeur »

2017 SCC 32 (CanLII)

interpretations (see *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59). Put differently, the anticipated (yet non-promulgated) regulations suggest that determining "value" per the *Revitalization Act* is not an analysis in which "the ordinary tools of statutory interpretation lead to a single reasonable interpretation" (*McLean*, at para. 38). Indeed, if there were only one reasonable interpretation for determining value, the regulatory power provided in s. 13 of the *Revitalization Act* would be superfluous, contrary to established principles of statutory interpretation.

dans ces circonstances donne ouverture à un éventail d'interprétations raisonnables (voir *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 18, citant *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 59). Autrement dit, le règlement anticipé (mais non encore promulgué) donne à penser qu'établir la « valeur » conformément à la *Revitalization Act* ne participe pas d'une analyse dans laquelle « les méthodes habituelles d'interprétation législative mènent à une seule interprétation raisonnable » (*McLean*, par. 38). D'ailleurs, s'il n'existait qu'une seule interprétation raisonnable pour déterminer la valeur, le pouvoir de réglementation prévu à l'art. 13 de la *Revitalization Act* serait superflu, contrairement aux principes établis d'interprétation des lois.

[87] Second, the arbitrator's determination of a reasonable valuation method must be assessed in the context of his reasons as a whole. Three "generally recognized valuation approaches" were presented to the arbitrator: Market Value, Income, and Depreciation Replacement Cost (para. 112). The arbitrator specifically explained his rejection of the first two methods on the basis that the value they generated did not correspond to a sensible value in the context of Crown land (which can neither be sold for market value nor generate income), a fact admitted by BC's own expert at the hearing (para. 113). As a result, the reasonableness of the arbitrator's analysis cannot be assessed solely with respect to the reasonableness of the Depreciation Replacement Cost Method in isolation. As the arbitrator recognized, all of the methods from the arbitration hearing had their own flaws (paras. 112-20). This was a reality the arbitrator had to grapple with while negotiating abundant expert evidence juxtaposing those methods. His ultimate choice — the Depreciation Replacement Cost Method — was defensible on the facts and the law.

[87] Ensuite, le choix par l'arbitre d'une méthode d'évaluation raisonnable doit être apprécié eu égard à ses motifs dans leur ensemble. Trois [TRADUCTION] « méthodes d'évaluation généralement reconnues » ont été proposées à l'arbitre : celles de la valeur marchande, du revenu et du coût de remplacement déprécié (par. 112). L'arbitre a expressément expliqué qu'il avait rejeté les deux premières méthodes parce que les valeurs qu'elles donnaient ne correspondaient pas à une valeur raisonnable dans le cas des terres de la Couronne (qui ne peuvent ni être vendues à leur valeur marchande ni générer de revenu), un fait qui a été admis par le propre expert de la C.-B. à l'audience (par. 113). Ainsi, le caractère raisonnable de l'analyse de l'arbitre ne peut être apprécié uniquement en fonction du caractère raisonnable de la méthode du coût de remplacement déprécié prise isolément. Comme l'a reconnu l'arbitre, toutes les méthodes présentées au cours de l'audience d'arbitrage comportaient des lacunes (par. 112-120). C'est une réalité avec laquelle l'arbitre a dû composer en examinant une abondante preuve d'expert juxtaposant ces méthodes. Son choix final — la méthode du coût de remplacement déprécié — était défendable au vu des faits et du droit.

(2) Arbitrator's Award

(2) Sentence de l'arbitre

[88] With the above background points addressed, I now turn to the logic of the arbitrator's award, which proceeded as follows:

[88] Les points généraux qui précèdent ayant été abordés, je passe maintenant à la logique de la sentence de l'arbitre, qui a suivi le raisonnement suivant :

2017 SCC 32 (CanLII)

(a) The compensation provision entitles Teal Cedar to "compensation . . . in an amount equal to the value of improvements made to Crown land". Accordingly, the arbitrator must select a valuation method for the "value of improvements made to Crown land".

(b) The valuation method need not be coterminous with the value of Teal Cedar's actual financial loss, as BC argues. Rather, the compensation provision expressly tells the arbitrator what the valuation method must be linked to, namely, "the value of improvements made to Crown land".

(c) The Depreciation Replacement Cost Method was accepted by both parties as a reasonable means of valuing improvements made to Crown land.

(d) An interpretation of the *Revitalization Act* as a whole supports the Depreciation Replacement Cost Method because it is the only valuation methodology actually presented to the arbitrator that determines Improvements Compensation separately from Rights Compensation, in keeping with their separate treatment under the *Revitalization Act*.

(e) In any event, interpreting the *Revitalization Act* is impossible with the other main methods proposed at the hearing — the Market Value Method and Income Method — because these methods are inapplicable to Crown land, which cannot be sold and which cannot generate income.

[89] This reasoning is supportable and understandable, and thus reasonable. As found by Bauman C.J. (para. 52) and Finch C.J., dissenting (paras. 141-43), it is logical to link the quantum of Improvements Compensation to "the value of improvements made to Crown land" when that is precisely what is prescribed by the *Revitalization Act*. Indeed, linking the

a) La disposition d'indemnisation donne à Teal Cedar le droit de toucher une [TRADUCTION] « indemnité égale à la valeur des améliorations apportées aux terres de la Couronne ». L'arbitre doit donc choisir une méthode d'évaluation permettant de déterminer la « valeur des améliorations apportées aux terres de la Couronne ».

b) Il n'est pas nécessaire que la méthode d'évaluation coïncide avec la valeur de la perte financière réelle de Teal Cedar, comme le prétend la C.-B. En effet, la disposition d'indemnisation indique expressément à l'arbitre à quoi la méthode d'évaluation doit se rapporter, à savoir « la valeur des améliorations apportées aux terres de la Couronne ».

c) La méthode du coût de remplacement déprécié a été reconnue par les deux parties comme un moyen raisonnable d'évaluer les améliorations apportées aux terres de la Couronne.

d) Une interprétation de la *Revitalization Act* dans son ensemble appuie le choix de la méthode du coût de remplacement déprécié parce qu'il s'agit de la seule méthode d'évaluation proposée à l'arbitre qui permet de fixer l'indemnité visant les améliorations séparément de l'indemnité visant les droits, ce qui est conforme au traitement distinct que leur réserve la *Revitalization Act*.

e) De toute façon, il est impossible d'interpréter la *Revitalization Act* en fonction des autres principales méthodes proposées à l'audience — celle de la valeur marchande et celle fondée sur le revenu — parce que ces méthodes sont inapplicables aux terres de la Couronne, qui ne peuvent ni être vendues ni générer de revenu.

[89] Ce raisonnement est soutenable et compréhensible, et donc raisonnable. Comme l'ont conclu le juge en chef Bauman (par. 52) et le juge en chef Finch, dissident (par. 141-143), il est logique de lier le montant de l'indemnité visant les améliorations à « la valeur des améliorations apportées aux terres de la Couronne » quand c'est précisément ce que

2017 SCC 32 (CanLII)

quantum of Improvements Compensation to "the value of improvements made to Crown land" is the stronger plain language interpretation of the *Revitalization Act*.

prescrit la *Revitalization Act*. D'ailleurs, le fait de lier le montant de l'indemnité visant les améliorations à « la valeur des améliorations apportées aux terres de la Couronne » constitue la meilleure interprétation fondée sur le sens ordinaire que l'on puisse donner à la *Revitalization Act*.

(3) BC's Arguments Against the Award

(3) Arguments de la C.-B. contre la sentence

[90] Conversely, BC's attacks on the reasonableness of the arbitrator's reasoning are, in reality, attacks on the correctness of the arbitrator's reasoning. Similarly, the majority — which misidentified the standard of review as correctness — improperly conducted a correctness review of the arbitrator's decision, rather than assessing its reasonableness (para. 68). This tainted their whole analysis of the decision.

[90] Inversement, les attaques de la C.-B. contre le caractère raisonnable du raisonnement de l'arbitre sont en réalité des attaques contre la justesse de ce raisonnement. De même, les juges majoritaires — qui ont fait erreur en considérant que la norme de contrôle applicable était celle de la décision correcte — ont procédé à tort au contrôle de la décision de l'arbitre suivant cette norme, plutôt que d'en apprécier le caractère raisonnable (par. 68), ce qui a entaché toute leur analyse de la décision.

[91] BC's first argument addresses the plain language interpretation of the compensation provision. BC's position is based on a truncated version of the compensation provision, where BC interprets the word "compensation" in isolation and reasons that such compensation must be limited to Teal Cedar's actual financial loss. This was, similarly, the approach taken by the majority of the Court of Appeal in its first decision (paras. 68 and 72-73) and subsequently by the Court of Appeal on remand (para. 38). However, the complete version of the compensation provision sets the value of the compensation at "an amount equal to the value of improvements made to Crown land", as noted by Bauman C.J. (para. 52), and affirmed by Finch C.J., dissenting (paras. 141-43). If that amount exceeds Teal Cedar's actual loss, such reasoning falls far short of indefensible, especially in so far as the arbitrator's chosen methodology is: (1) consistent with common law principles informing the liberal interpretation of remedial expropriation legislation (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at pp. 44-46, as noted by Bauman C.J. (paras. 46-48)); and (2) the only methodology of the three presented which reflects the *Revitalization Act*'s deliberate separation of Rights Compensation and Improvements Compensation, also noted by Bauman C.J. (para. 63). Recall that the issue on

[91] Le premier argument de la C.-B. traite de l'interprétation fondée sur le sens ordinaire de la disposition d'indemnisation. La position de la C.-B. repose sur une version tronquée de la disposition d'indemnisation, où la C.-B. interprète isolément le terme « indemnité » et soutient que celle-ci ne doit pas être supérieure à la perte financière réelle de Teal Cedar. Il s'agit également de la démarche retenue par la majorité de la Cour d'appel dans sa première décision (par. 68 et 72-73), puis par la Cour d'appel à la suite du renvoi (par. 38). Or, la version complète de la disposition d'indemnisation fixe la valeur de l'indemnité à [TRADUCTION] « [un montant] éga[l] à la valeur des améliorations apportées aux terres de la Couronne », comme l'a souligné le juge en chef Bauman (par. 52) et l'a confirmé le juge en chef Finch, dissident (par. 141-143). Si ce montant excède la perte réelle de Teal Cedar, un tel raisonnement est très loin d'être indéfendable, surtout dans la mesure où la méthode choisie par l'arbitre : (1) est conforme aux principes de common law qui sous-tendent l'interprétation libérale des lois réparatrices en matière d'expropriation (*Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32, p. 44-46, dont a fait état le juge en chef Bauman (par. 46-48)); et (2) constitue la seule méthode parmi les trois proposées qui reflète la distinction entre l'indemnité visant les droits

2017 SCC 32 (CanLII)

review is not whether the arbitrator's interpretation was correct, but rather whether that interpretation — which is supported by the plain language of the provision — was reasonable.

et l'indemnité visant les améliorations prévue délibérément par la *Revitalization Act*, dont a également fait état le juge en chef Bauman (par. 63). Rappelons que la question à l'examen n'est pas de savoir si l'interprétation de l'arbitre était correcte, mais plutôt de savoir si cette interprétation — étayée par le sens ordinaire de la disposition — était raisonnable.

[92] My colleagues suggest that the "obvious ordinary meaning" of the compensation provision limits compensation to Teal Cedar's "limited interest in the improvements as a licence holder" (para. 112). I respectfully disagree that this is the only reasonable interpretation of the provision at issue. Admittedly, the provision mentions that this compensation is paid to licence holders. But it makes no mention of limiting compensation in accordance with the nature of a licence holder's technical legal interest. Rather, it sets compensation equal to the "value of improvements made to Crown land", the interpretation ultimately adopted by the arbitrator.

[92] Mes collègues suggèrent que le « sens ordinaire [. . .] évident » de la disposition d'indemnisation fait en sorte que l'indemnité ne doit pas dépasser l'« intérêt limité [de Teal Cedar] dans les améliorations en tant que titulaire de permis » (par. 112). Soit dit en tout respect, je ne suis pas d'accord qu'il s'agit là de la seule interprétation raisonnable de la disposition en cause. Certes, la disposition indique que cette indemnité est versée aux titulaires de permis, mais elle ne parle pas de la limiter en fonction de la nature de l'intérêt légal technique que possède un titulaire de permis. Elle fixe plutôt l'indemnité à un montant égal à la « valeur des améliorations apportées aux terres de la Couronne », soit l'interprétation retenue en fin de compte par l'arbitre.

[93] BC's second argument addresses the purpose of the compensation provision. BC claims that the purpose of the compensation provision — i.e. paying back companies for the improvements they made and to which they were subsequently denied access — precludes a "windfall" payment to companies equal to the notional "value of [all] improvements made to Crown land". The majority of the Court of Appeal in its first decision (at para. 73) and subsequently the Court of Appeal on remand (at para. 38) similarly felt that "[t]he Legislature could not have intended" such a "publicly financed windfall" in compensation. Likewise, my colleagues label this "gross overcompensation" effectively on the basis that it exceeded the market value of the improvements (para. 134-36). But characterizing the payment resulting from the Depreciation Replacement Cost Method as a windfall begs the question, i.e. it assumes that compensation equal to the "value of [all] improvements" is excessive in the course of explaining that excess. To result in a windfall, the method would have to provide excessive compensation to forestry companies. And BC's basis for claiming that excessive compensation was paid in

[93] Le deuxième argument de la C.-B. porte sur l'objet de la disposition d'indemnisation. La C.-B. soutient que cet objet — c.-à-d. de rembourser les entreprises des améliorations qu'elles ont effectuées et auxquelles elles se sont vu par la suite refuser l'accès — empêche les entreprises de réaliser un [TRADUCTION] « gain fortuit » égal à la « valeur [nominale] de [toutes] les améliorations apportées aux terres de la Couronne ». La majorité de la Cour d'appel dans sa première décision (par. 73), puis la Cour d'appel à la suite du renvoi (par. 38) partageaient l'avis que [TRADUCTION] « [l]e législateur ne pouvait avoir souhaité » un tel « gain fortuit financé à même les fonds publics » en guise d'indemnité. Dans le même ordre d'idées, mes collègues qualifient en fait cette indemnité de « nettement excessive » au motif qu'elle excède la valeur marchande des améliorations (par. 134-136). Or, le fait de qualifier le paiement résultant de la méthode du coût de remplacement déprécié de gain fortuit élude la question, en ce qu'on tient ainsi pour acquis qu'une indemnité égale à la « valeur de [toutes] les améliorations » est excessive alors qu'on est en train d'expliquer cet excès. Pour donner lieu à un gain fortuit, il faudrait

2017 SCC 32 (CanLII)

this case is the assumption that it was inappropriate for the arbitrator to order compensation in excess of Teal Cedar's actual costs, despite the absence of any reference in the *Revitalization Act* limiting Teal Cedar's compensation to its actual costs or expenses.

que la méthode accorde une indemnité excessive aux entreprises forestières. Mais la C.-B. appuie sa prétention voulant qu'une indemnité excessive ait été payée en l'espèce sur la supposition selon laquelle il ne convenait pas que l'arbitre ordonne le paiement d'une indemnité supérieure aux frais réels de Teal Cedar, et ce, malgré l'absence dans la *Revitalization Act* de toute disposition limitant l'indemnité de Teal Cedar à ses frais ou dépenses réels.

[94] The full "value of improvements made to Crown land" is the language chosen by the legislature as the quantum for the compensation provision. If the BC legislature had wanted to pay companies less than the "value of improvements made to Crown land", it would not have set the amount of compensation "equal to" it. As a consequence, the arbitrator's reasoning is hardly indefensible, particularly when the wording of the compensation provision so clearly fixes compensation at the specific amount chosen by the arbitrator. Further, it is hardly indefensible to select a valuation method in excess of the actual costs incurred by forestry companies in improving their Crown land when the commercial value of those improvements — which are necessary instruments in Teal Cedar's complex and profitable timber operations — presumably exceeds the initial costs required to install the improvements in the first place. Indeed, one could argue that the notional cost of constructing the improvements attached to certain licences was built in to the cost of procuring the licence, hence justifying compensation when access to those improvements was restricted.

[94] La pleine « valeur des améliorations apportées aux terres de la Couronne » est l'expression choisie par le législateur pour désigner le montant de l'indemnité dans la disposition d'indemnisation. Si le législateur de la C.-B. avait voulu verser aux entreprises une indemnité inférieure à la « valeur des améliorations apportées aux terres de la Couronne », il n'aurait pas prévu une indemnité « égale à » celle-ci. Le raisonnement de l'arbitre n'est donc guère indéfendable, d'autant plus que le libellé de la disposition d'indemnisation fixe clairement l'indemnité au montant précisément établi par l'arbitre. En outre, il n'est guère indéfendable de choisir une méthode d'évaluation qui donne une indemnité excédant les frais réellement engagés par les entreprises forestières pour apporter des améliorations à leurs terres de la Couronne lorsque la valeur commerciale de ces améliorations — qui sont des instruments nécessaires aux activités forestières complexes et lucratives de Teal Cedar — excède vraisemblablement les coûts initiaux qui ont dû être supportés pour les installer au départ. En effet, on pourrait soutenir que le coût théorique de construction des améliorations se rapportant à certains permis était incorporé dans le coût d'obtention du permis, ce qui justifierait une indemnité lorsque l'accès à ces améliorations a été restreint.

[95] As such, the desire to limit Teal Cedar's compensation to its actual loss or damage or to what it lost through BC's takebacks is more complex than one might think, further justifying deference to the arbitrator's view of the abundant expert evidence before him. For example, my colleagues hold that the compensation should reflect how Teal Cedar only lost its right to use the improvements, not the improvements themselves (para. 123). But the arbitrator was clearly alive to this concern when he noted

[95] Ainsi, le désir de restreindre l'indemnité de Teal Cedar à la perte ou aux dommages qu'elle a réellement subis par suite des reprises de la C.-B. est plus complexe qu'on ne le croit, ce qui justifie d'autant plus que l'on fasse preuve de déférence envers l'opinion que s'est fait l'arbitre devant l'abondante preuve d'expert dont il disposait. Par exemple, mes collègues concluent que l'indemnité doit tenir compte du fait que Teal Cedar a seulement perdu son droit d'utiliser les améliorations, et non

2017 SCC 32 (CanLII)

that the amount of compensation he ultimately determined was lower than Teal Cedar's actual historical costs expended on improvements (para. 140), and when he deducted from his final compensation figure spur roads which, as a matter of fact, are useless after their initial use (para. 166). Similarly, my colleagues state that Teal Cedar was already compensated "for future construction costs through deductions from stumpage fees" (para. 126). But, as the arbitrator explained with reference to the record before him, stumpage (1) ultimately affects the value of the harvesting rights, compensation for which the parties settled on (para. 127); (2) was not even considered in the recognized valuation methodology he ultimately adopted (para. 127); and (3) cannot negate Improvements Compensation since the compensation provision presupposes compensation not captured by other avenues, such as reduced stumpage fees (para. 156).

les améliorations elles-mêmes (par. 123). Or, l'arbitre était clairement sensible à cette préoccupation quand il a fait remarquer que le montant de l'indemnité qu'il a fixé en définitive était inférieur aux frais réels engagés auparavant par Teal Cedar pour les améliorations (par. 140), et quand il a soustrait du montant final de l'indemnité les chemins de desserte qui, en fait, ne servent à rien après leur utilisation initiale (par. 166). De même, mes collègues affirment que Teal Cedar avait déjà été indemnisée « des coûts de construction futurs au moyen de déductions sur les droits de souche » (par. 126). Mais comme l'a expliqué l'arbitre en prenant appui sur le dossier qui lui a été présenté, les droits de souche (1) influent en définitive sur la valeur des droits de coupe, une indemnité sur laquelle les parties se sont entendues (par. 127); (2) n'ont même pas été pris en considération dans la méthode d'évaluation reconnue qu'il a fini par choisir (par. 127); et (3) ne peuvent servir à exclure une indemnité visant les améliorations puisque la disposition d'indemnisation sous-entend l'existence d'une indemnité non couverte par d'autres solutions telles qu'une réduction des droits de souche (par. 156).

[96] In reality, BC's "windfall" complaint is not that Teal Cedar received more compensation than the *Revitalization Act* requires in law, but rather, that Teal Cedar received more compensation than it allegedly deserved in fact. But the arbitrator's role in interpreting the *Revitalization Act* is not to assess the amount of compensation morally owed to Teal Cedar; it is to assess the amount of compensation prescribed by the *Revitalization Act*.

[96] En réalité, la contestation de la C.-B. relative au « gain fortuit » ne tient pas au fait que Teal Cedar a reçu une indemnité plus élevée que ce que la *Revitalization Act* exige en droit, mais plutôt au fait que Teal Cedar a reçu une indemnité plus élevée que ce qu'elle aurait mérité en fait. Or, le rôle de l'arbitre dans l'interprétation de la *Revitalization Act* n'est pas d'évaluer le montant d'indemnité moralement dû à Teal Cedar; il doit évaluer le montant d'indemnité prescrit par la *Revitalization Act*.

[97] BC's third argument is based on discussion of the *Revitalization Act* in Hansard, where the former Minister of Forests described how the compensation provision intended to compensate forestry companies for the fact that they had actual financial costs associated with their improvements: "They have built roads; they have built bridges. They deserve to be compensated for those costs if they are precluded from utilizing that infrastructure to harvest areas that are going to be redistributed elsewhere" (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess.,

[97] Le troisième argument de la C.-B. repose sur un examen de la *Revitalization Act* consigné dans le Hansard, où l'ancien ministre des Forêts a expliqué en quoi la disposition d'indemnisation visait à indemniser les entreprises forestières du fait qu'elles avaient supporté des coûts financiers réels relativement à leurs améliorations : [TRADUCTION] « Elles ont construit des routes; elles ont construit des ponts. Elles méritent d'être indemnisées de ces coûts si elles ne peuvent pas utiliser ces infrastructures pour exploiter des zones qui seront redistribuées ailleurs » (Colombie-Britannique, *Official Report*

2017 SCC 32 (CanLII)

37th Parl., March 27, 2003, at p. 5682 (Hon. M. de Jong)). But Hansard only goes so far. The words of a statute carry paramount importance in its interpretation. And the final wording of the compensation provision specifies that "compensation" will equal the "value of improvements made to Crown land". If the legislative intent was to capture actual costs, the compensation provision could have stated that "compensation" will be equal to, for example, the "expenses incurred by licensees to improve Crown land during their licence" or to the "actual costs paid by licensees to improve Crown land during their licence". Indeed, assuming that the legislative intent is actually to compensate companies for the full value of improvements on the Crown land to which their licences relate, I am hard-pressed to think of clearer phrasing to convey that intent than the current language of the compensation provision.

[98] BC's final argument addresses the nature of Teal Cedar's interest in the Crown land on which the improvements are located. BC argues that, by paying Teal Cedar for the full value of the improvements, the arbitrator presumed that Teal Cedar owned the assets and lost them under the *Revitalization Act*, whereas Teal Cedar lost only its right to use the assets. This argument ultimately fails to show the unreasonableness of the arbitrator's analysis for the same reason as the other attacks discussed above. Simply put, Teal Cedar was paid "an amount equal to the value of improvements" because that is what the compensation provision instructs. When the *Revitalization Act* was enacted, BC was no doubt well aware of the nature of forestry companies' interests in the improvements. Still, BC chose the language of the compensation provision, making no express link between those interests and the amount of compensation owed. As Bauman C.J. observed, Teal Cedar's interest in the improvements is "wholly irrelevant" because its compensation, and the amount thereof, is a statutory creation under the compensation provision (para. 52). In the end, the legislature is entitled

of Debates of the Legislative Assembly (Hansard), vol. 13, nº 6, 4e sess., 37e lég., 27 mars 2003, p. 5682 (l'hon. M. de Jong)). Or, le Hansard ne va pas plus loin. Les termes d'une loi sont d'une importance primordiale pour son interprétation. Et la dernière phrase de la disposition d'indemnisation précise que l'« indemnité » sera égale à la « valeur des améliorations apportées aux terres de la Couronne ». Si le législateur avait voulu prendre en compte les coûts réels, la disposition d'indemnisation aurait pu disposer que l'« indemnité » sera égale, par exemple, aux [TRADUCTION] « dépenses engagées par les titulaires de permis pour apporter des améliorations aux terres de la Couronne pendant la période visée par leur permis » ou aux « coûts réellement supportés par les titulaires de permis pour apporter des améliorations aux terres de la Couronne pendant la période visée par leur permis ». Du reste, à supposer que le législateur souhaitait vraiment indemniser les entreprises de la pleine valeur des améliorations apportées aux terres de la Couronne auxquelles se rapportent leurs permis, j'ai peine à imaginer une formulation plus claire pour exprimer cette intention que le libellé actuel de la disposition d'indemnisation.

[98] Le dernier argument de la C.-B. touche la nature de l'intérêt de Teal Cedar dans les terres de la Couronne où se trouvent les améliorations. La C.-B. soutient qu'en remboursant Teal Cedar de la pleine valeur des améliorations, l'arbitre a présumé que Teal Cedar était propriétaire des actifs et qu'elle les a perdus par application de la *Revitalization Act*, alors que Teal Cedar a perdu uniquement le droit de se servir des actifs. En fin de compte, cet argument n'établit pas le caractère déraisonnable de l'analyse de l'arbitre pour le même motif que celui énoncé à l'égard des autres attaques exposées précédemment. En termes simples, Teal Cedar a touché [TRADUCTION] « [une somme] égale à la valeur des améliorations » parce que c'est ce que prévoit la disposition d'indemnisation. Quand la *Revitalization Act* a été adoptée, la C.-B. était sans aucun doute bien consciente de la nature des intérêts des entreprises forestières sur les améliorations, ce qui ne l'a pas empêchée de choisir le libellé de la disposition d'indemnisation en n'établissant aucun lien explicite entre ces intérêts et le montant d'indemnité dû. Comme l'a fait remarquer le juge en chef Bauman, l'intérêt de Teal Cedar sur

2017 SCC 32 (CanLII)

to provide forestry companies with statutory compensation that is not quantified on the basis of the nature of their interests in the Crown land at issue. Put differently, it is hardly indefensible to rely on the plain language of the *Revitalization Act* for purposes of quantifying compensation, even if extra-statutory references to the nature of Teal Cedar's interest may not align with the quantum of compensation flowing from that plain language.

les améliorations n'est [TRADUCTION] « absolument pas pertinent » parce que son indemnité, et le montant de celle-ci, tirent leur origine de la disposition d'indemnisation (par. 52). Au bout du compte, le législateur a le droit d'offrir aux entreprises forestières une indemnité prévue par la loi dont le montant n'est pas fonction de la nature de leur intérêt dans la terre de la Couronne en cause. Autrement dit, il n'est guère indéfendable de s'appuyer sur le sens ordinaire de la *Revitalization Act* pour fixer le montant de l'indemnité même si des allusions non prévues par la loi à la nature de l'intérêt de Teal Cedar peuvent ne pas concorder avec le montant d'indemnité découlant de ce sens ordinaire.

[99] In short, BC's attacks on the arbitrator's reasoning are collateral attacks on the correctness of the arbitrator's reasonable plain language and contextual interpretation of the compensation provision. The decisions of the majority of the Court of Appeal and of the Court of Appeal on remand similarly focused on assessing correctness rather than reasonableness. My colleagues' emphasis on Teal Cedar's "limited interest" in the improvements is also more akin to "disguised correctness" review (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 27, citing D. Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at pp. 76-81) than the reasonableness review required. In the end, these approaches fail to show how the arbitrator's decision is unjustifiable, non-transparent, unintelligible, or indefensible. In my assessment, the arbitrator's decision cannot be overturned on a reasonableness review.

[99] Bref, les attaques de la C.-B. contre le raisonnement de l'arbitre constituent des attaques indirectes contre la justesse de l'interprétation fondée sur le sens ordinaire et le contexte que l'arbitre a donnée à la disposition d'indemnisation. Dans la décision des juges majoritaires de la Cour d'appel et celle rendue par la Cour d'appel à la suite du renvoi, ce tribunal a retenu la même démarche axée sur l'appréciation du caractère correct plutôt que sur celle du caractère raisonnable. En outre, l'accent que mes collègues mettent sur l'« intérêt limité » de Teal Cedar dans les améliorations s'apparente davantage à un contrôle « [déguisé] » selon la norme de la décision correcte (*Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770, par. 27, citant D. Mullan, « Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen! » (2013), 42 *Adv. Q.* 1, p. 76-81) qu'au contrôle selon la norme de la décision raisonnable qui s'impose ici. Au bout du compte, ces approches ne démontrent pas en quoi la décision de l'arbitre est injustifiable, non transparente, inintelligible ou indéfendable. La décision de l'arbitre ne peut être infirmée sur la base d'un contrôle selon la norme de la décision raisonnable.

VI. Conclusion

[100] To sum up, I would allow the appeal in part, with costs throughout to Teal Cedar, who was substantially successful on appeal.

VI. Conclusion

[100] En résumé, je suis d'avis d'accueillir le pourvoi en partie avec dépens dans toutes les cours en faveur de Teal Cedar, qui a eu gain de cause en majeure partie en appel.

2017 SCC 32 (CanLII)

[101] As Bauman C.J. (at para. 57) and Finch C.J., dissenting (at paras. 141-43), rightly held, the arbitrator reasonably relied on the Depreciation Replacement Cost Method of valuation. I would therefore overturn the Court of Appeal's holding to the contrary on remand (para. 38) and restore the arbitrator's initial valuation, as subsequently amended, predicated on that methodology.

[102] Further, Bauman C.J. (at para. 81) and Finch C.J., dissenting (at paras. 144-45), correctly ruled that the British Columbia Supreme Court lacked jurisdiction to review the arbitrator's resolution of the Interest Issue. Consequently, I would also overturn the Court of Appeal's holding to the contrary on remand (para. 58) and restore the arbitrator's initial ruling that BC must pay interest on top of the Improvements Compensation it owes to Teal Cedar.

[103] However, Bauman C.J. improperly remitted the Lillooet Issue to the arbitrator for reconsideration (para. 88), since the British Columbia Supreme Court lacked jurisdiction over this issue. Accordingly, albeit for different reasons than the Court of Appeal, I would restore the arbitrator's initial ruling denying compensation to Teal Cedar for improvements losses pertaining to the Lillooet Licence.

The reasons of Moldaver, Côté, Brown and Rowe JJ. were delivered by

MOLDAVER AND CÔTÉ JJ. (dissenting in part) —

I. Introduction

[104] This appeal concerns the compensation payable to a private forestry company, Teal Cedar Products Ltd. ("Teal"), for reductions made by British Columbia ("Province") to three of its forest tenures. Two questions are at issue in this case: one relates to the contractual interpretation of an amended settlement agreement made between the

[101] Comme le juge en chef Bauman (par. 57) et le juge en chef Finch, dissident (par. 141-143), l'ont conclu à bon droit, l'arbitre s'est raisonnablement appuyé sur la méthode d'évaluation fondée sur le coût de remplacement déprécié. Je suis donc d'avis d'infirmer la conclusion contraire que la Cour d'appel a tirée à la suite du renvoi (par. 38) et de rétablir l'évaluation initiale de l'arbitre qui repose sur cette méthode.

[102] De plus, le juge en chef Bauman (par. 81) et le juge en chef Finch, dissident (par. 144-145), ont statué à juste titre que la Cour suprême de la Colombie-Britannique n'avait pas compétence pour contrôler la décision de l'arbitre sur la question des intérêts. Par conséquent, je suis également d'avis d'infirmer la conclusion contraire que la Cour d'appel a tirée à la suite du renvoi (par. 58) et de rétablir la décision initiale de l'arbitre selon laquelle la C.-B. doit payer des intérêts en sus de l'indemnité visant les améliorations qu'elle doit à Teal Cedar.

[103] Cependant, le juge en chef Bauman a renvoyé à tort la question du permis Lillooet à l'arbitre pour nouvel examen (par. 88), car la Cour suprême de la Colombie-Britannique n'avait pas compétence sur cette question. Par conséquent, quoique pour d'autres motifs que ceux de la Cour d'appel, je suis d'avis de rétablir la décision initiale de l'arbitre de refuser d'accorder à Teal Cedar une indemnité pour les pertes liées aux améliorations touchant le permis Lillooet.

Version française des motifs des juges Moldaver, Côté, Brown et Rowe rendus par

LES JUGES MOLDAVER ET CÔTÉ (dissidents en partie) —

I. Introduction

[104] Le présent pourvoi porte sur l'indemnité payable à une entreprise forestière privée, Teal Cedar Products Ltd. (« Teal »), pour les réductions apportées par la Colombie-Britannique (« Province ») à trois de ses tenures forestières. Deux questions sont en litige en l'espèce : la première a trait à l'interprétation contractuelle d'une

2017 SCC 32 (CanLII)

Province and Teal, and the other regards the statutory interpretation of s. 6(4) of the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 ("*FRA*").

[105] We agree with our colleague Gascon J. that the question of contractual interpretation is not reviewable under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55. We would allow the appeal on this issue.

[106] Where we disagree, however, is with respect to the question of statutory interpretation. In our view, regardless of the applicable standard of review, the arbitrator's interpretation of s. 6(4) of the *FRA* cannot stand. As we will explain, the only interpretation of s. 6(4) that withstands scrutiny on either standard of review is that Teal, as a licence holder, was entitled to receive compensation only for its limited interest in the improvements. In valuing the improvements under s. 6(4), the arbitrator was required to take into account that Teal, as a licence holder, did not own the improvements, which belonged to the Crown. The arbitrator did not do that. Rather, he selected a valuation method — the cost savings approach — which failed to consider that Teal had only a limited interest in the improvements as a licence holder and was therefore not entitled to compensation on that basis under s. 6(4).

[107] We would therefore dismiss the appeal in part on the statutory interpretation issue and remit to the arbitrator the matter of compensation for the improvements relating to the three licences held by Teal.

II. Standard of Review

[108] We find it unnecessary to decide whether the standard of review applicable to the arbitrator's interpretation of s. 6(4) of the *FRA* is correctness or reasonableness. As we will explain, on either standard, the arbitrator's interpretation cannot stand.

convention de règlement modifiée conclue entre la Province et Teal, et la seconde concerne l'interprétation législative du par. 6(4) de la *Forestry Revitalization Act*, S.B.C. 2003, c. 17 (« *FRA* »).

[105] Nous convenons avec notre collègue le juge Gascon que la question de l'interprétation contractuelle n'est pas susceptible de contrôle au titre de l'art. 31 de l'*Arbitration Act*, R.S.B.C. 1996, c. 55. Nous sommes d'avis d'accueillir le pourvoi sur ce point.

[106] Nous divergeons cependant d'opinion sur la question de l'interprétation législative. À notre avis, peu importe la norme de contrôle applicable, l'interprétation que l'arbitre a donnée au par. 6(4) de la *FRA* ne tient pas. Comme nous l'expliquerons, la seule interprétation du par. 6(4) qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle Teal, en tant que titulaire de permis, n'avait le droit de recevoir une indemnité que pour son intérêt limité dans les améliorations. En évaluant les améliorations en vertu du par. 6(4), l'arbitre devait tenir compte du fait que Teal, en tant que titulaire de permis, n'était pas propriétaire des améliorations, lesquelles appartenaient à la Couronne. Il ne l'a pas fait. Il a plutôt retenu une méthode d'évaluation — soit l'approche fondée sur les économies de coûts — qui ne tenait pas compte du fait que Teal n'avait qu'un intérêt limité dans les améliorations en tant que titulaire de permis et que, par conséquent, elle n'avait pas droit à une indemnité à ce titre en vertu du par. 6(4).

[107] Nous sommes donc d'avis de rejeter en partie le pourvoi sur la question de l'interprétation législative et de renvoyer à l'arbitre la question de l'indemnité payable pour les améliorations se rapportant aux trois permis détenus par Teal.

II. Norme de contrôle

[108] Nous n'estimons pas nécessaire de décider si la norme de contrôle applicable à l'interprétation que l'arbitre a donnée au par. 6(4) de la *FRA* est celle de la décision correcte ou celle de la décision raisonnable. Comme nous l'expliquerons, quelle que soit la norme de contrôle applicable, l'interprétation de l'arbitre ne tient pas.

2017 SCC 32 (CanLII)

III. Analysis

(1) Section 6 of the *FRA*

[109] The Minister of Forests grants permission to private forestry companies like Teal to harvest timber on Crown land by issuing licences under the *Forest Act*, R.S.B.C. 1996, c. 157. Under these licences, private forestry companies have rights to harvest timber in certain areas and use the improvements in those areas. Three such licences are at issue in this appeal: Tree Farm Licence 46, the Fraser Licence and the Lillooet Licence. Following the enactment of the *FRA*, the Province was permitted to reduce the land base and allowable annual cut of timber under these licences. As a result of the Province's takebacks, Teal's rights to harvest timber and use the improvements were reduced.

[110] Section 6 of the *FRA* provides for compensation to licence holders for these reductions. Section 6(3) entitles the licence holder to compensation "in an amount equal to the value . . . of the harvesting rights taken by means of the reduction". The licence holder is also entitled to receive compensation for the "value of improvements made to Crown land" under s. 6(4). This provision reads as follows:

(4) In addition to the compensation to which the holder of an ungrouped licence, a timber licence or a licence in a group of licences is entitled under subsection (1), (2) or (3), the holder is entitled to compensation from the government in an amount equal to the value of improvements made to Crown land that

(a) are, or have been, authorized by the government,

(b) are not improvements to which section 174 of the *Forest Practices Code of British Columbia Act* applies, and

(c) are not, or have not been, paid for by the government under the *Forest Act* or the former Act as defined in the *Forest Act*.

III. Analyse

(1) Article 6 de la *FRA*

[109] Le ministre des Forêts accorde à des entreprises forestières privées comme Teal l'autorisation de couper du bois sur les terres de la Couronne en leur délivrant des permis en vertu de la *Forest Act*, R.S.B.C. 1996, c. 157. Selon ces permis, les entreprises forestières privées peuvent couper du bois dans certaines zones et utiliser les améliorations qui s'y trouvent. Trois de ces permis sont en cause dans le présent pourvoi : le permis de ferme forestière 46, le permis Fraser et le permis Lillooet. Avec l'adoption de la *FRA*, la Province a pu réduire le territoire et la coupe de bois annuelle autorisée par ces permis. À la suite des reprises effectuées par la Province, les droits de Teal de couper du bois et d'utiliser les améliorations dans ces zones ont été réduits.

[110] L'article 6 de la *FRA* prévoit le versement d'une indemnité aux titulaires de permis pour ces réductions. Selon le par. 6(3), le titulaire de permis a droit à une indemnité [TRADUCTION] « égal[e] à la valeur des droits de coupe retirés au moyen de la réduction ». Le titulaire de permis a également droit à une indemnité équivalant à la « valeur des améliorations apportées aux terres de la Couronne » en vertu du par. 6(4). Voici le texte de cette disposition :

[TRADUCTION]

(4) Outre l'indemnité à laquelle a droit le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis en vertu du paragraphe (1), (2) ou (3), le titulaire a droit, de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne :

(a) qui sont ou ont été autorisées par le gouvernement,

(b) auxquelles ne s'applique pas l'article 174 du *Forest Practices Code of British Columbia Act*, et

(c) qui ne sont pas ou n'ont pas été payées par le gouvernement conformément à la *Forest Act* ou à l'ancienne loi au sens de la *Forest Act*.

2017 SCC 32 (CanLII)

[111] The modern principle of statutory interpretation is well-established:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[112] This principle requires that statutes "be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. The plain and ordinary meaning of a statutory provision is the "natural meaning which appears when the provision is simply read through": *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735. In our view, the plain and ordinary meaning of s. 6(4) of the *FRA*, which accords with the purpose and context of the Act, is this: the licence holder is entitled to receive compensation for the improvements on a basis that reflects its limited interest in the improvements as a licence holder.

(2) The Plain and Ordinary Meaning of Section 6(4) of the *FRA*

[113] The meaning of "compensation" is understood to be a payment that makes a person whole for a loss. Compensation is defined by the *Shorter Oxford English Dictionary* (6th ed. 2007) as "amends, recompense; *spec.* money given to compensate loss or injury" (p. 470). Under s. 6(4) of the *FRA*, Teal is entitled to receive compensation *equal to* the value of improvements made to Crown land. If the compensation is to make Teal whole, the value of the improvements must reflect Teal's actual loss.

[111] Le principe moderne d'interprétation des lois est bien établi :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87)

[112] Selon ce principe, les lois « doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s'harmonise avec le contexte et l'objet visé par la loi dans laquelle ils sont employés » : *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21-22. Le sens ordinaire d'une disposition législative constitue simplement le « sens naturel qui se dégage de la simple lecture de la disposition » : *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735. À notre avis, le sens ordinaire du par. 6(4) de la *FRA* qui s'harmonise avec l'objet et le contexte de la Loi est le suivant : le titulaire de permis a le droit de recevoir une indemnité pour les améliorations, sur la base de son intérêt limité dans les améliorations en tant que titulaire de permis.

(2) Le sens ordinaire du par. 6(4) de la *FRA*

[113] Le sens du terme [TRADUCTION] « indemnité » (*compensation*) réfère à une somme versée en réparation intégrale d'une perte. Le *Shorter Oxford English Dictionary* (6e éd. 2007) définit l'indemnité comme une « réparation ou compensation; *spécialt* argent remis en guise de compensation d'une perte ou d'un préjudice » (p. 470). Selon le par. 6(4) de la *FRA*, Teal a droit à une indemnité *égale à* la valeur des améliorations apportées aux terres de la Couronne. Pour que l'indemnité constitue une réparation intégrale, la valeur des améliorations doit correspondre à la perte réelle de Teal.

2017 SCC 32 (CanLII)

[114] The provision further specifies that Teal, as a "holder of . . . a licence", is compensated for the "value of improvements made to Crown land". This language makes plain that the improvements do not belong to Teal. As a licence holder, Teal merely acquires limited rights to *use* the improvements. The ownership rights over the improvements remain vested in the Crown.

[114] Cette disposition précise en outre que Teal, en tant que [TRADUCTION] « titulaire d'un permis », a droit à une indemnité correspondant à la « valeur des améliorations apportées aux terres de la Couronne ». Ce libellé indique clairement que les améliorations n'appartiennent pas à Teal. En tant que titulaire de permis, Teal acquiert seulement un droit restreint d'*utiliser* les améliorations. Les droits de propriété sur les améliorations restent dévolus à la Couronne.

[115] On a plain reading, the provision at issue entitles Teal to compensation for the value of the improvements *to Teal* as a licence holder. If the valuation of the improvements does not take into account the fact that Teal has a limited interest in the improvements — as opposed to an ownership interest — then Teal will not receive "compensation" under s. 6(4); rather, it will receive overcompensation.

[115] Suivant son sens ordinaire, la disposition en litige accorde à Teal le droit de toucher une indemnité correspondant à la valeur des améliorations *pour Teal* en tant que titulaire de permis. Si l'évaluation des améliorations ne tient pas compte du fait que Teal a un intérêt limité dans les améliorations, par opposition à un droit de propriété, Teal recevra non pas une « indemnité » au sens du par. 6(4), mais une indemnité excessive.

(3) The Purpose and Context of the *FRA*

(3) L'objet et le contexte de la *FRA*

[116] The plain and ordinary meaning of s. 6(4) is that Teal is entitled to be compensated on a basis that reflects its limited interest in the improvements as a licence holder. This plain meaning of s. 6(4) is consistent with the purpose of the *FRA* and its expropriation context. The *FRA*'s purpose is to reduce the rights of licence holders — specifically, their rights to harvest timber and use the improvements — and to provide licence holders with compensation for these reductions. As a result of the takebacks at issue, reductions were made to Teal's rights to use the improvements — not ownership rights over such improvements. It runs counter to the purpose of the *FRA* to award Teal compensation that exceeds the value of what it lost due to the takebacks.

[116] Le sens ordinaire du par. 6(4) est le suivant : Teal a le droit d'être indemnisée sur une base reflétant l'intérêt limité qu'elle possède dans les améliorations en tant que titulaire de permis. Ce sens ordinaire du par. 6(4) est compatible avec l'objet de la *FRA* et son contexte d'expropriation. La *FRA* vise à réduire les droits des titulaires de permis, plus particulièrement leurs droits de couper du bois et d'utiliser les améliorations, et à indemniser les titulaires de permis pour ces réductions. À la suite des reprises en litige, Teal a perdu une partie de son droit d'utiliser les améliorations, et non des droits de propriété sur celles-ci. Il va à l'encontre de l'objet de la *FRA* d'accorder à Teal une indemnité excédant la valeur de ce qu'elle a perdu en raison des reprises.

[117] As the arbitrator pointed out, the *FRA* is a "species of expropriation legislation" (Arbitration Award, April 27, 2011, at para. 8). A presumption in favour of a payment of full compensation therefore applies to its interpretation: *British Columbia (Forests) v. Teal Cedar Products Ltd.*, 2013 SCC 51, [2013] 3 S.C.R. 301, at para. 37; E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at p. 35. This presumption, however,

[117] Comme l'a souligné l'arbitre, la *FRA* est une [TRADUCTION] « espèce de loi d'expropriation » (sentence arbitrale, 27 avril 2011, par. 8). Une présomption en faveur d'une indemnisation intégrale s'applique donc à son interprétation : *Colombie-Britannique (Forêts) c. Teal Cedar Products Ltd.*, 2013 CSC 51, [2013] 3 R.C.S. 301, par. 37; E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2e éd. 1992), p. 35.

2017 SCC 32 (CanLII)

does not mean that the owner of an expropriated property interest is awarded compensation in excess of the value of this interest. Rather, full compensation makes the owner "economically whole" for the loss of this interest (*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 55-56, citing *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712).

[118] When the ordinary meaning of s. 6(4) is read together with the object of the *FRA* and its expropriation context, we are satisfied that its meaning is clear and straightforward: an award of compensation under s. 6(4) must not exceed the value of Teal's limited interest in the improvements as a licence holder.

(4) The Arbitrator's Valuation Method

(a) *The Cost Savings Approach*

[119] The arbitrator applied a valuation methodology that he referred to as the "cost savings approach" to assess the compensation owed to Teal under s. 6(4). This approach, which was developed as a valuation method for "private timberlands", values compensation for Teal as if Teal was a private owner of the improvements. As such, it fails to take into account the fact that Teal did not own the improvements but had only a limited interest in them as a licence holder.

[120] The cost savings method is based on the depreciated replacement cost of the improvements (Arbitration Award, at para. 75), which is the cost of replacing "the entire useful road and improvement network for the take back areas", namely, "all roads and associated improvements that would access harvestable timber within the taking areas" in their current depreciated condition (para. 81). According to the cost savings methodology, Teal is entitled to compensation for this depreciated replacement cost (para. 75). This is because before the reductions, there was an existing network of improvements and

Cette présomption n'emporte cependant pas octroi, au propriétaire d'une propriété expropriée, d'une indemnité supérieure à la valeur de cet intérêt. L'indemnisation intégrale ne fait que permettre au propriétaire d'obtenir une « réparation intégrale » de la perte de cet intérêt (*Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 55-56, citant *Diggon-Hibben, Ltd. c. The King*, [1949] R.C.S. 712).

[118] Considérant le sens ordinaire du par. 6(4) à la lumière de l'objet de la *FRA* et de son contexte d'expropriation, nous sommes convaincus que ce sens est clair et simple : l'indemnité accordée au titre du par. 6(4) ne doit pas dépasser la valeur de l'intérêt limité que Teal possède dans les améliorations en tant que titulaire de permis.

(4) La méthode d'évaluation de l'arbitre

a) *L'approche fondée sur les économies de coûts*

[119] L'arbitre a utilisé une méthode d'évaluation qu'il a appelée l'[TRADUCTION] « approche fondée sur les économies de coûts » pour fixer l'indemnité due à Teal en application du par. 6(4). Cette approche, qui a été élaborée en tant que méthode d'évaluation pour les « terres à bois privées », sert à évaluer l'indemnité destinée à Teal comme si cette dernière était le propriétaire privé des améliorations. Par conséquent, elle ne tient pas compte du fait que Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci comme titulaire de permis.

[120] La méthode des économies de coûts repose sur le coût de remplacement déprécié des améliorations (sentence arbitrale, par. 75), qui représente le coût de remplacement de [TRADUCTION] « l'ensemble du réseau utile des routes et des améliorations pour les zones visées par la reprise », à savoir « toutes les routes et les améliorations connexes qui permettent d'avoir accès au bois susceptible d'être coupé à l'intérieur des zones reprises » dans leur état déprécié actuel (par. 81). Selon la méthode des économies de coûts, Teal a droit à une indemnité pour ce coût de remplacement déprécié (par. 75). Il en est ainsi

2017 SCC 32 (CanLII)

Teal did not have to pay to construct improvements to access timber for harvesting (para. 93). After the Province's reductions to Teal's land base, Teal would have to expend money to replace the improvements and therefore should be compensated for this cost (para. 93).

parce qu'avant les réductions, il existait déjà un réseau d'améliorations et Teal n'avait pas à payer la construction d'améliorations pour avoir accès au bois en vue de le couper (par. 93). Après les réductions apportées par la Province au territoire de Teal, cette dernière aurait à dépenser de l'argent pour remplacer les améliorations et elle doit donc être indemnisée de ce coût (par. 93).

(b) *The Arbitrator Applied the Cost Savings Approach in Valuing the Improvements in the Lillooet Licence*

b) *L'arbitre a appliqué l'approche fondée sur les économies de coûts lorsqu'il a évalué les améliorations se rapportant au permis Lillooet*

[121] As noted by our colleague Gascon J., the arbitrator also applied the cost savings method to value the improvements associated with the Lillooet Licence. The arbitrator awarded no compensation for these improvements, which is in fact consistent with the cost savings approach (para. 170).

[121] Comme l'a fait remarquer notre collègue le juge Gascon, l'arbitre a également utilisé la méthode des économies de coûts pour évaluer les améliorations se rapportant au permis Lillooet. L'arbitre n'a accordé aucune indemnité pour ces améliorations, ce qui est en fait conforme à l'approche fondée sur les économies de coûts (par. 170).

[122] Unlike the other two licences, the Province did not take back any operating areas from the Lillooet Licence (Arbitration Award, at para. 168). The reduction made to the Lillooet Licence by the Province was limited to reducing the allowable harvest cut by 54.3% (para. 168). Therefore, as the arbitrator found, Teal did not lose any opportunity to use the roads (para. 169) and accordingly did not need to expend money to replace the improvements. As a consequence, under the cost savings approach, Teal was not entitled to receive the depreciated replacement cost of the improvements associated with the Lillooet Licence.

[122] En effet, contrairement aux deux autres permis, la Province n'a repris aucune zone d'exploitation du permis Lillooet (sentence arbitrale, par. 168). La réduction apportée par la Province au permis Lillooet n'a fait que réduire la coupe autorisée de 54,3 % (par. 168). Ainsi, comme l'a conclu l'arbitre, Teal n'a pas perdu la possibilité d'utiliser les routes (par. 169) et n'a donc pas eu à dépenser de l'argent pour remplacer les améliorations. Par conséquent, selon l'approche fondée sur les économies de coûts, Teal n'a pas droit au coût de remplacement déprécié des améliorations se rapportant au permis Lillooet.

(5) The Cost Savings Approach Adopted by the Arbitrator Fails to Account for the Fact That the Improvements Are Not Owned by Teal

(5) L'approche fondée sur les économies de coûts retenue par l'arbitre ne tient pas compte du fait que les améliorations n'appartiennent pas à Teal

[123] In applying the cost savings valuation method to value the improvements associated with all three licences held by Teal, the arbitrator failed to consider that Teal, as a licence holder, had only a limited interest in the improvements. The cost savings approach may be an appropriate methodology in the context of privately owned land. But the

[123] En utilisant la méthode d'évaluation des économies de coûts pour évaluer les améliorations se rapportant aux trois permis dont Teal est titulaire, l'arbitre n'a pas tenu compte du fait que Teal, en qualité de titulaire de permis, n'avait qu'un intérêt limité dans les améliorations. L'approche fondée sur les économies de coûts peut constituer une

2017 SCC 32 (CanLII)

roads and bridges at issue in this case belonged to the Crown. Given that Teal did not own the improvements and had only a limited interest in the improvements as a licence holder, it cannot be said that it lost the replacement cost of the improvements when the Province made reductions to the land base under its licences. As stated by the majority of the Court of Appeal in its first decision, "Teal had the right to use the improvements. It therefore lost only the use of the assets, not the assets themselves": 2013 BCCA 326, 46 B.C.L.R. (5th) 272, at para. 73 (emphasis added).

méthode adéquate dans le cas des terres privées, mais les routes et les ponts en cause appartenaient à la Couronne. Puisque Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci en tant que titulaire de permis, on ne saurait affirmer qu'elle a perdu le coût de remplacement des améliorations lorsque la Province a réduit le territoire visé par ses permis. Comme l'a mentionné la majorité de la Cour d'appel dans sa première décision, [TRADUCTION] « Teal avait le droit d'utiliser les améliorations. Elle a donc perdu uniquement l'usage des biens, et non les biens eux-mêmes » : 2013 BCCA 326, 46 B.C.L.R. (5th) 272, par. 73 (nous soulignons).

[124] The arbitrator reasoned that the cost savings approach was applicable to the improvements because it accurately determined the "value to the owner", which is one method of assessing "full compensation": Todd, at pp. 110-11. The "value to the owner" approach assesses compensation on the basis of what a prudent owner would pay for its property interest rather than be divested of it (*MacMillan Bloedel Ltd. v. British Columbia* (1995), 12 B.C.L.R. (3d) 134 (C.A.), at paras. 29-32). The application judge, who agreed that the "value to the owner" approach applied by the arbitrator was consistent with "full compensation" likewise found that Teal was entitled to what a prudent owner "would have been willing to give for the improvements rather than be dispossessed of those improvements": 2012 BCSC 543, at para. 67 (CanLII).

[124] L'arbitre a estimé que l'approche fondée sur les économies de coûts s'appliquait aux améliorations parce qu'elle permettait de déterminer avec précision la [TRADUCTION] « valeur pour le propriétaire », laquelle constitue une façon d'établir l'« indemnité intégrale » : Todd, p. 110-111. L'approche fondée sur la « valeur pour le propriétaire » évalue l'indemnité en se fondant sur ce qu'un propriétaire prudent paierait pour conserver son intérêt de propriété plutôt que d'en être privé (*MacMillan Bloedel Ltd. c. British Columbia* (1995), 12 B.C.L.R. (3d) 134 (C.A.), par. 29-32). Le juge saisi de la requête, d'accord pour dire que cette approche utilisée par l'arbitre s'accordait avec l'[TRADUCTION] « indemnisation intégrale », a conclu lui aussi que Teal avait droit à ce qu'un propriétaire prudent « aurait été disposé à payer pour les améliorations au lieu d'en être dépossédé » : 2012 BCSC 543, par. 67 (CanLII).

[125] We do not agree that the "value to the owner" approach may serve as a basis for entitling Teal to the depreciated replacement cost of the improvements under s. 6(4) of the *FRA*. The "value to the owner" method awards compensation on the basis of the value to Teal of its *interest* in the improvements. Given that Teal did not own the improvements and had only a limited interest in them, Teal would not pay the full cost to replace the network of improvements at issue.

[125] Nous ne partageons pas l'avis que l'approche fondée sur la « valeur pour le propriétaire » puisse servir de fondement pour permettre à Teal de toucher le coût de remplacement déprécié des améliorations au titre du par. 6(4) de la *FRA*. La méthode de la « valeur pour le propriétaire » emporte octroi d'une indemnité en fonction de la valeur, pour Teal, de son *intérêt* dans les améliorations. Puisque Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci, Teal ne paierait pas le coût total du remplacement du réseau d'améliorations en cause.

2017 SCC 32 (CanLII)

[126] It is also significant that as a licence holder with only limited rights to the improvements, Teal would be compensated by the government for future construction costs through deductions from stumpage fees. As noted by the majority of the Court of Appeal in its first decision, if Teal chose to rebuild the improvements taken under the *FRA*, it would receive compensation for its construction costs through those deductions (para. 74). In assessing what Teal would pay to avoid being divested of its interest in the improvements under the "value to the owner" method, the fact that Teal is reimbursed for future construction costs through deductions from stumpage fees is a relevant consideration. This reimbursement would logically affect the amount Teal was willing to pay to avoid being dispossessed of its interest in the improvements. Furthermore, Teal's rights to use the improvements were conditional on Teal paying to maintain the roads under permit and deactivating them when they were no longer in use (s. 79(2) of the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004). Given that Teal had only this limited interest in the improvements, it would not pay for the full cost of replacing the improvements at issue to avoid being divested of them.

[126] Il est aussi révélateur qu'à titre de titulaire de permis ne possédant que des droits limités sur les améliorations, Teal serait remboursée par le gouvernement pour les coûts de construction futurs au moyen de déductions sur les droits de souche. Tel que l'a signalé la majorité de la Cour d'appel dans sa première décision, si Teal choisissait de reconstruire les améliorations reprises en application de la *FRA*, elle serait indemnisée de ses coûts de construction par le mécanisme de ces déductions (par. 74). Le fait qu'on rembourse Teal des coûts de construction futurs au moyen de déductions sur les droits de souche est une considération pertinente lorsqu'il s'agit de déterminer ce que paierait Teal pour éviter d'être privée de son intérêt dans les améliorations selon la méthode de la « valeur pour le propriétaire ». Ce remboursement influerait logiquement sur la somme que Teal est disposée à payer pour éviter d'être dépossédée de cet intérêt. Le droit de Teal d'utiliser les améliorations était en outre conditionnel au paiement par cette dernière de l'entretien des routes visées par le permis et à leur mise hors service lorsqu'elles n'étaient plus utilisées (par. 79(2) du *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004). Étant donné que Teal ne disposait que de cet intérêt limité dans les améliorations, elle ne paierait pas le coût total du remplacement des améliorations pour éviter d'en être privée.

(6) The Market Value Approach

(a) *The Arbitrator Erred in Narrowly Construing the Scope of Section 6(4) of the FRA to Exclude the Market Value Approach*

[127] In our view, it was not open to the arbitrator to adopt the cost savings approach under s. 6(4) of the *FRA*. In our view, there was, however, an option before the arbitrator that is consistent with this provision.

[128] As our colleague Gascon J. notes, there were three valuation methodologies put before the arbitrator: (1) market value; (2) income and; (3) depreciated replacement cost, which includes the cost savings approach. The arbitrator rejected the first

(6) L'approche fondée sur la valeur marchande

a) *L'arbitre a commis une erreur en interprétant étroitement la portée du par. 6(4) de la FRA de façon à exclure l'approche fondée sur la valeur marchande*

[127] À notre avis, l'arbitre ne pouvait retenir l'approche fondée sur les économies de coûts en vertu du par. 6(4) de la *FRA*. Selon nous, il disposait toutefois d'une solution compatible avec cette disposition.

[128] Comme le signale notre collègue le juge Gascon, trois méthodes d'évaluation ont été proposées à l'arbitre : (1) la valeur marchande, (2) le revenu et (3) le coût de remplacement déprécié, qui comprend l'approche fondée sur les économies de

2017 SCC 32 (CanLII)

two methodologies on the basis that they could not serve to value the improvements independently from the harvesting rights. He noted that the *FRA* draws a distinction between the value of harvesting rights and the value of improvements. In his view,

> [t]o give this distinction meaning, the value of improvements must be determined independent of the considerations that would be at issue in the context of determining either the value (market or value to owner) of the tenure as a whole, or the harvesting rights as an independent matter. [para. 110]

[129] The arbitrator interpreted s. 6(4) of the *FRA* to mean that the value of the improvements had to be calculated separately and independently from the harvesting rights, without reference to the value of the licence or tenure as a whole. The arbitrator found that the market value approach could not value the improvements in this manner. Since there is no market for the sale of improvements, the market value of the improvements must be determined by first considering the market value of the licence or tenure as a whole. The arbitrator accepted that the cost savings approach was the only valuation methodology that could value the improvements separate and apart from the tenure as a whole (para. 94).

[130] In our view, the arbitrator construed s. 6(4) of the *FRA* too narrowly in concluding that the distinction drawn by this provision between the value of the improvements and the value of the harvesting rights means that the market value of the tenure as a whole cannot be considered when determining the value of the improvements. With respect, there is nothing in the language or context of the Act to support this unduly restrictive reading of s. 6(4). On the contrary, it was open to the arbitrator to select *any* valuation method that could evaluate the value of the improvements to Teal as a licence holder, as long as the approach valued the improvements as separate and distinct from the harvesting rights.

coûts. L'arbitre a rejeté les deux premières méthodes au motif qu'elles ne pouvaient servir à évaluer les améliorations indépendamment des droits de coupe. Il a fait remarquer que la *FRA* établit une distinction entre la valeur des droits de coupe et la valeur des améliorations. Selon lui,

> [TRADUCTION] [p]our donner un sens à cette distinction, la valeur des améliorations doit être déterminée indépendamment des considérations qui seraient en cause dans un contexte où il s'agit de déterminer soit la valeur (marchande ou pour le propriétaire) de la tenure dans son ensemble, soit celle des droits de coupe d'une manière indépendante. [par. 110]

[129] L'arbitre a interprété le par. 6(4) de la *FRA* comme signifiant que la valeur des améliorations devait être calculée séparément et indépendamment des droits de coupe, sans égard à la valeur du permis ou de la tenure dans son ensemble. L'arbitre a conclu que l'approche fondée sur la valeur marchande ne permettait pas d'évaluer les améliorations de cette manière. Comme il n'existe pas de marché pour la vente des améliorations, il faut déterminer la valeur marchande des améliorations en examinant d'abord la valeur marchande du permis ou de la tenure dans son ensemble. L'arbitre a convenu que l'approche fondée sur les économies de coûts était la seule méthode d'évaluation qui permettait d'évaluer les améliorations séparément et indépendamment de la tenure dans son ensemble (par. 94).

[130] À notre avis, l'arbitre a interprété trop restrictivement le par. 6(4) de la *FRA* en concluant que la distinction établie par cette disposition entre la valeur des améliorations et celle des droits de coupe signifie que la valeur marchande de l'ensemble de la tenure ne peut être prise en compte pour déterminer la valeur des améliorations. Avec égards, rien dans le texte ou le contexte de la Loi n'appuie cette interprétation trop restrictive du par. 6(4). Au contraire, il était loisible à l'arbitre de choisir *une* méthode d'évaluation qui permettait de fixer la valeur des améliorations pour Teal en tant que titulaire d'un permis, pourvu que l'approche choisie serve à évaluer les améliorations comme élément séparé et distinct des droits de coupe.

2017 SCC 32 (CanLII)

(b) *The Market Value Approach Is Consistent With Section 6(4) of the FRA*

[131] Although the market value approach does consider the value of the licence or the tenure as a whole, it can ultimately serve to value the improvements separately and independently from the harvesting rights. The Province's expert witness, Eleanor Joy, explained this methodology as follows:

> . . . it is important to understand that what I was doing was a market value approach. So I looked historically at what people were willing to pay for timber tenures, and then I looked at whatever evidence I could find that would give me some indication of what people believed the roads were as a percentage of that overall amount they were willing to pay for timber tenures.

(A.R., vol. II, at p. 100)

[132] As the arbitrator observed, Ms. Joy drew on market data of sales of licences "to derive an approximate cost per cubic meter for tenures" and then allocated "a percentage of that value to the improvements at issue here" (para. 121). To determine what percentage of the value of the tenure as a whole should be allocated to the improvements, Ms. Joy consulted financial statements of forestry companies which apportioned certain values to the improvements, as well as press releases issued by forestry companies regarding settlements reached with respect to their compensation claims under the *FRA* (Arbitration Award, at para. 122). Ms. Joy therefore calculated the value of improvements on the basis of what forestry companies were willing to pay for tenures and the percentage of that value the companies allocated to the improvements.

[133] The market value approach therefore not only values the improvements separately and independently from the harvesting rights; it also ensures that Teal in this case does not receive more

b) *L'approche fondée sur la valeur marchande est compatible avec le par. 6(4) de la FRA*

[131] Bien que l'approche fondée sur la valeur marchande tienne effectivement compte de la valeur du permis ou de la tenure dans son ensemble, elle peut ultimement servir à évaluer les améliorations séparément et indépendamment des droits de coupe. Le témoin expert de la Province, Eleanor Joy, a expliqué ainsi cette méthode :

> [TRADUCTION] . . . il est important de comprendre que ce que je faisais, c'était une approche fondée sur la valeur marchande. J'ai donc examiné ce que les gens étaient prêts à payer historiquement pour acquérir des tenures forestières, puis j'ai examiné tous les éléments de preuve que j'ai pu trouver qui pouvaient me donner une certaine indication de ce que les gens croyaient que les routes représentaient comme pourcentage de ce montant total qu'ils étaient prêts à payer pour acquérir des tenures forestières.

(d.a., vol. II, p. 100)

[132] Comme l'a fait remarquer l'arbitre, Mme Joy s'est servie des données du marché sur les ventes de permis [TRADUCTION] « pour établir un coût approximatif par mètre cube pour les tenures » et a ensuite alloué « un pourcentage de cette valeur aux améliorations en cause en l'espèce » (par. 121). Pour décider quel pourcentage de la valeur de la tenure dans son ensemble devait être alloué aux améliorations, Mme Joy a consulté des états financiers d'entreprises forestières qui attribuaient certaines valeurs aux améliorations, ainsi que des communiqués de presse diffusés par des entreprises forestières qui traitaient de règlements intervenus relativement à leurs demandes d'indemnité présentées en vertu de la *FRA* (sentence arbitrale, par. 122). Elle a donc calculé la valeur des améliorations en fonction de ce que les entreprises forestières étaient prêtes à payer pour acquérir des tenures et sur le pourcentage de cette valeur que les entreprises attribuaient aux améliorations.

[133] Non seulement l'approche fondée sur la valeur marchande permet-elle d'évaluer les améliorations séparément et indépendamment des droits de coupe, mais elle fait aussi en sorte que Teal ne

2017 SCC 32 (CanLII)

compensation than the value of its interest in the improvements. Forestry companies such as Teal that purchase timber licences do not value improvements as if they were acquiring exclusive ownership of them. Rather, what they are willing to pay for the improvements is based on their projected use of the improvements, as well as on other related considerations, such as the government's reimbursement of construction costs for licence holders. Accordingly, the improvements are worth a fraction of the total value of the licence or tenure. As Ms. Joy explains,

A. . . . I think my argument would be, if somebody was willing to give up their timber tenures for $5.1 million, the roads have to be a fraction of that amount.

Q. Why do they have to be a fraction of that amount?

A. Well, for all sorts of different reasons that we've already covered. When they're going to be used, whether stumpage reimburses, so if people are indifferent between building or using existing roads, the quality of the roads, the type of roads. All of those factors feed into it.

(A.R., vol. II, at p. 107)

[134] In summary, the market value approach put forward by Ms. Joy takes into account that Teal has a limited interest in the improvements. This valuation method was available to the arbitrator under s. 6(4) of the *FRA*, and yet the arbitrator chose to apply a method that was inconsistent with this provision. This resulted in a substantial windfall for Teal: Ms. Joy estimated that the value of the improvements under the market value approach was about $1.5 million, whereas the arbitrator estimated that the value was $9.5 million when applying the cost savings approach (Arbitration Award, at para. 194).

reçoive pas en l'espèce une indemnité supérieure à la valeur de son intérêt dans les améliorations. Les entreprises forestières comme Teal qui achètent des permis d'exploitation forestière n'évaluent pas les améliorations comme si elles en acquéraient la propriété exclusive. Ce qu'elles sont prêtes à payer pour les améliorations tient plutôt à l'usage qu'elles prévoient en faire, ainsi qu'à d'autres considérations connexes comme le remboursement par le gouvernement des coûts de construction assumés par les titulaires de permis. Les améliorations représentent donc une fraction de la valeur totale du permis ou de la tenure. Comme l'explique Mme Joy :

[TRADUCTION]

R. . . . Je pense que mon argument consisterait à dire que, si quelqu'un est prêt à se départir de sa tenure forestière pour 5,1 millions de dollars, les routes doivent représenter une fraction de cette somme.

Q. Pourquoi doivent-elles représenter une fraction de cette somme?

R. Bien, pour toutes sortes de raisons différentes dont nous avons déjà traitées. Quand elles seront utilisées, si les droits de souche sont remboursés, si le fait de construire des routes ou d'utiliser les routes existantes laisse les gens indifférents, la qualité des routes, le type de routes. Tous ces facteurs entrent en ligne de compte.

(d.a., vol. II, p. 107)

[134] En résumé, l'approche fondée sur la valeur marchande proposée par Mme Joy tient compte de l'intérêt limité de Teal dans les améliorations. L'arbitre pouvait utiliser cette méthode d'évaluation en vertu du par. 6(4) de la *FRA*. Pourtant, il a choisi de recourir à une méthode incompatible avec cette disposition, ce qui a permis à Teal de réaliser un gain fortuit substantiel : Mme Joy a estimé que la valeur des améliorations selon l'approche fondée sur la valeur marchande était de 1,5 million de dollars, tandis que l'arbitre a estimé que cette valeur était de 9,5 millions de dollars selon l'approche fondée sur les économies de coûts (sentence arbitrale, par. 194).

2017 SCC 32 (CanLII)

[135] To be clear, it was open to the arbitrator to select any valuation method that was consistent with the only reasonable interpretation of s. 6(4) of the *FRA*: namely, that compensation must be awarded to Teal on the basis of its limited interest in the improvements. Contrary to the assertion of our colleague, we are of the view that the market value approach is merely one method that the arbitrator could have applied under s. 6(4) of the *FRA*.

(7) Conclusion

[136] In the end, the complexity of the valuation evidence seems to have had the unfortunate effect of masking the forest for the trees. The only interpretation of s. 6(4) of the *FRA* that withstands scrutiny on either standard of review is that Teal is entitled to compensation for its interest as a licence holder in the improvements. If the compensation awarded to Teal under s. 6(4) does not reflect its limited interest in the improvements, Teal does not receive compensation; rather, it receives gross overcompensation — and at the taxpayer's expense. As the Court of Appeal stated on remand, "[i]t cannot be . . . that a statute that provides for compensation be interpreted to mean it provides for a substantial publicly financed windfall, which would serve no purpose": 2015 BCCA 263, 386 D.L.R. (4th) 40, at para. 38. Indeed, the arbitrator's interpretation leads to the absurd result of having the British Columbia public compensate Teal for a private ownership right to the improvements — even though no such right or interest exists and the improvements at issue are owned by the Crown.

[137] As we have explained, there was a valuation method before the arbitrator that was consistent with s. 6(4) of the *FRA*, yet the arbitrator rejected it based on an interpretation of the provision that does not withstand scrutiny on either standard of review. With respect, we see no defensible basis for this interpretation.

[135] En termes clairs, l'arbitre pouvait choisir une méthode d'évaluation compatible avec la seule interprétation raisonnable du par. 6(4) de la *FRA* : à savoir que Teal doit être indemnisée compte tenu de son intérêt limité dans les améliorations. Contrairement à ce qu'affirme notre collègue, nous sommes d'avis que la méthode de la valeur marchande n'est qu'une des méthodes que l'arbitre aurait pu employer en vertu du par. 6(4) de la *FRA*.

(7) Conclusion

[136] En fin de compte, la complexité de la preuve relative à l'évaluation semble avoir eu l'effet malheureux de dissimuler la forêt derrière les arbres. La seule interprétation du par. 6(4) de la *FRA* qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle Teal a droit à une indemnité pour l'intérêt qu'elle détient en tant que titulaire de permis dans les améliorations. Si l'indemnité accordée à Teal au titre du par. 6(4) ne reflète pas l'intérêt limité qu'elle possède dans les améliorations, elle ne reçoit pas d'indemnité; elle reçoit plutôt une indemnité nettement excessive, et ce, aux frais du contribuable. Comme l'a affirmé la Cour d'appel à la suite du renvoi, [TRADUCTION] « [i]l est impossible [. . .] qu'une loi prévoyant une indemnisation soit interprétée comme signifiant qu'elle procure un gain fortuit substantiel à même les fonds publics qui ne servirait à rien » : 2015 BCCA 263, 386 D.L.R. (4th) 40, par. 38. En effet, l'interprétation de l'arbitre mène au résultat absurde où le public de la Colombie-Britannique indemnise Teal pour un droit de propriété privé sur les améliorations, en dépit du fait qu'aucun droit ou intérêt de cette nature n'existe et que les améliorations en cause appartiennent à la Couronne.

[137] Comme nous l'avons expliqué, l'arbitre disposait d'une méthode d'évaluation compatible avec le par. 6(4) de la *FRA*, mais il l'a rejetée sur la base d'une interprétation de la disposition qui ne résiste pas à un examen selon l'une ou l'autre norme de contrôle. Avec égards, cette interprétation nous paraît dépourvue de fondement.

2017 SCC 32 (CanLII)

IV. Disposition

[138] We agree with our colleague Gascon J. that the appeal should be allowed on the contractual interpretation question.

[139] For the reasons stated, we would dismiss the appeal in part on the statutory interpretation issue. We would not, however, restore the arbitrator's decision to award no compensation for the improvements associated with the Lillooet Licence. Although the majority of the Court of Appeal agreed with the arbitrator's valuation of the improvements associated with the Lillooet Licence, we have found that the arbitrator applied an improper interpretation of s. 6(4) of the *FRA* when valuing these improvements. Accordingly, we would remit to the arbitrator the matter of compensation for the improvements relating to all three licences at issue, namely Tree Farm Licence 46, the Fraser Licence and the Lillooet Licence.

Appeal allowed in part with costs throughout, MOLDAVER, CÔTÉ, BROWN *and* ROWE JJ. *dissenting in part.*

Solicitors for the appellant: Hunter Litigation Chambers, Vancouver.

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

IV. Dispositif

[138] Nous convenons avec notre collègue le juge Gascon que le pourvoi doit être accueilli sur la question de l'interprétation contractuelle.

[139] Pour les motifs énoncés ci-dessus, nous sommes d'avis de rejeter le pourvoi en partie sur la question de l'interprétation législative. Nous sommes cependant d'avis de ne pas rétablir la décision de l'arbitre de ne pas accorder d'indemnité pour les améliorations se rapportant au permis Lillooet. Même si les juges majoritaires de la Cour d'appel ont souscrit à l'évaluation que l'arbitre a faite des améliorations se rapportant au permis Lillooet, nous avons conclu que l'arbitre a donné une mauvaise interprétation du par. 6(4) de la *FRA* lorsqu'il a évalué ces améliorations. Nous sommes donc d'avis de renvoyer à l'arbitre la question de l'indemnité pour les améliorations concernant les trois permis en litige, à savoir le permis de ferme forestière 46, le permis Fraser et le permis Lillooet.

Pourvoi accueilli en partie avec dépens devant toutes les cours, les juges MOLDAVER, CÔTÉ, BROWN *et* ROWE *sont dissidents en partie.*

Procureurs de l'appelante : Hunter Litigation Chambers, Vancouver.

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

2017 SCC 32 (CanLII)

Tab 61

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Thomas v. Rio Tinto Alcan Inc.,*
2022 BCCA 415

Date: 20221205
Docket: CA48066

2022 BCCA 415 (CanLII)

Between:

Jackie Thomas on her own behalf and on behalf of all members of the Saik'uz First Nation and Reginald Louis on his own behalf and on behalf of all members of the Stellat'en First Nation

Appellants
(Plaintiffs)

And

Rio Tinto Alcan Inc., His Majesty the King in right of the Province of British Columbia and the Attorney General of Canada

Respondents
(Defendants)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 7, 2022 (*Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15, Vancouver Docket S116524).

Oral Reasons for Judgment

Counsel for the Appellants:	M.M. Giltrow, K.C. L.C. Glowacki
Counsel for the Respondent, Rio Tinto Alcan Inc.:	D.R. Bennett, K.C. M.D. Manhas
Counsel for the Respondent, His Majesty the King in right of the Province of British Columbia (via videoconference):	L. Greathead J. Regehr
Counsel for the Respondent, Attorney General of Canada:	E.M. Tully

Counsel for the Proposed Intervener, Nadleh Whuten:	S.A. Smith K.B. Brown
Counsel for the Proposed Intervener, Heiltsuk Tribal Council on its own behalf and on behalf of Heiltsuk Hím̓ás and the members of Heiltsuk Nation:	L.C. Fong, K.C. R.E.S. Tillman
Counsel for the Proposed Intervener, Chippewas of Saugeen First Nation and Chippewas of Nawash Unceded First Nation:	B. Brookwell
Counsel for the Proposed Intervener, Council of the Haida Nation:	M.A. Jackson, K.C. N. Baker-Grenier
Place and Date of Hearing:	Vancouver, British Columbia November 30, 2022
Place and Date of Judgment:	Vancouver, British Columbia December 5, 2022

2022 BCCA 415 (CanLII)

Summary:

The two appellants brought a claim in nuisance against the respondent Rio Tinto Alcan related to the construction and operation of the Kenney Dam and the diversion of water from the Nechako watershed, which had a severe and negative impact on their traditional fishery. The two Crown respondents were later added as parties. At trial, Rio Tinto Alcan successfully relied on the defence of statutory authority to avoid any liability in nuisance. The case also raised issues regarding Aboriginal title to submerged lands, but the trial judge ultimately did not determine that issue. The appellants appeal from the dismissal of their claim against Rio Tinto Alcan. Four First Nations seek to intervene in this appeal. The appellants and the two Crown respondents do not object, but the respondent Rio Tinto Alcan opposes the applications for intervener status. Held: Applications granted, with restrictions on the length of the factums and with no leave to make oral argument without further order. The intervener Nadleh Whuten has a direct interest in the litigation due to their overlapping claims of Aboriginal rights, interest, and title with the appellant Stellat'en First Nation. Nadleh may intervene and file a seven-page factum. The other three First Nations meet the public interest test and may intervene on the limited issue of Aboriginal title to submerged lands. Together, they may file a single factum of 21 pages.

GRIFFIN J.A.:

Overview

[1] This appeal raises complex issues relating to the intersection of the tort of nuisance and the defence of statutory authority with Aboriginal rights, interests, and title over land and submerged territories.

[2] Four First Nations seek leave to intervene in this appeal: Nadleh Whuten ("Nadleh"); the Council of the Haida Nation (the "Haida Nation"); the Heiltsuk Tribal Council (the "HTC"); and Chippewas of Saugeen First Nation and Chippewas of Nawash Unceded First Nation (jointly, the "Saugeen Ojibway Nation" or "SON"). The appeal is set to be heard from June 19–23, 2023.

[3] The respondent, Rio Tinto Alcan ("RTA"), opposes these applications, while the appellants and government respondents support the intervener applications and make submissions as to the length of their factums and their participation in the oral hearing.

2022 BCCA 415 (CanLII)

[4] The issue on these applications is whether the proposed interveners have established a direct interest or public interest in the underlying appeal to warrant granting them intervener status.

Background

[5] For the purposes of these applications, I rely on the key findings from the trial judge's reasons for judgment to describe the background.

[6] The subject matter of this complex litigation is the Kenney Dam and Nechako River reservoir, located in the interior plateau of British Columbia.

Factual History

[7] The two appellant First Nations, Saik'uz Nation and Stellat'en Nation, are distinct Dakelh (Carrier) "sub-tribes" who have relied on the Nechako River and its watershed for fishing and sustenance since time immemorial. They are also both recognized as distinct "bands" under the *Indian Act,* R.S.C. 1985, c. I-5.

[8] The Saik'uz First Nation mainly reside at Stoney Creek and also have a reserve on the Nechako itself. The Stellat'en First Nation have a reserve located at the mouth of the Stellako River at the west end of the Fraser Lake, part of the Nechako watershed.

[9] In the 1950s, the Province of British Columbia (the "Province") authorized RTA to build the Kenney Dam to facilitate the production of hydropower for the smelting of aluminum. The resulting reservoir is 233 km long with a water surface of 910 km. Water is released from the reservoir and ends up affecting several water ways, including the Kemano River and the Nechako River principally, but also the Cheslatta River and related lakes.

[10] The effect of the Kenney Dam and the reservoir on the Nechako River has been dramatic. The water diverted to the Kemano River never reaches the Nechako watershed. The nine km stretch of river bed between the Kenney Dam and above Cheslatta Falls has been dewatered since 1952. The hydrograph, or flow of water,

2022 BCCA 415 (CanLII)

has changed substantially in terms of volume and timing. The Kenney Dam has also affected the Nechako River as well as the fish and related fishery within the watershed. This has resulted in the imminent extirpation of the Nechako White Sturgeon and a substantial reduction in the salmon population.

[11] The appellants claim an Aboriginal right to fish in the Nechako watershed and they assert Aboriginal title to the areas from and in which they traditionally fished, both from the land and from the submerged beds of the relevant bodies of water. They brought the underlying claim alleging nuisance and a breach of riparian rights as a result of the Kenney Dam and the diversion of water from the Nechako River.

[12] The appellants sought injunctive relief before the court to compel RTA, the provincial government, and federal government to restore a more natural hydrograph, to prevent further damage to the fishery, and ultimately to restore the historic abundance of the Nechako White Sturgeon and salmon.

[13] In response to the claims, RTA said that the construction of the Kenney Dam and the operation of the reservoir were explicitly and validly authorized by the government such that the statutory authority immunized it against any liability for the inevitable consequences to the river and fishery within it. RTA relied primarily on this statutory authority as a full defence to the claims against it.

[14] Although the government parties acknowledged by the end of the trial that the appellants had an Aboriginal right to fish for food, social, and ceremonial purposes, they denied that those rights could ground a claim in nuisance. The provincial and federal governments denied that they had any fiduciary duty to order RTA to change the Nechako hydrograph or to institute any regime of adaptive management. They also denied that the Crown has any plenary duty in the absence of an identified specific Indigenous interest over which the Crown has assumed a discretionary control. In addition, they rejected the claim that the instruments that are the basis of the “statutory authority” defence are “constitutionally inapplicable”.

2022 BCCA 415 (CanLII)

Reasons for Judgment (2022 BCSC 15)

[15] Following a lengthy trial between 2019 and 2021, totaling 189 days, the trial judge issued reasons for judgment on January 7, 2022 (indexed as 2022 BCSC 15).

[16] Ultimately, the trial judge recognized that the appellants have a constitutionally recognized Aboriginal right to fish the Nechako watershed for food, social, and ceremonial purposes. He recognized that this right has been significantly impaired by the regulation of the Nechako River and the decline of the fish population. However, he found that RTA could not be held liable in nuisance due to the application of the defence of statutory authority. Specifically, RTA had complied with all of the regulatory requirements imposed by the government in installing and operating the Kenney Dam and its related reservoir. In the trial judge's view, the only remedy for the appellants was against the government, which has a duty to protect the appellants' Aboriginal right to fish.

[17] The trial judge summarized his key findings at para. 661:

> [661] The key findings of the Court in this case may be summarized as follows:
>
> - The plaintiffs have a constitutionally recognized Aboriginal right to fish the Nechako watershed for food, social, and ceremonial purposes, the modern continuation of a practice and way of life that long pre-existed the incursion of European explorers and settlers into their traditional territory in the first decade of the 1800's.
> - On procedural grounds (the absence of overlapping title claimants as parties or witnesses), the Court declines to make any formal "finding" of Aboriginal title to the Crown land bordering or below the plaintiffs' claimed traditional fishing sites. However, the Court does conclude in alternative *obiter dicta* that the evidence in this case satisfies the legal test for finding Aboriginal title to the land currently comprising Noonla Indian Reserve #6 (vested in the Saik'uz First Nations) and Stellaquo Indian Reserve #1 (vested in the Stellat'en First Nations). Such findings are without prejudice to any claims by non-parties with respect to any interest they may have in the land, e.g., joint title with other First Nations.
> - Again on procedural grounds (absence of evidence (1) from overlapping title claimants and (2) regarding relevant tenets of Indigenous law), the Court declines to make any alternative findings in *obiter* regarding either (1) Aboriginal title to the submerged lands

2022 BCCA 415 (CanLII)

and waters of the Nechako River, Stellako River, or Fraser Lake, or (2) Aboriginal rights akin to the type of riparian rights formerly available at English common law in or before the 19th century.

• As a matter of law, the Saik'uz plaintiffs' interest in and occupancy of Noonla Indian Reserve #6 and the Stellat'en plaintiffs' interest in and occupancy of Stellaquo Indian Reserve #1 is sufficient to found an action in private nuisance arising from any substantial and unreasonable interference with their use or enjoyment of the reserve lands.

• Further, as a matter of common law, whether as it presently stands or as an incremental extension of same, the plaintiffs' Aboriginal right to fish, whether independently or as an incident of title, is also sufficient to found an action in nuisance in the appropriate circumstances.

• Regulation of the Nechako River (the installation and operation of the Kenney Dam and related reservoir and the resulting alteration of the river's natural flow regime) has had negative effects on the abundance and health of the fish population in the watershed. In particular,

> (1) it has caused a chronic recruitment failure and imminent extirpation of the Nechako White Sturgeon;
>
> (2) it initially had a devastating effect upon the Chinook traditionally spawning in the upper Nechako River and, although the Chinook population has rebounded to approximately pre-regulation levels, restoration of a more natural flow regime might further increase their numbers; and,
>
> (3) it has resulted in warmer water temperatures during the migration of the sockeye salmon through the Nechako River which in turn causes pre-spawning mortality that contributes to the overall decline of the sockeye population.

• The resulting decline in the fish population and in the related Aboriginal fishery in the Nechako watershed has had hugely negative impacts upon the plaintiffs as Indigenous communities, one that is greatly disproportionate to the burden imposed on the non-Indigenous population of the region. In these circumstances, RTA must be found liable to the plaintiffs for the tort of private nuisance unless it is immunized by defences based on statutory authority or limitations legislation.

• The Kenney Dam was constructed in conformity with plans that were specifically approved by both levels of government. The water licences issued to RTA explicitly authorize the diversion of water from the Nechako River, its storage in the reservoir, and its use for maximum hydroelectricity production. The flow of water from the reservoir into the Nechako River is governed by an agreement between RTA and both levels of government as directed by a certain specified Technical Committee. RTA has always strictly complied with the water release requirements imposed upon it and any resulting

2022 BCCA 415 (CanLII)

> harm to the fish/fishery in the Nechako River is the inevitable result of those regulatory requirements. The defence of statutory authority therefore applies. The plaintiffs' argument that the statutory authority is somehow "constitutionally inapplicable" cannot succeed and the plaintiffs' tort action against RTA must be dismissed.
>
> • While the claim for injunctive relief against RTA must be dismissed and so too must be the plaintiffs' proposed declaration requiring the Crown to implement the requested relief, the Court nevertheless makes a declaration that the plaintiffs do have an Aboriginal right to fish for food, social, and ceremonial purposes in the Nechako River watershed and that, as an incident of the honour of the Crown, both the provincial and federal governments have an obligation to protect that Aboriginal right.

2022 BCCA 415 (CanLII)

[18] The second and third bullet points in para. 661 of the judge's reasons dealt with Aboriginal title to the Crown lands bordering the waters or submerged in the waters where the appellants traditionally exercised their Aboriginal fishing rights.

[19] The judge held that he could not determine Aboriginal title to the lands without hearing from overlapping Aboriginal title claimants, but if he was wrong in that regard, he found that the appellants did have Aboriginal title to certain of the lands, namely the two Indian reserves mentioned.

[20] As for the submerged lands, the judge held that he could not make any findings regarding Aboriginal title, based on a lack of evidence. In the course of his reasons, he elaborated on this somewhat, referring to possible legal barriers to such a claim. He referred to the case of *Saugeen First Nation v. The Attorney General of Canada*, 2021 ONSC 4181 [*Chippewas*], for its analysis of an Aboriginal title claim to submerged lands. He indicated some agreement with the analysis in that case. He also noted some distinguishing facts. The judge then observed:

> [330] That said, any argument for occupation and control of the relevant submerged lands is significantly weakened by a general lack of evidence that the plaintiffs' exercised exclusive control over the waters and the conflicting expert opinions with regard to *sadeku* ownership and control of rivers and riverbeds. This weakness is even more problematic if one applies the *Tsilhqot'in* requirements of sufficient, continuous, and exclusive occupation. It is also here that the evidence of overlapping title claimants would have been particularly helpful.
>
> [331] Even if I were to find that the plaintiffs had met the criteria considered by Matheson J. or required by the *Tsilhqot'in* construct, the conflict between

> the exclusivity of Aboriginal title and the primacy of the public right of navigation might still provide a potentially insurmountable barrier to a finding of Aboriginal title in this case. In fact, on the face of it, this would appear to be the case for *any* Aboriginal title claim to the bed of a navigable waterway.
>
> [332] As a best-case claim, one might imagine a land-locked lake, fully bounded by land to which Aboriginal title has been found, and to which access has been historically and exclusively controlled by the titleholders. In my opinion, it would be illogical to deny Aboriginal title to the lakebed, given the exclusive control of access to the lake belonging to the titleholders as an incident of Aboriginal title. In every meaningful way, the lake and access to it would be controlled by the titleholders. However, no such land-locked water is involved in the case before me. Rather, this case involves a large navigable river and lake bordering lands claimed by several different First Nations, all of whom may have navigated the waters since time immemorial.
>
> [333] In the absence of any further direction from the appellate courts, the inclusion of exclusive control and occupation in the definition of Aboriginal title set out in *Delgamuukw* and *Tsilhqot'in* remains operative. Without some development in the law, there may be no path to Aboriginal title to submerged lands beneath navigable waterways. Altering the definition of Aboriginal title (perhaps by burdening it with the public right of navigation) in the context of claims to such submerged lands would constitute a significant development in the law that I decline to make in *obiter*, and particularly so when the evidence respecting the exclusive control of the waters is lacking.
>
> [334] I wish to make it clear, however, that I am not dismissing the plaintiffs' alternative claim for waterbed title on the merits. I am simply deferring determination of that issue to a case where the question can be decided on a more complete evidentiary record.

[21] The judge's comments at paras. 330–334 of his reasons, dealing with claims of Aboriginal title to submerged lands, deeply concern three of the proposed interveners. Even as *obiter*, they say these comments will be used against them by the Crown when negotiating outstanding claims. They are concerned that this Court be alerted to this problem, so that it does not make statements even in *obiter* that might be prejudicial to their rights. For this reason, they say it is important that the proposed interveners' perspectives be heard on the appeal as to the reasons why they say Aboriginal title to submerged lands can co-exist with a public right of navigation.

Grounds of Appeal and Appellants' Arguments

[22] The appellants—Saik'uz and Stellat'en First Nations—have served their factum. They allege that the trial judge made the following errors of law:

2022 BCCA 415 (CanLII)

a) Concluding that the statutory authorizations issued to RTA immunized it in nuisance. They allege errors in the trial judge's interpretation of the inevitable result component of the statutory authorization defence and in holding that the Constitution did not apply to limit the lawful scope of the Crown authorizations relied on by RTA;

b) Refusing to make an order that the Crown require a change in flow by RTA to address the nuisance, despite finding that the Crown has a duty to protect the Aboriginal rights; and,

c) Refusing to make a finding of Aboriginal title to the appellants' reserves and adjacent fishing sites to additionally ground the nuisance claim.

[23] On the latter point, the appellants argue that the judge erred in two ways:

a) By considering the presence of overlapping claims as a basis for declining to decide Aboriginal title; and,

b) By finding barriers to making findings of title to submerged lands, including in relying on the *Chippewas* case and in holding that Aboriginal title is inconsistent with a right of navigation.

[24] The appellants argue that the proper interpretation of the law does not stand in the way of Aboriginal title to submerged lands and that the evidence and findings of the judge meet the Aboriginal title test for sufficient, exclusive occupation, just like the non-submerged lands. Their position is that the existing test for Aboriginal title accommodates submerged lands at the fishing sites. The appellants submit that the trial judge failed to account for the Aboriginal perspective as additional evidence of ownership of the riverbed or of exclusion or control of travel by water.

[25] Nadleh seek to make submissions relating to the first ground of appeal with respect to the defence of statutory authority and the proper approach to that defence where Aboriginal rights are infringed.

2022 BCCA 415 (CanLII)

[26] The remaining three interveners (Haida Nation, HTC, and SON) seek to make submissions with respect to the third ground of appeal regarding Aboriginal title to submerged lands and the public right of navigation.

Applicable Legal Tests

Jurisdiction and Powers of the Court

[27] Section 30(f) of the *Court of Appeal Act,* S.B.C. 2021, c. 6 and Rule 61 of the *Court of Appeal Rules,* B.C. Reg. 120/2022 govern applications for intervener status.

[28] Much of the case authorities were decided under previous Rule 36, but the substantive considerations relevant to intervener applications remain the same: *Linkletter v. Proctorio, Incorporated,* 2022 BCCA 313 at para. 14.

Routes to Intervener Status

[29] There are two situations in which intervener status will be permitted: 1) where the applicant has a direct interest in the outcome of the proceeding; or 2) where the appeal raises public law issues that legitimately engage the applicant's interests and the applicant brings a different and useful perspective to those issues: *Carter v. Canada (Attorney General),* 2012 BCCA 502 at paras. 12–13.

[30] Factors that weigh against granting intervener status include the possibility that an intervener will expand the scope of the proceeding by raising new or immaterial issues or that granting intervener status would create an undue burden or injustice for the parties to the appeal: *Friedmann v. MacGarvie,* 2012 BCCA 109 at para. 19.

[31] In *Equustek Solutions Inc. v. Google Inc.,* 2014 BCCA 448, Justice Groberman said the following about the two different bases for intervention and the different approaches by the Court:

> [8] …Where a person is directly affected by an appeal, the focus will be on the interests of the prospective intervenor and on whether fairness dictates that the person have the opportunity to make submissions before the Court. Where the intervention is on the basis of public interest, the Court is not concerned with fairness to the intervenor, but rather with the

2022 BCCA 415 (CanLII)

> comprehensiveness of the resources available to it on the appeal. Its concern will be with the advisability of obtaining submissions that go beyond those that the parties can effectively make. In allowing persons to intervene on appeals on this second basis, the Court is attempting to ensure that important points of view are not overlooked. Intervenors on this basis must demonstrate that it is in the Court's interest (or, more broadly, in the public interest), rather than their own, for them to be heard.
>
> [9] The scope for such interventions is very limited. While the intervenor must be able to present a perspective that is not already before the Court, it must not expand the litigation by raising matters that are not already part of it. Further, it must not attempt to take over or "hijack" the litigation by changing its focus to an issue that is peripheral to the case as it is presented. The niche that may be occupied by an intervenor is, therefore, necessarily a very narrow one. For that reason, intervenor status is not granted as a matter of course.

2022 BCCA 415 (CanLII)

Direct Interest

[32] To show a direct interest in the proceeding, an applicant's own legal rights or obligations must be affected by the proceedings: *Halalt First Nation v. British Columbia (Environment),* 2012 BCCA 191 at para. 6; *West Moberly First Nations v. McLeod Lake Indian Band,* 2014 BCCA 283 at para. 13. This interest must be substantial and different from that of the general public.

[33] Typically, a direct interest also requires more than a concern about how the precedential value of a decision might affect an applicant or bear upon an applicant's own circumstances or case: *Susan Heyes Inc. v. South Coast B.C. Transportation Society,* 2010 BCCA 113 at para. 12 [*Susan Heyes*].

Public Interest

[34] Where the applicant does not have a direct interest, the court will consider these factors to determine whether the intervention is in the public interest:

a) whether the proposed intervener has a broad representative base;

b) whether the case legitimately engages the interests of the proposed intervener in the public law issue raised on appeal;

c) whether the proposed intervener has a unique and different perspective that will assist the Court in the resolution of the issues; and

d) whether the proposed intervener seeks to expand the scope of the appeal by raising issues not raised by the parties.

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCCA 282 at para. 14.

[35] In determining whether to grant intervener status, the Court is concerned with ensuring that important perspectives are not overlooked. Prospective interveners must show that it is in the Court's interest or, more broadly, the public interest to grant leave to intervene: *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 66 at para. 12; *Equustek Solutions Inc.* at para. 8.

Positions of the Parties

Appellants and Respondents

[36] The appellants support all of the proposed interveners' applications.

[37] The respondent, Attorney General of Canada ("Canada"), consents on certain terms restricting the scope of participation. They agree that Nadleh should be granted intervener status because it has a direct interest in the appeal due to the territorial overlap between Nadleh and the appellant, Stellat'en First Nation. Canada also consents to the remaining three interveners being granted intervener status because they present a distinctive perspective on a public law issue, specifically the issue of Aboriginal title to submerged lands. Canada notes that whether Aboriginal title to submerged lands is a proper issue in this appeal is a matter to address at the appeal hearing.

[38] The respondent Attorney General of British Columbia also consents, but with conditions restricting the scope of participation as well.

[39] The respondent, RTA, opposes all four intervener applications.

2022 BCCA 415 (CanLII)

2022 BCCA 415 (CanLII)

Analysis

[40] The four proposed interveners each submit affidavits in support of their applications in order to establish that they have a direct interest or public interest in this appeal.

Nadleh Whuten

[41] Nadleh is a sub-tribe of an Indigenous people, the Central Dakelh. The appellant Stellat'en First Nation and Nadleh are together referred to as the "Fraser Lake Dakelh" and have interconnected clan and family systems. The name of their community, Nadleh Whut'en, means "the people who live where the salmon return".

[42] Nadleh has over 600 members today and is a band under the *Indian Act.* Nadleh say salmon is of central importance to their culture and way of life.

[43] In terms of a direct interest, Nadleh says that the trial judge's conclusions on the defence of statutory authority directly impact the group because they rely on the same rivers and fish populations as the appellants do, as a basis for exercising their Aboriginal title, rights, and interests. Nadleh says their Aboriginal right to fish the Nechako watershed for food, social, and ceremonial purposes is similar if not identical to the fishing rights the trial judge declared that the Saik'uz and Stellat'en First Nations possess. They submit that they continue to suffer similar impacts as the appellants as a result of the construction and operation of the Kenney Dam and Nechako River reservoir.

[44] The impacts on the Nautley River are unique to Nadleh, but they are linked to the same statutory authorizations at issue in this appeal.

[45] In addition to showing a direct interest, Nadleh also argues that they offer a distinct perspective, not advanced by the appellants, on the proper approach to consider the defence of statutory authority when it is raised in the context of historical and ongoing infringements of Aboriginal rights.

[46] RTA argues that the fact that the Nadleh assert Aboriginal rights and title to areas overlapping with the areas at issue is not sufficient to establish a direct interest for intervention. It submits that the position of the Nadleh is much like the position of the unsuccessful intervener in the *Susan Heyes* case. There, a neighbour, Mr. Gautam, who sued for nuisance, was not permitted to intervene in the nuisance claim brought by the appellant, even though he would be affected by the precedent-setting value of a decision on the defence of statutory authority. RTA makes the point that the Nadleh could have sought to be joined in the litigation at the trial level if they had a direct interest they wished to advance, as the litigation was well known.

[47] RTA also opposes Nadleh's intervention on a public interest basis because it says Nadleh has a similar perspective as the appellants, so their submissions would be duplicative, and even where not duplicative, would expand the scope of the litigation.

[48] I am satisfied that Nadleh's position is distinguishable from the neighbour who sought to intervene in the *Susan Heyes* case. Nadleh's claims to Aboriginal rights, interests, and title overlap with the appellants, and are not akin to those of the business neighbour in the *Susan Heyes* case, whose claim did not pertain to reasonable use and enjoyment of the very land that was the subject matter of the appellant's claim. Nadleh's claims are that their resource, the fish populations, were the very same fish populations travelling the shared rivers that were the subject of the appellants' claim.

[49] Further, the appellants support Nadleh's application to intervene, whereas all parties in the *Susan Heyes* case opposed the proposed intervener and argued that allowing the application would prejudice them.

[50] Lastly, in my view, RTA's criticism of Nadleh for not seeking to be joined as a party at the trial stage is answered by an appreciation of the unique challenges and goals of reconciliation. Reconciliation places pressure on all parties to Aboriginal claims to try to resolve issues through negotiation. The fact that Nadleh may be

2022 BCCA 415 (CanLII)

choosing to advance their interests in ways other than as a named party to litigation is, in my view, not dispositive: see *West Moberly* at para. 25.

[51] I therefore consider Nadleh to have a direct interest.

[52] I therefore will grant Nadleh intervener status. However, given the fact that they are only addressing one issue, the defence of statutory authority, compared to the many issues that the parties to the appeal must address, I will limit their factum to seven pages. Their factum will be limited to the issue they identified in their argument filed in support of their application to intervene, that is, their unique arguments on the proper approach to the statutory authority defence.

Interveners on Submerged Land Question

[53] I turn next to the applications of the other three proposed interveners. I am satisfied that they all meet the test for public interest standing. Each of them is properly representative and proposes a unique and distinct argument regarding the assertion of Aboriginal title over submerged lands and its interplay with the public right of navigation. Each of the Haida Nation and the HTC represent coastal First Nations with a significant membership and they assert large territorial claims including over bodies of water. The SON also represent a broad base of members and they assert title to the navigable waters of Lake Huron and Georgian Bay.

[54] In my view, the main issue is whether these proposed interveners will unduly expand the scope of the appeal or will assist the Court in the resolution of the issues.

[55] RTA argues that Aboriginal title to submerged lands is not going to be an issue on appeal. Its position is that the three interveners on this point are focusing on comments of the judge that do not even amount to *obiter* and that have no legal impact.

[56] In my view, there is a possibility that the division of this Court hearing the appeal will decide that it is unnecessary to opine on the issue of Aboriginal title to

2022 BCCA 415 (CanLII)

submerged lands, and if that is so, allowing for more submissions on this issue will not assist the Court. On the other hand, if the Court does engage on the issue, it could well assist the Court to know the various possible approaches to the issue advanced by the interveners.

[57] On balance, I have concluded that intervener status ought to be granted to each of these three interveners on a restricted basis. I accept that there is a danger that allowing too large a scope for intervention will unduly prejudice the other parties who already have several complex issues to address on appeal, and it could be a hindrance rather than a help to the division of this Court hearing the appeal. I will address this concern by imposing terms on the interventions.

[58] I pause to note that the interveners suggest generally that they do not seek to have their affidavit evidence before the Court on the appeal as relevant to any issues on which the Court may have to adjudicate. Rather, they accept that the affidavits in support of their applications can simply be used to explain the basis for their intervention.

[59] On the other hand, there was some vagueness on this notion in respect of the Haida Nation and HTC. The Haida Nation refer to various agreements they have reached and they seem to suggest they will want to refer to these agreements to show real-life examples of how Aboriginal rights, interests, and title in bodies of water can indeed be reconciled with public rights of navigation. The HTC seem to want to refer to their affidavits as evidence of their Indigenous laws. Respectfully, while these parties can advance arguments that such matters may be relevant on a proper approach to the submerged lands issue, I do not see these arguments as justifying the introduction of new evidence on appeal. I am concerned that to refer to this as evidence on appeal would take way from the focus of the appeal and the parties. I will therefore adopt a similar term as adopted by the Ontario Court of Appeal in respect of interventions on the *Chippewas* appeal (*Chippewas of Nawash Unceded First Nation v. Canada (Attorney General),* 2022 ONCA 705 at para. 7).

2022 BCCA 415 (CanLII)

2022 BCCA 415 (CanLII)

Disposition

[60] Given the complexity of the appeal and in light of the analysis above, I make the following orders:

a) the proposed interveners will be granted leave to intervene;

b) the length of the factum from Nadleh will be restricted to seven pages;

c) the other interveners will be permitted to cooperate to file a single factum no longer than 21 pages in total. It should be described on its cover as a factum of those interveners on the submerged lands issue. The purpose of requiring a combined factum is to avoid repetition, and to assist the Court and other parties in having only one additional factum on this issue. The submissions of these interveners will be limited to the issues already identified in their applications to intervene;

d) no evidence from the interveners will be admitted on the appeal without further order of a justice or the Court. However, the interveners are permitted to file a condensed book of their affidavits filed in support of their applications to intervene, simply so that the division hearing the appeal has an understanding of the basis for their intervention, if required;

e) the interveners will not be permitted to present oral argument, unless a justice or the division hearing the appeal orders otherwise; and

f) the interveners are to bear their own costs.

[61] I will now hear from the parties on their views as to the deadlines for the intervener factums and any response factums.

[Discussion with counsel re: filing deadlines]

[62] **GRIFFIN J.A.**: Having heard the parties' submissions, in order not to prejudice the main parties to the appeal, I am not willing to extend the date for the interveners' factums to December 19, 2022. The interveners will have until

December 16, 2022 to file the interveners' factums. The remaining deadlines for the exchange of factums is as set out in the order of Justice Hunter, entered October 13, 2022.

"The Honourable Justice Griffin"

2022 BCCA 415 (CanLII)

Tab 62

ONTARIO COURT OF JUSTICE

CITATION: *Toronto (City) v. Lee-Tucker*, 2025 ONCJ 323
DATE: 2025 06 12
COURT FILE No.: Toronto 4862 22 27810096
4862 22 25620477

2025 ONCJ 323 (CanLII)

IN THE MATTER OF an appeal under 135(1) of the *Provincial Offences Act,* R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HIS MAJESTY THE KING Ex Rel. THE CITY OF TORONTO

Appellants

— AND —

LISA LEE-TUCKER, HENRY SHEIN CANADA
Respondents

Before Justice David Rose
Heard on May 13, 2025
Reasons for Judgment released on June 12, 2025

Ms. V. Pankou ..... counsel for the prosecution
No appearance by or on behalf of either Respondent, even though notified of time and place.

ROSE J.:

[1] The Prosecution appeals the stays of proceedings against Henry Shein Canada and Lisa Lee-Tucker. They have a commonality, which is why the appeal were heard together. Both were charged with offences under Part 1 of the *Provincial Offences Act* R.S.O. c. P 33, as amended. Both appeared at an Early Resolution Meeting after requesting one. In each case His Worship stayed the proceedings because of both a violation of the Respondent's rights under s. 11(b) of the *Charter* and also because of a common law abuse of process.

[2] The City of Toronto (Toronto) appeals both decisions. In each case the Respondent was served with the Appeal materials but did not appear. For the following reasons both appeals are allowed and the stays vacated.

History

[3] The Respondent Henry Shein Canada was served with a Certificate of Offence documenting a red light camera system infraction. The offence was indicated as August 23, 2022 at Bloor St and Ossington Avenue at 1:33 pm. In the case of Ms. Lee-Tucker her car was photographed in the intersection of Sheppard Avenue and Leslie street on a red light on September 11, 2022. Both Respondents requested an early resolution meeting. Henry Shein Canada was given the 10th of July, 2024, Room W6 at the Courthouse at 2700 Eglinton Avenue West on the 10:45 am docket. Ms. Tucker was given July 17, 2024 on the 3:15 pm docket in the same Courtroom. The same Justice presided in early resolution court both days.

[4] It appears from my review of the transcript that the Court had a very busy docket each day. The Certificate of Offence against Henry Schein Canada was dated September 6, 2022, so by the time the case came up for early resolution on July 10, 2024 it was over 22 months old. At that appearance, fairly early on, His Worship said to the prosecutor:

> The Court:….So, I do not find that its appropriate that these cases proceed. So that's the angle I'm working at. I'm going to give you some time. We'll take a short recess. I'm not sure if you wish to refer this to your manager to come in and speak to this.
>
> Mr. Morra: Thank you Your Worship. Yes, I will reach out. I can indicate for the record and for yourself, Your Worship, in this situation as I indicated earlier that court scheduling or trial scheduling is in charge of scheduling with these matters without having any, application before the court.
>
> The Court: I respectfully disagree with that, notwithstanding that the scheduling is handled by court's administration. Again, the Crown's office, the prosecution's office is an entity that is affiliated with, it works holistically in concert with one another as you would appreciate. I see here that these defendants have satisfied their obligations to obviously put the matter before the court. This is an early resolution setting, but we're well beyond the Jordan ceiling. There's also the O'Connor decision that stands for the proposition and speaking for disclosure issues specifically on that point from the Supreme Court of Canada, it does also stands for the proposition that one might not need to necessarily wait for a charter filing in order to address a circumstance where there's an abusive process that is manifestly available to be discerned as it is in the is case. This is not fair play.

[5] Later on issue of notice came up:

> Mr. Henderson: …We respect the are remedies available to those who, who are their rights and freedoms on. I'm unaware if there's been anything filed with respect to that.

2025 ONCJ 323 (CanLII)

> The Court: So, there's been nothing filed.
>
> Mr. Henderson: Okay.
>
> The Court:…It is not a requirement or an obligation, especially for a self-represented defendant, that they would have to go through the exercise of having a charter motion prepared, filed and the case put back, again further delay, setting out the timeline even beyond 18 months while in excess of to begin with.

[6] The Court then stayed several cases on its own motion because they exceeded the 18 month time period outlined by the Supreme Court of Canada in *R. v. Jordan* 2016 SCC 27. When the Respondent's case came up Dave Dabideen appeared in Court by telephone for Henry Shein Canada. He identified himself as the driver of the vehicle. At that point His Worship said:

> The Court: Thank you. Okay resolution discussion was embarked on by the prosecution. Thank you. And, again, so with regard to Henry Shein Canada Inc at line 9 offence date in question August 23, 2022. This is a red light camera charge, first time before the court well exceeding the Jordan ceiling. Under common law authority, judicial state (sic) of proceedings entered. That's everything. You may disconnect. There's no conviction, no finding of guilt. No fine. Drive careful.

[7] In the case of Ms. Tucker, the Certificate of Offence was also some 22 months old by the time the case appeared for an early resolution. The day's court proceedings were similar to July 10 as regards the apparent delay:

> The Court: The charges that the Court is being asked to proceed on, by way of acceptance of resolution involve offence dates that offend the *Jordan* threshold of – within the provincial court, these cases are to be completed within 18 months. Cases are being scheduled for court and they are put before the Court from the very first instance – they are not stemming from any reopening applications. As I said last Wednesday, I'm not making any finding that there's malice on the part of the prosecution in any way.

[8] His Worship was clear that he intended to stay all cases which exceeded the Jordan 18 month ceiling:

> The Court:…I cannot in good conscience accommodate an application, resolution or to be rescheduled in a trial court to add further delay on top of an unlawful delay. I will enter a judicial stay of proceedings pursuant to O'Connor, 1995 decision and also the Jordan decision. As of the 18 months presumptive threshold being exceeded, that is for an abuse of process. That pertains to the following matters…

[9] When Ms. Tucker's case was called her husband appeared by telephone. The appearance was brief:

> Mr. Tucker: Hello, Your Worship, Chad Tucker, T-U-C-K-E-R. Relation to Lisa lee-Tucker, I'm her spouse

2025 ONCJ 323 (CanLII)

> The Court: Very good. This is for an offence date, I see here September 11, 2022…
>
> Mr. Tucker: Correct.
>
> The Court: …and its also for a red light camera offence. First time before the Court. Judicial stay of proceeding applicable. Case collapses. You may disconnect.
>
> Mr. Tucker: Thank you Your Worship.

[10] In both cases His Worship was clear at the outset of the day that any case that exceeded 18 months of delay would be stayed on the Court's own motion and without one being requested. In both cases His Worship stayed the charges. The certificate of offence for Ms. Tucker is endorsed "Judicial Stay of Proceedings Common Law Authority Abuse of Process + 18 months S.C.C. R. v. Jordan 201627 R. v. O'Connor '95".

[11] It has identical language to the endorsement from *R. v. Henry Shein Canada*, where His Worship endorsed "Judicial Stay of Proceedings, Common Law Authority Abuse of Process + 18 months SCC R. v. Jordan 2016 R. v. O'Connor '95".

[12] It is therefore beyond dispute that His Worship stayed the charges in both cases because the proceedings exceeded the 18 month limit imposed by the Court in *R. v. Jordan* 2016 SCC 27. There is nothing which explains the reason for the delay. It simply took too long to set Early Resolution Meetings. His Worship was entirely right that the *Jordan* guidelines were exceeded on their face.

Discussion

[13] The Justice was entirely correct that cases proceeding in the *Ontario Court of Justice* have a presumptive 18 month limit in which to conclude the case. R*. v. Jordan* (*supra*) stands for that proposition. The 18 month time limit is forum applicable, not offence specific. The 18 month limit applies to all charges, criminal and regulatory when proceeding in the Ontario Court, see *R. v. Nguyen*[1]. In other words, the 18 month presumptive time limit applies to traffic ticket and Indictable offences alike proceeding to trial in the *Ontario Court of Justice.*

[14] This case falls to be decided on application of the statutory procedural rule which is engaged when a Court embarks on an application to stay charges. This is found in the *Courts of Justice Act* 1990 R.S.O. c. C. 43:

> **Notice of constitutional question**
>
> **109** (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

[1] *R. v. Nguyen* 2020 ONCA 609

2025 ONCJ 323 (CanLII)

> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
>
> 2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.
>
> **Failure to give notice**
>
> (2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.
>
> **Form of notice**
>
> (2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.
>
> **Time of notice**
>
> (2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

[15] What is clear from s. 109 (2) of the *Courts of Justice Act* is that notice is essential before a Justice can hear an application to stay charges. Because s. 11(b) has only one remedy, namely a stay under s.24(1) of the *Charter*, when an Applicant seeks a stay of proceedings because of a delay and concomitant violation under s. 11(b) of the *Charter* there must be notice.

[16] S. 109 (2) is the statutory and logical extension of the procedural rule that a litigant claiming a breach of a *Charter* right bears the burden of proof on a balance of probabilities standard. If the Applicant does not succeed on that, then there is no *Charter* violation, see *R. v. Collins* [1987] 1 S.C.R. 265 at p. 277 per Lamer J.

[17] Beyond the statutory requirement to give notice before an accused may seek a stay of proceedings it is incumbent on the trial justice to remain impartial as between the prosecution and defence. Provincial offences, such as traffic tickets commonly appear in court without the benefit of representation for the accused. Despite this, the Justice must remain impartial and not become an advocate for the unrepresented accused. This was made clear in *R. v. Taubler* (1987) 20 O.A.C. 64 where the Court said,

> 30. While it is undoubtedly true that a trial judge has a duty to see that an unrepresented accused person is not denied a fair trial because he is not familiar with court procedure, the duty must necessarily be circumscribed by what is reasonable. Clearly it cannot and does not extend to his providing to the accused at each stage of his trial the kind of advice that counsel could be expected to provide if the accused were represented by counsel. If it did, the trial judge would

2025 ONCJ 323 (CanLII)

> quickly find himself in the impossible position of being both advocate and impartial arbiter at one and the same time.

[18] With that said, when the trial proceeds with the accused unrepresented the judge has an extra burden to ensure that the trial proceeds fairly. The judge can assist the unrepresented to provide information about procedure and may even ask questions to ensure that the case is fairly presented. It is worthwhile recalling the guidance by Cote J. speaking for the whole Court in *R. v. J.D.* 2022 SCC 15:

> 15. Before concluding, I emphasize that the accused in the case at bar was represented by counsel. This Court is therefore not required to determine whether the trial judge's duty to a self-represented accused would be different. Allow me nonetheless to digress by making a few comments, although without ruling definitively on this issue. In the case of a self-represented accused, the court has a duty to ensure that the accused can have a fair trial that is respectful of his or her fundamental rights. The judge is at that time [TRANSLATION] "charged with a particular responsibility" to ensure that the trial is fair (*R. v. Leblanc* 2010 QCCA 1891, 78 C.R. (6th) 359, at para. 47). The judge has, in this sense, a duty to assist the accused (*Guenette v. R.*, 2002 CanLII 7883 (Que. C.A.), at para. 20; *R. v. Richards*2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 110). This duty to assist is [TRANSLATION] "variable", however, as it differs according to the circumstances and is limited to what is reasonable (*M.R. v. R.*2018 QCCA 1983, 53 C.R. (7th) 182, at para. 25, citing *Jarrah v. R.*, 2017 QCCA 1869, and *R. v. Breton*2018 ONCA 753, 366 C.C.C. (3d) 281, at para. 13; see also *Richards*, at paras. 110-11). Although the court is not required to give advice to the accused, it must be reasonably certain that the accused is aware of his or her procedural rights. It could be necessary in such circumstances to inquire further into the consent of the accused.

[19] Two problems emerge in the cases before me. The first is that the Justice took it upon himself to initiate the application to stay the charges. Neither Respondent said anything about it. The s. 11(b) motion was therefore the Court's Motion, not the Accused's. The second is tied to the first, namely that there was no advance notice to the Appellant, beyond the discussion which transpired as Court was opening. The ability of Toronto to respond to the Court's motion to stay the charges was limited to the day the case was heard. Failure to require any notice at all before staying the charges was reversible error.

[20] It was reversible error for the Court to initiate a stay of proceedings on its own motion. A trial judge must be careful and reluctant to bring their own motions because of a perceived unfairness to one or the other party. In my finding the standard on which a trial judge brings their own motion to stay is similar to the test to apply when a trial judge calls their own evidence, namely:

> The discretion should only be exercised rarely and then with extreme care, so as not to interfere with the adversarial nature of the trial procedure or prejudice the accused

2025 ONCJ 323 (CanLII)

See *R. v. Finta* [1994] S.C.J. No. 26 at par. 192

[21] Trial judges must remain impartial and neutral to each side for risk of entering the fray. I do not find that a judge can *never* bring their own motion to stay the proceedings, but such circumstances will be exceedingly rare.

[22] I recognize that the Justice of the Peace properly raised the issue of delay with the prosecution. In the wake of *Jordan,* the Justice of the Peace's concern was entirely proper. The prosecution's response to the Court's concern was insufficient to the presiding justice. At one point on July 10, 2024, His Worship said this:

> The Court: All right. I'm going to ask a tough question here Mr. Morra. The charges here are going to back to almost 2 years old. I appreciate this is an early resolution. I feel that I have a duty and obligation in prosecution. I'm going to ask the question, why are they not on a withdraw docket?
>
> Mr. Morra: Your Worship, scheduling is up to the court administration, not up to the prosecution's office. These are the dockets that we've received, my colleague has reviewed the information and taken was agreed upon with the defendant.

[23] His Worship was entirely right that the delay in the cases before him engaged s. 11(b) concerns on their face. As the Court in *Jordan* stipulated, all justice system participants must actively work to move cases to a conclusion promptly. By raising this concern the Justice was doing just that. It therefore troubling that the prosecutor took the position that the 2 year delay from laying the charge to first appearance was the Court's responsibility, not the prosecution's. This is at odds with jurisprudence going back to *R. v. Askov*[2] that the Crown bears responsibility for institutional resource limitations in the context of s. 11(b). Put bluntly, the prosecution bears the burden of institutional delay. It is insufficient in the circumstances of these 2 cases for the prosecution to disavow responsibility for the delay.

[24] What happened here is that the Justice went a step too far. It is of no assistance to the analysis that the Justice offered a second limb for the stay, namely the common law authority from R*. v. O'Connor* [1995] 4 S.C.R. 411. While the Court has a residual discretion to stay charges under common law, it is extremely limited. In *O'Connor* (supra) at par. 70 L'Heureux-Dube J. put it this way:

> …I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this

[2] *R. v. Askov* (1990), 79 C.R. (3d) 273

2025 ONCJ 323 (CanLII)

somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

[25] In the appeals before me both cases clearly engaged the Respondents' s. 11(b) rights to a trial in a reasonable time. That was apparent to the Court and prosecution from the beginning. Any remedy because of delay could be dealt with completely by application of s. 11(b). There was therefore no residual common law discretion to stay the proceedings.

[26] It may be that when this situation arises in the future, ie an unrepresented accused is charged under the *Provincial Offences Act* where the presumptive *Jordan* guideline has been clearly and obviously breached that the prosecution may well be called on to assist the accused in raising an 11(b) Application. That would have been a suitable procedure in the cases on appeal. I would leave it to the trial justice to run their Courts as they see fit each day.

[27] In the result, the stays in each case are set aside and a new trial ordered.

Released: June 12, 2026

Signed: Justice Rose

2025 ONCJ 323 (CanLII)

Tab 63

John Arthur Wildman *Appellant*;

and

Her Majesty The Queen *Respondent.*

File No.: 16667.

1984: May 2; 1984: October 11.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Murder — Trial judge erring in excluding exculpatory evidence — Whether s 613(1)(b)(iii) of the Code applicable to uphold conviction — Criminal Code, R.S.C. 1970, c. C-34, s. 613(1)(b)(iii).

Statutes — Amendments — Legislation enacted after trial making accused's spouse competent to testify — New legislation applicable at new trial — Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 4(3.1) [added by 1980-81-82-83 (Can.), c. 125, s. 29(2)], 4(5) — Interpretation Act, R.S.C. 1970, c. I-23, s. 36(d).

Appellant was charged with the first degree murder of his 8 year old stepdaughter and tried by a judge with a jury. The Crown's case was based entirely on circumstantial evidence. Although considered at the preliminary inquiry, the testimony of two witnesses that related to a telephone conversation between them and the accused's wife or somebody purporting to be his wife was not admitted at trial. This evidence would have explained why the accused knew of the circumstances of the victim's death prior to the discovery of the body—the most incriminating evidence adduced against him. The accused's wife was not called as a witness. In his address to the jury, the Crown explained that the prosecution is prohibited by law from calling the accused's wife to give evidence and the trial judge did not comment that statement. Appellant was convicted. On appeal, the Court of Appeal found that the trial judge erred in excluding the evidence confirming part of the accused's testimony but, considering that no substantial wrong or miscarriage of justice had occurred in view of the overwhelming evidence of the accused's guilt, applied the proviso of s. 613(1)(*b*)(iii) of the *Criminal Code* and upheld the conviction. The Court held also that the Crown's remark did not constitute a comment within the meaning of s. 4(5) of the *Canada Evidence Act* and could not reasonably have been interpreted by the jury as a suggestion that an innocent accused would

John Arthur Wildman *Appelant*;

et

Sa Majesté La Reine *Intimée.*

N° du greffe: 16667.

1984: 2 mai; 1984: 11 octobre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

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

Droit criminel — Meurtre — Exclusion erronée d'une preuve disculpatoire par le juge du procès — L'art. 613(1)b)(iii) du Code est-il applicable pour confirmer la déclaration de culpabilité? — Code criminel, S.R.C. 1970, chap. C-34, art. 613(1)b)(iii).

Législation — Modifications — Adoption après le procès d'un texte de loi faisant du conjoint de l'accusé un témoin compétent — Nouveau texte de loi applicable au nouveau procès — Loi sur la preuve au Canada, S.R.C. 1970, chap. E-10, art. 4(3.1) [ajouté par 1980-81-82-83 (Can.), chap. 125, par. 29(2)], 4(5) — Loi d'interprétation, S.R.C. 1970, chap. I-23, art. 36d).

L'appelant a été accusé du meurtre au premier degré de sa belle-fille de huit ans et a subi son procès devant juge et jury. La preuve de la poursuite se fonde entièrement sur une preuve circonstancielle. Bien qu'entendue à l'enquête préliminaire, la déposition de deux témoins relativement à une conversation téléphonique qu'ils ont eue avec l'épouse de l'accusé, ou avec quelqu'un qui prétendait être son épouse, n'a pas été admise au procès. Cette preuve aurait expliqué pourquoi l'accusé connaissait les circonstances de la mort de la victime avant la découverte du corps, la preuve la plus incriminante produite contre lui. L'épouse de l'accusé n'a pas été citée comme témoin. Dans son réquisitoire adressé au jury, le substitut du procureur général a expliqué que la poursuite ne peut légalement citer l'épouse de l'accusé comme témoin et le juge du procès n'a pas commenté cette déclaration. L'appelant a été déclaré coupable. La Cour d'appel a conclu que le juge du procès avait commis une erreur en excluant la preuve qui confirme une partie du témoignage de l'accusé mais, considérant qu'aucun tort important ou aucune erreur judiciaire ne s'était produit compte tenu de la preuve accablante de la culpabilité de l'accusé, elle a appliqué la réserve du sous-al. 613(1)*b*)(iii) du *Code criminel* et a confirmé la déclaration de culpabilité. La Cour d'appel a également conclu que la remarque du substitut ne constituait pas un commentaire au sens du par. 4(5) de la *Loi sur la*

1984 CanLII 82 (SCC)

have called his wife to confirm his testimony. Appellant's appeal to this Court was on three grounds: (1) this was not a proper case to apply s. 613(1)(*b*)(iii) of the *Code*; (2) the trial judge's silence in respect of the Crown's remark resulted in an endorsement of the statement and was in effect a misdirection in law to the jury and (3) the Crown's remark was a comment forbidden by s. 4(5) of the *Canada Evidence Act*.

Held: The appeal should be allowed and a new trial ordered.

The trial judge erred in refusing to admit testimony corroborating the accused's explanation as to how the victim had been killed and s. 613(1)(*b*)(iii) of the *Code* could not apply to uphold the verdict. The onus was upon the Crown to satisfy the Court that the verdict "would necessarily have been the same if the errors had not occurred". Such determination is generally made upon a reading of the evidence put to the jury. But when the error of law is the preclusion of exculpatory evidence, the determination must be made with regard to the entirety of the evidence and in light of the effect the excluded evidence could possibly have had on the evidence that did go to the jury. Any reasonable effect that the excluded evidence could have had on the jury should, in applying s. 613(1)(*b*)(iii), enure to the benefit of the accused. Here, if admitted, the excluded evidence would have tended to negate the inference that the accused had to be on the scene at the time of the crime to have known the circumstances of the victim's death—the very inference the jury was concerned about. Without that inference, the evidence put to the jury, while sufficient to support a conviction, would not have made an acquittal unreasonable.

The problems raised by the Crown's remark will not arise at the new trial: as the victim was under 14 years old, the accused's wife is a competent and compellable witness for the prosecution without the accused's consent. This new rule of evidence, which was introduced by s. 4(3.1) of the *Canada Evidence Act*, is merely procedural and, in accordance with s. 36(*d*) of the *Interpretation Act*, will be applicable at the new trial.

Colpitts v. The Queen, [1965] S.C.R. 739, considered; *Mahoney v. The Queen*, [1982] 1 S.C.R. 834; *R. v. Ali*, [1980] 1 S.C.R. 221; *Bingeman v. McLaughlin*, [1978]

preuve au Canada et que le jury n'avait pas pu l'interpréter comme si elle signifiait qu'un accusé innocent aurait cité son épouse comme témoin pour qu'elle confirme son témoignage. Le pourvoi de l'appelant en cette Cour est fondé sur trois moyens: (1) il n'y a pas lieu d'appliquer en l'espèce le sous-al. 613(1)*b*)(iii) du *Code*; (2) le silence du juge du procès relativement à la remarque du substitut équivaut à une acceptation de la déclaration et constitue donc une directive erronée en droit au jury et (3) la remarque du substitut est un commentaire interdit par le par. 4(5) de la *Loi sur la preuve au Canada*.

Arrêt: Le pourvoi est accueilli et un nouveau procès est ordonné.

Le juge du procès a commis une erreur en refusant d'admettre les témoignages qui corroboraient l'explication de l'accusé quant à la façon dont la victime avait été tuée et le sous-al. 613(1)*b*)(iii) du *Code* ne peut pas s'appliquer pour confirmer le verdict. La poursuite avait l'obligation de convaincre la cour que le verdict «aurait nécessairement été le même si cette erreur ne s'était pas produite». Cette question est généralement tranchée après un examen de la preuve offerte au jury. Mais lorsque l'erreur de droit consiste en l'exclusion d'une preuve disculpatoire, la décision doit être rendue en tenant compte de l'ensemble de la preuve et en fonction de l'effet que la preuve exclue aurait pu avoir sur la preuve effectivement soumise au jury. Aux fins de l'application du sous-al. 613(1)*b*)(iii), l'accusé doit bénéficier de tout effet raisonnable que la preuve exclue aurait pu avoir sur le jury. En l'espèce, si elle avait été admise, la preuve exclue aurait eu pour effet de faire obstacle à la déduction que, pour connaître les circonstances du décès de la victime, l'accusé devait se trouver sur les lieux au moment du crime. Il s'agit là exactement de la déduction qui intéressait le jury. Sans cette déduction, la preuve soumise au jury, quoique suffisante pour justifier un verdict de culpabilité, ne serait pas suffisante pour rendre déraisonnable un verdict d'acquittement.

Les problèmes que crée la remarque du substitut ne se poseront pas au nouveau procès car, la victime étant âgée de moins de quatorze ans, l'épouse de l'accusé est un témoin compétent et contraignable pour la poursuite sans le consentement de l'accusé. Cette nouvelle règle de preuve, introduite par le par. 4(3.1) de la *Loi sur la preuve au Canada*, porte simplement sur la procédure et, conformément à l'al. 36*d*) de la *Loi d'interprétation*, elle sera applicable au nouveau procès.

Jurisprudence: arrêt examiné: *Colpitts v. The Queen*, [1965] R.C.S. 739; arrêts mentionnés: *Mahoney c. La Reine*, [1982] 1 R.C.S. 834; *R. c. Ali*, [1980] 1 R.C.S.

1984 CanLII 82 (SCC)

1 S.C.R. 548; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1981), 60 C.C.C. (2d) 289, dismissing appellant's appeal from his conviction on a charge of first degree murder. Appeal allowed and new trial ordered.

R. J. Climie, for the appellant.

David H. Doherty, for the respondent.

The judgment of the Court was delivered by

LAMER J.—The appellant was indicted of the first degree murder of his stepdaughter and, on November 18, 1978, was convicted by a jury in the County of Brant, Ontario. His appeal to the Court of Appeal was unsuccessful but required the application of the proviso of s. 613(1)(*b*)(iii) of the *Criminal Code*. Leave to appeal to this Court was granted at large.

A factual overview

On February 15, 1978, the appellant's 8-year old stepdaughter Tricia disappeared from her school yard before classes had begun. On February 19, 1978, her body was found on the bank of a nearby river. She had been killed by some nineteen blows to the head. A tan coloured hatchet sheath was found twenty-eight inches from the body. Medical evidence indicated that the injuries could have been inflicted by a hatchet. The killing was estimated to have taken place on the day of her disappearance.

The Crown's case against the appellant was based entirely on circumstantial evidence relating to:

1) motive, that is, Wildman's enmity toward his wife and to a lesser degree Tricia;

2) opportunity;

3) identification of a man and child by a Mrs. Jean Coubrough;

4) a hatchet, owned by Wildman at one time;

221; *Bingeman c. McLaughlin*, [1978] 1 R.C.S. 548; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1981), 60 C.C.C. (2d) 289, qui a rejeté l'appel de l'appelant contre sa déclaration de culpabilité relativement à une accusation de meurtre au premier degré. Pourvoi accueilli et nouveau procès ordonné.

R. J. Climie, pour l'appelant.

David H. Doherty, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE LAMER—L'appelant est inculpé du meurtre au premier degré de sa belle-fille, meurtre dont il a été déclaré coupable le 18 novembre 1978, par un jury siégeant dans le comté de Brant (Ontario). La Cour d'appel a eu recours à la réserve du sous-al. 613(1)*b*)(iii) du *Code criminel* pour rejeter l'appel. L'autorisation de pourvoi devant cette Cour a été accordée sans restriction.

Un aperçu des faits

Le 15 février 1978, la belle-fille de l'appelant, Tricia, âgée de huit ans, est disparue de la cour de son école avant le début des cours. Son corps a été trouvé au bord d'une rivière avoisinante le 19 février 1978. Sa mort avait été causée par quelque dix-neuf coups portés à la tête. Un étui de hachette beige a été trouvé à vingt-huit pouces de son corps. L'autopsie a révélé que les blessures ont pu avoir été causées par une hachette. On a estimé que le meurtre était survenu le jour de sa disparition.

La preuve de la poursuite contre l'appelant se fonde entièrement sur une preuve circonstancielle établissant:

1) le mobile, savoir, l'hostilité de Wildman envers son épouse et, à un degré moindre, envers Tricia;

2) la possibilité matérielle;

3) l'identification d'un homme et d'un enfant par Mme Jean Coubrough;

4) une hachette ayant déjà appartenu à Wildman;

1984 CanLII 82 (SCC)

5) Wildman's surreptitious disposal of his clothing on February 15, 1978; and
6) false statements made to the police by Wildman after the investigation started on February 15th.

Finally, and, in my view, if unexplained, fatal to the accused, was the fact that he made statements indicating that he had knowledge of the cause of death, the nature and location of the injuries and of the kind of weapon used prior to that information being released by the police, indeed, even prior to the discovery of the body and prior to the police themselves becoming aware of those circumstances.

I will return to the facts and deal more thoroughly with them when disposing of the ground of appeal upon which this appeal should in my view succeed.

At the trial the set of events giving rise to the three grounds of appeal in this Court were twofold: one relating to Wildman's wife not having testified, the other to a ruling on evidence.

First set of events

The accused's wife was not called as a witness by either the Crown or by the defence. When addressing the jury, Crown counsel advised the jury as follows:

> You are, however, bound by the law, what his Lordship says, and anything I say that sounds like law—and if I am not correct, I'm sure his Lordship will correct me.
>
> One of the points that you have heard a lot of evidence about a woman by the name of Joyce Wildman, who is the wife of the accused. You probably wondered why you haven't heard from Joyce Wildman. Well, I tell you as a point of law that the prosecution is prohibited by law from calling Joyce Wildman to give evidence.

(Emphasis added.)

The trial judge did not correct that statement of the law, which the appellant takes to be incorrect.

As a result, appellant raises two grounds:

5) le fait que Wildman se soit subrepticement débarrassé de ses vêtements le 15 février 1978;
6) et les fausses déclarations faites par Wildman à la police après le début de l'enquête en date du 15 février.

Enfin, il y a un fait qui, s'il demeure inexpliqué, peut, à mon avis, avoir des conséquences fatales pour l'accusé, soit l'existence de déclarations de sa part laissant voir qu'il connaissait la cause du décès, la nature et l'endroit des blessures ainsi que le genre d'arme utilisée avant que ces renseignements ne soient communiqués par la police, avant même la découverte du corps et avant que la police elle-même ne soit mise au courant de ces circonstances.

Je reviendrai aux faits et je les examinerai plus en détail lorsque je me prononcerai sur le moyen d'appel qui, à mon avis, permet d'accueillir ce pourvoi.

Au procès, deux séries d'événements ont donné ouverture aux trois moyens d'appel invoqués devant cette Cour: l'une portant sur le fait que l'épouse de Wildman n'a pas témoigné, l'autre relative à une décision quant à la preuve.

Première série d'événements

Ni le ministère public ni la défense n'ont cité l'épouse de l'accusé comme témoin. Dans son réquisitoire adressé au jury, l'avocat du ministère public a dit:

> [TRADUCTION] Vous êtes cependant liés par la loi, par ce que dit Sa Seigneurie et par n'importe lequel de mes propos qui ressemble à une règle de droit—et si je me trompe, je suis certain que Sa Seigneurie me corrigera.
>
> Je vous signale notamment que vous avez entendu un grand nombre de témoignages concernant une femme du nom de Joyce Wildman qui est l'épouse de l'accusé. Vous vous êtes probablement demandé pourquoi vous n'avez pas entendu Joyce Wildman. Eh bien, je vous dis que la poursuite ne peut légalement citer Joyce Wildman comme témoin.

(C'est moi qui souligne.)

Le juge du procès n'a pas corrigé cet exposé du droit que l'appelant considère inexacte.

En conséquence, l'appelant soulève deux moyens d'appel:

1984 CanLII 82 (SCC)

1) that the judge's silence resulted in an endorsement of the statement and was therefore in effect a misdirection in law to the jury;

2) Crown counsel's submission was a comment forbidden by s. 4(5) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10.

Second set of events

The appellant was denied the right to adduce, through cross-examination, evidence that purportedly would have explained his very incriminating knowledge of the circumstances of the death prior to the discovery of the body. The Court of Appeal having found this ruling wrong in law then applied the proviso of s. 613(1)(*b*)(iii).

3) Appellant raises as a third ground that this was not a proper case for the application of the proviso.

The Court of Appeal

Many grounds were raised by appellant in the Court of Appeal of Ontario (1981), 60 C.C.C. (2d) 289, including one of the three raised in this Court, the one relating to the denial of the right to adduce evidence in regard to the accused's knowledge of the circumstances of death. As I said, the Court of Appeal agreed with appellant that the trial judge had erred in excluding this evidence (as did the Crown at the trial and in this Court), but agreed with the Crown that, no substantial wrong or miscarriage of justice having been occasioned thereby, it was a proper case to invoke the provisions of s. 613(1)(*b*)(iii). The test the Court of Appeal purported to apply was as follows (at p. 304):

> Before invoking s. 613(1)(*b*)(iii) we must be satisfied that a reasonable jury, properly instructed, would inevitably have found a verdict of guilty even if the McIsaacs had given their testimony: *MacDonald v. The Queen*, (1977), 34 C.C.C. (2d) 1 at p. 12, 75 D.L.R. (3d) 107, [1977] 2 S.C.R. 832 at p. 848.

The other two grounds in this Court, resulting from the Crown's comments as to Mrs. Wildman's

1) le silence du juge équivaut à une acceptation de la déclaration et constitue donc une directive au jury erronée en droit;

2) la déclaration du substitut du procureur général est un commentaire interdit par le par. 4(5) de la *Loi sur la preuve au Canada*, S.R.C. 1970, chap. E-10.

Seconde série d'événements

On a refusé à l'appelant le droit de présenter, par voie de contre-interrogatoire, une preuve qui, prétendument, lui aurait permis d'expliquer le fait fort incriminant de sa connaissance des circonstances du décès avant la découverte du cadavre. Ayant jugé que cette décision était erronée en droit, la Cour d'appel a alors appliqué la réserve du sous-al. 613(1)*b*)(iii).

3) L'appelant invoque comme troisième moyen d'appel qu'il ne s'agissait pas d'un cas donnant lieu à l'application de cette réserve.

La Cour d'appel

L'appelant a soulevé plusieurs moyens d'appel devant la Cour d'appel de l'Ontario (1981), 60 C.C.C. (2d) 289, y compris l'un des trois moyens invoqués devant cette Cour, soit celui du refus de lui donner le droit de présenter une preuve concernant sa connaissance des circonstances du décès. Comme je l'ai dit, la Cour d'appel a convenu avec l'appelant (tout comme le ministère public en première instance et devant cette Cour) que le juge du procès a commis une erreur en excluant cette preuve, mais elle était d'accord avec le ministère public pour dire qu'il y avait lieu d'invoquer les dispositions du sous-al. 613(1)*b*)(iii) étant donné qu'aucun tort important ou aucune erreur judiciaire grave ne s'était produit. Voici le critère que la Cour d'appel entendait appliquer (à la p. 304):

> [TRADUCTION] Avant d'invoquer le sous-al. 613(1)*b*)(iii), nous devons être convaincus qu'un jury raisonnable, bien instruit du droit, aurait inévitablement rendu un verdict de culpabilité même si les McIsaac avaient témoigné: *MacDonald c. La Reine* (1977), 34 C.C.C. (2d) 1 à la p. 12, 75 D.L.R. (3d) 107, [1977] 2 R.C.S. 832, à la p. 848.

La Cour d'appel a soulevé d'elle-même les deux autres moyens d'appel invoqués devant cette Cour,

1984 CanLII 82 (SCC)

compellability were raised by the Court of Appeal *proprio motu*, and were disposed of as follows (at p. 295):

Whether or not the appellant's wife was a competent and compellable witness for the prosecution is a question of some difficulty which was not argued at the trial. Consequently, there was no ruling by the trial Judge upon which this Court is able to voice an opinion and the question is one which in our view should be reserved until it arises squarely for decision. In any case, we do not agree with Mr. Carter's suggestion that it is possible to construe the trial Judge's failure to correct Crown counsel as a tacit acceptance by him of the correctness of Crown counsel's statement of the law.

With respect to Mr. Carter's second submission, we do not think that Crown counsel's remarks constituted a comment, within the meaning of s. 4(5), on the failure of the appellant's wife to testify. In the particular circumstances of this case the remarks were in the nature of an explanation by Crown counsel, in light of his understanding of the law of evidence, for his failure to call Mrs. Wildman. Unlike in *R. v. Cooper (No. 2)* (1974), 19 C.C.C. (2d) 140, 51 D.L.R. (3d) 221, 5 O.R. (2d) 118, and *R. v. Arneson* (1930), 54 C.C.C. 330, [1930] 3 W.W.R. 163, 25 Alta. L.R. 125, Crown counsel's remarks in the present case could not reasonably have been interpreted by the jury as a suggestion that an innocent accused would have called his wife to confirm his testimony. As in the case of *Avon v. The Queen* (1971), 4 C.C.C. (2d) 357, 21 D.L.R. (3d) 442, [1971] S.C.R. 650, where the Supreme Court of Canada was concerned with somewhat similar remarks by a trial Judge, the language used here was a "statement" explaining the prosecution's inability to call an accused's spouse rather than a "comment" disparaging the accused's ability to use his wife's imposed silence to cloak his guilt. None the less, we are of the view that Crown counsel's remarks came perilously close to contravening s. 4(5) and that it would have been preferable if they had not been made. Again, however, if it were necessary, we would apply the provisions of s. 613(1)(*b*)(iii) of the *Code*.

qui font suite aux commentaires du ministère public concernant la possibilité de contraindre Mme Wildman, et elle les a tranchés comme suit (à la p. 295):

[TRADUCTION] Déterminer si l'épouse de l'appelant était un témoin compétent et contraignable pour la poursuite est une question qui présente certaines difficultés et qui n'a pas été débattue au cours du procès. Par conséquent, le juge du procès n'a rendu aucune décision au sujet de laquelle cette Cour peut se prononcer et, à notre avis, il s'agit d'une question qu'on devrait mettre de côté jusqu'à ce qu'elle se pose directement. Quoi qu'il en soit, nous ne partageons pas l'avis de Me Carter suivant lequel il est possible d'interpréter l'omission du juge du procès de corriger l'avocat du ministère public comme une acceptation tacite de l'exactitude de son exposé du droit.

Quant au second argument de Me Carter, nous ne croyons pas que les remarques du substitut du procureur général constituent un commentaire, au sens du par. 4(5), sur l'abstention de témoigner de l'épouse de l'appelant. Dans les circonstances de l'espèce, ces remarques étaient une explication du substitut du procureur général, fondée sur sa perception des règles de la preuve, qui a voulu justifier son omission de citer Mme Wildman comme témoin. Contrairement à la situation dans les affaires *R. v. Cooper (No. 2)* (1974), 19 C.C.C. (2d) 140, 51 D.L.R. (3d) 221, 5 O.R. (2d) 118, et *R. v. Arneson* (1930), 54 C.C.C. 330, [1930] 3 W.W.R. 163, 25 Alta. L.R. 125, le jury n'a pas pu interpréter les remarques du substitut du procureur général en l'espèce comme si elles signifiaient qu'un accusé innocent aurait cité son épouse comme témoin pour qu'elle confirme son témoignage. Comme dans l'arrêt *Avon c. La Reine* (1971), 4 C.C.C. (2d) 357, 21 D.L.R. (3d) 442, [1971] R.C.S. 650 où la Cour suprême du Canada s'est penchée sur des remarques semblables faites par un juge du procès, les termes employés en l'espèce sont une «déclaration» expliquant l'incapacité de la poursuite de citer le conjoint d'un accusé, plutôt qu'un «commentaire» critiquant la faculté de l'accusé de se servir du silence forcé de son épouse pour masquer sa culpabilité. Néanmoins, nous sommes d'avis que les remarques du substitut du procureur général ont dangereusement failli contrevenir au par. 4(5) et qu'il aurait mieux valu qu'elles n'eussent pas été faites. Mais une fois de plus, nous appliquerions les dispositions du sous-al. 613(1)*b*)(iii) du *Code*, si cela était nécessaire.

1984 CanLII 82 (SCC)

The third ground (the exclusion of evidence and s. 613(1)(*b*)(iii))

This ground should, with respect, have succeeded in the Court of Appeal and resulted in the ordering of a new trial. There is here no disagreement as to the commission of an error by the trial judge; nor does anyone take issue with the test the Court of Appeal said must be met in order to apply s. 613(1)(*b*)(iii). Where we part is as regards the proper application of the test to the facts of this case, a matter this Court has declared, for policy reasons, to be a question of law (see *Mahoney v. The Queen*, [1982] 1 S.C.R. 834).

As announced earlier, I now return to the evidence in this case.

Motive

The appellant and Joyce Wildman married in October 1973 when he was 21 and she was 19. At that time Tricia Paquette was 4 years old. She is the natural daughter of Joyce Wildman, but not of John Wildman. Mrs. Wildman had agreed that John would adopt Tricia after their marriage, but later reneged on this promise. Two children were born to the marriage.

All agree that the marriage was a turbulent one. There were numerous fights and on a few occasions the police had to be called in. They separated on numerous occasions. John Wildman attributed this to his wife's alcoholism. Donna Dumont, the sister of Joyce Wildman, attributed the separation to John Wildman's lack of affection for Tricia Paquette and to Mr. Wildman being a thief.

There is substantial evidence of various events, some disproving these assertions, others supportive thereof. I have read the evidence and I am satisfied that there is evidence supportive of the fact that appellant's animosity towards his wife, whether understandable or not, could in turn be supportive of a motive for his killing Tricia. There is also evidence that he threatened his wife's life and that of a social worker.

Le troisième moyen d'appel (l'exclusion de la preuve et le sous-al. 613(1)*b*)(iii))

Avec égards, la Cour d'appel aurait dû accueillir ce moyen d'appel et ordonner un nouveau procès. On s'entend ici pour dire que le juge du procès a commis une erreur; personne ne conteste non plus le critère énoncé par la Cour d'appel en ce qui concerne l'application du sous-al. 613(1)*b*)(iii). Là où nous ne sommes pas d'accord, c'est au sujet de l'application appropriée de ce critère aux faits de l'espèce, question que cette Cour a jugée, pour des raisons de principe, être une question de droit (voir l'arrêt *Mahoney c. La Reine*, [1982] 1 R.C.S. 834).

Je reviens à la preuve en l'espèce.

Le mobile

L'appelant et Joyce Wildman se sont mariés au mois d'octobre 1973 à l'âge de 21 et de 19 ans respectivement. À cette époque, Tricia Paquette était âgée de 4 ans. Elle est la fille naturelle de Joyce Wildman mais non de John Wildman. Mme Wildman avait accepté que John adopte Tricia après leur mariage, mais elle est plus tard revenue sur cette promesse. Deux enfants sont issus du mariage.

Il est généralement admis que le mariage a été tumultueux. Les querelles étaient nombreuses et la police a dû intervenir à certaines occasions. Les conjoints se sont séparés à plusieurs reprises. John Wildman a attribué cette situation à l'alcoolisme de son épouse. Donna Dumont, soeur de Joyce Wildman, a attribué les séparations au manque d'affection de John Wildman envers Tricia Paquette et au fait que c'est un voleur.

De nombreux éléments de preuve établissent l'existence de divers événements, certains contredisant ces déclarations, d'autres les corroborant. J'ai pris connaissance de la preuve et je suis convaincu qu'elle confirme que l'animosité de l'appelant envers son épouse, qu'elle soit compréhensible ou non, pouvait servir de mobile au meurtre de Tricia. Il est en outre établi qu'il a menacé de tuer son épouse ainsi qu'une travailleuse sociale.

1984 CanLII 82 (SCC)

In June of 1977, when the police were called because of a dispute over the custody of the two younger girls, he said "if Joyce gets the two babies, I will get Tricia". John Wildman testified that he used the expression "get Tricia" in the sense of getting custody of her, just as, when referring to the two babies, he used the expression "gets the two babies". The officer who heard this comment took it at the time to have been said in relation to custody. Four witnesses testified that Wildman acted in an appropriate fatherly manner towards Tricia.

Opportunity

There is no need to consider the evidence in any detail. The accused attempted to establish an alibi, but was not successful. Tricia disappeared from school shortly before 9 a.m. on February 15th. The appellant's first recorded contact with anyone that morning was between 10:15 and 10:45 a.m. when he spoke to his landlady while in his apartment. Tests established that a person could have walked from the school yard to where Tricia's body was found and from there to appellant's apartment in fifty minutes.

Identification and the disposal of the clothing

Mrs. Jean Coubrough lived at 94 Grand Street. The back of her property ran to the embankment overlooking the river about 270 feet from where the body was found. On February 15, between 9 and 10 a.m., Mrs. Coubrough saw a man and a child walking down the railroad tracks. The man, she said, walked with a purpose and the child struggled along six feet behind. The child was wearing a blue ski jacket matching the description of the one Tricia was wearing on that day. It is common ground that the man and the child Mrs. Coubrough saw would have been in her field of vision for about 22 to 25 seconds. She described the man as being about 5 feet 3 inches tall, and of the same height but somewhat slimmer than the accused she saw in court. The accused, it was established, had gained 10 pounds while in jail. He was wearing a black knee-length coat, a black hat, but no gloves though it was a very cold morning.

Au mois de juin 1977, alors que la police a été appelée à intervenir en raison d'une dispute concernant la garde des deux filles cadettes, il a dit [TRADUCTION] «si Joyce a les deux bébés, j'aurai Tricia». John Wildman a témoigné qu'il a employé l'expression «aurai Tricia» en voulant dire la garde de cette dernière tout comme, lorsqu'il a fait mention des deux bébés, il a employé l'expression «a les deux bébés». L'agent qui a entendu cette remarque a considéré à ce moment là qu'elle avait été faite en rapport avec la garde. Quatre témoins ont déclaré que Wildman a agi en bon père à l'égard de Tricia.

La possibilité matérielle

Il n'est pas nécessaire d'examiner la preuve en détail. L'accusé a tenté, sans succès, d'établir un alibi. Tricia est disparue de l'école le 15 février peu avant 9 heures. C'est entre 10 h 15 et 10 h 45 que l'appelant a communiqué avec quelqu'un pour la première fois ce matin-là, lorsqu'il a parlé à sa propriétaire alors qu'il se trouvait dans son appartement. Des reconstitutions ont démontré qu'une personne pouvait, en cinquante minutes, se rendre à pied de la cour d'école à l'endroit où le corps de Tricia a été trouvé et, de là, à l'appartement de l'appelant.

L'identification et la mise au rebut des vêtements

Mme Jean Coubrough habite 94 rue Grand. L'arrière de sa propriété s'étend jusqu'à la berge qui surplombe la rivière à environ 270 pieds de l'endroit où le corps a été trouvé. Le 15 février, entre 9 et 10 heures, Mme Coubrough a vu un homme et un enfant marchant le long de la voie ferrée. L'homme, a-t-elle dit, marchait d'un pas décidé et l'enfant le suivait péniblement à une distance de six pieds. L'enfant portait un anorak de ski bleu qui correspondait à la description de celui que portait Tricia ce jour-là. Il est admis que l'homme et l'enfant ont été dans le champ de vision de Mme Coubrough pendant environ 22 à 25 secondes. L'homme qu'elle a décrit mesurait environ cinq pieds trois pouces, de la même taille mais un peu plus mince que l'accusé qu'elle a vu en cour. Il est établi que ce dernier avait gagné dix livres pendant son séjour en prison. Il était vêtu d'un manteau noir arrivant aux genoux, d'un chapeau noir mais

1984 CanLII 82 (SCC)

The hat was what she called "an airman's hat" turned up in the middle. She saw no glasses on the man, but only saw a profile of the man's face.

Joyce Smoke, a social worker who had been "handling" the Wildman family, said she was accustomed to seeing John Wildman wear a black hat and a black coat. But, as regards the hat, she was contradicted by her secretary Miss Carvel, and by several other witnesses who said Mr. Wildman did not wear a hat. Mr. McIsaac said that on February 14 the appellant was wearing a long brown leather coat and tan cowboy boots. Wildman testified he had lost his gloves the night of February 14. He also testified he had put his coat and boots in the garbage on Monday, February 13, and put the garbage out on Wednesday, February 15. This happened about two hours after Tricia went missing. He explained this as the result of a call he received from his wife on February 13.

Q. After—sorry. During this telephone discussion that you had with your wife, was the question of a pair of boots and a coat discussed?

A. Yes, sir, they were.

Q. And at that time did you indicate to your wife, what if anything you were going to do with them?
A. Yes, I told her I was going to throw them in the garbage.

Q. Why was that?
A. Well, she had bought me the boots about six months earlier and she bought me the coat for Christmas, and I was to be indebted for life for them.

Q. What do you mean by that?
A. Well, such things as, there was no heater in her bathroom at 481 Colborne.

Q. Yes?
A. And there wasn't any in mine at 25 Duke.

Q. Yes?
A. But I had an electric heater, so she wanted that. And I said, "Well, I need it"; she says, "Well——

Q. Well, don't tell us what she said: you argued over that?

il ne portait pas de gants même s'il faisait très froid ce matin-là. Ce chapeau était ce qu'elle a appelé [TRADUCTION] «un chapeau d'aviateur» relevé au milieu. Elle affirme que l'homme ne portait pas de lunettes, mais par contre elle ne l'a vu que de profil.

Joyce Smoke, travailleuse sociale qui s'occupait de la famille Wildman, a déclaré que John Wildman portait habituellement un chapeau noir et un manteau noir. Mais, en ce qui concerne le chapeau, elle a été contredite par sa secrétaire, Mlle Carvel, et par plusieurs autres témoins qui ont affirmé que M. Wildman ne portait pas de chapeau. M. McIsaac a dit que le 14 février l'appelant portait un long manteau de cuir brun et des bottes de cow-boy beiges. Wildman a témoigné qu'il a perdu ses gants le soir du 14 février. Il a ajouté qu'il a jeté son manteau et ses bottes dans un sac à ordures le lundi 13 février et qu'il a placé le sac à l'extérieur le mercredi 15 février. Cela est survenu environ deux heures après la disparition de Tricia, à la suite, a-t-il expliqué, d'un appel téléphonique qu'il a reçu de son épouse le 13 février.

[TRADUCTION] Q. Après—excusez-moi. Au cours de cette conversation téléphonique que vous avez eue avec votre épouse, a-t-il été question d'une paire de bottes et d'un manteau?

R. Oui monsieur.

Q. Et à ce moment-là, avez-vous indiqué à votre épouse ce que vous alliez en faire?
R. Oui, je lui ai dit que j'allais les jeter aux ordures.

Q. Pourquoi?
R. Eh bien, elle m'avait offert les bottes quelque six mois auparavant et le manteau à l'occasion de Noël, et j'allais être endetté pour toujours.

Q. Que voulez-vous dire par là?
R. Eh bien, par exemple, il n'y avait pas de radiateur dans sa salle de bain du 481 Colborne.

Q. Oui?
R. Et il n'y en avait pas dans la mienne au 25 Duke.

Q. Oui?
R. J'avais cependant un radiateur électrique qu'elle désirait avoir. Et je lui ai dit «J'en ai besoin»; elle a répondu «Bien . . .

Q. Ne nous dites pas ce qu'elle a dit: vous êtes-vous disputés à ce sujet?

1984 CanLII 82 (SCC)

A. Yes, she said that I should give it to her because she had bought my coat and boots.

Q. And was it in that discussion you said you would throw them away?

. . .

And he was seen putting garbage in front of the neighbour's house, which he explained as follows:

Q. All right. Do you recall when you put those into a garbage bag?
A. On Monday night.

Q. Before or after you talked to Joyce?
A. Well, after; I mean, I hadn't decided to throw them out until after I had talked to her.

Q. There has been some evidence that you took the garbage bag, I guess westerly towards the store, and put a garbage bag, I think one door down from your place?
A. Yes, sir, I did.

Q. Why did you do that?
A. Because I'm lazy.

Q. What was in it?
A. Garbage.

Q. Okay. Well, why—if you are so lazy—walk one door down and put the garbage out?

A. No—well, we had a problem with dogs ripping garbage apart.

Q. Yes?
A. Now this had—this bag had dirty diapers, bad foodstuffs: like when my wife had left, she left the fridge open and the food in there had gone bad.

Q. Yes?
A. This was all in that bag. I merely took it to the next door neighbour's house to leave it there; if the dogs tore it apart, I wouldn't have to clean it up.

Q. All right. About what time was that, that you took your garbage out?
A. I would say about 11.30, quarter to twelve.

The boots and coat, according to him, were put out in front of his residence while the other garbage bags went to the neighbour's. There was also

R. Oui, elle m'a dit que je devrais le lui donner parce qu'elle m'avait acheté le manteau et les bottes.

Q. Était-ce au cours de cette discussion que vous avez dit que vous les jetteriez?

. . .

Et on l'a vu placer le sac à ordures en face de la maison voisine, ce qu'il a expliqué de la façon suivante:

[TRADUCTION] Q. Très bien. Vous souvenez-vous quand vous les avez mis dans un sac à ordures?
R. Le lundi soir.

Q. Avant ou après votre conversation avec Joyce?
R. Après; je veux dire que je n'avais pas décidé de les jeter avant de lui avoir parlé.

Q. Il a été établi que vous avez emporté le sac à ordures, j'imagine, en direction ouest vers le magasin et que vous l'avez déposé, je pense, devant une porte voisine?
R. Oui, monsieur.

Q. Pourquoi avez-vous fait cela?
R. Parce que je suis paresseux.

Q. Qu'y avait-il à l'intérieur du sac?
R. Des ordures.

Q. D'accord. Pourquoi—si vous êtes si paresseux—avez-vous marché jusqu'à une porte voisine pour y déposer le sac à ordures?
R. Non—eh bien, nous avions des difficultés avec des chiens qui déchiraient les sacs à ordures.

Q. Oui?
R. Eh bien—ce sac contenait des couches sales, des aliments avariés: lorsque mon épouse est partie, elle a laissé le réfrigérateur ouvert et la nourriture qui s'y trouvait s'est gâtée.

Q. Oui?
R. Tout cela se trouvait dans ce sac. Je l'ai simplement emporté en direction de la porte voisine et je l'ai laissé là; si les chiens l'avaient déchiré, je n'aurais pas eu à faire de nettoyage.

Q. Très bien. Quelle heure était-il environ lorsque vous avez sorti votre sac à ordures?
R. Je dirais environ 11 h 30, midi moins le quart.

Selon lui, les bottes et le manteau ont été déposés devant chez lui tandis que les autres sacs à ordures ont été déposés devant chez les voisins.

1984 CanLII 82 (SCC)

some evidence, though not conclusive, that Wildman, due to a diabetic condition would, after walking some distance, develop a limp. Mrs. Coubrough did not see the man limp.

Certains éléments de preuve indiquent, même si cela n'est pas concluant, qu'étant diabétique, Wildman commençait à boiter après avoir marché pendant un certain temps. Mme Coubrough ne l'a pas vu boiter.

The hatchet

The injuries to Tricia's head could have been caused by a hatchet. A sheath was found 28 inches from the body. A hatchet was located in the water 200 feet from the body. Near the location of the hatchet, on the river's embankment, was a blood-stained garbage bag; the blood was not inconsistent with Tricia's. The hatchet fitted snugly into the sheath. Wildman had owned a hatchet and a sheath which he sold to one Daniel Curry. The hatchet disappeared from Curry's apartment sometime between the middle of January and February 23, 1978. The appellant was at Curry's apartment on February 9, 1978 and could have stolen it as he was left alone for some time. I do not intend to canvass the evidence in detail. Many witnesses were heard who had seen Wildman's or Curry's hatchet. Curry said it had a long black handle, and had "Stainless", stamped on it. The hatchet found in the river had "Fuller 16 Forged" stamped on it. One Paul Bell said that Curry's hatchet had "Fuller 16 Forged" stamped on it. Witnesses when looking at the sheath, the markings, the handle, or the colour of the hatchet found near the body and comparing it with their recollection of the one owned by Wildman or by Curry or borrowed from either of them, either concluded that the hatchets were different or, at best, similar, but none could affirm that they were identical let alone the same one. The additional cuts in the sheath and the difference of colour of the hatchet and the sheath found on the scene of the crime that might have misled some of the witnesses could be explained by the forensic testing done on them. But in the end, one could summarize the extensive evidence surrounding the hatchet's possible identification by saying that the hatchets and sheaths were somewhat similar, but no more.

La hachette

Les blessures à la tête de Tricia ont pu être causées par une hachette. On a trouvé un étui à vingt-huit pouces du corps. La hachette se trouvait dans l'eau à deux cents pieds du corps. Un sac à ordures taché de sang a été trouvé près de cet endroit, sur la berge de la rivière; le sang n'était pas incompatible avec celui de Tricia. La hachette s'ajustait parfaitement dans l'étui. Wildman possédait une hachette et un étui qu'il avait vendus à un nommé Daniel Curry. La hachette est disparue de l'appartement de Curry entre la mi-janvier et le 23 février 1978. L'appelant se trouvait dans l'appartement de Curry le 9 février 1978 et, comme il y est demeuré seul pendant un certain temps, il a pu la voler. Je n'entends pas examiner la preuve en détail. Plusieurs témoins ont déclaré avoir vu la hachette de Wildman ou de Curry. Ce dernier a dit qu'elle avait un long manche noir et qu'elle portait l'inscription «Stainless». La hachette trouvée dans la rivière portait l'inscription «Fuller 16 Forged». Un nommé Paul Bell a déclaré que la hachette de Curry portait l'inscription «Fuller 16 Forged». Après avoir examiné l'étui, les marques, le manche ou la couleur de la hachette trouvée près du corps et après l'avoir comparée avec ce dont ils se rappelaient de celle qui avait appartenu à Wildman ou à Curry ou qui a été empruntée à l'un d'eux, les témoins ont conclu que les hachettes étaient différentes ou tout au plus semblables, et aucun d'eux n'a pu affirmer qu'elles étaient identiques et encore moins qu'il s'agissait de la même hachette. Les entailles additionnelles dans l'étui et la différence de couleur de la hachette et de l'étui trouvés sur la scène du crime qui ont pu induire certains témoins en erreur peuvent s'expliquer par les expériences médico-légales effectuées sur ces objets. À toutes fins pratiques on pourrait résumer l'abondante preuve concernant l'identification possible de la hachette en disant que les hachettes et les étuis étaient semblables, sans plus.

1984 CanLII 82 (SCC)

The false statements

When questioned by the police as to why he would have put garbage in front of the neighbour's house, the appellant denied having done so, nor did he mention his disposing of the coat and boots. An expert witness said that the killer's coat and boots would normally have been bloodstained. Generally speaking, Wildman gave various differing versions as regards the boots, the coat, and the garbage bags, the hatchet, and, through various statements to the police and to others, such as his landlord McIsaac, and Dan Curry, he appears to have given them the run-around intentionally, was very uncooperative and, as a result, his conduct must be regarded as highly suspect.

On this evidence, standing alone, one could not say that a verdict of guilty would have been unreasonable; nor could one consider likewise unreasonable a jury entertaining a reasonable doubt and acquitting. There is strong circumstantial evidence upon which a jury could be satisfied beyond a reasonable doubt, but I would be unable to say that it was overwhelming, as said the Court of Appeal.

What justified the Court of Appeal in finding, as they did, the evidence overwhelming was the result of the following additional evidence.

Tricia disappeared on February 15 and her body was discovered four days later on February 19. Prior to the 19th no one could be sure that Tricia was dead, whether death was self-inflicted or involved another person, was accidental or intentional, the nature and location of the wounds inflicted, the instrument, if any, used or probably used to inflict the wounds. Yet, on February 16 Wildman phoned a Mr. Beyer, his divorce lawyer, and told him "that his wife had accused him of killing Tricia with an axe".

After the discovery of Tricia's body on the 19th, the police, because of the sheath found 28 inches

Les fausses déclarations

Lorsque la police lui a demandé pourquoi il avait déposé les ordures devant chez le voisin, l'appelant a nié avoir accompli un tel acte et il n'a pas mentionné non plus qu'il avait jeté son manteau et ses bottes. Un témoin expert a affirmé que le manteau et les bottes de l'assassin auraient normalement été tachés de sang. D'une façon générale, Wildman a fourni des versions différentes en ce qui concerne les bottes, le manteau, les sacs à ordures et la hachette et, dans ses diverses déclarations à la police et à d'autres personnes telles que son propriétaire McIsaac et Dan Curry, il semble avoir été intentionnellement évasif, il a été très peu coopératif et, en conséquence, on doit considérer son comportement comme très suspect.

Compte tenu de cette seule preuve, on ne peut pas dire qu'un verdict de culpabilité aurait été déraisonnable; on ne pourrait pas non plus considérer comme déraisonnable qu'un jury ait un doute raisonnable et qu'il acquitte l'accusé. Il existe des éléments de preuve circonstancielle convaincants à partir desquels un jury pouvait être convaincu au-delà de tout doute raisonnable, mais je ne peux pas dire que la preuve soit accablante, comme l'a affirmé la Cour d'appel.

La raison pour laquelle la Cour d'appel a jugé la preuve accablante découle de la preuve additionnelle suivante.

Tricia est disparue le 15 février et son corps a été découvert quatre jours plus tard, soit le 19 février. Avant cette date, personne ne pouvait être sûr que Tricia était décédée, on ne pouvait pas savoir non plus si elle s'était donné la mort ou si celle-ci impliquait une autre personne, ni si elle était accidentelle ou intentionnelle, et on ne connaissait pas non plus la nature et l'emplacement des blessures infligées, l'instrument, le cas échéant, qui avait été utilisé ou vraisemblablement utilisé pour les infliger. Pourtant, le 16 février, Wildman a téléphoné à Me Beyer, l'avocat qui s'occupait de son divorce, et lui a dit [TRADUCTION] «que son épouse l'avait accusé d'avoir tué Tricia avec une hache».

Après la découverte du corps de Tricia le 19 février, la police a cherché une hachette en raison

1984 CanLII 82 (SCC)

from the body, started looking for a hatchet. On that day a press release by the police said that "she had been battered with a blunt instrument". On that evening the police interrogated Wildman about a hatchet.

On the 20th Wildman said to a witness that "someone put an axe in Tricia's head". It was only on February 23 that the police revealed with precision the nature of the wounds, and only on February 28 the use of a hatchet.

On February 19, 23 and 25, the appellant mentioned to various persons that "Tricia had been killed with an axe". His knowledge of the circumstances of the crime on the 19th, 23rd and 25th is not unexplained. He was questioned with insistance by the police on the 19th about a hatchet and the police press release referred to Tricia having been battered with a blunt instrument. It would not be unreasonable for Wildman to suspect that the police were of the view that the blunt instrument was a hatchet and that some of the wounds, if not all, would be to the head, since Tricia had been "battered" to death. But what needed explanation was his statement to his lawyer on the 16th. Whoever knew those details on that date had to either have participated or witnessed the crime, or have received the information from someone who had. In his testimony he attempted to explain this knowledge; Wildman testified as follows:

> Q. Prior to that question of a hatchet being discussed between you and Detective Sergeant Stephenson, had any other police officer told you about a hatchet, or asked you about a hatchet?
> A. No, sir.
> Q. Had any other person?
> A. Yes, sir.
> Q. When?
> A. On Thursday, the day after Tricia disappeared.

He was not questioned any further about this person because of a ruling the trial judge had made in the course of the Crown's case.

de la découverte de l'étui à vingt-huit pouces du corps. Ce même jour, la police a diffusé un communiqué disant que [TRADUCTION] «elle a été battue à l'aide d'un instrument contondant». Ce soir-là, la police a interrogé Wildman au sujet d'une hachette.

Le 20 février, Wildman a dit à un témoin que [TRADUCTION] «quelqu'un a planté une hache dans la tête de Tricia». Ce n'est que le 23 février que la police a divulgué avec précision la nature des blessures et ce n'est que le 28 février qu'elle a parlé de l'utilisation d'une hachette.

Les 19, 23 et 25 février, l'appelant a mentionné à différentes personnes que [TRADUCTION] «Tricia a été tuée à l'aide d'une hache». Sa connaissance des circonstances du crime qu'il a divulguées ces trois jours-là s'explique. Le 19 février, la police l'a interrogé avec insistance au sujet d'une hachette et elle a indiqué dans son communiqué de presse que Tricia avait été battue à l'aide d'un instrument contondant. Wildman pouvait soupçonner que la police pensait que l'instrument contondant était une hachette et que certaines blessures, sinon toutes, avaient été causées à la tête, puisque Tricia avait été «battue» mortellement. Mais ce qu'il fallait cependant expliquer, c'était la déclaration qu'il a faite à son avocat le 16 février. Quiconque connaissait ces détails ce jour-là devait avoir participé au crime, en avoir été le témoin ou avoir reçu des renseignements d'une personne qui y avait participé ou en avait été le témoin. Dans son témoignage où il a tenté d'expliquer cette connaissance, Wildman a déclaré ce qui suit:

> [TRADUCTION] Q. Avant que le sergent-détective Stephenson ne discute avec vous de cette question de la hachette, est-ce qu'un autre agent de police vous a parlé ou interrogé à ce sujet?
> R. Non monsieur.
> Q. Est-ce qu'une autre personne l'a fait?
> R. Oui monsieur.
> Q. Quand?
> R. Le jeudi, lendemain de la disparition de Tricia.

Il n'a pas été interrogé davantage au sujet de cette personne en raison d'une décision rendue par le juge du procès au cours de la présentation de la preuve à charge.

1984 CanLII 82 (SCC)

The ruling

In the course of cross-examining Mrs. Beverly McIsaac and Mr. Ronald McIsaac, the attorney for the defence was denied the right to elicit the contents of a conversation which took place over the phone at the McIsaacs' on February 16. Wildman was at the McIsaacs' when the phone rang. Mrs. McIsaac answered and she identified the voice as being that of Mrs. Wildman. Mrs. Wildman accused her, Mr. McIsaac and John Wildman of "murdering Tricia with a hatchet". Mr. McIsaac got on the phone and would have corroborated the conversation, though uncertain as to the identity of the voice because he had not, as his wife had many times previously, ever spoken to Mrs. Wildman on the phone. The McIsaacs' had been examined on the matter at the preliminary inquiry.

Mrs. McIsaac:

Q. I understand, Mrs. McIsaac, that on Thursday night—that would be the day after Tricia Paquette disappeared, I understand that you received a phone call from someone who identified herself as Joyce Wildman. Am I correct?

A. Yes.

Q. The phone call went to your apartment and you answered it?

A. Yes.

Q. Would you agree with me that, whoever made that phone call indicated to you, or sorry, that they accused you and Ron and John Wildman of murdering Tricia Paquette with a hatchet?

A. That is right. They did.

Q. That is the day after Tricia disappeared?

A. Yes.

Q. Did you, prior to that day, ever talk on the telephone with Joyce Wildman?

A. She would phone and start arguing with us and kept calling us murderers and that . . .

And, later on:

Q. If I might go back to the telephone call you received from someone who said she was Joyce Wildman, on Thursday, during that telephone conversation, did your husband speak to that person?

La décision

Au cours du contre-interrogatoire de Mme Beverly McIsaac et de M. Ronald McIsaac, le procureur de la défense s'est vu refuser le droit de faire la lumière sur la teneur d'une conversation téléphonique qui a eu lieu chez les McIsaac le 16 février. Wildman se trouvait chez ces derniers lorsque le téléphone a sonné. Mme McIsaac a répondu et elle a reconnu la voix de Mme Wildman. Celle-ci l'a accusée, ainsi que M. McIsaac et John Wildman, d'avoir [TRADUCTION] «tué Tricia avec une hachette». M. McIsaac s'est mis au téléphone et il aurait corroboré la conversation, même s'il n'était pas certain de l'identité de la voix, puisqu'il n'avait jamais parlé à Mme Wildman au téléphone contrairement à son épouse qui l'avait fait à plusieurs reprises. Les McIsaac ont été interrogés à ce sujet à l'enquête préliminaire.

[TRADUCTION] Mme McIsaac:

Q. Je crois comprendre, Mme McIsaac, que le jeudi soir—c'est-à-dire le lendemain de la disparition de Tricia Paquette, je crois comprendre que vous avez reçu un appel téléphonique de quelqu'un qui s'est identifié comme étant Joyce Wildman. Est-ce exact?

R. Oui.

Q. Le téléphone a sonné dans votre appartement et vous avez répondu?

R. Oui.

Q. Êtes-vous d'accord avec moi pour dire que la personne qui a fait cet appel téléphonique vous a indiqué, ou pardon, vous a accusée, ainsi que Ron et John Wildman, d'avoir tué Tricia Paquette à l'aide d'une hachette?

R. C'est exact. Effectivement.

Q. Est-ce le lendemain de la disparition de Tricia?

R. Oui.

Q. Aviez-vous, avant ce jour-là, déjà parlé à Joyce Wildman au téléphone?

R. Elle a téléphoné, s'est mise à se disputer avec nous et ne cessait pas de nous traiter d'assassins et de . . . .

Et par la suite:

[TRADUCTION] Q. Si je peux revenir à l'appel téléphonique que vous avez reçu le jeudi de quelqu'un qui a dit être Joyce Wildman, est-ce que votre mari a parlé à cette personne au cours de cette conversation téléphonique?

1984 CanLII 82 (SCC)

A. I answered the phone and my husband got the phone and she called him a murderer and John and I murderers.

Q. Did John talk to that person on the telephone or was it just you and your husband?

A. Just my husband and I.

Q. When she said that you and Ron and John had murdered Tricia with an axe or hatchet, do you remember which it was she said? An axe or hatchet?

A. It was a hatchet, I think.

Q. When she said that, do you remember what you said to her?

A. I just told her no, we didn't . . . have anything to do with it.

Q. Up to that point, was that the first time that you can remember any mention being made of a hatchet, either on the radio or in the newspaper or T.V.?

A. It seemed to me that that person knew about the hatchet before anyone else did.

Q. Was that the first time that the hatchet was brought to your attention?

A. Yes.

Mr. McIsaac:

Q. I understand, Mr. McIsaac, that, on the Thursday after Tricia was missing, that you received a phone call from a person who told you they were Joyce Wildman; is that correct?

A. Yes.

Q. And in that phone conversation, this woman, who said she was Joyce Wildman, accused you and your wife and John Wildman of killing Patricia with a hatchet?

A. That is right.

Q. I suggest to you that you took the phone from your wife and discussed that, or heard that same accusation from the person who said she was Joyce Wildman; is that correct?

A. Yes.

Q. Up to that point, after Tricia had been missing, had you received any information from the newspaper or radio or T.V.?

A. Yes.

Q. Just a moment. Was there any information, from those sources, that there was a hatchet involved in killing Tricia, or was the phone call the first time that the hatchet was brought to your attention?

R. J'ai répondu au téléphone et mon mari a pris le récepteur et elle l'a traité, ainsi que John et moi, d'assassins.

Q. John a-t-il parlé à cette personne au téléphone ou était-ce seulement vous et votre mari?

R. Seulement mon mari et moi.

Q. Lorsqu'elle a dit que vous, Ron et John aviez tué Tricia à l'aide d'une hache ou d'une hachette, vous rappelez-vous ce qu'elle a dit? Une hache ou une hachette?

R. C'était une hachette, je pense.

Q. Lorsqu'elle a dit cela, vous rappelez-vous ce que vous lui avez répondu?

R. Je lui ai simplement dit non, nous n'avions . . . rien à voir avec cela.

Q. Était-ce la première fois à ce moment-là qu'on faisait mention d'une hachette, à la radio, dans les journaux ou à la télévision?

R. Il me semble que cette personne était la toute première à être au courant de la hachette.

Q. Était-ce la première fois qu'on attirait votre attention sur la hachette?

R. Oui.

M. McIsaac:

Q. Je crois comprendre, M. McIsaac, que le jeudi qui a suivi la disparition de Tricia, vous avez reçu un appel téléphonique d'une personne qui vous a dit être Joyce Wildman; est-ce exact?

R. Oui.

Q. Et au cours de cette conversation téléphonique, cette femme, qui a dit être Joyce Wildman, vous a accusé, ainsi que votre épouse et John Wildman, d'avoir tué Patricia à l'aide d'une hachette?

R. C'est exact.

Q. Si je vous dis que vous avez pris le récepteur des mains de votre épouse et avez discuté de cette question, ou que vous avez entendu la même accusation provenant de la personne qui a dit être Joyce Wildman; est-ce exact?

R. Oui.

Q. Après la disparition de Tricia et jusqu'à ce moment-là, aviez-vous obtenu des informations dans les journaux, à la radio ou à la télévision?

R. Oui.

Q. Un instant. Avez-vous su par l'entremise de ces sources d'information qu'une hachette avait servi à tuer Tricia ou était-ce la première fois au cours de la conversation téléphonique qu'on a attiré votre attention sur la hachette?

1984 CanLII 82 (SCC)

A. Yes, it was the first time.

Q. When you talked to that person on the phone, who said she was Joyce Wildman, did it appear they had been drinking or could you tell?

A. I couldn't tell.

Q. From the time you became John Wildman's landlord, you had a number of times to see and talk to Joyce Wildman?

A. Yes.

Q. She came to John's apartment a number of times?

A. Yes.

Q. Did the voice on the telephone, on Thursday night, accusing you of killing Tricia with a hatchet, did that sound to you like Joyce Wildman's voice?

A. I really couldn't say because I never talked to her on the phone before.

All agree that proof of the conversation was admissible and that the trial judge erred in disallowing it. The result is twofold. It left unexplained the most incriminating evidence adduced against Wildman. It also deprived him of the right to put before the jury the fact that, for some reason, his wife, or somebody purporting to be his wife, knew before the body was discovered that Tricia was dead, that she had been murdered and that the instrument used was a hatchet!

The importance of this evidence to the defence was directly proportional to the incriminating effect the evidence it sought to explain had against the accused. Unexplained, that knowledge by the accused was very incriminating and, as I said before, made the circumstantial evidence "overwhelming" as said the Court of Appeal.

Witness the fact that the Crown, when addressing the jury, stressed at some length the fact that Wildman had incriminating knowledge of the circumstances of her death.

Witness also what the trial judge said in his charge:

Mr. Beyer was called by the defence, and he was acting for Wildman. In cross-examination by Mr. Swan-

R. Oui, c'était la première fois.

Q. Lorsque vous avez parlé au téléphone à cette personne qui a dit être Joyce Wildman, vous a-t-il semblé qu'elle avait bu ou pourriez-vous l'affirmer?

R. Je ne pourrais pas l'affirmer.

Q. À partir du moment où vous êtes devenu le locateur de John Wildman, vous avez à certaines reprises vu Joyce Wildman et vous lui avez parlé?

R. Oui.

Q. Elle s'est rendue à l'appartement de John à plusieurs reprises?

R. Oui.

Q. Est-ce que la voix que vous avez entendue au téléphone le jeudi soir, vous accusant d'avoir tué Tricia à l'aide d'une hachette, vous a semblé être la voix de Joyce Wildman?

R. Je ne pourrais vraiment pas le dire parce que je ne lui avais jamais parlé au téléphone.

Il y a unanimité pour dire que la preuve de la conversation était admissible et que le juge du procès a commis une erreur en la rejetant. Ce rejet a deux effets. Il laisse inexpliquée la preuve la plus incriminante présentée contre Wildman. Il le prive en outre du droit de soumettre au jury le fait que, pour une raison ou une autre, son épouse ou une personne se disant son épouse savait, avant la découverte du corps, que Tricia était morte, qu'elle avait été assassinée et que l'instrument utilisé était une hachette!

L'importance de cette preuve pour la défense est directement proportionnelle à l'effet incriminant que la preuve qu'elle cherchait à expliquer avait contre l'accusé. Étant inexpliquée, cette connaissance de la part de l'accusé était très incriminante et, comme je l'ai déjà dit, elle rendait la preuve circonstancielle «accablante» comme l'a dit la Cour d'appel.

La preuve en est que le ministère public, lorsqu'il s'est adressé au jury, a insisté sur le fait que Wildman avait une connaissance incriminante des circonstances du décès.

La preuve en est également que le juge du procès a dit dans son exposé:

[TRADUCTION] Me Beyer qui représentait Wildman a été cité par la défense. Contre-interrogé par Me Swan-

1984 CanLII 82 (SCC)

son he said that the accused spoke to him—and I do not recall whether it was on the telephone or in person—on February the 16th—no, he said he had a call from Wildman and that Wildman said that his wife was accusing him of killing Tricia with an axe. That is Thursday the 16th. The child's body had not yet been found.

The accused, as a result of the exclusion of Mr. and Mrs. McIsaacs' testimony on that point, was the only one left asserting the existence of this accusation by his wife on the phone.

The trial judge told the jury:

You alone are the judges of the facts. You will have to judge whether that was said and how Joyce could know. Did she tell this to John or accuse him of this? You have to judge, did Mr. Beyer hear that, or is it correctly reported by him, and you may think that Mr. Beyer has no interest in this matter.

The Crown then asks for you to consider Guillemette's evidence. About three days before the body was found—no, I will deal with this aspect of it in a moment.

If you do not accept the evidence that Joyce told him on Thursday, February the 16th, that Tricia was killed with an axe, how could he know? The Crown says that the only person or persons who could know were the person or persons who in fact used that axe to kill Tricia. You will recall that the gentleman who owned the hairdressing establishment was called, and he said that Joyce was working there from fairly early in the morning on Wednesday the 15th until 4.00 o'clock in the afternoon.

If you accept his evidence, then Joyce was not at the river that morning with Tricia.

The jury's request is very eloquent as regards the importance of the evidence of the knowledge and, as a corollary, the damaging effect of excluding its explanation.

After four hours of deliberation the jury returned and asked the judge the following:

FOREMAN OF THE JURY: We would like the details of the timing relative to the January 20th events concerning the receptionist at the Children's Aid Society, of Joyce Smoke, Detective White, and Mr. Wildman's personal recollection of that time period.

son, il a déclaré que l'accusé lui a parlé—je ne me souviens pas si c'était au téléphone ou en personne—le 16 février—non, il a dit avoir reçu un appel de Wildman qui lui a déclaré que son épouse l'accusait d'avoir tué Tricia avec une hache. C'est jeudi le 16. Le corps de l'enfant n'avait pas encore été trouvé.

En raison de l'exclusion du témoignage de M. et de Mme McIsaac sur ce point, l'accusé était la seule autre personne à pouvoir établir l'existence de cette accusation portée par son épouse au téléphone.

Le juge du procès a dit au jury:

[TRADUCTION] Vous êtes les seuls juges des faits. Vous devrez décider si cela a été dit et comment Joyce a pu le savoir. A-t-elle dit cela à John ou l'accuse-t-elle de cela? Vous devez décider si Me Beyer a entendu cela ou s'il l'a rapporté correctement, et vous pouvez penser que Me Beyer n'a aucun intérêt dans cette affaire.

La poursuite vous demande alors d'examiner le témoignage de Guillemette. Environ trois jours avant la découverte du corps—non, j'examinerai cet aspect de la question dans un instant.

Si vous n'acceptez pas la preuve que Joyce lui a dit le jeudi 16 février que Tricia avait été tuée à l'aide d'une hache, comment pouvait-il le savoir? La poursuite prétend que la seule personne ou les seules personnes qui pouvaient le savoir étaient celles qui ont effectivement utilisé cette hache pour tuer Tricia. Vous vous souviendrez que l'homme qui est propriétaire du salon de coiffure a témoigné que Joyce travaillait à cet endroit et qu'elle s'y était rendue tôt le mercredi 15 et avait terminé à 16 heures.

Si vous acceptez son témoignage, Joyce ne se trouvait pas à la rivière ce matin-là avec Tricia.

La question du jury est très significative en ce qui concerne l'importance de la preuve de la connaissance et, en corollaire, l'effet préjudiciable causé par le rejet de son explication.

Après quatre heures de délibération, le jury est revenu devant le juge et lui a demandé:

[TRADUCTION] LE PRÉSIDENT DU JURY: Nous aimerions connaître en détail la chronologie des événements du 20 janvier en ce qui concerne la réceptionniste de la Société d'aide à l'enfance, Joyce Smoke, le détective White et le souvenir que M. Wildman conserve de cette période.

1984 CanLII 82 (SCC)

We would like to re-hear the testimony of the solicitor, Mr. Beyer.

HIS LORDSHIP: The whole of it?

THE FOREMAN OF THE JURY: Your lordship, we feel it is relatively short and we would like to hear what he has to say.

As regards Mr. Beyer's testimony, the judge read his personal notes to the jury, and said:

Now, if you are not satisfied with that, would you like to hear the tape?

FOREMAN OF THE JURY: Sir, I would like to hear, I would like to hear the last portion of the tape pertaining to the discussion re the remarks attributed to Mrs. Wildman, made to Mr. Beyer by Mr. Wildman regarding the hatchet.

HIS LORDSHIP: All right.

After hearing the tape, the jury retired and came back an hour and a half later with a verdict of guilty.

Mr. Beyer's testimony was crucial and in fact fatal to the accused. The judge put the matter quite properly when he told the jury that if they did not accept the accused's (sole) evidence that Joyce had told him "that Tricia was killed with an axe, how could he know?"

The judge was quite right in this. And the inference to be drawn from this knowledge of the accused would then be that he had to have been there.

The proviso of s. 613(1)(*b*)(iii)

As regards resort by a Court of Appeal to the proviso of s. 613(1)(*b*)(iii) the law has been clearly laid down by this Court in *Colpitts v. The Queen*, [1965] S.C.R. 739. Cartwright J.'s formulation of the test was as follows, at p. 744:

. . . once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. The satisfaction of this onus is a condition precedent to the right of the Appellate Court to apply the terms of the subsection at all. The Court is not bound to apply the subsection merely because this onus is discharged.

Nous aimerions réentendre le témoignage de Me Beyer.

SA SEIGNEURIE: Tout le témoignage?

LE PRÉSIDENT DU JURY: Votre Seigneurie, nous estimons qu'il est relativement court et nous aimerions entendre ce qu'il a à dire.

En ce qui concerne la déposition de Me Beyer, le juge a lu ses notes personnelles au jury et il a dit:

[TRADUCTION] Eh bien, si cela ne vous satisfait pas, aimeriez-vous entendre la bande enregistrée?

LE PRÉSIDENT DU JURY: Monsieur, j'aimerais entendre, j'aimerais entendre la dernière partie de la bande enregistrée concernant la discussion portant sur les remarques attribuées à Mme Wildman, que M. Wildman a faites à Me Beyer concernant la hachette.

SA SEIGNEURIE: Très bien.

Après avoir entendu la bande enregistrée, le jury s'est retiré et il est revenu une heure et demie plus tard pour prononcer un verdict de culpabilité.

Le témoignage de Me Beyer a été crucial et en fait, il a porté un coup fatal à l'accusé. Le juge a exposé la question très clairement lorsqu'il a dit au jury que s'il n'acceptait pas l'(unique) preuve de l'accusé suivant laquelle Joyce lui a dit [TRADUCTION] «que Tricia avait été tuée à l'aide d'une hache, comment pouvait-il le savoir?»

Le juge a eu tout à fait raison à cet égard. Et on doit déduire de cette connaissance de la part de l'accusé qu'il devait se trouver à cet endroit.

La réserve du sous-al. 613(1)*b*)(iii)

En ce qui concerne le recours par une cour d'appel à la réserve du sous-al. 613(1)*b*)(iii), cette Cour a clairement énoncé la règle de droit dans l'arrêt *Colpitts v. The Queen*, [1965] R.C.S. 739. Voici comment le juge Cartwright a formulé le critère à la p. 744:

[TRADUCTION] . . . une fois que l'on a jugé qu'il y a eu erreur de droit au procès, il incombe à la poursuite d'établir à la satisfaction de la Cour que le verdict aurait nécessairement été le même si cette erreur ne s'était pas produite. Cette preuve est une condition préalable de toute application des dispositions de ce sous-alinéa par la Cour d'appel. La Cour n'est pas tenue de l'appliquer du seul fait que cette obligation se trouve remplie.

1984 CanLII 82 (SCC)

Under our system of law a man on trial for his life is entitled to the verdict of a jury which has been accurately and adequately instructed as to the law. The construction of s. 592(1)(*b*)(iii) contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. To adapt the words of Lord Herschell in *Makin v. Attorney General for New South Wales*, [1894] A.C. 57 at 70, the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

The determination as to whether the verdict "would necessarily have been the same if such error had not occurred" is generally made upon a reading of the evidence put to the jury.

But when the error of law is the preclusion of exculpatory evidence, then the determination must be made with regard to the entirety of the evidence, that evidence having been included, and in the light of the effect the excluded evidence could, within reason, possibly have had on the evidence that did go to the jury. Any reasonable effect that excluded evidence could have had on the jury should, in applying s. 613(1)(*b*)(iii), enure to the benefit of the accused. When the excluded evidence is, as in this case, of a certain importance and might reasonably have had an effect on the jury then, even assuming we in this Court would have nevertheless convicted, I find it difficult to be satisfied that the jury would have necessarily agreed with us. Any reasonable, possible effect of that excluded evidence on the jury should enure to the benefit of Wildman.

The effect of the McIsaacs' testimony would have been to corroborate the accused's explanation and thereby to tend to negate the inference that the accused had to have been there—the very inference that the jury was concerned about. Had that evidence been adduced, it would have then been open to the jury not to entertain the inference and, as a result, we would then be left with evidence which, as I have already stated, while sufficient to support a conviction, would not make an acquittal unreasonable; therefore the Crown has

Dans notre système juridique, une personne dont la vie est en jeu a droit au verdict d'un jury informé correctement et suffisamment sur l'état du droit. L'interprétation de l'art. 592(1)*b*)(iii) invoquée par la Couronne en l'espèce conférerait non plus au jury mais à la Cour d'appel la question de savoir si les éléments de preuve ont démontré la culpabilité de l'accusé au-delà de tout doute raisonnable. Pour reprendre les termes de lord Herschell dans l'arrêt *Makin v. Attorney General for New South Wales*, [1894] A.C. 57, à la p. 70, les juges se substitueraient véritablement au jury et ils rendraient leur propre verdict en examinant attentivement la preuve sans avoir la possibilité de voir le comportement des témoins et de peser la preuve et sans bénéficier des avantages qui en résultent.

La question de savoir si le verdict «aurait nécessairement été le même si cette erreur ne s'était pas produite» est généralement tranchée après un examen de la preuve offerte au jury.

Mais lorsque l'erreur de droit consiste en l'exclusion d'une preuve disculpatoire, la décision doit être rendue compte tenu de l'ensemble de la preuve, cette preuve comprise, et en fonction de l'effet que la preuve exclue pourrait raisonnablement avoir eu sur la preuve soumise au jury. Aux fins de l'application du sous-al. 613(1)*b*)(iii), l'accusé doit bénéficier de tout effet raisonnable que la preuve exclue aurait pu avoir sur le jury. Lorsque la preuve exclue revêt, comme en l'espèce, une certaine importance et aurait normalement pu avoir un effet sur le jury, même si l'on présume que les membres de cette Cour auraient néanmoins rendu un verdict de culpabilité, je peux difficilement être convaincu que le jury aurait nécessairement été d'accord avec nous. Wildman doit bénéficier de tout effet raisonnable que cette preuve exclue aurait pu avoir sur le jury.

Le témoignage des McIsaac aurait eu pour effet de corroborer l'explication de l'accusé et, de ce fait, de faire obstacle à la déduction portant que l'accusé avait dû se trouver là, la déduction même dont se préoccupait le jury. Une fois cette preuve présentée, il était loisible au jury de ne plus faire cette déduction; le cas échéant, la preuve résiduelle, quoique suffisante pour justifier un verdict de culpabilité, ne serait par ailleurs pas suffisante pour rendre déraisonnable un verdict d'acquittement; par conséquent, le ministère public ne m'a

1984 CanLII 82 (SCC)

not, in my respectful view, met the onus of satisfying me "that the verdict would necessarily have been the same", had the defence been allowed, as was its right, to adduce the evidence of the telephone conversation of February 16 (see *Colpitts v. The Queen*, *supra*). I would, therefore, on this ground allow the appeal, and order a new trial.

The other grounds

The other two grounds for appeal can be disposed of together. Being of the view that a new trial should be ordered, I would normally, in order to avoid any further appeal arising out of those grounds, deal with the matter as to whether the spouse would, at the trial be a compellable witness under the circumstances of this case and, if not, whether and to what extent comment could be made by the Crown as to why she was not called to testify. But those problems will not arise at the new trial in view of the introduction to s. 4 of the *Canada Evidence Act supra*, of subs. (3.1), which covers the situation as follows:

(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

The new trial will be governed by that section.

Indeed s. 36(*d*) of the *Interpretation Act*, R.S.C. 1970, c. I-23, states that:

36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

. . .

(*d*) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal;

pas convaincu, à mon humble avis, «que le verdict aurait nécessairement été le même», si l'accusé avait été autorisé, comme cela était son droit, à faire la preuve de la conversation téléphonique du 16 février (voir *Colpitts v. The Queen*, précité). Je suis par conséquent d'avis d'accueillir le pourvoi pour ce motif et d'ordonner un nouveau procès.

Les autres moyens d'appel

Les deux autres moyens d'appel peuvent être traités ensemble. Étant d'avis qu'il doit y avoir un nouveau procès et afin d'éviter que ces moyens d'appel ne donnent ouverture à un autre pourvoi, je serais normalement d'avis d'examiner la question de savoir si le conjoint est, au cours du procès, un témoin contraignable dans les circonstances de l'espèce et, dans la négative, si et dans quelle mesure le ministère public peut commenter la raison pour laquelle elle n'a pas été citée comme témoin. Ces problèmes ne se poseront cependant pas au cours du nouveau procès, étant donné l'ajout du par. (3.1) à l'art. 4 de la *Loi sur la preuve au Canada*, paragraphe qui vise la situation en l'espèce:

(3.1) La femme ou le mari d'une personne accusée d'une infraction visée à l'un des articles 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 ou 245.3 du *Code criminel*, lorsque le plaignant ou la victime est âgée de moins de quatorze ans, est un témoin compétent et contraignable pour la poursuite sans le consentement de la personne qui est accusée.

Cet article régira le nouveau procès.

En effet, l'al. 36*d*) de la *Loi d'interprétation*, S.R.C. 1970, chap. I-23 prévoit:

36. Lorsqu'un texte législatif (au présent article appelé «texte antérieur») est abrogé et qu'un autre texte législatif (au présent article appelé «nouveau texte») y est substitué,

. . .

d) la procédure établie par le nouveau texte doit être suivie, autant qu'elle peut y être adaptée, dans le recouvrement ou l'imposition des peines et confiscations encourues et pour faire valoir des droits existant ou naissant aux termes du texte antérieur, ou dans toute procédure concernant des choses survenues avant l'abrogation;

1984 CanLII 82 (SCC)

This is an enactment of the common law rule that there is no vested right in procedure along with a limitation to the effect that the following of the new procedure must be feasible (see *R. v. Ali*, [1980] 1 S.C.R. 221). Therefore, a new procedure applies to pending suits without breaching the "rule of interpretation to the effect that statutes ought, if possible, to be interpreted so as to respect vested rights" (see E.A. Driedger, "The Retrospective Operation of Statutes", *Legal Essays in Honour of Arthur Moxon*, University of Toronto Press, 1953, pp. 5 *et seq.*) Section 36(*d*) of the *Interpretation Act* uses procedure in a wide sense and that expression includes the rules of evidence. On the point, *Phipson on Evidence*, 13th ed., 1982, at p. 1:

> Law is commonly divided into substantive law, which defines rights, duties and liabilities; and adjective law, which defines the procedure, pleading and proof by which the substantive law is applied in practice.
>
> The rules of procedure regulate the general conduct of litigation; the object of pleading is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; proof is the establishment of such facts by proper legal means to the satisfaction of the court, and in this sense includes disproof. The first-mentioned term is, however, often used to include the other two.

(Emphasis added.)

Some rules of evidence must nevertheless be excluded for they are not merely procedural, they create rights and not merely expectations and, as such, are not only adjectival but of a substantive nature. Such has been found to be the case for rules or laws creating presumptions arising out of certain facts. (See, for example, as regards the presumption of advancement in questions of ownership of property as between husband and wife, *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548.) P. Roubier, in *Le droit transitoire*, 2nd ed., Paris, Dalloz et Sirey, 1960, at p. 237, rationalizes their exclusion because, says he, [TRANSLATION] "As these rules are independent of the existence of an issue, they are not affected by the fact that there is

Cette disposition énonce la règle de *common law* selon laquelle il n'existe pas de droit acquis en procédure, pour autant que la mise en oeuvre de la nouvelle procédure soit, en pratique, possible (voir *R. c. Ali*, [1980] 1 R.C.S. 221). Par conséquent, une nouvelle procédure s'applique aux poursuites en cours sans qu'il y ait atteinte à la [TRADUCTION] «règle d'interprétation selon laquelle les lois doivent, dans la mesure du possible, être interprétées de façon à respecter les droits acquis» (voir E.A. Driedger, «The Retrospective Operation of Statutes», *Legal Essays in Honour of Arthur Moxon*, University of Toronto Press, 1953, aux pp. 5 et suiv.) L'alinéa 36*d*) de la *Loi d'interprétation* emploie le mot procédure dans son sens large et cette expression comprend les règles de preuve. Voici ce qu'on retrouve dans l'ouvrage *Phipson on Evidence*, 13e éd., 1982, à la p. 1:

> [TRADUCTION] Le droit se divise ordinairement en règles de fond, qui définissent les droits, les obligations et les responsabilités; et en règles de procédure qui définissent la procédure, les actes de procédure et la preuve qui permettent d'appliquer les règles de fond.
>
> Les règles de procédure régissent la conduite générale d'un procès; les actes de procédure ont pour objet de déterminer à l'intention des parties et de la cour les faits importants en litige dans un cas donné; la preuve consiste à établir ces faits par des moyens juridiques appropriés à la satisfaction de la cour et, en ce sens, elle comprend la réfutation d'une preuve. Cependant, le premier terme mentionné englobe souvent les deux autres.

(C'est moi qui souligne.)

Certaines règles de preuve doivent néanmoins être exclues car elles ne sont pas de simples règles de procédure, elles créent des droits et non simplement des expectatives et, comme telles, elles sont non seulement des règles de forme mais également des règles de fond. On a jugé qu'il en était ainsi des règles ou des lois créant des présomptions découlant de certains faits. (Voir par exemple l'arrêt *Bingeman c. McLaughlin*, [1978] 1 R.C.S. 548 en ce qui concerne la présomption d'avancement au sujet de la propriété de biens-fonds entre conjoints). Dans *Le droit transitoire*, 2e éd., Paris, Dalloz et Sirey, 1960, à la p. 237, P. Roubier rationalise l'exclusion de ces règles parce que, dit-il, «ces règles étant indépendantes de l'existence

1984 CanLII 82 (SCC)

litigation in progress". Such is also the case of the lawyer-client privilege resulting from a person's right to the confidentiality of his lawyer, irrespective of whether there is litigation, (see *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860). The courts, for obvious reasons of logic, have not excluded under new laws, for want of certain new prerequisites to its admissibility, evidence which had complied with the prerequisites of the previous. *R. v. Ali, supra*, is an illustration of this approach, using the proviso "as far as it can be adapted thereto" of s. 36(*d*) of the *Interpretation Act*. (For a more thorough review of the case law on the matter, see Pierre-André Côté, *Interprétation des lois* (1982), at pp. 155 *et seq.*) But such is not the case as regards a spouse's incompetence to testify.

Spouses do not have a substantive right to the confidentiality as to what either was seen doing by the other or to the confidentiality of what was to the other communicated by either.

The incompetence and uncompellability of s. 4 of the *Canada Evidence Act, supra*, is not the result of a substantive right to confidentiality and is merely procedural.

If a new trial ensues, Mrs. Wildman will be a competent and compellable witness for the prosecution without the consent of the accused.

To conclude, I would allow the appeal, quash the conviction and order a new trial.

Appeal allowed and new trial ordered.

Solicitor for the appellant: Robert J. Carter, Toronto.

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

d'un litige, ne sont pas modifiées par la survenance d'un procès». Il en est de même du secret professionnel entre avocat et client découlant du droit d'une personne aux rapports confidentiels avec son avocat, qu'il y ait ou non litige (voir *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S 860). Pour des raisons de logique évidentes, les tribunaux n'ont pas exclu, en vertu de lois nouvelles, la preuve qui respectait les conditions fixées par les lois antérieures mais où il manquait certaines conditions d'admissibilité exigées par la nouvelle loi. L'arrêt *R. c. Ali*, précité, qui emploie la réserve «autant qu'elle peut y être adaptée» de l'al. 36*d*) de la *Loi d'interprétation*, illustre ce point de vue. (Pour les fins d'un examen plus approfondi de la jurisprudence en la matière, voir Pierre-André Côté, *Interprétation des lois* (1982), aux pp. 155 et suiv.) Il n'en est pas ainsi en ce qui concerne l'inhabilité d'un conjoint à témoigner.

La confidentialité des rapports entre conjoints, lorsque l'un d'eux est témoin d'un acte de son conjoint ou lorsque l'un d'eux communique avec son conjoint, ne relève pas d'une règle de fond.

L'inhabilité et l'impossibilité de contraindre prévues à l'art. 4 de la *Loi sur la preuve au Canada*, précitée, ne résultent pas d'une règle de fond en matière de confidentialité, il s'agit d'une simple règle de procédure.

S'il y a un nouveau procès, Mme Wildman sera un témoin compétent et contraignable pour la poursuite sans le consentement de l'accusé.

En conclusion, je suis d'avis d'accueillir le pourvoi, d'annuler la déclaration de culpabilité et d'ordonner un nouveau procès.

Pourvoi accueilli et nouveau procès ordonné.

Procureur de l'appelant: Robert J. Carter, Toronto.

Procureur de l'intimée: Le ministère du Procureur général de l'Ontario, Toronto.

1984 CanLII 82 (SCC)

Tab 64

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wu v. Murray,*
2023 BCCA 270

Date: 20230705
Docket: CA49002

Between:

Jiaqi Wu

Appellant
(Plaintiff)

And

Collin Bruce Murray and Paulette Anne Nelson

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2023 (*Wu v. Murray*, Vancouver Docket S232483).

The Appellant, appearing in person: J. Wu

Counsel for the Respondents: C. Hartnett
D. Sahbebi, Articled Student

Place and Date of Hearing: Vancouver, British Columbia
June 21, 2023

Place and Date of Judgment: Vancouver, British Columbia
July 5, 2023

2023 BCCA 270 (CanLII)

Summary:

Application for extension of time to serve a notice of appeal that had been filed in time granted.

Reasons for Judgment of the Honourable Mr. Justice Harris:

2023 BCCA 270 (CanLII)

Nature of the Application

[1] The appellant and plaintiff below, Jiaqi Wu, applies for an extension of time to serve her notice of appeal. She seeks to appeal Justice Milman's order removing a certificate of pending litigation ("CPL") from a Coquitlam residential property (the "Orkney Property") she had unsuccessfully tried to purchase in January of 2023.

[2] The respondents (defendants below) are, collectively, the sellers and the successful buyers of the Orkney Property. The respondents oppose the application; they do not suggest there is any prejudice resulting from the delay, but maintain the application should nonetheless be refused on the basis the appeal is entirely devoid of merit.

Background

[3] This dispute centers on the interpretation of two contracts the sellers entered into for the purchase and sale of the Orkney Property: the first, with the buyers (the "Perry Contract") and the back-up, with the appellant (the "Wu Contract").

[4] The sellers entered into the Perry Contract on December 31, 2022. The sale was made subject to a number of conditions, all of which had to be removed on or before January 27, 2023. One such condition made the sale of the Orkney Property subject to the sale of the buyers' property (the "Ailsa Property"). The terms of the Perry Contract permitted the sellers to entertain back-up offers on the Orkney Property. If the sellers received another acceptable offer, they could deliver written notice to the buyers to remove all conditions from the contract within 48 hours (the "48-Hour Notice"). The contract stipulated that the 48-Hour Notice clause could not, however, be invoked on the buyers in the event they had accepted an offer to

purchase the Ailsa Property. The relevant language of the Perry Contract reads, in full:

> Subject to the Buyers entering into an unconditional agreement to sell the Buyer's property at [address] by January 27th, 2023. This condition is for the sole benefit of the Buyers. However, in the event the Sellers receive another acceptable offer, the Sellers may deliver written notice to the Buyers or their Agent requiring the Buyers to remove all conditions from the contract within 48 hours of the delivery of the notice, not to include Sundays and Statutory Holidays but not before January 13th, 2023. However, such notice will not be invoked on the Buyers in the event they have accepted an offer to purchase the Buyers property before the subject removal date of that offer.

[5] On January 19, 2023, the sellers accepted an offer from the appellant for the sale of the Orkney Property as a back-up, and entered into the Wu Contract. The Wu Contract clearly specified that the offer was a back-up. The relevant terms and conditions portion of the Wu Contract states:

> This is a back up offer. Subject to the seller ceasing to be obligated in any way under the Contract of Purchase and Sale date: December 31, 2022 (the "Sale Contract") respecting the Property, including the Seller obtaining a full release from the Buyer, on or before: January 28, 2023. This condition is for the sole benefit of the Seller.* (Optional - The Seller agrees not to amend the Sale Contract).

[6] The appellant removed all conditions on her offer, paid a deposit, and requested the sellers deliver the 48-Hour Notice to the buyers. After the Notice was given, the buyers informed the sellers that the 48-Hour Notice clause could not be invoked, as they had, as of January 18, 2023, accepted an offer to buy the Ailsa Property. The buyers removed all subject conditions on the Perry Contract on January 27, 2023.

[7] On February 3, 2023, the appellant requested and received the return of her deposit from the sellers.

[8] On March 27, 2023, the appellant sought to enforce the Wu Contract by commencing an action against the respondents for specific performance. She registered a CPL against the Orkney Property. The appellant's claim was primarily based on allegations that the buyers had misrepresented the offer they had received

2023 BCCA 270 (CanLII)

on the Ailsa Property to avoid the invocation of the 48-Hour Notice clause. The appellant claimed the buyers had induced the sellers to breach the Wu Contract.

[9] The sellers brought an application to remove the CPL on the basis that the appellant has no interest in land, or, on the alternative basis of hardship and inconvenience. On April 12, 2023, the chambers judge granted the sellers' application to remove the CPL on the basis of hardship, and ordered the respondents replace the CPL with a $50 cash security.

[10] The appellant notified her then-counsel the morning of April 13, 2023 of her intention to appeal, but was told he would be unable to assist her in her appeal. The appellant began the paperwork to file the notice appeal herself, and ordered a transcript on a rushed basis. She filed a notice of appeal on April 19, 2023. The respondents state they were only notified of the appellant's appeal on May 19, 2023, at 5:00 pm. They informed the appellant on May 29, 2023 of their position that no appeal had been brought as she had failed to file and serve her notice of appeal within the prescribed timelines under the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*], and *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*].

Analysis

Extension of time to bring the appeal

[11] On an application for an extension of time, there is a material difference in whether the extension is sought to *begin* an appeal, or to take steps to *continue* prosecuting an appeal validly brought: See *Stewart v. Postnikoff*, 2015 BCCA 388 at para. 9.

[12] To dispel any confusion, proper service is a requisite component of bringing an appeal. A failure to serve a copy of the filed notice of appeal on each named

2023 BCCA 270 (CanLII)

respondent within the timeframe prescribed by the *Rules* is a failure to bring the appeal. Rule 22 of the *Rules* states:

> 22 An appeal is brought for the purposes of these rules as follows:
>
> (a) if leave to appeal is not required, when the appellant
>
> (i) files the notice of appeal, <u>and</u>
>
> (ii) <u>serves a copy of the filed notice of appeal on each respondent named in the notice of appeal</u>;
>
> (b) if leave to appeal is required, when leave to appeal is granted.
>
> [Emphasis added.]

[13] Both sub-components 22(a)(i) and (ii) must be satisfied to bring the appeal. This was recently confirmed in *Liebreich v. Farmers of North America*, 2022 BCCA 221 (Chambers), where Justice Butler clarified that even if a notice of appeal is filed on time, if it is not served within the timelines in the *Rules*, and no extension of time to serve the notice of appeal has been granted, the appeal has not been brought: at paras. 21–22.

[14] I now turn to the criteria relevant to an application to extend time to begin an appeal. These criteria were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260 (C.A.) and can be summarized as follows:

i. Was there a *bona fide* intention to appeal?

ii. When were the respondents informed of the intention?

iii. Would the respondents be unduly prejudiced by an extension of time?

iv. Is there merit in the appeal?

v. Is it in the interest of justice that an extension be granted?

[15] The interests of justice is “an overriding question and embraces the first four questions”; the fifth factor therefore “states the decisive question”: *Davies* at 260–261.

2023 BCCA 270 (CanLII)

[16] The appellant's failure to properly serve the appeal within the time limits prescribed by the *Rules* was arguably due to an oversight on the part of her former counsel. Further, correspondence between the appellant and her former counsel, and her continued pursuit of the appeal as a self-represented litigant, evinces a *bona fide* intention to appeal. As noted above, the respondents do not claim any prejudice would flow from granting an extension.

[17] As such, the only relevant issue on this application is whether the appeal has merit.

Merits of the appeal

[18] The threshold for the assessment of the merits of the appeal is low. The question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit" *Stewart v. Postnikoff*, 2014 BCCA 292 at paras. 5–6 (Chambers). A single judge in chambers does not have the jurisdiction to refuse an extension of time to continue prosecuting an appeal solely on the basis of inadequate merit: *Sekhon v. Armstrong*, 2003 BCCA 318 at para. 28; *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at para. 15 (Chambers). However, this is different from when an appeal has not been brought in time. An extension of time to begin an appeal should not be granted if the appeal is without merit: *Simon v. Canada (Attorney General)*, 2018 BCCA 54, at paras. 32, 36–40. This principle applies even where the other *Davies* factors are met: *Simon* at para. 38.

[19] The chambers judge granted the cancellation of the CPL on the basis of hardship and inconvenience, but also concluded that the appellant did not advance a viable claim to an interest in land: at para. 14. The judge noted:

> [15] The main difficulty I have with the plaintiff's position is that even if events had unfolded as she says they should have (that is, had she been apprised of what was actually happening with the [buyers'] sale of their home), there still remained an insurmountable impediment to her being in a position to force a sale to her under back-up contract with the sellers. The sellers would have been required to sell the property to her only if they were in possession of a release from the [buyers], and it is clear that the [buyers] were intent throughout on asserting their rights to purchase the property.

2023 BCCA 270 (CanLII)

> When the [buyers] were put to that election a short time later, they opted to waive the subjects in circumstances where they had no accepted offer outstanding on their home. Although the purported contract with Mr. Sy (the putative purchaser whose accepted offer was said to justify calling off the 48-hour notice) appears to have collapsed at some point, the [buyers] are now bound to sell their home to someone else under a different contract that was entered into only after they agreed to waive the subjects on the December 31 contract with the sellers.

[20] The appellant submits her appeal has merit, and advances three grounds of appeal. First, she argues the judge relied upon facts not supported by the evidence. She submits the buyers did not have a *bona fide* contract to allow them to avoid the invocation of the 48-Hour Notice clause. She says the purported contract with the purchasers of the Ailsa Property collapsed shortly after it was entered into, and there was no evidence to show the buyers had arranged another sale to sustain the freezing of the notice period, or that they had waived subjects on the Perry Contract within the specified 48-Hour Notice period.

[21] She also argues the judge erred in mixed law and fact by misapprehending the terms and conditions of the back-up clause in the Wu Contract. The appellant submits the judge erroneously interpreted the subordinate clause, “including the Seller obtaining a full release from the Buyer” as a free-standing precondition to be satisfied for the contract to be binding. The appellant contends that, properly read, that clause simply provides an example of a scenario in which the sellers would cease to be obligated to the buyers in any way.

[22] Finally, she submits the judge erred in law by concluding that the Perry Contract remained in effect at all times.

[23] The respondents say the judge did not make, or rely on, any findings about: (1) whether the sellers ceased to be obligated under the Perry Contract; (2) whether that contract remained in effect at all times; or (3) the merits of the contract the buyers entered into for the sale of the Ailsa Property. Rather, he found that *regardless* of whether the buyers had a valid contract enabling them to resist the 48-Hour Notice, the sellers were only required to sell the Orkney Property to the appellant if they obtained a release from the buyers, and that it was it was clear

2023 BCCA 270 (CanLII)

throughout that the buyers were intent on asserting their right to purchase: at para. 15.

[24] While it may be that the appellant's chance of success on this appeal is remote, particularly in light of the standard of review applicable to alleged errors in contractual interpretation, I cannot say with certainty this appeal has no merit.

[25] In my view, the argument that a full release was not an independent condition precedent, but was rather an example of a scenario in which the sellers ceased to be obligated in any way, is not one entirely without merit. On these facts, the proper characterization of the clause, whether a release was required or not, is of significance. There is no dispute that the sellers never received a release from the buyers in relation to the Perry Contract, but it is not readily apparent that the sellers ceased to be obligated to them in any way. In my view, the resolution of that question depends on the proper interpretation of the 48-Hour Notice clause and its effect, if any, on the Perry Contract as a whole.

[26] For the purpose of extending time to serve the notice of appeal, I am not persuaded that it is clear that the appeal is doomed to fail. However, I do not wish to be interpreted as foreclosing the possibility that this Court may subsequently find otherwise. It is arguably open to the respondents to apply to quash the appeal pursuant to R. 60(4) of the *Rules*, if they are of the view the appeal is manifestly devoid of substance or merit: *Yang v. Shi*, 2022 BCCA 317 at para. 24.

[27] Considering the totality of the *Davies* factors, I find it is in the interests of justice to grant the extension of time to serve the appellant's notice of appeal.

Disposition

[28] I would grant the appellant's application for an extension of time to serve the appeal within 2 business days of the release of this judgment.

"The Honourable Mr. Justice Harris"

2023 BCCA 270 (CanLII)

Tab 65

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yang v. Shi,*
2022 BCCA 317

Date: 20220824
Docket: CA46449

Between:

Lihong Yang

Appellant
(Petitioner)

And

Li Shi

Respondent
(Respondent)

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 20, 2019 (*Yang v. Shi*, Vancouver Docket S189243).

Oral Reasons for Judgment

The Appellant, appearing in person:	L. Yang (R. Lam, Interpreter)
Counsel for the Respondent:	C. Shen
Place and Date of Hearing:	Vancouver, British Columbia August 24, 2022
Place and Date of Judgment:	Vancouver, British Columbia August 24, 2022

2022 BCCA 317 (CanLII)

Summary:

The respondent requested a referral of the appeal for summary determination pursuant to s. 21 of the Court of Appeal Act at a case management hearing. In the alternative, he sought directions with respect to how to bring an application under this new provision. Held: Request to refer the appeal for summary determination dismissed. Section 21 of the Court of Appeal Act establishes a mechanism for a justice or the registrar to refer an appeal to the Court for summary determination on their own motion. It does not prescribe or warrant a formal application process from a party seeking a referral for summary determination. An application for an order quashing an appeal is provided for in R. 60. The distinction between an order made under s. 21, and an order made on application pursuant to R. 60, is that one is court driven and the other is driven by the parties. A referral may be made where there is an apparent defect in the appeal. An application, on the other hand, is appropriate where evidence or argument is necessary in order to satisfy the court that the appeal is manifestly devoid of substance or merit. It is inappropriate to refer this appeal for summary determination because the respondent's argument and submissions are necessary to determine whether the appeal is bound to fail.

[1] **WILLCOCK J.A.**: Lihong Yang appeals an order made by Justice Jackson in the Supreme Court of British Columbia on September 20, 2019. The impugned order was made in proceedings on an appeal brought by Ms. Yang from the January 10, 2019 order of Master Baker. The order made by Master Baker dismissed an appeal from an order made by a Provincial Court judge in a small claims action involving a residential tenancy dispute.

[2] The order appealed adjourned the hearing of the appeal. The chambers judge concluded that an adjournment was necessary in order to permit the respondent to reply to recently filed materials. She directed that the hearing be reset quickly, and ordered Ms. Yang to pay the costs thrown away forthwith on preparation of the adjourned appeal in the fixed amount of $1,000.

[3] A notice of appeal was filed on October 18, 2019. An appearance was entered by the respondent on October 22, 2019.

[4] The appellant's factum was filed on January 10, 2020. I have read it. The chronology is remarkable. It begins with the commencement of a small claims action in November 2017. In July 2018, the Small Claims Court judge heard an application with respect to the manner in which witnesses would appear in the Small Claims

2022 BCCA 317 (CanLII)

Court and ruled against the appellant. In August 2018, the petition ultimately giving rise to these proceedings was filed.

[5] On October 15, 2018, the master dismissed the appeal from the challenged procedural order of the Small Claims judge. In January 2019, the appellant filed a notice of appeal from the master.

[6] On September 20, 2019, when the appeal from the decision of the master was supposed to have been heard, it was adjourned because Ms. Yang, the appellant, brought recently filed material to the attention of the chambers judge.

[7] Justice Jackson held as follows:

> [1] ... I have been asked to adjourn Ms. Lihong Yang's appeal of Master Baker's order on the basis that material was filed and served by Ms. Yang very late, as late as a couple of days ago, which has made it very difficult for counsel for the respondent to respond to, and much later than is required under the *Supreme Court Civil Rules*.
>
> [2] I am persuaded that it would be in the interests of justice to adjourn the application. Although I asked Ms. Yang why she filed her amended statement of argument eight months after the document to which it purportedly replies, I am not satisfied with your answer. It does not sound like you really had any valid reason for waiting so long, but the fact that you did has prejudiced the respondent, and, in my view, that is not fair.
>
> ...
>
> [5] I am satisfied that the affidavit material and the amended notice of argument is material the respondent is entitled to consider and that the respondent is unable to do so if the appeal proceeds today:
>
> [6] I am also taking into account that Ms. Yang suggested that she should have been advised about the respondent's application for the adjournment earlier, and her advice that she did not receive the September 18, 2019, letter from Mr. Shen on behalf of the respondent, which was sent by mail, until today at the hearing. However, given that Ms. Yang has refused to allow the respondent to contact her by email and instead required documentation either to be sent by regular mail' or that the respondent somehow take the extra step of finding Mr. Yang and serving her in person, it is not surprising, given the lateness at which Ms. Yang filed her material, the respondent was only in a position to seek the adjournment on September 18, 2019. The fact that Ms. Yang did not receive notice the respondent would be seeking to adjourn Ms. Yang's appeal is, I would suggest, very largely of her own doing, given to the lateness of the material Ms. Yang has now filed and seeks to rely on.
>
> [7] Therefore, I am satisfied that, in the circumstances, an adjournment is appropriate and I am ordering the appeal to be adjourned generally. I am

2022 BCCA 317 (CanLII)

> also, as part of that order, directing the matter be reset quickly, that Ms. Yang take steps to reset it quickly, on a date that is convenient to both parties. I am satisfied it is appropriate, given the lateness with which the material was filed and the lateness being the reason for the need for the adjournment, that costs for preparation of today's hearing should be ordered against Ms. Yang.
>
> [8] I am satisfied that it is appropriate to fix costs, in an effort to reduce the growing costs that have been incurred by the respondent, and I agree with Mr. Shen with respect to the $1,000 he has proposed. I will fix costs at $1,000 and set them at that amount.

[8] In the course of submissions, Mr. Shen had argued:

> If we go by the tariff schedule, only looking at just to come here today -- tariff items 26 and 27 -- preparation for a full day hearing is 5 units. If we are adjourned, then attending a half day hearing is also 5 units. Ten units, under 10, that's a thousand and one hundred dollars, plus tax on top of that, plus any other units that I haven't even addressed potentially that could be awarded.
>
> I am asking Your Ladyship to fix a thousand dollars all-inclusive, which is well less than the outcome would be if it goes to assessment. We know that there would be at least another 3 to 6 units just for the assessment alone.

[9] The subject matter of this appeal may properly be characterized as trivial. It is an appeal from an order adjourning the hearing of an appeal to challenge an order in Small Claims Court that certain witnesses had to attend court in person.

[10] In support of this appeal, Mrs. Yang, who is self represented, says she was surprised by the application to adjourn the matter before Justice Jackson. She did not have notice the application would be made. She did not have enough time to deal with it. She says the adjournment order was unfair and unjust.

[11] It is now a number of years since the adjournment order was made. Ms. Yang recognizes today that is too late to effectively appeal the adjournment order. An appeal of that order would not accomplish anything.

[12] Her main concern is that the court ought not to have fixed costs at $1,000 because the authorities provide that the costs payor—Ms. Yang in this case—must have an opportunity to test the reasonableness of the fees of ordered costs. She says the discretion to award a fixed amount of costs must be exercised sparingly, and the amount of costs not must not be fixed on the rough and ready basis.

2022 BCCA 317 (CanLII)

[13] On February 14, 2020, the respondent filed a motion in support of an order to have the appeal dismissed as one that required leave and leave had not been granted. In the alternative, there was an application for security for costs.

[14] The motion was never heard due to “various scheduling issues”, some of which were a result of Ms. Yang’s prolonged absence from Canada and her refusal to have the motion to strike the appeal determined in any way other than an in person hearing.

[15] In the meantime, the *Court of Appeal Act*, S.B.C. 2021, c. 6, has been amended, *inter alia*, by the addition of s. 21, which provides:

> 21 (1) A justice or the registrar may refer an appeal to the court for summary determination if the justice or registrar considers that the appeal
>
> (a) is frivolous or vexatious, or
>
> (b) can otherwise be dismissed on a summary basis.
>
> (2) On a referral under subsection (1), the court may dismiss all or part of the appeal if the court considers that the appeal meets the criteria set out in subsection (1) (a) or (b).
>
> (3) Before dismissing all or part of an appeal under subsection (2), the court must give the appellant an opportunity to make written submissions or otherwise be heard.

[16] Despite the addition of this provision, the *Court of Appeal Rules*, B.C. Reg. 120/2022, still provide that an application may be made to quash an appeal:

> 60 (1) This rule applies to an application to do one or more of the following:
>
> …
>
> (c) quash an appeal before it is heard.
>
> (2) A party who wishes to apply to do anything referred to in subrule (1) must, at least 7 business days before the application hearing date, file and serve the following documents:
>
> (a) a notice of application in Form 4;
>
> (b) the party's supporting affidavits, if any;
>
> (c) the party's written argument, if any.
>
> ...

2022 BCCA 317 (CanLII)

> (4) Unless a justice or the registrar orders otherwise, an application under this rule must be heard at the time these of the hearing of the appeal.

[17] The respondent has filed a request for a direction pursuant to s. 21 at this case management conference. The respondent asks:

a) What is the appropriate procedure to seek a summary determination under s. 21 of the *Court of Appeal Act*?

b) Does the appellant require leave to pursue this appeal? and

c) Can this appeal be dismissed on a summary basis?

[18] The respondent correctly observes that there is no prescribed procedure for seeking a referral for summary determination, but that it is implicit in s. 21 that the determination is to be based on written submissions and will be made before the hearing of the appeal.

[19] The respondent says the *Act* and *Rules* are unclear on:

a) Whether a party may apply for a summary determination; and

b) If yes, what is the procedure to do so, and in particular:

   i. Whether it <u>requires</u> a chambers application;

   ii. The timing of such an application; and

   iii. What materials are to be submitted for summary determination.

[20] The applicant submits that:

a) A party should be able to apply for consideration for a referral for summary determination.

2022 BCCA 317 (CanLII)

b) As such, there should be flexibility in the method of requesting consideration for a referral, including a chambers application, request to a case management justice, written request, or any other method prescribed by the court.

c) Likewise, there should be flexibility in the materials required for summary determination.

d) A summary determination should be available at any time during an appeal.

[21] In my view, s. 21 establishes a mechanism for a justice or the registrar on their own motion to refer an appeal to the court. For that reason, there is no prescribed mechanism for a party to seek an order from a justice or the registrar that an appeal be referred to the court. An application for an order quashing an appeal is provided for in R. 60. An order may be made setting the motion to quash for hearing before the date set for the hearing of the appeal.

[22] Where a party is of the view that a justice or the registrar should consider a referral pursuant to s. 21, they may request the court to consider making a referral. In my view, a formal application process is not prescribed or warranted because the rule is intended to give the court a means of dismissing appeals on a summary basis, on its own motion, where neither argument nor evidence is necessary to determine that the appeal: (a) is frivolous or vexatious; or (b) can otherwise be dismissed on a summary basis. That is reflected in the fact there is a provision in the *Act* for submissions by the appellant, upon being notified that the court intends to refer a matter, but no provision for submissions by the respondent.

[23] A direction pursuant to s. 21 may be sought and made in case management. Rule 48 provides:

> 48 (1) During case management for an appeal, a justice may make orders or give directions, with or without a party making an application, for the purposes of managing the conduct of the appeal …
>
> (2) During case management, a justice or the registrar may refer a matter to be heard by the court or a justice in chambers if the justice or registrar considers it to be in the interests of justice.

2022 BCCA 317 (CanLII)

[24] The distinction between the orders that may be made under s. 21 and those that may be made on application pursuant to R. 60 is that one is court driven and the other is driven by the parties. A referral may be made where there is an apparent defect in the appeal. An application, on the other hand, is appropriate where evidence or argument is necessary in order to satisfy the court that the appeal is manifestly devoid of substance or merit or so devoid of merit as to constitute an abuse of process. These are the tests described in *Nederland Holdings Inc. v. British Columbia*, 2018 BCCA 373, and *Sangha v. Bhamrah*, 2017 BCCA 434.

[25] In such cases, the *Rules* call for the exchange of supporting affidavits and written arguments.

[26] In my view, it is not appropriate to refer this appeal to a division because the respondent's argument and submissions are necessary in order to determine whether the appeal is bound to fail. Some of the evidence of proceedings, such as Mr. Shen's submissions, for example, to which I have referred, may be necessary in order to address the appellant's argument that costs were fixed inappropriately.

Leave

[27] Section 13(2)(a) of the *Act* requires that leave be granted before an appeal of a limited appeal order may be brought.

[28] Rule 11 of the *Rules* (R. 2.1 of the former *Rules*) defines the categories of limited appeal orders. In particular:

> (e) an order granting or refusing an adjournment or an extension or a shortening of time;
>
> (f) an order granting or refusing costs, or granting or refusing security for costs, if the only matter being appealed is that grant or refusal; ...

[29] In my view, the respondent is correct to say that Justice Jackson's orders to adjourn the hearing and for costs are both limited appeal orders. Neither order may be brought without leave. The appeal of a costs order unrelated to a substantive order (or one that may be appealed without leave) requires leave: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2016 BCCA 311 at paras. 11–12. It now appears that

2022 BCCA 317 (CanLII)

Ms. Yang is intending to advance an appeal of a costs order unrelated to substantive order.

[30] The appellant filed a notice of appeal rather than an application for leave. After receiving the notice, the respondent notified the appellant on or about October 23, 2019, to indicate that leave is required, and again emphasized it verbally on numerous subsequent occasions.

[31] The appellant has not taken any steps to seek leave. The respondent opposes the granting of an extension of time to seek leave. The respondent also opposes the granting of leave.

[32] There is, however, no application for an extension of time to seek leave before me nor an application for leave. Sitting as a case management judge, I cannot hear a leave application. I can only give directions, with or without a party making an application, for the purposes of managing the conduct of the appeal. I therefore direct the appellant to apply for leave to appeal and, if necessary, leave to extend the time within which to do so. I direct that application to be filed within 30 days and set for hearing within 60 days, unless the parties, by consent, agree to vary that schedule.

[33] Such an application will give the respondent an opportunity to argue that the appeal is bound to fail at an early date, before incurring the expense of drafting and filing a factum.

[34] It goes without saying that all other steps in the appeal will be stayed pending the hearing of the application for an extension of time and the application for leave to appeal.

"The Honourable Mr. Justice Willcock"

2022 BCCA 317 (CanLII)

Tab 66

Young v Bristol Aeroplane Company Ltd

Jurisdiction	UK Non-devolved
Court	House of Lords
Judge	Viscount Simon,Lord Russell of Killowen,Lord Macmillan,Lord Porter,Lord Simonds
Judgment Date	29 November 1945
Judgment citation (vLex)	[1945] UKHL J1129-2
Date	29 November 1945

Categories

- Damages and Restitution (https://vlex.co.uk/c/damages-and-restitution)
  - Compensations (https://vlex.co.uk/c/compensations)
- Banking and Finance (https://vlex.co.uk/c/banking-and-finance)
  - Finance and Markets (https://vlex.co.uk/c/finance-and-markets)
- Practice and Procedure (https://vlex.co.uk/c/practice-and-procedure)
  - Court Structure (https://vlex.co.uk/c/court-structure)
- Tort (https://vlex.co.uk/c/tort)

Young
and
Bristol Aeroplane Company Limited
[1945] UKHL J1129-2

Viscount Simon

Lord Russell of Killowen

Lord Macmillan

Lord Porter

Lord Simonds

House of Lords

After hearing Counsel, as well on Tuesday the 24th, as on Wednesday the 25th, Thursday the 26th and Friday the 27th, days of July last upon the Petition and Appeal of Wilfred Young, of 16 Arundel Street, Burnley, in the County of Lancaster, praying, That the matter of the Order set forth in the Schedule thereto, namely, an Order of His Majesty's Court of Appeal of the 28th of July 1944, might be reviewed before His Majesty the King, in His Court of Parliament, and that the said Order might be reversed, varied or altered, or that the Petitioner might have such other relief in the premises as to His Majesty the King, in His Court of Parliament, might seem meet; as also upon the printed Case of Bristol Aeroplane Company, Limited, lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this cause:

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King assembled, That the said Order of His Majesty's Court of Appeal, of the 28th day of July 1944, complained of in the said Appeal, be, and the same is hereby, Affirmed, and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And (by consent) it is hereby Declared, That on the 3d of April 1942, the Appellant received personal injury by accident arising out of and in the course of his employment with the Respondents, and that the Appellant has claimed and received the payments due to him under the Workmen's Compensation Acts, 1925 to 1943, under which the Respondents admit their liability for the incapacity for work caused by the said personal injury, and is earning not less than his average pre-accident weekly earnings computed in accordance with the said Acts, but, inasmuch as it appears that there is a reasonable probability that further incapacity may result in the future from the said personal injury, it is *Ordered*, That, in such event, the Appellant shall be at liberty to apply to the appropriate County Court in accordance with the said Acts for further compensation thereunder: And it is also further *Ordered*, That the Appellant do pay, or cause to be paid, to the said Respondents the Costs incurred by them in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments.

Viscount Simon
My Lords,

1 This is the appeal of the Plaintiff, in an action brought for damages at common law against his employers, the Respondents, for failure to fence dangerous machinery. The appeal is from a unanimous decision of the Court of Appeal reported in [1944] 1 K.B. 718. That Court was specially constituted to hear the Plaintiff's appeal from the judgment given against him by Mr. Commissioner Laski, K.C., at Manchester Assizes. Besides the Master of the Rolls (Lord Greene), who delivered the considered judgment of the whole Court, the Lords Justices Scott, Mackinnon, Luxmoore, Goddard, and du Parcq were parties to the decision. One of the conclusions reached in the judgment of the Master of the Rolls is that if the Court of Appeal, when sitting in one of its Divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the Court, the previous decision must be followed (unless, of course, it was given *per incuriam*, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the Court as usually constituted. Thus, the previous decisions of the Court of Appeal in *Perkins v. Hugh Stevenson & Sons Ltd. (https://vlex.co.uk/vid/perkins-v-hugh-stevenson-807276009)* [1940], 1 K.B. 56 (https://vlex.co.uk/vid/perkins-v-hugh-stevenson-807276009), and *Selwood v. Townley Coal and Fireclay Co. (https://vlex.co.uk/vid/selwood-v-townley-coal-804210453)* [1940], 1 K.B. 180 (https://vlex.co.uk/vid/selwood-v-townley-coal-805351025), upon the correctness of which the Respondents rely, but which the Appellant challenges, could not be overruled in that Court, and since these decisions were held to apply to the present case in a sense adverse to the Appellant, his appeal was necessarily dismissed.

2 The present appeal, therefore, is in substance, a submission that the decisions in *Perkins' (https://vlex.co.uk/vid/perkins-v-hugh-stevenson-807276009)* case and *Selwood's (https://vlex.co.uk/vid/selwood-v-townley-coal-804210453)* case are wrong, or at any rate that they are not conclusive against the Appellant's claim. The question involves the interpretation and application of section 29 (1) of the Workmen's Compensation Actï¿½a section which is in the same form as section 1 (2) (*b*) of the original Act of 1896 and one which has given rise to many difficulties and to a multitude of decisions.

3 That enactment runs as follows:

> *"29.ï¿½(1) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."*

4 Before proceeding further, it is necessary to set out the essential facts in the present case.

5 On April 3rd, 1942, the Appellant lost three fingers of his left hand by amputation while operating a guillotine sheet-metal cutter in the Respondents' factory. It is not in dispute that this accident arose out of and in the course of his employment in such

circumstances as to create a liability in the Respondents to pay compensation for his injury under section 1 of the Act.

6 On April 30th, 1942, the Appellant attended at the Respondents' works and received from a Mr. Howarth whose duty it was to attend, on the Respondents' behalf, to payments under the Workmen's Compensation Act, the sum of £6 15s. od., which amount is equal to the compensation under the Act due to the Appellant for the first four weeks. Thereafter, the Appellant attended at the works and was paid by Mr. Howarth, week after week, the sum of £1 15s. od. till the following October. On each occasion there was put before him a pay-sheet which plainly showed that these were payments under the Workmen's Compensation Act, and how they were calculated. On each occasion the Appellant signed the pay sheet "for payment received." Mr. Commissioner Laski found that the Appellant read the form and understood it, and accepted these payments knowing them to be made as compensation under the Act, though he did not in the first instance "make a claim for compensation 'as such'"

7 In the course of making and receiving these weekly payments, viz. on July 24th, 1942 (and apparently after the Respondents had been prosecuted and convicted for failing to fence the machineiy which had injured the Appellant), the Appellant's Solicitor wrote on his behalf claiming "compensation under the Workmen's Compensation Act and, alternatively, claiming damages". The Respondents replied admitting liability under the Act only, and pointed out that the Appellant "has been in receipt of compensation since his cessation of work following the injuries".

8 Notwithstanding this correspondence in July, the Appellant continued to draw his weekly compensation and the learned Commissioner finds (*a*) that the Appellant between the time of the accident and July "did not know that he had a right under Section 29 (1) of the Workmen's Compensation Act to elect as between two alternative remedies", and (*b*) inferentially, that he *did* know after July 24th, but nevertheless went on drawing his compensation money. Consequently, the learned Commissioner, following *Perkins' (https://vlex.co.uk/vid/perkins-v-hugh-stevenson-807276009)* case, felt constrained to hold that the option to sue independently of the Act had gone.

9 In *Perkins' (https://vlex.co.uk/vid/perkins-v-hugh-stevenson-807276009)* case, the injured workman had actually applied to his employers for compensation under the Act and was paid weekly sums accordingly for about a year, after which no further compensation was due as he had recovered from his injuries. About two months after the accident, however, his solicitor had written referring to his alternative claim apart from the Act and attempted unsuccessfully to secure that the weekly payments should be regarded as being made without prejudice to the alternative claim. The Court of Appeal held that mis alternative claim was barred, because from the date of the solicitor's letter the workman must be regarded as having material for exercising his "option" and as having exercised it; the employer had already been made liable under the Act and had paid in full all that the Act prescribed and could not, therefore, be also liable independently of the Act.

10 It is true that in the course of his judgment the Master of the Rolls expressed the view, at page 66, that "where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or *pro tanto*, the statutory liability under the Act", and Finlay L.J. appears to agree with him. But this view is not essential to the decision, and the Master of the Rolls goes on to point out that in that case the workman has in fact exercised his

option. The actual decision can be supported by reason of that circumstance, apart from the fact that the workman had claimed and received compensation without knowledge that another remedy was available to him if he chose to adopt it.

11 In *Selwood's (https://vlex.co.uk/vid/selwood-v-townley-coal-804210453)* case, the workman had made no application for compensation, but he had received a number of weekly sums from his employers which were, as he knew, payments under the Act. Later, and while still gravely incapacitated, he...

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Singapore **High Court (Singapore)** **3 November 2010**

... ... [1968-1970] SLR(R) 851 and Young v Bristol ... Aeroplane [1944] 1 KB 718. I do ... ...

Zuliaha Selamat and Another v Majlis Amanah Rakyat and Another (https://my.vlex.com/vid/zuliaha-selamat-and-another-1067058961)

Malaysia **High Court (Malaysia)** **1 January 2023**

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6 February 2019

...intention of rejecting." See: Lissenden v. C.A.V. Bosch Ltd. (1940) A.C 412 at 418 - 419 per Lord Maugham. Young v. Bristol Aeroplane Co. (1946) A.C 163 Lord Atkin. See also Banning v. Wright (1972) 1 W.L.R. 972 at 979 per Lord Hailsham. The defence of waiver is only available on a plea of .....

LAYANJU V. ARAOYE (https://ng.vlex.com/vid/layanju-v-araoye-914265535)

...Bristol Aeroplane Co. 1.td. (1944) K.B. 718; (1944) 2 All E.R. 293; 113 L.J.K.B. 513; 171 L.T. 113; (;0 T.L.R. 536; 88 Sol.J 332; affd. (1946) A.C. 163. 2. Osumanu v. Seidu, 1949, 12 W.A.C.A., 437. 30 3. Lagunju v. Olubadan in Council, 12 W.A.C.A., 223 and 406. Adekunle for Appellant. Thann.....

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