Divisional Court File No.: 533/77
Court File No. CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

BETWEEN:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff/Respondent

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants/Appellants

BOOK OF AUTHORITIES OF THE RESPONDING PARTY
(Appeal of Interlocutory Mareva Injunction)

April 30, 2018

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Defendant

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Google Inc. v. Equustek Solutions Inc.

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Google Inc. (Appellant) and Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. (Respondents) and Attorney General of Canada, Attorney General of Ontario, Canadian Civil Liberties Association, OpenMedia Engagement Network, Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (formerly known as Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association, Society of Professional Journalists, Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, Center for Technology and Society, Wikimedia Foundation, British Columbia Civil Liberties Association, Electronic Frontier Foundation, International Federation of the Phonographic Industry, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, International Confederation of Societies of Authors and Composers, International Confederation of Music Publishers, Worldwide Independent Network and International Federation of Film Producers Associations (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: December 6, 2016

Judgment: June 28, 2017
Docket: 36602

Proceedings: affirming *Equustek Solutions Inc. v. Jack* (2015), 135 C.P.R. (4th) 173, [2015] 11 W.W.R. 45, 386 D.L.R. (4th) 224, 2015 CarswellBC 1590, 2015 BCCA 265, 641 W.A.C. 240, 373 B.C.A.C. 240, 39 B.L.R. (5th) 175, 75 B.C.L.R. (5th) 315, 71 C.P.C. (7th) 215, Frankel J.A., Groberman J.A., Harris J.A. (B.C. C.A.); affirming *Equustek Solutions Inc. v. Jack* (2014), [2014] B.C.J. No. 1190, 28 B.L.R. (5th) 265, 63 B.C.L.R. (5th) 145, 2014 BCSC 1063, 2014 CarswellBC 1694, [2014] 10 W.W.R. 652, 374 D.L.R. (4th) 537, L.A. Fenlon J. (B.C. S.C.)

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Cynthia Khoo, for Intervener, the OpenMedia Engagement Network
Iris Fischer, Helen Richards (written), for Interveners, the Reporters Committee, for Freedom of the Press, the American Society of News Editors, the Association of Alternative Newsmedia, The Center, for Investigative Reporting, Dow Jones & Company, Inc., the First Amendment Coalition, First Look Media Works, Inc., the New England First Amendment Coalition, the News Media Alliance (formerly known as the Newspaper Association of America), AOL Inc., the California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, the Online News Association and the Society of Professional Journalists
Paul Schabas, Kaley Pulfer (written), for Interveners, Human Rights Watch, ARTICLE 19, Open Net (Korea), the Software Freedom Law Centre and the Center, for Technology and Society
David T.S. Fraser, Jane O'Neill (written), for Intervener, the Wikimedia Foundation
Justin Safayeni, Carlo Di Carlo, for Intervener, the British Columbia Civil Liberties Association
David Wotherspoon, Daniel Byma, for Intervener, the Electronic Frontier Foundation
Dan Glover, Miranda Lam, for Interveners, the International Federation of the Phonographic Industry, Music Canada, the Canadian Publishers' Council, the Association of Canadian Publishers, the International Confederation of Societies of Authors and Composers, the International Confederation of Music Publishers and the Worldwide Independent Network
Gavin MacKenzie, Brooke MacKenzie, for Intervener, the International Federation of Film Producers Associations

Subject: Civil Practice and Procedure; Constitutional; Corporate and Commercial; International; Property; Torts; Human Rights

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APPEAL from judgment reported at *Equustek Solutions Inc. v. Jack* (2015), 2015 BCCA 265, 2015 CarswellBC 1590, 386 D.L.R. (4th) 224, 71 C.P.C. (7th) 215, [2015] 11 W.W.R. 45, 39 B.L.R. (5th) 175, 75 B.C.L.R. (5th) 315, 373 B.C.A.C. 240, 641 W.A.C. 240, 135 C.P.R. (4th) 173, [2015] B.C.J. No. 1193 (B.C. C.A.), affirming granting of injunction with extraterritorial effect against non-party.

POURVOI formé à l'encontre d'un jugement publié à *Equustek Solutions Inc. v. Jack* (2015), 2015 BCCA 265, 2015 CarswellBC 1590, 386 D.L.R. (4th) 224, 71 C.P.C. (7th) 215, [2015] 11 W.W.R. 45, 39 B.L.R. (5th) 175, 75 B.C.L.R. (5th) 315, 373 B.C.A.C. 240, 641 W.A.C. 240, 135 C.P.R. (4th) 173, [2015] B.C.J. No. 1193 (B.C. C.A.), ayant confirmé l'octroi d'une injonction ayant des effets extraterritoriaux à l'encontre d'un tiers.

Abella J. **(McLachlin C.J.C., Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. concurring):**

1 The issue in this appeal is whether Google can be ordered, pending a trial, to globally de-index the websites of a company which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company. The answer turns on classic interlocutory injunction jurisprudence: is there a serious issue to be tried; would irreparable harm result if the injunction were not granted; and does the balance of convenience favour granting or refusing the injunction. Ultimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case.

Background

2 Equustek Solutions Inc. is a small technology company in British Columbia. It manufactures networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.

3 The underlying action between Equustek and the Datalink defendants (Morgan Jack, Datalink Technology Gateways Inc., and Datalink Technologies Gateways LLC - "Datalink") was launched by Equustek on April 12, 2011. It claimed that Datalink, while acting as a distributor of Equustek's products, began to re-label one of the products and pass it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product, the GW1000. Any orders for Equustek's product were filled with the GW1000. When Equustek discovered this in 2011, it terminated the distribution agreement it had with Datalink and demanded that Datalink delete all references to Equustek's products and trademarks on its websites.

4 The Datalink defendants filed statements of defence disputing Equustek's claims.

5 On September 23, 2011, Leask J. granted an injunction ordering Datalink to return to Equustek any source codes, board schematics, and any other documentation it may have had in its possession that belonged to Equustek. The court also prohibited Datalink from referring to Equustek or any of Equustek's products on its websites. It ordered Datalink to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek products and directing customers interested in Equustek's products to Equustek's website. In addition, Datalink was ordered to give Equustek a list of customers who had ordered an Equustek product from Datalink.

6 On March 21, 2012, Fenlon J. found that Datalink had not properly complied with this order and directed it to produce a new customer list and make certain changes to the notices on their websites.

7 Datalink abandoned the proceedings and left the jurisdiction without producing any documents or complying with any of the orders. Some of Datalink's statements of defence were subsequently struck.

8 On July 26, 2012, Punnett J. granted a *Mareva* injunction freezing Datalink's worldwide assets, including its entire product inventory. He found that Datalink had incorporated "a myriad of shell corporations in different jurisdictions", continued to sell the impugned product, reduced prices to attract more customers, and was offering additional services that Equustek claimed disclosed more of its trade secrets. He concluded that Equustek would suffer irreparable harm if the injunction were not granted, and that, on the balance of convenience and due to a real risk of the dissipation of assets, it was just and equitable to grant the injunction against Datalink.

9 On August 3, 2012, Fenlon J. granted another interlocutory injunction prohibiting Datalink from dealing with broader classes of intellectual property, including "any use of whole categories of documents and information that lie at the heart of any business of a kind engaged in by both parties". She noted that Equustek's "earnings ha[d] fallen drastically since [Datalink] began [its] impugned activities" and concluded that "the effect of permitting [Datalink] to carry on [its] business [would] also cause irreparable harm to [Equustek]".

10 On September 26, 2012, Equustek brought an application to have Datalink and its principal, Morgan Jack, found in contempt. No one appeared on behalf of Datalink. Groves J. issued a warrant for Morgan Jack's arrest. It remains outstanding.

11 Despite the court orders prohibiting the sale of inventory and the use of Equustek's intellectual property, Datalink continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world.

12 Not knowing where Datalink or its suppliers were, and finding itself unable to have the websites removed by the websites' hosting companies, Equustek approached Google in September 2012 and requested that it de-index the Datalink websites. Google refused. Equustek then brought court proceedings seeking an order requiring Google to do so.

13 When it was served with the application materials, Google asked Equustek to obtain a court order prohibiting Datalink from carrying on business on the Internet. Google told Equustek it would comply with such an order by removing specific webpages. Pursuant to its internal policy, Google only voluntarily de-indexes individual webpages, not entire websites. Equustek agreed to try this approach.

14 On December 13, 2012, Equustek appeared in court with Google. An injunction was issued by Tindale J. ordering Datalink to "cease operating or carrying on business through

any website". Between December 2012 and January 2013, Google advised Equustek that it had de-indexed 345 specific webpages associated with Datalink. It did not, however, de-index *all* of the Datalink websites.

15 Equustek soon discovered that de-indexing webpages but not entire websites was ineffective since Datalink simply moved the objectionable content to new pages within its websites, circumventing the court orders.

16 Google had limited the de-indexing to those searches that were conducted on google.ca. Google's search engine operates through dedicated websites all over the world. The Internet search services are free, but Google earns money by selling advertising space on the webpages that display search results. Internet users with Canadian Internet Protocol addresses are directed to "google.ca" when performing online searches. But users can also access different Google websites directed at other countries by using the specific Uniform Resource Locator, or URL, for those sites. That means that someone in Vancouver, for example, can access the Google search engine as though he or she were in another country simply by typing in that country's Google URL. Potential Canadian customers could, as a result, find Datalink's websites even if they were blocked on google.ca. Given that the majority of the sales of Datalink's GW1000 were to purchasers outside of Canada, Google's de-indexing did not have the necessary protective effect.

17 Equustek therefore sought an interlocutory injunction to enjoin Google from displaying any part of the Datalink websites on any of its search results worldwide. Fenlon J. granted the order ((2014), 374 D.L.R. (4th) 537 (B.C. S.C.)). The operative part states:

> Within 14 days of the date of this order, Google Inc. is to cease indexing or referencing in search results on its internet search engines the [Datalink] websites ..., including all of the subpages and subdirectories of the listed websites, *until the conclusion of the trial of this action or further order of this court.*
>
> [Emphasis added]

18 Fenlon J. noted that Google controls between 70-75 percent of the global searches on the Internet and that Datalink's ability to sell its counterfeit product is, in large part, contingent on customers being able to locate its websites through the use of Google's search engine. Only by preventing potential customers from accessing the Datalink websites, could Equustek be protected. Otherwise, Datalink would be able to continue selling its product online and the damages Equustek would suffer would not be recoverable at the end of the lawsuit.

19 Fenlon J. concluded that this irreparable harm was being facilitated through Google's search engine; that Equustek had no alternative but to require Google to de-index the websites; that Google would not be inconvenienced; and that, for the order to be effective,

the Datalink websites had to be prevented from being displayed on all of Google's search results, not just google.ca. As she said:

> On the record before me it appears that to be effective, even within Canada, Google must block search results on all of its websites. Furthermore, [Datalink's] sales originate primarily in other countries, so the Court's process cannot be protected unless the injunction ensures that searchers from any jurisdiction do not find [Datalink's] websites. [1]

20 The Court of Appeal of British Columbia dismissed Google's appeal ((2015), 386 D.L.R. (4th) 224 (B.C. C.A.)). Groberman J.A. accepted Fenlon J.'s conclusion that she had *in personam* jurisdiction over Google and could therefore make an order with extraterritorial effect. He also agreed that courts of inherent jurisdiction could grant equitable relief against non-parties. Since ordering an interlocutory injunction against Google was the only practical way to prevent Datalink from flouting the court's several orders, and since there were no identifiable countervailing comity or freedom of expression concerns that would prevent such an order from being granted, he upheld the interlocutory injunction.

21 For the following reasons, I agree with Fenlon J. and Groberman J.A. that the test for granting an interlocutory injunction against Google has been met in this case.

Analysis

22 The decision to grant an interlocutory injunction is a discretionary one and entitled to a high degree of deference (*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 155-56). In this case, I see no reason to interfere.

23 Injunctions are equitable remedies. "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited" (Ian Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333). Robert Sharpe notes that "[t]he injunction is a flexible and drastic remedy. Injunctions are not restricted to any area of substantive law and are readily enforceable through the court's contempt power" (*Injunctions and Specific Performance* (loose-leaf ed.), at para. 2.10).

24 An interlocutory injunction is normally enforceable until trial or some other determination of the action. Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits (Jeffrey Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 24-25). Their character as "interlocutory" is not dependent on their duration pending trial.

25 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

26 Google does not dispute that there is a serious claim. Nor does it dispute that Equustek is suffering irreparable harm as a result of Datalink's ongoing sale of the GW1000 through the Internet. And it acknowledges, as Fenlon J. found, that it inadvertently facilitates the harm through its search engine which leads purchasers directly to the Datalink websites.

27 Google argues, however, that the injunction issued against it is not necessary to prevent that irreparable harm, and that it is not effective in so doing. Moreover, it argues that as a non-party, it should be immune from the injunction. As for the balance of convenience, it challenges the propriety and necessity of the extraterritorial reach of such an order, and raises freedom of expression concerns that it says should have tipped the balance against granting the order. These arguments go both to whether the Supreme Court of British Columbia had jurisdiction to grant the injunction and whether, if it did, it was just and equitable to do so in this case.

28 Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this Court said in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.), injunctions may be issued "'in all cases in which it appears to the court to be just or convenient that the order should be made ... on terms and conditions the court thinks just'" (para. 15, citing *s. 36* of the *Law and Equity Act*, R.S.B.C. 1979, c. 224). *MacMillan Bloedel Ltd.* involved a logging company seeking to restrain protesters from blocking roads. The company obtained an interlocutory injunction prohibiting not only specifically named individuals, but also "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] order" from engaging in conduct which interfered with its operations at specific locations. In upholding the injunction, McLachlin J. noted that

> [i]t may be confidently asserted ... *that both English and Canadian authorities support the view that non-parties are bound by injunctions*: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey.
>
> [Emphasis added; para. 31]

See also Berryman, at pp. 57-60; Sharpe, at paras. 6.260 to 6.265.

29 In other words, where a non-party violates a court order, there is a principled basis for treating the non-party as if it had been bound by the order. The non-party's obligation arises "not because [it] is bound by the injunction by being a party to the cause, but because [it] is conducting [itself] so as to obstruct the course of justice" (*MacMillan Bloedel Ltd.*, at para. 27, quoting *Seaward v. Paterson*, [1897] 1 Ch. 545 (Eng. C.A.), at p. 555).

30 The pragmatism and necessity of such an approach was concisely explained by Fenlon J. in the case before us when she offered the following example:

> ... a non-party corporation that warehouses and ships goods for a defendant manufacturing company might be ordered on an interim injunction to freeze the defendants' goods and refrain from shipping them. That injunction could affect orders received from customers around the world. Could it sensibly be argued that the Court could not grant the injunction because it would have effects worldwide? The impact of an injunction on strangers to the suit or the order itself is a valid consideration in deciding whether to exercise the Court's jurisdiction to grant an injunction. It does not, however, affect the Court's authority to make such an order. [2]

31 *Norwich* orders are analogous and can also be used to compel non-parties to disclose information or documents in their possession required by a claimant (*Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.), at p. 175). *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator (*York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755 (Ont. S.C.J.)). *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich Pharmacal Co.*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.* (2016), [2017] 1 All E.R. 700 (Eng. C.A.), at para. 53). *Norwich Pharmacal Co.* supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier International AG*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF* (2015), 144 B.M.L.R. 194 (Eng. Patents Ct.)).

32 This approach was applied in *Cartier International AG*, where the Court of Appeal of England and Wales held that injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access

certain websites in order to avoid facilitating infringements of the plaintiff's trademarks. (See also Jaani Riordan, *The Liability of Internet Intermediaries* (2016), at pp. 412 and 498-99.)

33 The same logic underlies *Mareva* injunctions, which can also be issued against non-parties. *Mareva* injunctions are used to freeze assets in order to prevent their dissipation pending the conclusion of a trial or action (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (Eng. C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). A *Mareva* injunction that requires a defendant not to dissipate his or her assets sometimes requires the assistance of a non-party, which in turn can result in an injunction against the non-party if it is just and equitable to do so (Stephen Pitel and Andrew Valentine, "The Evolution of the Extra-territorial *Mareva* Injunction in Canada: Three Issues" (2006), 2 J. Priv. Int'l L. 339, at p. 370; Vaughan Black and Edward Babin, "Mareva Injunctions in Canada: Territorial Aspects" (1997), 28 *Can. Bus. L.J.* 430, at pp. 452-53; Berryman, at pp. 128-31). Banks and other financial institutions have, as a result, been bound by *Mareva* injunctions even when they are not a party to an underlying action.

34 To preserve Equustek's rights pending the outcome of the litigation, Tindale J.'s order of December 13, 2012 required Datalink to cease carrying on business through the Internet. Google had requested and participated in Equustek's obtaining this order, and offered to comply with it voluntarily. It is common ground that Datalink was unable to carry on business in a commercially viable way unless its websites were in Google's search results. In the absence of de-indexing these websites, as Fenlon J. specifically found, Google was facilitating Datalink's breach of Tindale J.'s order by enabling it to continue carrying on business through the Internet. By the time Fenlon J. granted the injunction against Google, Google was aware that in not de-indexing Datalink's websites, it was facilitating Datalink's ongoing breach of Tindale J.'s order, the purpose of which was to prevent irreparable harm to Equustek.

35 Much like a *Norwich* order or a *Mareva* injunction against a non-party, the interlocutory injunction in this case flows from the necessity of Google's assistance in order to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

36 Google's next argument is the impropriety of issuing an interlocutory injunction with extraterritorial effect. But this too contradicts the existing jurisprudence.

37 The British Columbia courts in these proceedings concluded that because Google carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of *in personam* and territorial jurisdiction. Google does not challenge those findings. It challenges instead the global reach of the resulting order.

Google suggests that if any injunction is to be granted, it should be limited to Canada (or google.ca) alone.

38 When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world. (See *Transat Tours Canada Inc. v. Tescor, S.A. de C.V.*, [2007] 1 S.C.R. 867 (S.C.C.), at para. 6; Berryman, at p. 20; Pitel and Valentine, at p. 389; Sharpe, at para. 1.1190; Spry, at p. 37.) *Mareva* injunctions have been granted with worldwide effect when it was found to be necessary to ensure their effectiveness. (See *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (B.C. S.C. [In Chambers]); Berryman, at pp. 20 and 136; *Babanaft International Co. SA v. Bassatne* (1989), [1990] Ch. 13 (Eng. C.A.); *Haiti (Republic of) v. Duvalier* (1988), [1990] 1 Q.B. 202 (Eng. C.A.); *Derby & Co. v. Weldon* (1988), [1990] Ch. 48 (Eng. C.A.); and *Derby & Co. v. Weldon (Nos. 3 & 4)* (1988), [1990] Ch. 65 (Eng. C.A.); Sharpe, at paras. 1.1190 to 1.1220.)

39 Groberman J.A. pointed to the international support for this approach:

> I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. Several such cases are cited in the arguments of [International Federation of Film Producers Associations and International Federation of the Phonographic Industry], including *APC v. Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grande Instance de Paris); *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grande Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog https://inforrm.wordpress.com/2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/) and *ECJ Google Spain SL, Google Inc. v. Agencia EspaÑola de Protección de Datos*, Mario Costeja González, C-131/12 [2014], CURIA. [3]

40 Fenlon J. explained why Equustek's request that the order have worldwide effect was necessary as follows:

> The majority of GW1000 sales occur outside Canada. Thus, quite apart from the practical problem of endless website iterations, the option Google proposes is not equivalent to the order now sought which would compel Google to remove the [Datalink] websites from all search results generated by any of Google's websites worldwide. I therefore conclude that [Equustek does] not have an out-of-court remedy available to [it]. [4]

. . . . .

> ... to be effective, even within Canada, Google must block search results on all of its websites. [5]

As a result, to ensure that Google did not facilitate Datalink's breach of court orders whose purposes were to prevent irreparable harm to Equustek, she concluded that the injunction had to have worldwide effect.

41 I agree. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.

42 The interlocutory injunction in this case is necessary to prevent the irreparable harm that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation. The order targets Datalink's websites — the list of which has been updated as Datalink has sought to thwart the injunction — and prevents them from being displayed where they do the most harm: on Google's global search results.

43 Nor does the injunction's worldwide effect tip the balance of convenience in Google's favour. The order does not require that Google take any steps around the world, it requires it to take steps only where its search engine is controlled. This is something Google has acknowledged it can do — and does — with relative ease. There is therefore no harm to Google which can be placed on its "inconvenience" scale arising from the global reach of the order.

44 Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted, "Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong". [6]

45 And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A. concluded:

> In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.
>
> ... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem. [7]

46 If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.

47 In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google.

48 This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.

49 And I have trouble seeing how this interferes with what Google refers to as its content neutral character. The injunction does not require Google to monitor content on the Internet, nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily". [8] Even if it could be said that the injunction engages freedom of expression

issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders.

50 Google did not suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing the Datalink websites. It acknowledges, fairly, that it can, and often does, exactly what is being asked of it in this case, that is, alter search results. It does so to avoid generating links to child pornography and websites containing "hate speech". It also complies with notices it receives under the *US Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2680 (1998) to de-index content from its search results that allegedly infringes copyright, and removes websites that are subject to court orders.

51 As for the argument that this will turn into a permanent injunction, the length of an interlocutory injunction does not, by itself, convert its character from a temporary to a permanent one. As previously noted, the order requires that the injunction be in place "until the conclusion of the trial of this action or further order of this court". There is no reason not to take this order at face value. Where an interlocutory injunction has been in place for an inordinate amount of time, it is always open to a party to apply to have it varied or vacated. Google has brought no such application.

52 Datalink and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. Equustek has made efforts to locate Datalink with limited success. Datalink is only able to survive — at the expense of Equustek's survival — on Google's search engine which directs potential customers to its websites. In other words, Google is how Datalink has been able to continue harming Equustek in defiance of several court orders.

53 This does not make Google liable for this harm. It does, however, make Google the determinative player in allowing the harm to occur. On balance, therefore, since the interlocutory injunction is the only effective way to mitigate the harm to Equustek pending the resolution of the underlying litigation, the only way, in fact, to preserve Equustek itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

54 I would dismiss the appeal with costs in this Court and in the Court of Appeal for British Columbia.

***Côté, Rowe JJ.* (dissenting):**

55 Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. ("Equustek") seek a novel form of equitable relief — an effectively permanent injunction, against an innocent third party, that requires court supervision, has not been shown to be effective, and for

which alternative remedies are available. Our response calls for judicial restraint. While the court had jurisdiction to issue the June 13, 2014 order against Google Inc. ("Google Order") (2014 BCSC 1063, 374 D.L.R. (4th) 537 (B.C. S.C.), per Fenlon J.), in our view it should have refrained from doing so. The authority to grant equitable remedies has always been constrained by doctrine and practice. In our view, the Google Order slipped too easily from these constraints.

56 As we will explain, the Google Order is effectively final redress against a non-party that has neither acted unlawfully, nor aided and abetted illegal action. The test for interlocutory injunctions established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), does not apply to an order that is effectively final, and the test for a permanent injunction has not been satisfied. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and there are alternative remedies available to Equustek.

I. Judicial Restraint

57 The power of a court to grant injunctive relief is derived from that of the Chancery courts of England (*Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087 (U.K. H.L.), at para. 30), and has been confirmed in British Columbia by the *Law and Equity Act*, R.S.B.C. 1996, c. 253, *s. 39(1)*:

> **39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

58 In *Fourie*, Lord Scott explained that "provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it" (para. 30). However, simply because a court has the jurisdiction to grant an injunction does not mean that it should. A court "will not according to its settled practice do so except in a certain way and under certain circumstances" (Lord Scott, at para. 25, quoting from *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 (Eng. K.B.), at p. 563; see also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354, [2015] 1 All E.R. 949 (Eng. Ch. Div.), at paras. 98-100). Professor Spry comes to similar conclusions (I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333):

> The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. [Footnote omitted.]

59 The importance of appropriately modifying judicial restraint to meet the needs of justice was summarized by Lord Nicholls in *Mercedes-Benz AG v. Leiduck* (1995), [1996] A.C. 284 (Hong Kong P.C.), at p. 308: "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice."

60 Changes to "settled practice" must not overshoot the mark of avoiding injustice. In our view, granting the Google Order requires changes to settled practice that are not warranted in this case: neither the test for an interlocutory nor a permanent injunction has been met; court supervision is required; the order has not been shown to be effective; and alternative remedies are available.

II. Factors Suggesting Restraint in This Case

A. The Effects of the Google Order Are Final

61 In *RJR-MacDonald Inc.*, this Court set out the test for interlocutory injunctions — a serious question to be tried, irreparable harm, and the balance of convenience — but also described an exception (at pp. 338-39):

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.
>
> . . . . .
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.
>
> [Emphasis added.]

62 In our view, the Google Order "in effect amount[s] to a final determination of the action" because it "remove[s] any potential benefit from proceeding to trial". In order to understand this conclusion, it is useful to review Equustek's underlying claim. Equustek sought, in its Further Amended Notice of Civil Claim against Datalink, damages, declarations, and:

> A temporary and permanent injunction restraining the Defendants from:

> a. using the Plaintiffs' trademarks and free-riding on the goodwill of any Equustek products on any website;
>
> b. making statements disparaging or in any way referring to the Equustek products;
>
> c. distributing the offending manuals and displaying images of the Plaintiff's products on any website; and
>
> d. selling the GW1000 line of products which were created by the theft of the Plaintiff's trade secrets;
>
> and obliging them to:
>
> e. immediately disclose all hidden websites;
>
> f. display a page on all websites correcting [their] misrepresentations about the source and continuing availability of the Equustek products and directing customers to Equustek.

In short, Equustek sought injunctions modifying the way in which Datalink carries out its website business, along with damages and declarations. On June 20, 2012, Datalink's response was struck and Equustek was given leave to apply for default judgment. It has not done so. On December 13, 2012, Justice Tindale ordered that

> [t]he Defendants Morgan Jack, Datalink Technologies Gateways Inc. and Datalink Technologies Gateways LLC (the "Datalink Defendants") cease operating or carrying on business through any website, including those contained in Schedule "A" and all associated pages, subpages and subdirectories, and that these Defendants immediately take down all such websites, until further order of this court. ["December 2012 Order"]

The December 2012 Order gives Equustek *more* than the injunctive relief it sought in its originating claim. Rather than simply ordering the modification of Datalink websites, the December 2012 Order requires the ceasing of website business altogether. In our view, little incentive remains for Equustek to return to court to seek a lesser injunctive remedy. This is evidenced by Equustek's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so.

63 As for the Google Order, it provides Equustek with an additional remedy, beyond the December 2012 Order and beyond what was sought in its original claim. In our view, granting of the Google Order further erodes any remaining incentive for Equustek to proceed with the underlying action. The effects of the Google Order are final in nature. Respectfully, the

pending litigation assumed by our colleague Abella J. is a fiction. The Google Order, while interlocutory in form, is final in effect. Thus, it gives Equustek more relief than it sought.

64 Procedurally, Equustek requested an interlocutory order in the course of its litigation with Datalink. While Equustek's action against Datalink could technically endure indefinitely (G.P. Fraser, J.W. Horn and S.A. Griffin, *The Conduct of Civil Litigation in British Columbia* (2nd ed. (loose-leaf)), at § 14.1) — and thus the interlocutory status of the injunction could technically endure indefinitely — it does not follow that the Google Order should be considered interlocutory. Courts of equity look to substance over form, because "a dogged devotion to form has often resulted in injustice" (*John Deere Ltd. v. Firdale Farms Ltd. (Receiver of)* (1987), 45 D.L.R. (4th) 641 (Man. C.A.), at p. 645). In *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698 (Eng. Rolls Ct.), at p. 701, Lord Romilly explained it thus:

> ... Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and, if [they do] find that by insisting on the form, the substance will be defeated, [they hold] it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.

In our view, the substance of the Google Order amounts to a final remedy. As such, it provides Equustek with more equitable relief than it sought against Datalink, and amounts to final resolution via Google. It is, in effect, a permanent injunction.

65 Following *RJR-MacDonald Inc.* (at pp. 338-39), an extensive review of the merits is therefore required at the first stage of the analysis (*Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680 (B.C. C.A.), at paras. 26-27). Yet this was not done. When Justice Fenlon considered Equustek's application for an interim injunction enjoining Google to cease indexing or referencing Datalink's websites, she did not conduct an extensive review of the merits. She did however note that Equustek had raised an arguable case, and that Datalink was presumed to have admitted the allegations when its defenses were struck (para. 151). The rule is not immutable that if a statement of defense is struck, the defendant is deemed to have admitted the allegations contained in the statement of claim. While the facts relating to Datalink's liability are deemed to be admitted, the court can still exercise its discretion in assessing Equustek's claims (*McIsaac v. Healthy Body Services Inc.*, 2009 BCSC 1716 (B.C. S.C.), at paras. 42 and 44 (CanLII); *Plouffe v. Roy* [2007 CarswellOnt 5739 (Ont. S.C.J.)], 2007 CanLII 37693, at para. 53; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140 (Alta. C.A.), at p. 143). Equustek has avoided such an assessment. Thus, an extensive review of the merits was not carried out.

66 The Google Order also does not meet the test for a permanent injunction. To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant

an injunction (*1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643 (Ont. C.A.), at paras. 74-80; Spry, at pp. 395 and 407-8). Equustek has shown the inadequacy of damages (damages are ascertainable but unlikely to be recovered, and the wrong is continuing). However, in our view, it is unclear whether the first element of the test has been met. Equustek's claims were supported by a good *prima facie* case, but it was not established that Datalink designed and sold counterfeit versions of its product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

67 In any case, the discretionary factors affecting the grant of an injunction strongly favour judicial restraint. As we will outline below, the Google Order enjoins a non-party, yet Google has not aided or abetted Datalink's wrongdoing; it holds no assets of Equustek's, and has no information relevant to the underlying proceedings. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and Equustek has alternative remedies.

B. Google Is a Non-Party

68 A court order does not "technically" bind non-parties, but "anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court" (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.), at paras. 23 and 27). In *MacMillan Bloedel Ltd.*, the injunction prohibiting named individuals from blocking a logging road also caused non-parties to face contempt proceedings for doing the act prohibited by the injunction.

69 The instant case is not one where a non-party with knowledge of a court order deliberately disobeyed it and thereby deprecated the court's authority. Google did not carry out the act prohibited by the December 2012 Order. The act prohibited by the December 2012 Order is Datalink "carrying on business through any website". That act occurs whenever Datalink launches websites to carry out business — not when other parties, such as Google, make it known that such websites exist.

70 There is no doubt that non-parties also risk contempt proceedings by aiding and abetting the doing of a prohibited act (*Seaward v. Paterson*, [1897] 1 Ch. 545 (Eng. C.A.); D. Bean, A. Burns and I. Parry, *Injunctions* (11th ed. 2012), at para. 9-08). Lord Denning said in *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (Eng. C.A.), at p. 1682:

> It has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who, knowing of an injunction, aids and abets the defendant in breaking it. The reason is that by aiding and abetting the defendant, he is obstructing the course of justice.

71 In our view, Google did not aid or abet the doing of the prohibited act. Equustek alleged that Google's search engine was facilitating Datalink's ongoing breach by leading customers to Datalink websites (Fenlon J.'s reasons, at para. 10). However, the December 2012 Order was to cease carrying on business through any website. That Order was breached as soon as Datalink established a website to conduct its business, regardless of how visible that website might be through Google searches. If Equustek's argument were accepted, the scope of "aids and abets" would, in our view, become overbroad. It might include the companies supplying Datalink with the material to produce the derivative products, the companies delivering the products, or as Google argued in its factum, it might also include the local power company that delivers power to Datalink's physical address. Critically, Datalink breached the December 2012 Order simply by launching websites to carry out business, regardless of whether Google searches ever reveal the websites.

72 We agree with our colleague Justice Abella that *Mareva* injunctions and *Norwich* orders can operate against non-parties. However, we respectfully disagree that the Google Order is similar in nature to those remedies. *Mareva* injunctions are granted to freeze assets until the completion of a trial — they do not enforce a plaintiff's substantive rights (*Mercedes-Benz AG*, at p. 302). In contrast, the Google Order enforces Equustek's asserted intellectual property rights by seeking to minimize harm to those rights. It does not freeze Datalink's assets (and, in fact, may erode those assets).

73 *Norwich* orders are made to compel information from third parties. In *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.), at p. 175, Lord Reid identified

> a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

Lord Reid found that "without certain action on [Customs'] part the infringements could never have been committed" (at 174). In spite of this finding, the court did not require Customs to take specific action to prevent importers from infringing the patent of Norwich Pharmacal; rather the court issued a limited order compelling Customs to disclose the names of importers. In *Cartier International AG*, the court analogized from *Norwich Pharmacal Co.* to support an injunction requiring Internet service providers ("ISPs") to block access to trademark-infringing websites because "it is via the ISPs' services" that customers view and purchase the infringing material (para. 155). That injunction did not extend to parties merely assisting in finding the websites.

74 In the case at bar, we are of the view that Google does not play a role in Datalink's breach of the December 2012 Order. Whether or not the December 2012 Order is violated does not hinge on the degree of success of the prohibited website business. Rather, the December 2012 Order is violated merely by Datalink conducting business through a website, regardless of the visibility of that website or the number of customers that visit the website. Thus Google does not play a role analogous to Customs in *Norwich Pharmacal Co.* nor the ISPs in *Cartier International AG*. And unlike the order in *Norwich Pharmacal Co.*, the Google Order compels positive action aimed at the illegal activity rather than simply requiring the provision of information to the court.

C. The Google Order Is Mandatory

75 While the distinction between mandatory and prohibitive injunctions has been questioned (see *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20), courts have rightly, in our view, proceeded cautiously where an injunction requires the defendant to incur additional expenses to take positive steps (*Redland Bricks v. Morris* (1969), [1970] A.C. 652 (U.K. H.L.), at pp. 665-66; J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 199-200). Also relevant to the decision of whether to grant a mandatory injunction is whether it might require continued supervision by the courts, especially where the terms of the order cannot be precisely drawn and where it may result in wasteful litigation over compliance (*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* (1997), [1998] A.C. 1 (U.K. H.L.).

76 The Google Order requires ongoing modification and supervision because Datalink is launching new websites to replace de-listed ones. In fact, the Google Order has been amended at least seven times to capture Datalink's new sites (orders dated November 27, 2014; April 22, 2015; June 4, 2015; July 3, 2015; September 15, 2015; January 12, 2016 and March 30, 2016). In our view, courts should avoid granting injunctions that require such cumbersome court-supervised updating.

D. The Google Order Has Not Been Shown To Be Effective

77 A court may decline to grant an injunction on the basis that it would be futile or ineffective in achieving the purpose for which it is sought (Spry, at pp. 419-20; Berryman, at p. 113). For example, in *Attorney General v. Guardian Newspaper Ltd.* (1988), [1990] 1 A.C. 109 (Eng. H.L.), the *Spycatcher* memoirs of an M.I.5 agent were already readily available, thus making a perpetual injunction against publication by the defendant newspapers ineffective.

78 In our view, the Google Order is not effective in enforcing the December 2012 Order. It is recalled that the December 2012 Order requires that Datalink "cease operating or carrying on business through any website" — it says nothing about the visibility or success of the website

business. The December 2012 Order is violated as soon as Datalink launches websites to carry on business, regardless of whether those websites appear in a Google search. Moreover, the Google Order does not assist Equustek in modifying the Datalink websites, as Equustek sought in its originating claim for injunctive relief.

79 The most that can be said is that the Google Order might reduce the harm to Equustek which Fenlon J. found "Google is inadvertently facilitating" (para. 152). But it has not been shown that the Google Order is effective in doing so. As Google points out, Datalink's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. Datalink's websites are open for business on the Internet whether Google searches list them or not. In our view, this lack of effectiveness suggests restraint in granting the Google Order.

80 Moreover, the quest for elusive effectiveness led to the Google Order having worldwide effect. This effect should be taken into consideration as a factor in exercising discretion. Spry explains that territorial limitations to equitable jurisdiction are "to some extent determined by reference to questions of effectiveness and of comity" (p. 37). While the worldwide effect of the Google Order does not make it more effective, it could raise concerns regarding comity.

E. Alternatives Are Available

81 Highlighting the lack of effectiveness are the alternatives available to Equustek. An equitable remedy is not required unless there is no other appropriate remedy at law (Spry, at pp. 402-3). In our view, Equustek has an alternative remedy in law. Datalink has assets in France. Equustek sought a world-wide *Mareva* injunction to freeze those assets, but the Court of Appeal for British Columbia urged Equustek to pursue a remedy in French courts: "At present, it appears that the proposed defendants reside in France .... The information before the Court is that French courts will assume jurisdiction and entertain an application to freeze the assets in that country" (2016 BCCA 190, 88 B.C.L.R. (5th) 168 (B.C. C.A.), at para. 24). We see no reason why Equustek cannot do what the Court of Appeal urged it to do. Equustek could also pursue injunctive relief against the ISPs, as was done in *Cartier International AG*, in order to enforce the December 2012 Order. In addition, Equustek could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites.

III. Conclusion

82 For these reasons, we are of the view that the Google Order ought not to have been granted. We would allow the appeal and set aside the June 13, 2014 order of the Supreme Court of British Columbia.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Para. 148.

2 Para. 147.

3 Para. 95.

4 Para. 76.

5 Para. 148.

6 Para. 144.

7 Paras. 93-94.

8 Para. 137.

End of Document

TAB 2

2002 SCC 12
Supreme Court of Canada

R. v. Regan

2002 CarswellNS 61, 2002 CarswellNS 62, 2002 SCC 12, [2002] 1 S.C.R. 297, [2002] S.C.J. No. 14, 161 C.C.C. (3d) 97, 201 N.S.R. (2d) 63, 209 D.L.R. (4th) 41, 282 N.R. 1, 49 C.R. (5th) 1, 52 W.C.B. (2d) 150, 629 A.P.R. 63, 91 C.R.R. (2d) 51, J.E. 2002-377, REJB 2002-27926

Gerald Augustine Regan, Appellant v. Her Majesty the Queen, Respondent and The Attorney General of Canada, the Attorney General of Quebec and the Attorney General for New Brunswick, Intervenors

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: March 15, 2001
Judgment: February 14, 2002
Docket: 27541

Proceedings: affirming (1999), 137 C.C.C. (3d) 449, 1999 CarswellNS 263, 28 C.R. (5th) 1, [1999] N.S.J. No. 293, 179 N.S.R. (2d) 45, 553 A.P.R. 45 (N.S. C.A.); reversing (1998), 1998 CarswellNS 395, 21 C.R. (5th) 366, [1998] N.S.J. No. 128, 58 C.R.R. (2d) 283 (N.S. S.C.)

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John J. Walsh, for Intervenor, Attorney General for New Brunswick

Subject: Criminal; Constitutional
Related Abridgment Classifications
Criminal law
II Constitutional authority
II.3 Prosecutorial responsibility
II.3.b Provincial Attorney General
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]

IV.12.c Principles of fundamental justice
IV.12.c.iv Fair and impartial hearing
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.e Abuse of process
Criminal law
IV Charter of Rights and Freedoms
IV.30 Charter remedies [s. 24]
IV.30.b Stay of proceedings
Criminal law
XXIV Investigation and arrest
XXIV.3 Indictment
XXIV.3.f Preferring indictment
XXIV.3.f.ii Preferring indictment without grand jury
Criminal law
XXXI Trial
XXXI.1 General principles
XXXI.1.i Abuse of process
XXXI.1.i.iii Jurisdiction of court to stay or dismiss

APPEAL by accused from judgment reported at 137 C.C.C. (3d) 449, 1999 CarswellNS 263, 28 C.R. (5th) 1, [1999] N.S.J. No. 293, 179 N.S.R. (2d) 45, 553 A.P.R. 45 (N.S. C.A.), which reversed trial judge's decision to stay proceedings against accused on certain sex-related charges.

POURVOI de l'accusé à l'encontre de l'arrêt publié à 137 C.C.C. (3d) 449, 1999 CarswellNS 263, 28 C.R. (5th) 1, [1999] N.S.J. No. 293, 179 N.S.R. (2d) 45, 553 A.P.R. 45 (C.A. N.-É.), qui a infirmé l'ordonnance du juge du procès arrêtant les procédures déposées contre l'accusé relativement à certaines accusations de nature sexuelle.

***LeBel J.* (*McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Bastarache JJ.* concurring):**

I. Introduction

1 This case brought before the Court allegations of prosecutorial misdeeds, allegations of sexual interference and the harsh light of publicity surrounding the man at the centre, Nova Scotia's former Premier, Gerald Regan. The appellant Regan was ultimately charged with 18 counts of rape, attempted rape, indecent assault and unlawful confinement involving 13 women. He has already faced trial on eight of these counts, involving three women, for which he was acquitted. At the time of this hearing, one charge involving a fourth woman was still

awaiting trial. The remaining charges were stayed by the trial judge because of Regan's claim that the Crown prosecutor was out to get him. The Court of Appeal overturned the stay. The Crown, itself, has since stayed two of the charges, and seven counts of sexual assault against Regan are currently pending.

2 The issue before this Court is whether the Crown and the police did indeed overstep their authority in the proceedings of this case, and if so, whether that abuse of the criminal justice process was so egregious as to warrant a stay of the proceedings. The ultimate question, as far as the appellant Regan is concerned, is whether or not he must return to trial to face the remaining charges of sex-related offences. Thus, the decision to uphold a stay of proceedings is a very serious one, which prevents, forever, the possibility of bringing charges of criminal behaviour before a judge and jury. In this case, the evidence does not disclose any serious abuse of process, or taint of the justice system, that would warrant such a drastic measure. I would dismiss Regan's appeal.

II. Facts

A. Overview

3 On March 15, 1995, Gerald Regan, by that time a former Premier of Nova Scotia, was charged with a long list of sexual offences, against a variety of women who had worked for or with him, dating back to the 1950s. The stories of alleged abuse had taken a long and winding path before finally surfacing. First, a CBC journalist spoke to a number of women who told of abusive acts they had allegedly suffered at the hands of the appellant. But that journalist did not broadcast the story. Several years later, while doing some research of his own, an avowed political foe of the appellant uncovered the information from the aborted news report. This informant took the stories to the police in July of 1993, and in September, an RCMP task force launched an investigation. During the investigation, a police officer responded to a reporter's request to confirm or deny that the appellant was under investigation. The police confirmed — a public admission which was in violation of police policy to remain silent about individual suspects until charges are laid. More than 300 interviews later, and 18 months after the story first broke about the Regan investigation, charges were laid.

B. The Charges

4 The decision to lay charges also has a convoluted history. At the conclusion of the police investigation, a report dated May 30, 1994 was submitted to the province's then Director of Public Prosecutions ("DPP"), John Pearson, with a request for his opinion about the laying of charges. The report identified 22 women complainants. Among them were six women who had been Regan's babysitters, one who had been his housekeeper, a political intern, a legislative page, a secretary, and a political reporter. The women were all young at the time of the alleged assaults, ranging in age from 14 to 24 years. One woman alleged she was raped

when she was 14, two others alleged attempted rape. The other incidents involved sexual touching, exposure and kissing. The police report categorized the charges this way:

- three complainants who "may have been victims of sexual impropriety", but in the opinion of the police were not victims of criminal acts (although the acts showed a "*modus operandi*");

- six complainants who the police believed were victims of criminal offences, but who were "not willing to testify in a court of law";

- four complainants who were considered victims of criminal offences, but who did not want to testify as complainants, and were only willing to "co-operate by providing similar fact evidence at trial";

- and nine complainants of criminal acts who were willing to testify as complainants. Of these nine, one of them alleged the attack had occurred in Calgary, Alberta.

5 DPP Pearson responded to police by letter dated June 28, 1994, that he and two other prosecutors had reviewed the file. One of those was Susan Potts, then Senior Crown Attorney in charge of sexual assault prosecutions. Pearson recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical violations, including rape, attempted rape, and the one case where it was alleged the appellant had exposed his penis.

6 In the other four local cases of willing complainants, DPP Pearson recommended that the police not proceed with charges. These cases involved many similar accounts of the appellant trying to grope and "French kiss" the victim. DPP Pearson explained that although these acts would have been against the law at the time, "the allegations are minor in nature, especially when placed in the context of societal values at the time", and the "staleness" of the offences outweighed their "gravity". He thought that the minor charges could be sanctioned by proceeding against the more major ones, and he feared that otherwise the prosecution might appear to be a "persecution".

7 In addition, DPP Pearson advised that "the case against Regan would be significantly enhanced if some of the more recent incidents were proceeded with." He recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. He made no recommendation about the complainants who had apparently been victims of criminal behaviour, but were only willing to give similar fact evidence. Finally, DPP Pearson recommended that the police contact Alberta authorities with regard to the Calgary-based incident. He advised the police that "you are not obliged to accept our opinion and that the final charging decision rests with you. We are also cognizant of the duties and responsibilities of Crown counsel to consider whether or not it is appropriate

to proceed with charges once they have been laid." He suggested that police investigators "meet with [Crown counsel] Susan Potts to finalize the wording of any charge you decide to proceed with."

8 The police did not agree with DPP Pearson's charging recommendation. They were of the view that a more complete picture of the allegations against the appellant should be put before the court. Chief Superintendent Falkingham testified:

> ... over the several years I saw a pattern and an MO that Mr. Regan sexually assaulted, in my view, a number of young teenagers. ... The MO was with babysitters, the MO was with — when he had an opportunity to be alone with a young girl, and I felt that that was all building into a large picture which indicated to me that there was a continuing criminal offence in my mind, together — as a global investigation.
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> . . . . .
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> My view is the matter of charges had to involve the large number of complainants and as a result of them — the continued offenses over the years. ...

9 After the Crown joined police in re-interviewing most of the original complainants, 16 counts for sex-related offences, involving 11 women, were laid against the appellant on March 15, 1995. On May 30, 1995, a revised information was sworn, which added two new complainants and three new counts, for a total of 19 counts related to 13 women.

10 The matter proceeded to a preliminary hearing in April 1996. One year later, the Crown decided to prefer a direct indictment. In that final charging decision, one complainant was dropped, a new one was added (count 16), and the charges concerning a third were amended to drop one count, bringing the final tally to 18 counts of sex-related offences, involving 13 women, laid against the appellant.

C. Crown Conduct

11 After DPP Pearson's written recommendations, Crown Potts met with police on July 15, 1994. At that recorded meeting, Crown Potts suggested that it would not be "advisable" that charges be brought before a particular judge, because she thought he would have political ties to the appellant. Instead, she said she would "keep monitoring the court docket to see who is sitting when and what would be in our best interest" — an exercise commonly known as" judge shopping".

12 At the same meeting, Potts requested to read all the investigation reports, because "this would give her a clear picture of what was actually going on." Notes of a meeting on January 17, 1995, attended by the RCMP Chief Superintendent on the case, confirmed that Potts had by then re-read "the evidence and the victims' statements". Police and Crown then agreed

that six complainants reluctant to testify "have to be re-interviewed". In the end, police and Crown counsel together re-interviewed many of the original 22 complainants, as well as five new women who came forward after the Pearson letter.

13 The purpose of the re-interviews was "[f]irstly and primarily, to provide information about the Court process to potential complainants so that they could make an informed decision as to their involvement in these proceedings; and secondly, to make assessments of credibility about these witnesses, including their capacity for recall and general demeanor issues, and to prepare for a preliminary inquiry." (Trial submissions of the Crown, Appellant's Record, p. 1089).

14 The re-interviews included 16 of the original 22 complainants: four of the six reluctant witnesses whom DPP Pearson had recommended should be re-approached; three of the four women only willing, at first, to give similar fact evidence; three of the four complainants for whom Pearson had recommended laying charges (the fourth refused to proceed further); all four willing complainants whom the police wanted to charge but for whom DPP Pearson had recommended that no charge be laid; the complainant in the Alberta-based incident; and one of the three complainants for whom, at first, it was thought there was no criminal offence.

15 Crown Potts was removed from the prosecution of this case by the time the preliminary inquiry began in April 1996. Crown Adrian Reid stepped in as lead counsel at the preliminary inquiry and trial. Crown Reid became involved with the case in December 1995 after charges were laid.

16 Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the appellant sought a global stay of all of the charges. At trial, a partial stay — nine of the 18 counts — was granted.

III. Judicial History

A. Nova Scotia Supreme Court (1999), 21 C.R. (5th) 366 (N.S. S.C.)

17 Michael MacDonal J. d identified that the appellant was not claiming an abuse of process which had tainted the fairness of the trial, and was therefore seeking relief under the so-called residual category of procedural abuse, which will warrant a stay of proceedings. MacDonald J. noted, however, that the remedy of a stay remains reserved for only the clearest of cases, where it is the only remedy available to counter the effects of the abuse (*Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.)).

18 MacDonald J. adopted the test for a stay articulated in *Tobiass*, where the Court held that in order to grant a stay, two criteria must be satisfied: (1) that the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome,

and (2) that no other remedy is reasonably capable of removing the prejudice flowing from the abuse (at para. 90). The Court added a third factor which should be considered in cases where it remains unclear whether the abuse is sufficient to warrant the stay. It requires courts to engage in a weighing of the societal interests involved. Courts must then "balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern" (para. 92). MacDonald J. acknowledged that this third criterion would play a significant part in his analysis. In approaching the issue, MacDonald J. noted that he had to weigh the cumulative effect of any alleged wrongdoing. He was also mindful that abuse of process need not be driven by evidence of *mala fides* to warrant a stay, although such evidence was certainly relevant.

19 MacDonald J. reviewed the respective roles of the police and of the Crown and noted that while performing independent tasks, they must work well together. A strict separation of their functions, however, creates a safeguard against misconduct by either one. This system of checks and balances is achieved by drawing a clear line between the investigation of charges, and their prosecution. He held that police in Nova Scotia are "exclusively responsible for the investigation of crime and deciding what if any charges are to be laid. ... Here, the Crown's role is limited to simply providing legal advice; advice which is not binding on the police" (paras. 63 and 65). In contrast, the Crown must function as "a quasi judicial minister of justice who must also serve as advocate" (para. 67).

20 The appellant submitted a list of allegations of police and Crown misconduct, including the premature formation of a police task force to investigate allegations against Regan, and questionable investigative techniques and arrest procedures. MacDonald J. concluded that these actions had little impact on the appellant. He did consider that the premature confirmation of Regan as a suspect in the police investigation was clearly wrong, as it contravened express police policy. He was troubled by this serious error in judgment.

21 MacDonald J. then reviewed the allegations of Crown misconduct. He found clear evidence of Crown Potts' blatant attempt at judge shopping, and found this offensive and most troubling. For MacDonald J., this gave the appearance of a Crown Attorney who was attempting to secure a conviction at all costs. He concluded that Potts' behaviour had the effect of tainting her entire involvement in the process.

22 The pre-charge Crown interviews of complainants were, however, the most contentious issue before MacDonald J. Crown counsel, particularly Ms. Potts, became heavily involved with pre-charge interviewing. He found that the practice of pre-charge Crown interviewing in this country is not entirely rejected, but where used, its scope is narrow. MacDonald J. observed that in the provinces like New Brunswick, where pre-charge Crown interviews are

done, they serve only as a screen to protect a suspect from the humiliation of being charged, if charges are later dropped or stayed. In this case, he found that the purpose for at least some of the pre-charge Crown interviews was to have reluctant complainants change their minds and come forward to lay charges. MacDonald J. held that protection of the appellant was never a factor motivating the Crown's pre-charge interviews.

23 As a result, MacDonald J. found that this process had an impact on the number of charges that were ultimately laid. He held that the Crown was integrally immersed in the decision-making about charges. Cooperation led to consensus and this collaboration homogenized the process which then became a joint charging decision. The Crown had lost its objectivity: the effect was to deny the appellant a hard, objective second look at the charging decision, which is fundamental to the role of the Crown. In MacDonald J.'s view (at para. 124),

> It is impossible to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews with the complainants. Human nature just will not allow it. By doing so you hear first hand only one side of the story. How can you then objectively review the process which includes a consideration of the rights of the applicant?

Nevertheless, MacDonald J. found that the Crown did not get involved in the investigation, and apart from Crown Potts' inexcusable comment about judge shopping, all other Crown counsel involved in the case were well-intentioned throughout the process, yet they simply lost perspective during the charging procedure.

24 MacDonald J. found that the Crown had not acted in bad faith when preferring the direct indictment. The preliminary inquiry was very lengthy. If the Crown had been ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

25 When viewing his concerns cumulatively, about judge shopping, the Crown's pre-charge interviews and to a lesser extent, the RCMP's premature confirmation that Regan was under investigation, in total this was not one of those clearest of cases of procedural abuse that demanded a global stay of all the charges. Instead, on a case-by-case review, he decided that for the nine charges concerning the most serious allegations there was a strong societal interest in proceeding with the prosecution.

26 However, for the less serious charges, MacDonald J. pointed out that the Pearson Report was detailed and comprehensive and spoke volumes about what the Crown originally thought was fair to the appellant. The Crown should not be seen to significantly change its position without valid reason. He held that the Crown did change its position: the direct indictment proceeded with charges involving at least four and arguably six complainants who

were initially on Mr. Pearson's recommended list to exclude. He concluded that the Pearson recommendations should be given significant deference. He followed the Pearson charging recommendation and also applied its criteria to charges which post-dated the Pearson report. In the end, MacDonald J. concluded by staying the remaining nine of the 18 counts before him.

27 MacDonald J. added a final comment about count 16, which was among those he stayed. He held that the Crown had been motivated by an improper purpose in proceeding with this charge, which was first laid as part of the direct indictment. Count 16 was similar in fact to the incident alleged to have occurred in Alberta. The Alberta allegation could not be pursued in Nova Scotia. MacDonald J. was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. MacDonald J. considered this an improper purpose which irretrievably tainted this count.

B. Nova Scotia Court of Appeal (1999), 179 N.S.R. (2d) 45 (N.S. C.A.)

1. Cromwell J.A. (Roscoe J.A. concurring)

28 Cromwell J.A., for a majority of the Court of Appeal, found two significant errors in the trial judge's reasoning. First, the trial judge erred in law by not asking himself whether the continuation of the prosecution of the charges would manifest, perpetuate or aggravate the prejudice caused by the Crown's failure to properly exercise its discretion at the charging stage. Second, the trial judge also erred by treating a judicial stay of proceedings as a remedy for past misconduct.

29 The narrow, residual category of abuse of process applied in this case, because the trial judge had rejected all the appellant's arguments that he could not receive a fair trial. Cromwell J.A. observed that there must be exceptional circumstances here to warrant the granting of a stay, as" [o]nly in rare and unusual circumstances could holding a fair trial, of itself, be damaging to the integrity of the judicial process" (para. 108).

30 Cromwell J.A. recounted the three-step analysis for this residual category (*Tobiass*, *supra*). At the first step, the accused must show that there has been misconduct, or circumstances which have arisen apart from misconduct, which render the continuation of the prosecution damaging to the integrity of the judicial process. At the second step, the court must balance the integrity of the judicial process against the societal interest in the prosecution of alleged crimes. This is done by considering whether the prejudice caused by the abuse will be manifested, perpetuated or aggravated by the continuation of the prosecution. If so, then the court considers whether another remedy, short of a stay, is reasonably capable of removing the prejudice. Only if the abuse is ongoing, and no other remedy is tenable, does the balance favour a judicial stay.

31 Further analysing the elements of the second stage, Cromwell J.A. emphasized that the remedy of a stay is prospective rather than retroactive: "a stay of proceedings is not approached as a remedy to redress a wrong that has already been done, but rather as a remedy to prevent further damage to the integrity of the judicial process in the future caused by the continuation of the prosecution" (para. 116). The ongoing harm might be repeated in the future, or might plague the process in the sense that the misconduct is so egregious that the mere going forward with the proceedings is offensive. To these examples in the case law, Cromwell J.A. added a third possibility of ongoing prejudice. This would occur in cases where "the conduct has the effect of setting the prosecution on a fundamentally different path than it would otherwise have followed" (para. 118).

32 The third step in the analysis is only undertaken if, after completing the analysis at the first two stages, it is still unclear whether a stay is required. The third stage reconsiders the balance between society's interest in proceeding, and the interests served by granting the stay. At this stage, however, the emphasis is on whether the misconduct, on its own, is so egregious that a stay is warranted. Cromwell J.A. pointed out that in theory, such cases might exist, but in practice, it is unlikely that such egregious behaviour would not meet the criterion of ongoing harm at step two. Thus Cromwell J.A. concluded that to grant the remedy of a stay, evidence of ongoing harm from the abuse will almost always be key.

33 Cromwell J.A. noted that abuse of process cases are dependent on their facts. The trial judge made specific findings of misconduct on four matters: the premature announcement of Regan as a suspect, the judge-shopping comment, the Crown's loss of objectivity at the charging stage, and a fourth specific finding relating to count 16, the so-called similar fact count. Cromwell J.A. went on to outline what the trial judge had specifically *not* found, including: the Crown was not improperly involved in the investigation; the police did not act wrongly in laying the charges; the Crown had not acted with *mala fides* or with an improper purpose when preferring the direct indictment; the Crown's loss of objectivity did not extend beyond the charging stage; and the Crown did not encourage the police to lay more charges nor did the Crown disregard police freedom and independence to make a decision on charges.

34 Generally, the trial judge appeared to leave out any direct consideration of the second step in the stay inquiry. There was no finding by the trial judge of a likelihood of future or ongoing misconduct, nor did he find that the cumulative abuse was so egregious, in itself, that a stay was required. Cromwell J.A. added: "However, he appears to have thought that the loss of objectivity had ongoing impact because it may have resulted in more charges proceeding than would have been prosecuted had objectivity been retained" (para. 131). Nevertheless, the trial judge expressly stated that the abuse was not serious enough to warrant a global stay. Furthermore, the trial judge gave no explicit consideration to whether another remedy was capable of removing the prejudice.

35 Cromwell J.A. proceeded to analyze each of the trial judge's findings of abuse. First was the misconduct found in the laying of count 16, the similar fact count. The trial judge concluded that count 16 was added to the direct indictment because of an improper motive. Cromwell J.A. found that this finding was contradicted by the judge's other findings that, aside from Ms. Potts, no Crown had acted improperly or with bad faith, and their perspective was lost only at the charging stage, "the time around which the first charges were laid in March of 1995" (para. 129) (not at the direct indictment, when count 16 was added). There was nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and its impact on the prospects of conviction when deciding to proceed with charges. Cromwell J.A. concluded the evidence surrounding count 16 disclosed no abuse, and thus failed step one of the stay analysis. The trial judge had erred in ordering a stay of count 16.

36 Next Cromwell J.A. dealt with the finding of the loss of Crown objectivity. The trial judge had reached two independent conclusions: at the charging stage, the Crown had lost its objectivity, and at the direct indictment stage, the Crown decision was proper. Cromwell J.A. found these two holdings could not stand together. If the Crown's discretion to prefer the direct indictment was properly exercised, it must be taken to have been exercised with proper regard to the public interest. This was consistent with the trial judge's finding that the Crown's loss of objectivity was confined to the charging stage. Cromwell J.A. also noted that virtually all of the specific findings of misconduct related exclusively or primarily to Ms. Potts. Her involvement in the matter ended at the time of the preliminary inquiry and before the direct indictment was preferred. Cromwell J.A. found that the trial judge erred in generalizing about misconduct by the Crown, given the narrowness of the specific conclusions that the loss of objectivity was at the charging stage, and misconduct was attributed only to Crown Potts.

37 Cromwell J.A. disagreed with the trial judge's finding that collaboration between the Crown and the police in the charging decision is wrong. He found no basis in law for such a conclusion. Provided that the independence and distinct roles of the police and the Crown are respected and that no improper purpose is being pursued, it is desirable for the Crown and police to avoid unnecessary disagreements about whether charges should proceed.

38 The trial judge had reasoned that human nature makes it impossible for the Crown to maintain objectivity if they interview witnesses pre-charge. Cromwell J.A. rejected this. If it were so, the Crown could never conduct witness interviews, pre- or post-charge, and still remain objective. Cromwell J.A. concluded instead that "[t]he obligation to be fair-minded is ongoing" (para. 158). There was nothing "inherently insidious" about the Crown's pre-charge interviews in this case, and Cromwell J.A. proceeded on the narrower ground identified by the trial judge that the Crown's pre-charge interviews were conducted without objectivity because they were not done "for the purpose of reviewing whether the charges should proceed

in the public interest" (para. 163). In other words, the Crown did something more than charge screening in this case. However, Cromwell J.A. added that neither the trial judge nor he found anything wrong with the Crown encouraging, by ethical means, reluctant complainants to come forward, especially in cases of sexual assault, because those victims' confidence in the justice system is especially low.

39 Cromwell J.A. noted that the loss of Crown objectivity constituted the central concern regarding abuse of process in this case. The improper police announcement, and the judge shopping comment appeared to be incidental to the decision to stay the nine charges. As a result, Cromwell J.A. did not deal with these issues at any great length.

40 Turning to the test for a stay of proceedings, Cromwell J.A. was of the view that the trial judge erred fundamentally at step two of this analysis because he focussed on the abuse rather than on the future harm to the integrity of the justice system. The trial judge did not find that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial, nor did he turn his mind to any acceptable remedy short of a stay. However, the trial judge's reasons were consistent with a conclusion that Regan was facing more charges than he might have been, if the Crown had not lost its objectivity. In this sense the abuse may have had ongoing effects. But granting a stay on this basis overlooked the proper preferring of the direct indictment.

41 Cromwell J.A. concluded that the trial judge erred in law by relying so heavily on the Pearson recommendation as a guide to his decision to stay some of the charges. The trial judge's approach intended to restore Regan to the position he would have enjoyed but for the Crown's subsequent loss of objectivity. This was wrong, as it was a retroactive cure for past misdeeds, instead of a prospective consideration of whether the abuse was ongoing, and what remedy would be best to address it. The Pearson letter had not crystallized the Crown's position on the charging decision — it was merely advice in response to police questions, and it did not even deal with three new charges, from five new complainants who surfaced after the Pearson letter.

42 Furthermore, the trial judge had not expressly considered the issue of whether another remedy was capable of removing the prejudice. Cromwell J.A. was of the view that this criterion could be satisfied without the need for a stay in this case. Crown Potts' removal from the case and the proper preferring of the direct indictment accrued to provide sufficient remedies to any past misconduct, and to prevent any future harm to the integrity of the judicial process.

43 From the errors committed in the stay inquiry, Cromwell J.A. concluded that the trial judge must have been unsure about the necessity of a stay at the completion of step two, and proceeded on to the balancing exercise at step three, on a case by case basis. In contrast,

Cromwell J.A. ruled that the inevitable conclusion was that neither of the two criteria at the second stage of the test for a stay of proceedings was satisfied. However, if he was in error and it was necessary to go on to the third stage, Cromwell J.A. thought the trial judge erred in failing to properly consider all of the interests affected by the cases he stayed. It is impossible to do the required balancing of interests if only one side of the scale is considered. The trial judge had considered Regan's interest in granting the stay, but did not consider the societal interests in proceeding. Cromwell J.A. was especially sensitive to the fact that three of the stayed counts involved teenagers, employed as babysitters or a housekeeper by the appellant, and he opined that, in such situations, the integrity of the justice system might be harmed by *not* proceeding to trial. In the result, he allowed the appeal and set aside the stays of all nine counts.

2. Freeman J.A. (Dissenting)

44 Freeman J.A. found that this case turned on the need for police and the Crown to observe the demarcation line between their functions, particularly at the pre-charge stage. The trial judge had found that the police decision to charge and the Crown decision to prosecute the charge had been scrambled together, or homogenized. As a result, neither police nor Crown was able to discharge their constitutional role of protecting the accused and the public perception of the administration of justice. Freeman J.A. reviewed the trial judge's decision and found no fault with the careful manner in which the trial judge instructed himself respecting the role of the police and of the Crown.

45 A trial judge has superior familiarity with the context of a case. This is an important reason for an appeal court to show the trial decision deference. Freeman J.A. observed that the trial judge was shocked by the judge shopping incident and even more so by the Crown's assumption of the police role in conducting pre-charge interviews to encourage witnesses to pursue charges. The trial judge had also noted the context in which this had all occurred. Following the tragedy of the wrongful imprisonment of Donald Marshall Jr., the criminal justice system in Nova Scotia was criticized for treating prominent people more favourably. The appellant argued that Regan was the victim of a backlash, specifically that the authorities in this case overreacted by singling him out for special, unfavourable treatment. Freeman J.A. agreed that any citizen knowledgeable of the principles and facts involved would be equally shocked.

46 Freeman J.A. was of the view that the trial judge had correctly applied the legal principles to determine that the appellant had been denied a dispassionate review of the charging decision, by an objective Crown. The result was that the accused faced a multiplicity of charges which had been determined without taking societal interests, including those of decency and fair play, into account. The trial judge had properly found this one of the clearest of cases to warrant a stay of some of the charges. A reduction in the number of charges by

pruning out the less serious ones, and by accommodating society's interest by proceeding with the more serious criminal charges of rape and attempted rape, was not only the obvious remedy, but the only effective one. In conclusion, Freeman J.A. found that the trial judge had not misdirected himself and his decision was not so clearly wrong as to amount to an injustice.

IV. Legislation

47 *Canadian Charter of Rights and Freedoms*

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> **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.

Criminal Code, R.S.C. 1985, c. C-46

> **577.** In any prosecution,
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> > (*a*) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
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> > (*b*) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid
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> before any court without,
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> > (*c*) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or
> >
> > (*d*) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

V. Issues

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> 1. Did the conduct of the Crown and police amount to an abuse of process under s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. Was a partial stay of proceedings warranted?

3. Was the Court of Appeal entitled to interfere with the trial court's decision to grant a partial stay?

VI. Analysis

A. Abuse of Process

49 In the *Charter* era, the seminal discussion of abuse of process is found in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.). The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in *O'Connor*, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer, Sopinka and Major JJ. dissenting on the application of law to the facts, subsumed the common law doctrine abuse of process into the principles of the *Charter* in the following terms, at para. 63:

> [I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

50 L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in *O'Connor*, at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the *Charter* will dovetail (see *O'Connor*, at para. 71). In this manner, while it acknowledged that the focus of the *Charter* had traditionally been the protection of individual right, the *O'Connor* decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings" unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.
>
> (*R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007)

51 Under the *Charter*, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see *O'Connor*, at para. 73).

52 Finally, this Court's most recent consideration of the concept of abuse of process arose in the administrative context. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), it was held that a 30 month delay in processing a sexual harassment complaint through the British Columbia human rights system was not an abuse of process causing unfairness to the alleged harasser. For the majority, Bastarache J. came to this decision on the basis that abuse of process has a necessary causal element: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (para. 133). In Blencoe's case, it was held that the humiliation, job loss and clinical depression which he suffered did not flow primarily from the delay, but from the complaint itself, and the publicity surrounding it (*Blencoe*, at para. 133; see also *United States v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19 (S.C.C.)).

B. Stay of Proceedings

53 A stay of proceedings is only one remedy to an abuse of process, but the most drastic one:" that ultimate remedy", as this Court in *Tobiass*, *supra* (at para. 86), called it. It is ultimate in the sense that it is final. 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. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the 'clearest of cases'" (*O'Connor*, *supra*, at para. 68).

54 Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice. (*O'Connor*, at para. 75)

The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55 As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional"," relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (*Tobiass*, at para. 91).

56 Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57 Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done:" it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits." In these cases," an egregious act of misconduct could [never] be overtaken by some passing public concern [although] ... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding" (*Tobiass*, at para. 92).

C. Application to the Case at Bar

1. Abuse of Process

58 In the case at bar, the trial judge was concerned with the cumulative effect of three elements of the proceedings brought against the appellant: "These include judge shopping; the Crown's pre-charge interviews, and to a lesser extent, the R.C.M.P.'s premature press release confirming the investigation" (para. 132). In addition to these events early in the proceedings, the trial judge found that the one count added to the direct indictment (count 16) was laid for an improper purpose.

(a) Judge Shopping

59 It is important to understand exactly what the Crown said and did in relation to judge shopping. There is direct evidence that the Senior Crown Attorney assigned to this case during the police investigation said in a meeting with police that the laying of charges should be delayed to avoid bringing them before a particular judge, whom she feared might be sympathetic to the accused. This impropriety was exacerbated by her comment that she would monitor the court docket, looking for a different judge who would be more sympathetic to the laying of charges against the accused. There is no evidence that the comment was made more than once, and no evidence that it was acted upon. Nevertheless, it was said to police involved in the case, and set a tone of overzealous and unfair pursuit of a prosecution against the accused.

60 This Court has adverted to the impropriety of trying to influence the outcome of a proceeding by trying to "select" the judge. Where it appeared that the Crown had abandoned a case before one judge to avoid an unfavourable ruling, and then reinstated charges at a new trial before a new judge, McLachlin J. (as she then was) was quick to point out the affront to the integrity of the system:

> The concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. ...
>
> Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused.
>
> (*Scott, supra*, at pp. 1008-9)

61 The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which

judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

(b) The Police/Crown Relationship

62 The appellant contends that a bright line must be drawn at the stage where charges are laid, in order to keep the functions of the police separate from those of the prosecutors. This separation, he argues, is the only way to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges. The trial judge adopted this approach in assessing the administration of justice now practised in Nova Scotia. Citing various studies on the police/Crown relationship, MacDonald J. identified the police role as limited to pure investigation pre-charge, and the subsequent decision of whether to lay a charge. This reserves for the Crown the role of "Minister of Justice", in the sense that the Crown must be both ardent prosecutor once charges have been laid, but also objective defender of the general public interest in determining *whether* to prosecute the charges recommended by police. Recognizing that in practice the police and Crown must still work together, MacDonald J. nevertheless emphasized that "the need for co-operation should never interfere [with] their individual autonomy" (para. 72).

63 The trial judge determined that the practice of Crown pre-charge interviewing in this country is" non-existent to rare", and is only done for the benefit of the accused, that is for the purpose of screening out frivolous or unsupportable charges: "[o]n the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117). Any other pre-charge contact with witnesses would unavoidably undermine the Crown's objectivity — MacDonald J. reasoned that human nature would prevent the Crown from considering any interest other than that of the witness. The trial judge concluded that in this case, every charge laid subsequent to a Crown interview was suspect, and only DPP Pearson's paper-based assessment of the charges was objective.

64 The question before this Court is whether the Crown's objectivity is necessarily compromised if Crown counsel conduct pre-charge interviews of witnesses without the single, express intention of screening out charges before they are laid. In essence, this Court has been asked to consider whether, at law, Crown prosecutors must be prevented from engaging in wide-ranging pre-charge interviews in order to maintain their essential function

as "Ministers of Justice". First, it is my view that different provinces have answered this question differently, and that the trial judge erred in his evaluation of the standard practice across the country on this issue. Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of *how* that separation must be maintained.

65 The seminal concept of the Crown as "Minister of Justice" is expressed by this Court's judgment in *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), in which Rand J. explained, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

The issue before the Court in *Boucher, inter alia*, was whether the Crown counsel's personal opinion about the guilt of the accused was improper. It was so found. The exposition of the facts in *Boucher* helps to draw the distinction between Crown involvement with the case, pre-charge, and whether that inevitably leads to a loss of the Crown's necessary objectivity (at p. 27):

> The [Crown's] statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.
>
> . . . . .
>
> The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him. [Emphasis added.]

Based on the underlined sections, it appears that the Crown was involved in the investigation, before the arrest, thus presumably pre-charge. Yet this alone was not troublesome to the Court. Instead, it was the subsequent Crown's personal conclusion drawn from this investigation, namely that the accused was guilty, which was then put before the jury in the manner of evidence, which the Court found inappropriate. This action revealed that the Crown had lost his objective stance as a Minister of Justice in the process. The example, I

believe, helps to differentiate between the fact of pre-charge involvement by the Crown, and the loss of objectivity which *may* result.

66 The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The Royal Commission on the Donald Marshall, Jr., Prosecution, *Findings and Recommendations* (1989) ("the *Marshall Report*") speaks of the Crown's duty this way: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28) The *Marshall Report* emphasizes that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function — that of investigation and law enforcement — is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

67 I note that investigation is not synonymous with interviewing for the purposes at issue in this appeal. The trial judge made a clear ruling that the Crown did not engage in "investigation" in this case. The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges. (See testimony of Philip Stenning, Appellant's Record, at p. 975.) The Nova Scotia Solicitor General's Directive on Laying of Charges (1990), which responded to the Marshall inquiry, states:

> All Police Departments must implement the following protocol for the resolution of disputes between police and Crown over the laying of criminal charges:
>
> (i) no charge shall be laid, contrary to the advice of a Crown Prosecutor, until discussion concerning the matter has taken place between the Police Department and the Crown Prosecutor;
>
> (ii) if there is no resolution of the disagreement at that level, the matter must be referred to a senior police official of the department, who will discuss the matter with the Regional Crown Prosecutor;
>
> (iii) if, following such discussion, the police remain of the view that a charge is warranted, the charge shall be laid.

68 The protocol encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the *Marshall Report* speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.

69 The appellant also drew the Court's attention to the Report of the Commission on Proceedings Involving Guy Paul Morin (1998), which inquired into another recent instance of wrongful conviction, after which Morin spent several years in jail, before his innocence was recognized. This inquiry focussed on the Crown's failure of objectivity *throughout the process* as a result of too close contact between the Crown counsel and police. Justice Kaufman, who wrote the report, concluded that, at the root of the problems in the Morin case there had been a failure by the Crown prosecutor to assess objectively the reliability of evidence, before charges were laid (at pp. 909, 911, 1069-70):

> The bottom line is this: [the Crown] failed to *objectively* assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which each of the prosecutors appreciated just how unreliable some of the evidence tendered was. ...
>
> The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution. ...
>
> It is also understandable that this belief [of Morin's guilt] would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers. [Emphasis in original.]

70 The parties agree in the present case that Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded. What the Morin inquiry shows is that objectivity can be lost without the Crown's involvement in pre-charge interviews, and that this loss of objectivity in fact did occur, in part, as a result of post-charge Crown interviews. It does not mean that the absence of pre-charge interviews

would be, of itself, a guarantee of fair process or that the restrained use of such interviews may not be consistent with a separation of Crown and police functions.

(c) Other Jurisdictions

71 While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In *R. v. S. (S.)*, [1990] 2 S.C.R. 254 (S.C.C.), Dickson C.J. observed, at pp. 289-90:

> It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by ss. 91(27) and 92(14) of the *Constitution Act, 1867*. The area of criminal law and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.

An examination of the practices in several Canadian provinces illustrates that different jurisdictions have approached the issue of Crown pre-charge interviews in different ways.

(i) New Brunswick

72 At trial, several witnesses gave evidence about the system of criminal prosecutions in the province of New Brunswick. Glendon Abbott, Director of Public Prosecutions for the province, was one. He described that part of the Crown's function as to

> provide advice to policing authorities. We in the Province of New Brunswick, at least, exercise a pre-charge screening function. The Attorney General has set out a threshold for charging and we review police files that are brought to us for that purpose, to make a decision on charging. And we exercise the prosecutorial duties to advance the case through the legal system. ... The short form of the test [to determine whether a prosecution should proceed] is to be satisfied that there is a reasonable prospect of conviction.

73 Mr. Abbott also gave evidence about his understanding of New Brunswick's written policy on initiating prosecutions: "In my view, yes, implicitly it does speak to [Crown pre-charge interviews] and contemplates pre-charge contact with potential witnesses." The policy states:

> In making a decision as to sufficiency of evidence, the Crown prosecutor considers such factors as the availability and admissibility of evidence, the credibility of witnesses, and their likely impression on a judge or jury, the admissibility of any confessions, the reliability and admissibility of any identification, and generally will draw on experience to evaluate how strong the case is likely to be when presented in court. In addition, there are public interest factors that may be taken into account.
>
> (New Brunswick Criteria for Prosecutions, Appellant's Record, at pp. 519-520)

Mr. Abbott testified that based on this policy,

> in some cases ... the prosecutor and myself from my own experience would want to interview some of the witnesses [pre-charge]. Not in every case, but in some cases. ...
>
> Over approximately 23 or so years I've been with public prosecutions, this is not an uncommon practice. ...
>
> I think as a category of offenses or alleged offenses, where there are allegations of sexual assault, this is more common.

Such Crown pre-charge interviews are conducted to assess credibility and weight of the complainant's evidence, for both youthful witnesses, and adults, and to inform potential witnesses of the legal process, while also testing their resolve to pursue the matter. Mr. Abbott acknowledged that as a result of his pre-charge interviews, "there were cases where it aided me in drawing a conclusion that there was a reasonable prospect of conviction and — well, not equally, but in many cases where there wasn't a reasonable prospect of conviction." He concluded, "I don't feel that interviewing the witness prior to the approval or not or approval [*sic*] of charges affects my ability to discharge my duty impartially."

74 Regional Crown Prosecutor for the rural Miramichi district of New Brunswick, Fred Ferguson, testified that he too does pre-charge interviewing, about once a year. In his experience, such interviewing is done for young witnesses, historic sex assault allegations, and "where there's been a question of motive to prosecute." He said that time and manpower have made it difficult to do more pre-charge interviews.

ii) Quebec

75 The intervener Attorney General of Quebec made submissions before this Court that it is not unusual in that province for Crown counsel to interview witnesses pre-charge: [translation] "The intervener maintains that there is nothing heretical in a representative of the Attorney General meeting with or even questioning witnesses, including victims, before charges are laid" (Intervener's factum, at para. 3). In fact, pre-charge screening has been a" systematic" practice in Quebec for more than thirty years (Intervener's factum at para. 4).

76 The system of Crown pre-charge screening in Quebec is much like that in New Brunswick, and was instituted to improve the administration of justice. In particular, the practice is done for a number of reasons:

> [TRANSLATION]
>
> The prosecutor's decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations. [Intervener's factum, at para. 14]

As almost all of the expert witnesses at trial testified, Crown pre-charge interviewing is especially useful in cases of sexual assault allegations. The Quebec experience further supports this:

> [TRANSLATION]
>
> Generally, the goals are to understand better the victim's reluctance to lodge a complaint or to testify, to reassure him or her and to create an atmosphere of trust, in order better to assess the witness's credibility if necessary or to get the witness to relate accurately the circumstances of the offence to the court or, in some cases, simply to explain the proceedings to the victim, including the examination and cross-examination, so that he or she is better prepared to face an experience that is very painful for a number of people. [Intervener's factum, at para. 36]

In fact, Quebec's Justice Minister has instructed that contact between sexual assault complainants and Crown counsel should occur at the beginning of the process of laying charges, and in cases of minors (under the age of 18) who make such complaints, pre-charge meetings with the Crown are mandatory. According to the *Manuel de directives aux substituts du procureur général*, Directive No. INF-1, with certain exceptions, [translation]" the prosecutor must meet with the child before authorizing the laying of an information." (See

also *Crimes à caractère sexuel: Guide du poursuivant*, Direction générale des poursuites publiques, Ministère de la Justice du Québec, at pp. 13, 27).

(iii) British Columbia

77 Several of the witnesses and interveners remarked that British Columbia also uses a system of pre-charge screening, similar to New Brunswick and Quebec. In British Columbia, Crown counsel must approve charges before the police can lay them, and this Crown approval may require witness interviews, pre-charge. The Crown charge screening function is intended to accomplish the same variety of systemic benefits as in New Brunswick, Quebec, and even Ontario (see below). A 1990 study by the Law Reform Commission of Canada, which looked at the role of Crown counsel in the criminal justice system, remarked that the pre-charge screening/interviewing procedures used in New Brunswick, Quebec and British Columbia work well (Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, at pp. 74-75).

(iv) Ontario

78 Michael Code, a witness for the appellant, described the most restrictive role for Crown pre-charge involvement, which he said is the practice in Ontario. According to Mr. Code, a former Assistant Deputy Attorney General - Criminal Law of the province, two dangers arise from pre-charge interviewing by the Crown. First, it can undermine the independence of police in deciding which charges to lay, and second, it can strip the Crown of its necessary objectivity in assessing whether to proceed with the charges laid by police. (I note here that the trial judge in this case made no finding that the police decision to lay charges was improper. Therefore, only the second concern will be further developed.)

79 To avoid these perversions of our system of police/Crown independence, Mr. Code was of the opinion that Crown counsel should not interview witnesses until after police have laid the charge, *and* after the Crown has decided to prosecute it. He testified that among the 10 very senior prosecutors he knows, they personally never conduct pre-charge interviews, have never heard of anyone else doing it, and think it is wrong, and inconsistent with their role as Crown counsel.

80 Despite Mr. Code's position, another witness from Ontario, Chief Crown Attorney for Ottawa-Carleton, Andrejs Berzins, testified that some pre-charge Crown interviewing is done in Ontario. Mr. Berzins has done one or two such pre-charge interviews every year.

81 Brian Gover, another expert witness from Ontario, confirmed this practice:" I regard it as an unusual event for a Crown counsel to interview a potential witness at a pre-charge

stage. But, nonetheless, it's my view that Crown practice in Ontario is sufficiently flexible to accommodate that occurring." (Appellant's Record, p. 696) He added:

> It's important that Crown counsel have paramount in his or her mind the role of the Crown as distinguished from the role of the police. It's essential that the Crown not engage in pre-charge evidence-gathering. But, as I said, there will be circumstances in which it is appropriate for the Crown to engage in a process of confirming in his or her own mind that the evidence attributed to a witness would, in fact, be given by that witness as part of the determination of whether reasonable grounds exist and whether there's a reasonable likelihood of conviction.

82 Therefore, even in Ontario, it cannot be said that Crown pre-charge interviews are non-existent, and in Quebec, New Brunswick and British Columbia they are common, and regularly conducted in sexual assault cases, especially when historic incidents or young complainants are involved.

(d) Policy Considerations

83 A lesson underscored by the report on the Morin case and the events which led to its tragic outcome is that the appellant's proposed "quick fix" to maintain Crown objectivity, by preventing Crown interviews pre-charge, is both misguided, and potentially harmful — because pre-charge Crown interviews may advance the interests of justice (see below), and because the pre-versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity *throughout* the proceedings.

84 It is quite clear that there are many public policy reasons for which Crown counsel in some jurisdictions conduct witness interviews, pre-charge. Mr. Abbott and Mr. Gover both testified about efficiencies which are gained by pre-charge screening which protect the repute of the justice system, not only the personal interests of the accused. Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the appearance that they have made a spurious accusation if the charge is later withdrawn. In addition, all of the expert witnesses with knowledge of the Crown practice of pre-charge interviewing told of the interests it serves in assessing witness credibility, demeanour and resolve, especially in sexual assault cases. Such pre-charge interviews are even more important when charges are "historic" or when complainants are young.

85 The evidence in this case also exposes the systemic concerns that sexual assault complainants often have. The RCMP report about the Regan investigation is very telling in this regard:

> In some cases, those strongly suspected of being a victim, would not discuss the incident with the investigators, leaving the member with the feeling that the incident had taken place however they preferred not to disclose ... [some] who were willing to confirm that an offence was committed ... are not in a position to become involved in any court process because of ... the fear of repercussions...
>
> The fact that the suspect, in some cases being the Premier of the Province or in other cases, a high-profile person within the community, coupled with the victim's fear and what the public reaction would be, especially in the 1950's, '60's and '70's, is certainly reason to understand why victims failed to disclose.
>
> (Investigation Report, March 30, 1994, Appellant's Record at pp. 1068-69.)

Complainants may worry of retribution from the alleged assailant, and from their own families and community. They may also fear being "re-victimized" by the court system. They may not feel comfortable making complaints to police, or feel reassured by police regarding confidentiality, or the process in general. The extensive record of discussion between witnesses, police and Crown (see for example: continuation report R.R. vol. iv, p. 716, 717, 718) here shows that, in some cases where police failed to assuage the concerns of some complainants, Crown counsel were successful. The interests of justice are not only served by screening out fruitless complaints but also served by encouraging proper charges to go forward, and by signalling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted.

86 Finally, quite apart from the specific aspects of sexual assault allegations, other examples abound of situations where the interests of justice may be served by the Crown conducting pre-charge interviews. For example: the protection of *Charter* rights during an investigation, cases involving jailhouse informants, and cases which have a statutory requirement for Crown consent to the laying of charges.

(e) The Impact of the Trial Judge's Approach to Policy Issues

87 It is also important that the justice system not be and not appear arbitrary. The trial judge explained "the crucial issue" before him as a narrow one: "It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid" (para. 121). But the determination of the appropriateness of Crown influence on the charging decision based on when Crown interviews are conducted reveals a certain arbitrariness. In the case at bar, the trial judge found abuse because the Crown interviewed complainants before charges were laid. The trial judge found that this extinguished the Crown's objectivity, and he implied that,

as a result, more charges were laid than if objectivity had been retained. Yet, if the Crown had waited until after charges were laid to re-interview those complainants who initially had refused to come forward, it would still have been open to the Crown to recommend to police that these additional charges should be laid. It would have remained within police discretion to add charges based on that Crown advice. In fact, the May 30 amendment to the information did add new charges in relation to a new complainant. Yet, again, in the direct indictment, a new complainant was added and other charges were amended or dropped. The conclusion to be drawn from what could have happened and did happen is that the process is a fluid one. The expectation is that both the police and the Crown will act according to their distinct roles in the process, investigating allegations of criminal behaviour, and assessing the public interest in prosecuting, respectively. The exercise of these roles does not seem to be clearly or predictably altered by whether the formal act of the laying of charges has occurred.

88 The trial judge's more formalistic view might have negative policy consequences. MacDonald J. said: "The Crown emphasizes the fact that they always interview complainants post-charge in any event. ... That, with respect, misses the point. The charging decision is crucial. It determines who the complainants will be" (para. 125). This approach, however, does not account for the fact, recognized by the expert witnesses, that in some cases, especially involving sexual assault, complainants may need information from the Crown to properly understand the process in order to decide whether to press charges. In the trial judge's scenario, this could never happen, because Crown counsel would only ever interview complainants who were *already pressing charges*.

89 There is another negative implication of arbitrarily drawing a hard line at the decision to lay charges. As Rand J. made clear in *Boucher*, *supra*, commitment to the case, belief in the allegations, and the desire to see justice done are not incompatible with objectivity and fairness. Objectivity requires that a rational assessment of facts be brought to bear in making decisions relating to the case. Awareness of one's strong feelings about a case can and should be kept in mind, as a check against tunnel vision. The danger with the trial judge's approach, that of drawing a bright line between pre- and post-charge interviews, is that it risks giving the false impression that remaining personally detached from complainants before charges are laid is the best (or the only necessary) effort to protect objectivity. So how does the Crown protect objectivity after the charge is laid? As all parties accept, objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process. The Court of Appeal, respondent and interveners point out that if subjectivity is the inevitable consequence of contact between the Crown and complainant, then even post-charge interviews are problematic because they would undermine Crown objectivity for every decision after these interviews have taken place.

90 Finally, the trial judge's concern about human nature must be addressed. The trial judge held that personal interaction in the form of interviews between the Crown and

potential complainants inherently threatens the Crown's ability to be objective, because it is an inevitable fact of human nature that the Crown will become subjectively involved with the facts of the case. In the result, the trial judge found that a bright line should be drawn between pre- and post-charge interviews by the Crown. Yet he also ruled that pre-charge Crown interviews are quite proper for the limited purpose of charge screening, to spare the potential accused from the unnecessary embarrassment and harm to reputation that comes with a criminal charge. This begs the question, however, of how a Crown in such proper pre-charge interviews would be able to overcome the natural impulse to favour the complainants, in order to reach the objective conclusion to recommend against laying charges.

91 Summing up, the evidence shows that in some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. Viewed in this context, I cannot conclude that wide-ranging pre-charge Crown interviews, *per se*, are an abuse of process.

(f) Police Conduct

92 The trial judge found that the police were "clearly wrong" (para. 86) when they released Regan's name as a suspect, well in advance of any charges. This was in contravention of the express policy of law enforcement agencies that the identity of suspects may be released only after charges have been laid. However, MacDonald J. added that this lapse was not done in bad faith, and the judge himself further indicated that this police error influenced his finding of abuse of process "to a lesser extent" (para. 132).

93 This policy was adopted, no doubt, to protect the privacy and other interests of individuals who are merely questioned about a crime, with nothing more. There is no question that such a policy is laudable, and a breach of it should not be condoned. However, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. For example, when the police delivered their investigation report to DPP Pearson, the letter included

> a control sheet asking that all persons who have control or access to please sign and date, to establish continuity. Throughout this investigation, the media has been diligent and persistent in obtaining information and for this reason security must remain a priority. I have implemented controls within the R.C.M.Police to limit access. I have not allowed any R.C.M.Police documents, pertaining to this investigation, to be disseminated outside this Headquarters, Halifax Sub Division and the Task Force

> investigators. Therefore, I am now asking that the same restriction occur within your office and this information be carefully protected.
>
> (Letter from Chief Superintendent Falkingham to DPP Pearson, May 19, 1994)

In addition, the police acceded to Regan's request to hold the arraignment outside Halifax, to try to avoid a media frenzy. In my view, this supports the finding of no bad faith.

94 I would add that following the dictum in *Blencoe*, the prejudice experienced by the appellant as a result of this early leak — humiliation and stress — cannot be attributed to this police error alone. This impact on Regan was a certainty no matter when his name was finally released in connection with these charges, and there is no question that there was sufficient evidence and subjective belief for the police to ultimately lay at least some of the charges. Furthermore, there is no evidence to suggest that the premature announcement had any effect on the separate question of whether the Crown properly proceeded with the charges. While the media may have been clamouring for information, it does not follow that this put pressure on the authorities to lay any particular number of charges, or any charges at all, for that matter.

95 For these reasons, I think the trial judge was correct in his finding that this police error either alone or in combination with the Crown conduct discussed above does not rise to the level of egregious abuse. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

(g) Count 16

96 This count involved a woman who alleged that when she was a 24-year-old political reporter, she was pushed onto a hotel room bed and groped during an interview with then-Premier Regan. At the time of DPP Pearson's assessment of the allegations, this complainant was only willing to be a similar fact witness. Pearson suggested that she be re-interviewed. After a re-interview with police and Crown, this witness decided to press charges.

97 The trial judge was "unsettled" by the laying of this charge because it was factually similar to the Alberta-based incident. From this, MacDonald J. concluded: "[t]he Crown therefore felt it needed [to lay count 16] so that [the Alberta complainant's] 'story could be told'. ... Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the [complaint of the Alberta woman], a similar fact witness" (paras. 157-58).

98 The trial judge did, however, recognize the validity of count 16 in its own right: "I realize that the Crown nonetheless considers [count 16] to be worthy of prosecuting. Yet I do not find this to be their primary motive" (para. 159). The reason the Crown's motive was improper, in MacDonald J.'s view, was because of his finding of the Crown's loss of

objectivity: "When the Crown interviews pre-charge a certain amount of objectivity is lost. The Crown's critical review of the charge list is gone. Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light" (para. 160).

99 As I have already discussed, I find that the trial judge's finding of a loss of Crown objectivity cannot be supported by the evidence. This erroneous reading of the facts influenced the holding on count 16. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right. Furthermore, as Cromwell J.A. observed, in other respects the trial judge held that there was no improper purpose or *mala fides* underlying the preferral of the direct indictment. The trial judge found a loss of Crown objectivity only at the first charging decision, nearly a year before the direct indictment. Moreover, Cromwell J.A. pointed out, "There is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges" (para. 140). For these reasons I find the trial judge erred in finding an abusive or improper purpose behind the laying of count 16.

(h) Cumulative Effect of Police and Crown Conduct

100 In assessing the cumulative effect of this evidence of Crown and police misconduct, the trial judge concluded that Crown Potts' objectivity was hopelessly lost, and her influence on the case set other well-meaning Crown counsel astray. The trial judge seemed reinforced in this decision because in addition to Potts' judge shopping comment, he was troubled by "Ms. Potts' perplexing desire to interview all potential complainants" (para. 100).

101 On close review of the evidence, however, the Crown intention to re-interview complainants does not seem perplexing at all. Police were of the opinion that a pattern of criminal behaviour emerged from a view of the full picture of the allegations. They disagreed with DPP Pearson's recommendation to lay charges in respect of only four complainants. Police were urging further review and Crown Potts undertook to read the voluminous, detailed investigation reports (which ultimately took her some six months).

102 In the course of that review, Crown Potts indicated that re-interviews would be appropriate, according to notes taken by Staff Sergeant Fraser: "Reports being reviewed by Potts. Interested in meeting with victims" (Fraser notes, August 17 and 18, 1994, Respondent's Record, at p. 501; see also Investigation Report, August 22, 1994, Respondent's Record, at p. 498). These re-interviews were done after DPP Pearson had already advised that the case which proceeded would be strengthened if the unwilling complainants with the more

recent allegations would change their mind and come forward. Furthermore, DPP Pearson specifically recommended that six of the unwilling complainants should be interviewed, albeit by police. The police attended with the Crown at these re-interviews and appeared to agree that the joint interviews should be done:" It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds" (Police Transit Slip, January 17, 1995, Appellant's Record, at p. 1084). Finally, the expert testimony of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning indicated that in a case such as this, it would be very likely that in other provinces, some Crown counsel would interview complainants pre-charge: the allegations of sexual assault were historic, the alleged victims were young at the time of the incidents, the alleged perpetrator was high profile and the case was made further controversial by the involvement of the suspect's political enemy. In this context, I fail to see why a thorough re-interview of complainants by the Crown was perplexing, where the Crown would have wanted to assess first-hand the possible charges versus similar fact evidence, and to ensure that complainants fully understood the judicial process before deciding whether to press charges.

103 From this process, the trial judge seemed to infer that the appellant ended up facing more charges than he otherwise would have. Yet I do not see how re-interviewing the complainants for whom DPP Pearson had already recommended charges could have led to more charges in those cases. In the case of the unwilling and similar fact complainants, Pearson had made no charging recommendation. He did, however, generally recommend that some witnesses be re-approached, and that more recent allegations would strengthen the overall case. As some of these complainants decided to press charges, I do not understand why it was inappropriate to reassess the other cases, even where Pearson had initially recommended against laying charges. And of course, during this process, five new complainants surfaced. It is not known to what extent their allegations cast a new light or raised new questions in relation to the earlier list of complainants. In the end, it appears to me that the police had virtually made their charging decision — they wanted to lay charges in respect of the complete picture. The Crown's interviews appear to have provided a basis on which to make their own charging decision — which was also based on an assessment of the full, revised picture. The re-interviews were done to promote many of the policy reasons discussed above: to fully inform potential complainants of the process, to assess their evidence and credibility, for efficiency in the administration of justice, and for the sake of the appearance of decisive action, taken in an already highly public and controversial case. Finally, as the Pearson charging recommendation was clearly preliminary, it is impossible to know whether, as a result of the Crown interviews, the appellant ended up facing more charges.

104 In summary, it is my view that there was no abuse of process in this case. The pre-charge interviews were done in accordance with the common practice of some other

provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by DPP Pearson that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid. I conclude that, based on the evidence of judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, the cumulative effect of these actions, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused, which would jeopardize the fairness of his trial. On that basis, I must now turn to the central issue decided by the Court of Appeal, namely the decision to lift the stay of proceedings ordered by the trial judge.

2. Stay of Proceedings

105 Having found an abuse of process under s. 7 of the *Charter* but ruled that it would not affect trial fairness, the trial judge recognized this put the case in the narrow residual category of abuse where a stay may be granted only in exceptional cases. However, the trial judge misconceived the governing test for a stay of proceedings as outlined in *Tobiass*. At this stage of the analysis, instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise (at paras. 58-59):

> This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar.
>
> In summary, to justify a stay I must ask myself: Are the alleged wrongdoings so unfair to the applicant or so offensive to society so as to render a stay the only reasonable remedy? Is this one of those "*clearest of cases*" or, on the other hand, are there societal interests compelling enough to tip the scales in favour of proceeding? [Emphasis in original.]

106 This error was further emphasized when the judge turned his mind to the facts of the abuse of process, as he saw them (at para. 133):

> ... the cumulative effect of these actions would not shock the community's sense of fair play and decency so as to warrant a stay of all charges outright. It is not one of those "*clearest of cases*" that demands a global stay. Some of these charges involve very serious allegations that by their very nature present a strong societal interest to have prosecuted through a full and fair hearing. As was explained in *Tobiass, supra*, I find that this"

compelling societal interest ... tips the scales in favour of proceeding" with at least some of these charges. [Emphasis in original.]

107 There was no discussion in the trial judge's reasons of any ongoing impact of the abuse he found. As discussed earlier, the embarrassment to the appellant of the premature police announcement was overtaken by the charges which would have been laid in any event. Therefore there was no continuing prejudice from this misconduct. One must also remember that the humiliation flowing from properly laid charges, while unpleasant, is not an abuse of process. As for the trial judge's concern for loss of Crown objectivity, there was no evidence that this was in any way affected by the police misbehaviour. It was also discussed above that the evidence cannot support the inference that Crown pre-interviews or any loss of Crown objectivity inevitably led to the appellant facing more charges. It should be noted that DPP Pearson and the police had expressed a desire to re-interview all but three of the complainants, and that, since then, these three never pressed any charges. Therefore this conduct, even if abusive, cannot be said to be manifested or perpetuated if the process continues. The judge-shopping comment was restricted to one Crown counsel, on one occasion, without further action. In addition, that Crown counsel has long since left the prosecution of this case. Finally, there was simply nothing improper about the inclusion of count 16 in the direct indictment. To speak of ongoing abuse where none was ever apparent makes no sense. All told, even if this conduct did amount to abuse, it falls at the low end of the spectrum of seriousness, and is not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency.

108 Thus, the trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The abuse that was found by the trial judge could be and was addressed by remedies other than a stay. Crown Potts was removed from the prosecution. A Crown not involved with the earlier stages of the case became lead counsel for the prosecution. The police instituted strict measures to maintain confidentiality of the investigation. And ultimately, there was a detailed review of the charges, signed by a new Director of Public Prosecutions when the direct indictment was preferred.

(a) The Direct Indictment

109 For the purposes of assessing any ongoing or lingering effects of the abuse of process found by the trial judge, the majority of the Court of Appeal relied heavily on the direct indictment as evidence of a fresh, objective review of the charges. Cromwell J.A. noted that the trial judge's finding of abuse was at" the charging stage", that is, when the information was sworn on May 30, 1995. The trial judge also found no impropriety in the Crown's decision to prefer the direct indictment. Cromwell J.A. therefore reasoned that even if Crown Potts' involvement in the process, and more generally the Crown's participation in pre-charge interviews, had tainted the process, by the time of the direct indictment, Crown Potts was

no longer on the case, and the direct indictment itself amounted to a remedy which cleansed any earlier abuse.

110 Section 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that the Attorney General or his or her Deputy give personal consent in writing to prefer a direct indictment. It is predictable that there will be variation from office to office and province to province on the actual procedure involved to meet this requirement. I think it is fair to assume, however, that the case at bar would not have been treated as any garden variety, *pro forma* approval of a direct indictment. As Freeman J.A. (dissenting) pointed out, from the outset, this prosecution had been "extraordinary and controversial" (para. 4) as a result of "[t]he prominence of the accused and the high level of media interest in the case" (para. 5).

111 Not only would this sensitive context likely have drawn the close attention of the Attorney General of Nova Scotia (or his or her delegate), but there is direct evidence that the Crown paid close attention to the actual charges contained in the direct indictment. First, one complainant listed on the May 30, 1995 information was completely dropped from the direct indictment. Second, one count under s. 138(2) of the *Criminal Code*, S.C. 1953-54, c. 51, was dropped from the charges in relation to a second complainant. Third, a count in relation to an entirely new complainant was added to the direct indictment. Furthermore, these changes were ultimately approved by Jerry Pitzul, a new Director of Public Prosecutions, who was not involved in the Pearson review, and was not the acting DPP immediately after Pearson left the post.

112 Finally, there is evidence of objectivity at the stage when the Crown was preparing the direct indictment. Two witnesses were interviewed by the Crown a second time in April 1997. In one case, the woman was included as an unwilling witness on the original list that went to DPP Pearson. At this final meeting, she expressed an interest in pressing charges against Regan, but the Crown decided *not* to include her in the direct indictment. In the other case, the woman had come forward after the Pearson recommendation with another, similar allegation against the accused. At that time, and at the time of the direct indictment, she was unwilling to get involved in the proceedings, and no charge was laid.

(b) Balancing a Stay Against Proceeding to Trial

113 Even if one assumes that by applying the proper test the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. Indeed, that prompted the trial judge's charge-by-charge balancing analysis. Yet in his balancing analysis, the trial judge omitted some significant issues relevant to the public interest.

114 The trial judge "afforded significant deference" (para. 141) to the Pearson charging recommendation when reaching his conclusion about staying half of the total charges. In fact, the decision to proceed with charges relating to only four complainants directly reflected DPP Pearson's advice. The trial judge explained that he was so highly influenced by Pearson's position because" the Crown should not be seen to significantly change its position without valid reason" (para. 135). The trial judge, however, did not seem to consider the inconclusive nature of the Pearson recommendation. First, the Pearson letter advised that the case would be strengthened if more complainants with more recent allegations were willing to come forward. Second, the Pearson letter specifically recommended that four complainants be re-interviewed. Police did re-interview those women, and others, accompanied by a Crown counsel. As a result, more women came forward, willing to lay charges. This constituted a valid reason to alter the original opinion regarding charges. Finally, the letter indicated that it was entirely within police discretion to accept or ignore the Pearson recommendation, and it was also open to the Crown to reconsider which charges to proceed with, following the police charging decision. These qualifications all signify a Crown recommendation which anticipated the possibility of change — not one which was etched in stone. As a result of new complainants surfacing, of further interviews, and ongoing consideration of the charges by both police and the Crown, a charging decision was made which included the Pearson recommendation as well as additional charges. There was no reason to assume that the Pearson view of the matter was the Crown's final or most appropriate view.

115 The trial judge's differentiation between the charges he stayed and those he did not also reflected DPP Pearson's view of the "seriousness" of the alleged offences. As discussed above, the Pearson view emphasized physical invasiveness and overlooked the complainants' age, and their socially subordinate and relatively powerless positions in relation to the accused. The Pearson view also reflected the notion of social acceptance (as opposed to illegality) of the alleged crimes some 30 to 40 years ago. Charges brought before a modern court should not be trapped in a social time warp. Once it is determined that past behaviour was an apparent violation of the contemporary law, then the benefit of current social mores should be brought to bear in assessing the advisability of pursuing charges. This approach is especially significant when sexual assault charges are at issue. This Court has recognized the disadvantage that women victims have suffered as a result of stereotypes in society and the justice system. (See, for example, *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.); *O'Connor*, *supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.); *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46 (S.C.C.).) Without revisiting the thoughtful consideration of those judgments in the current case, it suffices to say that those gains would amount to nothing if modern charges of sexual assault for historic acts are viewed with blinkers and through a looking glass that sees an old stereotypic view rather than an enlightened one. It is not for this Court to judge the Crown's assessment of social interests in proceeding with historic sexual assault charges. It is, however, appropriate for this

Court to review lower court decisions according to the standards of modern jurisprudence. Furthermore, when exercising their discretion to grant a stay, courts are bound to consider all significant factors, a requirement by which the Crown is not bound when making its charging decisions. It was not sufficient for the trial judge to merely follow the course set by DPP Pearson.

116 There are many societal interests engaged by this case, which the trial judge failed to factor into the balance. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

D. Standard of Review

117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "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" (*Tobiass*, *supra*, at para. 87; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at p. 1375). Furthermore, 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 (*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.); see also *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38 (S.C.C.); *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.)).

118 This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the "trial judge made some palpable and overriding error which affected his assessment of the facts", the decision based on these facts may be reversed ("*Kathy K*", at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

1. Error of Fact

119 I find that the trial judge's characterization of the scope of pre-charge interviewing done across the country was narrower than the expert evidence indicates. The trial judge concluded (at para. 117):

> Based upon my review of all of the above expert evidence, it seems to me that the scope of pre-charge Crown interviewing in this country is a very narrow one. It ranges from non-existent to rare. On the occasions when it is performed, it serves as a screen designed to protect an accused form going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed.

He characterized the practice of pre-charge interviewing conducted by Crowns in New Brunswick, Quebec and British Columbia as "Crown pre-charge screening" (para. 120). By this, MacDonald J. meant that the only acceptable form of Crown pre-charge meetings with complainants occurs when the Crown is motivated solely by a desire to benefit the accused by screening out frivolous or unsustainable charges. The evidence of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning clearly contradicts this. Pre-charge interviews in New Brunswick are done for a variety of policy reasons, only one of which is the protection of the potential accused. Furthermore, even in Ontario where the practice of Crown pre-charge interviewing is the most circumscribed, it does occur on a regular basis. The trial judge, with respect, was therefore in error when he ruled that "pre-charge Crown interviewing in this country is ... non-existent to rare" (para. 117). The evidence before him disclosed that Crown pre-charge interviews range from a regularly although infrequently exercised practice in Ontario, to a commonly practised procedure in New Brunswick. While the practice is not used in every case, it appears that it is typically used in cases of sexual assault, especially when allegations are historic, the complainant is young, or there is some other reason for specific concern about the strength of the evidence. This palpable error of fact had significant ramifications on the trial judge's reasoning. Based on his erroneous view, he found the Crown's conduct in this case at variance with standard practice across the country and therefore improper. From this impropriety he deduced a loss of objectivity in the Crown's decision to proceed with charges, and from that finding, he concluded that there was an abuse of process, where the other examples of police and Crown misconduct alone would not have risen to the level of procedural abuse where a stay might be warranted.

120 In addition, I find a second factual error in the trial judge's reasoning. Without ever explicitly stating it, the trial judge implies that the loss of objectivity was abusive because it meant that the appellant ultimately faced more charges. No evidence can be found to support this deduction. The recommendations of DPP Pearson were clearly given as part of a charging decision still in flux. Pearson stated that the police were not bound to follow his advice, nor was the Crown bound to proceed with any charges which the police decided to lay. Pearson expressly recommended that some complainants be reinterviewed and he suggested that more charges would strengthen the case. Finally, he could not have anticipated that five new complainants would come forward, subsequent to his charging recommendation (three of whom ultimately accepted that the Crown proceed with charges). All of these facts point to the conclusion that the Pearson recommendation to proceed with charges related to

four complainants was an *interim* one, and that it would be impossible to know whether the process which followed the Pearson recommendation resulted in the appellant facing *more* charges — more charges in relation to what? However, this erroneous factual finding was a palpable error which served as a springboard for the trial judge to find an abuse of process, and to launch into the case-by-case assessment of which charges should be stayed. At any rate, it could not have been inappropriate to lay additional charges if they had an adequate factual foundation and probable cause could be ascertained.

2. Error of Law

121 In addition, the trial judge misdirected himself on the test for granting a stay. By incorrectly emphasizing the balancing stage, weighing the interests flowing from a stay against the public interest in proceeding, he skipped over the key assessment of whether the abuse (as he so found it) would be manifested, perpetuated or aggravated in the proceedings if they continued. He also ignored the step of the analysis which requires that other remedies be considered.

122 I agree with the Court of Appeal that if the trial judge had properly applied the law, he would have concluded that the abuse that he had identified was not ongoing, and that indeed, the remedies of removing Crown Potts from the prosecution and of recognizing, in the circumstances of this case, the direct indictment as a fresh, objective review of the charges put an end to any lingering doubt that the appellant was continuing to face a prosecution that was abusive, vexatious, oppressive or in any way an affront to decency and fair play.

123 Finally, if after having properly undertaken this analysis, the trial judge had still been in doubt as to whether a stay of proceedings was the proper remedy for the abuse of process he found, the balancing exercise which he ultimately undertook was also erroneous. The *Tobiass* test instructs that in such circumstances, the benefits of a stay must be considered in relation to the benefits of continuing the process. An egregious act of misconduct can overtake some passing public concern, but, in other circumstances, a compelling societal interest in proceeding can tip the scales against granting a stay. By the trial judge's own assessment, the case of abuse before him was not egregious enough to warrant a global stay of all the charges. Yet this less serious example of abuse was not fully weighed against the compelling societal interests in signalling that allegations of sexual abuse of young, vulnerable girls and women will be heard, in encouraging all sexual assault complainants to trust the system and come forward, and in protecting the repute of a system of justice that is sensitive to these allegations of crime and the difficulties faced by the complainants who make them. If the societal factors had been fully weighed, the balancing exercise would have led to the conclusion that not one of these allegations was among the clearest of cases where a stay of proceedings was appropriate.

VII. Conclusion

124 As Freeman J.A., dissenting, put it: "On the hearing of the application for the stays, it was incumbent on the appellant to establish not only that he was entitled to a duty of objectivity on the part of the Crown in making its prosecuting decision, but that the duty was infringed so seriously that only a stay of proceedings could remedy the harm." There is no question, and the Crown readily concedes, that the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute. However, even if the trial judge was correct in finding an abuse of process, when the facts at bar are correctly understood, and when the proper test for granting a stay of proceedings is applied, the appellant fails to establish that the Crown's duty of objectivity was infringed so seriously, either by the police, Crown Potts, or the Crown's involvement in pre-charge interviews, that only a stay can remedy the harm.

125 For these reasons I would dismiss the appeal.

Binnie J. **(dissenting) (*Iacobucci, Major, Arbour JJ.* concurring):**

126 This is an appeal from the discretionary order of Michael MacDonald A.C.J., who stayed the prosecution of nine charges of indecent assault against the appellant while permitting nine more serious charges to proceed. It was his view, after an 18-day hearing, that Crown prosecutors had manifested such a lack of objectivity in seeking the conviction of a prominent politician "at all costs" as to taint the integrity of the administration of justice in Nova Scotia. We ought to defer to his factual conclusions, in my opinion.

127 In the two most serious situations, which were allowed to proceed, the appellant was charged with rape (and attempted rape) and unlawful confinement. In a third situation, which also went to trial, he was charged with exposing his penis to a babysitter while grabbing her hand when driving her home. These charges involved teenage girls, one barely 14 years of age, about half the appellant's age at the time.

128 A Nova Scotia jury subsequently acquitted the appellant of all eight charges that have thus far gone to trial. One charge of indecent assault is outstanding.

129 The trial judge was favourably impressed by the opinion of the then Director of Public Prosecutions in Nova Scotia, Mr. John Pearson, when advising the RCMP in 1994 prior to the commencement of any proceedings. Mr. Pearson concluded that while the more serious charges should proceed against the appellant, the prosecution of the less serious charges (that are now 24 to 34 years old)" may be seen as 'persecution' in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered". While Mr. Pearson did not say so, it appears he viewed the "lesser"

incidents as matters that might have proceeded at the earlier time on summary conviction, in which case the applicable limitation period would have been six months.

130 The appellant claims that because of strong criticism of the Nova Scotia prosecutors' service in the case of Donald Marshall who served 11 years in jail for a crime he did not commit, and the controversies related to prosecutions arising out of the Westray mining disaster (discussed in part in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 (S.C.C.)), the prosecutors failed in this case to perform their constitutional role as a check and balance on police power. In their determination not to be seen to be favouring the appellant, a former Premier of Nova Scotia, they leaned over backwards and denied him the" hard objective second look at the charging decisions" ((1998), 21 C.R. (5th) 366 (N.S. S.C.), at para. 122) to which every citizen, of whatever rank or station, is entitled. In the trial judge's view the prosecutors, far from acting as a counterbalance to the police team, effectively became part of it.

131 Since obtaining a favourable decision from the Nova Scotia Court of Appeal the Crown has, on its own motion, stayed two of the nine charges on which it obtained a green light to proceed.

132 The remaining seven charges that were the subject of the stay involve allegations of sexual assault consisting of unwanted kissing, "French kissing", groping, fondling or similar acts between 1968 and 1978 with different complainants who, at the time, came into contact with the appellant as babysitters, a legislative page, a housekeeper, a hotel dishwasher and a news reporter. The complainants' ages varied from 14 to 24 years old. The trial judge acknowledged that all charges of sexual assault are serious. Nevertheless, he concluded that the Crown's failure to act objectively in this case amounted to an abuse of process. The policy concerns raised by the then Director of Public Prosecutions were never subsequently properly addressed, as they ought to have been, in the trial judge's view.

133 As the charges themselves were the direct product of the abuse, the logical remedy was to stay their further prosecution. No lesser remedy would eliminate the root of the abuse. The trial judge found the prosecution of the additional nine charges to arise out of a fundamentally unfair procedure and to be among the "clearest of cases" calling for a stay of proceedings.

134 In my view, the trial judge instructed himself properly on the law and there is no reversible error in his application of the law to the facts. His decision ought not to have been reversed by the majority judgment of the Nova Scotia Court of Appeal (Freeman J.A. dissenting). That court, in my view, simply substituted their own divided opinion on issues that were given to the trial judge to decide. I would allow the appeal.

I. Abuse of Process

135 Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse. An important element of the protection of the law is that where the Crown Attorneys are involved they stand independent both of the police and of persons suspected of crimes to determine in a fair and even-handed way whether and how charges laid by the police should proceed.

136 The appellant says that the Crown cannot point to any other instances where it was sought to prosecute a comparable series of 24- to 34-year-old allegations of sexual touching, serious as those allegations are, and his counsel draws the conclusion that if the appellant had remained in obscurity as a sometime lawyer and sports announcer, Nova Scotia would not now be expending its considerable resources to obtain his conviction. The Crown Attorney's office, in his view, is not standing up as they should to the powerful pressures of the media and an aroused public opinion.

137 I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role. This is the Crown Attorney's "Minister of Justice" function and its high standards are amply supported in the cases: *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at p. 257, and *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.), at p. 341. In *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, the Law Reform Commission of Canada rightly observed that" prominent people, such as politicians ... should be treated neither preferentially nor more harshly than others. If such proceedings would not have been commenced against an ordinary individual, they ought also not to be commenced against the prominent individual" (p. 80).

138 The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure (including premature disclosure of the investigation, improper Crown involvement in the charging decisions, laying a charge to bootstrap otherwise inadmissible similar fact evidence, and judge-shopping), but his listing of the symptoms should not be mistaken for his important and central finding of fact that the appellant had been denied his constitutional right to a fair pre-trial procedure.

A. Standard of Review

139 I agree with my colleague LeBel J. that the standard of review of the trial judge's decision to grant a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* was authoritatively stated by Gonthier J. in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at p. 1375, as follows: "[A]n 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"; see also *R. v. Carosella*, [1997] 1 S.C.R. 80 (S.C.C.), at para. 48.

140 We should also keep in mind the well-established rule mentioned by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at p. 76:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

B. Review of Findings of Fact

141 An appellate court should give appropriate deference to the findings of fact of a trial judge, who in this case heard nine days of evidence and nine days of legal argument. The relevant cases are gathered together in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), where Lamer C.J. concluded, at para. 81:

> It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses.
>
> . . . . .
>
> I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses. ...

142 For the reasons that follow, it is my view that the critical findings of fact of the trial judge in this case compel the issuance of a stay of proceedings.

C. Approach of the Court of Appeal

143 I agree with Cromwell J.A. in the Nova Scotia Court of Appeal ((1999), 179 N.S.R. (2d) 45 (N.S. C.A.)) that the crux of the trial judge's reasoning was that as a result of the abuse of process which the trial judge found to exist, the appellant is facing charges that otherwise

would never have been laid, or if laid would not have been prosecuted. (The excessive charges, to be specific, are the nine charges which are the subject of the stay.)

144 Cromwell J.A. put it this way at para. 128:

> Although the judge does not explicitly say so, it appears that he found that the respondent, as a result of the loss of objectivity, may have been facing many more charges than he would have had appropriate objectivity been retained. With respect to Count 16, the judge found that it was prosecuted for an improper motive.

145 On the other hand, with respect, I do not agree with the overall approach of the majority judgment of Cromwell J.A. when it takes the symptoms of institutional failure identified by the trial judge and (as I interpret his opinion) addresses each symptom in isolation from the others with a view to demonstrating that what was done was not necessarily and in all cases wrong. I think, with respect, this approach is incorrect. Quite apart from the trial judge's emphasis on the *cumulative* effect of the various elements of the conduct complained of, the majority opinion mistakes the symptoms for the diagnosis. The trial judge's concern was not so much at the level of the individual symptoms as it was with the failure in this case of the institutional checks and balances. The failure prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

146 As stated, these broader concerns found expression in the report of the then Director of Public Prosecutions for Nova Scotia, Mr. John Pearson, dated June 28, 1994. The trial judge accepted, of course, that Mr. Pearson's opinion was not binding upon the police or on subsequent prosecutors (and certainly not on the court). Still, it represented a bench mark of objectivity and even-handedness that he thought ought to have continued to guide consideration of both the charges Mr. Pearson considered and the others that followed. Mr. Pearson made the following observations about the potential charges that he recommended against proceeding with:

> **The Other Complainants**
>
> Concerning the other four complainants ... it is our opinion that these allegations should not be proceeded with by way of criminal charges. We have concluded that acts contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases. However, consideration of the following public interest factors tips the scale in favour of not proceeding with these matters as criminal charges:
>
> i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in [the] incident [involving one

complainant] where her father, upon learning of the facts, demanded an apology from the accused);

ii) the "staleness" of the offences when compared with their gravity;

iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;

iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and

v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding.

147 The charges that were stayed by the trial judge were described by Freeman J.A., dissenting, as *historic* counts (at para. 20):

> Each count alleges a single impulsive act, an isolated incident without repetition, follow-up, or persistency on the part of the respondent. The most recent of the stayed counts was almost 20 years old at the time of the trial, and some were more than 30. None of the complainants had come forward to initiate contact with police. The director of public prosecutions who evaluated the police case before the charging decision was made, and before the Crown's objectivity had been compromised, had recommended against proceeding with historic counts of this nature.

148 The conclusion that well-informed people may reasonably take from the continued prosecution of what Mr. Pearson described as "minor" allegations 24 to 34 years after the events are said to have taken place is that the appellant is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system, in my opinion.

D. Law Governing Abuse of Process

149 There is no doubt that the prosecutorial misconduct found by the trial judge would not prevent the accused from receiving a fair trial on all charges. The appellant's complaints in that regard were all properly rejected.

150 The issues relevant to the "abuse of process" claim in this case are:

(i) the extent to which an objective and even-handed Crown Attorney is essential to the checks and balances at the stages of the criminal justice system in which he or she is involved, and

(ii) whether preferring a direct indictment and the holding of a subsequent fair trial cures the omission of an essential check and balance in the laying of the charges.

1. The Importance of Checks and Balances

151 It is clear that Crown Attorneys perform an essential "Minister of Justice" role at all stages of their work. Their role in considering or carrying forward a prosecution is of the highest importance for the integrity of our criminal justice system, and was perhaps most famously described by Rand J. in *Boucher*, *supra*, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Many other statements of the highest authority can be found to the same effect. In *Stinchcombe*, *supra*, Sopinka J. for the Court stated as follows, at p. 341:

> The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high.

152 In *R. v. Bain*, [1992] 1 S.C.R. 91 (S.C.C.), Gonthier J. for himself, McLachlin and Iacobucci JJ., dissenting on other grounds, stated at p. 118:

> The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors.

153 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), Lamer J. for himself, Dickson C.J. and Wilson J., stated at p. 191:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate".

154 See also *Lemay*, *supra*, *per* Cartwright J., dissenting on other grounds, at p. 257: "[T]he sole object of the proceedings is to make certain that justice should be done".

155 The "Minister of Justice" responsibility is not confined to the courtroom and attaches to the Crown Attorney in all dealings in relation to an accused person whether before or after charges are laid. It is a responsibility" that should be conducted without feeling or animus on the part of the prosecution" (*R. v. Chamandy* (1934), 61 C.C.C. 224 (Ont. C.A.), *per* Riddell J.A. (Ont. C.A.), at p. 227).

156 These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus — either negative or positive — towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

157 In *R. v. B. (G.D.)*, [2000] 1 S.C.R. 520, 2000 SCC 22 (S.C.C.), at para. 24, we held that "the right to effective assistance of counsel" in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria first established in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 513:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves. [Italics in original.]

158 These requirements set a high standard. The courts rightly presume, such are the high traditions of the prosecutorial service in this country, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble — rightly or wrongly — with the law. Unfounded or trivial allegations will be given short shrift. In this case, however, the trial judge found that the departure from the expected standard was neither unfounded nor trivial. The extent of the departure was deeply troubling. The trial judge has much experience in the practicalities of criminal prosecutions. We are thus confronted in this case with a very exceptional set of facts.

159 The police investigate. Their task is to assemble evidence and, assessing it as dispassionately as they can, determine whether in their view it provides reasonable and probable grounds to lay charges. The prosecutors provide the initial checks and balances to the power of the police. As the late Mr. Justice Arthur Martin observed in his *Report of*

the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("*Martin Report*"), at p. 117, "[a]s ministers of justice, their ultimate task is to see that the public interest is served, in so far as it can be, through the use, *or non-use*, of the criminal courts" (emphasis added). Further (at pp. 117-18):

> Discharging these responsibilities, therefore, inevitably requires Crown counsel to take into account many factors, discussed above, that may not necessarily have to be considered by even the most conscientious and responsible police officer preparing to swear an information charging someone with a criminal offence.

160 The Crown prosecutor thus stands as a buffer between the police and the citizen. As the *Martin Report* emphasized, at p. 39:

> ... separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. [Emphasis added.]

161 The appellant was as much entitled to this "level of independent review" as any other suspect. The trial judge concluded that the distinct roles of the Crown Attorney and the police became blurred and "homogenized". In the result, the appellant was deprived of the institutional protection to which he was, and is, entitled. This is how the trial judge put this crucial finding of fact (at para. 122):

> The Crown states that it was not involved in the investigation and I accept this. However it is clear to me that the Crown was integrally immersed in the decision-making process as it applied to the laying of charges. In so doing it became heavily involved with interviewing potential complainants. Unlike Mr. Pearson, they did not critically review a police report. Instead they collaborated fully with the police to create what in essence became a joint charging decision. Cooperation led to consensus, but only at the expense of the process which became homogenized. Thus the applicant was denied that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown. [Emphasis added.]

162 These are findings of fact for which there was ample evidence.

163 No reason has been shown, in my view, for any interference in these findings of fact either by the Nova Scotia Court of Appeal or by this Court.

2. The "Residual Category" of the Law on Abuse of Process

164 The jurisprudence is clear that a fair trial cannot always cure an earlier default that taints the integrity of the justice system. In *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), it was said at para. 73 that there is a

> residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

165 The common law had developed a doctrine of abuse of process long before the *Charter*. In Canada it is sometimes traced to *Sproule, Re* (1886), 12 S.C.R. 140 (S.C.C.). A rationale of the common law doctrine was adopted in *R. v. Jewitt*, [1985] 2 S.C.R. 128 (S.C.C.), in terms that are pertinent here, at p. 136:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

E. Prosecutorial Discretion

166 The trial judge in this case was careful not to understate or diminish the broad scope traditionally and properly afforded to prosecutorial discretion. Courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances. In *R. v. Beare*, [1988] 2 S.C.R. 387 (S.C.C.), for example, the Court noted that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, *per* La Forest J., at p. 410:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

See also: *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.); *R. v. Smythe*, [1971] S.C.R. 680 (S.C.C.), at p. 686; *R. v. T. (V.)*, [1992] 1 S.C.R. 749 (S.C.C.); and *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.), at p. 348.

167 Still, the corollary to these extensive discretionary powers is that they must be exercised with objectivity and dispassion. This principle has found its way into the Canadian Bar Association's *Code of Professional Conduct* (1987); see chapter IX, "The Lawyer as Advocate":" Duties of Prosecutor", s. 9:

> The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.

168 Because the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts, it is all the more imperative that the discretion be exercised in a fair and objective way. Where objectivity is shown to be lacking, corrective action may be necessary (as here) to protect what *O'Connor* referred to as "the integrity" of the criminal justice system.

169 Wilson J., in *R. v. Keyowski*, [1988] 1 S.C.R. 657 (S.C.C.), developed the notion that abuse of process in this regard does *not* require a demonstration of prosecutorial bad faith. She wrote that courts should look at all relevant factors." To define 'oppressive' as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. ... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account ..." (p. 659).

170 In the present case, the overriding concern was the failure of the proper and usual institutional checks and balances.

171 The fact that *O'Connor* brought together the two streams of jurisprudence relating to abuse of power — the common law with its emphasis on the integrity of the criminal justice system and the *Charter* with its emphasis on individual rights — did not diminish judicial preoccupation with the integrity of the process. It was fairly observed in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), that cases of abuse of process that do *not* involve fair trial rights or other individual rights and freedoms can be expected to be few in number. This is because despite the fact that errors are made, the institutional *integrity* of our system of justice is rarely called into question successfully.

172 In my view, the Crown did not demonstrate that in finding an abuse of process in this case the trial judge either misdirected himself or that "his decision is so clearly wrong as to amount to an injustice" (*Elsom*, *supra*, at p. 1375).

173 I agree with Freeman J.A. in dissent when he said, at para. 5, that:

> The prominence of the accused and the high level of media interest in the case called for a disciplined and dispassionate approach by the Crown to ensure a perception that Mr. Regan was treated as even-handedly as any citizen has a right to expect. Instead the trial judge identified a number of lapses of judgment indicative of over-zealousness by the police and the Crown, three of which figured in his decision to stay what were considered to be lesser charges to preserve the reputation of the administration of justice.

174 As Freeman J.A. points out, the specific lapses were considered "indicative" (not exhaustive) of over-zealousness.

F. Addressing the Symptoms

175 Much of the reasons for judgment of the majority in the Nova Scotia Court of Appeal is devoted to pointing out what the trial judge did *not* find, or alleged inconsistencies in what he *did* find. In my view, with respect, the reasons of the trial judge read as a whole by a mind willing to understand are consistent and coherent. As stated, I disagree with the effort to divide his reasons into airtight compartments and then isolate and attack the compartments one by one. Nevertheless, I proceed with a consideration of the symptoms listed by the trial judge and addressed by the Court of Appeal in the order in which they arose in the earlier judgments.

1. Police Misconduct

176 The trial judge rejected almost all of the appellant's allegations of misconduct against the police, including the allegedly "premature" formation of a task force to investigate rumours and journalistic speculation about the appellant's behaviour, allegedly questionable investigative techniques, missing evidence and arrest procedures. He was nevertheless "troubled" by the "serious error in judgment" (para. 87) by the police in confirming that the appellant was under investigation before any of the complainants had been interviewed let alone charges laid. This was contrary to the express direction of the provincial Solicitor General's Department dated February 6, 1990:

> 3. No police official shall disclose the fact of a police investigation, other than on a need-to-know basis within the Police Department, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of an investigation.

The disclosure was not a slip. The trial judge found that the police officer checked with his superior officer before making the disclosure and issued the disclosure in the form of a

press release. The effect, as pointed out by Freeman J.A., was that" [t]he story made national headlines some 17 months before charges were laid" (para. 24).

177 The majority judgment of the Nova Scotia Court of Appeal considered this event to be largely irrelevant to the issues under appeal because it relates to the police, not the prosecutors. I disagree. What this incident should have indicated to the Crown Attorney's office was that the police perceived themselves to be under a great deal of public pressure and that a "hard objective second look" at any charges ultimately laid would be of the highest importance to the fair and even-handed administration of justice. It is in such situations that the system of checks and balances is most severely tested.

2. Conduct of the Crown Prosecutors

178 There were three aspects, in particular, of the conduct of the prosecutors that indicated to the trial judge that the system of checks and balances did not operate in this case.

(a) Judge Shopping

179 The first aspect was the apparent willingness of the Senior Crown Attorney on the case, Ms. Susan Potts, to manipulate the court system to advantage the prosecution. This emerged in the RCMP minute of a meeting on July 15, 1994 between the Crown Attorney and RCMP investigators where she advocated judge shopping, i.e., using the Crown's scheduling privilege to get the case before a judge of its own choosing, a practice which undermines both the reality and the appearance of the impartial administration of justice. The RCMP minute reads:

> There was some discussion in regards to where charges are laid and an appearance by Regan in court. [Crown counsel] Potts said that Judge Randall is sitting in Sept and it is not advisable to bring the matter before him — political appointment (Liberals). Oct may be the appropriate month. Potts is to keep monitoring the court docket to see who is sitting when and what would be in our best interest. [Emphasis added.]

180 The trial judge considered the note important because of what it revealed, namely that the Senior Crown Attorney with day-to-day responsibilities for the case had identified herself with the police point of view, and was "attempting to secure a conviction at all costs". The trial judge wrote (at para. 101):

> This entry represents a blatant attempt at judge shopping, pure and simple. It is offensive and most troubling. The reference to avoiding a particular judge is one distressing thing, the flagrant attempt at "*monitoring the court docket to see who is sitting when and what would be in our best interest*" [emphasis added by MacDonald J.] is even more disturbing.

> This gives the appearance of a Crown Attorney who is attempting to secure a conviction at all costs. [Emphasis added.]

181 The Nova Scotia Court of Appeal pointed out that eventually Ms. Potts left the case in 1996. This is true, but the trial judge was concerned about the absence of an objective view at the time the charges were laid, at which point (for example, the critical meeting with the RCMP on January 17, 1995) Ms. Potts was very much the heart and sinews of the prosecution team. The Crown says that the "judge shopping" comment was neither repeated nor acted on. We do not know this. The appellant attempted to subpoena Ms. Potts to testify at the abuse of process hearing but it seems that her appearance was successfully blocked by Crown objections.

(b) Joining Forces with the Police

182 A few years before the investigation in this case, the prosecutorial branch in Nova Scotia was severely shaken by the findings of the *Royal Commission on the Donald Marshall, Jr., Prosecution* (1989) (the "*Marshall Report*"). In the course of inquiring into the wrongful conviction of Mr. Marshall, the Royal Commission found instances of political interference in charging decisions and differential treatment as between prominent citizens and the disadvantaged. The *Marshall Report* therefore recommended that the problems historically experienced in Nova Scotia be addressed by maintaining a "distinct line" between the police and the Crown law office (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function — that of investigation and law enforcement — is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice. [Emphasis added.]

183 The accepted practice in Nova Scotia in the 1994-95 time period (i.e., the" local custom") was set out in a report submitted to the Minister of Justice for Nova Scotia concerning the status of the Public Prosecution Service in 1994, in which Professors Ghiz and Archibald of Dalhousie Law School stated as follows:

> In some Canadian jurisdictions, and in Nova Scotia prior to the Marshall Inquiry, prosecutors claimed the authority to direct the police in their general investigative duties (as well prior to as after the laying of charges), and sometimes purported to have the authority to order the police not to lay charges in specific cases. Pursuant to recommendations 36 and 37 of the Marshall Inquiry, as adopted by the Attorney General and the then Solicitor General, there is now a clearer understanding of the importance of separating the policing and prosecution functions. Fundamentally, one might say the police have the right to investigate and lay charges unimpeded by Crown

> Prosecutors, while Prosecutors have the right to stop charges once laid. However, there is often a need for both pre-charge and post-charge consultation since the normal scenario is a cooperative rather than antagonistic relationship between Crowns and police, both of whom share common goals in the administration of criminal justice. The nature of this advice sought by police and given by Crowns is usually limited as to the appropriateness of a specific charge under the *Criminal Code* or the interpretation of a *Criminal Code* section, but the advice may also extend to whether or not certain evidence that has been gathered would be sufficient to sustain a case in court. [Emphasis in original.]
>
> (J. Ghiz and B. P. Archibald, *Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation* (1994), at pp. 41-42.)

184 In my view, the Nova Scotia Court of Appeal did not meet the trial judge's point when it attempted to show that pre-charge involvement of Crown Attorneys with the police varies somewhat from province to province and cannot be regarded as in all circumstances and for all purposes objectionable. I agree that the test is a principled test (i.e., have objectivity and independence been maintained?) rather than mechanical (e.g., did the interview take place pre-charge or post-charge?), and that in principle the charging decision does not represent a "bright line" prior to which the involvement of a Crown Attorney is presumptively suspect.

185 Moreover, I agree with my colleague LeBel J., at para. 83, that:

> ... pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings. [Emphasis in original.]

186 The trial judge's concern was a principled concern. He deplored what he found to be the absence of independence and objectivity on the part of Ms. Potts and her colleagues in the Crown office working on this case. Those who engaged in the pre-charge interviews had acquired, for whatever reason, tunnel vision under the pressures of a high profile investigation of a politically prominent individual.

187 The trial judge was not opposed to the pre-charge involvement of the Crown. He had no trouble, for example, with the pre-charge involvement of Mr. Pearson, the Director of Public Prosecutions. He stated his concern more narrowly (at para. 121):

> The crucial issue before me is a more narrow one. It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid. [Emphasis added.]

188 Some of the trial judge's observations on the dangers of interviewing complainants pre-charge may have gone beyond the "narrow" issue he had identified for himself. I do not, for example, think he should be taken to say that pre-charge interviews *necessarily* give rise to a loss of objectivity. Not only did he endorse pre-charge interviews for certain limited purposes but he was dealing with a loss of objectivity that pre-dated even the initial Crown interviews. Ms. Potts made the judge-shopping comment on July 15, 1994, but she did not begin her interviews of the complainants until over four months later, on November 17, 1994.

189 Taking his reasons as a whole, the trial judge appeared to accept (as I do) the correctness of the evidence of Dr. Philip Stenning, which the trial judge summarized as follows (at paras. 115-16):

> Dr. Philip Stenning was arguably the Crown's most qualified expert. He has dedicated his entire academic career to studying the role of the Crown and has published extensively on this topic. Like Mr. Gover, he feels it would be an over-simplification to decree that a prosecutor should never interview pre-charge. Everything must be placed in context he feels, and local customs must be acknowledged and respected. Despite what might be stated in the *Martin* and *Marshall Reports*, he feels there is still room for the Crown to interview pre-charge in appropriate circumstances.
>
> ... [He] does concede that such occasions would be rare.

190 The specific problems here, therefore, were breach of what Dr. Stenning termed a "local custom" of maintaining a distinct division of responsibilities that was perhaps more emphasized in Nova Scotia than elsewhere due to well-publicized problems with the Crown Attorney's office over the preceding ten years or so, and the problematic motive for the breach. As to the former, the trial judge's concern was not with cross-Canada variations but whether or not the Crown Attorneys in Nova Scotia observed the local rules that had been put in place following the *Marshall Report*. Their willingness to ignore the "distinct line" between their role and that of the police, accepted by Nova Scotia following the *Marshall Report*, showed a zeal for the laying of more charges that "homogenized" what were supposed to be distinct and separate functions. Instead of the police laying charges and the Crown providing a "hard objective second look", the Crown had subordinated itself and become a supporting actor in the initial charging decision, which the trial judge described as a "joint decision". As to motive, the trial judge recognized several legitimate reasons to interview a complainant pre-charge, for example, to prevent an accused "from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117), rapport building to encourage informed willingness to participate, or assessing victim credibility. He said (at para. 118):

> The Crown in the case at bar has given its reasons for interviewing pre-charge. They include "rapport building" and assessing victim credibility. Yet, despite these stated intentions, it is clear according to one R.C.M.P. file reviewer that the purpose for at least some of these pre-charge Crown interviews was to have reluctant complainants change their minds and come forward. [Emphasis added.]

191 The purpose here, apparently, was not to "build rapport" with complainants who were worried about the court process, which would be a perfectly acceptable reason for a pre-charge interview. The trial judge saw the Crown involvement in "changing their minds" as simply another aspect of the Crown's joining the police team rather than exercising a" level of independent review". In this respect, he quoted (at para. 118) a contemporaneous RCMP internal note dated January 17, 1995, which recorded:

> It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds. [Emphasis added.]

This was to further the police strategy of a "broadly based prosecution", as it was described by counsel for the Crown in this Court. In my view, the trial judge was correct in his criticism. If the charges were examined and approved one by one, the Crown might wind up with a "broadly based prosecution", but the Crown ought not to start out with the objective of a broadly based prosecution and then *afterwards* look to approve individual charges to make it happen. This is what the trial judge criticized (at para. 123):

> The Crown's role in response is to objectively assess the case globally. As ministers of justice they are to dispassionately protect the process which includes protecting the rights of the applicant. In this case the Crown did not review the investigators' charging decision. They became part of it. They interviewed all potential complainants. Their involvement became subjective by nature. Like the police, it is understandable that they would have strong feelings. Not surprisingly and as Mr. Reid confirmed, they eventually came to see the case the same way the police saw it. That would be fine if their review was totally objective; as was Mr. Pearson's. It becomes problematic when what was to be a review becomes a joint endeavour and a joint decision. That I believe is what happened in the case at bar.

192 On this point, Freeman J.A., dissenting, made the following comment, with which I agree (at para. 67):

> While expert opinions varied as to the rare circumstances in which pre-charge interviews may be engaged in by the Crown without imperiling Crown objectivity, there was agreement that Crown objectivity itself was an essential component of Canadian justice.

> If such a value exists then it must have a home within the system, and there must be remedies for lapses.

In my opinion, such a value exists and its home is in s. 7 of the *Charter*.

193 The Crown's effort to lay the responsibility for all this on the head of Ms. Susan Potts is unconvincing. As mentioned, when the defence attempted to subpoena Ms. Potts to testify about the extent and depth of alleged loss of objectivity among the prosecutors, the Crown resisted and she never had the opportunity to explain her conduct to the court. I do not say the Crown's objections to her testimony were either unfounded or unreasonable. I say only that the Crown cannot draw a self-serving conclusion from this unfortunate situation when the critical evidence went unheard because of the Crown's objection.

(c) Count 16

194 This count related to a 24-year-old news reporter who says that in 1976 she was forcibly fondled by the appellant in a hotel room while being pushed onto a bed. She was unwilling to become involved as a complainant. The police wanted count 16 before the court because it would enable them to lead" similar fact" evidence of a more significant incident in Alberta in 1990. The police apparently thought this 1990 incident would add credibility to their" broadly based prosecution" strategy by making the series of charges appear less stale and more up to date. This strategy was reflected in Staff Sergeant Fraser's internal RCMP report of December 9, 1994:

> The investigation surfaced many victims and charges to be laid should reflect the whole picture. The report, dated 94-06-28, from the Public Prosecutions Service [the Pearson opinion] recommended that charges be laid in respect to four victims. This in effect shows that the subject was active in his early years however the investigation surfaced evidence to support the fact that the offences continued throughout the period 1960-1990. For this reason, it was requested by C/Supt. Falkingham that Crown review the evidence and consider laying charges in all instances so that the gravity of the subject's actions be properly presented to give the full picture.

195 The obstacle to this "full picture" strategy is that the only complainant more recent than 1978 was the Alberta allegation that could not be prosecuted in Nova Scotia. The Crown therefore decided to prosecute count 16 as a gateway to introduce the Alberta evidence, thereby extending by 12 years" the full picture".

196 The majority judgment of the Nova Scotia Court of Appeal considered count 16 to be valid in its own right, and the trial judge's condemnation of the police strategy to be misconceived. Cromwell J.A. writes, at para. 140:

> There is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges.

I agree, but that is not the point taken by the trial judge. His concern with count 16, as was his concern with the judge-shopping comment and the pre-charge interviews, was the Crown's apparent inability or unwillingness to assert its independence from the police strategies. On count 16 the trial judge said (at para. 158):

> Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the complaint of A.R.S., a similar fact witness. Similar fact evidence is only admissible if relevant to proving the listed charge. You cannot lay a charge in order to get similar fact evidence in. Such a concept would be totally contrary to the very essence of this exclusionary rule.

197 In my view, the trial judge's concern was quite appropriate. Similar fact evidence is generally inadmissible but will be permitted where its probative value exceeds its prejudicial effect: *R. v. Sweitzer*, [1982] 1 S.C.R. 949 (S.C.C.), at p. 952, and *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 (S.C.C.), at p. 735. The trial judge concluded that count 16 was to be used as a vehicle to get otherwise inadmissible evidence before the jury to extend and perhaps distort" the full picture". Whether or not a conviction was entered on count 16 was, according to the trial judge's finding of fact, of secondary importance to the police and the Crown. This was a reversal of the natural and proper order of considerations, and showed to his satisfaction that over-zealousness by the Crown was still operating more than a year after Ms. Potts left the case.

(d) Preferring the Direct Indictment

198 The majority decision of the Nova Scotia Court of Appeal concluded that even if proper procedures were not followed in the laying of the charges in 1995 (and the subsequently added charges), the omission was cured by the preferral of the direct indictment on April 10, 1997. In this respect, Cromwell J.A. in a number of passages interprets the trial judge's decision as saying the "discretion to prefer a direct indictment, some two years after the initial charges were laid, *was properly exercised*" (para. 105 (emphasis added); see also paras. 143 and 173). The "cleansing effect" of the direct indictment is endorsed by my colleague LeBel J. at para. 109.

199 I think the so-called "cleansing effect" of a direct indictment is overstated. While s. 577(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires "the personal consent in writing of the Attorney General or Deputy Attorney General", the purpose of this provision is to engage the responsibility of senior officials, not necessarily to compel their sustained and

undivided attention to the nuts and bolts of a prosecution. Under our notions of ministerial responsibility, much is done on the basis of the signature of a Minister or Deputy Minister that he or she could not possibly have reviewed in any detail. They rely (and it is expected that they rely) on advice from their officials. In this case, the officials were the very people whose conduct the appellant complains about.

200 The extracts of the record before us, which are restricted to factual matters relevant to the legal issues, exceed 1200 pages in length. I do not say that the Attorney General or his Deputy did not master the file, but I would require more evidence than we have been given before accepting as realistic the conclusion that they did so to the point of "cleansing" the failures in the system of checks and balances that had occurred earlier. This is particularly so when the real explanation for the direct indictment is perfectly clear. The direct indictment was recommended to the Attorney General because the preliminary hearing had run the better part of a year and showed no signs of an early conclusion.

201 In any event, I view the trial judge's finding on this point somewhat differently than did the Nova Scotia Court of Appeal majority. What the trial judge said, in fact (at para. 131), is that he was

> ... not convinced that the Crown acted *mala fides* in its decision. The preliminary inquiry was very lengthy. If the Crown was so ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

202 A finding of *mala fides* or bad faith is not, of course, a condition precedent to finding an abuse of process: *Keyowski*, *supra*, at p. 659. The trial judge found that the Crown had not acted in bad faith to shut down a preliminary inquiry that had already run from April 9, 1996 to February 25, 1997. His comment about *mala fides* did not address and was not intended to address the appellant's much broader complaint of a failure by the Crown, for whatever reason, to review in an objective and even-handed way the appropriateness of the "minor" charges that Mr. Pearson had earlier rejected, and charges in the same category laid subsequently, in light of all the factors touching on the public interest. As to the direct indictment issue, I agree with Freeman J.A. in dissent (at para. 15):

> Whether the decision was fixable at that stage [i.e., of the direct indictment] is not the issue. Justice MacDonald did not find it had been fixed.

203 In light of the trial judge's conclusion that the charging process was fundamentally flawed, and the fact that he eventually entered a stay against nine of the lesser charges, it is apparent that while he did not regard the direct indictment that cut short the preliminary inquiry as tainted with *mala fides* on that account, he nevertheless concluded that in limited respects it was inappropriate. He specifically so found in relation to count 16, which was not laid until the direct indictment, i.e., long after Ms. Potts had left the prosecution team.

204 The direct indictment in this case was not a cleanser. At best it was a missed opportunity.

205 I would not want to leave this branch of the case without repeating the apposite observations of McLachlin J. (as she then was) and Major J. in *Curragh, supra*. Although written in dissent, they are sentiments with which no member of the Court would disagree (at para. 120):

> [I]t is especially where pursuit of truth is righteous that we must guard against overreaching on the part of those charged with the authority to investigate and prosecute crimes. We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged. High profile trials, by their nature, attract strong public emotions. In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness. ... When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree.

206 I would uphold in this case the trial judge's conclusion that the nine charges that he stayed represented, in all the circumstances, an abuse of process.

II. Stay of Proceedings

207 Demonstration of an abuse of process does not, of course, lead to an automatic stay of proceedings.

208 This is particularly true where, as here, the trial judge concluded that notwithstanding the passage of time and the difficulty of getting to the bottom of momentary events that happened 24 to 34 years ago, the appellant's fair trial interests have not been prejudiced by the conduct found to amount to an abuse of process.

209 The inherent power of a superior court to stay proceedings that are an abuse of power was recognized in Canada in the nineteenth century, called into question in *R. v. Osborn* (1970), [1971] S.C.R. 184 (S.C.C.), and *R. v. Rourke* (1977), [1978] 1 S.C.R. 1021 (S.C.C.), but affirmed again with *Jewitt, supra*. In *Rourke*, Pigeon J., for the majority, concluded, consistent with earlier statements in *Osborn*, that" I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive" (p. 1043), while also stating that "[i]f there is the power", it "should only be exercised in the most exceptional circumstances" (p. 1044).

210 The controversy over whether the discretion to stay for abuse of process was an option that had been completely foreclosed in Canada remained in doubt until *Jewitt, supra*, where

Dickson C.J., for a unanimous Court, affirmed the availability of a stay of proceedings to remedy an abuse of process and *Osborn* and *Rourke* were read narrowly. This Court affirmed the existence of the residual discretion of a trial judge to stay proceedings where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-37). Further, he added, the power can be exercised only in the "clearest of cases".

211 In *Jewitt*, Dickson C.J. alluded briefly to the concern about the defendant receiving a procedural windfall of sorts. "The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction" (p. 148). That concern was more fully developed, along with an elaboration of the abuse of process doctrine, in *R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667, by L'Heureux-Dubé J. for the majority:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits ..., but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure" that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society". ... It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

See also *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), *per* McLachlin J., at pp. 1007-8.

212 The residual category of cases where a stay of proceedings is available notwithstanding the fact the abuse of process found to exist does not affect the fairness of the trial (or impair the more specific procedural rights in the *Charter*) was further elaborated in *O'Connor*, *supra*, *per* L'Heureux-Dubé J., at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

213 In *Tobiass*, *supra*, at para. 89, the Court characterizes the residual category as a" small one" and observes that fairness of the trial will occupy the" vast majority" of the cases. I do not treat that observation as deprecating the importance of the residual category. As previously suggested, it merely reflects the fact that on the whole our system of criminal justice functions justly. The cases where a stay of proceedings is required on this account are rare, not because of judicial *fiat* to limit their numbers but because the system works. The institutional checks and balances are observed.

214 *Tobiass* notes that a stay of proceedings is not intended to redress a past wrong but to prevent the perpetuation of a wrong that will continue to trouble the parties and community in the future. The mere fact of" shabby treatment" of an individual in the past does not satisfy the criterion (at para. 96):

> A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent — a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.

215 Accordingly, in a unanimous pronouncement on the subject, this Court in *Tobiass* laid down a two-part analysis for considering the grant of a stay of proceedings (at para. 90):

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

To which a potential third step was added at para. 92:

> After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings". ... We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits.

216 In my view, with respect, the criteria laid down in these cases, and recited by the trial judge in his reasons for judgment, are amply fulfilled by the findings of fact in this case.

217 The absence of the proper checks and balances between police and prosecutor in this case led to an increase in the number of charges laid against the appellant. The trial judge's reasons can be read in no other way. Cromwell J.A. noted, at paras. 168-69, that the trial judge's

> reasons are consistent with a conclusion that the respondent may have been facing more charges than he would have been had Crown objectivity been retained at "the charging stage". In other words, had objectivity been retained, some of the charges laid by the police might have been stayed by the Crown. If this is correct, the loss of objectivity found by the judge could be taken to have ongoing effects in the sense that it may have put the prosecution on a fundamentally different path than it would otherwise have followed. The judge sought to remedy the loss of objectivity by staying counts which he thought Mr. Pearson would not have proceeded with had he remained in office.
>
> In my respectful view, this analysis overlooks the proper preferring of the direct indictment.

218 I have already discussed my disagreement with Cromwell J.A.'s interpretation of the trial judge's treatment of the direct indictment.

219 It is clear to me, applying the first stage of the *Tobiass* test, that the trial judge concluded that the Crown's loss of objectivity and improper motive will be" manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise (*Tobiass*, *supra*, at para. 90). If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse.

220 Secondly, the only way to halt this continued prejudice to the appellant is by bringing a halt to the charges going forward to trial, i.e., a stay of proceedings.

221 The trial judge's analysis of these first two elements in the *Tobiass* analysis draws support, I think, from the scholarly article that initially formulated these elements of the test (see *O'Connor*, *supra*, at para. 75):

> Where the abuse has caused no prejudice to the fairness of the trial itself, a stay will be appropriate where:
>
> > the abuse is in the very fact that a charge was laid, and the abuse in question or the prejudice it has caused is so significant relative to the seriousness of the offence that

> it is more important to the interests of justice that the court redress the abuse, than try the offence on its merits. ... [Emphasis added.]
>
> (D. M. Paciocco," The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *C.L.J.* 315, at p. 350.)

222 In this case, "the seriousness" of the offences was characterized as relatively" minor" and the importance which may be attached to their prosecution therefore does not outweigh the prejudice in this case to the integrity of the administration of justice.

223 The majority opinion in the Nova Scotia Court of Appeal largely rested on the view that the trial judge had failed to consider whether the continuation of the prosecution would" manifest, perpetuate or aggravate the prejudice" (para. 101). The trial judge cited that specific aspect of the test at para. 56 of his reasons and in my opinion he applied it and, given his findings of fact, he came to the right conclusion.

224 The *Tobiass* case, I note parenthetically, was decided on very different facts. Neither the original charges nor the conduct of the prosecutors assigned to the case were criticized. A meeting took place between the Chief Justice of the Federal Court and a senior member of the Justice Department (neither of whom had any direct role in *Tobiass* or its companion cases). At the meeting, *Tobiass* and its companion cases, amongst other cases of alleged war crimes, were referred to in terms of alleged scheduling delays. Defence counsel were not made aware of the meeting until after it had occurred. This Court found a serious breach of fairness had occurred, but the prejudice could be eliminated by ensuring that the participants in the meeting at issue had no further participation whatsoever in the case. No such limited remedy is possible in this case. So long as the charges stand, the prejudice will persist.

225 Finally, at the third stage of the *Tobiass* test, the court is to consider (if it still has any uncertainty) the balance between any harm to the justice system that would result from taking the charges to trial as against the public interest in having these charges disposed of on their merits. As mentioned, the balancing process was described by L'Heureux-Dubé J. in *Conway*, *supra*, at p. 1667:

> Where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

226 This was expressly noted by the trial judge in this case, who said: "This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar" (para. 58).

227 The key to the trial judge's "balance" was his view that despite the existence of allegations which, if believed, would constitute the offences charged, the group of charges stayed were less serious than those he allowed to proceed, and had never been objectively reviewed in light of what the *Martin Report* described as factors "that may not necessarily have to be considered by even the most conscientious and responsible police officer" (para. 34, *supra*).

228 Society, like the Crown Attorney, has no specific interest in "winning or losing" but it does have an interest in placing the relevant facts before a court for determination on their merits. This factor militates against a stay, but in this case it is a factor that is overwhelmed by competing considerations.

229 The trial judge was clearly of the same view as the former Director of Public Prosecutions, Mr. John Pearson, who said that while on the one hand" acts contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases", nevertheless, on the other side of the ledger, "consideration of the following public interest factors tips the scale in favour of *not* proceeding" (emphasis added) with the "minor" charges. For ease of reference, I repeat Mr. Pearson's public interest factors which the trial judge adopted:

> i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in the [C.E.R.] incident where her father, upon learning of the facts, demanded an apology from the accused);
>
> ii) the "staleness" of the offences when compared with their gravity;
>
> iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;
>
> iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and
>
> v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding. [Emphasis added.]

230 The Pearson report was clearly not binding on the Crown or upon Mr. Pearson's successors, and the trial judge never suggested that it was. What he did suggest is that the factors put in the balance by Mr. Pearson were logical and pertinent. It was open to the trial judge to adopt the Pearson criteria as his own, and he did so. As I read his judgment, he concluded, that in light of his decision to send the appellant to trial on the nine more

serious charges (eight of which, as stated, have now resulted in the appellant's acquittal), the prosecution of additional charges of a relatively minor nature that allegedly took place 24 to 34 years ago, and which if successful would carry a "relatively insignificant sentence", did not outweigh the public interest in vindicating the importance of the role played by objective and independent Crown prosecutors.

231 The trial judge thought that in this way an appropriate balance had been struck between the public interest in having *all* charges dealt with on their merits against the public interest in having *all* charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system. Whether or not this Court would draw the line precisely where the trial judge drew it is beside the point. After hearing evidence and argument for 18 days, he properly instructed himself on the law, carefully reviewed the facts, and made no palpable or overriding error in the inferences and conclusions that he reached.

III. Conclusion

232 I would therefore allow the appeal.

Appeal dismissed.

Pourvoi rejeté.

TAB 3

2003 CarswellOnt 4087
Ontario Superior Court of Justice (Divisional Court)

Khan v. Metroland Printing, Publishing & Distributing Ltd.

2003 CarswellOnt 4087, [2003] O.J. No. 4261, 126 A.C.W.S. (3d) 360, 178 O.A.C. 201, 44 C.P.C. (5th) 110, 68 O.R. (3d) 135

COLLEEN KHAN, RAY KHAN, SHELLY KHAN, JAMES KHAN and SONNY KHAN (Plaintiffs/Appellants) and METROLAND PRINTING, PUBLISHING & DISTRIBUTING LTD., IAN PROUDFOOT, BRENDA LARSON, DEBORA KELLY, DAVID TEETZEL, CHRISTOPHER DOURIS and WILLIAM F. BELL (Defendants/Respondents)

Lane, Meehan, Linhares de Sousa JJ.

Heard: June 5, 2003
Judgment: October 27, 2003 *
Docket: 461/01

Proceedings: additional reasons at (2004), 2004 CarswellOnt 564 (Ont. Div. Ct.); reversing (2001), 2001 CarswellOnt 2395 (Ont. S.C.J.)

Counsel: Philip P. Healey for Plaintiffs/Appellants. Colleen Khan, Ray Khan, James Khan and Sonny Khan
Alison B. Woodbury for Defendants/Respondents, Metroland Printing, Publishing & Distributing Ltd., Ian Proudfoot, Brenda Larson, Debora Kelly, David Teetzel, Christopher Douris
C.M. Loopstra, Q.C. for Defendant, William F. Bell

Subject: Torts; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
I Principles governing rules of practice
I.4 Interpretation of rules
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.a General principles

Civil practice and procedure
XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.c Appeals from order for security for costs
Torts
V Defamation
V.9 Practice and procedure
V.9.f Costs
V.9.f.i Security for costs
V.9.f.i.C Miscellaneous
Torts
V Defamation
V.9 Practice and procedure
V.9.f Costs
V.9.f.ii Award of costs
V.9.f.ii.C Miscellaneous
Torts
V Defamation
V.9 Practice and procedure
V.9.f Costs
V.9.f.i Security for costs
V.9.f.i.C Miscellaneous
Torts
V Defamation
V.9 Practice and procedure
V.9.f Costs
V.9.f.ii Award of costs
V.9.f.ii.C Miscellaneous

APPEAL by plaintiffs from judgment reported at *Khan v. Metroland Printing, Publishing & Distributing Ltd.* (2001), 2001 CarswellOnt 2395 (Ont. S.C.J.), granting motion by defendants for order requiring plaintiffs to post security for costs.

***Linhares de Sousa J.*:**

Introduction

1 This is an appeal brought pursuant to s. 19(1)(b) of the *Courts of Justice Act* seeking to set aside the order of Nordheimer J., dated July 4, 2001, ordering the four Appellants to this appeal, Colleen Khan, Ray Khan, James Khan and Sonny Khan to post security for costs in

the total amount of $50,600 pursuant to R. 56.09 of the *Rules of Civil Procedure ("Rules")* as a condition to their continuing to prosecute their claim against the Respondents.

2 Leave to appeal from the decision of Nordheimer J. to this Court was granted by Then J. on November 5, 2001.

Standard of Review

3 The standard of review for appeals from the order of a judge was not contested by counsel and is widely accepted to be whether or not the decision of the judge was "clearly wrong". This standard applies to both findings of fact and to the application of legal principles. A reviewing court may vary or set aside the decision of a motions judge where the judge, "disregarded, misapprehended, or failed to appreciate relevant evidence" and "made a finding not reasonably supported by the evidence, or drew an unreasonable inference from the evidence". (See *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.); *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Ont. Div. Ct.); and *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.).)

4 On questions of law, however, the standard of review is correctness. This has long been established by the jurisprudence. In *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577, [2002] S.C.J. No. 31 (S.C.C.), the Supreme Court of Canada recently addressed the standards of review which can be summarized in the following way:

> [para8] 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: . . .
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> [para10] 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" . . .
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> . . .
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> [para28] . . . 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 [than for findings of fact] . . .

5 Within the parameters of this standard, it is also accepted that where the exercise of discretion is involved, the decision of the motions judge is owed the highest level of deference and should not be overturned unless it is "so clearly wrong as to amount to an injustice".

This is particularly so where the discretionary decisions in question are those of a case management judge (R. 37.15 of the *Rules*) as Nordheimer J. had been so appointed in this matter. (See *Daishowa Inc. v. Friends of the Lubicon*, [1996] O.J. No. 729 (Ont. Div. Ct.).)

Factual Background

6 The four Appellants are members of an immediate family. As Plaintiffs, they together with another member of their immediate family, Mr. Shelly Khan, who is not an Appellant on this appeal, commenced a libel action against the Respondents on January 23, 1998. The action arises in connection with an article published on October 28, 1997 in the Richmond Hill Liberal, a Metroland newspaper during the course of the municipal election held in November 1997. The article concerned the then candidacy for mayor of the Town of Richmond Hill of the Appellant, Colleen Khan. The article also referred to the Appellants, James Khan, Sonny Khan and the plaintiff Shelly Khan who had been candidates for municipal office in previous elections. Among other things, the article also attributed certain statements to the Respondent, William Bell, who was also a candidate for the office of mayor of Richmond Hill. The Appellants and the Plaintiff, Shelly Khan, allege the statements made by the Respondent, William Bell, were defamatory of them and they seek damages as a consequence.

7 At the commencement of the libel action, all four appellants and the Plaintiff, Shelly Khan, had a common solicitor of record. The Metroland Respondents and Mr. Bell had their own solicitor of record. In December 1999, the Plaintiff, Shelly Khan served a Notice of Intention to Act in Person and a withdrawal of the Appellants' and his common solicitor of record. He further notified the Respondents by letter dated December 21, 1999 that the Respondents should direct "all correspondence, communication and service" in connection with the Khan family to him. (See Appeal Book I of II, pp. 120-121.) In view of this development, the Respondents sought the appointment of a judge pursuant to R. 37.15 which reads as follows:

> 37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. . . .

8 Nordheimer J. was so appointed on February 1, 2000.

9 On February 6, 2000, the four Appellants, Colleen Khan, Ray Khan, James Khan and Sonny Khan served their own notices of intent to act in person. However, in a letter signed by all four Appellants and the Plaintiff, Shelly Khan, prior to the initial case conference before

Nordheimer J., the four Appellants indicated that the Plaintiff, Shelly Khan was authorized to represent them in certain instances. They wrote, "It is our position that any issue which affects one of us affects all of us . . . " (See Appeal Book I of II pp. 125-126.)

10 In his letter dated February 11, 2000, Nordheimer J. permitted the Plaintiff, Shelly Khan, to appear at the initial case conference before him on behalf of himself and the four Appellants only for the purpose of agreeing to a schedule to deal with various outstanding proceedings such as ongoing discoveries and some preliminary motions that the Plaintiff, Shelly Khan wished to bring before him. However, Nordheimer J. ruled, as he wrote in his letter of February 11, 2000 and in his reasons at p. 2, that the Appellants and the Plaintiff, Shelly Khan could only appear on their own behalves and that no single plaintiff in the action could purport to represent the other plaintiffs on any motions before the Court or other steps in the proceedings in terms of any substantive matters that will be determined by the Court. (See Appeal Book I of II p. 127.)

11 As a result of the initial case conference held before Nordheimer J. on February 16, 2000, a fixed schedule was set for the carrying out and completion of discoveries. A date, February 28, 2000, was also set for the hearing by Nordheimer J. of the preliminary motions to be brought by the Plaintiff, Shelly Khan and by the Respondent, Mr. William Bell.

12 On February 28-29, 2000, Nordheimer J. heard and dismissed Shelly Khan's motion for summary judgment dismissing the counterclaim of the Respondent, William Bell or in the alternative, to sever the counterclaim from the main action. He also dismissed, with some exceptions, Shelly Khan's motions to strike certain paragraphs of the statement of defence of the Respondents. Furthermore, the Respondent, William Bell's, motions for leave to amend his statement of defence and counterclaim and for an order for substituted service were granted.

13 Following the written submissions on costs of these motions from the Respondents and the Plaintiff, Shelly Khan, Nordheimer J. ordered costs against Shelly Khan, payable forthwith, "which shall mean prior to the commencement of the continued examinations for discovery". The costs fixed by Nordheimer J. and the costs ordered to be assessed finally came to a total amount of $21,631.95.

14 After his lack of success on his motions before Nordheimer J., the Plaintiff, Shelly Khan, wrote letters dated April 10, 2000 and April 12, 2000 to Regional Senior Justice Blair to have Nordheimer J. removed as case management judge appointed under R. 37.15 alleging that his "confidence in the justice system as well as that of the other plaintiffs had been greatly shaken to say the least". By letters dated April 11, 2000, the Respondents contested this request. By letter dated April 12, 2000, Regional Senior Justice Blair declined to reverse Nordheimer J.'s appointment as a R. 37.15 judge.

15 The Plaintiff, Shelly Khan brought a motion for leave to appeal to Divisional Court from the orders of the motions judge including the costs awards. Shelly Khan's motion for leave to appeal was dismissed with additional costs fixed against him for $4,500 on May 17, 2000.

16 Despite the demands made by the Respondents, Shelly Khan did not pay the costs orders made against him.

17 On September 13, 2000, a Notice of Change of Solicitors indicated that the four Appellants and the Plaintiff, Shelly Khan now had one counsel of record, Mr. Philip Healey of the firm Aird & Berlis. (See Appeal Book I of II pp. 201-202.)

18 When Mr. Healey wrote to counsel for the Respondents on November 29, 2000 asking for dates for the continued examinations for discovery in connection with the action, counsel for the Respondents, by letter dated December 11, 2000, refused to proceed with the examinations for discovery of any party until the costs orders against Shelly Khan had been paid. They took the position that the order of Nordheimer J. dated April 4, 2000, indicated that the outstanding costs awards against Shelly Khan were to be paid forthwith which was meant to be prior to the commencement of the continued examination for discovery. It was also the position of Respondent's counsel that, in view of the schedule previously set by the motions judge for continuation of the examination for discoveries, a schedule that had already expired, any further rescheduling of examinations for discovery could only be done with the approval of Nordheimer J. as the designated R. 37.15 judge.

19 On January 12, 2001, the Plaintiff, Shelly Khan informed the Respondents that he continued to act on his own behalf in the action and that the Notice of Change of Solicitors filed on September 13, 2000 that included him with the four Appellants as having the same counsel of record, Mr. Philip Healey of the firm Aird & Berlis, was done so in error. On January 22, 2001, the Plaintiff, Shelly Khan served a Notice of Intention to Act in Person.

20 In view of the Respondents' continual refusal to proceed with the examination for discoveries, Mr. Healey, on behalf of the four Appellants, Colleen Khan, Ray Khan, James Khan and Sonny Khan, wrote, on January 30, 2001, to Nordheimer J. as case management judge to schedule either a telephone conference, meeting or motion to resolve certain outstanding issues necessary to move the action forward including the fixing of discovery dates. In that same letter, Mr. Healey took the position that since the outstanding costs order was made against the Plaintiff, Shelly Khan alone, for whom he did not act, his four clients were not in default of any costs order. They had not brought any motion nor had they participated in the motions. His clients, therefore, should be entitled to proceed with their examinations for discovery.

21 Counsel for the Respondents responded to this request of Mr. Healey by informing Nordheimer J. that they intended to bring a motion pursuant to R. 57.03 seeking a stay of proceedings against all four of the Appellants and the Plaintiff, Shelly Khan on the basis of the outstanding costs orders. Alternatively, the Respondents would be seeking an order requiring the four Appellants, Colleen Khan, Ray Khan, James Khan and Sonny Khan to post security for costs. The Respondents relied on the court's general power to stay proceedings pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and also the general power of the court to control its process and to prevent an abuse of process for the relief that they sought against the Appellants. The four Appellants, in reply to the Respondents' motion, did not bring a countermotion of their own but merely defended themselves by contesting the relief sought by the Respondents.

22 By the time the motion came before Nordheimer J. on June 27, 2001, Shelly Khan had still not satisfied the outstanding costs orders against him. Furthermore, Shelly Khan had been out of the country for some time; his exact whereabouts were unknown; and, there was no way of communicating with him. The Plaintiff, Shelly Khan did not respond to the motion.

Decision of Nordheimer J. Under Appeal

23 With respect to the Plaintiff, Shelly Khan, Nordheimer J. found that the Respondents were entitled to the relief sought under R. 57.03(2) in view of Shelly Khan's consistent refusal to obey the orders of the Court requiring him to pay costs to the Respondents.

24 Nordheimer J., out of "an abundance of caution", was not prepared to dismiss Shelly Khan's claim at that stage. He concluded that the more appropriate relief was to stay the claim of Shelly Khan to give him one last opportunity to cure his default. He was given 90 days from the date of his reasons, (July 4, 2001), to do this, failing which, the claim of Shelly Khan was to be automatically dismissed with costs payable by him to the Respondents forthwith after assessment.

25 With respect to the four Appellants, Nordheimer J. denied the Respondents' request that their claims also be stayed. The motions judge expressed concerns for the conduct of the Appellants and the Plaintiff, Shelly Khan in the action as follows:

> [para12] I confess to being troubled by a situation where it appears that a group of plaintiffs acting on their own behalves have set up one of their number to bring motions which would clearly benefit all of the plaintiffs and then when such motions are unsuccessful, with the result that the moving plaintiff is ordered to pay costs but fails to do so, disassociate themselves from that plaintiff and seek to continue the proceeding.

> Such arrangements give rise to a significant opportunity to misuse the process of the court.
>
> [para13] In an effort to disassociate themselves from the conduct of Shelly Khan, the other plaintiffs now say that they had parted company with him and his handling of this litigation from December 1999. I have serious problems in accepting that assertion. There was never any suggestion prior to these motions being launched that there was any disagreement among the plaintiffs as to the conduct of this litigation and there was ample opportunity for the court to have been made aware of such disagreement, if it existed. For example, some of the other plaintiffs attended on the motions heard by me in February 2000 but they did not make any statements to the effect that they were disassociating themselves from Shelly Khan with respect to those motions. To the contrary, they appeared to be actively assisting Shelly Khan in his submissions on those motions. Similarly, there have been subsequent events in this litigation where the other plaintiffs could have made it known that their position was independent of Shelly Khan but they have never done so.

26 Nordheimer J. was not convinced that a stay of the Appellants' case was appropriate. He states at pp. 5 and 6 of his Reasons for Decision:

> [para15] . . . It is sufficient for me to say that I am not satisfied that it would be a proper exercise of the court's discretion to order a stay of this action based on costs orders that are unpaid but for which the other plaintiffs bear no direct liability. To do otherwise would, as I have already said, be to do indirectly what I already ruled could not be done directly. I also do not believe that the conduct here would warrant the granting of a stay under the principle of abuse of process. The motion to stay the claims of the other plaintiffs is therefore dismissed.

27 In considering the alternative relief sought by the Respondents on the motion, namely the posting of security for costs, Nordheimer J. concluded that R. 56.09 and R. 1.05 allowed the Court to order security for costs where it grants relief and where it has a discretion to impose terms as a condition of granting relief.

28 Rule 56.09 reads:

> 56.09 Notwithstanding rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications.

29 Rule 1.05 states:

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

30 In their submissions on the motion before Nordheimer J., no party appears to have raised the issue of the applicability of s. 12 of the *Libel and Slander Act ("LSA")* either in conjunction with R. 56.09 or to the exclusion of R. 56.09, to the issue of security for costs. Section 12 of the *LSA* reads as follows:

Security for costs

12. (1) In an action for a libel in a newspaper or in a broadcast, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or the defendant's agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant, that the defendant has a good defence on the merits and that the statements complained of were made in good faith, or that the grounds of action are trivial or frivolous, and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until the security is given. R.S.O. 1990, c. L.12, s. 12 (1).

31 The issue for the motions judge was whether on the motion before him, there was relief being granted to the Appellants to which a term requiring the posting of security could attach as the Respondents argued. He concluded that there was, stating at pp. 6 and 7 of his Reasons for Decision.

[para19] With respect to the first alleged form of relief, the defendants rely on *Sydlo Inc. v. Mixing Equipment Co. (No. 3)* (1987), 18 C.P.C. (2d) 79 (Ont. Div. Ct.) where Galligan J. said, at pp. 81-82:

> The Master then decided that, instead of setting aside the order to continue, he would grant relief to the respondent by declining to set it aside and directing that it continue in force, subject to terms. In our opinion, when the Master declined to set aside the order to continue he granted relief to the respondent, and thus, had jurisdiction under r. 1.05 and r. 56.09 to impose terms as a condition of that relief. (emphasis added)

[para20] Like the situation in Sydlo where the Master refused the defendant's motion to set aside the order to continue, the defendants say here, that if I refuse their motion to stay, that is the equivalent to the granting of relief to the plaintiffs which would then

empower the court to require the posting of security for costs as a term of that relief. While I will confess that such an interpretation did not come readily to me from the language of rule 56.09, I acknowledge that the rule can be so read. I am, of course, bound by Divisional Court's decision.

[para21] In any event, I accept that the plaintiffs must seek relief regarding their right to continue the prosecution of this action, including the re-scheduling of the examinations for discovery, in light of my earlier order regarding the conduct of those examinations and, therefore, I am satisfied that relief is effectively being granted here to the other plaintiffs of a nature and kind that is sufficient to invoke rule 56.09. Alternatively, at the very least, this is a case where the plaintiffs are seeking an "indulgence" - as that expression was used by Morden J.A. in *Toronto-Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.) - which is also sufficient to invoke the jurisdiction of the court to require security for costs to be given.

32 In the circumstances of the case before him, Nordheimer J. arrived at the conclusion that it was appropriate to require the Appellants to post security for costs as a term of continuing this action. At pp. 8 and 9 of his Reasons for Decision, he states:

[para25] The question then becomes whether it is appropriate to require the other plaintiffs to post security for costs as a term of continuing this action. I have concluded that it is appropriate in the particular circumstances of this case. I earlier expressed difficulty in accepting the position of the other plaintiffs that they had parted company with Shelly Khan regarding his actions in this litigation. However, even if I accept that such a split developed in their relationship, it still seems to me that the other plaintiffs cannot disassociate themselves entirely from the past events. They are not only co-plaintiffs in this litigation, and thus were clearly prepared to accept the benefit of any relief that Shelly Khan might achieve through his motions, they are also all members of the same family. Indeed, their claim for damages arising from the alleged libels is based very much on their being members of the same family - see, for example, paragraphs 64 and 65 of the statement of claim. They therefore have a much more intimate connection to each other than might normally be the case in situations of multiple plaintiffs. In such circumstances, it does not seem unreasonable to impose some degree of shared responsibility on them for the conduct of the proceeding.

[para26] Further, there is evidence from the history of this proceeding that there may have been, and could in the future be, an abuse of the court's process. Indeed, such an abuse is arguably extant regarding the motions brought by Shelly Khan. The court must be vigilant in dealing with any abuse of its process. This is the thrust of the comments made by Southin J.A. that I quoted above from *Household Trust Co. v. Golden Horse Farms Inc., supra.* If the other plaintiffs are serious about prosecuting this claim (and I

> am prepared to assume that they are) then a requirement that they post security for costs in light of the conduct of Shelly Khan is not unfair or unreasonable. On the other hand, to not place such a requirement on the other plaintiffs would be "manifestly unfair" to the defendants given the events that have taken place to date.

33 After the motions judge's decision on security for costs made against the Appellants, by letter dated September 27, 2001, counsel for the Appellants wrote to Nordheimer J. informing him of their intention to seek leave to appeal his decision and to request that he recuse himself as case management judge on the basis that he has demonstrated "a reasonable apprehension of bias".

Endorsement of Then J. Granting Leave to Appeal

34 The issue of the applicability of s. 12 of the *LSA* was first raised by the Appellants on their motion for leave before Then J. Because the motions judge did not consider the applicability of s. 12 of the *LSA* on the motion, and had based his award for security for costs on R. 56.09, Then J. was of the view that there was good reason to doubt the correctness of the decision based on R. 1.02(1)3 which states:

> 1.02 (1) These rules apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice, subject to the following exceptions:
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> . . .
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> 3. They do not apply if a statute provides for a different procedure.

and the jurisprudence found under that Rule. (See *Gunn v. North York Public Library Board* (1976), 14 O.R. (2d) 554 (Ont. H.C.).)

35 Then J. stated in his endorsement:

> [para3] In my view, it is important for the development of the jurisprudence of this province for the Divisional Court to determine the interplay between Rule 56.09 and s. 12 of the *Libel and Slander Act* or whether s. 12 of the *Libel and Slander Act* constitutes a complete Code in libel actions to the exclusion of Rule 56.09.

36 Then J. was also of the view, after reading the reasons of Nordheimer J., that his conclusion relating to the issue of whether on the motion there was a granting of relief to the Appellants to which the posting of security could be attached as a condition, and his reliance on the decision of the Divisional Court in *Sydlo Inc. v. Mixing Equipment Co.* (1987), 18 C.P.C. (2d) 79 (Ont. Div. Ct.) to come to that conclusion was open to serious debate. He, therefore, granted leave to appeal to the Divisional Court under R. 62.02(4)(a). He reserved costs to the Divisional Court panel hearing the appeal.

The Issues on Appeal

37 The issues raised on this appeal are the following:

> 1. Did the learned motions and case management judge err in not considering and not applying s. 12 of the *LSA* to the question of the posting of security for costs in the libel action before him even though it was not raised by any of the parties to the motion?
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> 2. If the answer to issue #1 is in the negative, did the learned motions and case management judge err in finding that he had jurisdiction to award security for costs under R. 56.09? More specifically, did the learned motions judge err in finding that security for costs could be ordered in the circumstances of this case "as a term of relief"?
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> 3. Assuming the learned motions and case management judge had jurisdiction to order security for costs pursuant to R. 56.09, did he exercise his discretion fairly in the circumstances of this case?

Position of the Appellants

38 With respect to the first issue, the Appellants take the position that before the motions judge could order the Appellants to post security for costs in an action to which the *LSA* applies, he should have considered and applied the test established by s. 12 of the *LSA*. The test and procedure found in s. 12 of the *LSA* is a different and more onerous one with cumulative conditions than that found in R. 56. They rely on *Gunn*, *supra*, where the defendant failed to meet all of the three cumulative grounds required by s. 20(1) of the *LSA* (now s. 12 of the current *LSA*) and therefore did not succeed in his application for security for costs.

39 The Appellants argue that R. 1.02(1)3 rendered the *Rules* inapplicable to those cases where a "statute provides for a different procedure" which s. 12 of the *LSA* does with respect to the question of security for costs in libel actions. Rules 1.02(1)3 and 56.01(1)(f) establish that the libel and slander legislation excludes and takes precedence over the *Rules*.

40 With respect to the second issue, the Appellants argue that R. 56.09, by its wording grants the Court the jurisdiction to award security for costs as an imposed term only "as a condition of granting relief" in a motion or matter before it. On a strict reading of that rule, it cannot apply to the facts of this case where, on the Respondents' motion for security for costs, the Appellants sought no relief but merely responded to defend against the motion. The Appellants further argue that the fact that they would have had to seek a ruling from

Nordheimer J. to proceed with the examinations for discoveries because of the expired schedule for such examinations cannot be considered the granting of relief within the meaning of R. 56.09. While such a request or indulgence might have been made on their behalf by their counsel in a correspondence to the motions judge as the case management judge, that request or issue was not specifically before the judge on the Respondents' motion for security for costs.

41 The Appellants deny that the case, *Sydlo Inc. v. Mixing Equipment Co.*, [1986] O.J. No. 2542 (Ont. Master) could be properly relied on by Nordheimer J. to find that he had jurisdiction to grant an order for security for costs under R. 56.09. The Appellants argue that the facts of the *Sydlo, supra* case are substantially distinguishable from the case at bar.

42 With respect to the last issue, the Appellants take the position that the motions judge exercised his discretion unfairly in awarding security for costs against them. They argued that the motions judge's conclusion that it did not seem "unreasonable to impose some degree of shared responsibility on them [the Appellants] for the conduct of the proceedings" was unfair and unjustified. They had not, in any way, supported the unsuccessful motions of the Plaintiff, Shelly Khan. There was no basis for the motions judge's finding of potential abuse of process.

Position of the Respondents

43 With respect to the first issue regarding the interplay between s. 12 of the *LSA* and the *Rules*, the Respondents argue firstly, that by not arguing s. 12 of the *LSA* before the motions judge, raising it only for the first time as an issue in seeking leave to appeal to this Court, the Appellants effectively conceded on the motion that s. 56 of the *Rules* applied to the action. The Appellants did not argue then that the *LSA* constituted a complete code for security for costs and, therefore, the motions judge properly addressed the argument put to him by the Appellants concerning his jurisdiction to award security for costs.

44 Secondly, the Respondents take the position that there is no authority for the proposition that s. 12 of the *LSA* must be applied to this case to the exclusion of the applicability of the *Rules*. They argue that the case referred to by the Appellants, *Gunn, supra*, does not stand for that proposition. Rather it establishes that if a party seeks to rely on the *LSA* for an order for security for costs, it must meet the full test laid out in the *Act* to succeed on the motion.

45 It is the view of the Respondents that the *Rules* are regulations of the *Courts of Justice Act (Ontario)*. Therefore, the *Rules* like the *LSA* are enactments of the Legislature of Ontario. They must be read as complementary except where there is a clear repugnancy or conflict. No such conflict can be found. Therefore, access to the two regimes is clearly

intended. For this, the Respondents relied on the decision of *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) at p. 38.

46 In support of their position of complementary enactments, the Respondents point to the legislative history of s. 12 of the *LSA* as well as to the wording found in s. 12 of *LSA*. By the use of the permissive word "may", the section permits rather than mandates applicable defendants to seek security under the *LSA*. Section 12 also expressly refers to the co-existing access to security for costs under the *Rules* in dealing with plaintiffs who reside out of Ontario. The last four lines of s. 12 read:

> . . . and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, . . . (Emphasis Added.)

47 Finally, the Respondents argue that an examination of the *Rules* themselves point to the complementary nature and co-existence of the two enactments. Rule 56.01(1)(f) which reads:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
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> . . .
>
> (f) a statute entitles the defendant or respondent to security for costs.

expressly includes security for costs under a statute as one ground on which security for costs may be ordered under the *Rules*.

48 Rule 1.02(3), the Respondents argue, will not oust the application of the *Rules* in a matter unless the statute is found necessarily inconsistent or in conflict with what is provided under the *Rules*.

49 The Respondents also point to a number of cases where media libel defendants in Ontario, like defendants in other types of actions, were regularly awarded security for costs under R. 56. See *Austin v. Torstar Corp.*, [2001] O.J. No. 3378 (Ont. Master), at paras. 1, 2 and 24 and *Grenier v. Southam Inc.* (1994), 19 O.R. (3d) 799 (Ont. C.A. [In Chambers]) at p. 800.

50 With respect to the second issue, the Respondents argue that Nordheimer J. was correct in finding that the refusal of the Respondents' motion to stay the Appellants' action in the circumstances before him was equivalent to the granting of relief to the Appellants. This, therefore, gave the motions judge the jurisdiction to impose security for costs as a condition of the granting of that relief pursuant to R. 56.09. The Respondents further argue that the Appellants' request to Nordheimer J. as case management judge, prior to the motion, regarding their right to re-schedule examinations for discovery amounted to a request for

relief or at least an indulgence that was sufficient to invoke the Court's jurisdiction under R. 56.09. As authority for their position, they rely on the case, *Sydlo Inc. v. Mixing Equipment Co.* (1987), 18 C.P.C. (2d) 79 (Ont. Div. Ct.) at p. 82.

51 On the last issue, the Respondents argue that Nordheimer J. as the case management judge on this matter had an accumulated knowledge of the case gained from his prior involvement in it. He rightfully and correctly considered the whole of the conduct of the Appellants and the Plaintiff, Shelly Khan throughout the action. Based on that experience and knowledge, he was correct in concluding that the arrangements between the Appellants and Shelly Khan gave rise to "significant opportunity to misuse the process of the court". In light of this, he did not stay the Appellants' action but only awarded security for costs against them. In all of the circumstances of the case, the motions judge cannot be said to have acted unfairly or unreasonably to the Appellants.

Analysis

Issue I: The Interplay Between s. 12 and the Rules of Civil Procedure

52 As one embarked upon the very difficult task of the legal analysis and the attempt to reconcile in a jurisprudential, principled way the very divergent positions of the parties on this issue, it became evident that there was a paucity of binding jurisprudence that dealt directly with the issue in question, to be found. Because of this, it has been necessary to draw inferences and analogies from case law that deal with the issue, either peripherally or in the context of legislation comparable to the *LSA* such as *Public Authorities Protection Act ("PAPA")*.

53 Counsel for the Respondents are correct when they argue that there does not appear to be any clear legislative enactment or jurisprudence indicating that in libel and slander actions, where a defendant seeks an order for security for costs, s. 12 of the *LSA* exclusively governs the proceedings. A number of cases appear to support the position of the Respondents that the two legislative regimes are meant to co-exist, and that a defendant in a libel action is not denied access to security for costs under the *Rules* merely because there is additional provision for security for costs under specific legislation. These cases appear to indicate that the moving party is free to choose relief under the *Rules* or the *LSA*. In *Austin v. Torstar Corp.*, [2001] O.J. No. 3378 (Ont. Master), a defamation action, case management Master McLeod made a finding of fact of whether or not the plaintiff was ordinarily in Ontario for the purposes of deciding whether the Defendant was entitled to an order for security for costs pursuant to Rule 56.01(1)(a). Master McLeod, in para. 2 of his Endorsement, noted that the defendant in his motion did not rely on s. 12 of the *LSA* "which provides for security for costs — whether or not a plaintiff is ordinarily resident in Ontario — and imposes different tests". He went on to decide the case entirely under the *Rules*.

54 In another libel case, only the *LSA* was relied upon for a request for security for costs against a plaintiff without any mention or regard for the comparable relief available under the *Rules*. See *Whalen v. Ottawa Sun*, [2001] O.J. No. 2751 (Ont. Master).

55 In *Christoffersen v. Cambridge (City)*, [1986] O.C.P. No. 34 (Ont. Master), Senior Master Rodger of the Supreme Court of Ontario had before him for consideration four motions for security for costs. In two of the motions, the grounds of the motion were R. 56.01(f) and s. 14 of the *PAPA* (now s. 10). In one of the motions, the grounds of the motion were R. 56.01(c), (d) and (f), s. 20(1) of the *LSA* (now s. 12) and s. 14 of the *PAPA*.

56 Rule 56.01(f) grants relief to a defendant or respondent for security for costs where it appears that "a statute entitles the defendant or respondent to security for costs". Section 14 of the *PAPA* is comparable legislation to s. 12 of the *LSA*, but deals with the prosecution of public officials acting under their public authority. Its wording, as can be seen from the following current legislation is very similar to s. 12 of the *LSA*.

> **Security for costs**
>
> **10**. Where an action is brought against a justice of the peace or against any person for any act done in pursuance or execution or intended execution of any public duty, statutory or otherwise, or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, the defendant may, at any time after the service of the writ, make a motion for security for costs if it is shown that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, or that the grounds of action are trivial or frivolous. R.S.O. 1990, c. P.38, s. 10.

57 In the *Christoffersen*, *supra* case, in each motion where R. 56.10(f) and the applicable statute in question was relied on, Master Rodger decided the question of security for costs in accordance with the statutory tests outlined in the applicable legislation without further reference to any of the *Rules*.

58 On the motion for security for costs, where the grounds for the motion relied on were both Rule 56.01(c) (unpaid order for costs) and (d) (corporation insufficient assets in Ontario to pay costs) and (f) of the *Rules* and s. 20(1) of the *LSA* and s. 14 of the *PAPA* both the test under the *Rules* and the legislation were considered by Master Rodger in coming to his conclusion as to whether to grant or dismiss the motion. In fact, he appears to treat the *Rules* and legislation quite interchangeably as long as they have been relied upon in the motion. He states at p. 4 of his decision:

> As to s. 20(1) of the *Libel & Slander Act* and s. 14 of the *Public Authorities Protection Act*, the statutory requirements are substantially the same.
>
> Filed in support of this motion is the affidavit of the Defendant Claudette Millar, in which she deposes in paragraph 2 that "I have read the Affidavit of Vernon B. Copp, Q.C. and to the best of my knowledge it accurately and truly sets forth the facts related to this matter". On the strength of the affidavit of Vernon B. Copp, Q.C. filed in support of the motion by the Corporation of the City of Cambridge, I came to the conclusion, for the reasons expressed above, that "there is good reason to believe that the action is frivolous and vexatious" within the meaning of clause (e) of Rule 56.01. This defendant, however, is not moving under clause (e) of Rule 56.01 and, in my view, the affidavit of Vernon B. Copp, Q.C. relied upon by this defendant, falls far short of the statutory requirements of s. 20(1) of the *Libel & Slander Act* or s. 14 of the *Public Authorities Protection Act*, both of which require that it be "shown" that the action is "trivial or frivolous". Accordingly, in the absence of any evidence that the defendant has a good defence to this action on the merits, albeit that it is conceded that the plaintiffs are not possessed of property sufficient to answer the costs of the action, I have come to the conclusion that this motion must also be dismissed with costs to the plaintiffs in the cause.

59 Unfortunately, in all of these cases, the question of the nature of the interplay between the *Rules* and the security for costs legislation in question was never addressed in any analytical way that may be helpful to the resolution of the issue before the court.

60 An important consideration in this analysis is the *Rules* which expressly state that the court must defer to specific statutes where such legislation provides for the granting of security for costs. No other interpretation can be given to the wording found in those *Rules*. Rule 1.02(1)3 of the *Rules* clearly states that where a statute provides for a different procedure from the one set out in the *Rules*, the statute shall apply. The Respondents argue that Rule 1.02(1)3, despite its clear wording, will not oust the application of the Rule by a statute that provides for a "different procedure" unless the statute is found to be necessarily inconsistent or in conflict with the procedure provided for under the *Rules*. They cite in support of this proposition the case of *Metrin Mechanical v. Big H* (2001), 10 C.P.C. (5th) 302 (Ont. Master) at p. 306 per Master Haberman. In my view, this position is not apparent, either from a reading of R. 1.02(1)3 or from the case cited.

61 In *Metrin Mechanical v. Big H*, *supra*, Master Haberman found that despite the procedure set out in s. 13 of the *Solicitors Act* that applied to the facts of his case, she could still deal with the matter pursuant to the *Rules*. This was because the *Solicitors Act* did not "mandate" the exclusive use of that procedure.

62 Rule 56.01(f) indicates that the court, on motion by the defendant or respondent, may make an order for security for costs, where a statute entitles the defendant or respondent to security for costs. As I read the wording of that Rule, the entitlement to security for costs necessarily comes from the statute in question. Before the court may exercise its discretion under R. 56.01(f), the test established by the statute for the entitlement to security for costs necessarily applies and takes precedence over the Rule. This was certainly how Master Rodger in *Christoffersen v. Cambridge (City)*, *supra* dealt with the motions before him that relied on R. 56.01(f) and either s. 14 of the *PAPA* or s. 20(1) of the *LSA*. The test in the legislation was applied to determine whether the motions for security for costs should be granted or refused.

63 *Reiger v. Chief of Police* (1987), 58 O.R. (2d) 203 (Ont. Master) involved an action against a number of police officers for damages. The defendants moved for an order for security for costs pursuant to s. 14 of the *PAPA*. The specific question before Master Sandler concerned the defendant's right to examine the plaintiffs. In considering R. 56.01(f) in relation to the s. 14 of the *PAPA*, Master Sandler took it for granted that the specific statute, in that case the *PAPA*, had to be considered to determine the question of security for costs and the question of the defendant's right to examine the plaintiff in support of his motion for security for costs as a result of R. 56.01(f) which refers the court to the specific statute. He states at pp. 2 and 3 of his decision:

> Rule 56.01(f) really adds nothing to this problem since the rule refers back to the statute, in this case s. 14, which itself contains procedural provisions that must be interpreted and applied by me on this motion.
>
> Rule 56 of the *Rules of Civil Procedure* is the general rule for security for costs that governs all Supreme Court and District Court actions in Ontario. In addition, there are some specific statutory provisions such as s. 20 of the *Libel and Slander Act*, R.S.O. 1980, c. 237, and s. 14 of the said *Public Authorities Protection Act*.
>
> . . .
>
> There are some specific statutory provisions dealing with security for costs, one being s. 20 of the *Libel and Slander Act*, and the other being s. 14 of the *Public Authorities Protection Act*. I had occasion to deal with s. 20 in *Shewchun v. McMaster University et al.* (1983), 143 D.L.R. (3d) 238, 33 C.P.C. 35. It is clear that s. 20(2) of that statute specifically permits a plaintiff to be examined for the purpose of a motion for security for costs under s. 20(1). In a motion under that section, the defendant must show in an affidavit, inter alia, that the plaintiff is not possessed of property sufficient to answer the costs. What else a defendant has to show in order to succeed on a motion under s. 20(1) was discussed in *Gunn v. North York Public Library Board et al.* (1976), 14 O.R.

(2d) 554, 2 C.P.C. 68, *Nikolic et al. v. Northern Life Publishing Co. et al.* (1976), 1 C.P.C. 335, and *Molina v. Libman Manufacturing Ltd. et al.* (1979), 15 C.P.C. 174.

64 In the result in this decision, Master Sandler, finding under the *Rules* that the law did not permit the examination sought by the defendants, concluded that such examination was so permitted under the *PAPA*. He concluded at p. 4:

> I thus conclude that the practice and procedure in a motion under s. 14 of the *Public Authorities Protection Act*, is different than that under rule 56.01(d) or (e), and that the defendant can examine the plaintiff as to his property and assets for the purposes of a motion under the section (as well as examine the plaintiff upon the merits of the action), and that such an examination under rule 39.03(1) can be held, and is not an abuse of process, and that the *Drapeau case, supra*, is distinguishable.

65 The decision of *Reiger v. Chief of Police, supra* is just one example of a case that has given primacy to a specific statute over the *Rules* in an area of concurrent legislation. There have been a number of others. Not all of the following cases deal specifically with security for costs and the *LSA*. However, I find them useful for the purpose of drawing analogies and extracting certain principles. In *Clarke's Electrical Service Ltd. v. Gottardo Construction Ltd.*, [2001] O.J. No. 1517 (Ont. S.C.J.), Seppi J. of the Ontario Superior Court of Justice found that the *Construction Lien Act*, a remedial piece of legislation, provided for a different procedure in relation to the issue of joinder of actions that she had before her than did the *Rules*. Guided by R. 1.02(1)3, she applied the relevant section of the *Construction Lien Act* because of the nature and requirements of the action before her. She states a pp. 5 and 6 of her decision:

> [para30] . . . Rule 1.02 provides that the *Rules of Civil Procedure* apply to all proceeding subject to certain exceptions, and 1.02 (1) 3 specifically states that "they do not apply if a statute provides for a different procedure".
>
> [para31] In the case at bar, the *CLA* provides a different procedure for joinder. Due to the need for expedient and speedy resolution of lien claims, the *CLA* has restricted joinder to a limited class of claims for "breach of contract or subcontract". In keeping with the purpose of this special expedient procedure under the *CLA*, the terms "contract" and "subcontract" must be interpreted having regard to the purpose of the *CLA*. To hold otherwise would no doubt open the floodgates for joinder of unrelated claims without the essential connection to the lien claim which gives rise to the application of the *CLA*. Section, s. 55(1) of the *C.L.A.*, while allowing all claims in relation to the contract or subcontract to be litigated within the lien action to avoid a multiplicity of these proceedings, nevertheless restricts this joinder in accordance with the definition of contract and subcontract in the s. 1(1) of the *Act*.

66 Yet again, in *Stone v. Metropolitan Toronto Housing Authority* (1987), 59 O.R. (2d) 605 (Ont. Dist. Ct.), the court was faced with a motion for security for costs brought pursuant to R. 56.01(c) (order against the plaintiff for costs that remain unpaid). In the context of the action before him, an application brought by a tenant of a residential premise for an abatement of rent from the respondent landlord, Matlow D.C.J. considered whether the *Rules* apply at all to summary applications brought pursuant to s. 113 of the *Landlord and Tenant Act*.

67 He concluded that the *Rules*, by their own terms and by the language of the *Landlord and Tenant Act*, did not apply to the matter before him and that R. 56.01(c), therefore, had no application to the case. The motion was dismissed. How Matlow D.C.J. came to this conclusion is interesting. He states a pp. 2 and 3 of his decision:

> The starting point for the determination of the basic question is the rules themselves. Rule 1.02(1) reads as follows:
>
> > 1.02(1) These rules apply to all civil proceedings,
> >
> > (a) in the Supreme Court of Ontario and the District Court of Ontario; and
> >
> > (b) in the surrogate courts of Ontario, as provided in the Surrogate Courts Act, except where a statute provides for some other procedure.
>
> This calls for the determination of whether the *Landlord and Tenant Act* "provides for some other procedure" to be followed in "summary applications" brought pursuant to s. 113 of the *Landlord and Tenant Act*.
>
> Rule 1.02(1) must be construed in accordance with rule 1.04(1) which reads as follows:
>
> > 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> In my view, the *Landlord and Tenant Act* does so provide. In coming to this conclusion, I adopt the following statement of Henry J. in *Berhold* at p. 342:
>
> > In my opinion the summary application prescribed by the statute is not a proceeding in the nature of an action in which resort to the Rules of Practice as to pleadings, discoveries and productions and other pre-trial disclosures is envisaged. The intent of the Act is to avoid such proceedings and to allow the dispute between landlord and tenant to be resolved simply and expeditiously by a simple process analogous to an originating notice followed by a hearing at which viva voce evidence may be

> tendered as at a trial; but the procedure set up by the Act is entirely the creature of the statute.
>
> Although the judgment in *Berhold* preceded the enactment of the *Rules of Civil Procedure*, the above-quoted observation is equally applicable with respect to them.
>
> As much as anything in the *Landlord and Tenant Act* is clear, it is clear that Part IV of the *Act* includes an extensive self- contained code of the procedure that must be followed in s. 113 "summary applications". The obvious objective of this code is to provide for the determination of proceedings in this class of litigation in a more expeditious and economical manner than that followed in general civil litigation . . .

68 The above analysis is interesting and instructive because a logical question that naturally surfaces in the consideration of the issue before the Court is whether the *LSA* can be considered an "extensive self-contained code" for libel and slander actions that might logically exclude the application of rules dealing with the same subject matter? Clearly, there is no certain and definitive answer to this question. There are just indices that, in my view, respond to the question in the affirmative.

69 According to the *Concise Oxford Dictionary*, 10th ed. (Oxford University Press Inc., New York, 1999) at p. 276, the word "code" is "a set of conventions governing behaviour or activity in a particular sphere". A piece of legislation can be considered a code once it provides a comprehensive treatment or contains a comprehensive list of laws and procedures in that particular field. This was clearly why the *Landlord and Tenant Act* was found to be an "extensive self-contained code" in *Stone v. Metropolitan Toronto Housing Authority*, *supra.*

70 Clearly, one cannot consider the *LSA* as a code in the same way that one might treat the *Landlord and Tenant Act*. However, when one examines the *LSA* in its entirety and some of the legislative history and antecedent sections as provided in the Respondents' factum, one is struck by its legislative breadth. It addresses many issues that will arise as a result of a libel and slander action involving newspapers, be it the issue of damages, the requirements of the offences, evidence, defences, limitation periods, costs and, of course, interlocutory relief such as security for costs. The broad scope of the *LSA* supports the view that the Legislature intended the question of security for costs in libel and slander actions involving newspapers, such as the case at bar, to be governed entirely by s. 12 of the *LSA*.

71 From another perspective, it is accepted that R. 56 is the general rule dealing with security for costs. The *Rules* are regulations to a statute, being the *Courts of Justice Act* and thus are subordinate to a statute and "limited in their construction to procedure only". See *Armstrong v. Cambrian Equipment Sales Ltd.* (1977), 17 O.R. (2d) 33 (Ont. Prov. Ct.) at p. 3

and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.).

72 In *Reiger v. Chief of Police*, *supra* at p. 2, Master Sandler recognized the general nature of R. 56 as opposed to the specific statutory provisions found in the *LSA* and *PAPA* dealing with security for costs. For the reasons already discussed, he applied the specific legislation to the facts before him.

73 It is a well recognized principle of statutory interpretation that, where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the specific legislation prevails. (See *R. v. Greenwood* (1992), 7 O.R. (3d) 1 (Ont. C.A.), at pp. 6-7, leave to appeal to the Supreme Court of Canada refused, [1992] 1 S.C.R. viii (S.C.C.). With a slightly different development on this principle, the Ontario Court of Appeal reinforced the concept of precedence of a specific rule over a general one in its decision *Lana International Ltd. v. Menasco Aerospace Ltd.* (2000), 50 O.R. (3d) 97, [2000] O.J. No. 3261 (Ont. C.A.) at para. 19. On the facts of that case that dealt with the question of which of two rules applied in the matter, there was not so much a conflict between the two rules as an uncertainty about which applies where both could apply. The Court held at p. 102:

> [19] Moreover, rule 39.04(2) is specific, precluding parties from using their own discoveries on a motion. Rule 20.01(3), on the other hand, is general, permitting the use of "other evidence." To the extent that there is any uncertainty about which rule applies to the use by parties of their own discoveries, the specific provision, Rule 39.04(2), should take precedence over the general: Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 186.

74 We have, in the case at bar, an uncertainty as to whether R. 56 or s. 12 of the *LSA* should apply. Applying the reasoning of the Court of Appeal in *Lana International Ltd. v. Menasco Aerospace Ltd.*, *supra*, the *LSA*, being specific legislation to our matter should prevail.

75 While one cannot say that there is a direct conflict between the procedures set out in R. 56 and those set out in s. 12 of the *LSA*, there is an unequivocal difference in the procedural requirements found under the *LSA*. The requirements under the *LSA* are definitely more onerous than that under R. 56. Specifically, under the *LSA*, an affidavit indicating the pecuniary position of the plaintiff is necessary. A good defence must be shown or that the plaintiff's claim is trivial. The test under the *LSA* is conjunctive. (See *Gunn v. North York Public Library Board* (1976), 14 O.R. (2d) 554 (Ont. H.C.).) The parties are permitted to conduct examinations for discovery to determine the extent and value of the plaintiff's assets and whether the latter would be able to pay the amount of any judgment awarded should the defendant be successful.

76 In contrast to this, under R. 56, once "good reason" is shown to demonstrate the plaintiff's incapability of paying any judgment awarded or that the action is frivolous and vexatious, (R. 56.01(1)(d) and (e)) that is sufficient to meet the test. No affidavit and certainly no examinations for discovery are required. (See *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 (Ont. H.C.) and *Reiger v. Chief of Police* (1987), 58 O.R. (2d) 203 (Ont. Master).) Based on the reasoning of the Ontario Court of appeal in *Lana International Ltd. v. Menasco Aerospace Ltd.*, *supra*, given the substantial difference in procedure and onus between the *Rules* as general legislation and the *LSA* as specific legislation, a strong argument can be made for having the *LSA* prevail in this matter.

77 Finally, I must consider the argument that one should read the two pieces of legislation that deal with the same matter in conjunction with each other. In other words, one supplements the other as was done in the following two cases:

78 In *McNight v. Emmerson*, [2002] O.J. No. 4240 (Ont. S.C.J.), Pitt J. was dealing with a motion for security for costs under s. 10 of the *PAPA*. The specific issue before him was the defendant's right to examine the plaintiffs in aid of the motion for security for costs. Pitt J., in his reasons, appears to accept the principle that R. 56 and the specific legislation on security for costs that he was dealing with, namely, the *PAPA*, had to be read together. Rule 56, in his opinion, imported limitations on the exercise of s. 10 of the *PAPA* when he stated at p. 2 of his decision:

> [para11] It is to be remembered that the discovery sought is solely for the purpose of advancing the right provided for in section 10 of the *Public Authorities Protection Act*. That section itself contains some internal limitations in its exercise. In addition, it is exercisable only in accordance with the rules of Court, specifically rule 56.01, which imports some limitations on its exercise, albeit arguably less stringent.

79 In *Hunter v. Pittman*, [1988] O.J. No. 478 (Ont. H.C.), Gravely J. held that even though the security for costs provision in the *PAPA* applied, the Court still had a discretion under R. 56.05 (court's ability to give relief to a plaintiff against whom an order for security for costs has been made) to vary or amend the order if it were unjust or causing undue hardship.

80 Senior Master Marriott concluded in his decision of *Goudie v. Oliver*, [1957] O.W.N. 575 (Ont. H.C.), that the *Rules* can supplement specific legislation by way of additional protection in circumstances not necessarily covered by the legislation. On the facts of that case, he was dealing with an action brought against the defendants who were police officers for damages for false arrest and false imprisonment. The defendant, Oliver obtained a *praecipe* order for security for costs against the plaintiffs who resided outside Ontario. The plaintiffs attempted to set aside the order arguing, among other things, that the only manner in which an order

for security for costs may properly be obtained by the defendant who was a public officer was pursuant to s. 14 of the *PAPA*. Section 14 read, at that time, as follows:

> Where an action is brought against a justice of the peace or against any person for any act done in pursuance or execution or intended execution of any public duty, statutory or otherwise, or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, the defendant may at any time after the service of the writ apply for security for costs if it is shown that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, or that the grounds of action are trivial or frivolous. R.S.O. 1950, c. 303.

81 As can be seen from the above section, its wording is almost indentical to the current s. 10 of the *PAPA* and the current *LSA*. At p. 576 of his decision, Senior Master Marriott concluded that the *praecipe* order for security for costs was properly obtained under the *Rules* despite the application of the *PAPA*. To conclude otherwise would deprive the defendants of the "usual rights conferred upon all defendants being sued by a person residing out of the jurisdiction":

> As to the first ground relied on, I am not satisfied that there is any real conflict between the provisions of the statute and the rule in question. Rule 373(a) applies generally to all persons commencing an action or certain other proceedings residing out of the jurisdiction, whereas s. 14 of *The Public Authorities Protection Act* was enacted to cover a special case where an action was commenced against a person carrying out a public duty and as it must be assumed that the Legislature in contemplating that such a section was desireable could not have intended to deprive such a person from the usual rights conferred upon all defendants when being sued by a person residing out of the jurisdiction. I think it must be found that the enactment of the said section was additional protection to such person and was to apply primarily to a case where the plaintiff resided within the jurisdiction.

82 However, in a more recent decision, *Van Riessen v. Canada (Attorney General)*, [1994] O.J. No. 2580 (Ont. Gen. Div.), Trafford J., for reasons that I found both compelling and persuasive, rejected the contention that on the issue of security for costs, R. 56.01(1)(a) should be read as supplementing s. 10 of the *PAPA* to apply to a plaintiff who resided outside Ontario.

83 While the reasons given are very short and succinct, it appears that an issue arose as to whether the complete and conjunctive test under s. 10 of the *PAPA* (insufficient assets by the plaintiff and good defence on the merits or grounds of the action are frivolous) had

to be met or whether merely establishing that the plaintiffs were ordinarily resident outside Ontario under R. 56.01(1) was sufficient.

84 Trafford J. applied the complete and conjunctive test under s. 10 of the *PAPA* and granted the order for security for costs. At the end of his decision he concluded as follows:

> Let me continue, however, and comment on the relationship between rule 56.01 and s. 10 of the *Public Authorities Protection Act*. Section 66(3) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, provides for rules supplementing an act in respect of practice and procedure, but notes that it does not authorize the making of rules in conflict with an act. Rule 56.01(1)(a) gives a discretion to the court to order security for costs where it appears the plaintiff is ordinarily resident outside of Ontario. Section 10 of the *Act* does not distinguish cases against the Crown by residents from those commenced by non-residents. To interpret rule 56.01(1)(a) as supplementing this provision is, I believe, to introduce a significant change to the scheme of s. 10. It is a change that affects not only the substance of the *Act*, but also the evidentiary and persuasive burdens in such cases. While one might conclude the position of the Crown as a defendant in a case where the plaintiff is a non-resident should be as set out in rule 56.01(1)(a), this, I believe, is a change to be introduced by the Legislature.

Disposition

85 Based on the above examination of the jurisprudence and analysis, I come to the conclusion that s. 12 of the *LSA* should have been considered and applied to the facts of this case and not R. 56 and that it was an error in law not to have done so. The fact that neither counsel raised the issue before the motions judge, especially the Appellant who now raised it for the first time on appeal, certainly contributed substantially to the error being made but does not render the decision for security for costs made under R. 56.09 instead of under s. 12 of the *LSA* a correct one.

86 In view of the disposition of the first issue, it is unnecessary to deal with the other two issues raised on the appeal. Nonetheless, I make the following comments with respect to the last issue. Based on the evidence relating to the conduct of the Appellants and the Plaintiff, Shelly Khan throughout the course of this litigation, the motions judge correctly concluded that there may have been and could be in the future an abuse of the court's process. We cannot find that he exercised his discretion in an unfair nor unreasonable manner.

87 For the reasons given with respect to the first issue, the appeal is allowed. There will be an order rescinding the order for security for costs made by the motions judge. The Respondents are permitted to bring another motion for security for costs under s. 12 of the *LSA*.

Costs

88 Costs may be addressed in written submissions, those of the Appellants' within 30 days, those of the Respondents' within a further 20 days and any reply within a further seven days.

Appeal allowed.

Footnotes

* Additional reasons reported *Khan v. Metroland Printing, Publishing & Distributing Ltd.* (2004), 2004 CarswellOnt 564, 183 O.A.C. 317 (Ont. Div. Ct.).

TAB 4

2016 ONCA 135
Ontario Court of Appeal

Popack v. Lipszyc

2016 CarswellOnt 2243, 2016 ONCA 135, 129 O.R. (3d) 321,
262 A.C.W.S. (3d) 841, 348 O.A.C. 341, 396 D.L.R. (4th) 57

Joseph Popack, United Burlington Retail Portfolio Inc. and United Northeastern Retail Portfolio Inc., Applicants (Appellants) and Moshe Lipszyc and Sara Lipszyc, Respondents (Respondents)

Doherty, G. Pardu, M.L. Benotto JJ.A.

Heard: January 20, 2016
Judgment: February 18, 2016
Docket: CA C60656

Proceedings: affirming *Popack v. Lipszyc* (2015), 2015 CarswellOnt 8001, 2015 ONSC 3460, W. Matheson J. (Ont. S.C.J.)

Counsel: Marlys A. Edwardh, Daniel Sheppard, for Appellants
Colin P. Stevenson, Neil G. Wilson, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial; Public
Related Abridgment Classifications
Alternative dispute resolution
VII Arbitration awards
VII.10 Miscellaneous

APPEAL by applicant from judgment reported at *Popack v. Lipszyc* (2015), 2015 ONSC 3460, 2015 CarswellOnt 8001 (Ont. S.C.J.), dismissing application to set aside arbitration award.

***Doherty J.A.*:**

I

Overview

1 The appellant, Joseph Popack, and the respondent, Moshe Lipszyc, agreed to submit their dispute concerning certain properties in Ontario to arbitration by a New York Rabbinical Court (the "panel"). Under the arbitration agreement, the panel was free to choose the appropriate procedures by which to conduct the arbitration, no record was to be kept of the evidence or the submissions, and no reasons for decision were required from the panel. The arbitration agreement did, however, stipulate that the parties had a right to appear before the panel at all "scheduled hearings" of the panel.

2 During the hearing, Mr. Lipszyc's representative suggested that the panel should hear from the arbitrator in a previous attempted arbitration, Rabbi Schwei. Mr. Popack's representative advised the panel that Mr. Popack did not object to the panel hearing from Rabbi Schwei. It would appear that nothing more was said by the parties or the panel about the possibility of Rabbi Schwei giving evidence.

3 Without notice to either Mr. Lipszyc or Mr. Popack, the panel met *ex parte* with Rabbi Schwei on July 8, 2013. There is no record of this meeting.

4 The panel issued its award in August 2013.

5 Mr. Popack brought an application pursuant to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (the "*ICAA*"), to set aside the award on the ground that the panel, by conducting the *ex parte* meeting with Rabbi Schwei without notice to the appellant, had breached the procedure agreed upon by the parties. Mr. Popack argued that the failure to follow the procedure agreed upon by the parties necessitated the setting aside of the award under Article 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (a schedule to the *ICAA*).

6 The application judge found that the *ex parte* meeting with Rabbi Schwei without notice to the parties breached the procedure the parties had agreed upon. She also accepted that the breach provided a ground upon which she could set aside the award under Article 34(2)(a)(iv) of the Model Law. The application judge went on, however, to hold that under Article 34(2)(a)(iv) she had a discretion as to whether to set the award aside. After referring to several factors relevant to the exercise of that discretion, the application judge concluded she would not set aside the award despite the procedural error by the panel. She dismissed Mr. Popack's application. He appeals.

7 On the appeal, the parties accept that Article 34(2)(a)(iv) applies and that the application judge correctly determined that the *ex parte* meeting with Rabbi Schwei without notice to the parties breached the procedure agreed upon by the parties. The appeal focuses exclusively on the application judge's decision not to set aside the award despite the failure to comply with the agreed upon procedure.

8 Mr. Popack acknowledges that Article 34(2)(a)(iv) gave the trial judge a discretion as to whether the award should be set aside. He contends, however, that the application judge drew the boundaries of that discretion far too widely and, in any event, considered immaterial factors in arriving at her decision. Mr. Popack argues that the application judge having determined that the procedural breach was "significant" (para. 73), and that there was a "possibility of prejudice" to Mr. Popack (para. 69), should have set aside the award.

9 Mr. Lipszyc contends that all of the factors identified by the application judge were properly considered by her in the exercise of her discretion. He further submits that the application judge's exercise of her discretion, particularly in the context of a review of a private arbitral award, attracts the highest degree of deference in this court. Mr. Lipszyc argues that, viewed through the deference lens, the application judge's order should stand.

II

The Two Letters

(a) Mr. Popack's letter to the panel

10 Before examining the application judge's reasons, it is necessary to describe two documents that were part of the record before her. The first is a letter dated July 15, 2013 from Mr. Popack's representative to the arbitration panel. This letter was sent to the panel about a week after its meeting with Rabbi Schwei and while the arbitration was still ongoing. The letter was sent to the panel without any notice to Mr. Lipszyc or his representative. Mr. Lipszyc became aware of both the *ex parte* meeting with Rabbi Schwei and the *ex parte* communication with the panel by Mr. Popack's representative sometime after this application was commenced.

11 In the July 15, 2013 letter, Mr. Popack's representative began by setting out his position as to the terms of the award that the panel should make. He then turned to the meeting with Rabbi Schwei. That part of the letter began: "we heard a rumor that the Rabbinical Court went to Rabbi Schwei to discuss a *certain release*, etc." (emphasis in original).

12 Mr. Popack's representative went on to set out Mr. Popack's version of the events relevant to the release and Rabbi Schwei's involvement in those events. This part of the letter concluded:

> We do not know what Rabbi Schwei recalls or does not recall; however, his testimony against a contract written and signed between the parties is worthless.
>
> In light of the above, it does not diminish Popack's right, because had Rabbi Schwei testified in his presence, he would have shown him the signed agreement that was written

> at the time; perhaps Rabbi Schwei's recollection would have been different than that which he said, (especially since Rabbi Schwei already told the Rabbinical Court many years ago at the beginning of the Rabbinical Court arbitration, saying "that he does not recall anything").

13 Having set out Mr. Popack's position in respect of Rabbi Schwei's involvement in this *ex parte* communication with the panel, Mr. Popack's representative made the following request:

> It is therefore our request that if the Rabbinical Court considers Rabbi Schwei's testimony (which was without our knowledge) we request a Rabbinical Court hearing about this, in the defendant's presence, and the Rabbinical Court should consider this as well.
>
> [Emphasis added.]

14 The letter concluded with an indication that Mr. Popack's representative had further arguments to make about the release. He added "please let me know about this, because we are not prepared to lose many millions based on *ex parte* testimony; therefore, we want a Rabbinical Court hearing about this."

15 Counsel for Mr. Popack reads the July 15, 2013 letter as an unqualified objection by Mr. Popack to the *ex parte* proceeding and a declaration that he would have exercised his right to be present and question Rabbi Schwei had he been aware of the hearing. Counsel for Mr. Lipszyc reads this letter as a waiver of any complaint about the *ex parte* proceeding and a demand for a hearing before the panel only if the panel was of the view that it considered Rabbi Schwei's testimony relevant to the award it would make.

16 The application judge referred to the July 15, 2013 letter in the course of listing the factors relevant to the exercise of her discretion (para. 71). She treated the letter as a qualified request for a hearing if the panel regarded Rabbi Schwei's evidence as relevant and as an improper *ex parte* communication made on Mr. Popack's behalf to the panel without Mr. Lipszyc's knowledge.

(b) The panel's letter

17 The second document is a letter from the panel prepared in response to inquiries made by counsel for Mr. Lipszyc after this application was commenced. In their letter, the panel indicated that Mr. Lipszyc's representative had requested that Rabbi Schwei give evidence and the panel had granted the request. The letter indicated that neither party "objected to our decision, or requested the opportunity to be present at the meeting". The panel further

indicated in the letter that had either party wanted to attend the meeting with Rabbi Schwei, they would have been allowed to do so.

18 The panel stated in the letter that the information provided by Rabbi Schwei had no impact on their award. The panel referred to Mr. Popack's request in his letter that the panel conduct a hearing if it viewed Rabbi Schwei's evidence as germane. The panel indicated that it did not hold a hearing as it was satisfied that Rabbi Schwei's evidence "didn't make any change in our ruling".

19 Counsel for Mr. Popack argued that the letter from the panel should be given no weight by the application judge for three reasons. First, as acknowledged by counsel for Mr. Lipszyc, the letter did not accurately describe the events that occurred when Mr. Lipszyc raised the possibility of Rabbi Schwei testifying before the panel. Second, the letter was a self-serving attempt by the panel to justify its failure to follow the procedure the parties had agreed upon. Third, the contents of the letter breached the panel's obligation to maintain the secrecy of its deliberations.

20 The application judge appreciated Mr. Popack's arguments that the letter should be given no weight. She ultimately indicated she would take the letter into account in exercising her discretion (para. 68). The application judge, however, did not accept the contents of the letter as an accurate account of the dialogue between the parties and the panel when the possibility of Rabbi Schwei testifying arose. She also did not accept as determinative the panel's indication that Rabbi Schwei's testimony had no impact on the award.

III

The Application Judge's Reasons

21 The parties agree that the *ICAA* applies to the award of the panel. That Act brings the Model Law into Ontario domestic law. Pursuant to Article 34(2)(a)(iv), a court "may" set aside an award if "the arbitral procedure was not in accordance with the agreement of the parties".

22 Under the terms of the arbitration agreement, the parties were entitled to be "informed by the arbitrators of the scheduled hearing(s)". Neither Mr. Popack, nor Mr. Lipszyc was informed of the panel's meeting with Rabbi Schwei. This *ex parte* without notice meeting meant that the procedure followed by the panel "was not in accordance with the agreement of the parties" and triggered the power under Article 34(2)(a)(iv) to set aside the award.

23 In concluding that the award should not be set aside, the application judge considered several factors:

i. The panel did not meet with Rabbi Schwei on its own initiative, but only after Mr. Lipszyc had requested that Rabbi Schwei's evidence be heard and Mr. Popack agreed that the panel could hear Rabbi Schwei's evidence (para. 66);

ii. While the absence of a transcript of the proceedings before the panel made it difficult to know exactly what had happened, based on the material filed on the application, the panel could well have been under an honest misapprehension that the parties were satisfied that it could take Rabbi Schwei's evidence in their absence (para. 67);

iii. Rabbi Schwei was not aligned with either party and had served as a neutral arbitrator in the earlier attempt at arbitration (para. 69);

iv. Mr. Popack could not show actual prejudice, however, there was "the possibility of prejudice for both sides" flowing from the *ex parte* meeting with Rabbi Schwei (para. 69);

v. Setting aside the award would mean added costs as the expenses associated with the eight-week arbitration would be lost and a new arbitration required. The application judge referred to this as not "especially significant" (para. 70);

vi. Mr. Popack's father had given evidence before the panel. He had since died. If the award were to be set aside, a new hearing would be required and Mr. Popack Sr.'s evidence would not be available to the parties (para. 70);

vii. When Mr. Popack became aware of the meeting with Rabbi Schwei, he made only a qualified objection to the procedure followed and requested a hearing only if the panel regarded Rabbi Schwei's evidence as relevant to its decision (para. 71); and

viii. In communicating *ex parte* with the panel and without notice to Mr. Lipszyc, Mr. Popack had himself contravened procedural rules and raised fairness concerns (para. 71).

24 The first two factors pertain to the seriousness of the procedural breach in the specific circumstances. Factors three and four relate to the potential impact of the breach on the award made. Factors five and six address the potential prejudice to the ultimate effective arbitration of the dispute should the award be set aside. Factors seven and eight go to the conduct before the panel of the complaining party (Mr. Popack) after he became aware of the procedural error.

IV

Should This Court Set Aside the Award?

25 The order under appeal is discretionary. Virtually all discretionary orders involve the balancing of competing interests. In most cases, the existence of a discretion implies that different judges can reasonably arrive at different results. Consequently, appellate courts will defer to the exercise of discretion at first instance absent a clearly identifiable error in the application of the law, a material misapprehension of the relevant evidence, or a result that is clearly wrong in the sense that it is not defensible on an application of the relevant law to the facts: see *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125 (S.C.C.), at para. 27.

26 In addition to the generally applicable principles that urge deference in the review of all discretionary decisions, the nature of the specific order under appeal can also enhance the deference rationale. The application judge exercised her discretion in the context of a review of an award rendered in a private arbitration before a panel chosen by the parties to determine the dispute between them. The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum: see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), [1991] 1 W.W.R. 219 (B.C. C.A.), at p. 229, leave to appeal refused, [1990] S.C.C.A. No. 431 (S.C.C.); *Société d'investissements l'Excellence inc. c. Rhéaume*, 2010 QCCA 2269 (C.A. Que.), at paras. 52-62, leave to appeal refused, [2011] S.C.C.A. No. 57 (S.C.C.). The application judge's decision to not set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.

27 Counsel for the appellant accepts that deference is a central feature of appellate review of discretionary decisions. He submits, however, that deference must end when the exercise of discretion is tainted by the application of an erroneous legal principle. Counsel argues that the application judge erred in principle in failing to conform the exercise of her discretion under Article 34(2) of the Model Law to the manner in which that discretion has been exercised by courts in other jurisdictions that also apply the Model Law.

28 Counsel submits that conformity with the case law from other jurisdictions rises to the level of a legal principle because the *ICAA*, and specifically the adoption of the Model Law, is a clear legislative signal to Ontario courts that they must recognize and enforce awards made in international arbitrations in a manner that is consistent with the way in which courts in other jurisdictions that apply the Model Law recognize and enforce awards: see *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (Ont. C.A.), at p. 264. Counsel contends that the discretion captured in in Article 34(2) is an important feature of the enforcement and recognition scheme established under the Model Law. As such, that discretion must be interpreted consistently among various jurisdictions that apply the Model Law if the desired consistency and predictability is to be achieved. Counsel submits that the application judge, in declining to set aside the award despite the significant procedural

error and the potential prejudice to Mr. Popack, failed to adhere to the broadly accepted approaches to Article 34(2) followed in other jurisdictions.

29 Counsel for both parties have helpfully put before the court several cases from many jurisdictions that have considered the discretion in Article 34(2). Counsel for Mr. Popack submits that while the cases suggest three different approaches to the exercise of the discretion provided in Article 34(2), none would countenance the exercise of the discretion in favour of upholding the award in the circumstances of this case.

30 I do not find any bright line rule in the cases that address the nature of the discretion in Article 34(2). Article 34(2) provides several grounds upon which awards may be set aside. It is clear from the case law that the scope of the discretion under Article 34(2) is significantly affected by the ground upon which the award could be set aside. For example, Article 34(2)(a)(i) provides that the award may be set aside if there is no valid arbitration agreement between the parties. It seems self-evident that if a party establishes that there was no valid arbitration agreement, a judge would have considerably less discretion to uphold the award despite the absence of a valid arbitration agreement, than a judge would have if the error lay in the arbitration panel's failure to comply with a specific procedural provision in the course of an otherwise proper arbitration: see *Carr v. Allan*, [2014] NZSC 75 (New Zealand S.C.), at paras. 76-80, rev'g on other grounds [*Allan v. Brookside Farm Trust Ltd.*] [2013] NZCA 11 (New Zealand C.A.); *Dallah Real Estate & Tourism Holding Co. v. Pakistan*, [2010] UKSC 46 (U.K. S.C.), at paras. 67-69. In considering whether the application judge's exercise of her discretion is out of step with decisions from other jurisdictions, it is important to focus on those cases in which courts have been asked to set aside arbitral awards on grounds involving procedural errors in the arbitration process.

31 The Canadian cases reveal an approach that looks both to the extent that the breach undermines the fairness or the appearance of the fairness of the arbitration and the effect of the breach on the award itself: see *Rhéaume*, at paras. 50-61; *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, 14 B.L.R. (3d) 285 (B.C. S.C.), at paras. 127-29. In *Rhéaume*, at para. 61, after reviewing the Canadian case law, the court observed:

> [I]t would be wholly inconsistent with the intention of the legislature and the current jurisprudential trend to treat every breach of the applicable procedure, however minor and however inconsequential, as requiring a court to refuse to homologate an award or to annul it if so requested. A court called upon to adjudicate such a proceeding must balance the nature of the breach in the context of the arbitral process that was engaged, determine whether the breach is of such a nature to undermine the integrity of the process, and assess the extent to which the breach had any bearing on the award itself.

32 More recent decisions in other jurisdictions reflect the same kind of balancing as described in *Rhéaume*. *Kyburn Investments Ltd. v. Beca Corporate Holdings Ltd.*, [2015] NZCA 290 (New Zealand C.A.) is instructive. In *Kyburn*, the applicant moved to set aside an award on the basis that the arbitration panel had improperly met with a witness from one side in the absence of the other side while conducting a site inspection. Not surprisingly, the application judge held that the panel's conduct had breached the rules of natural justice and gave rise to an award that conflicted with the public policy of New Zealand. Conflict with public policy is a ground for setting aside an award under Article 34(2). The application judge, however, exercised his discretion against setting aside the award. The Court of Appeal upheld the exercise of that discretion.

33 The Court of Appeal described the discretion in Article 34(2) in broad terms, para. 28:

> [W]hile the discretion in [Article] 34 is of a wide and apparently unfettered nature, it must be exercised in accordance with the purposes and policy of the Act which emphasize the finality of arbitral awards and reduce the scope for curial intervention in accordance with the intentions of the parties to arbitration.

34 The court explained, at para. 47, that the exercise of the discretion under Article 34(2) required an evaluation of the nature of the breach and its impact on the proceedings:

> No single factor is decisive or necessary for an award to be set aside. Sometimes, the breach will be sufficiently serious as to speak for itself. In other cases, the Court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Other factors may be relevant to the exercise of the discretion, such as the likely costs of holding a rehearing.

35 The Federal Court of Australia, in *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty. Ltd.*, [2014] FCAFC 83 (Australia Fed. Ct.), also takes an approach that balances a broad array of factors in deciding whether to set aside an arbitration award on account of procedural errors at the arbitration. The court, at para. 111, identified the purpose of the discretion in Article 34(2) as the prevention of "real unfairness and real practical injustice" flowing from the failure to conduct the proceedings in accordance with the proper procedure. The court went on, at para. 154:

> [T]he notion of prejudice or unfairness does not involve re-running the arbitration and quantifying the causal effect of the breach of some rule. The task of the Court in assessing prejudice or unfairness or practical injustice is not to require proof of a different result. If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way that could reasonably have made a difference. It should be recalled that the proper framework of analysis for the IAA is the setting aside

> or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate real unfairness or real practical injustice. [Citations omitted.]

36 In my view, all of the factors identified by the application judge as relevant to the exercise of her discretion (listed above, at para. 23) were properly considered in deciding whether the improper *ex parte* meeting with Rabbi Schwei produced "real unfairness" or "real practical injustice". The relevance of the seriousness of the breach (factors one and two) and the potential impact of that breach on the result (factors three and four) to the fairness of the arbitral proceedings are obvious. The potential prejudice flowing from the need to redo the arbitration if the order is set aside can also be relevant in assessing "real practical injustice" (factors five and six). I think Mr. Popack's conduct after learning of the procedural breach (factors seven and eight) is also significant in this case.

37 When Mr. Popack learned of the possibility that the panel had improperly interviewed Rabbi Schwei in the absence of the parties, he chose not to advise Mr. Lipszyc of any possible concern and he chose not to make any formal complaint about the procedure followed by the panel. Instead, Mr. Popack chose to communicate *ex parte* with the panel. In that communication he put forward his position with respect to Rabbi Schwei's involvement and a forceful argument that anything Rabbi Schwei might say was "worthless".

38 Mr. Popack did not request a hearing at which he could raise his concerns about the *ex parte* meeting with Rabbi Schwei and share his view of Rabbi Schwei's evidence with the other side. Instead, he asked for a hearing only if the panel did not agree with his assessment that Rabbi Schwei's evidence had no value.

39 Mr. Popack sought to gain an advantage in the arbitration proceedings when he learned of the *ex parte* meeting with Rabbi Schwei. He was content to attempt to exploit that advantage by putting his position to the panel without any notice to Mr. Lipszyc. His conduct strongly suggests a tactical decision whereby Mr. Popack was content to allow the panel to finish its adjudication and make its award despite the improper *ex parte* meeting with Rabbi Schwei. Mr. Popack positioned himself so that he could decide to raise the issue formally and on notice to Mr. Lipszyc only if he was not satisfied with the award given by the panel. To reward that tactic by setting aside the award would eviscerate the finality principle that drives judicial review of arbitral awards and would cause "a real practical injustice". Mr. Popack's conduct after he learned of the *ex parte* meeting speaks loudly against setting aside this award.

40 Mr. Popack's *ex parte* communication with the panel is also relevant to the consideration of the panel's letter explaining its conduct (above, at paras. 17-20). Mr. Popack demanded a hearing in respect of Rabbi Schwei's evidence only if it was going to affect the panel's

decision. Having taken that position in an *ex parte* communication with the panel, only to subsequently challenge the panel's award, it does not lay in Mr. Popack's mouth to argue that the panel could not provide insight as to the significance of Rabbi Schwei's evidence. The panel's letter is in effect, at least in part, a response to the request made in the *ex parte* communication made on behalf of Mr. Popack. The panel's letter explains that it did not convene a hearing over Rabbi Schwei's evidence because that evidence had no impact on its ruling. Mr. Popack had made it clear that he did not want a hearing if the evidence had no impact on the panel. In these circumstances, I think the panel's explanation for not convening a hearing after it received Mr. Popack's *ex parte* communication was relevant to the application judge's exercise of her discretion.

41 One other factor referred to by the application judge in exercising her discretion deserves some comment. The application judge considered the death of a material witness and thus his unavailability at any subsequent hearing as a significant consideration. She did not do so on the basis that this witness helped one side or the other, but rather on the basis that the absence of this witness would inevitably detract from the effective and fair resolution of the dispute.

42 Concerns about the effect of procedural errors on the "integrity of the process" (*Rhéaume*) or the "practical injustice" of the proceeding (*TCL Air Conditioner*) will normally focus on the arbitration proceeding giving rise to the award. In the context of private arbitrations, I think the ability of the parties to effectively and fairly redo the arbitration process should the award be set aside can also be a factor in the exercise of the Article 34(2) discretion, at least in cases where neither party bears any responsibility for the procedural error said to justify the setting aside of the initial order. Neither Mr. Popack nor Mr. Lipszyc can be blamed in any way for the panel's decision to take Rabbi Schwei's evidence *ex parte* and without notice.

43 Counsel for the appellant also argued that the application judge should have considered Article 34(2)(a)(ii) and Article 34(2)(b)(ii). The former addresses violations of the right of a party to be present at the arbitration process. The latter is concerned with public policy violations.

44 Counsel submits that although a single procedural error underlies each of the three complaints, the appropriate exercise of discretion under Article 34(2) may be different depending upon the characterization of the procedural error.

45 I agree with the application judge that each of the different alleged violations comes down to the same conduct and the same balancing exercise. I do not see how the outcome of that balancing exercise can depend on the specific label placed on the procedural error giving rise to the Article 34(2) complaint. For example, characterizing the procedural failure as a breach of Ontario "public policy" if it could be so characterized, would not, in my view,

automatically make the breach more serious or tip the scale in favour of setting aside the award. Whatever label is placed on the procedural error, and whichever subsection of Article 34(2) is invoked, the essential question remains the same — what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of the fairness of the process?

46 The application judge made no error in choosing not to give separate consideration to each of the provisions of Article 34 advanced on behalf of Mr. Popack.

V

Conclusion

47 I would dismiss the appeal.

48 I would award costs to the respondents in the amount of $25,000, inclusive of disbursements and relevant taxes.

G. Pardu J.A.:

I agree

M.L. Benotto J.A.:

I agree

Appeal dismissed.

TAB 5

2008 SCC 51
Supreme Court of Canada

R. v. M. (R.E.)

2008 CarswellBC 2037, 2008 CarswellBC 2038, 2008 SCC 51, [2008] 11 W.W.R. 383, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 235 C.C.C. (3d) 290, 260 B.C.A.C. 40, 297 D.L.R. (4th) 577, 380 N.R. 47, 439 W.A.C. 40, 60 C.R. (6th) 1, 79 W.C.B. (2d) 321, 83 B.C.L.R. (4th) 44, J.E. 2008-1861

Her Majesty the Queen (Appellant) and R.E.M. (Respondent) and Attorney General of Ontario and Attorney General of Alberta (Interveners)

McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein JJ.

Heard: May 16, 2008
Judgment: October 2, 2008 *
Docket: 32038

Proceedings: reversing *R. v. M. (R.E.)* (2007), 218 C.C.C. (3d) 446, 393 W.A.C. 176, 238 B.C.A.C. 176, 2007 BCCA 154, 2007 CarswellBC 547 (B.C. C.A.)**Proceedings: reversing in part *R. v. M. (R.E.)* (2004), 2004 CarswellBC 3313, 2004 BCSC 1679 (B.C. S.C.)**

Counsel: Alexander Budlovsky, Q.C. for Appellant
J.M. Brian Coleman, Q.C., Lisa Jean Helps for Respondent
M. David Lepofsky, Amanda Rubaszek for Intervener, Attorney General of Ontario
David C. Marriott for Intervener, Attorney General of Alberta

Subject: Criminal; Constitutional
Related Abridgment Classifications
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.j Grounds
XXXIII.1.j.v Sufficiency of reasons

APPEAL by Crown from judgment reported at *R. v. M. (R.E.)* (2007), 218 C.C.C. (3d) 446, 393 W.A.C. 176, 238 B.C.A.C. 176, 2007 BCCA 154, 2007 CarswellBC 547 (B.C. C.A.), ordering new trial based on trial judge's reasons being deficient.

POURVOI formé par le ministère public à l'encontre d'un jugement publié à *R. v. M. (R.E.)* (2007), 218 C.C.C. (3d) 446, 393 W.A.C. 176, 238 B.C.A.C. 176, 2007 BCCA 154, 2007 CarswellBC 547 (B.C. C.A.), ayant ordonné un nouveau procès en raison de la déficience des motifs du juge du procès.

McLachlin C.J.C.:

1 This case requires the Court to consider the adequacy of reasons of a trial judge on the credibility of witnesses in a criminal trial. The Court of Appeal faulted the trial judge for not explaining why conflicting evidence failed to raise a reasonable doubt as to the accused's guilt, and ordered a new trial on the basis that the trial judge's reasons were insufficient. The Crown appeals to this Court, arguing that the Court of Appeal, under the guise of faulting the sufficiency of the reasons, in fact substituted its own view of the facts without showing error by the trial judge.

2 I conclude that the appeal must be allowed. Although his reasons may not have been ideal, the trial judge provided adequate reasons to explain why he reached the verdicts of guilt and to provide a basis for appellate review.

I. Factual and Judicial History

3 The accused, R.E.M., was charged with various sexual offences involving the complainant, who is the accused's stepdaughter, and K.A.P., who is the daughter of a family friend. The offences involving the complainant were alleged to have been committed when the complainant was between 9 and 17 years old. When the complainant was 16 years old, she gave birth to a baby who had been conceived with the accused.

4 The accused admitted to having sex with his stepdaughter, but claimed that the relationship only became sexual when she was 15 and that the intercourse was consensual. (The age for minor consent at the time was 14.) He denied all the other allegations against him.

5 The charges involving K.A.P. were dismissed. The trial focused on the charges involving the accused's stepdaughter.

6 The evidence dealt with 11 incidents relating to 4 counts respecting the complainant. At trial, the accused admitted the essential elements of one offence and denied the three other charges, and was ultimately acquitted of one of those. The trial judge found the complainant to be a very credible witness, that much of her testimony was not seriously challenged, and that she was not prone to embellishment or vindictiveness. The trial judge largely disbelieved the accused's evidence, although at some points found that it was not seriously challenged.

The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led (2004 BCSC 1679 (B.C. S.C.)).

7 The B.C. Court of Appeal (*per* Saunders J.A.) allowed the appeal with respect to the two unadmitted counts, based on its view that the reasons for judgment did not sufficiently show that the trial judge properly applied the principle of reasonable doubt ((2007), 238 B.C.A.C. 176, 2007 BCCA 154 (B.C. C.A.)). In particular, the court found that the trial judge failed to mention some of the accused's evidence, failed to make general comments about the accused's evidence, and failed to reconcile his generally positive findings on the complainant's credibility with the rejection of some of her evidence. The court found that the trial judge's failure to explain why he rejected the accused's plausible denial of the charges placed the reasons for judgment beyond the reach of meaningful appellate review. Finding that conviction was not inevitable and that the accused was entitled to the benefit of any reasonable doubt raised by his evidence, the court concluded that the minimal standard for sufficiency of reasons was not met and ordered a new trial.

II. Analysis

A. When are Reasons Required?

8 The common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence has been believed and what disbelieved: see e.g. R. v. Inhabitants of Audly (1699) 2 Salk. 527, 91 E.R. 448; *Swinburne v. David Syme & Co*, [1909] V.L.R. 550 (Australia Vic. Sup. Ct.), aff'd on other grounds, [1910] V.L.R. 539 (H.C. Aust.); *R. v. Macdonald* (1976), [1977] 2 S.C.R. 665 (S.C.C.). In the words of a former Chief Justice of this Court, Laskin C.J.:

> A recurring question [in] non-jury trials and at the appellate level is whether reasons should be given. There is no legal requirement of this kind, and it is quite unnecessary in a great many cases that come to trial before a Judge alone, and equally unnecessary in a great many cases where the appellate Court's judgment affirms the trial Judge.
>
> (B. Laskin, "A Judge and His Constituencies" (1976-1977), 7 *Man. L.J.* 1, at pp. 3-4)

9 Judicial reasons of the 19th and early 20th century, when given, tended to be cryptic. One searches in vain for early jurisprudence on the duty to give reasons, for the simple reason, one suspects, that such reasons were not viewed as required unless a statute so provided. This absence of such a duty is undoubtedly related to the long-standing common law principle that an appeal is based on the judgment of the court, not on the reasons the court provides to explain or justify that judgment: see e.g. *Glennie v. McDougall & Cowans Holdings Ltd.*, [1935] S.C.R. 257 (S.C.C.), at p. 268.

10 The law, however, has evolved. There is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory. As this Court stated in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (S.C.C.), at para. 18, quoting from *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 43, (in the administrative law context), "it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision". A criminal trial, where the accused's innocence is at stake, is one such circumstance.

11 The authorities establish that reasons for judgment in a criminal trial serve three main functions:

> 1. Reasons tell the parties affected by the decision why the decision was made. As Lord Denning remarked, on the desirability of giving reasons, "... by so doing, [the judge] gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account": *The Road to Justice* (1955), at p. 29. In this way, they attend to the dignity interest of the accused, an interest at the heart of post-World War II jurisprudence: M. Liston, "'Alert, alive and sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law", in D. Dyzenhaus, ed., *The Unity of Public Law* (2004), 113, at p. 121. No less important is the function of explaining to the Crown and to the victims of crime why a conviction was or was not entered.
>
> 2. Reasons provide public accountability of the judicial decision; justice is not only done, but is seen to be done. Thus, it has been said that the main object of a judgment "is not only to do but to seem to do justice": Lord MacMillan, "The Writing of Judgments" (1948), 26 *Can. Bar Rev.* 491, at p. 491;
>
> 3. Reasons permit effective appellate review. A clear articulation of the factual findings facilitate the correction of errors and enable appeal courts to discern the inferences drawn, while at the same time inhibiting appeal courts from making factual determinations "from the lifeless transcript of evidence, with the increased risk of factual error": M. Taggart, "Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases" (1983), 33 U.T.L.J. 1, at p. 7. Likewise, appellate review for an error of law will be greatly aided where the trial judge has articulated her understanding of the legal principles governing the outcome of the case. Moreover, parties and lawyers rely on reasons in order to decide whether an appeal is warranted and, if so, on what grounds.

12 In addition, reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the

possibility of overlooking or under-emphasizing important points of fact or law. As one judge has said: "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper"; United States v. Forness, 125 F.2d 928, at p. 942 (2d Cir. 1942). Finally, reasons are a fundamental means of developing the law uniformly, by providing guidance to future courts in accordance with the principle of *stare decisis.* Thus, the observation in H. Broom's *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd ed. 1885), at pp. 147-48: "A public statement of the reasons for a judgment is due to the suitors and to the community at large — is essential to the establishment of fixed intelligible rules, and for the development of law as science." In all these ways, reasons instantiate the rule of law and support the legitimacy of the judicial system.

13 The critical functions of reasons in letting the parties know the reasons for conviction, in providing public accountability and in providing a basis for appeal were emphasized in *Sheppard.* At the same time, *Sheppard* acknowledged the constraints of time and the general press of business in criminal trial courts and affirmed that the degree of detail required may vary with the circumstances and the completeness of the record.

14 In summary, the law has progressed to the point where it may now be said with confidence that a trial judge on a criminal trial where the accused's innocence is at stake has a duty to give reasons. The remaining question is more difficult: what, in the context of a particular case, constitutes *sufficient* reasons?

B. The Test For Sufficient Reasons

15 This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

16 It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), at p. 524).

17 These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard.* But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties *what* he or she

has decided and *why* he or she made that decision" (emphasis added). What is required is a logical connection between the "what" — the verdict — and the "why" — the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

18 Explaining the "why" and its logical link to the "what" does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. Doherty J.A. in *Morrissey*, at p. 525, states:

> A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict. [Emphasis added.]

19 The judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties. This applies to both the law and the evidence. Speaking of the law, Doherty J.A. states in *Morrissey*, at p. 524:

> Where a case turns on the application of well-settled legal principles to facts as found after a consideration of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those principles.

20 Similarly, the trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.

21 This is what is meant by the phrase in *Sheppard* "the path taken by the trial judge through confused or conflicting evidence" (at para. 46). In *Sheppard*, it was not possible to determine what facts the trial judge had found. Hence, it was not possible to conclude *why* the trial judge had arrived at *what* he concluded — the verdict.

22 The charge in *Sheppard* was the theft of two windows. The only evidence connecting the accused to the windows came from an estranged girlfriend who had vowed to "get him". The trial judge convicted with these formulaic words:

> Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

23 The reasons said nothing about the facts. They said nothing about the credibility of the witnesses. And they said nothing about the law on the offence. They repeated stock phrases of what a trial judge is expected to do, but did not show that he had done it. There was nothing in the reasons to tell the accused why the trial judge was convicting him. There was nothing to tell the public why the conviction had been entered. And there was nothing to tell the Court of Appeal whether the trial judge's findings and reasoning were sound. The reasons were clearly inadequate from a functional perspective.

24 The Court of Appeal in this case took the phrase "the path taken by the trial judge through confused or conflicting evidence" to mean that the trial judge must detail the precise path that led from disparate pieces of evidence to his conclusions on credibility and guilt. In other words, it insisted on the very "verbalization of the entire process engaged in by the trial judge in reaching a verdict" rejected in *Morrissey* (p. 525). *Sheppard* does not require this. The "path" taken by the judge must be clear from the reasons read in the context of the trial. But it is not necessary that the judge describe every landmark along the way.

25 The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27 (S.C.C.), at para. 31:

> The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision. [Emphasis in original.]

26 *Braich* was decided together with *Sheppard.* Unlike in *Sheppard*, the factual record was detailed. Binnie J., writing for the Court, adopted a flexible approach that took into account the fact that inferences could be drawn from that record, and found the reasons to be sufficient.

27 The appellate court had found the trial judge's reasons inadequate because they failed to weigh evidentiary frailties properly in assessing identification evidence. In overturning this ruling, Binnie J. adopted a functional approach. He found that the accused was able to

articulate informed disagreement with the trial judge and to formulate an arguable ground of appeal on the facts of the case (paras. 21 and 24). Warning against a formalistic approach, he stated, "[t]he insistence on a 'demonstration' of a competent weighing of the frailties elevates the alleged insufficiency of reasons to a stand-alone ground of appeal divorced from the functional test, a broad proposition rejected in *Sheppard*" (para. 38). He concluded that the trial judge met the functional test for sufficiency of reasons.

28 In *R. c. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (S.C.C.), this Court allowed a Crown appeal of an appellate decision in which an error of law had been found on the basis of insufficiency of reasons. The majority, *per* Bastarache and Abella JJ., found that the appellate court had ignored the trial judge's unique position to see and hear witnesses. It had instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised. Bastarache and Abella JJ. observed, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

29 In *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41 (S.C.C.), the appellant contended that the trial judge's reasons were insufficient. This ground of the appeal was rejected. McLachlin C.J., writing for the majority, I held at para. 101:

> In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

30 Viewed in the context of the entire record, the trial judge's reasons sufficiently informed the appellant why the case was decided against him, and permitted meaningful appellant review: *Hill*, at para. 103.

31 More recently, in *R. c. Dinardo* [2008] 1 S.C.R. 788, 2008 SCC 24 (S.C.C.), the Court, *per* Charron J., rejected a formalistic approach. The case turned on credibility. The trial judge's reasons failed to articulate the alternatives to be considered in determining reasonable doubt as set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.). Charron J. stated that only the substance, not the form, of *W. (D.)* need be captured by the trial judge, then went on to say:

> In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. [para. 23]

32 Charron J. went on to state that where credibility is a determinative issue, deference is in order and intervention will be rare (para. 26). While the reasons must explain why the evidence raised no reasonable doubt, "there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel" (para. 30).

33 The Court found that the trial judge's reasons fell short of even this flexible standard. There was evidence that the complainant was mentally challenged, with a history of making up stories to get attention, and her testimony had wavered on the core issue of whether the accused had committed the assault in question. The trial judge's failure to avert to these critical matters left the Court in doubt that he had directed his mind to the central issue of credibility.

34 In *R. v. Walker*, 2008 SCC 34 (S.C.C.), the issue was whether the trial judge's reasons had adequately detailed the path to the verdict. Binnie J., writing for the Court, held that while the reasons "fell well short of the ideal", they were not so impaired that the Crown's right of appeal was impaired (para. 27). He stated: "Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue" (para. 20).

35 In summary, the cases confirm:

> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict

must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 *of Sheppard* for a more comprehensive list of the key principles.

36 Against this background, I turn to a more detailed discussion of four differences between the positions advanced by the defence and the Crown in this case: (1) the degree to which context informs the assessment of the sufficiency of reasons; (2) the degree of detail required in connecting particular pieces of evidence to the verdict or explaining propositions of law; (3) how much need be said on findings of credibility; and (4) the role of appellate courts.

1. Reasons in Context

37 As we have seen, the cases confirm that a trial judge's reasons should not be viewed on a stand-alone, self-contained basis. The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated *in the context of the record, the issues and the submissions of counsel at trial.* The question is whether, viewing the reasons in their entire context, the foundations for the trial judge's conclusions — the "why" for the verdict — are discernable. If so, the functions of reasons for judgment are met. The parties know the basis for the decision. The public knows what has been decided and why. And the appellate court can judge whether the trial judge took a wrong turn and erred. The authorities are constant on this point.

38 This important role played by the record was recognized in *Macdonald.* The majority of the Court explained, *per* Laskin C.J., at p. 673, that a question of law will only be raised if an examination of the record indicates that "there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict"; mere failure to give reasons, without more, does not raise a question of law.

39 In *Sheppard*, Binnie J. affirmed the need to look at the record: "Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene" (para. 46). In point 2 of his summary (para. 55), he stated: "Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record." Similarly, with respect to the need for lawyers to know the basis of the judgment for appellate purposes he stated at point

3, after saying that they may require reasons: "On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record." Throughout the reasons in *Sheppard*, Binnie J. emphasizes the functional and relative nature of the question of whether a trial judge's reasons for judgment are adequate.

40 *Hill*, citing *Sheppard*, confirms that "the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable" (para. 101).

41 The contextual approach to assessing the sufficiency of reasons recognizes that the trial process, including the trial judge's reasons, is a dynamic process, in which the evidence, counsel and the judge play different but imbricated roles. Whether the trial judge's reasons for judgment are sufficient must be judged in the full context of how the trial has unfolded. The question is whether the reasons, viewed in light of the record and counsel's submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand, and the verdict on the other.

2. The Degree of Detail Required

42 In this case, the Court of Appeal faulted the trial judge principally for not giving sufficiently precise reasons for accepting the complainant's evidence and rejecting the accused's evidence, as well as for not stating precisely what evidence he accepted and rejected in respect of each of the counts on which he found the accused guilty. Similarly, in *Dinardo*, the reasons of the trial judge were criticized for failing to engage in a detailed discussion of the process of assessing reasonable doubt recommended in *W. (D.)* In both cases, the issue was how much detail the trial judge's reasons are required to provide — in this case on the facts, in *Dinardo* on the law.

43 The answer is provided in *Dinardo* and *Walker* — what is required is that the reasons, read in the context of the record and the submissions on the live issues in the case, show that the judge has seized the substance of the matter. Provided this is done, detailed recitations of evidence or the law are not required.

44 The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue...": *Sheppard*, at para. 55.

45 Just as it is reasonable to infer that the trial judge seized the import of the evidence, it is generally reasonable to infer that the trial judge understands the basic principles of criminal

law at issue in the trial. Indeed, for this reason it has repeatedly been held that "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not required to recite pages of "boilerplate" or review well-settled authorities in detail, and failure to do so is not an error of law. As Binnie J. pointed out in *Sheppard*, at para. 55:

> Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

46 Similarly, in *Dinardo*, the Court, *per* Charron J., held that the trial judge was not required to recite the rule set out in *W. (D.)*, provided the reasons demonstrated he had seized the substance of the critical issue of a reasonable doubt in the context of a credibility assessment.

47 This said, the presumption that trial judges are presumed to know the law with which they work on a day-in day-out basis does not negate the need for reasons to show that the law is correctly applied in the particular case (*Sheppard*, at para. 55), nor the need for reasons to deal with "troublesome principles of unsettled law" (*Sheppard*, at para. 55).

3. Findings on Credibility

48 The sufficiency of reasons on findings of credibility — the issue in this case — merits specific comment. The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science". They went on to state that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.

49 While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing

credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

50 What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

51 The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

4. The Role of Appellate Courts in Assessing the Sufficiency of Reasons

52 In *Sheppard*, the Court, *per* Binnie J. enunciated this "simple underlying rule": "if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law [under s. 686 of the *Criminal Code*] has been committed" (para. 28).

53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

54 An appellate court reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's perceptions of the facts. As decided in *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), and stated in *Gagnon* (para. 20), "in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected". It is true that deficient reasons may cloak a palpable and overriding error, requiring appellate intervention. But the appellate court's point of departure should be a deferential stance based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law.

55 The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

56 If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *R. v. Harper*, [1982] 1 S.C.R. 2 (S.C.C.), at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence.... Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

57 Appellate courts must ask themselves the critical question set out in *Sheppard:* do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo)*, then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

5. Application of the Principles to This Case

58 This was a case that turned on credibility. The complainant testified to 11 incidents of sexual assault by the accused, over a period of years when she was a child, between the ages of 9 and 17. The accused testified. He admitted to having sexual intercourse with the complainant, but claimed that the relationship only became sexual after she was 15 and that the intercourse was consensual.

59 The trial judge found the complainant to be a credible witness and accepted most of her evidence, while rejecting some portions that had been contradicted by other evidence. He discussed the reasons for these conclusions in some detail, noting that the complainant was a child at the time of most of the incidents, and that they had occurred a long time before. Some errors in her evidence were understandable, he concluded.

60 The trial judge largely disbelieved the accused's evidence, although he found that on some points, it was not challenged. Again he gave reasons, although less extensive than he had in the case of the complainant's evidence.

61 In summary, the reasons for judgment show that on most points, the trial judge accepted the evidence of the complainant and rejected that of the accused. This said, there were aspects of the complainant's evidence that he did not accept and aspects of the accused's evidence that he accepted. In the end, the trial judge convicted the accused of three offences: (1) having intercourse with a minor; (2) indecent assault; and (3) having illicit intercourse with his stepdaughter. He acquitted the accused on the count of gross indecency.

62 The Court of Appeal found the trial judge's reasons to be deficient on the following grounds:

> (1) The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led;
>
> (2) The trial judge failed to mention some of the accused's evidence;
>
> (3) The trial judge failed to make general comments about the accused's evidence;
>
> (4) The trial judge failed to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence;
>
> (5) The trial judge failed to explain why he rejected the accused's plausible denial of the charges.

63 The trial judge's failure to clearly explain which of the three offences were grounded by which of the incidents must be considered in the context of the record as a whole. The three offences of which the accused was convicted found support in the evidence as to a number of

the incidents. This gives rise to a reasonable inference that the trial judge accepted some or all of this evidence and grounded the convictions on that evidence. While reasons drawing a precise link between each count on which the accused was found guilty and the particular evidence that the trial judge accepted in support of that count might have been desirable, this omission did not render the reasons deficient on this record, as discussed more fully below.

64 Nor did the trial judge's failure to mention some of the accused's evidence render the reasons for judgment deficient. The foregoing discussion of the law establishes that a trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the third objection, that the trial judge failed to make general comments about the accused's evidence. As helpful as it might be in a given case, a trial judge is not required to summarize specific findings on credibility by issuing a general statement as to "overall" credibility. It is enough that the trial judge has demonstrated a recognition, where applicable, that the witness's credibility was a live issue.

65 The trial judge's alleged failure to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence did not render the reasons deficient. As juries are routinely instructed, it is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness. The trial judge explained that the fact that many of the incidents testified to happened many years before and the fact that the complainant was a child at the time might well explain certain inconsistencies. In fact, he did explain why he rejected some of her evidence.

66 Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

67 It may have been desirable for the trial judge to explain certain matters more fully. In particular, it would have been preferable to relate the charges on which the accused was found guilty to the evidence of the specific incidents disclosed by the evidence. Given the

trial judge's mixed findings on credibility, the relationship between the 11 incidents to the convictions may not have been totally clear. However, on the law enunciated above, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this, he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident.

68 Instead of looking for this basis, the Court of Appeal focussed on omitted details and proceeded from a sceptical perspective. Having concluded that the accused's denial was plausible, it proceeded to examine the case from that perspective, asking whether the reasons disclosed that the trial judge had properly applied the reasonable doubt standard. In doing so, it fell into the trap identified in *Gagnon* of ignoring the trial judge's unique position to see and hear witnesses, and instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised.

III. Conclusion

69 I would allow the appeal and restore the verdicts of guilty.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the Court on December 5, 2008 has been incorporated herein.

TAB 6

1995 CarswellOnt 18
Ontario Court of Appeal

R. v. Morrissey

1995 CarswellOnt 18, [1995] O.J. No. 639, 22 O.R. (3d) 514, 26 W.C.B. (2d) 436, 38 C.R. (4th) 4, 80 O.A.C. 161, 97 C.C.C. (3d) 193

R. v. ROBERT J. MORRISSEY

Osborne, Doherty and Laskin JJ.A.

Heard: September 16, 1994
Judgment: March 14, 1995
Docket: Doc. CA C14366

Counsel: *Brian H. Greenspan* and *Sharon E. Lavine*, for appellant.
Scott Hutchison and *David Lepofsky*, for the Crown.

Subject: Criminal
Related Abridgment Classifications
Criminal law
XXIII Sentencing by offence
XXIII.6 Sexual offences, public morals and disorderly conduct
XXIII.6.u Historical offences
Criminal law
XXIII Sentencing by offence
XXIII.9 Offences against the person and reputation
XXIII.9.d Assault
XXIII.9.d.iv Assault with weapon or causing bodily harm
XXIII.9.d.iv.A Adult offenders
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.j Grounds
XXXIII.1.j.iv Sufficiency of evidence

Appeal from convictions and sentence on charges of indecent assault, gross indecency, attempted buggery and assault causing bodily harm.

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

I. Overview

1 As 1991 arrived, the appellant was a parish priest in Daysland, Alberta. He had been a priest for twenty years and, by all accounts, had been a valued and respected member of the communities in which he lived and served as a priest. At the same time the appellant was performing his duties in Daysland, the Ontario Provincial Police began an investigation into allegations that inmates at St. John's Training School in Uxbridge, Ontario had been sexually and physically abused by members of the Christian Brothers in the 1950s and 1960s. St. John's housed adolescent males sent there by the juvenile justice system. While there, the boys lived in large dormitories, attended school, and did various jobs around the institution. The Christian Brothers, a religious teaching order associated with the Catholic Church, operated the institution. The appellant was a Christian Brother and worked at St. John's in 1960-61 as the Grade 8 teacher and a dormitory supervisor. He took the name Frederick Morgan when he became a Brother and was known at the school as Brother Frederick. The appellant was 20 years old when he was assigned to St. John's.

2 As a result of a public request by the police for information, several former inmates came forward and alleged that they had been sexually and physically abused by one or more of the Christian Brothers. Some of these complainants identified the appellant as their assailant. The appellant found himself facing seven allegations arising out of events which had occurred 30 years earlier. The charges referred to a time span of some 4 years (August 1960 to August 1964), involved four complainants and can be summarized as follows:

- With respect to the complainant F.P., charges of indecent assault,gross indecency and attempted buggery (counts 1, 2 and6).

- With respect to the complainant B.G., one count of indecent assault (count 3).

- With respect to the complainant G.S., one count of indecent assault and one count of assault (counts 4 and 5).

- With respect to the complainant A.S., one count of assault causing bodily harm (count 7).

3 The trial judge acquitted the appellant on the counts involving G.S., convicted him on the five counts involving the three other complainants, and imposed sentences totalling 18 months. The appellant appeals conviction and sentence. There is no appeal from the acquittals.

4 The evidence in support of the four charges involving F.P. and B.G. described a course of sexual abuse perpetrated by the appellant. The Crown relied on the evidence of F.P. and

B.G., school records, the personnel record of the appellant, and similar fact evidence from another inmate to make its case on these counts.

5 The count involving A.S. related to a single incident of alleged physical abuse. The Crown contended that the appellant struck A.S. on the side of the head with his hand. The force of the blow perforated A.S.'s eardrum. The Crown relied on the evidence of A.S., two other inmates who it was said witnessed the assault, medical records pertaining to A.S. and school records to establish the appellant's guilt on this charge.

6 As I read the evidence, the defence challenged both the contention that the assaults occurred, and the complainants' identification of the appellant as the perpetrator. The appellant testified and denied the allegations. He admitted that on occasion he put his arm around various inmates at St. John's in a friendly or consoling manner, but denied any of the sexual or physical improprieties alleged by the complainants. The defence also called extensive character evidence and expert evidence from two witnesses. That evidence was proffered to support the position that the appellant was not the sort of person who would have engaged in the conduct described by the complainants. The expert evidence was directed to the allegations involving sexually abusive conduct.

7 The trial judge gave extensive reasons for judgment. Using the school records he narrowed the time period during which the assaults could have occurred. Those records showed that the appellant was at St. John's between September 1960 and the end of 1961 when he was transferred to Montreal. The records also showed that while F.P. and B.G. were at St. John's on various occasions, they were there when the appellant was there only between the middle of October 1961 and the end of 1961. Consequently, if the assaults they alleged occurred and were committed by the appellant, they had to have occurred between the middle of October 1961 and the end of that year. With respect to the count involving A.S., the trial judge found, relying on hospital records, that A.S. suffered the injury to his ear in December 1960. Both A.S. and the appellant were at the school at that time.

II. The Conviction Appeal

A. The grounds of appeal

8 The appellant raises the following issues:

(i) Was the verdict with respect to the count involving A.S. unreasonable?

(ii) Did the trial judge err in law in his treatment of the defence character evidence?

(iii) Did the trial judge err in law in his treatment of the defence expert psychiatric evidence?

(iv) Did the trial judge proceed on the assumption that the appellant had committed the offences alleged against him?

(v) Did the trial judge limit his assessment to the credibility of the complainants instead of considering whether apart from their credibility, their evidence was sufficiently reliable to warrant convictions?

(vi) Did the trial judge fail to consider the evidence of the appellant in arriving at his verdicts?

(vii) Did the trial judge resort to speculation in holding that certain evidence supported inferences which buttressed the evidence of B.G. and F.P.?

(viii) Did the trial judge misapprehend the evidence of B.G. and F.P., and did that misapprehension occasion reversible error?

9 The first ground of appeal challenges the conviction of the charge involving A.S. The remaining grounds of appeal relate primarily to the four counts involving F.P. and B.G.

B. Was the conviction on count 7 unreasonable?

10 A.S. testified that at dinner time one evening two other inmates, Fred Briggs and Donald Shildrick, were engaged in horseplay and one of them pushed A.S. out of the line waiting to go into dinner. Brother Frederick, who was supervising, asked A.S. if he was "fooling around". When A.S. denied it, the appellant struck A.S. on the side of the head with his open hand. A.S. was uncertain about the exact date of the assault. He placed it in January or February of 1961. Medical records indicated that he suffered the injury to his eardrum in December of 1960. The injury as described in those records was consistent with A.S. having been struck on the side of the head with an open hand. As a result of the blow, A.S. suffered a perforated eardrum which later required corrective surgery.

11 A.S. testified that he complained about the assault to the nurse at St. John's, the doctors at the hospital, and his mother. The hospital records confirmed that A.S. complained about being struck by a "Brother", but did not identify the Brother. A.S.'s mother also confirmed that A.S. had complained to her about being struck by Brother Frederick. Briggs and Shildrick both testified that they recalled the appellant striking a student on the side of the head with his open hand while the students were lining up for dinner one night. Neither could recall the student who was struck.

12 A.S.'s description of the appellant as he appeared in 1960 was inaccurate in several respects. He maintained, however, that he was certain that it was the appellant, whom he knew as Brother Frederick, who assaulted him. There was no other Brother Frederick at

St. John's. A.S. also picked the appellant's photograph out of a group of photographs of the Brothers who were at the institution in the early 1960s. It was suggested to A.S. that he recalled the appellant because the appellant had taught him for a number of months while he was at St. John's. A.S. could not recall being taught by the appellant, however, the school records showed that A.S. was in the appellant's Grade 8 class.

13 On a consideration of all of the relevant evidence, including the appellant's, I cannot say the verdict is unreasonable. There is overwhelming evidence that A.S. was hit by a Brother and suffered bodily harm. The evidence identifying the appellant as the person who inflicted the blow is perhaps less cogent but still meets the reasonableness standard of review: *R. v. François*, [1994] 2 S.C.R. 827 at pp. 835-38.

C. Did the trial judge err in his treatment of the defence character evidence?

14 The trial judge addressed the character evidence in his reasons:

> As this evidence relates to his honesty it is to be considered as going to his credibility as a witness. As it relates to his reputation for morality it calls for a consideration of whether or not this accused is the type of person who would commit crimes having the immoral nature of the crimes alleged.

15 The trial judge next observed that the illicit sexual activity referred to in the allegations was the sort of thing that if it had occurred would be unknown to those likely to be aware of an accused's general reputation in the community. In making this observation as to the limited evidentiary value of reputation evidence in cases involving allegations of abuse against children, the trial judge anticipated the comments of Sopinka J. in *R. v. Profit* (1993), 85 C.C.C. (3d) 232 at p. 248 [24 C.R. (4th) 279] (S.C.C.) reversing (1992), 85 C.C.C. (3d) 232 [16 C.R. (4th) 332] (Ont. C.A.).

16 The trial judge did not, however, remove the character evidence from the evidentiary mix. He went on to instruct himself that the evidence was relevant both to his assessment of the credibility of the complainants and the credibility of the accused. This approach finds support in the reasons of Goodman J.A., speaking for the majority in this court, in *Profit*, supra at p. 239 [C.C.C., pp. 341-42 C.R.]. I do not understand the Supreme Court of Canada to have disagreed with that aspect of his judgment.

17 I see no error in the trial judge's treatment of the character evidence.

D. Did the trial judge err in his treatment of the expert psychiatric evidence?

18 The defence led evidence from two experts, Dr. Orchard, a psychiatrist and Dr. Resnick, a psychologist. Both examined the appellant. Dr. Orchard testified that assuming

one person had committed all of the acts alleged against the appellant, it was likely that the perpetrator of the offences was a homosexual paedophile. In his view, the appellant was not a homosexual paedophile. Dr. Resnick came to a similar conclusion. It was his opinion that the appellant was heterosexual and did not display any personality disorders suggesting a propensity towards paedophiliac behaviour.

19 Dr. Collins, a psychiatrist called by the Crown in reply, challenged both opinions and the means used by the defence experts to arrive at those opinions. He testified that one could not identify a paedophile through clinical study, especially where the subject denied any paedophiliac tendency. Dr. Collins was also of the view that the person who committed the offences was not necessarily a homosexual or a paedophile. He suggested two other possibilities, neither of which need be explored in these reasons.

20 The admissibility of the expert evidence was not contested at trial. On appeal, the Crown, relying on *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 [29 C.R. (4th) 243] (S.C.C.), submitted that the evidence was not admissible. I will assume admissibility and proceed directly to the arguments arising out of the trial judge's treatment of that evidence in his reasons.

21 The trial judge appreciated the purpose for which the evidence was proffered and the conflict between the defence and Crown experts. He accepted the evidence of the Crown expert as he was entitled to do. In accepting that evidence, the trial judge found that there was no clinically identifiable profile of a paedophile, that he could not say whether the appellant was a paedophile at the time of the trial or in 1960-61, and that the offences charged were not necessarily committed by a paedophile.

22 The trial judge set out several reasons for rejecting the opinions advanced by the defence experts. With one exception, these reasons are fully supported by the evidence adduced at trial. The exception is contained in this extract from the trial judge's reasons:

> ... Dr. Orchard *first* requested Dr. Resnick to carry out the MMPI and Rorschach tests on the accused and *only then and thereafter* interviewed the accused after having seen the conclusions of the psychologist ... [Emphasis in the reasons.]

23 Dr. Orchard, in fact, had interviewed the appellant before he referred him to Dr. Resnick and before he reviewed Dr. Resnick's report.

24 I do not regard this error as fatal. The trial judge's misapprehension of a part of the evidence does not, standing alone, render his verdicts unreasonable, constitute an error in law, or result in a miscarriage of justice. The impact of that error on the trial judge's reasoning process and the product of that process must be assessed. [1] Here, the trial judge's mistaken belief that Dr. Orchard did not interview the appellant before sending him to Dr. Resnick provided but one of several bases for the trial judge's expressed preference for the evidence

of the Crown expert. The error was irrelevant to the trial judge's finding that paedophiles did not have an identifiable clinical profile. That finding alone neutralized the defence experts' evidence. Examined in the context of the trial judge's entire analysis of the expert evidence, this isolated misapprehension of one piece of that evidence did not have any impact on the trial judge's overall assessment of the expert evidence or on the conclusions he reached in relation to that evidence.

E. Did the trial judge proceed on the assumption that the appellant had committed the offences alleged?

25 In support of his submission that the trial judge ignored the presumption of innocence and proceeded in direct contradiction to that fundamental principle, counsel relies on four passages from the extensive reasons delivered by the trial judge. The first passage appears after the trial judge had made certain non-controversial findings as to when the various complainants and the appellant were at St. John's. The trial judge then said:

> If any of the events complained of in fact occurred, they had to have occurred within that short time frame.

26 The appellant submits that the phrase "the events complained of" refers only to the assaultive acts. He contends that the trial judge's finding that the assaults had to have occurred while the appellant was at St. John's demonstrates that the trial judge presumed that the appellant was the perpetrator of those assaults. With respect, this is a tortured interpretation of the passage from the trial judge's reasons. "The events complained of" consisted not of acts uncon nected to any actor, but of acts allegedly committed by the appellant. The trial judge was merely stating that if the complainants had been assaulted by the appellant as they alleged, then the assaults had to have occurred during the "short time frame" that the complainants and the appellant were both at St. John's.

27 Even if the passage set out above was ambiguous and could bear either the interpretation I place on it or the interpretation advanced on behalf of the appellant, I would adopt my interpretation. Trial judges are presumed to know the law: *R. v. B. (R.H.)* (1994), 89 C.C.C. (3d) 193 [29 C.R. (4th) 113] (S.C.C.) at pp. 199-200 [C.C.C., p. 121 C.R.]. That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law: *R. v. Smith* (1989), 95 A.R. 304 (C.A.) at pp. 312-13, affirmed [1990] 1 S.C.R. 991.

28 In any event, it is wrong to analyze a trial judge's reasons by dissecting them into small pieces and examining each piece in isolation as if it described, or was intended to describe a legal principle applied by the trial judge. Reasons for judgment must be read as a whole:

R. v. C. (R.) (1992), 81 C.C.C. (3d) 417 at 418 (Que. C.A.), per Rothman J.A. in dissent at p. 419; dissenting reasons adopted by the Supreme Court of Canada (1993), 81 C.C.C. (3d) 417; *Telmosse v. R.* (1945), 83 C.C.C. 133 (S.C.C.) at p. 138. Furthermore, they must be read with an appreciation of the purpose for which they were delivered. Where a case turns on the application of well settled legal principles to facts as found after a consideration of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those principles.

29 In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision. The reasons should be responsive to issues raised at trial and must be read in the context of the entire trial. Reasons for judgment should offer assurance to the parties that their respective positions were understood and considered by the trial judge in arriving at his or her conclusion: *R. v. Smith*, supra, at pp. 313-14; M. Taggartt, "Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases" (1983), 33 U. Toronto L.J. 1 at pp. 5-6; A. Hooper, "Criminal Procedure — Trial Without Jury — Obligation to Give Reasons for Judgment — Appellate Attitudes Where No Reasons Given" (1970), 48 Can. Bar Rev. 584. In cases like this, where the result turns on fact-finding and not on the application of contested legal principles, it is appropriate that the reasons should focus on telling the parties what evidence was believed and why it was believed.

30 A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.

31 Reasons for judgment are not required as a matter of law in criminal cases: *R. v. MacDonald*, [1977] 2 S.C.R. 665 at p. 672. That is not to say, however, that reasons should not be given. Reasons for judgment enhance the quality of justice and should be encouraged. Appellate courts can offer that encouragement by approaching reasons for judgment, not as if they were intended to be a dissertation on the applicable law or a comprehensive catalogue of the evidence, but rather as an attempt by the trial judge to articulate the conclusions reached and the bases for those conclusions. Appellate courts must resist the invitation to microscopically examine reasons for judgment, lest trial judges decide that silence is indeed golden.

32 I do not propose to set out the remaining three passages relied on by the appellant in support of this ground of appeal. My conclusion with respect to the passage quoted above

applies to those three passages. Considered alone or in combination, they do not lead me to conclude that the trial judge presumed guilt in assessing the evidence and arriving at his verdicts.

F. Did the trial judge err in law in limiting his assessment to the credibility of the complainants instead of considering whether their evidence, even if credible, was sufficiently reliable to warrant conviction?

33 Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness' sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness' testimony. The accuracy of a witness' testimony involves considerations of the witness' ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness' veracity, one speaks of the witness' credibility. When one is concerned with the accuracy of a witness' testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest, witness may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

34 At the outset of his reasons the trial judge observed:

> The passage of time since the alleged incidents have caused great difficulty to all of the witnesses including the accused in trying to recall exactly what transpired at the training school over 30 years ago. *Obviously, the credibility of the witnesses and the accuracy of their memory of the events are very important issues in this trial.* [Emphasis added.]

35 The trial judge recognized the importance of both credibility and reliability. He also stressed the passage of time as a key feature in the case. The passage of time impacts on the reliability of evidence as opposed to the credibility of witnesses. While the trial judge's subsequent references were to the credibility of key witnesses and did not refer specifically to the reliability of their testimony, he did address factors which were relevant to both. For example, he returned to the significance of the passage of time when considering the testimony of the complainants. He also referred to other factors (e.g., prior inconsistent statements) which were relevant to both the witnesses' credibility and the reliability of the witnesses' testimony. Lastly, the trial judge actually found parts of the evidence of B.G. to be unreliable and yet found him to be a credible, that is, honest witness. This treatment of B.G.'s evidence leaves no room for the argument that the trial judge did not appreciate the distinction between reliability and credibility and did not consider both in assessing the evidence of the complainants.

G. Did the trial judge err in law in that he failed to consider the evidence of the appellant in arriving at his verdicts?

36 The appellant testified at length although much of his testimony related to non-contentious matters. Given the nature of the allegations and the 30 years that had passed since the events in question, it is not surprising that the appellant could not offer much more than a blanket denial.

37 The trial judge neither reviewed the evidence of the appellant, nor gave reasons for rejecting the evidence of the appellant where it stood in contradiction to that given by the complainants. The absence of any review of the appellant's evidence and the failure to set out express reasons for rejecting the contentious parts of his evidence does not necessarily demonstrate that the trial judge failed to consider that evidence in arriving at his verdicts: *R. v. B. (R.H.)*, supra, at p. 199 [C.C.C., p. 121 C.R.]. The trial judge indicated on three occasions that a consideration of the appellant's evidence formed part of his deliberations. He noted that the passage of time was an important consideration in assessing the appellant's testimony. He also observed that the character evidence called by the defence was a significant feature when assessing the evidence of the appellant. Furthermore, the trial judge indicated specifically that he had considered the evidence of the appellant along with the evidence of F.P. and B.G. in addressing the allegations involving F.P.

38 The trial judge's conclusion based upon a consideration of all of the evidence, that the evidence of the complainants combined with the other supporting evidence satisfied him beyond a reasonable doubt that the appellant had committed the assaults made any separate exposition of his reasons for rejecting the contrary evidence of the appellant unnecessary. The trial judge clearly considered all of the evidence including the appellant's and rejected the appellant's denials because they were inconsistent with the conclusions that he had arrived at based upon his assessment of all of the evidence. While it would have been preferable for the trial judge to deal expressly with the appellant's evidence, I would not hold that his failure to do so demonstrates that he did not give full and fair consideration to the evidence of the appellant.

H. Did the trial judge resort to speculation in holding that certain evidence supported inferences which buttressed the evidence of F.P. and B.G.?

39 The appellant was a Christian Brother from 1958 to the summer of 1962. He returned in 1967 and left again in 1969. While a Brother, the appellant, like other Brothers, applied to renew his vows each year. A record of the results of these applications was kept in a book referred to as the Chapter of Vows. Although no witness was called to explain how the process worked, how the records were made, or how they were kept, it would appear that a group of Brothers voted on each application for renewal and that the votes were recorded in the Chapter of Vows along with a brief comment on the progress of each applicant.

40 Crown counsel first sought to introduce the parts of the Chapter of Vows pertaining to the appellant during the case for the Crown. She relied on s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The trial judge refused to admit the documents as the appellant's counsel had not been given the appropriate notice. In the course of so ruling he said:

> Well, I certainly don't need any more documents which we cannot interpret.

41 Crown counsel responded:

> The main concern of the Crown was to give the court and counsel the opportunity to have everything *that we have before the court should it be relevant to where this gentleman was at a particular time*. [Emphasis added.]

At this stage of the trial Crown counsel offered the documents for a very limited purpose.

42 In the course of his examination-in-chief, the appellant made brief reference to the Chapter of Vows and the application process described above. He indicated that he applied to renew his vows in the spring of 1962 and was told that he was not suited to be in the Christian Brothers. The appellant also indicated that he returned to the Brothers in 1967, but was again told in 1969 that he could not renew his vows. He testified that by 1969 he had told his superior that he was interested in the priesthood. This apparently counted against the appellant when he applied to renew his vows.

43 During cross-examination of the appellant, Crown counsel addressed the admissibility of the relevant pages of the Chapter of Vows for a second time. She indicated:

> It is now my view that the character of the accused has clearly been put in issue and more particularly, his character during that period of time and the comments in the Chapter of Vows or certainly the comment of the community in which he lived that determined whether or not he be permitted to take his vows and what their views of him were at that time and it is my position they are relevant. It is also my position, in fairness to the accused, I should address them directly and then seek to adduce those documents in reply.

44 It would appear that Crown counsel considered the entries in the Chapter of Vows to be relevant to the appellant's character.

45 The trial judge held that Crown counsel could cross-examine on the contents of the Chapter of Vows stating:

> I think reasonable cross-examination is proper, without badgering the witness, and I am going to permit her to do that bearing in mind that she will have to prove to your

> satisfaction and to mine, of course, that this is a public record before I will grant her permission to introduce it under s. 30. I am granting that permission assuming it can be proved to be a public record ...

46 Crown counsel cross-examined on the contents of the Chapter of Vows relating to the years 1959-62 and 1967-69. She read each entry in its entirety to the appellant and asked him to comment on it. The appellant had not seen the documents until after he was charged, knew nothing about their contents or creation and could offer no explanation for any of the comments in the book. The Crown did not call any reply evidence relating to the Chapter of Vows.

47 The entry dated February 25, 1961 indicated that 11 Brothers voted in favour of the appellant renewing his vows and none voted against him. The comments beside the vote were all positive. This vote took place about 2 months after A.S. was assaulted. The trial judge made no use of this entry.

48 The entry dated April 15, 1962, some four or five months after the alleged assaults on F.P. and B.G., showed 2 votes in favour of allowing the appellant to renew his vows and 12 against. The comment beside the vote read:

> Devoted to class work and rel. obligations, evidence of emotional immaturity and of indiscretion. Pleasant character.

49 The appellant said that shortly after April 15, 1962 he was told that he would not be allowed to renew his vows. He had no knowledge of and no explanation for the comments set out above.

50 The appellant does not challenge the admissibility of the excerpts from the Chapter of Vows, although on the record before this court it is difficult to understand the basis upon which they were received. [2] The appellant does, however, take strong exception to the use the trial judge made of the April 15, 1962 entry. After reviewing the evidence of F.P., the trial judge then went on to outline the independent evidence which he regarded as confirmatory of the testimony of F.P. In the course of that outline he said:

> I also have regard to the excerpt from the Chapter of Vows Exhibit 43, in which an entry was made on the 15th of April, 1962 that the accused was refused his vows by a vote of 12 to 2 with the observation noted, inter alia, "evidence of emotional immaturity and of indiscretion" . This would lead to an inference that he had experienced some sort of problem in the preceding months and is consistent with the evidence of F.P. and B.G.

51 The appellant submits that no such inference could be drawn and that it is pure speculation to conclude that the reference to an "indiscretion" in the April 15, 1962 entry was a reference to the incidents complained of by F.P. and B.G.

52 A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 [28 C.R. (4th) 160] (Nfld. C.A.) at p. 351 [C.C.C., p. 175 C.R.]:

> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

53 The trial judge drew two inferences from the April 15, 1962 commentary. The first was explicit. He inferred that the appellant "had experienced some sort of problem in the preceding months" . The second inference was implicit in the trial judge's conclusion that the commentary was "consistent with the evidence" of F.P. and B.G. It could only be consistent with that evidence if the trial judge inferred that the "problem" related either to the incidents described by F.P. and B.G. or to their complaint about the appellant. The April 15, 1962 commentary had probative value as supportive of the evidence of F.P. and B.G. only if this second inference was a logical and reasonable one.

54 I agree with the appellant's submission that no such inference was available. The word "indiscretion" is ambiguous, the author or authors of the commentary unknown, the information on which it was based undisclosed, and the process through which it was produced a total mystery. I must conclude that the trial judge reached beyond the realm of reasonable inference in holding that the April 15, 1962 commentary was consistent with and therefore provided support for the evidence of F.P. and B.G. Only through speculation could one link the commentary to any part of the testimony of the two complainants.

55 The trial judge went beyond reasonable inference on a second occasion. The appellant taught Grade 8 at St. John's. He taught Grade 4 when he was transferred to Montreal and again when he was subsequently sent to De la Salle School in Toronto. The trial judge observed:

> It may also be significant that his assignment at those schools was in teaching lower grades than Grade 8.

56 The significance escapes me. The appellant testified that he was sent to Montreal to replace a certain teacher. There was no evidence to the contrary and no other explanation as to why he was assigned to teach Grade 4. In oral argument, Crown counsel submitted that the assignment to teach a lower grade was somehow a demotion and was consistent with a complaint having been made against the appellant by F.P. and B.G. There is nothing in the evidence or common experience to support this hypothesis.

57 In his reasons, the trial judge appears to have regarded the assignment of the appellant to teach a lower grade as providing some independent support for the evidence of F.P. and B.G. As there is no reasonable inference from that evidence capable of supporting the evidence of either complainant, the trial judge erred in giving that evidence any evidentiary value.

58 The trial judge erred in law by drawing factual conclusions based on speculation and not reasonable inferences. Unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice, the convictions touched by that error must be quashed. In seeking to invoke the proviso, the Crown may rely on findings of fact made by the trial judge to the extent that those findings are not tainted by legal error: *R. v. Haughton* (1994), 93 C.C.C. (3d) 99 at 107 [34 C.R. (4th) 22] (S.C.C.); *R. v. W.(P.)*, a decision of the Supreme Court of Canada, released December 1, 1994 [reported at [1994] 3 S.C.R. 830]. The legal error made in this case was relied on by the trial judge in the course of his assessment of the credibility of F.P. and B.G. and the reliability of their evidence. The error figured directly in his ultimate conclusion that the complainants were credible and their evidence was reliable. Since those conclusions are tainted by the error, they cannot be relied on by the Crown in support of an argument that the error occasioned no substantial wrong or miscarriage of justice. Once the findings that the complainants were credible and their evidence reliable are set aside, it cannot be said that no trier of fact, properly instructed and acting reasonably, could have acquitted on counts 1, 2, 3 and 6. The curative proviso cannot be applied to the conviction on those counts. This error, however, had no impact on the conviction involving the complainant A.S. (count 7) and I would apply the curative proviso to save that conviction.

I. Did the trial judge misapprehend the evidence of F.P. and B.G., and did that misapprehension occasion reversible error?

59 F.P. and B.G. were close friends at St. John's and testified to events which involved both of them. They also testified that they had discussed their abuse at the hands of the appellant while they were at St. John's. The trial judge found that their evidence was consistent on several material points. That finding, combined with his conclusion that F.P. and B.G. had no opportunity to jointly concoct their evidence, was central to his conclusion that both were credible and reliable witnesses. The appellant submits that the trial judge misapprehended

the evidence in several respects and that this misapprehension tainted his conclusion that the evidence of the two complainants was consistent and therefore, mutually corroborative.

60 F.P. was first sent to St. John's in October of 1961. He remained there until August of 1962. He returned in November of 1962 and remained there until August of 1963. His third and final stay at St. John's began in October of 1963 and ended in August of 1964. F.P. was almost 13 years old when he arrived at St. John's in October of 1961. He was assigned to the appellant's dormitory. B.G. arrived at St. John's about the same time and was also placed in the appellant's dormitory. F.P. and B.G. became good friends although, according to F.P., B.G. was moved to a different dormitory a few months later.

61 F.P. testified that about three weeks or a month after his arrival he was playing soccer on the sports field with the other boys. The appellant was supervising the game and then became involved. He tackled F.P. and while on the ground placed his hand inside F.P.'s shorts and squeezed and fondled his penis. F.P. testified that he was shocked by this act, looked to the sky and saw the image of Jesus Christ. F.P.'s parents were devout Roman Catholics. F.P. said that he was the only one approached by the appellant during the game and that the appellant "singled" him out.

62 A few days after the incident on the soccer field, F.P. was assigned to clean up the appellant's room which adjoined the dormitory. F.P. said that he was sexually assaulted by the appellant on a number of occasions when he was in the appellant's room. The assaults included fondling, simulated anal intercourse, at least one attempt at anal penetration, and at least one act of fellatio. These incidents happened after the dinner hour, but usually before lights out in the dormitory. The other boys were in the dormitory.

63 F.P. was adamant that he did not discuss any of these assaults with any of the other Brothers at St. John's, nor with his parents until much later. He did tell some of the other inmates including B.G. F.P. testified that he and B.G. discussed the abuse of them by the appellant although he could not recall the details of that conversation. He specifically could not recall ever telling B.G. that the appellant had assaulted him by coming to his bed late in the evenings and fondling him while he was lying in his bed in the dormitory. F.P. saw no improper contact involving B.G. and the appellant.

64 F.P. testified that shortly before Christmas of 1961 he was told by B.G. that his father was coming to visit. F.P. recalled that it was on a Sunday and that B.G.'s father was driving a 1956 Meteor. He said that he and B.G. ran to the car and B.G. referred to the driver as "dad" . F.P. and B.G. then had a conversation with this man in which they complained about the conduct of the appellant. According to F.P., B.G.'s father then went to see Brother Adrian, the supervisor of the institution, and very shortly after that the appellant was transferred to

another institution. F.P. said that this occurred around Christmas of 1961. He indicated that he had no direct involvement in the complaint apart from speaking to B.G.'s father.

65 B.G. was 14 years of age when he first arrived at St. John's. He was there from October of 1961 until June 1962 and again from December 1962 to August 1963. According to B.G., he and F.P. lived in the same dormitory for virtually the entire period that B.G. was at St. John's. During his first stay (October 1961 to June 1962) they lived in Brother Mark's dormitory and during his second stay (December 1962 to August 1963) they lived in the appellant's dormitory. B.G.'s testimony that he lived in a dormitory supervised by the appellant during his second stay at St. John's was clearly wrong. The appellant had left the school a year earlier.

66 B.G. testified that during his first stay at St. John's the appellant would sometimes supervise the outdoor games. He said that the appellant would often wrestle with various boys including himself and F.P. When he was doing so, he would "kind of let his hands wander all over you, like feel your breasts and your buttocks and your crotch area" . B.G. referred to this as horseplay which took on a sexual connotation. He also said that it was a common occurrence on the playground and happened to many of the boys although he noticed that the appellant seemed to pay more attention to F.P. than anybody else. B.G. had no recollection of any specific incident on the playground involving F.P. and the appellant. According to B.G., these incidents on the playground began within a few months of his arrival in October 1961. At another point in his testimony he indicated that they occurred in the spring.

67 B.G. also testified that he was assaulted in the washroom by the appellant on two occasions. On one occasion, the appellant came up behind B.G. and grabbed him in the crotch area while B.G. was standing in front of a urinal. He said that the appellant felt his testicles and penis. B.G. also said that he was confronted by the appellant on at least two occasions in the stairwell. On one occasion, the appellant "cornered" him and rubbed his breast and crotch. On the second occasion, B.G. pushed the appellant backward and got away from him.

68 B.G. was asked when these various incidents occurred. He said that most of the incidents occurred while he was in Brother Mark's dormitory during his first stay at St. John's. He was also asked the following question and gave the following answer:

Q. While you were in Brother Frederick's dorm did anything further occur to you?

A. No.

69 During cross-examination B.G. said that the incidents in the washroom occurred only during his first stay at St. John's and that the incident in the stairwell occurred near the end of his first stay (April to June of 1962).

70 B.G. said that he and F.P. became friends and on occasion discussed their abuse at the hands of the appellant. B.G. testified that F.P. told him that the appellant came to F.P.'s bed in the dormitory late at night and molested him while F.P. was lying in bed. F.P. gave no such evidence and could not recall whether or not he had so described the assault to B.G. F.P. did not tell B.G. about the assaults which occurred in the appellant's room.

71 B.G. gave extensive evidence about the complaints which led to the removal of the appellant from St. John's. B.G. fixed the time of the complaints by reference to an incident involving his escape from St. John's. He testified that he had not tried to escape during his first stay at St. John's, but that he had escaped on 4 occasions during his second stay. The school records indicated that his first escape during his second stay was in December of 1962. There was no suggestion that records made any reference to an escape during his first stay. B.G. testified that after one of these escapes, and he believed it may have been the one in December 1962, he fled to St. Catharines where he met with his family including his brother. He told his brother that he was being beaten by the Brothers. He made no mention of sexual molestation because he was too embarrassed. He and his brother returned to St. John's and his brother went to see Brother Adrian. B.G. did not attend this meeting. A few weeks passed after the meeting and nothing changed at the school. B.G. and F.P. discussed what should be done and B.G. decided to go see a Brother Francis. He went to Brother Francis and told him that he and F.P. were being molested by the appellant and asked if anything could be done about it. B.G. described Brother Francis as one of the kinder Brothers at St. John's. B.G. also asked to see the supervisor, Brother Adrian. A few days later he was called to the office and explained to Brother Adrian that he and F.P. were being molested. B.G. believed that F.P. was also interviewed privately by Brother Francis and Brother Adrian. A short time later, B.G. and F.P. were told to see Brother Adrian together. According to B.G.:

> We just explained to him what was going on and that and two or three weeks after that, maybe even a month, Brother Frederick was transferred somewhere.

72 In cross-examination, B.G. indicated that he told Brother Francis basically what he had described in his examination-in-chief. He told Brother Adrian that the appellant was "bothering us and feeling us up and that". He said that similar disclosures were repeated when he and F.P. went to see Brother Adrian together.

73 B.G. testified that F.P. did help clean the appellant's room while they were living in the dormitory supervised by the appellant. He had no evidence to give with respect to anything that may have happened to F.P. while he was in the appellant's room. B.G. confirmed that upon arriving at St. John's he was told by other inmates that the appellant was "a queer".

74 The trial judge reviewed the evidence of F.P. and B.G. He acknowledged there were inconsistencies between their versions of events, particularly with respect to the year in which the events occurred. He preferred the evidence of F.P. on this point. He went on to conclude:

> *Lastly, F.P. and B.G. who have not seen each other for thirty years have nevertheless given testimony that is substantially corroborative of each other's version of the events.* [Emphasis added.]

75 The trial judge reiterated this conclusion when addressing the appellant's liability on the counts involving F.P. and again when considering the appellant's liability on the count involving B.G.

76 I understand the trial judge to have used the word "corroborative" in its modern non-technical sense as evidence independent of a witness' testimony rendering it more probable that the witness' testimony is true: *R. v. B. (G.)* (1990), 56 C.C.C. (3d) 161 [77 C.R. (3d) 327] (S.C.C.) [at pp. 178-180 C.C.C., pp. 344-46 C.R.]. I also accept the proposition that, where joint concoction is excluded, the fact that two complainants give evidence which is consistent on material matters may make the evidence of one complainant confirmatory of the evidence given by the other complainant: *R. v. P. (P.N.)* (1993), 81 C.C.C. (3d) 525 (Nfld. C.A.) at pp. 538-40.

77 The trial judge's finding that the evidence of B.G. was consistent with that given by F.P. is, however, undermined by several mistakes made by the trial judge as to the substance of B.G.'s evidence. The mistakes include the following:

- The trial judge indicated on at least two occasions that B.G. testified that the assaults occurred during his second stay at St. John's when he was living in the appellant's dormitory. In fact, B.G. testified that most, if not all, of the assaults occurred during the latter part of his first stay at St. John's when he was living in Brother Mark's dormitory. He described most, if not all, of these assaults as occurring after Christmas of 1961 and before the end of June of 1962.

- The trial judge found that B.G.'s second stay at St. John's commenced at a time subsequent to or "almost concurrent to" the appellant's departure from the institution. In fact, according to B.G. and the school records, his second stay at St. John's commenced a year after the appellant had left.

- The trial judge found that B.G. testified that his brother went to Brother Adrian to complain about the appellant bothering B.G. and F.P. In fact, B.G. testified that he did not tell his brother about any sexual abuse committed by the appellant. Rather, he told his brother that he and the others who had escaped with him (not F.P.) had

been physically abused while at the institution. According to B.G., his brother went to complain about that physical abuse. There is no evidence from B.G. that he said anything to his brother about F.P. or sexual abuse.

• The trial judge found that F.P. testified that B.G.'s father spoke to Brother Adrian about the appellant. The trial judge went on to say that B.G. "could not recall that". In fact, B.G. expressly testified that his father never visited St. John's and that it was his brother who made a complaint about physical abuse.

• The trial judge found that B.G. testified that both he and F.P. were living in the appellant's dormitory when the incidents occurred. B.G. testified to the contrary. He said most, if not all, of the assaults occurred while he was in Brother Mark's dormitory, and he specifically said there were no further incidents of sexual abuse involving him when he was in the appellant's dormitory.

78 These factual errors were repeated and compounded when the trial judge turned to the specific features of B.G.'s evidence which he regarded as consistent with and, therefore, confirmatory of the evidence of F.P. The trial judge said that B.G.'s evidence that the appellant wrestled with students on the soccer field and fondled them while doing so was consistent with F.P.'s evidence. It was, except for the fact that B.G. described these activities as a daily occurrence on the playing field involving many of the boys and most commonly F.P. F.P. said that it happened once and he was singled out by the appellant.

79 The trial judge also regarded B.G.'s evidence that he and F.P. discussed the appellant's abuse of them as confirmatory of F.P.'s evidence that he had discussed the abuse with B.G. This finding of consistency ignores B.G.'s evidence that F.P. told him that the assaults occurred late at night when the appellant would come to F.P.'s bed in the dormitory. According to B.G., F.P. said nothing about having been assaulted while in the appellant's room. F.P. did not testify to any such conversation with B.G. and denied during his evidence that the appellant assaulted him while he was in his bed in the dormitory.

80 Finally, and in my view, most significantly, the trial judge found that the evidence of F.P. and B.G. as to how the complaint was made against the appellant was different in "detail" but "essentially" the same. This finding does not accurately reflect the evidence on this point. F.P. testified that he and B.G. met with B.G.'s father shortly before Christmas of 1961 and that after this meeting B.G.'s father went to Brother Adrian to complain about the appellant's conduct toward B.G. and F.P. According to F.P., the appellant was transferred shortly after B.G.'s father went to visit Brother Adrian. B.G. testified that his twenty-one-year-old brother made a complaint of physical abuse probably around Christmas of 1962. B.G. did not suggest that F.P. had any prior knowledge of, or any involvement in, the complaint made by his brother. B.G. went on to testify that after his brother's efforts produced no results, he and

F.P. discussed what they should do about the appellant. As a result of these discussions, B.G. said that he went first to Brother Francis and then to Brother Adrian to complain about the appellant's sexual abuse of himself and F.P. B.G. also said that he believed that F.P. went alone to speak to each Brother and that on one occasion he and F.P. were summoned to Brother Adrian's office to discuss their allegations of sexual abuse against the appellant. It was a few weeks after this joint meeting that the appellant was moved.

81 I cannot characterize these two stories as differing only in detail with respect to the identity of the complainant and the timing of the complaint. On F.P.'s version, he played no direct role in the making of the complaint and would not have played any such role because of his distrust of the Brothers. On B.G.'s version, his brother made no complaint involving F.P. or sexual abuse by the appellant, and it was only after B.G. and F.P. went separately and jointly to Brother Adrian (and Brother Francis) and made specific complaints of sexual abuse against the appellant that their complaints resulted in the transfer of the appellant. B.G. and F.P. described very different complaint processes leading to the removal of the appellant. Their evidence is substantially inconsistent on the point.

82 In my opinion, the trial judge misapprehended the evidence of B.G. in several respects. In fairness, I should add that the evidence of B.G. was lengthy and even with the assistance of a transcript and of the luxury of time for repeated readings of that evidence, it was not easy to distil the net effect of B.G.'s evidence on some points.

83 I will now address the effect of the trial judge's misapprehension of the evidence. Submissions premised on an alleged misapprehension of evidence are commonplace in cases tried by a judge sitting without a jury. A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence. Where, as in the case of Crown appeals from acquittals (s. 676(1)(*a*)) and appeals to the Supreme Court of Canada pursuant to s. 691, the court's jurisdiction is predicated on the existence of an error of law alone, characterization of the nature of the error arising out of the misapprehension of evidence becomes crucial. The jurisprudence from the Supreme Court of Canada demonstrates the difficulty in distinguishing between misapprehensions of the evidence which constitute an error of law alone and those which do not: *R. v. Harper* (1982), 65 C.C.C. (2d) 193 (S.C.C.); *R. v. Schult*, [1985] 2 S.C.R. 592; *R. v. Roman* (1989), 46 C.C.C. (3d) 321 (S.C.C.); *R. v. B. (G.)* (sub nom. *R. v. B.(G.)(No. 3)*) (1990), 56 C.C.C. (3d) 181 [77 C.R. (3d) 370] (S.C.C.); *R. v. Morin* (1992), 76 C.C.C. (3d) 193 [16 C.R. (4th) 291] (S.C.C.). The recent trend in that court suggests that most errors which fall under the rubric of a misapprehension of evidence will not be regarded as involving a question of law: *R. v. Morin*, supra; J. Sopinka and S.M. Gelowitz, *The Conduct of an Appeal* (Markham: Butterworths, 1993), pp. 85-89.

84 The need, for jurisdictional purposes, to classify a misapprehension of the evidence as an error of law, as opposed to an error of fact or mixed fact and law, does not arise in this court where the appeal is from conviction in proceedings by way of indictment. Section 675(1)(*a*) gives this court jurisdiction to consider grounds of appeal which allege any type of error in the trial proceedings. The wide sweep of s. 675(1)(*a*) manifests Parliament's intention to provide virtually unobstructed access [3] to a first level of appellate review to those convicted of indictable offences.

85 The scope of this court's power to quash convictions is commensurate with the broad jurisdiction given to it by s. 676(1)(*a*). Section 686(1)(*a*) provides that:

> 686.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

86 The powers granted in that section are qualified to some extent by s. 686(1)(*b*)(iii) and s. 686(1)(*b*)(iv). For present purposes I need reproduce only s. 686(1)(*b*)(iii):

> (*b*) [the Court of Appeal] 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;

87 While s. 686(1)(*a*) provides three distinct bases upon which this court may quash a conviction, each shares the same underlying rationale. A conviction which is the product of a miscarriage of justice cannot stand. Section 686(1)(*a*)(i) is concerned with the most obvious example of a miscarriage of justice, a conviction which no reasonable trier of fact properly instructed could have returned on the evidence adduced at trial. Section 686(1)(*a*)(ii) read along with s. 686(1)(*b*)(iii) presumes that an error in law produces a miscarriage of justice unless the Crown can demonstrate the contrary with the requisite degree of certainty. Section 686(1)(*a*)(iii) addresses all other miscarriages of justice not caught by the two preceding

subsections. In so far as the operation of s. 686(1)(*a*) is concerned, the distinction between errors of law and all other types of error has only one significance. Where the error is one of law the Crown bears the burden of demonstrating that the error did not result in a miscarriage of justice. Where the error is not one of law alone the appellant bears that burden.

88 In my opinion, on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict (s. 686(1)(*a*)(i)). If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of evidence occasioned a miscarriage of justice (s. 686(1)(*a*)(iii)). If the appellant is able to show that the error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases, a new trial ordered. Finally, if the appellant cannot show that the verdict was unreasonable or that the error produced a miscarriage of justice, the court must consider the vexing question of whether the misapprehension of evidence amounted to an error in law (s. 686(1)(*a*)(ii)). If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s. 686(1)(*b*)(iii)).

89 In considering the reasonableness of the verdict pursuant to s. 686(1)(*a*)(i), this court must conduct its own, albeit limited, review of the evidence adduced at trial: *R. v. B. (R.H.)*, supra, at pp. 198-99 [C.C.C., p. 120 C.R.]. This court's authority to declare a conviction unreasonable or unsupported by the evidence does not depend upon the demonstration of any errors in the proceedings below. The verdict is the error where s. 686(1)(*a*)(i) is properly invoked. A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to a finding that a verdict is unreasonable. In cases tried without juries, a finding that the trial judge did misapprehend the evidence can, however, figure prominently in an argument that the resulting verdict was unreasonable. An appellant will be in a much better position to demonstrate the unreasonableness of a verdict if the appellant can demonstrate that the trial judge misapprehended significant evidence: *R. v. B. (R.H.)*, supra, at p. 200 [C.C.C., p. 122 C.R.].

90 I need not pursue the relationship between a misapprehension of the evidence and an unreasonable verdict any further. On the evidence adduced in this case and bearing in mind the errors made by the trial judge in his appreciation of that evidence, I cannot say that the convictions of counts 1, 2, 3, and 6 were unreasonable.

91 I turn next to s. 686(1)(*a*)(iii). This subsection is not concerned with the characterization of an error as one of law, fact, mixed fact and law or something else, but rather with the impact of the error on the trial proceedings. It reaches all errors resulting in a miscarriage of justice and vindicates the wide jurisdiction vested in this court by s. 675(1). The long reach of

s. 686(1)(*a*)(iii) was described by McIntyre J., for a unanimous court, in *R. v. Fanjoy* (1985), 21 C.C.C. (3d) 312 [48 C.R. (3d) 113] (S.C.C.) at pp. 317-18 [C.C.C., p. 120 C.R.]:

> A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.

92 *Fanjoy*, like most cases where s. 686(1)(*a*)(iii) has been invoked, involved prosecutorial or judicial misconduct in the course of the trial: e.g., see *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.); *R. v. R. (A.J.)* (1994), 20 O.R. (3d) 405 (C.A.). Such conduct obviously jeopardizes the fairness of a trial and fits comfortably within the concept of a miscarriage of justice. Nothing in the language of the section, however, suggests that it is limited to any particular type of error. In my view, any error, including one involving a misapprehension of the evidence by the trial judge must be assessed by reference to its impact on the fairness of the trial. If the error renders the trial unfair, then s. 686(1)(*a*)(iii) requires that the conviction be quashed.

93 When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

94 I am satisfied that the trial judge's errors with respect to the content of the evidence of B.G. were significant and resulted in a miscarriage of justice. The trial judge treated the evidence of F.P. and B.G. as if it was consistent on all significant points relating to the events surrounding the assaults except for the year in which those assaults actually occurred. In fact, as indicated above, there were other inconsistencies between the evidence of the two complainants which went unnoticed by the trial judge as a result of his misapprehension of the substance of the evidence. Similarly, the trial judge regarded the complainants' evidence concerning their initial complaint about the appellant as consistent save for minor details such as the exact familial relationship between B.G. and the person first complained to by him. Here too, the trial judge's misapprehension of the content of the evidence obscured

numerous differences in the versions of events described by the two complainants. The cumulative effect of these errors was significant in that it infected the very core of the reasoning process which culminated in the conviction of the appellant on the four counts involving F.P. and B.G. Without the finding of mutual confirmation, the trial judge may not have found either F.P. or B.G. to be credible and their evidence to be reliable. Those findings were essential to the verdicts rendered by the trial judge.

95 The observation of Laycraft J.A. in *Whitehouse v. Reimer* (1980), 116 D.L.R. (3d) 594 (Alta. C.A.) has application here. In that case, the trial judge was faced with two conflicting versions of the relevant event. He found in favour of the plaintiff but in doing so misstated the evidence on three significant factual issues. In ordering a new trial, Laycraft J.A., speaking for a unanimous court, said at p. 595:

> Where a principal issue on a trial is credibility of witnesses to the extent that the evidence of one party is accepted to the virtual exclusion of the evidence of the other, it is essential that the findings be based on a correct version of the actual evidence. Wrong findings on what the evidence is destroy the basis of findings of credibility.

96 The appellant has demonstrated significant errors in the trial judge's understanding of the substance of the evidence. He has further demonstrated that those errors figured prominently in the reasoning process which led to crucial findings of credibility and reliability, and then to crucial findings of fact. In these circumstances, the appellant has met the onus of showing that the convictions on the counts relating to F.P. and B.G. constitute a miscarriage of justice. Those convictions must be quashed and a new trial ordered.

97 As I have concluded that the misapprehension of the evidence by the trial judge produced a miscarriage of justice, it is not necessary for me to decide whether that error constituted an error in law. I will, however address that issue. In my opinion, the trial judge's mistaken apprehension of the content of the evidence of a witness cannot be classified as an error in law. There is no suggestion that he did not consider all of the relevant evidence (*R. v. Harper*, supra) or that he misdirected himself on the applicable law and thereby misapprehended the evidence (*R. v. B. (G.)(No. 3)*, supra). The trial judge addressed his mind to all of the evidence and as revealed by his reasons for judgment, was simply mistaken as to what was said by B.G. in his evidence. That error was made in his fact-finding capacity and is not, in my view, an error in law: *Telmosse v. R.*, supra, at pp. 138-39.

III. Conclusion with Respect to the Conviction Appeal

98 The convictions on counts 1, 2, 3 and 6 must be quashed and a new trial ordered. Neither the trial judge's mistakes as to the content of some of the evidence, nor his resort to speculative conclusions had any impact on the conviction on count 7. The appeal from that conviction should be dismissed.

IV. The Sentence Appeal

99 It is necessary to consider only the sentence imposed on the charge of assault causing bodily harm. The trial judge imposed a sentence of 1 month. Given my conclusion that there must a new trial on the other counts, the assault on A.S. must be viewed as a single isolated act for sentencing purposes. Considering the passage of time between the offence and the conviction, the appellant's relative youth when the offence occurred, and the exemplary life he has led over the last 30 years, I do not regard further incarceration at this point as necessary or appropriate. I would reduce the sentence to time served.

V. Conclusion

100 In the result, I would quash the convictions on counts 1, 2, 3, and 6 and direct a new trial. I would dismiss the appeal from the conviction on count 7, grant leave to appeal the sentence imposed on that count, allow the appeal, and reduce the sentence to time served.

Order accordingly.

Footnotes

1 The relationship between mistakes with respect to the substance of the evidence and this court's power to quash a conviction is developed below in the context of the final ground of appeal advanced by the appellant.

2 As admissibility was not challenged, the record for appeal purposes does not set out in full the submissions made by counsel on the admissibility of the documents.

3 Where the ground of appeal does not allege an error in law, the appellant must receive leave to appeal. In Ontario, at least, leave to appeal poses no bar. All grounds of appeal are considered on their merits in a single hearing.

TAB 7

2008 SCC 53
Supreme Court of Canada

C. (R.) v. McDougall

2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, [2008] 11 W.W.R. 414, [2008] 3 S.C.R. 41, [2008] A.C.S. No. 54, [2008] S.C.J. No. 54, 169 A.C.W.S. (3d) 346, 260 B.C.A.C. 74, 297 D.L.R. (4th) 193, 380 N.R. 82, 439 W.A.C. 74, 60 C.C.L.T. (3d) 1, 61 C.R. (6th) 1, 61 C.P.C. (6th) 1, 83 B.C.L.R. (4th) 1, J.E. 2008-1864

F.H. (Appellant) and Ian Hugh McDougall (Respondent)

F.H. (Appellant) and The Order of the Oblates of Mary Immaculate in the Province of British Columbia (Respondent)

F.H. (Appellant) and Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development (Respondent)

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

Heard: May 15, 2008
Judgment: October 2, 2008 *
Docket: 32085

Proceedings: reversing *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.)**Proceedings: reversing in part *C. (R.) v. McDougall* (2005), 2005 BCSC 1518, 2005 CarswellBC 2578 (B.C. S.C.)**

Counsel: Allan Donovan, Karim Ramji, Niki Sharma for Appellant
Bronson Toy for Respondent, Ian Hugh McDougall
F. Mark Rowan for Respondent, The Order of the Oblates of Mary Immaculate in the Province of British Columbia
Peter Southey, Christine Mohr for Respondent, Her Majesty The Queen

Subject: Torts; Civil Practice and Procedure; Evidence; Family
Related Abridgment Classifications
Civil practice and procedure
XX Trials
XX.4 Conduct of trial

XX.4.i Powers and duties of trial judge
XX.4.i.ii Giving reasons for judgment
Civil practice and procedure
XX Trials
XX.11 Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.g Reversing findings of fact
XXIII.13.g.ii Finding by judge alone
XXIII.13.g.ii.A Finding based on credibility of witnesses
Evidence
II Proof
II.4 Standard
II.4.b Balance of probabilities
II.4.b.ii Allegations of crime in civil actions
Evidence
II Proof
II.4 Standard
II.4.b Balance of probabilities
II.4.b.iv Miscellaneous
Evidence
XX Corroboration
XX.2 When required
XX.2.c Primary witnesses in sexual offences cases
Torts
XX Trespass
XX.4 Trespass to person
XX.4.a Assault and battery
XX.4.a.i Sexual assault
Torts
XX Trespass
XX.4 Trespass to person
XX.4.a Assault and battery
XX.4.a.i Sexual assault

APPEAL by plaintiff from judgment reported at *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.), allowing in part defendant supervisor's appeal from judgment allowing plaintiff's action against defendants for physical and sexual assault.

POURVOI du plaignant à l'encontre d'un jugement publié à *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.), ayant accueilli en partie l'appel interjeté par le surveillant défendeur à l'encontre d'un jugement ayant accueilli l'action du plaignant pour voies de fait et agression sexuelle.

***Rothstein J.*:**

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

I. Facts

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

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

4 F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately ten years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

> As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his

lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.

F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.

The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.

The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.

The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took him upstairs to the supervisors' washroom. Another rape occurred.

(2005 BCSC 1518 (B.C. S.C.))

5 F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

6 F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(1)).

II. Judgments Below

A. British Columbia Supreme Court, 2005 BCSC 1518 (B.C. S.C.)

7 F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact (para. 1):

> 1) Was either plaintiff physically or sexually abused while he attended the school?
>
> 2) If the plaintiff was abused
>
> a) by whom was he abused?
>
> b) when did the abuse occur? and
>
> c) what are the particulars of the abuse?

8 The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *Francis v. Canada (Attorney General)*, [2002] B.C.J. No. 436, 2002 BCSC 325 (B.C. S.C.), in which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

9 The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

10 In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defense that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defense position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defense counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

11 The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H.

was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults being four incidents of anal intercourse committed during the 1968-69 school year.

12 In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

13 With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. British Columbia Court of Appeal (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212 (B.C. C.A.)

14 The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

15 Rowles J.A. concluded that McDougall' s appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

16 Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did not scrutinize the evidence in the manner required and thereby erred in law.

17 In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

18 In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

19 Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other... requires... an articulated reason founded in evidence other than that of the plaintiff (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.), of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

20 In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

21 While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

22 Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

23 In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

24 Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

25 Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. The Standard of Proof

(1) Canadian Jurisprudence

26 Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa, and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2003), 455, at p. 456:

> ...These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the civil case.

27 Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (Eng. C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated at p. 459:

> It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

28 In the present case the trial judge referred to *Francis v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

> The court is justified in imposing a higher degree of probability which is "commensurate with the occasion"....

29 In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements

of a s. 1 inquiry and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

30 However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities....
>
> . . . . .
>
> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.
>
> . . . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

31 In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Div. Ct.), at para. 53).

(2) Recent United Kingdom Jurisprudence

32 In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R. (on the application of McCann) v. Manchester Crown Court* (2002), [2003] 1 A.C. 787 (U.K. H.L.), Lord Steyn said at para. 37:

> ... I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these

views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

33 Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *H., Re* (1995), [1996] A.C. 563 (Eng. H.L.), at p. 586:

> ... the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

34 Most recently in *B (Children), Re*, [2008] 3 W.L.R. 1 (U.K. H.L.), a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

35 Lord Hoffman addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

36 The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffman states:

> ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffman did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

> ... I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

37 Lord Hoffman went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

> I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

38 *B (Children), Re* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31 (2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

39 I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154 (S.C.C.), at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the

presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice, then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence* (2nd ed. 1999), at p. 154:

> ... Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

43 An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of "51% probability", or "more likely than not" can be understood by decision-makers, the concept of 60% or 70% probability cannot.

44 Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffman explained in *B (Children), Re* at para. 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the

> burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *B (Children), Re* at para. 72:

> ... Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *B (Children), Re*:

> ... Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account

in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

50 I turn now to the issues particular to this case.

B. The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.

51 The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

52 In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "[s]crutinize the evidence in the manner required and thereby erred in law" (para. 79).

53 As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

54 Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof,

it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664, *per* McLachlin J. (as she then was)).

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

55 An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.), at para. 27 of her reasons (para. 22 of *Housen*).

56 Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> ... From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. The Inconsistency in the Evidence of F.H.

57 At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. B. (R.W.)* (1993), 24 B.C.A.C. 1 (B.C. C.A.), at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of

supporting evidence. Although *R. v. B. (R.W.)* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

58 As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

59 It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

60 The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77, that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

> ... There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to the respondent's recollection of events. In fact, the defense evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

61 However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

62 In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

63 The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall, he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

64 It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

65 However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

66 As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months.
>
> [Emphasis added.]

67 Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

68 The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

69 As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

70 The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

71 All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

72 With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. c. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (S.C.C.), at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

73 As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*L. (H.)*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. Palpable and Overriding Error

74 Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

75 I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole. She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

76 In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over thirty years earlier when F.H. was approximately ten years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an

appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. Corroboration

77 The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> ... No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

78 In her concurring reasons at para. 106, Southin J.A. stated:

> ... To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

79 The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

80 Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

81 Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis

of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. Is W. (D.) Applicable in Civil Cases in Which Credibility is in Issue?

82 At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742.
>
> . . . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on the balance of probabilities.

83 *W. (D.)* was a decision by this Court in which Cory J., at pp. 757-58, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

84 These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. S. (J.H.)*, [2008] 2 S.C.R. 152, 2008 SCC 30 (S.C.C.), at paras. 9 and 13:

> ... Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.
>
> . . . . .

> In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

85 The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

86 However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. Did the Trial Judge Ignore the Evidence of McDougall?

87 In an argument related to *W. (D.)*, the Attorney General of Canada says at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

88 The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.), which concludes at p. 357:

> ... a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

89 Thus, the Attorney General contends, at para. 47 of its factum, that:

> ... In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

90 I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

91 The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H.. She also dealt with the defense arguments with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

92 In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behavior such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

93 She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

94 And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

95 At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence

> on other issues, but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

96 I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. Were the Reasons of the Trial Judge Adequate?

97 The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that lead to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this court that the reasons are nonetheless inadequate.

98 The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (S.C.C.). In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34 (S.C.C.), Binnie J. summarized the duty to give adequate reasons:

> (1) To justify and explain the result;
>
> (2) To tell the losing party why he or she lost;
>
> (3) To provide for informed consideration of the grounds of appeal; and
>
> (4) To satisfy the public that justice has been done.

99 However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself (para.

> 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.... The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

100 An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *R. c. Gagnon*). But that does not make the reasons inadequate. In *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), released at the same time as this decision, McLachlin C J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter, that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

101 Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

102 I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on November 4, 2008 has been incorporated herein.

TAB 8

2018 ONCA 99
Ontario Court of Appeal

R. v. Brownlee

2018 CarswellOnt 1278, 2018 ONCA 99, [2018] O.J. No. 553

Her Majesty the Queen (Respondent) and Marty Brownlee (Appellant)

Paul Rouleau J.A., S.E. Pepall J.A., and B.W. Miller J.A.

Heard: November 15, 2017
Judgment: February 2, 2018
Docket: CA C62929

Proceedings: affirming *R. v. Brownlee* (2016), [2016] O.J. No. 4144, 2016 CarswellOnt 12597, 2016 ONSC 4763, Timothy Ray J. (Ont. S.C.J.)

Counsel: John N. Pepper, for Appellant
Andrew Hotke, for Respondent

Subject: Criminal; Property
Related Abridgment Classifications
Criminal law
XXI Defences
XXI.16 Res judicata
XXI.16.h Miscellaneous
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.j Grounds
XXXIII.1.j.iii Misapprehension of evidence
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.j Grounds
XXXIII.1.j.v Sufficiency of reasons

APPEAL by accused from convictions reported at *R. v. Brownlee* (2016), 2016 ONSC 4763, 2016 CarswellOnt 12597, [2016] O.J. No. 4144 (Ont. S.C.J.), for offences including break and enter.

***S.E. Pepall J.A.*:**

A. INTRODUCTION

1 The appellant, Marty Brownlee, was convicted of theft over $5,000, break and enter, two counts of possession of property for the purpose of trafficking, and one count of possession of property obtained by crime. He received a 12 month sentence of incarceration, a six month consecutive conditional sentence, 36 months of probation, and a $50,000 restitution order.

2 The appellant appeals from his convictions. He submits that the trial judge failed to properly apply *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.), applied stricter scrutiny to the defence case than that of the Crown, provided insufficient reasons, and misapprehended the evidence. Based on *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729 (S.C.C.), he also submits that two of the convictions should be stayed. The appellant has abandoned his sentence appeal.

B. BACKGROUND FACTS

3 At the time of trial, the victim, Donald McHugh was a 69 year old retiree. He and his wife had lived in Renfrew, Ontario for 29 years. He was an experienced coin collector. McHugh's coin collection included silver dollars and silver bars, and had a value in the tens of thousands of dollars. His coins and bars were distinctive, as he kept them highly polished. At trial, witnesses who were professional coin dealers stated that it was unusual to see coins and bars as uniformly polished as McHugh's.

4 McHugh maintained his collection in a safe covered with a cloth in his garage. The safe was easy to lock but took 10 or 15 minutes to open. McHugh testified that he would leave the safe unlocked if he was going into the house on an errand or staying around.

5 The appellant was 42 and was in the electronic security installation business. The appellant admitted that, in 2014, around the time the thefts occurred, his main business partner was absent and there had been a decline in business. In the appellant's own words, the business went through "peaks and valleys", and it was in one such a valley. That spring, there were days the appellant did not work, days he worked at home, and days he worked at his partner's place.

6 The appellant and McHugh considered themselves to be friends. The appellant visited McHugh most mornings; they would sit in the garage, have coffee, and discuss the affairs of the world. They would also discuss coins. Like McHugh, the appellant was interested in

coins and both he and his wife had coin collections. The appellant was not as experienced in coin collecting as McHugh and would seek his advice.

7 The appellant would come from time to time to borrow tools and, if McHugh were not there, Ms. McHugh would give him the key to the garage. Ms. McHugh recalled that in the last week or two before the theft, the appellant was at the house every day and sometimes two to three times a day. She found the many and frequent visits to be unusual.

8 On May 9, 2014, the day of the theft, the appellant visited McHugh in the morning as was his habit. He came to borrow a tool and arrived between 7:00 a.m. and 8:00 a.m. in his white pickup truck. He brought coffee and the two men talked in the garage. To the appellant's knowledge, Ms. McHugh was not there, having returned to work that day after a lengthy medical leave.

9 The appellant left McHugh's place between 9:30 a.m. and 11:00 a.m.

10 After the appellant left, another friend of McHugh's, Robert McLaren, came to visit. He was interested in buying some coins from McHugh. McLaren left around noon, after visiting the garage and looking at some coins in which he was interested.

11 It was McHugh's habit to have lunch each day with a friend who suffered from Parkinson's disease. McHugh left for lunch at 12:30 p.m. and returned at 2:00 p.m. While he was gone, a significant portion of his collection had been stolen, although there was no evidence of any forced entry.

12 McHugh could not recall if he had locked the safe before leaving for his friend's place for lunch that day, but did remember locking the door to the garage. Another access point to the garage was by a remote controlled garage door. McHugh testified that the next day, he found one of the three remote control garage openers missing from its usual spot.

13 On discovery of the theft on his return from lunch, McHugh called the appellant, who said he was in Kanata, a suburb of Ottawa not far from Renfrew. McHugh then called McLaren, followed by the police. McLaren came right over and the appellant came over later in the afternoon in a different motor vehicle from the white truck he visited in during the morning.

14 The police conducted an investigation. They interviewed the appellant twice, first on June 3, 2014 and then again on August 13, 2014.

15 On June 3, 2014, the appellant produced various receipts to account for his whereabouts. He was asked where he had gone in Ottawa on the day of the theft. He knew that the questioning was about coins, but did not mention that he had gone that afternoon to Ottawa

Gold Buyer, a company in Ottawa that buys and sells precious metals, and for the first time ever, sold them some silver coins. Nor did the appellant mention that, in the weeks following the theft, he sold polished coins on several occasions to Aidid El-Khoury and George Bateh of Coin Talk Inc., an Ottawa-based company that buys and sells coins. He also failed to tell the police that he tried to sell some coins to Vincenzo Demarinis, his business partner's neighbour, later in May. He did volunteer that he had an ATM receipt to show where he was on May 9, 2014.

16 On August 13, 2014, the appellant was asked by the police to go through the day of May 9, 2014. Again, he said nothing about visiting Ottawa Gold. Similarly, when asked if he had tried to sell any coins, he said nothing about Ottawa Gold, Coin Talk, or Demarinis. When asked about coins and selling coins, he stated that he had zero interest in coins or said he did not remember. As the trial judge noted at paras. 48-49 of his reasons:

> When asked further about how much buying or selling he had done, he responded "nope", when he admitted he had by the time of that interview sold between $4,000 and $5,000 to [Aidid] or George at Cointalk. When he was further questioned at the time about his use of kijiji or eBay to sell coins, he again failed to mention Ottawa Gold or Cointalk.
>
> Detective Burns asked the [appellant] if anyone was going to come forward and say that he had tried to sell them coins. He deflected her question and failed to tell her about Mr. Demarinis.

17 As part of their investigation, on September 24, 2014, the police obtained the appellant's call logs. The logs showed the following calls were made on May 9, 2014 from the appellant's phone:

- a call to McHugh's neighbour (Robert Bilmer) at 10:18 a.m. made from Renfrew;
- a call to McHugh's home at 11:38 a.m. also made from Renfrew;
- four calls to the Pembroke hospital, where the appellant's wife worked, at 11:39 a.m., 12:21 p.m., 1:13 p.m., and 1:33 p.m., respectively. The first two calls were made from Renfrew, the third was from Arnprior, a town between Renfrew and Ottawa, while the last call was made from West Carleton, which is on the outskirts of Ottawa;
- a call at 1:14 p.m. to the appellant's business partner, again from the outskirts of Ottawa;
- a call at 1:35 p.m. to an unrelated party made from Kanata;

- a call at 2:14 p.m. to Ottawa Bullion (another company located in Ottawa that deals in silver bullion) made from Ottawa;

- a call at 2:19 p.m. to Ottawa Gold made from Ottawa; and

- a fifth call to the Pembroke hospital at 2:24 p.m. made from Ottawa.

18 The police confirmed with Ottawa Gold that the appellant had called them. An invoice dated May 9, 2014, showed that, at 2:56 p.m., the appellant had sold polished coins, a 1 kg bar, and a 10 ounce bar to Ottawa Gold for $2,385.73. The appellant had never contacted Ottawa Gold previously.

19 The police also followed up with Demarinis, after learning from the appellant's business partner that the appellant had approached Demarinis about purchasing some coins and a bar after the date of the theft. Demarinis confirmed that he was contacted by the appellant on May 25 or 26, 2014. The two met, and the appellant produced a shiny coin and bar, both of which he tried to sell to Demarinis, who was not interested.

20 Meanwhile, McHugh had been in touch with El-Khoury and Bateh of Coin Talk, with whom he had prior dealings, and told them about the theft of his coins and bars. El-Khoury recalled meeting the appellant in May 2014 and purchasing two tubes of polished silver dollar coins from him. El-Khoury and Bateh remembered at least seven additional transactions where one or both of them purchased coins from the appellant in the weeks after the theft. In total, Coin Talk purchased from the appellant between $4,500 and $5,000 of coins, which El-Khoury and Bateh remembered as being mostly and unusually highly polished. Phone logs confirmed that the appellant had telephoned Coin Talk's office 13 times on May 20. Between May 20 and August 19, 2014, there were 62 calls between the appellant and Coin Talk. Prior to May 9, 2014, the appellant had never dealt with Coin Talk.

21 The call logs also showed the appellant's location relative to call towers. The logs suggested that the appellant had time to steal the coins and bars and be in the places identified by the call towers and on his ATM receipt.

22 Prior to the day of the theft, McHugh had made two small purchases from the appellant. These were the only two sales of coins or bars the appellant made before May 9.

C. GROUNDS OF APPEAL

23 The appellant submits that the trial judge failed to assess the credibility and reliability of the Crown's witnesses, particularly McHugh, and dismissed or ignored the defence submissions on flaws and weaknesses in the Crown's case without articulating why he did so. The appellant similarly submits that the trial judge also rejected the appellant's

evidence without putting it in context. He submitted that these flaws could be characterized as: i) a failure to articulate and apply the *W.(D.)* analysis, ii) the application of harsher scrutiny to the defence case in comparison to that of the Crown, or iii) inadequate reasons.

24 The appellant also submits that the trial judge misapprehended aspects of the evidence. Finally, the appellant appeals on the basis that two of his convictions involved lesser offences arising out of the same facts as two of the more serious offences for which the appellant was also convicted. On the basis of *Kienapple*, the appellant submits that the convictions for the two lesser offences should be stayed.

25 For the following reasons, I would reject each of these submissions, with the exception of the *Kienapple* submission, which I would grant.

D. ANALYSIS

(a) R. v. W. (D.) *Analysis*

26 The appellant submits that where an accused has testified, the trial judge must assess the accused's evidence in the context of the evidence of a whole, and explain why the evidence was rejected. He contends that the trial judge failed to do so here.

27 The trial judge noted in his reasons that he was obliged to follow *W. (D.)*. He reviewed in considerable detail the evidence advanced by the Crown and that of the defence. He set forth the positions of the parties and, after repeating certain facts, he properly instructed himself on the requirements of *W. (D.)* at paras. 88 and 90. He then applied those principles to the case before him. He did not accept the appellant's evidence and concluded that his evidence did not raise a reasonable doubt about his guilt. He identified some of the numerous shortcomings in the appellant's version of events including inconsistencies, implausibilities, and material omissions. The trial judge then considered whether, on the whole of the evidence, the Crown had established the appellant's guilt beyond a reasonable doubt.

28 Describing the evidence as circumstantial, the trial judge also instructed himself to consider whether, on the basis of the whole of the evidence, the only rational conclusion was the guilt of the appellant. He determined that the only reasonable and rational conclusion was that the appellant had: entered McHugh's garage while he was gone, using either the garage door remote opener, which he quickly replaced, or a key to the door, which he had surreptitiously hidden; opened the safe either with a key or, more likely, found it open; removed contents from the safe; and drove to Ottawa, where he sold $2,385.73 of the coins and bars he had stolen.

29 Among other things, the trial judge observed that, apart from dealings with McHugh, the appellant had never sold from his or his wife's collection before nor had

he had any dealings with Ottawa Gold or Coin Talk. He found that the appellant had ample opportunity to complete the theft, as the appellant was very familiar with McHugh's premises. Furthermore, he inferred that the sale by the appellant of so many shiny coins and bars was consistent with those coins and bars having been stolen from McHugh. As work was not going well and the appellant clearly was not spending much time working, it was a reasonable inference that, at the time, the appellant was hard up.

30 The trial judge also rejected the defence argument that it would have been ludicrous for the appellant to sell silver to Ottawa Gold where identification was required, noting that only one sale was made there, and that no records or identification was kept or required at Coin Talk. In addition, the Demarinis sale would have been an unrecorded transaction to an unidentifiable purchaser. As the trial judge stated at para. 98:

> Just as it was arguably ludicrous for the [appellant] on the day of the theft to go to Ottawa Gold to sell coins, it was equally ludicrous for the [appellant] to have repeatedly omitted to tell the police about his visit to Ottawa Gold when he was asked to explain his movements the day of the theft.

31 The trial judge gave extensive consideration to whether the whole of the evidence established the appellant's guilt beyond a reasonable doubt. I see no error in the trial judge's *W.(D.)* analysis.

(b) Scrutiny Given to Defence Evidence

32 Turning to the appellant's argument that the trial judge applied stricter scrutiny to the defence evidence than to that of the Crown, this court has repeatedly stated that it is an error of law to apply such a stricter level of scrutiny: *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111 (Ont. C.A.), at para. 18.

33 The appellant submits that McHugh's credibility was a live issue in the trial, and that the trial judge failed to resolve certain credibility issues in McHugh's testimony. The unresolved credibility issues identified by the appellant include details relating to any indebtedness owed by McHugh to the appellant following the appellant's two sales to McHugh, when McHugh noticed that the garage door opener was missing, and whether McHugh told the coin dealers El-Khoury and Bateh that the theft occurred while he was on vacation.

34 The trial judge's treatment of the Crown witnesses and in particular the evidence of McHugh must be placed in context. It was not contested that the coins and bars were stolen from McHugh's safe on May 9, 2014. Nor was McHugh's evidence that the appellant visited McHugh often, knew about the safe, and was at McHugh's the morning of the theft contested. Similarly, McHugh's evidence that he kept his coins shiny and polished was uncontested. Lastly, despite the defence's submission at trial that the appellant sold his own coins and bars

in Ottawa on May 9 to Ottawa Gold because McHugh had not paid him for earlier coin purchases, the appellant never testified to this effect.

35 Furthermore, although the trial judge did not expressly state that he believed McHugh, it is obvious from his reasons that he accepted his testimony. Counsel never suggested that McHugh was a suspect, nor did the appellant.

36 The trial judge also outlined the defence position at paras. 71 and 72 of his reasons. His outline is borne out by the transcript of the submissions of defence counsel at trial (who was different from counsel on appeal). In essence, the appellant's position was that someone else had stolen the bars and coins and that the police had done an inadequate investigation in following up with the leads McHugh had given them. The appellant argued that the sale to Ottawa Gold reflected his innocence because he knew he would have to provide Ottawa Gold with identification and would receive a cheque in payment for the bars and coins. The appellant contended that the reason he went to Ottawa Gold on May 9 was because McHugh had not paid him for a previous sale. However, as mentioned, he never testified to that effect nor did he raise this point in either of his two statements to the police.

37 In my view, the trial judge fairly responded to the positions advanced by the defence and the Crown. While admittedly there were some inconsistencies in McHugh's evidence that might have been addressed, none related to matters of significance. When he noticed the garage door opener missing and whether he told his wife about it were not critical, nor was the timing and fact of the post-dated cheque payable by McHugh to the appellant which the trial judge considered at paras. 12 and 42. A trial judge is not required to refer to every piece of evidence or argument made by counsel: *R. v. B. (H.S.)*, 2008 SCC 52, [2008] 3 S.C.R. 32 (S.C.C.), at para. 8. I would not give effect to this ground of appeal.

(c) Sufficiency of Reasons

38 The appellant also submits that the trial judge's reasons for decision were insufficient.

39 Appellate courts are to take a functional approach to reviewing the sufficiency of reasons. An appeal will be allowed if the reasons are so deficient that they fail to show why the judge decided as the judge did and foreclose appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (S.C.C.), at para. 28. As stated by Watt J.A. in *R. v. Wolynec*, 2015 ONCA 656, 330 C.C.C. (3d) 541 (Ont. C.A.), at para. 56: consideration of the sufficiency of reasons "requires reading the reasons as a whole, in the context of the evidence, the arguments and the trial, together with an appreciation of the purposes or functions for which reasons are delivered." The core question to be answered in this case, as in others, is whether the trial judge's reasons, read in context, show why the judge decided as he did on the offences charged: see *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639 (S.C.C.), at para. 15.

40 The trial judge gave extensive 30 page reasons for decision. There is no question why he decided as he did. The Crown had a strong case. There was good reason to disbelieve the appellant given the numerous inconsistencies in his testimony and his statements to the police. Moreover, the only reasonable and rational conclusion that could be drawn from the whole of the evidence was that the appellant was the thief. The trial judge described in detail why the Crown had proven the appellant's guilt beyond a reasonable doubt, and he was clearly alive to the material issues in the case and the positions advanced by the parties. His reasons plainly provided for appellate review. I would not give effect to this ground of appeal.

(d) Misapprehension of Evidence

41 The appellant also submits that the trial judge misapprehended the evidence. A verdict must be based exclusively on the evidence adduced at trial. If a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, that conviction is not based exclusively on the evidence and is not a "true" verdict: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.).

42 The appellant alleges that the trial judge misapprehended two issues.

43 The first related to the appellant's 10:18 a.m. call to Bilmer, McHugh's neighbour. The trial judge stated at para. 93 of his reasons that he did not accept the appellant's explanation that he had called McHugh's neighbour to enquire about a boat. The trial judge reasoned:

> If that were the case he would have spoken to Bilmer in person the morning of the theft, or even when he returned the afternoon of the theft. He did not. He said initially he could not remember why he had telephoned Bilmer. The story he told in his evidence of a late recovering memory was simply untrue.

44 The trial judge's reference to a boat was inaccurate. In fact, although the appellant had said in his police interview that he was considering buying a boat, he said he called Bilmer about a trailer. However, this error cannot be described as material, nor did it play an essential part in the reasoning process.

45 Second, the appellant submits that the trial judge erred in concluding that the appellant had ample time to commit the theft. He argues that the trial judge improperly treated any time following 11:39 a.m. to be "unaccounted for" (and therefore part of the window of opportunity necessary to commit the theft) and by counting time from 12:21 as relevant to opportunity. McHugh was home until around 12:30, and therefore, the appellant contends, those times could not be relevant for opportunity. The appellant also argues that the times and distances revealed by the phone logs made it impossible for the appellant to be the thief if the safe was locked, and very difficult if it was not.

46 I disagree.

47 The references to 11:39 a.m. and 12:21 p.m., when the appellant called the Pembroke hospital where his wife worked, were part of the narrative that also referenced the call tower and the 1:39 p.m. ATM receipt evidence and served to explain how long it would have taken the appellant to travel between Renfrew and Ottawa. The appellant conceded that he could have committed the theft if the safe was unlocked. At para. 91 of his reasons, the trial judge found that the safe was most likely open. This finding was available to him on the record. He did err in stating that the period between 12:21 p.m. in Renfrew and 1:13 p.m. in Arnprior was 54 minutes, as this in fact amounts to 52 minutes. However, again, this error was not material and the trial judge's determination that there was sufficient time to commit the theft was nonetheless reasonable. I would not give effect to this ground of appeal.

(e) Kienapple

48 Lastly, the appellant submits that the convictions on counts one and five should be stayed based on *Kienapple*. He argues that his conviction for theft contrary to s. 334(a) of the *Criminal Code* (count one) is an included offence in his conviction for break and enter contrary to s. 348(1)(b) of the *Code* (count two) and his conviction for possession of McHugh's silver contrary to s. 354(1)(a) of the *Code* (count five) is an included offence in his conviction for possession knowing the silver was stolen and for the purposes of trafficking contrary to s. 355.5(b) of the *Code* (count three).

49 The Crown is unopposed to this request.

50 Here in each instance, the same transaction gave rise to two offences with substantially the same elements. There was both a factual and a legal nexus. The appellant should only have been convicted of the most serious of the offences. I would allow the appeal in this regard and grant the appellant's request that counts one and five be stayed.

E. DISPOSITION

51 For these reasons, the conviction appeal is allowed in part so that the convictions on counts one and five are stayed.

Paul Rouleau J.A.:

I agree.

B.W. Miller J.A.:

I agree.

Appeal allowed only to stay two counts, under Kienapple principle.

End of Document

TAB 9

2017 ONCA 281
Ontario Court of Appeal

Trade Capital Finance Corp. v. Cook

2017 CarswellOnt 4692, 2017 ONCA 281, 138 W.C.B. (2d) 232, 278 A.C.W.S. (3d) 59

Trade Capital Finance Corp. (Plaintiff / Respondent) and Peter Cook also known as Peter William Cook, Marc D'Aoust also known as Jean Marc D'Aoust, Thomas Barker also known as Thomas Richard Barker (personally and carrying on business as LC Exchange, Global Medical and GreenLink Canada Group), Rocky Racca, Bruno Didiomede also known as Bruno Diaiomede, Alan Keery also known as Alan John Keery, Chris Bennett Jr. also known as Chris Bennett also known as Christopher Bennett (personally and carrying on business as CJR Consulting), Todd Cadenhead, Dayawansa Wickramasinghe, Bonny Lokuge also known as Don Bonny Lokuge, Virtucall Inc., Virtucall International LLC, Debt ResolveMortgage Funding Solutions Inc. carrying on business as Debtresolve Inc., The Cash House Inc., 1160376 Ontario Limited operating as The Cash House, 2242116 Ontario Inc. carrying on business as Superior Medical Services Inc. and Superior Medical Services, Carlo De Maria also known as Carlo Vince De Maria also known as Carlo Vincent De Maria also known as Carlo Vincenzo De Maria, Matteo Pennacchio, Frank Zito also known as Francesco Zito, Simone Sladkowski, Jobec Trade Finance Inc., 1461350 Ontario Inc., 2299430 Ontario Inc., WF Canada Ltd., Jobec Investments RT LTD., Green Link Canada Inc., 2339989 Ontario Inc., 2252364 Ontario Inc., 2224754 Ontario Ltd., 6980023 Canada Inc. operating as Living Benefits and Millwalk Enterprises Inc. (Defendant / Appellant)

Paul Rouleau J.A., K. van Rensburg J.A., B.W. Miller J.A.

Heard: October 26, 2016
Judgment: April 4, 2017
Docket: CA C61750

Counsel: Andrew Parley, Eli Lederman, for Appellant, Cash House Inc., and the non-parties, Osman Khan and 2454904 Ontario Inc.
Peter W.G. Carey, Christopher R. Lee, for Respondent

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Judges and courts
XX Contempt of court
XX.6 Practice and procedure
XX.6.h Appeals
XX.6.h.iii Miscellaneous

APPEAL by defendants from judgment finding them in contempt of mareva order.

***B.W. Miller J.A.*:**

OVERVIEW

1 The respondent, Trade Capital Finance Corp., is in the business of purchasing accounts receivable. It alleges that it was defrauded of approximately $6,500,000 in a sophisticated scheme in which it unknowingly purchased fictitious accounts receivable. It alleges that the majority of its lost funds were eventually deposited in bank accounts owned by the appellant, The Cash House Inc., a financial services company in the business of making payday loans, cashing third party cheques, and providing foreign exchange services. Cash House is owned by 2454904 Ontario Inc. ("245"), which in turn is owned by Osman Khan.

2 On May 6, 2015, the respondent obtained a Mareva Order freezing the assets of named defendants, including Cash House, and ordering financial disclosure. Cash House, 245, and Khan (collectively "the appellants"), were later found to be in contempt of the Mareva Order. Khan was eventually sentenced to 90 days incarceration, and the statement of defence and crossclaim of Cash House was struck.

3 The appellants now appeal the finding of contempt, the sanction of incarceration, and the striking of the statement of defence and crossclaim of Cash House.

4 For the reasons given below, I would dismiss the appeal.

FACTS AND DECISIONS BELOW

5 Trade Capital obtained an *ex parte* Mareva Order on May 6, 2015, freezing the assets of Cash House and other defendants, ordering financial disclosure, and providing other relief.

6 The Mareva Order provides that all persons with notice are "restrained from directly or indirectly . . . (a) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of any of the Mareva Defendants". The Mareva Order further specifies that "a Defendant's assets include any asset which such Defendant has the power, directly or indirectly, to dispose of or deal with as if it were the Defendant's own."

7 Cash House moved to set aside or vary the Mareva Order, and in support filed two affidavits from Khan. In his first affidavit, sworn May 15, 2015, Khan provided a list of the assets of Cash House. In his cross-examination on May 27, 2015, he revealed the existence of a bank account held by 245 that he had used for the operations of Cash House, both before and after the Mareva Order had been issued.

8 The motion to set aside or vary the Mareva Order was dismissed by Ricchetti J. on June 10, 2015. In his endorsement, Ricchetti J. found that the respondent had made out a strong *prima facie* case of fraud against Cash House, and found that Khan had intentionally used 245's bank account in a manner that contravened the Mareva Order. The decision of Ricchetti J. was not appealed.

9 Through September and October 2015, the respondent sought to schedule an examination of Khan as representative of Cash House, as authorized by the Mareva Order. After the respondent was unsuccessful in doing so, it unilaterally set a date on 7 days' notice. Counsel for the appellants advised that neither he nor Khan were available on that date. Accordingly, Khan did not attend.

10 The respondent then brought a motion, seeking: (i) to have the appellants found in contempt of the Mareva Order under rule 60.11 of the Rules of Civil Procedure, and (ii) to strike Cash House's statement of defence and crossclaim under rule 60.12 for failure to comply with the Mareva Order.

11 On December 4, 2015, McKenzie J. granted an adjournment of the contempt motion on terms, which included the requirement that Khan deliver an updated list of assets of Cash House, with supporting documents, by December 7, 2015, and that Khan attend for examination on December 11, 2015.

12 The hearing of the contempt motion continued on January 8, 2016, with reasons given on January 21, 2016. Reviewing the steps taken by the appellants to comply with their obligations under the Mareva Order and the December 4, 2015 order, the motion judge noted that they "only delivered non-current documents relating to the bank accounts of Cash House and no documents for the accounts of 245". Although Khan had attended the examination

scheduled for December 11, 2015, he "did not produce the documents that were subject to the Mareva Order and further stipulated in the December 4, 2015 order."

13 The motion judge found that "Cash House and Mr. Khan . . . intentionally operated the business of Cash House on an ongoing basis since the inception of the Mareva Order on May 5, 2015 utilizing the bank account(s) of 245." He found the appellants to be in contempt (the "Contempt Order"), and adjourned the motion to strike the defence and crossclaim until the sanction hearing. The appellants were given two months to purge their contempt before the sanction hearing.

14 During that interval, the appellants delivered a sworn statement from Khan listing accounts into which any money in which Cash House had a legal or beneficial interest had been deposited or withdrawn since May 6, 2015. The appellants produced some financial statements, tax returns, and bank statements. They also collected approximately 1,000 boxes of documents in a storage location, and invited the participation of the respondent to develop a plan for the review and inspection of these documents.

15 On March 14, 2016, the matter was back before the motion judge for the sanction phase hearing, and the hearing of the motion to strike. He released his decisions on May 24, 2016. He found the appellants' documentary production since the Contempt Order to have fallen short of what was ordered, and ordered the appellants to "forthwith supply the Plaintiff, through counsel, with a comprehensive and detailed written inventory of the documents contained in each of the approximately 1,000 bankers boxes" that the appellants had collected.

16 The motion judge found that the appellants had intentionally and continually disobeyed orders of the court, and he sentenced Khan to 90 days of imprisonment to be served on weekends (the "Penalty Order"). He further ordered that the statement of defence and crossclaim of Cash House be struck, with leave to amend should Cash House comply with the ordered disclosure.

17 The appellants appeal the Contempt Order, the Penalty Order, and the order to strike the statement of defence and crossclaim.

ISSUES

18 The appellants argue that the motion judge erred by:

1. finding the Mareva Order to be clear and unambiguous;

2. failing to correctly apply the test for striking a pleading;

3. providing insufficient reasons;

4. ordering a custodial sentence for the contempt;

5. failing to allow the appellants an opportunity to make submissions before awarding costs on a substantial indemnity basis.

ANALYSIS

A. IS THE MAREVA ORDER CLEAR AND UNAMBIGUOUS?

19 The elements of civil contempt have been recently summarized by this court in *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951 (Ont. C.A.), leave to appeal to SCC requested [2017 CarswellOnt 2642 (S.C.C.)], at para. 20:

> A party seeking to establish civil contempt must prove that: (a) the order alleged to have been breached states clearly and unequivocally what should and should not have been done; (b) the party alleged to have breached the order had actual knowledge of it; and (c) the party allegedly in breach intentionally did the act the order prohibits or intentionally failed to do the act the order compels. A judge retains an overriding discretion to decline to make a contempt finding where the foregoing factors are met where it would be unjust to do so, such as where the alleged contemnor has acted in good faith to take reasonable steps to comply with the relevant court order. The burden on a party seeking a contempt order is to establish the above elements by proof beyond a reasonable doubt [citations omitted.]

20 The appellants argue that the motion judge erred by failing to conduct a correct analysis to determine whether the Mareva Order was sufficiently clear and unambiguous in the circumstances to ground a finding of contempt.

21 The appellants' position, both before the motion judge and this court, is that the Mareva Order is unclear and suffers from multiple ambiguities that must be resolved in favour of the appellants. An ambiguity in an order is to be resolved in favour of the person said to have breached the order: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at para. 39. The resolution of these ambiguities, the appellants argue, ought to have resulted in the dismissal of the contempt motion. The ambiguities identified by the appellants can be summarized as follows:

1. It is unclear whether the prohibition of "dealing with the assets" of Cash House prohibits the operation of the Cash House's business;

2. It is unclear whether the Mareva Order obligated Cash House to include the bank account of 245 in a sworn statement describing its worldwide assets; and

3. It is unclear whether Khan, as representative of Cash House, was obligated to attend a unilaterally scheduled examination.

22 Although this ground of appeal is expressly formulated in terms of ambiguity, the argument, in reality, is that the Mareva Order is not sufficiently clear or precise for the appellants to understand their obligations under that order. Ambiguity, in the sense employed in *G. (N.)*, indicates uncertainty as to which of two (or perhaps more) discrete meanings was intended by the order. To resolve an ambiguity in favour of the contemnor is to choose the meaning that is most favourable to the contemnor. The appellants have not identified any ambiguity in this sense, but argue instead that the relevant terms of the Mareva Order do not set out the appellants' obligations with sufficient precision for them to know whether or not they have complied.

23 As I explain below, however, the motion judge made no error in finding the Mareva Order to be sufficiently clear.

(i) "Dealing with the assets"

24 The appellants argue that, if the prohibition against "dealing with the assets" of Cash House was intended to prohibit the continued operations of Cash House, the Mareva Order needed to say so expressly. It did not, the appellants say, and to interpret it in this way would be inconsistent with the purpose of a Mareva Order, which is to prevent a party from depleting its assets, and not to prevent it from carrying on business in the ordinary course: *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819, 11 C.P.C. (7th) 363 (Ont. S.C.J.), at para. 111.

25 I am not persuaded by this argument. The salient question for the purpose of this appeal is not whether the appellants were operating the business of Cash House, but whether they dealt with the assets of Cash House. It is not necessary to consider the question of whether the Mareva Order permitted the business of Cash House to be operated in some form. The motion judge found that the appellants, in the mode in which they continued to carry on the business of Cash House, dealt with assets of Cash House — specifically, they dealt with funds deposited into the account of 245 — and that this was expressly prohibited by the Mareva Order. That finding was supported by the evidence before the motion judge, particularly the evidence of Khan on cross-examination.

26 Khan, on cross-examination, admitted that he opened 245's account contemporaneous with his purchase of 245 and Cash House, and began using the 245 account for the operations of Cash House shortly thereafter. After the Mareva Order was issued and the accounts of Cash House were frozen, Khan continued operation of Cash House through the 245 account, which was used to accept deposits belonging to Cash House.

27 A review of the 245 account statements provided revealed there were significant sums deposited and paid out of that account commencing in March 2015 and continuing well after the Mareva Order was issued. It appears that any business that Cash House was conducting, including the collection of its receivables, was occurring from 245's account. The motion judge made no error in finding that the 245 account was "directly or indirectly" an asset of Cash House. The use of this asset constituted a breach of the Mareva Order, and the motion judge made no error in so concluding.

(ii) Disclosure

28 On the second issue, paragraph 4 of the Mareva Order required Cash House to prepare a sworn statement providing particulars of its worldwide assets "whether owned directly or indirectly and including any assets held in trust for [Cash House]".

29 The appellants argue that there was no direct evidence in the contempt proceedings to establish that Cash House had the power to dispose of or deal with 245's account, and that the motion judge erred by not engaging in any reasoning to establish that 245's account came within the scope of the Mareva Order.

30 There is no merit to this submission and it cannot be maintained in light of Khan's evidence on cross-examination. The evidence is clear that the 245 account received funds from Cash House's operations. Its existence therefore had to be disclosed. It was not disclosed and the motion judge made no error in finding Cash House and Khan thereby breached the Mareva Order.

(iii) Examination under oath

31 On the third issue, Cash House and Khan have attempted to manufacture confusion where the Mareva Order is abundantly clear: Cash House "must submit to examinations under oath within thirty (30) days of the delivery by [Cash House] of the aforementioned sworn statements or by such later date as may be confirmed by the Plaintiff's counsel of record." The appellants argue that this provision is unclear because, effectively, it authorizes the respondent to demand the impossible: to schedule an examination unilaterally for a date when a party could not appear.

32 Again, the motion judge made no error. A Mareva Order does not want for clarity simply because it does not concretize every particular of a party's obligations. It need not do so. The order was made in the context of a self-governing legal profession with settled norms of practice. There can be no suggestion here that the appellants, represented by counsel, did not understand their obligations. Neither did the respondent depart from settled norms of practice and demand the impossible of the appellants. The respondent made reasonable

attempts to enlist the assistance of the appellants in coming to a mutually convenient schedule for an examination. That assistance was not forthcoming. The appellants' failure to participate is not the product of any defect in the Mareva Order or, for that matter, any unreasonable demands made by the respondent. The motion judge made no error in refusing to give effect to this argument.

B. STRIKING THE DEFENCE AND CROSSCLAIM

33 The appellants argue that the motion judge erred by failing to apply correct legal principles on the motion to strike the statement of defence and crossclaim pursuant to rule 60.12. They advance six arguments, all of which I would reject.

34 First, the appellants argue that the motion judge erred by striking the defence and crossclaim at the first instance, and thus using it as a remedy of first resort. They rely on this court's decision in *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para. 35, that striking out a defence for failure to comply with a court's order is a severe remedy that should not generally be imposed as a remedy of first resort. This argument is contradicted by the procedural history of the motion: the motion judge adjourned the hearing of the motion to strike for two months to provide the appellants with time to comply with court orders. He found that they did not do so.

35 Second, the appellants argue that the motion judge erred by failing to consider whether a less extreme remedy would suffice. In fact, after the motion judge chronicled the history of the appellants' contempt, he specifically addressed the need to provide a remedy that is proportionate to the misconduct, expressing concern about turning the action into a default proceeding. Consequently, he made the order without prejudice to Cash House moving for leave to amend after satisfying the court that the contempt has been purged.

36 Third, the appellants argue that the motion judge erred in stating that the appellants were in contempt of two court orders, the Mareva Order and the December 4, 2015 order in aid of the Mareva Order. In fact, the appellants argue, they were only in contempt of the first of these orders.

37 It is difficult to see how this submission assists the appellants.

38 Fourth, the appellants argue that the motion judge misapprehended the requirement that he assess the merits of the defence in order to consider whether the interests of justice warranted another method of sanction, and improperly imposed an evidentiary burden on the appellants to establish the legitimacy of the defence.

39 The statement of defence and crossclaim, however, amounts to little more than a bare denial. In the context of an action where there has been a determination that the respondent

has adduced a strong *prima facie* case, the motion judge was justified in concluding that the merits of the defence were weak and that, in the absence of a full evidentiary record, "bald assertions" would not suffice. There was no misapprehension of the test here, and the motion judge placed no burden on the appellants to establish their defence. Indeed, as he observed, it was not the court's role to determine the viability of either the claims or any defence, but to assess whether striking the pleading was an appropriate sanction (para. 22).

40 Fifth, the appellants argue that the motion judge considered only the goal of sanctioning the appellants, and failed to consider the overarching objective that the Rules of Civil Procedure be interpreted so as to secure the just determination of each civil proceeding on its merits.

41 Again, there is no merit to this submission. Cash House is one among many defendants in the same action. Where one defendant among many does not comply with its procedural obligations, it hinders and delays the expeditious determination of the overall proceeding.

42 Finally, the appellants argue that the motion judge failed to give Cash House one last chance. Again, I would not give effect to this submission. The motion judge found that Cash House has a lengthy history of non-compliance with the Mareva Order. It received numerous warnings. The hearing of the motion to strike was adjourned for two months after the Contempt Order to allow for further time to comply. It did not do so. Even in striking the defence and crossclaim, Cash House has been permitted to move for leave to amend after it has complied. The motion judge did not err by not providing for further indulgence.

C. SUFFICIENCY OF REASONS

43 The appellants also appeal on the grounds that the reasons of the motion judge on both the Contempt Order and the motion to strike are inadequate, in that they do not explain why the motion judge decided the way that he did.

44 I would not give effect to this ground of appeal. With respect to the Contempt Order, the reasons, when read in conjunction with the written record that was before the court (including the endorsement of Ricchetti J., dated June 10, 2015), disclose all that is needed to be known for the purposes of appellate review, and for the purposes of enabling the appellants to understand their obligations. Reasons are given in context and must be understood in that context: *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3 (S.C.C.). The motion judge set out in detail the submissions of the appellants and the respondent. He accepted the arguments of the respondent as rationally superior to the arguments of the appellants and defeating those arguments. It was not necessary, in this context, that he do anything more than this.

45 Similarly, with respect to the motion to strike the appellants' statement of defence and crossclaim, I do not accept the appellants' argument that the reasons given by the motion

judge are inadequate. None of the five defects that the appellants allege have any merit, and I do not propose to address each individually. One example is sufficient to illustrate their tenor: the appellants ask how the motions judge could have concluded that the merits of the defence are weak. No one who has read the record, including the statement of defence and crossclaim and the endorsement of Ricchetti J., could be left with any doubt about the basis of the motion judge's conclusion.

D. CONTEMPT SANCTION — ERROR IN ORDERING A CUSTODIAL SENTENCE

46 The appellants argue that ordering a 90 day custodial sentence is grossly disproportionate for what it describes as a first instance of non-compliance. They further argue that they made massive efforts to comply with the extensive production obligations imposed.

47 The motion judge did not view the appellants' conduct as either a first instance of non-compliance or as an imperfect but well-intentioned attempt to comply with an onerous production obligation. He found that the appellants breached the Mareva Order continuously, even after the endorsement of Ricchetti J., service with the contempt motion, and after being found in contempt.

48 The motion judge was not impressed with the production efforts of the appellants. The appellants' production obligations under the Mareva Order were not satisfied, in the view of the motion judge, by simply dumping 1,000 boxes of documents on the respondent. These are not the records of an unsophisticated enterprise, but of a financial services corporation. The motion judge made no error, in my view, in requiring the appellants to provide a "comprehensive and detailed written inventory" of the documents contained in the 1,000 boxes.

49 It is important to note that the appellants made no proposal whatsoever as to how they would proceed to satisfy their obligations, and merely invited the respondent to consult with them. The motion judge found this to be insufficient. What the appellants describe as a mammoth task is hardly novel or unprecedented. At a minimum, the appellants ought to have put before the motion judge a plan from which it could have argued for an extension of time before the penalty hearing. It did little more than argue that the task was a large one, and that the respondent had not provided any assistance. The motion judge was accordingly unimpressed.

50 The motion judge made no error in principle: he did not, as the appellants argue, overemphasize punishment, or lose sight of the purpose of contempt sanctions, namely to secure compliance. To the contrary, the intermittent nature of the custodial sentence was expressly intended to facilitate compliance with disclosure obligations.

Costs appeal

51 The motion judge imposed an award of costs against the appellants on a full indemnity basis. The appellants appeal on the basis that they did not have an opportunity to make submissions on costs, and that this constituted a breach of natural justice. They ask this court to set aside the costs order.

52 As the respondents note, however, the costs award was imposed as a sanction for contempt, pursuant to rule 60.11(e). The quantum of the costs remains to be assessed. This penalty was available to the motion judge under rule 60.11(e). The requirement that costs be assessed provides the appellants with an opportunity to make submissions on quantum. I would not give effect to this ground of appeal.

DISPOSITION

53 I would dismiss the appeal. I would award the respondent costs in the amount of $15,000 inclusive of disbursements and HST.

Paul Rouleau J.A.:

I agree.

K. van Rensburg J.A.:

I agree.

Appeal dismissed.

TAB 10

2015 ONCA 488
Ontario Court of Appeal

PDM Entertainment Inc. v. Three Pines Creations Inc.

2015 CarswellOnt 9648, 2015 ONCA 488, [2015] O.J. No. 3420, 254 A.C.W.S. (3d) 825, 336 O.A.C. 156, 388 D.L.R. (4th) 478, 46 B.L.R. (5th) 1

PDM Entertainment Inc., Applicant (Respondent) and Three Pines Creations Inc. and Louise Penny, Respondents (Appellants)

J.C. MacPherson, Gloria Epstein, L.B. Roberts JJ.A.

Heard: June 12, 2015
Judgment: June 29, 2015
Docket: CA C60024

Counsel: Kenneth Prehogan, Hilary Book, for Appellants
M. Scott Martin, for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.19 Miscellaneous
Contracts
VII Construction and interpretation
VII.1 General principles
Equity
III Equitable doctrines
III.7 Relief against penalty and forfeiture
III.7.a General principles

APPEAL by parties from judgment regarding interpretation of contract for option rights to books.

***J.C. MacPherson J.A.*:**

A. Overview

1 The appellant, Louise Penny, is an award-winning Canadian mystery writer. In 2011, she optioned certain rights to her books to a television production company, the respondent PDM Entertainment Inc. ("PDM"). Through her company, the appellant Three Pines Creations Inc. ("Three Pines"), Ms. Penny granted PDM the option to purchase the rights to her works for the purpose of producing made-for-television movies.

2 The option agreement had an initial two-year term. It also provided for extensions. When PDM gave notice that it was invoking the extension clause, Ms. Penny and Three Pines asserted that PDM's rights under the agreement had ended.

3 The parties brought duelling applications, which the application judge heard together on January 22, 2015. He found for PDM the next day.

4 Ms. Penny and Three Pines appeal.

B. Facts

(1) The parties and events

5 Louise Penny is a wonderful writer. She is the author of a series of ten novels featuring Chief Inspector Armand Gamache of the Sûreté de Québec and the imaginary, bucolic Quebec village of Three Pines. These books are, in a word, delightful. (I have read them all, usually by a fireplace on Boxing Day.)

6 The first novel in the series, *Still Life*, was published in 2005. The second, *Dead Cold*, followed in 2007 and the tenth, *The Long Way Home*, in 2014. The novels have been a huge success; more than three million copies have been sold in 30 countries and 23 languages. They have appeared on the bestseller lists of the *Globe and Mail*, the *London Times* and the *New York Times*.

7 The novels have also achieved significant critical acclaim. Ms. Penny has won awards for her books, including the Arthur Ellis Award (Canada), the Dagger Award (United Kingdom) and the Agatha Award (United States). She is the only writer ever to have won the Agatha Award five times.

8 Three Pines is a Canadian company and the assignee of Ms. Penny's rights in the Gamache novels. Ms. Penny is its sole officer, director and shareholder.

9 PDM is an Ontario company that produces television programs. It was formed in 2011 by Phyllis Platt, Brian Dennis and Peter Moss, all of whom have substantial experience in the production of television movies.

10 In September 2011, PDM as "Producer" and Three Pines as "Owner" entered into an Option/Purchase Agreement ("Option Agreement"). It gave PDM an exclusive option to acquire certain rights in the Gamache novels, including the exclusive right to make made-for-television movies based on the novels.

11 Section 2.1 of the Option Agreement required PDM to pay Three Pines $16,000 for an option on an initial set of two books (the "First Set Option Fee"). PDM paid this fee.

12 The Option Agreement provides that the option for the initial two books terminates after two years unless extended:

> 2.2 Unless extended as provided for in Section 2.3 or Section 2.3B, the Option for the initial two Books (the "First Set Option") will terminate on the day that is 24 months from the date of execution of this Agreement (the "Initial First Set Option Period").

13 Sections 2.3 and 2.3B, which are at the heart of this litigation, enable PDM to extend the initial two-year term:

> 2.3 Provided that Producer remains in active development with respect to one or both Productions based on the initial two Books, Producer will be entitled to extend the Initial First Set Option Period for a further 12-month period (the "Extended First Set Option Period") upon payment to Owner of the sum of C$8,000 (the "First Set Option Extension Fee") on or before the last day of the Initial First Set Option Period. The First Set Option Extension Fee will not be applicable against the purchase price payable for any set of Books.
>
> B. Notwithstanding the foregoing, if the initial production order received by Producer is for one Production and not two, then, upon payment of the purchase price for the initial Book, Producer shall have the right to further extend the First Set Option Period with respect to the other Book that is the subject of the First Set Option upon payment of the sum of C$4,000 (the "First Set Additional Option Extension Fee") on or before the last day of the Extended First Set Option Period. The First Set Additional Option Extension Fee will not be applicable against the purchase price payable for that remaining Book.

14 Section 5.1B was added to the Option Agreement pursuant to an Amending/ Confirmation Agreement executed in 2012. It provides, in part:

> 5.1B ... if despite the best efforts of Producer the initial production order received by Producer for the initial set of two Books is for only one Production and not two as contemplated in Section 5.1, Producer shall have the right to exercise the Option for the initial Book ....

> Provided that Producer has paid Owner the sum of C$16,000 representing the First Set Option Fee as contemplated in Section 2.1 above, Producer shall be entitled to extend the First Set Option Period for the other Book that is the subject of the First Set Option as contemplated in Section 2.3B above.

15 The Option Agreement also gives PDM 'rolling rights' to cover additional sets of Gamache novels. (When the Option Agreement was signed, there were six novels in the series. There are now ten.)

16 In October 2012, PDM purchased the television movie rights to *Still Life*, the first book in the Gamache series, and paid Three Pines $104,625 in accordance with s. 5.1(i) of the Option Agreement. The movie aired on CBC on September 15, 2013. It was the highest rated television movie for the year on CBC and was nominated for several Directors Guild of Canada Awards including best television movie and best director (Peter Moss). CBC funded the preparation of a script for a movie based on the second Gamache novel, *Dead Cold*, but ultimately did not order the production of the movie.

17 Thus, in September 2013, as the second anniversary of the Option Agreement neared, PDM had exercised its option to purchase the rights to the first two books in the Gamache series — namely, *Still Life* and *Dead Cold*. It had purchased the television movie rights to *Still Life* and produced the movie. It had not taken these additional steps with respect to *Dead Cold*.

18 On September 4, 2013, Brian Dennis of PDM sent an email to Ms. Penny's agent giving notice that PDM was extending the Option Agreement pursuant to s. 2.3B:

> I am writing to notify you that, in accordance with Clause 2.3B ... we are extending the First Set Option Period for one more year.
>
> Pursuant to Clause 9.1 of the Agreement, we made payment today by electronic transfer of $4,000 Cdn to the Knight Hall Agency.

19 A year later, in September 2014, PDM still had not finalized a production order for *Dead Cold*. On September 18, Mr. Dennis sent an email purporting to extend the Option Agreement for a fourth year:

> I am writing to notify you that, in accordance with Clause 2.3B ... we are extending the Extended First Set Option Period with respect to Dead Cold for one more year.
>
> Pursuant to Clause 9.1 of the Agreement, we made payment today via electronic transfer of $4,000 Cdn to the Knight Hall Agency.

20 On October 8, 2014, Ms. Penny's agent, Knight Hall Agency, sent an email to Mr. Dennis informing PDM that the agency was not accepting PDM's proposed extension of the Option Agreement:

> Upon legal advice, we have determined that PDM holds no such right to any extension of the Extended First Set Option Period.
>
> More specifically, when PDM gave notice on September 5, 2013, that it was extending the First Set Option Period it did not pay C$8,000 for that extension as required by clause 2.3. PDM's notice at that time specifically invoked clause 2.3B to permit PDM to extend the First Set Option Period by payment of only C$4,000. In doing so, PDM interpreted clause 2.3B in the same manner in which we too had understood it: as permitting the reduction by half of the First Set Option Extension Fee since PDM had then produced one of the two titles in the first set.
>
> Clause 2.3B was only intended for the purpose to which it has already been invoked. It was never intended to accord, and is not drafted in such a way as to accord, any option term additional to the Extended First Option Period.

21 In the same email, Ms. Penny's agent also declared that PDM had no further right to purchase *Dead Cold* or any other books in the Gamache series. The agency returned PDM's payment.

(2) The application judge's decision

22 On November 10, 2014, PDM brought an application seeking a declaration that the Option Agreement remained in effect and, if necessary, granting relief from forfeiture due to its payment of $4,000, rather than the $8,000 required by s. 2.3 of the Option Agreement.

23 On December 22, 2014, Three Pines commenced its own application seeking a declaration that any option rights PDM may have had pursuant to the Option Agreement, save for the option with respect to *Still Life* that had already been exercised, had ended.

24 The application judge heard the duelling applications together on January 22, 2014. He released brief reasons (11 paragraphs) the next day. He accepted PDM's interpretation of the Option Agreement and concluded that "the option agreement allows for an extension of a fourth year by the clearest language and which makes the most commercial sense."

25 The application judge also granted PDM relief from forfeiture. He noted that, if PDM's interpretation of ss. 2.3 and 2.3B of the Option Agreement was correct, then PDM had underpaid Three Pines by $4,000 on the first extension. The question thus became: should relief from forfeiture be granted and PDM permitted to pay an additional $4,000 to comply

with s. 2.3 of the Option Agreement? The application judge answered this question in the affirmative. He reasoned:

> I accept the suggestion that there is no restriction on the use of the equitable relief. I would suggest that the gross disproportionate outcome, if no relief is granted, is a significant part of the context to be considered. It is a comparison of the two values: a payment of $4,000 and the loss of opportunity to create and produce a very valuable and successful film property.
>
> I agree that the relief should be used sparingly however, this is ... a case where it should appropriately be used.
>
> I agree with the factors set out in the applicant's factum — good faith on the part of PDM, the breach of the options was trivial and based on a common mistake, there will be significant consequences for PDM.

26 Three Pines and Ms. Penny appeal.

C. Issues

27 The appellants raise three issues on appeal and frame them as follows:

> (1) Did the application judge provide adequate reasons for judgment?
>
> (2) Did the application judge err in finding that the Option Agreement provides for two one-year extensions of the Initial First Set Option Period?
>
> (3) Did the application judge exceed his jurisdiction or otherwise err in granting the respondent relief from forfeiture?

D. Analysis

(1) Sufficiency of reasons

28 The appellants contend that the application judge's reasons are "wholly inadequate". They attach this description to the application judge's reasons on both the contract and relief from forfeiture issues.

29 On the contract issue, the appellants submit that, although the application judge held that the Option Agreement in the "clearest language" permitted an extension for a fourth year, he did not say anything about the actual wording of the two key provisions, ss. 2.3 and 2.3B. Nor did he even mention a third relevant provision, s. 5.1B.

30 On the relief from forfeiture issue, the appellants assert that, in weighing the competing interests relating to this discretionary equitable remedy, the application judge disregarded or minimized the creative and reputational importance of the Option Agreement to Ms. Penny and Three Pines.

31 I do not accept this submission. I acknowledge that the application judge's reasons on the contract issue are conclusory and that his reasons on the relief from the forfeiture issue are terse. They do not, however, cross the line and fall into the category of 'insufficient' as described in the leading cases: see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (S.C.C.); *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.); *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3 (S.C.C.); *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.).

32 I begin with an important contextual point. After the two applications were filed, they were scheduled for hearing on an urgent basis on the first available date that permitted time for responding materials, examinations and facta. In its Notice of Application, PDM said, under a separate heading titled "Urgency":

> (eee) [I]t is imperative that the Application be heard on an urgent basis. PDM has funding applications that are presently being considered and, if there is uncertainty as to the ownership of the rights, the funding applications may have to be withdrawn[.]

33 Moreover, at the conclusion of argument on January 22, 2015, PDM's counsel advised the application judge of the urgency of the matter and requested that, if possible, a decision be issued quickly. There is no indication that the appellants took issue with that request or with PDM's justification therefor. The application judge released his decision the next morning, on January 23, 2015. He gave the parties what he had been asked for: an early hearing and an immediate decision.

34 In *C. (R.) v. McDougall*, at para. 98, Rothstein J. summarized the rationales underlying the duty to give adequate reasons:

> (1) to justify and explain the result;
>
> (2) to tell the losing party why he or she lost;
>
> (3) to provide for informed consideration of the grounds of appeal; and
>
> (4) to satisfy the public that justice has been done.

35 In my view, the application judge's reasons in this case meet this standard.

36 First, they justify and explain the result. Although the application judge's reasons on the contract issue are conclusory, the two main provisions in issue are quite short. Moreover, the record before the court was comprehensive, the parties having advanced clear — and opposing — positions: see *Hill*, at para. 101. On the relief from forfeiture issue, the application judge stated explicitly that he agreed with the arguments in PDM's factum, including PDM's good faith, the minor nature of PDM's breach of the Option Agreement — that is, paying $4,000 instead of the required $8,000 — and PDM's great loss if it were not granted any relief, namely, "the loss of opportunity to create and produce a very valuable and successful film property."

37 Second, from reading the application judge's reasons, Three Pines and Ms. Penny would know why they lost. The application judge did not agree with their interpretation of the contract and thought that PDM deserved equitable relief so that the contract could continue to operate.

38 Third, the application judge's reasons, coupled with the record (especially the terms of the Option Agreement) and the parties' excellent facta and oral submissions provide for this court's "informed consideration of the grounds of appeal".

39 Fourth, there is nothing to suggest that a reasonable member of the public would doubt that justice has been done. The Superior Court arranged an expedited hearing, the application judge heard submissions for several hours and he rendered a decision the next day. The public could be satisfied that justice was done.

(2) The contract issue

40 The appellants contend that the application judge erred in interpreting ss. 2.3 and 2.3B of the Option Agreement which, for ease of reference, I set out again:

> 2.3 Provided that Producer remains in active development with respect to one or both Productions based on the initial two Books, Producer will be entitled to extend the Initial First Set Option Period for a further 12-month period (the "Extended First Set Option Period") upon payment to Owner of the sum of C$8,000 (the "First Set Option Extension Fee") on or before the last day of the Initial First Set Option Period. The First Set Option Extension Fee will not be applicable against the purchase price payable for any set of Books.
>
> B. Notwithstanding the foregoing, if the initial production order received by Producer is for one Production and not two, then, upon payment of the purchase price for the initial Book, Producer shall have the right to further extend the First Set Option Period with respect to the other Book that is the subject of the First Set Option upon payment of the

> sum of C$4,000 (the "First Set Additional Option Extension Fee") on or before the last day of the Extended First Set Option Period. The First Set Additional Option Extension Fee will not be applicable against the purchase price payable for that remaining Book.

41 In my view, the appellants accurately and succinctly state the crucial issue in their factum, at para. 52:

> The difference of interpretation between the parties may be simply stated: Was PDM permitted to extend the Option Agreement (a) pursuant to s. 2.3 **and** s. 2.3B, or (b) pursuant to ss. 2.3 **or** 2.3B? [Emphasis in original.]

42 The Option Agreement is a contract. The respondent asserts that its interpretation presents a question of mixed fact and law because, as Rothstein J. stated in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) ("*Sattva*"), at para. 55, "the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific." Accordingly, the general rule "in favour of deference to first instance decision-makers on points of contractual interpretation" (*Sattva*, at para. 52) applies on this appeal.

43 I do not accept this submission. In his reasons, the application judge did not provide any analysis of ss. 2.3 and 2.3B of the Option Agreement; rather, all he said was, "I am of the view that the option agreement allows for an extension of a fourth year by the clearest language". He said nothing about s. 5.1 of the Option Agreement, on which the appellants heavily relied. I also observe that the decision in this case was made in relation to two applications, not a trial; that there are no credibility issues; and that there are only two or perhaps three contractual provisions that need to be considered. Taking these circumstances together, I think it is appropriate to review the decision under appeal on a standard of correctness.

44 The appellants advance four arguments in support of their position that ss. 2.3 and 2.3B of the Option Agreement are alternative, not cumulative, sources of an extension right.

45 First, the appellants rely on s. 2.2 of the Option Agreement:

> Unless extended as provided for in Section 2.3 **or** Section 2.3B, the Option for the initial two Books (the "First Set Option") will terminate on the first day that is 24 months from the date of execution of this Agreement (the Initial First Set Option Period"). [Emphasis added.]

The appellants contend that the word "or" is disjunctive in this provision; PDM can extend its option, but only once.

46 I am not persuaded by this submission. In my view, the word "or" in s. 2.2 cannot be interpreted in isolation from ss. 2.3 and 2.3B. "Or" signals only that there are, depending on

the facts on the ground with respect to development, two possible routes to an extension. PDM could initially choose the s. 2.3 route near the end of the original contract period; the s. 2.3B route allows for a potential second extension a year later.

47 Second, the appellants rely on the phrase "[n]otwithstanding the foregoing" in s. 2.3B of the Option Agreement. They say that this phrase indicates that s. 2.3B is an alternative, not an addition, to the extension route set out in s. 2.3.

48 Again, I disagree. When the words of s. 2.3B are considered as a whole, it becomes clear that all the "notwithstanding" phrase does is provide a transition from the extension route in s. 2.3 to the extension route in s. 2.3B in circumstances where PDM has moved from no production order to an initial production order.

49 Third, the appellants submit that s. 5.1B, which was added to the Option Agreement in 2012, supports its position. For ease of reference, I set out the relevant part of s. 5.1B again:

> ... Provided that Producer has paid Owner the sum of C$16,000 representing the First Set Option Fee as contemplated in Section 2.1 above, Producer shall be entitled to extend the First Set Option Period for the other Book that is the subject of the First Set Option as contemplated in Section 2.3B above.

According to the appellants, this provision makes it clear that where PDM has obtained the rights to produce a movie relating to one book, but not the second, s. 2.3B (and not s. 2.3) is to be used to extend the Initial First Set Option Period.

50 I do not accept this submission. In my view, s. 5.1B speaks to the timing and circumstances (one movie moving forward) relating to the exercise of the extension right in s. 2.3B. Section 5.1B says nothing about whether that right is alternative or cumulative to the extension right in s. 2.3 of the Option Agreement. Rather, s. 5.1B expressly states that the Producer's entitlement to extend is "as contemplated in s. 2.3B", which provides for a further extension during the Extended First Set Option Period.

51 Fourth, the appellants submit that, since part of the basic test for contractual interpretation is "to ascertain the objective intentions of the parties" (*Sattva*, at para. 55), PDM's own actions support the appellants' reading of the provisions at issue. The appellants note that PDM sought legal advice when it extended its option in 2013. Based on that advice, it specifically invoked s. 2.3B of the Option Agreement, not s. 2.3. It paid a fee of $4,000, not $8,000. In short, say the appellants, PDM knew that there were two potential routes for extending its option. It sought and obtained legal advice in choosing between them. It accepted and acted on that advice. PDM's eyes were wide open throughout the extension process and it arrived, in 2013, at an interpretation of the contract opposite to the one it advanced before the application judge in January 2015.

52 I agree with this submission. It is a strong point in the appellants' favour.

53 However, in the end, I think that the wording of ss. 2.3 and 2.3B, taken together, supports the respondent's interpretation of the Option Agreement. Section 2.3 provides for an extension of the contract into a third year. Section 2.3B provides for a further extension, albeit in more limited circumstances.

54 Section 2.3 applies when, after almost two years of effort, the Producer (PDM) is, at a minimum, "in active development" with respect to at least one of the two books in its First Set Option. In 2013, PDM was easily inside that requirement; it had developed the project to the point of purchasing the movie rights to *Still Life* from Three Pines for $104,625. So PDM could have invoked s. 2.3 at this juncture to obtain an extension of the Option Agreement for a third year. [1]

55 To obtain a further extension thereafter, under s. 2.3B, it would not have been enough for PDM merely to have been engaged in the "active development" of the project. Rather, PDM would have needed to have received an initial production order to trigger the extension. This was precisely the lay of the land in September 2014; PDM had obtained a production order from CBC. Section 2.3B had been triggered.

56 What, then, does s. 2.3B say?

57 In my view, the wording of s. 2.3B strongly supports an additional extension. It provides the Producer with the right to "further extend" the First Set Option Period with respect to the second book in the First Set Option. It requires payment of a fee of $4,000 and calls it the "First Set Additional Option Extension Fee". It requires that the option be exercised "on or before the last day of the Extended First Set Option Period". All of these words and titles — especially the words "further" and "[a]dditional" and the explicit link to the expiration of the third- year extension in s. 2.3 — support the conclusion that, against the backdrop of a major new development in year three (a production order), s. 2.3B allows an extension of the Option Agreement for a fourth year.

58 Finally, I think there is commercial sense in the above interpretation. Section 2.3 deals with a commercial scenario in which, after two years under the Option Agreement, the Producer has engaged in genuine active development of the project but has not obtained a production order. Section 2.3 gives the Producer a third year to try to fulfil its contractual obligations to the Owner. Section 2.3B deals with a different factual scenario — one in which, by the end of the third year, the Producer has obtained a production order for a movie relating to one of the two books. In other words, the Producer has achieved a huge success, not only for itself but also for the Owner. Section 2.3B, as interpreted above, recognizes this success

and grants the Producer a second (and final) extension to try to obtain a production order for a movie relating to the second book. This strikes me as commercially reasonable and fair.

59 For these reasons, my answer to the clear and succinct question posed by the appellants in their factum is: PDM was permitted to extend the Option Agreement pursuant to s. 2.3 and s. 2.3B, cumulatively. The application judge correctly interpreted the Option Agreement.

(3) Relief from forfeiture

60 PDM now admits that it erred in citing s. 2.3B as the basis for the first extension of the Option Agreement. It sought relief from forfeiture to avoid the harsh consequences of this error. The application judge exercised his equitable discretion to grant that request.

61 The appellants submit that, in doing so, he erred. They say that the application judge did not have jurisdiction to grant relief from forfeiture because this remedy can only be granted where the party seeking relief has breached a contract and the breach gives rise to a right to forfeiture essentially to secure payment of money. PDM did not breach the Option Agreement; it chose to extend the option under a contractual provision (s. 2.3B) which caused it to lose its extension right a year earlier than if it had extended the option under a different provision (s. 2.3).

62 I do not accept this essentially technical argument. A court has a broad discretion to award relief from forfeiture under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

> A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

63 Relief from forfeiture is available in a wide range of cases, including cases involving a failure to renew a lease: see, for example, *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, [1993] O.J. No. 2801 (Ont. C.A.), at para. 9; *1383421 Ontario Inc. v. Ole Miss Place Inc.* (2003), 67 O.R. (3d) 161 (Ont. C.A.), at para. 80. I am not prepared to draw a bright line distinction between 'breach' and 'loss' to avoid considering the merits of granting relief from forfeiture in this case.

64 The appellant contends that, even if the application judge had the jurisdiction to grant relief from forfeiture, he erred in doing so.

65 The test for granting relief from forfeiture was recently restated by LaForme J.A. in *Kozel v. Personal Insurance Co.*, 2014 ONCA 130, 119 O.R. (3d) 55 (Ont. C.A.), at para. 31:

> In exercising its discretion to grant relief from forfeiture, a court must consider three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the

disparity between the value of the property forfeited and the damage caused by the breach.

66 Although his reasons are brief, the application judge touched on all of these factors. He found that PDM acted in good faith in the contract extension process; that its 'breach' (mistake) — the payment of $4,000 instead of $8,000 — was trivial in relation to a contract on which it had already paid well over $100,000; and that forfeiture would be a grossly disproportionate outcome in light of PDM's mistake — namely, "the loss of opportunity to create and produce a very valuable and successful film property."

67 Relief from forfeiture is a discretionary equitable remedy. A judge's decision in this domain is entitled to considerable deference. I see no basis for interfering with the application judge's exercise of discretion in this case.

E. Disposition

68 I would dismiss the appeal. The respondent is entitled to its costs of the appeal, which I would fix at $20,000, inclusive of disbursements and HST.

Gloria Epstein J.A.:

I agree

L.B. Roberts J.A.:

I agree

Appeal dismissed.

Footnotes

1 In its September 2013 email to Ms. Penny's agent, set out above, PDM actually stated that it was extending the Option Agreement pursuant to s. 2.3B, not s. 2.3. PDM now acknowledges that this was an error. This is the basis for PDM's claim for relief from forfeiture.

TAB 11

2007 SCC 41
Supreme Court of Canada

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board

2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 2007 SCC 41, [2007] 3 S.C.R. 129, [2007] R.R.A. 817, [2007] S.C.J. No. 41, 160 A.C.W.S. (3d) 573, 230 O.A.C. 253, 285 D.L.R. (4th) 620, 368 N.R. 1, 40 M.P.L.R. (4th) 1, 50 C.C.L.T. (3d) 1, 50 C.R. (6th) 279, 64 Admin. L.R. (4th) 163, 87 O.R. (3d) 397 (note), J.E. 2007-1867

Jason George Hill (Appellant / Respondent on cross-appeal) and Hamilton-Wentworth Regional Police Services Board, Jack Loft, Andrea McLaughlin, Joseph Stewart, Ian Matthews and Terry Hill (Respondents / Appellants on cross-appeal) and Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Canadian Police Association and Police Association of Ontario (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: November 10, 2006
Judgment: October 4, 2007 *
Docket: 31227

Proceedings: affirming *Hill v. Hamilton-Wentworth Regional Police Services Board* (2005), 259 D.L.R. (4th) 676, 33 C.R. (6th) 269, [2005] O.J. No. 4045, 76 O.R. (3d) 481, 2005 CarswellOnt 4589, 36 C.C.L.T. (3d) 105, 202 O.A.C. 310 (Ont. C.A.)**Proceedings: affirming *Hill v. Hamilton-Wentworth Regional Police Services Board* (2003), [2003] O.J. No. 3847, 66 O.R. (3d) 746, 2003 CarswellOnt 3369 (Ont. S.C.J.)**

Counsel: Sean Dewart, Louis Sokolov, Charlene Wiseman for Appellant / Respondent on cross-appeal
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Mark J. Sandler, Joseph Di Luca for Intervener, Criminal Lawyers' Association (Ontario)
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Ian Roland, Emily Lawrence for Interveners Canadian Police Association, Police Association of Ontario

Subject: Torts; Public; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.5 Actions in tort
VII.5.a Specific actions
VII.5.a.iii Other actions in negligence
Civil practice and procedure
XX Trials
XX.4 Conduct of trial
XX.4.i Powers and duties of trial judge
XX.4.i.ii Giving reasons for judgment
Law enforcement agencies
I Police
I.2 Duties, rights and liabilities of officers
I.2.c Conduct of officers
I.2.c.vii Negligence
Torts
XVI Negligence
XVI.2 Duty and standard of care
XVI.2.b Standard of care
Torts
XVI Negligence
XVI.2 Duty and standard of care
XVI.2.b Standard of care

APPEAL by plaintiff from judgment reported at *Hill v. Hamilton-Wentworth Regional Police Services Board* (2005), 259 D.L.R. (4th) 676, 33 C.R. (6th) 269, [2005] O.J. No. 4045, 76 O.R. (3d) 481, 2005 CarswellOnt 4589, 36 C.C.L.T. (3d) 105, 202 O.A.C. 310 (Ont. C.A.), dismissing his appeal from dismissal of action in tort against police; CROSS-APPEAL by defendants from finding that there is tort of negligent investigation.

POURVOI du demandeur à l'encontre d'une décision publiée à *Hill v. Hamilton-Wentworth Regional Police Services Board* (2005), 259 D.L.R. (4th) 676, 33 C.R. (6th) 269, [2005] O.J. No. 4045, 76 O.R. (3d) 481, 2005 CarswellOnt 4589, 36 C.C.L.T. (3d) 105, 202 O.A.C. 310 (Ont. C.A.), ayant rejeté son appel interjeté à l'encontre du rejet de son action en responsabilité délictuelle contre des agents de police; POURVOI INCIDENT des défendeurs à l'encontre de la conclusion selon laquelle il existe un délit pour enquête négligente.

McLachlin C.J.C.:

I. Introduction

1 The police must investigate crime. That is their duty. In the vast majority of cases, they carry out this duty with diligence and care. Occasionally, however, mistakes are made. These mistakes may have drastic consequences. An innocent suspect may be investigated, arrested and imprisoned because of negligence in the course of a police investigation. This is what Jason George Hill, appellant in the case at bar, alleges happened to him.

2 Can the police be held liable if their conduct during the course of an investigation falls below an acceptable standard and harm to a suspect results? If so, what standard should be used to assess the conduct of the police? More generally, is police conduct during the course of an investigation or arrest subject to scrutiny under the law of negligence at all, or should police be immune on public policy grounds from liability under the law of negligence? These are the questions at stake on this appeal.

3 I conclude that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

II. Facts and Procedural History

4 This case arises out of an unfortunate series of events which resulted in an innocent person being investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit.

5 Ten robberies occurred in Hamilton between December 16, 1994 and January 23, 1995. The *modus operandi* in all of the robberies seemed essentially the same. Eyewitnesses provided similar descriptions of the suspect. The police, relying on similarities in the *modus operandi* and eyewitness descriptions, concluded early on in the investigation that the same person had committed all the robberies, and labelled the perpetrator "the plastic bag robber".

6 The appellant, Jason George Hill, became a suspect in the course of the investigation of the "plastic bag" robberies. The police investigated. They released his photo to the media, and conducted a photo lineup consisting of the aboriginal suspect Hill and 11 similar looking Caucasian foils. On January 27, 1995, the police arrested Hill and charged him with 10 counts of robbery. The evidence against him at that point included: a Crime Stoppers tip; identification by a police officer based on a surveillance photo; several eyewitness identifications (some tentative, others more solid); a potential sighting of Hill near the site of a robbery by a police officer; eyewitness evidence that the robber appeared to be aboriginal (which Hill was); and the belief of the police that a single person committed all 10 robberies.

7 At the time of the arrest, the police were in possession of potentially exculpatory evidence, namely, an anonymous Crime Stoppers tip received on January 25, 1995 suggesting that two Hispanic men ("Frank" and "Pedro") were the perpetrators. As time passed, other exculpatory evidence surfaced. Two similar robberies occurred while Hill was in custody. The descriptions of the robber and the *modus operandi* were similar to the original robberies, except for the presence of a threat of a gun in the last two robberies. The police received a second Crime Stoppers tip implicating "Frank", which indicated that "Frank" looked similar to Jason George Hill and that "Frank" was laughing because Hill was being held responsible for robberies that Frank had committed. The police detective investigating the last two robberies (Detective Millin) received information from another officer that a Frank Sotomayer could be the robber. He proceeded to gather evidence and information which tended to inculpate Sotomayer — that Sotomayer and Hill looked very much alike, that there was evidence tending to corroborate the credibility of the Crime Stoppers tip implicating "Frank", and that photos from the first robberies seemed to look more like Sotomayer than Hill. Information from this investigation of the later robberies was conveyed to the detective supervising the investigation of the earlier robberies (Detective Loft).

8 Two of the charges against Hill were dropped in response to this new evidence, the police having concluded that Sotomayer, not Hill, had committed those robberies. However, the police did not drop all of the charges.

9 Legal proceedings against Hill in relation to the remaining eight charges began. Two more charges were withdrawn by the Crown during the preliminary inquiry because a witness testified that Hill was not the person who robbed her. Five more charges were withdrawn by

the Assistant Crown Attorney assigned to prosecute at trial. A single charge remained, and the Crown decided to proceed based on this charge, largely because two eyewitnesses, the bank tellers, remained steadfast in their identifications of Hill.

10 Hill stood trial and was found guilty of robbery in March 1996. He successfully appealed the conviction based on errors of law made by the trial judge. On August 6, 1997, his appeal was allowed and a new trial was ordered. Hill was ultimately acquitted of all charges of robbery on December 20, 1999.

11 To summarize, Hill first became involved in the investigation as a suspect in January of 1995 and remained involved in various aspects of the justice system as a suspect, an accused, and a convicted person, until December of 1999. Within this period, he was imprisoned for various periods totalling more than 20 months, although not continuously.

12 Hill brought civil actions against the police (the Hamilton-Wentworth Regional Police Services Board and a number of individual officers) and the Crown prosecutors involved in his preliminary inquiry and trial. The actions against some of the individual officers and all of the Crown prosecutors were discontinued before trial. The action against the remaining defendants was brought on the basis of negligence, malicious prosecution, and breach of rights protected by the *Canadian Charter of Rights and Freedoms*. This appeal is concerned with the negligence claim.

13 Hill alleges that the police investigation was negligent in a number of ways. He attacks the identifications by the two bank tellers on the ground that they were interviewed together (not separately, as non-mandatory guidelines suggested), with a newspaper photo identifying Hill as the suspect on their desks, and particularly objects to the methods used to interview witnesses and administer a photo lineup. He also alleged that the police failed to adequately reinvestigate the robberies when new evidence emerged that cast doubt on his initial arrest.

14 At trial, Marshall J. in the Ontario Superior Court of Justice held that the police were not liable in negligence ((2003), 66 O.R. (3d) 746 (Ont. S.C.J.)). In his view, the conduct of the police did not breach the standard of care of a reasonably competent professional in like circumstances; the police had acted in the frenzy of the moment, in circumstances where there was no recognized police procedure at the time, and it would be "facile hindsight" to conclude that they were negligent (para. 75). The trial judge expressed considerable sympathy for Hill and found frailties in the police evidence. Nevertheless, he concluded that the standard of care that would be expected of the reasonable officer at that time was met (paras. 75-76).

15 Hill appealed. The Court of Appeal unanimously held that there is a tort of negligent investigation and that the appropriate standard of care is the reasonable officer in like circumstances, subject to qualification at the point of arrest when the standard of care is tied to the standard of reasonable and probable grounds ((2005), 76 O.R. (3d) 481 (Ont. C.A.)).

However, the Court of Appeal split on the application of the tort of negligent investigation to the facts.

16 A majority of three (*per* MacPherson J.A. (MacFarland and Goudge JJ.A. concurring)) held that the standard of care was not breached and that the police should not be held liable in negligence. In the view of the majority, the impugned elements of the investigation pre-arrest complied with the standard of care. In particular, the majority was not prepared to find the photo lineup negligent. In light of the lack of uniform rules or procedures relating to photo lineups at the time, it was not clear that the police failed to do what the reasonable officer would have done in conducting the lineup as they did. Further, it was not established that the photo lineup was structurally biased. Nor was the failure to reinvestigate negligent. First, since "Hamilton is a fairly large city with many bank robberies", it was reasonable that the police's knowledge that later robberies were committed by Sotomayer did not cast doubt on the earlier arrest of the appellant (para. 112). Second, it was reasonable not to connect information relating to later robberies to the earlier robberies for which Hill was arrested because the later robberies involved a gun and the earlier ones did not. Third, police did take significant actions in response to new information, including dropping some of the charges against Hill. Fourth, some key evidence against Hill remained unchanged even after Sotomayer was arrested for some of the "plastic bag robberies", including some of the eyewitness identifications. Finally, the ultimate decision to proceed to trial was made by the Crown prosecutor, not the police.

17 In dissent, Feldman and LaForme JJ.A. found aspects of the impugned police conduct constituted negligent failure to reinvestigate. They concluded that the trial judge had made errors of law and palpable and overriding errors of fact, in concluding that the photo lineup and failure to reinvestigate were not negligent. A photo lineup consisting of one aboriginal person and 11 Caucasians is "*prima facie* potentially structurally biased with obvious potential for unfairness" and thus "falls below the standard of care required of police" (para. 156). Feldman and LaForme JJ.A. also found that the police had not pursued a number of pieces of evidence which could potentially have exculpated Hill (paras. 144 ff.).

18 Hill appeals to this Court, contending that the majority of the Court of Appeal erred in finding that the police investigation leading to his arrest and prosecution was not negligent. The police cross-appeal, arguing that there is no tort of negligent investigation in Canadian law.

III. Analysis

A. The Tort of Negligent Investigation

1. Duty of Care

19 The issue at this stage is whether the law recognizes a duty of care on an investigating police officer to a suspect in the course of investigation. This matter is not settled in Canada. Lower courts have divided and this Court has never considered the matter. We must therefore ask whether, as a matter of principle, a duty of care should be recognized in this situation.

20 The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.), at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80 (S.C.C.), at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (S.C.C.), at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18 (S.C.C.), at para. 47.)

(a) Does the Relationship Establish a *Prima Facie* Duty of Care?

21 The purpose of the inquiry at this stage is to determine if there was a relationship between the parties that gave rise to a legal duty of care.

22 The first element of such a relationship is foreseeability. In the foundational case of *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), Lord Atkin stated:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. ...Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> [Emphasis added; p. 580.]

Lord Atkin went on to state that each person "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). Thus the first question in determining whether a duty in negligence is owed is whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.

23 However, as acknowledged in *McAlister (Donoghue)* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To

impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?

24 Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), cited in *Cooper*, at para. 35).

25 Proximity may be seen as providing an umbrella covering types of relationships where a duty of care has been found by the courts. The vast number of negligence cases proceed on the basis of a type of relationship previously recognized as giving rise to a duty of care. The duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client — these are but a few of the relationships where sufficient proximity to give rise to a *prima facie* duty of care is recognized, provided foreseeability is established. The categories of relationships characterized by sufficient proximity to attract legal liability are not closed, however. From time to time, claims are made that relationships hitherto unconsidered by courts support a duty of care giving rise to legal liability. When such cases arise, the courts must consider whether the claim for sufficient proximity is established. If it is, and the *prima facie* duty is not negated for policy reasons at the second stage of the *Anns* test, the new category will thereafter be recognized as capable of giving rise to a duty of care and legal liability. The result is a concept of liability for negligence which provides a large measure of certainty, through settled categories of liability — attracting relationships, while permitting expansion to meet new circumstances and evolving conceptions of justice.

26 In this case, we are faced with a claim in negligence against persons in a type of relationship not hitherto considered by the law — the relationship between an investigating police officer and his suspect. We must therefore ask whether, on principles applied in previous cases, this relationship is marked by sufficient proximity to make the imposition of legal liability for negligence appropriate.

27 Before moving on to the analysis of proximity in depth, it is worth pausing to state explicitly that this judgment is concerned only with a very particular relationship — the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the *Charter* and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person. It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law. Further, I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See *Odhavji* and *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Gen. Div.).) I note that *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve these disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar.

28 Having said this, I proceed to consider whether there is sufficient proximity between a police officer and a suspect that he or she is investigating to establish a *prima facie* duty of care.

29 The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection between the actions of the wrongdoer and the victim may exist where there is

a personal relationship between alleged wrongdoer and victim. However, it may also exist where there is no personal relationship between the victim and wrongdoer. In the words of Lord Atkin in *McAlister (Donoghue)*:

> [A] duty to take due care [arises] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.
>
> [Emphasis added; p. 581.]

30 While not necessarily determinative, the presence or absence of a personal relationship is an important factor to consider in the proximity analysis. However, depending on the case, it may be necessary to consider other factors which may bear on the question of whether the relationship between the defendant and plaintiff is capable in principle of supporting legal liability: *Cooper*, at para. 37.

31 In accordance with the usual rules governing proof of a cause of action, the plaintiff has the formal onus of establishing the duty of care: *Odhavji* and *Childs*, at para. 13, should not be read as changing this fundamental rule. Uncertainty may arise as to which factors fall to be considered at this part of the stage one analysis, and which should be reserved to the second stage "policy" portion of the analysis. The principle that animates the first stage of the *Anns* test — to determine whether the relationship is in principle sufficiently close or "proximate" to attract legal liability — governs the nature of considerations that arise at this stage. "The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant", for example expectations, representations, reliance and the nature of the interests engaged by that relationship: *Cooper*, at paras. 30 (emphasis added) and 34. By contrast, the final stage of *Anns* is concerned with "residual policy considerations" which "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37. In practice, there may be overlap between stage one and stage two considerations. We should not forget that stage one and stage two of the *Anns* test are merely a means to facilitate considering what is at stake. The important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered.

32 In this appeal, we are concerned with the relationship between an investigating police officer and a suspect. The requirement of reasonable foreseeability is clearly made out and

poses no barrier to finding a duty of care; clearly negligent police investigation of a suspect may cause harm to the suspect.

33 Other factors relating to the relationship suggest sufficient proximity to support a cause of action. The relationship between the police and a suspect identified for investigation is personal, and is close and direct. We are not concerned with the universe of all potential suspects. The police had identified Hill as a particularized suspect at the relevant time and begun to investigate him. This created a close and direct relationship between the police and Hill. He was no longer merely one person in a pool of potential suspects. He had been singled out. The relationship is thus closer than in *Cooper* and *Edwards*. In those cases, the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who, at a further remove, interacted with the claimants.

34 A final consideration bearing on the relationship is the interests it engages. In this case, personal representations and consequent reliance are absent. However, the targeted suspect has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life. These high interests support a finding of a proximate relationship giving rise to a duty of care.

35 On this point, I note that the existing remedies for wrongful prosecution and conviction are incomplete and may leave a victim of negligent police investigation without legal recourse. The torts of false arrest, false imprisonment and malicious prosecution do not provide an adequate remedy for negligent acts. Government compensation schemes possess their own limits, both in terms of eligibility and amount of compensation. As the Court of Appeal pointed out, an important category of police conduct with the potential to seriously affect the lives of suspects will go unremedied if a duty of care is not recognized. This category includes "very poor performance of important police duties" and other "non-malicious category of police misconduct" (paras. 77-78). To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies.

36 The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest. Recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has had more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness

can be a significant cause of wrongful convictions. (See the Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001), at p. 10 ("Cory Report"); the Right Honourable Antonio Lamer, *The Lamer Commission of Inquiry into the Proceedings Pertaining to Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes* (2006), at p. 71; Federal/Provincial/ Territorial Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2004); the Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), at pp. 25, 26, 30, 31, 34-36, 1095-96, 1098-99, 1101 and 1124.)

37 As Peter Cory points out, at pp. 101-3:

> [I]f the State commits significant errors in the course of the investigation and prosecution, it should accept the responsibility for the sad consequences. ...
>
> . . . . .
>
> [S]ociety needs protection from both the deliberate and the careless acts of omission and commission which lead to wrongful conviction and prison.

38 Finally, it is worth noting that a duty of care by police officers to suspects under investigation is consistent with the values and spirit underlying the *Charter*, with its emphasis on liberty and fair process. The tort duty asserted here would enhance those values, which supports the appropriateness of its recognition.

39 These considerations lead me to conclude that an investigating police officer and a particular suspect are close and proximate such that a *prima facie* duty should be recognized. Viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner. (See *Odhavji*, at para. 57.)

40 It is argued that recognition of liability for negligent investigation would produce a conflict between the duty of care that a police officer owes to a suspect and the police's officer duty to the public to prevent crime, that negates the duty of care. I do not agree. First, it seems to me doubtful that recognizing a duty of care to suspects will place police officers under incompatible obligations. Second, on the test set forth in *Cooper* and subsequent cases, conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an "overarching public duty", and it must pose a real potential for negative policy consequences. Any potential conflict that could be established here would not meet these conditions.

41 First, the argument that a duty to take reasonable care toward suspects conflicts with an overarching duty to investigate crime is tenuous. The officer's duty to the public is not

to investigate in an unconstrained manner. It is a duty to investigate in accordance with the law. That law includes many elements. It includes the restrictions imposed by the *Charter* and the *Criminal Code*, R.S.C. 1985, c. C-46. Equally, it may include tort law. The duty of investigation in accordance with the law does not conflict with the presumed duty to take reasonable care toward the suspect. Indeed, the suspect is a member of the public. As such, the suspect shares the public's interest in diligent investigation in accordance with the law.

42 My colleague Justice Charron suggests there is a conflict between the police officer's duty to investigate crime, on the one hand, and the officer's duty to leave people alone. It may be that a citizen has an interest in or preference for being left alone. But I know of no authority for the proposition that an investigating police officer is under a duty to leave people alone. The proposed tort duty does not presuppose a duty to leave the citizen alone, but only a duty to investigate reasonably in accordance with the limits imposed by law.

43 Second, even if a potential conflict could be posited, that would not automatically negate the *prima facie* duty of care. The principle established in *Cooper* and its progeny is more limited. A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds. *Cooper* illustrates this point. The proposed duty was rejected on the basis, not of mere conflict, but a conflict that would "come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole" (para. 50). Not only was there a conflict, but a conflict that would engender serious negative policy consequences. In this case, the situation is otherwise. Requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, the potential for negative repercussions is dubious. Acting with reasonable care to suspects has not been shown to inhibit police investigation, as discussed more fully in connection with the argument on chilling effect.

44 In a variant on this argument, it is submitted that in a world of limited resources, recognizing a duty of care on police investigating crimes to a suspect will require the police to choose between spending resources on investigating crime in the public interest and spending resources in a manner that an individual suspect might conceivably prefer. The answer to this argument is that the standard of care is based on what a reasonable police officer would do in similar circumstances. The fact that funds are not unlimited is one of the circumstances that must be considered. Another circumstance that must be considered, however, is that the effective and responsible investigation of crime is one of the basic duties of the state, which cannot be abdicated. A standard of care that takes these two considerations into account will

recognize what can reasonably be accomplished within a responsible and realistic financial framework.

45 I conclude that the relationship between a police officer and a particular suspect is close enough to support a *prima facie* duty of care.

(b) Policy Considerations Negating the *Prima Facie* Duty of Care

46 The second stage of the *Anns* test asks whether there are broader policy reasons for declining to recognize a duty of care owed by the defendant to the plaintiff. Even though there is sufficient foreseeability and proximity of relationship to establish a *prima facie* duty of care, are there policy considerations which negate or limit that duty of care?

47 In this case, negating conditions have not been established. No compelling reason has been advanced for negating a duty of care owed by police to particularized suspects being investigated. On the contrary, policy considerations support the recognition of a duty of care.

48 The respondents and interveners representing the Attorneys General of Ontario and Canada and various police associations argue that the following policy considerations negate a duty of care: the "quasi-judicial" nature of police work; the potential for conflict between a duty of care in negligence and other duties owed by police; the need to recognize a significant amount of discretion present in police work; the need to maintain the standard of reasonable and probable grounds applicable to police conduct; the potential for a chilling effect on the investigation of crime; and the possibility of a flood of litigation against the police. In approaching these arguments, I proceed on the basis that policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent. Judged by this standard, none of these considerations provide a convincing reason for rejecting a duty of care on police to a suspect under investigation.

(i) The "Quasi-Judicial" Nature of Police Duties

49 It was argued that the decision of police to pursue the investigation of a suspect on the one hand, or close it on the other, is a quasi-judicial decision, similar to that taken by the state prosecutor. It is true that both police officers and prosecutors make decisions that relate to whether the suspect should stand trial. But the nature of the inquiry differs. Police are concerned primarily with gathering and evaluating evidence. Prosecutors are concerned mainly with whether the evidence the police have gathered will support a conviction at law. The fact-based investigative character of the police task distances it from a judicial or quasi-judicial role.

50 The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect. Police are required to weigh evidence to some extent in the course of an investigation: *Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. 474 (S.C.C.). But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorneys and judges. This distinction is properly reflected in the standard of care imposed, once a duty is recognized. The standard of care required to meet the duty is not that of a reasonable lawyer or judge, but that of a reasonable *police officer*. Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.

(ii) Discretion

51 The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. It is true that police investigation involves significant discretion and that police officers are professionals trained to exercise this discretion and investigate effectively. However, the discretion inherent in police work is taken into account in formulating the *standard* of care, not whether a duty of care arises. The discretionary nature of police work therefore provides no reason to deny the existence of a duty of care in negligence.

52 Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.

53 Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.

54 Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise

discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

(iii) Confusion with the Standard of Care for Arrest

55 Recognizing a duty of care in negligence by police to suspects does not raise the standard required of the police from reasonable and probable grounds to some higher standard, as alleged. The requirement of reasonable and probable grounds for arrest and prosecution informs the standard of care applicable to some aspects of police work, such as arrest and prosecution, search and seizure, and the stopping of a motor vehicle. A flexible standard of care appropriate to the circumstances, discussed more fully below, answers this concern.

(iv) Chilling Effect

56 It has not been established that recognizing a duty of care in tort would have a chilling effect on policing, by causing police officers to take an unduly defensive approach to investigation of criminal activity. In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other. Files must be closed, life must move on, but care must also be taken. All of this is taken into account, not at the stage of determining whether police owe a duty of care to a particular suspect, but in determining what the standard of that care should be.

57 The record does not support the conclusion that recognizing potential liability in tort significantly changes the behaviour of police. Indeed, some of the evidence suggests that tort liability has no adverse effect on the capacity of police to investigate crime. This supports the conclusion of the majority in the Court of Appeal below that the "'chilling effect' scenario" remains speculative and that concern about preventing a "chilling effect" on the investigation of crime is not (on the basis of present knowledge) a convincing policy rationale for negating a duty of care (para. 63). (For a sampling of the empirical evidence on point, see e.g.: A. H. Garrison, "Law Enforcement Civil Liability under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers (1995), 18 *Police Studies* 19; T. Hughes, "Police officers and civil liability: 'the ties that bind'?" (2001), 24 *Policing: An International Journal of Police Strategies & Management* 240, at pp. 253-54, 256, 257-58; M. S. Vaughan, T. W. Cooper and R. V. del Carmen, "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views" (2001), 47 *Crime & Delinquency* 3; D. E. Hall et al., "Suing cops and corrections officers: Officer attitudes and experiences about civil liability" (2003), 26 *Policing: An International Journal of Police Stategies & Management* 529, at pp. 544-45.) Whatever the situation may have been in the United Kingdom (see *Brooks*

v. Commissioner of Police of the Metropolis, [2005] 1 W.L.R. 1495, [2005] UKHL 24 (U.K. H.L.); *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (U.K. H.L.)), the studies adduced in this case do not support the proposition that recognition of tort liability for negligent police investigation will impair it.

58 The lack of evidence of a chilling effect despite numerous studies is sufficient to dispose of the suggestion that recognition of a tort duty would motivate prudent officers not to proceed with investigations "except in cases where the evidence is overwhelming" (Charron J., at para. 152). This lack of evidence should not surprise us, given the nature of the tort. All the tort of negligent investigation requires is that the police act reasonably in the circumstances. It is reasonable for a police officer to investigate in the absence of overwhelming evidence — indeed evidence usually becomes overwhelming only by the process of investigation. Police officers can investigate on whatever basis and in whatever circumstances they choose, provided they act reasonably. The police need not let all but clearly impaired drivers go to avoid the risk of litigation, as my colleague suggests. They need only act reasonably. They may arrest or demand a breath sample if they have reasonable and probable grounds. And where such grounds are absent, they may have recourse to statutorily authorized roadside tests and screening.

59 It should also be noted that many police officers (like other professionals) are indemnified from personal civil liability in the course of exercising their professional duties, reducing the prospect that their fear of civil liability will chill crime prevention.

(v) Flood of Litigation

60 Recognizing sufficient proximity in the relationship between police and suspect to ground a duty of care does not open the door to indeterminate liability. Particularized suspects represent a limited category of potential claimants. The class of potential claimants is further limited by the requirement that the plaintiff establish compensable injury caused by a negligent investigation. Treatment rightfully imposed by the law does not constitute compensable injury. These considerations undermine the spectre of a glut of jailhouse lawsuits for negligent police investigation.

61 The record provides no basis for concluding that there will be a flood of litigation against the police if a duty of care is recognized. As the Court of Appeal emphasized, the evidence from the Canadian experience seems to be to the contrary (majority reasons, at para. 64). Quebec and Ontario have both recognized police liability in negligence (or the civil law equivalent) for many years, and there is no evidence that the floodgates have opened and a large number of lawsuits against the police have resulted. (See the majority reasons in the Court of Appeal, at para. 64.) The best that can be said from the record is that recognizing a duty of care owed by police officers to particular suspects led to a relatively small number

of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the prima facie duty of care established at the first stage of the *Anns* test.

(vi) The Risk that Guilty Persons Who Are Acquitted May Unjustly Recover in Tort

62 My colleague Charron J. (at paras. 156 ff.) states that recognizing tort liability for negligent police investigation raises the possibility that persons who have been acquitted of the crime investigated and charged, but who are in fact guilty, may recover against an officer for negligent investigation. This, she suggests, would be unjust.

63 This possibility of "injustice" — if indeed that is what it is — is present in any tort action. A person who recovers against her doctor for medical malpractice may, despite having proved illness in court, have in fact been malingering. Or, despite having convinced the judge on a balance of probabilities that the doctor's act caused her illness, it may be that the true source of the problem lay elsewhere. The legal system is not perfect. It does its best to arrive at the truth. But it cannot discount the possibility that a plaintiff who has established a cause of action may "factually", if we had means to find out, not have been entitled to recover. The possibility of error may be greater in some circumstances than others. However, I know of no case where this possibility has led to the conclusion that tort recovery for negligence should be denied.

64 The answer to the ever-present possibility of erroneous awards of damages lies elsewhere, it seems to me. The first safeguard is the requirement that the plaintiff prove every element of his or her case. Any suspect suing the police bears the burden of showing that police negligence in the course of an investigation caused harm compensable at law. This means that the suspect must establish through evidence that the damage incurred, be it a conviction, imprisonment, prosecution or other compensable harm, would not have been suffered but for the police's negligent investigation. Evidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to this causation inquiry. It is not necessary to decide here whether an acquittal should be treated as conclusive proof of innocence in a subsequent civil trial. Existing authority is equivocal: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.). (I note that in the United States, victims may recover damages against a defendant who has been acquitted in criminal proceedings: *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (U.S. Cal. Ct. App. 2 Dist. 2000). The second safeguard is the right of appeal. These safeguards, not the categorical denial of the right to sue in tort, are the law's response to the ever-present possibility of error in the legal process.

65 I conclude that no compelling policy reason has been shown to negate the *prima facie* duty of care.

2. Standard of Care

66 Two issues arise: What is the appropriate standard of care? and Was that standard met on the facts of this case?

(a) The Appropriate Standard of Care for the Tort of Negligent Investigation

67 Both the trial judge and the Court of Appeal adopted the standard of the reasonable police officer in like circumstances as the standard that is generally appropriate in cases of alleged negligent investigation. I agree that this is the correct standard.

68 A number of considerations support the conclusion that the standard of care is that of a reasonable police officer in all the circumstances. First, the standard of a reasonable police officer in all the circumstances provides a flexible overarching standard that covers all aspects of investigatory police work and appropriately reflects its realities. The particular conduct required is informed by the stage of the investigation and applicable legal considerations. At the outset of an investigation, the police may have little more than hearsay, suspicion and a hunch. What is required is that they act as a reasonable investigating officer would in those circumstances. Later, in laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty; since the law requires such grounds, a police officer acting reasonably in the circumstances would insist on them. The reasonable officer standard entails no conflict between criminal standards (Charron J., at para. 175). Rather, it incorporates them, in the same way it incorporates an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight. In all these ways, it reflects the realities of police work.

69 Second, as mentioned, the general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling". (See L. N. Klar, *Tort Law* (3rd ed. 2003), at p. 306.) These principles suggest the standard of the reasonable officer in like circumstances.

70 Third, the common law factors relevant to determining the standard of care confirm the reasonable officer standard. These factors include: the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct (including professional standards) and statutory standards. (See *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.); *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), at p. 227.) These factors suggest a standard of reasonableness, not something less onerous. There is a significant likelihood that police officers may cause harm to suspects if they investigate negligently. The gravity of the potential

harm caused is serious. Suspects may be arrested or imprisoned, their livelihoods affected and their reputations irreparably damaged. The cost of preventing the injury, in comparison, is not undue. Police meet a standard of reasonableness by merely doing what a reasonable police officer would do in the same circumstances — by living up to accepted standards of professional conduct to the extent that it is reasonable to expect in given circumstances. This seems neither unduly onerous nor overly costly. It must be supposed that professional standards require police to act professionally and carefully, not just to avoid gross negligence. The statutory standards imposed by the *Police Services Act*, R.S.O. 1990, c. P.15, although not definitive of the standard of care, are instructive (s. 1).

71 Fourth, the nature and importance of police work reinforce a standard of the reasonable officer in similar circumstances. Police conduct has the capacity to seriously affect individuals by subjecting them to the full coercive power of the state and impacting on their repute and standing in the community. It follows that police officers should perform their duties reasonably. It has thus been recognized that police work demands that society (including the courts) impose and enforce high standards on police conduct (Cory Report, at p. 10). This supports a reasonableness standard, judged in the context of a similarly situated officer. A more lenient standard is inconsistent with the standards that society and the law rightfully demand of police in the performance of their crucially important work.

72 Finally, authority supports the standard of the reasonable police officer similarly placed. The preponderance of case law dealing with professionals has applied the standard of the reasonably competent professional in like circumstances (See Klar, at p. 349; see also the reasons of the trial judge at para. 63.) The Quebec Court of Appeal has twice stated that the standard is the ordinarily competent officer in like circumstances (*Jauvin c. Québec (Procureur général)* (2003), [2004] R.R.A. 37 (Que. C.A.), at para. 59, and *André c. Québec (Procureur général)*, [2003] R.J.Q. 720 (Que. C.A.), at para. 41).

73 I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired

results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care (*Lapointe c. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 (S.C.C.); *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.); Klar, at p. 359.)

(b) Application of the Standard of Care to the Facts — Was the Police Conduct in this Case Negligent?

74 The defendant police officers owed a duty of care to Mr. Hill. That required them to meet the standard of a reasonable officer in similar circumstances. While the investigation that led to Mr. Hill's arrest and conviction was flawed, I conclude that it did not breach this standard, judged by the standards of the day.

75 Hill alleges that Detective Loft, who was in charge of the investigation of the plastic bag robberies, conducted the investigation negligently, and that Officers McLaughlin, Stewart, Matthews and Hill acted negligently in aspects of the investigation assigned to them. On this basis, he argues that the Police Services Board is vicariously liable for the individual acts and omissions of its officers.

76 The arrest itself is not impugned as negligent. Although there were problems in the case against Hill, it is accepted that the investigation, as it stood at the time the arrest was made, disclosed reasonable and probable grounds. It is the conduct of the police prior to and following the arrest that Hill criticizes. At the pre-arrest stage, Mr. Hill alleges: witness contamination as the result of publishing his photo (McLaughlin); failure to make proper records of events and interviews with witnesses (McLaughlin and Stewart); interviewing two witnesses together and with a photo of Hill on the desk (McLaughlin); and structural bias in the photo lineup in which Hill was identified (Hill and Loft). At the post-arrest stage, Hill charges that Detective Loft failed to reinvestigate after evidence came to light that suggested the robber was not Hill, but a different man, Sotomayer. (It is also alleged that Detective Loft failed to communicate relevant facts to defence counsel. This has more to do with trial conduct than investigation, and I consider it no further.)

77 We must consider the conduct of the investigating officers in the year 1995 in all of the circumstances, including the state of knowledge then prevailing. Police practices, like practices in other professions, advance as time passes and experience and understanding accumulate. Better practices that developed in the years after Hill's investigation are therefore not conclusive. By extension, the conclusion that certain police actions did not violate the standard of care in 1995 does not necessarily mean that the same or similar actions would

meet the standard of care today or in the future. We must also avoid the counsel of perfection; the reasonable officer standard allows for minor mistakes and misjudgments. Finally, proper scope must be accorded to the discretion police officers properly exercise in conducting an investigation.

78 Considered in this light, the first four complaints, while questionable, were not sufficiently serious on the record viewed as a whole to constitute a departure from the standard of a reasonable police officer in the circumstances. The publication of Hill's photo, the somewhat incomplete record of witness interviews, the fact that two witnesses were interviewed together and the failure to blind-test the photos put to witnesses are not good police practices, judged by today's standards. But the evidence does not establish that a reasonable officer in 1995 would not have followed similar practices in similar circumstances. Nor is it clear that if these incidents had not occurred, Hill would not have been charged and convicted. It follows that the individual officers involved in these incidents cannot be held liable to Hill in negligence.

79 This brings us to the photo lineup. The photo array consisted of one aboriginal suspect, Hill, and eleven Caucasian foils. However, a number of the subjects had similar features and colouring, so that Hill did not in fact stand out as the only aboriginal.

80 The first question is whether this photo lineup met the standard of a reasonable officer investigating an offence in 1995. The trial judge accepted expert evidence that there were "no rules" and "a great deal of variance in practice right up to the present time" in relation to photo lineups (paras. 66 and 70). These findings of fact have not been challenged. It follows that on the evidence adduced, it cannot be concluded that the photo lineup was unreasonable, judged by 1995 standards. This said, the practice followed was not ideal. A reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid both the perception of injustice and the real possibility of unfairness to suspects who are members of minority groups — concerns underlined by growing awareness of persisting problems with institutional bias against minorities in the criminal justice system, including aboriginal persons like Mr. Hill. (See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996).)

81 In any event, it was established that the lineup's racial composition did not lead to unfairness. A racially skewed lineup is structurally biased only "if you can tell that the one person is non-Caucasian" and "assuming the suspect is the one that's standing out" (majority reasons in the Court of Appeal, at para. 105). Although the suspects were classified as being of a different race by the police's computer system, at least some of them appeared to have similar skin tones and similar facial features to Hill. On this evidence, the trial judge concluded that the lineup was not in fact structurally biased. Any risk that Hill might have been unfairly chosen over the 11 foils in the photo lineup did not arise from structural bias

relating to the racial makeup of the lineup but rather from the fact that Hill happened to look like the individual who actually perpetrated the robberies, Frank Sotomayer.

82 It remains to consider Mr. Hill's complaint that the police negligently failed to reinvestigate when new information suggesting he was not the robber came to light after his arrest and incarceration. This complaint must be considered in the context of the investigation as a whole. The police took the view from the beginning that the 10 robberies were the work of a single person, branded the plastic bag robber. They maintained this view and arrested Hill despite a series of tips implicating two men, "Pedro" and "Frank". Other weaknesses in the pre-charge case against Hill were the failure of a search of Hill's home to turn up evidence, and the fact that at the time of his arrest Hill had a long goatee of several weeks' growth, while the eyewitnesses to the crime described the robber as a clean-shaven man. While the police may have had reasonable and probable grounds for charging Hill, there were problems with their case.

83 After Hill was charged and taken into custody, the robberies continued. Another officer, Detective Millin, was put in charge of the investigation of these charges. Sotomayer emerged as a suspect. Millin went into Hill's file and became concerned that Sotomayer, not Hill, may have committed at least some of the earlier robberies. He met with Detective Loft and discussed with him the fact that in the photographic record, the perpetrator of the December 16 robberies resembled Sotomayer more than Hill. As a result, on March 7 the charges against Hill relating to that robbery were withdrawn and Sotomayer was charged instead. Detective Millin met with Detective Loft again on April 4 and 6 to express concerns that Sotomayer and not Hill was the plastic bag bandit on the other charges. Detective Loft told Detective Millin that he would attempt to have the trial of the charges against Hill put over to permit further investigation. He never did so. The matter remained in the hands of the Crown prosecutors and no further investigation was done. Eventually, the Crown withdrew all the charges, except one, on which Hill was convicted. Detective Loft did not intervene to prevent that charge going forward. Nor did he check the alibi that Hill supplied. Had Detective Loft conducted further investigation, it is likely the case against Hill would have collapsed. Had he re-interviewed the eyewitnesses, for example, and shown them Sotomayer's photo, it is probable that matters would have turned out otherwise; when the witnesses were eventually shown the photo of Sotomayer, they recanted their identification of Hill as the robber.

84 When new information emerges that could be relevant to the suspect's innocence, reasonable police conduct may require the file to be reopened and the matter reinvestigated. Depending on the nature of the evidence which later emerges, the requirements imposed by the duty to reinvestigate on the police may vary. In some cases, merely examining the evidence and determining that it is not worth acting on may be enough. In others, it may be reasonable to expect the police to do more in response to newly emerging evidence. Reasonable prudence

may require them to re-examine their prior theories of the case, to test the credibility of new evidence and to engage in further investigation provoked by the new evidence. At the same time, police investigations are not never-ending processes extending indefinitely past the point of arrest. Police officers acting reasonably may at some point close their case against a suspect and move on to other matters. The question is always what the reasonable officer in like circumstances would have done to fulfil the duty to reinvestigate and to respond to the new evidence that emerged.

85 It is argued that by failing to raise the matter with the Crown and ask that they halt the case for purposes of reinvestigation, and instead allowing it to proceed to trial, Detective Loft failed to act as a reasonable officer similarly situated. It is also argued that the other defendant officers also acted unreasonably in not intervening before the case came to trial.

86 The liability of the officers who assisted in the investigation is readily disposed of. It has not been established that a reasonable police officer in the position of McLaughlin, Stewart, Matthews and Hill would have intervened to halt the case. They were not in charge of the case and had only partial responsibility.

87 The case of Detective Loft presents more difficulty. He was in charge of the case and could have asked the Crown to postpone the case to permit reinvestigation, as favoured by Detective Millin. He considered doing so, but in the end did not intervene, with the result that the matter went to trial. Explaining his decision, he referred to the evidence of two eyewitnesses identifying Hill as the robber on the final charge.

88 This was not a case of tunnel-vision or blinding oneself to the facts. It falls rather in the difficult area of the exercise of discretion. Deciding whether to ask for a trial to be postponed to permit further investigation when the case is in the hands of Crown prosecutors and there appears to be credible evidence supporting the charge is not an easy matter. In hindsight, it turned out that Detective Loft made the wrong decision. But his conduct must be considered in the circumstances prevailing and with the information available at the time the decision was made. At that time, awareness of the danger of wrongful convictions was less acute than it is today. There was credible evidence supporting the charge. The matter was in the hands of the Crown prosecutors, who had assumed responsibility for the file. Notwithstanding that Detective Millin favoured asking the prosecutors to delay the trial, I cannot conclude that Detective Loft's exercise of discretion in deciding not to intervene at this late stage breached the standard of a reasonable police officer similarly situated.

89 I therefore conclude that although Detective Loft's decision not to reinvestigate can be faulted, judged in hindsight and through the lens of today's awareness of the danger of wrongful convictions, it has not been established that Detective Loft breached the standard of a reasonable police officer similarly placed.

3. Loss or Damage

90 To establish a cause of action in negligence, the plaintiff must show that he or she suffered compensable damage. Not all damage will justify recovery in negligence. Recovery is generally available for damage to person and property. On the other hand, debates have arisen, for example, about when an action in negligence may be brought for purely economic loss and psychological harm. (See Klar, at pp. 201-4, and T. Weir, *Tort Law* (2002), at pp. 44-51.)

91 It is not disputed that imprisonment resulting from a wrongful conviction constitutes personal injury to the person imprisoned. Indeed, other forms of compensable damage without imprisonment may suffice; a claimant's life could be ruined by an incompetent investigation that never results in imprisonment or an unreasonable investigation that does not lead to criminal proceedings. Wrongful deprivation of liberty has been recognized as actionable for centuries and is clearly one of the possible forms of compensable damage that may arise from a negligent investigation. There may be others.

92 On the other hand, lawful pains and penalties imposed on a guilty person do not constitute compensable loss. It is important as a matter of policy that recovery under the tort of negligent investigation should only be allowed for pains and penalties that are wrongfully imposed. The police must be allowed to investigate and apprehend suspects and should not be penalized for doing so under the tort of negligent investigation unless the treatment imposed on a suspect results from a negligent investigation and causes compensable damage that would not have occurred but for the police's negligent conduct. The claimant bears the burden of proving that the consequences of the police conduct relied upon as damages are wrongful in this sense if they are to recover. Otherwise, punishment may be no more than a criminal's just deserts — in a word, justice.

4. Causal Connection

93 Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered. Negligent police investigation may cause or contribute to wrongful conviction and imprisonment, fulfilling the legal requirement of causal connection on a balance of probabilities. The starting point is the usual "but for" test. If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met.

94 Cases of negligent investigation often will involve multiple causes. Where the injury would not have been suffered "but for" the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well. On the other hand, if the contributions of others to the injury are so significant that the same damage

would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to a wrongful conviction causing compensable damage.

5. Limitation Period

95 The respondents claim that Hill's action is statute-barred. The relevant limitation period is set out in the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7(1) (now repealed):

> **7.** — (1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

96 The limitation period for negligent investigation begins to run when the cause of action is complete. This requires proof of a duty of care, breach of the standard of care, compensable damage, and causation. A cause of action in negligence arises not when the negligent act is committed, but rather when the harmful consequences of the negligence result. (See G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 148, citing L. N. Klar et al., *Remedies in Tort* (loose-leaf), ed. by L. D. Rainaldi, vol. 4 (release 5), chp. 27, at para. 217, n. 23.)

97 As discussed above, the loss or injury as a result of alleged police negligence is not established until it is clear that the suspect has been imprisoned as a result of a wrongful conviction or has suffered some other form of compensable harm as a result of negligent police conduct. The wrongfulness of the conviction is essential to establishing compensable injury in an action where the compensable damage to the plaintiff is imprisonment resulting from a wrongful conviction. In such a case, the cause of action is not complete until the plaintiff can establish that the conviction was in fact wrongful. So long as a valid conviction is in place, the plaintiff cannot do so.

98 It follows that the limitation period in this case did not start to run until December 20, 1999 when Mr. Hill, after a new trial, was acquitted of all charges of robbery. The action was commenced by notice of action on June 19, 2000, within the six-month limitation period set out in the *Public Authorities Protection Act*. Therefore, the relevant limitation period was met.

6. Adequacy of Reasons

99 The appellant Hill argues that this appeal should be allowed on the basis that the reasons of the trial judge were inadequate. With respect, I disagree.

100 The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (S.C.C.), at para. 55.

101 In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome issues of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

102 It might have been preferable for the trial judge to provide a more comprehensive treatment of the allegations of negligence and the dismissal of the action. As the Court of Appeal noted, the trial judge's choice not to address some of the specific allegations of negligence might have made appellate review more "difficult" (para. 165).

103 This said, the reasons were in fact sufficient to allow for meaningful appellate review, when considered in light of the extensive trial record, and Hill's functional need to know why the case was decided against him was met. As the Court of Appeal concluded, it was "clear from the reasons for judgment why the trial judge reached the decision he did — he found the evidence of police officers Loft, Matthews and Stewart and Crown prosecutor Nadel to be credible and, based on their evidence, he concluded that the respondents' conduct did not constitute either malicious prosecution or negligent investigation. The trial judge also reviewed the evidence of the appellant's expert witness, Professor Lindsay, and concluded that it did not undermine the quality of the police investigation in this case. The appellant simply did not demonstrate a standard of care breached by this investigation" (majority reasons, at para. 124).

104 I agree with this assessment. The claim that the reasons were inadequate therefore fails.

IV. Conclusion

105 I would dismiss Hill's appeal with costs. The Court of Appeal was correct to conclude that the police conduct impugned on this appeal met the standard of care and, therefore, was not negligent.

106 I would also dismiss the cross-appeal. The Court of Appeal rightly concluded that the tort of negligent investigation is available in Canadian law.

***Charron J.*:**

1. Overview

107 The dictum that it is better for ten guilty persons to escape than for one innocent person to go to jail has long been a cornerstone of our criminal justice system: (W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, c. 27, at p. 352). Consequently, many safeguards have been created within that system to protect against wrongful convictions. Despite the presence of such safeguards, however, miscarriages of justice do occur. When an innocent person is convicted of a crime that he or she did not commit, it is undeniable that justice has failed in the most fundamental sense.

108 Mr. Hill submits that he is one such victim of the criminal justice system. Of the ten robbery charges laid against him, nine were withdrawn by the Crown. Mr. Hill was convicted on the remaining charge but, following a successful appeal, was retried and ultimately acquitted of the offence. Mr. Hill claims that he has sustained significant damages because of substandard policing during the course of the criminal investigation leading to and following the charges laid against him. He therefore brings this action in negligence.

109 While Mr. Hill acknowledges that his cause of action is novel, he nonetheless submits that the tort system can act as an effective deterrent against, and fairly allocate the costs arising from, negligent investigative practices. Consequently, he urges this Court to bring "[t]he law of negligence ... to bear on the problem of wrongful convictions" by recognizing a new tort of negligent investigation designed to compensate the wrongfully convicted who have suffered damages as a result of a substandard police investigation (appellant's factum, at para. 71).

110 The Crown takes the position that this mischaracterizes the issue. In its view, this is not a case about providing a remedy for the wrongfully convicted since, if this Court accepts Mr. Hill's argument, *any* person charged with a criminal offence in respect of whom the charge does not ultimately result in a conviction would be a potential plaintiff. The Crown submits that the "wrongfully convicted" consist, rather, of those persons who are not only presumed innocent or found not guilty, but who are also determined to be factually innocent after a review or an inquiry under ss. 696.1 to 696.6 of the *Criminal Code*, R.S.C. 1985, c. C-46.

111 The Crown argues further that, for important public policy reasons, tort liability should be limited to instances where the police seriously abuse or misuse their public powers, not where they are merely negligent in the discharge of their duties. According to the Crown, the imposition of a duty of care in negligence would not only subsume existing torts such as false arrest, false imprisonment, malicious prosecution, and misfeasance in public office, but would upset the careful balance between society's need for effective law enforcement and an individual's right to liberty.

112 The novel question before this Court is therefore whether the new tort of negligent investigation should be recognized by Canadian law. I have concluded that it should not. A private duty of care owed by the police to suspects would necessarily conflict with the investigating officer's overarching public duty to investigate crime and apprehend offenders. The ramifications from this factor alone defeat the claim that there is a relationship of proximity between the parties sufficient to give rise to a *prima facie* duty of care. In addition, because the recognition of this new tort would have significant consequences for other legal obligations, and would detrimentally affect the legal system, and society more generally, it is my view that even if a *prima facie* duty of care were found to exist, that duty should be negatived on residual policy grounds.

113 Therefore, for the reasons that follow, I would allow the Crown's cross-appeal and find that the tort of negligent investigation is not a remedy available at common law. In light of this conclusion, I find that the action was properly dismissed by the courts below and I would therefore dismiss Mr. Hill's appeal.

2. Analysis

2.1. Elements of the Tort Action

114 Mr. Hill claims that the defendants — who for simplicity I will refer to collectively as "investigating officers" — committed the tort of negligent investigation and that he is entitled to damages. In order to succeed in his claim, Mr. Hill must establish the following elements: (1) that the investigating officers owed him a duty of care; (2) that the investigating officers failed to meet the standard of care appropriate in the circumstances; (3) that he suffered a compensable loss or injury; and (4) that the loss or injury was caused by the investigating officers' negligent act or omission. While the most contentious elements of the proposed tort of negligent investigation are the duty and standard of care, the proposed new tort gives rise to difficult issues in respect of all four elements of the action. I will touch on each element in what follows, focussing principally on the duty of care.

2.2. The Anns Test

115 Police officers have multiple duties. There is no question that one of them is the duty to investigate crime. This duty exists at common law and, in Ontario, is embodied in s. 42 of the *Police Services Act*, R.S.O. 1990, c. P.15, which describes the general duties of a police officer. Although "investigating crime" is not specifically listed, several of the listed duties are related to, or form part of, the police investigation into crime. Section 42(1) reads as follows:

> **42.** — (1) The duties of a police officer include,
>
> (a) preserving the peace;
>
> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
>
> (c) assisting victims of crime;
>
> (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
>
> (e) laying charges, prosecuting and participating in prosecutions;
>
> (f) executing warrants that are to be executed by police officers and performing related duties;
>
> (g) performing the lawful duties that the chief of police assigns;
>
> (h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
>
> (i) completing the prescribed training.

See also *Police Act*, R.S.B.C. 1996, c. 367, s. 34(2); *Police Act*, R.S.A. 2000, c. P-17, s. 38(1); *The Police Act*, 1990, S.S. 1990-91, c. P-15.01, ss. 18 and 19(1); *Provincial Police Act*, R.S.M. 1987, c. P150, C.C.S.M., c. P150, s. 5; *Police Act*, S.N.S. 2004, c. 31, ss. 30(1) and 31(1); *Police Act*, S.N.B. 1977, c. P-9.2, s. 12(1); *Police Act*, R.S.P.E.I. 1988, c. P-11, s. 5(2); *Royal Newfoundland Constabulary Act*, S.N.L. 1992, c. R-17, s. 8(1); *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18; *Police Act*, R.S.Q., c. P-13.1, s. 48.

116 There is no dispute that a police officer owes an overarching duty to the public to investigate crime. The question that occupies us here is whether this overarching public duty translates into a private duty owed to individual members of that public who fall in a particular class, namely suspects under investigation. This question calls for the application

of what is commonly called the *Anns* test (in reference to the House of Lords decision in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)), as refined by this Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.); *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80 (S.C.C.); *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (S.C.C.), and *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18 (S.C.C.).

117 The Chief Justice has set out in some detail the analytical framework that must be followed in applying the *Anns* test. For the purpose of my analysis, I need only summarize that test briefly. For convenience, I reproduce here the succinct summary of the *Anns* test articulated by McLachlin C.J. and Major J. in *Edwards* (at paras. 9-10):

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

2.3 Foreseeability

118 The requirement of reasonable foreseeability poses no barrier to finding a duty of care in this case. A police investigator can readily foresee that a targeted suspect is among those persons who could be harmed as a result of the negligent conduct of the investigation. To be sure, when a targeted suspect is in fact the perpetrator of the offence under investigation, the public rather than the suspect may be the actual victim of a substandard investigation.

Nonetheless, on the strict question of foreseeability, it is clear that this part of the test is made out.

2.4 Proximity

2.4.1 The Search For Analogous Categories

119 It is when we turn to the question of proximity that problems arise. As stated in the above-noted summary of the *Anns* test, the proximity analysis can usefully be started by inquiring whether the case falls, either directly or by analogy, within a category of cases in which a duty of care has previously been recognized. If the case does fall within such a category of cases, the court can generally be satisfied that there are no residual policy considerations that might negative the imposition of a duty of care, and a duty of care will be found to exist. In this case, Mr. Hill does not dispute that, prior to the Ontario trial judgment in *Beckstead v. Ottawa (City)* (1995), 37 O.R. (3d) 62 (Ont. Gen. Div.) at 64, no court of common law jurisdiction in Canada, across the Commonwealth or in any state in the U.S. had found a private law duty of care owed by police to suspects in respect of the investigation of crime. Indeed, in jurisdictions outside Ontario, and in Ontario prior to *Beckstead*, courts have declined to recognize such a duty in cases where the issue has arisen. For authorities to this effect, see *Reynen v. R.* (1993), 70 F.T.R. 158 (Fed. T.D.), at para. 5; *McGillivary v. New Brunswick* (1994), 149 N.B.R. (2d) 311 (N.B. C.A.), at para. 10; *Al's Steak House & Tavern Inc. v. Deloitte & Touche* (1994), 20 O.R. (3d) 673 (Ont. Gen. Div.); *Collie Woollen Mills Ltd. v. R.* (1996), 107 F.T.R. 93 (Fed. T.D.), at para. 34; *Stevens v. Fredericton (City)* (1999), 212 N.B.R. (2d) 264 (N.B. Q.B.); *Dix v. Canada (Attorney General)* (2002), 315 A.R. 1, 2002 ABQB 580 (Alta. Q.B.), at para. 557; *Kleysen v. Canada (Attorney General)* (2001), 159 Man. R. (2d) 17, 2001 MBQB 205 (Man. Q.B.); and *Avery v. Canada (Attorney General)*, [2004] N.B.J. No. 391, 2004 NBQB 372 (N.B. Q.B.), at para.11. See also *D. (A.A.) v. Tanner* (2004), 188 Man. R. (2d) 15, 2004 MBQB 213 (Man. Q.B.), where at para. 148, Duval J. explicitly declined to recognize the separate tort of negligent investigation while nonetheless considering whether a claim for negligence was made out on the particular facts of that case.

120 U.K. authorities holding that no duty of care is owed by the police to individual members of the public in the context of the investigation of crime are: *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (U.K. H.L.), at pp. 243-44; *Alexandrou v. Oxford* (1990), [1993] 4 All E.R. 328 (Eng. C.A.); *Osman v. Ferguson* (1992), [1993] 4 All E.R. 344 (Eng. C.A.); *Cowan v. Chief Constable of the Avon & Somerset Constabulary*, [2001] E.W.J. No. 5088, [2001] EWCA Civ 1699 (Eng. C.A.); and *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24 (U.K. H.L.), at paras. 19-23 and 33. See also *Calveley v. Chief Constable of Merseyside Police*, [1989] 1 All E.R. 1025 (Eng. H.L.), at pp. 1030-32, in support of the proposition that the police do not owe a duty of care in the context of an internal police investigation and disciplinary proceeding against police officers.

121 Australian authorities holding that no duty of care is owed to suspects in the context of a police investigation are *Emanuele v. Hedley* (1997), 137 F.L.R. 339, at p. 359; *Courtney v. State of Tasmania*, [2000] TASSC 83 (Tasmania S.C.); *Wilson v. New South Wales* (2001), 53 N.S.W.L.R. 407, [2001] NSWSC 869 (New South Wales S.C.), at para. 63; *Tame v. New South Wales* (2002), 191 A.L.R. 449, [2002] H.C.A. 35 (Australia H.C.), at para. 231; *Gruber v. Backhouse* 190 F.L.R. 122 [2003] ACTSC 18 (Australian Capital Territory S.C.), at para. 41; *Duke v. New South Wales*, [2005] NSWSC 632 (New South Wales S.C.), at para. 23; and in New Zealand, *Gregory v. Gollan*, [2006] NZHC 426 (New Zealand H.C.), at paras. 16-17. See also the discussion in *Sullivan v. Moody* 183 A.L.R. 404 [2001] H.C.A. 59 (Australia H.C.), at para. 60. Cases holding that no duty of care is owed to individual members of the public in the broader investigatory context are *Cran v. State of New South Wales* (2004), 62 N.S.W.L.R. 95, [2004] NSWCA 92 (New South Wales C.A.), at para. 50 (leave to appeal to HCA denied, [2005] HCATrans 21 (Australia H.C.)); and in New Zealand, *Simpson v. Attorney General*, [1994] 3 N.Z.L.R. 667 (New Zealand C.A.).

122 For American authorities supporting the proposition that police do not owe a duty of care to suspects, see: *Gregoire v. Biddle*, 177 F.2d 579 (U.S. 2nd Cir. N.Y. 1949), at p. 581; *Thompson v. Olson*, 798 F.2d 552 (U.S. C.A. 1st Cir. 1986), at p. 556; *Kompare v. Stein*, 801 F.2d 883 (U.S. C.A. 7th Cir. 1986), at p. 890; *Kelly v. Curtis*, 21 F.3d 1544 (U.S. C.A. 11th Cir. 1994), at p. 1551; *Orsatti v. New Jersey State Police*, 71 F.3d 480 (U.S. C.A. 3rd Cir. 1995), at p. 484; *Schertz v. Waupaca*, 875 F.2d 578 (U.S. C.A. 7th Cir. 1989), at p. 583. Also relevant are the remarks of Scalia J. in *Castle Rock (Town) v. Gonzales*, 125 S.Ct. 2796 (U.S. Sup. Ct. 2005), at p. 2810.

123 I will mention some of these decisions later in my judgment, but first, a word about *Beckstead v. Ottawa (City)* and the decision of the Court of Appeal for Ontario in this case ((2005), 76 O.R. (3d) 481 (Ont. C.A.)).

124 In *Beckstead v. Ottawa (City)*, the Court of Appeal for Ontario confirmed a trial decision holding that a duty of care was owed by the investigating officer to the suspect under investigation ((1997), 37 O.R. (3d) 62 (Ont. C.A.) (p. 63). Notably, however, neither the trial judge nor the panel of the Court of Appeal in that case carried out the *Anns* analysis to determine whether a duty of care in respect of this new category should be found to exist. This lack of any prior authority to support such a holding and the lack of any principled analysis in *Beckstead* prompted the Chief Justice of Ontario to create a five-judge panel for the hearing of this case to determine whether *Beckstead* was correctly decided. (Court of Appeal judgment, at para. 2).

125 In support of his conclusion that *Beckstead* was correctly decided, MacPherson J.A., writing for a unanimous court on this issue, relied in part on the existence of a duty of care

in an analogous category, stating that "the duty of care exists in Ontario with respect to both suspects (*Beckstead*) *and victims* (*Jane Doe*)" (para. 65(emphasis added)). He then concluded that he could "see no principled basis for distinguishing the two categories" (para. 65).

126 The question whether the relationship between the investigating officer and the victim or potential victim of crime can give rise to a private duty of care has never been considered by this Court and we are not deciding this issue on this appeal. However, given the reliance placed by the Court of Appeal on *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Gen. Div.)), it is necessary to examine the import of the finding in that case to determine whether the Court of Appeal was correct in concluding that a general duty of care exists with respect to victims and that the categories of victim and suspect are indistinguishable.

127 First, it is important to properly circumscribe the decision in *Jane Doe*. In order to do so, it may be helpful to briefly review the facts and the findings of the court in that case. From December 1985 to August 1986, a series of sexual assaults took place in Toronto. The sexual assaults shared certain characteristics: each took place in the same downtown Toronto neighbourhood; all the female victims lived in second or third floor apartments; each apartment contained an exterior balcony; and entry to the women's apartments had been effected via the balconies.

128 After the fourth incident, but prior to the sexual assault of Jane Doe, the Metropolitan Toronto Police Force ("MTPF") had grounds to believe that a single individual was responsible for the sexual assaults. However, while anticipating that additional assaults were likely to occur, the MTPF deliberately refrained from informing potential victims of the specific risk to them on the grounds that doing so would cause the offender to flee. The trial judge, MacFarland J. (as she then was), found that the circumstances of the case suggested that "the women were being used — without their knowledge or consent — as 'bait' to attract a predator whose specific identity then was unknown to the police, but whose general and characteristic identity most certainly was" (p. 725).

129 According to MacFarland J., the MTPF's decision not to inform members of the public who had been identified as being at risk was grossly negligent. Importantly, however, MacFarland J. took care to delineate the scope of the duty thus breached. She was "satisfied on the evidence that a meaningful warning could and should have been given to the women who were at *particular risk*" (p. 730 (emphasis added)). MacFarland J. went on to find that "the police failed utterly in their duty to protect *these women* and *the plaintiff in particular* from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves" (p. 732 (emphasis added)). MacFarland J. concluded that "[h]ere police were aware of a *specific threat or risk* to a *specific*

group of women and they did nothing to warn *those women* of the danger they were in, nor did they take any measures to protect *them*" (p. 732 (emphasis added)).

130 Hence, the trial judge in *Jane Doe* held that where the police are aware of a *specific* threat to a *specific* group of individuals, the police have a duty to inform those individuals of the specific threat in question so that they may take steps to protect themselves from harm. As Moldaver J. (as he then was) said, speaking for the Divisional Court in confirming that the action could proceed to trial, "[w]hile the police owe certain duties to the public at large, they cannot be expected to owe a private law duty of care to every member of society who might be at risk": *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 72 D.L.R. (4th) 580 (Ont. Div. Ct.), at p. 584. Hence, *Jane Doe* cannot be read to stand for the wide proposition that the police owe a *general* duty of care to *all potential* victims of crime. Such an interpretation would ignore the fact that there must be more than mere foreseeability of harm before a duty of care will arise; there must also be sufficient proximity between the parties and the absence of policy considerations negating the existence of any *prima facie* duty of care.

131 Without further qualification, therefore, I find myself unable to endorse MacPherson J.A.'s broad conclusion in this case that "the duty of care exists in Ontario with respect to ... victims" (para. 64). I also respectfully disagree with his assertion that there is no principled basis on which to distinguish between the two categories. To the contrary, there is crucial distinction between victim and suspect. The distinction resides in the fact that the public interest in having police officers investigate crime for the purpose of apprehending offenders and a potential victim's interest in being protected from the offenders are generally reconcilable. In contrast, the police officer's duty to investigate crime and apprehend offenders is diametrically opposed to the interests of the person under investigation. This is because the suspect's interest, regardless of whether that suspect is the actual perpetrator of the crime, is *always* to be left alone by the state. In other words, the suspect's interest is *always* at odds with the public interest in the context of a criminal investigation. I will explain.

132 That a perpetrator's interest is at odds with the public interest in having him investigated and apprehended is too obvious to require explanation. It is important in this context to appreciate, however, that the interests of the suspect who is factually innocent of any criminal involvement is also at odds with the fulfilment of the officer's public duty to investigate crime. In my respectful view, it would be naive to simply assume that the innocent suspect's interest is not at odds on the ground that such a person will always be exonerated as a result of the investigation, if the police perform their duty in a competent manner. There is a significant gap between the "reasonable and probable grounds" standard upon which the initiation of the criminal process is based and the ultimate standard of proof beyond a reasonable doubt upon which a conviction is grounded. There is, moreover, a significant public interest in maintaining the long-established lower standard for the

initiation of process. The result of this is that a criminal investigation, even of the most stellar quality, may well result in the targeting of the factually innocent. Further, even in those cases where the innocent suspect is exonerated as a result of the investigation, he or she will inevitably have suffered some harm as a result of the process that led to his exoneration: her reputation may be tarnished, or she may have suffered economic loss. This is why I say that *all* suspects, whether they have in fact committed the offence or not, stand to lose from being targeted by the police. It is *always* in the suspect's personal interest to be left alone by the state.

133 Therefore, victims and suspects are not analogous categories.

134 The Court of Appeal also placed some reliance on this Court's decision in *Odhavji* in support of the approach it adopted (para. 71). In my view, however, *Odhavji* provides little assistance in determining the question that occupies us on this appeal. *Odhavji* involved a suit brought against the Metropolitan Toronto Chief of Police by the family of an individual who had been fatally shot by the police. The plaintiffs alleged that the Chief owed them a duty of care to ensure that officers co-operated with the Special Investigations Unit, and that the Chief had breached that duty, resulting in harm to the family. This Court refused to strike the plaintiff's statement of claim as disclosing no cause of action, noting in particular that s. 41(1)(b) of the *Police Services Act* imposed on the Chief a "freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community" (*Odhavji*, at para. 58). This Court took this to support the finding of a relationship of proximity. By way of contrast, no similar specific statutory duty can be pointed to in the present case. Consequently, *Odhavji* does not provide us with an analogous category in which a duty of care has previously been found to exist either.

135 Because this case does not fall either directly or by analogy within a category of cases in which a duty of care has previously been recognized, it is necessary to turn to the proximity inquiry under the *Anns* test to determine whether the relationship between an investigating officer and a suspect under investigation is sufficiently close to give rise to a *prima facie* duty of care.

2.4.2. The Interests Engaged by the Relationship Between the Investigator and the Investigated

136 As explained by my colleague (at paras. 26-30), the question at this stage of the inquiry is whether the relationship between the investigating officer and the suspect is such as "to make the imposition of legal liability for negligence appropriate". Proximity is closely connected to the notion of foreseeability: the relationship must be sufficiently close and direct that the defendant *ought* to have had the plaintiff in mind as a person who could potentially be harmed by his or her conduct. But proximity is not exhausted by foreseeability. In addition, other factors that may bear on the question of whether the relationship between the defendant

and the plaintiff is capable of supporting legal liability must be considered (*Cooper*, at para. 37). Such factors may include expectations, representations, reliance and the nature of the interests that characterize the relationship (*Cooper*, at para. 34). However, no definitive list of factors is possible and the list will vary depending on the circumstances of the case (*Cooper*, at para. 35).

137 There is no question that the relationship between police officer and suspect is sufficiently close and direct that the investigating officer ought to have the targeted suspect in mind as a person potentially harmed by his actions. As I have noted, however, other factors engaged by the relationship must also be considered in order to reach a conclusion regarding proximity. In my view, none of these further factors, either jointly or severally, is sufficient to give rise to the required proximate relationship.

138 McLachlin C.J. identifies the expectations of the parties and the interests engaged by the relationship as relevant factors giving rise to a relationship of proximity. In respect of the first factor, my colleague states: "Viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner" (para. 39). From a logical standpoint, I take no issue with this proposition. Since society undoubtedly relies on police officers to perform their public duty to investigate crime and apprehend criminals in a competent, non-negligent manner, the suspect, as a member of that society, may reasonably be said to share that expectation. The critical factor, however, and one which, in my view, strongly militates *against* the recognition of a duty of care is the second one, the interests engaged by the relationship.

139 McLachlin C.J. describes the high interests at stake for the targeted suspect. As she states, the suspect "has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life" (para. 34). In addition, as the Statement of Claim in this case reveals, the targeted suspect's financial interests are also engaged. Mr. Hill claims loss of wages, decreased future income earning ability and numerous out-of-pocket expenses. My colleague concludes that "[t]hese high interests support a finding of a proximate relationship giving rise to a duty of care" (para. 34). With respect, however, the suspect's interests are not the only interests engaged by the relationship. As aptly stated in *Childs v. Desormeaux*, at para. 25:

> The law of negligence not only considers the plaintiff's loss, but explains why it is just and fair to impose the cost of that loss on the particular defendant before the court. The proximity requirement captures this two-sided face of negligence.

In other words, in assessing the proximity of the relationship between plaintiff and defendant, we must pay attention not only to the plaintiff's interests; we must also pay attention to those

of the defendant, in this case the investigating officers. This requires us to consider their role in the enforcement of the criminal law.

140 The enforcement of the criminal law is one of the most important aspects of the maintenance of law and order in a free society. Police officers are the main actors who have been entrusted to fulfill this important function. Often, this requires police officers to make decisions that might adversely affect the rights and interests of citizens. As the Canadian Association of Chiefs of Police notes in its factum:

> While there is a superficial similarity between liability in negligence for police officers and liability in negligence for other professionals, there is also a fundamental distinction. Other professionals have a private law duty to act in the best interests of their clients. Police officers however are public office holders, and have a public duty to act in the best interests of society as a whole. This public interest is not synonymous with the interests of private citizens in a police investigation. As stated in *Odhavji Estate* [at para. 28], "[i]n a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens". [para. 22]

The importance of maintaining the police officer's authority to make decisions in the public interest that are adverse to certain citizens is underscored in the case of suspects. As I explained earlier, because society's interest in having the police investigate crime and apprehend criminals inevitably collides with the suspect's interest to be left alone by the state, the imposition of a private duty of care would of necessity give rise to conflicting duties. I am not suggesting, as stated by the Chief Justice (at para. 42), that the police have "a duty to leave people alone". I am saying that it is always in the *interest* of individual members of society to be left alone rather than to be investigated by the police. This is because the individual, whether innocent or not, always stands to lose from being targeted by the police. Therefore, the imposition on the police of a legal duty to take reasonable care not to harm the individual inevitably pulls the police away from targeting that individual as a suspect. In such circumstances, it is neither just nor fair to the individual police officers, nor in the interest of society generally, to impose on police officers a duty that brings in its wake a set of conflicting duties.

141 By way of example, we need only consider the — unfortunately not uncommon — occurrence of the suspected impaired driver. If in acting to combat impaired driving the police were duty-bound to take into account not only the public interest but also the suspect's interests, in all but the most obvious cases of impairment, the officer might well be advised to simply let the suspect go rather than risk harming the suspect by initiating a criminal law process that may not result in a conviction. By letting the suspect go, the officer would also avoid the risk of time-consuming legal entanglements and potential civil liability. This cautionary approach may seem even more advisable to the officer if the suspect

in question is a person of stature and means who may personally stand to lose more from being "wrongfully" dragged into the criminal justice system.

142 I do not mean to suggest that if a duty of care towards suspects is recognized, police officers will become "so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims" that they will be incapable of carrying out their assigned duties (*Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (U.K. H.L.), at p. 1033, *per* Lord Reid). Like Lord Reid, in my view, the police are made of sterner stuff. Rather, my point is that the overly cautious approach that may result from the imposition of conflicting duties would seriously undermine *society's interest* in having the police investigate crime and apprehend offenders. Mr. Hill purports to answer this argument by denying that the police officer would be faced with such concerns because, he argues, the officer could always safely stand behind the reasonable and probable grounds standard. I will have more to say about the reasonable and probable grounds standard below. For the moment, however, let me simply say that I am dubious that a police officer, who has spent time in impaired driving court and who has witnessed countless legal debates about whether the arresting officer had the requisite reasonable and probable grounds to believe the suspect had been driving while impaired, would regard this standard as a sufficient safety net. Therefore, I am not persuaded that the potential ramifications of imposing on police these conflicting duties can be so easily answered by an appeal to the reasonable and probable grounds standard.

143 If authority is needed in support of the proposition that the imposition of conflicting duties is to be avoided, we need to look no further than the decisions of this Court in *Cooper* and *Edwards*. In both cases, the defendants were found to owe duties to the public at large, and private claims against them were dismissed at the pleadings stage for failure to disclose a reasonable cause of action.

144 In *Cooper*, the Registrar of Mortgage Brokers was sued for alleged negligence in failing to exercise his statutory powers with appropriate care to avoid or minimize a loss suffered by the plaintiff resulting from the improper actions of a mortgage broker. This Court found that there was no private duty of care in part because "a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public" (para. 44).

145 *Edwards* involved a similar claim against the Law Society of Upper Canada for its alleged negligence in failing to protect a class of fraud victims from improper conduct on the part of a solicitor. This Court refused to impose a private duty of care because imposing liability for negligence on the Law Society would be inconsistent with the Society's "public interest" role. The Court agreed with the following excerpt from Finlayson J.A.'s judgment in the Court of Appeal for Ontario, at para. 6:

> The public is well-served by refusing to fetter the investigative powers of the Law Society with the fear of civil liability. The invocation by the plaintiffs of the "public interest" role of the Law Society seems to be misconceived as it actually works to undermine their argument. ... [T]he Law Society cannot meet this obligation if it is required to act according to a private law duty of care to specific individuals such as the appellants. The private law duty of care cannot stand alongside the Law Society's statutory mandate and hence cannot be given effect to.

146 It might be objected that in each of *Cooper* and *Edwards* a particular statutory scheme brought the parties together and that that statutory scheme was what stood in the way of a finding of proximity. However, this provides no basis for declining to apply the same principle to this case. Although the police officer's duty to investigate crime and apprehend suspects is rooted in common law, it is also recognized, expressly or impliedly, by statute. Furthermore, the relationship between the investigating officer and the suspect arises in the context of the criminal law and regulatory law, both of which are governed almost entirely by statute. In fact, in my view, the conflicting duties that would arise in this case are far more acute than those in *Cooper* or *Edwards* where, at least in some instances, the interest of the potential victim can be reconciled with the interest of the public. After all, both the investing public and the private investor might have as an interest the shutting down of unscrupulous mortgage brokers. By contrast, as I have explained earlier, it is *never* in the interest of the targeted suspect that the police investigate him or her. This suggests again that the interests of the public in having police officers investigate crime and the interests of suspects are inherently and diametrically opposed.

147 This opposition of interests has been recognized by courts in other countries as a sufficient reason not to impose a duty of care. The imposition of a duty of care in negligence owed to suspects has been held to be inconsistent with a police officer's duty to fully investigate the conduct in question. For example, Australian courts have reasoned that to impose a duty of care in negligence to a person whose conduct is under investigation would conflict with and constrain the proper performance of the police officers' duty to fully investigate the conduct in question: see *Tame v. New South Wales*, at paras. 231 and 298-99; *Gruber v. Backhouse*, at paras. 29-30 and 35-39. Similarly, in England, the House of Lords has refused to extend the duty of care on the basis of a conflict with the "fearless and efficient discharge by police officers of their vitally important public duty of investigating crime": *Calveley v. Chief Constable of Merseyside Police*, at p. 1030; see also *Hill v. Chief Constable of West Yorkshire*, at pp. 240-41; *Brooks v. Commissioner of Police*, at para. 30.

148 To sum up: in my view, although in the present case there is foreseeability of harm, there remains a lack of proximity. Consequently, I would conclude on the ground of lack of proximity alone that the relationship between the investigating officer and the suspect does

not give rise to a *prima facie* duty of care. However, even if some degree of proximity were found, and even if this degree of proximity were held to be sufficient to give rise to a *prima facie* duty of care, it is my position that a consideration of additional policy considerations would militate against the recognition of such a duty. This takes us to the second stage of the *Anns* test.

2.5 Residual Policy Considerations

2.5.1. Potential Impact on the Exercise of Police Discretion

149 It is at the second stage of the *Anns* test that so-called residual policy considerations fall to be considered. At this stage we are "not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37; see also *Edwards*, at para. 10). I begin my analysis of the residual policy considerations with the question of police discretion since discussion of this factor is more closely related to the issue of conflicting duties we have just discussed. McLachlin C.J. finds that the discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care because, in her view, it is a factor to be "taken into account in formulating the *standard* of care, not whether a duty of care arises" (para. 51 (emphasis in original)). I disagree. The concern about police discretion in this context is not whether courts will be able to properly distinguish between mere errors of judgment and negligent acts. Police discretion is a significant factor because the police have the discretionary power not to investigate further or engage the criminal process despite the existence of reasonable and probable grounds to believe that an offence has been committed. A concern therefore arises from the fact that, should this Court recognize a private duty of care owed to the suspect under investigation, this power could be exercised, not to advance the public interest as it should be, but out of a fear of civil liability.

150 The police discretionary power has been recognized by this Court as "an essential feature of the criminal justice system": *R. v. Beare* (1987), [1988] 2 S.C.R. 387 (S.C.C.), at p. 410. As stated by La Forest J. in that case: "A system that attempted to eliminate discretion would be unworkably complex and rigid." Equally important, however, is the need to properly circumscribe this power so that it be exercised solely in the *public interest*. This issue arose recently in *R. v. Beaudry*, [2007] 1 S.C.R. 190, 2007 SCC 5 (S.C.C.). This Court recognized that the police officer's duty to enforce the law and investigate crimes is not absolute and is subject to the exercise of discretion. "Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process" (para. 37). The Court was quick to add, however, that the discretionary power itself is not absolute and stated that "Far from having *carte blanche*, police officers must justify their decisions rationally." The exercise of

the discretion must first be justified subjectively: it must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds. In addition, the exercise of discretion must also be justified on the basis of objective factors.

151 At first blush, it may be thought that the imposition of a private duty of care to the suspect and the consequent potential for civil liability should give rise to no concern about the improper exercise of police discretion. Just as a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion, so would a police officer be precluded from deciding not to engage the criminal law process simply to avoid potential civil liability. Again, however, I am not persuaded that we can so easily disregard the potential legal and societal ramifications of imposing on police such a duty.

152 If this Court accepts Mr. Hill's argument, the investigating officer will be *legally bound*, not only to fulfill his or her public duty to enforce the law, but also to take care not to harm the suspect by conduct that may ultimately be found to fall below the relevant standard of care. The law should not impose a duty unless it expects that it will be fulfilled. Of course, the surest way of avoiding harm to the suspect is for the officer to decide to not issue process and not engage the criminal law; in other words, in order to reconcile the conflicting duties imposed by law, the police officer may well choose to avoid any risk of harm to the suspect by the exercise of "police discretion". Since there is a significant gap between the "reasonable and probable grounds" standard to issue process and the "beyond a reasonable doubt" standard to convict, the prudent officer who tries to reconcile his public duty to enforce the law and his private duty not to harm the innocent suspect may be well advised not to issue process except in cases where the evidence is overwhelming. How then would we distinguish between a proper exercise of discretion based on a police officer's desire to fulfill his legal duty of care to the suspect and an improper one based on the selfish desire to avoid potential civil liability?

153 There is significant public interest in maintaining the long-standing reasonable and probable grounds standard so as to ensure a robust and efficient enforcement of the law. Once this standard is met, it is left to others within the criminal justice system, namely the Crown prosecutor, the preliminary hearing justice, and the ultimate finder of fact, to delve more deeply into the legal and factual merits of a case. As this Court has recognized in *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), at pp. 249-50, the reasonable and probable grounds standard achieves a reasonable balance between the individual's right to liberty and the need for society to be protected from crime. In my view, because the imposition of a private duty of care as suggested in this case could only impede the police officers' ability to perform their public duties fearlessly and with despatch, it would detrimentally upset this delicate balance.

2.5.2. Identifying the Wrongfully Convicted for the Purpose of Compensation

154 As stated earlier, Mr. Hill urges this Court to bring "the law of negligence ... to bear on the problem of wrongful convictions" by recognizing a new tort of negligent investigation. McLachlin C.J. accepts his plea and, in fact, relies on the need to compensate the wrongfully convicted as an important factor in support of finding a duty of care (paras. 36-37). It is noteworthy that the proposed tort would also provide recourse to targeted suspects who, short of being convicted, suffer a loss or injury as a result of a negligent investigation. Indeed, from the plaintiff's viewpoint, it makes little sense to limit the right of action to cases of wrongful conviction. In the context of an action for negligent investigation, the difference between a negligent investigative process that results in a conviction and one that is terminated at an earlier point would seem to go only to the question of the quantum of damages.

155 Mr. Hill relies on his ultimate acquittal in support of his claim that the losses he suffered as a result of being subjected to the criminal justice system should be compensable at law. The Crown disputes the notion that this is a case about providing a remedy for the wrongfully convicted, and states the following (factum, at para. 6):

> This case is not about preventing wrongful convictions. Wrongfully convicted persons would constitute only a tiny sub-set of the class who would be in a position to sue for negligent investigation (the largest sub-set being those who are acquitted at trial or against whom charges are dropped before trial). Even amongst the wrongfully convicted, few would be able to establish that negligent police investigation caused their conviction.

156 No one is disputing the validity of Mr. Hill's acquittal. However, the distinction between an acquittal and a finding of innocence must be considered in assessing the potential ramifications of recognizing a tort of negligent investigation. The difficulty arises from the fact that our criminal justice system is not focussed on identifying the innocent. The verdict in a criminal case is guilty or not guilty. A verdict of not guilty is not a factual finding of innocence; neither is an order on appeal overturning a conviction. A verdict of not guilty encompasses a broad range of circumstances, from factual innocence to proof just short of beyond a reasonable doubt. That reality about our criminal justice system raises difficult questions of public policy when it comes time to consider the issue of compensation. Should compensation be reserved to those accused who are factually innocent of the crime with which they were charged or convicted? If so, how should factual innocence be determined? The question whether *any* inquiry should be made into the "true" status of the acquitted person is itself rather controversial. The controversy, in a nutshell, can be described as follows.

157 On the one hand, a compelling argument can be made that a not guilty verdict should be considered as a determination of innocence for all purposes, including compensation.

Under this first approach, all persons charged with a criminal offence who are ultimately found not guilty could fall in the category of potential plaintiffs. The most powerful argument in support of this approach is that any qualification of the verdict of acquittal would in effect introduce the third verdict of "not proven" which has not been accepted in our criminal justice system. The introduction of such a "Scotch verdict" would create a lingering cloud over those persons who have been found not guilty or in respect of whom the criminal process was terminated but whose innocence has not been conclusively ascertained. Professor H. A. Kaiser, in the context of discussing possible statutory compensation schemes, explains the rationale for having a more inclusive compensatory approach in his article "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989), 9 *Windsor Y.B. Access Just.* 96, as follows (at p. 139):

> It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:
>
> > ... one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower. ... There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted. [Peter MacKinnon, "Costs and Compensation for the Innocent Accused" (1988), 67 *Can. Bar Rev.* 489, at pp. 497-98]

158 On the other hand, an equally compelling argument can be made that any compensation regime that is not limited to the "factually innocent" is unacceptable because it would provide the persons who have in fact committed the offence, but whose guilt could not be proven, with a possible means of profiting from the commission of their crime. Under the federal-provincial *Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* (agreed to and adopted by federal and provincial justice ministers in March 1988), a clear distinction is made between a finding of not guilty and a finding of innocence for the purpose of compensation. The following was added to the listed prerequisites for eligibility for compensation:

> As compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:
>
> > a) If a pardon is granted under Section 683 [of the *Criminal Code*], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or

> b) If a reference is made by the Minister of Justice under Section 617(b), a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c), to the effect that the person did not commit the offence. [Emphasis added.]

159 The Chief Justice alludes to this concern when she stresses, at para. 64, that any suspect suing the police "bears the burden of showing that police negligence in the course of an investigation caused harm compensable at law" and that "[e]vidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to this causation inquiry." My colleague takes the position, however, that "[i]t not necessary to decide here whether an acquittal should be treated as conclusive proof of innocence in a subsequent civil trial" (para. 64). While it is perhaps not necessary in order to dispose of this appeal to decide whether an acquittal should be treated as conclusive proof of innocence, it will certainly be necessary to do so in the next tort action where the plaintiff succeeds in proving negligence in the conduct of a police investigation. These are precisely the sorts of ramifications that must be considered at the second stage of the *Anns* test. The question I ask, therefore, is the following: how are we to distinguish between treatment that is "*rightfully* imposed by the law" and treatment that is "*wrongful*" for the purpose of compensation? If we adopt the first approach described earlier, namely that an acquittal should be regarded as the equivalent of a finding of innocence for the purpose of compensation, this could have wide-ranging ramifications. For example, every suspect, who is charged with an offence but who is not convicted because the criminal justice system has worked the way it should, would become a potential plaintiff if he can show that the police conducted a substandard investigation. This result would follow regardless of whether the suspect has in fact committed the crime or not.

160 The issue is most pertinent in the context of a proposed right of action where, as here, the alleged wrong is the conduct of a substandard police investigation. On the one hand, there is no question that negligent police investigation may contribute to the wrongful conviction of a person who did not commit the crime. Negligent mishandling of physical evidence may lead to erroneous forensic results. Careless or incomplete investigations may fail to yield evidence that would have exonerated the accused or raised a reasonable doubt about his guilt. On the other hand, a negligent investigation will often be the effective cause of an acquittal — as indeed it should be in the criminal context. Numerous evidentiary and procedural safeguards are built in the criminal trial process to guard against wrongful convictions. Hence, evidence may be excluded or disregarded because improper investigative techniques were used in obtaining it. Or, a substandard investigation may yield insufficient evidence to support a conviction, even though the evidence may have been out there to be found.

161 It is a principle of fundamental justice that the accused in a criminal trial be given the benefit of any reasonable doubt. Therefore, from a criminal law perspective, there is no question that an acquittal must be regarded as tantamount to a finding of innocence. However, in the context of a tort action, we must come to terms with the reality that the person who committed the offence may well stand to *benefit* rather than lose from a botched-up investigation. The true victim in such cases is not the suspect but the public at large. Should the successful accused who actually committed the offence be entitled to use the acquittal brought about by the negligent conduct of police investigators as a basis to claim compensation? A simple example may assist in understanding how this difficulty may easily arise and why it cannot simply be resolved by a careful tailoring of the appropriate standard of care.

162 Let us assume that a complainant is the victim of a brutal sexual assault. The perpetrator is unknown to her. However, she provides a detailed description to the police which leads them to pick from police files a photo of a suspect matching her description. The complainant is shown the single photo and she positively identifies the person in the photo as her assailant. Fearing the assailant may strike again, the police quickly apprehend the suspect. The police later arrange for a physical lineup comprised of several persons, including the suspect in the photo. The other persons in the lineup bear questionable resemblance to the suspect. The complainant views the lineup, and again identifies the suspect as her assailant. The suspect is charged. As it turns out at trial, there is little else connecting the suspect to the crime, and the case for the prosecution essentially turns on the complainant's eyewitness identification. The complainant is firm in her identification of the accused at trial. However, because of the inherent frailties of eyewitness identification and the risk that the identification made by the complainant may have been tainted by the improper police techniques adopted in this case, the trial judge concludes that he cannot be satisfied beyond a reasonable doubt of the guilt of the accused. The accused is acquitted.

163 The accused commences a civil action in negligence against the police alleging that the improper identification techniques caused the complainant to wrongfully identify him as the perpetrator which, in turn, led to his wrongful arrest and prosecution. He claims damages for loss of reputation, nervous shock, and the legal expenses he incurred in defending himself against the charge.

164 In defence of the claim, the defendant proposes to call the complainant to identify the plaintiff as her assailant. The defendant argues that any negligent conduct on his part did not cause the harm. Rather, the plaintiff's own conduct in committing the sexual assault occasioned his loss. The defendant argues further that, even if causation is proven, none of the damages should be compensable at law unless the plaintiff proves that he did not in fact commit the offence.

165 How is the civil claim to be adjudicated? Is the acquittal to be considered as the legal equivalent of factual innocence in the civil trial thereby precluding the defendant from advancing this line of defence? If that approach is adopted, the action in negligence is easily made out. The duty of care would exist as a matter of law. The breach of standard is proven because, quite clearly, the identification techniques fell below acceptable standards. The causal link is inevitably made out because, if the plaintiff must be regarded as innocent of the crime, one can only conclude that it is the negligent conduct of the police that caused the complainant to wrongfully identify him as her assailant, which identification in turn caused him to be subjected to the entire criminal process. Upon proof of his loss, the plaintiff is assured of compensation. This result appears entirely just, if the plaintiff in fact is not the person who assaulted the complainant. On the other hand, if he is in fact the assailant, many would view it as unthinkable that his loss should be regarded as compensable at law, given that the true victim who was harmed as a result of the police officer's substandard conduct was society, not the plaintiff.

166 Adopting the second approach, according to which a finding of not guilty is distinguished from factual innocence, could also bring about undesirable results if the plaintiff did not in fact commit the crime with which he was charged. If the acquittal is not conclusive of factual innocence, the plaintiff, who bears the burden of proving his claim on a balance of probabilities, would have to prove that he is not the assailant in order to succeed in his civil action. Meeting this burden may prove impossible to do. It also seems unjust that, having already been acquitted, he should be put through this additional hurdle. It would also necessitate a retrial of the case which may well lead to conflicting findings and put an aura of suspicion on his acquittal.

167 Quite clearly, this Court would have to choose one approach or the other on the question of compensability of harm. Whichever approach is adopted, there may be unforeseen and undesirable ramifications in the criminal context. If the first approach is adopted, would triers of fact be less inclined to arrive at a verdict of not guilty on the basis of deficiencies in the police investigation, knowing that this result could give the accused the right to claim damages? Conversely, if the second approach is adopted and one branch of the law draws a distinction between a finding of not guilty and a finding of innocence, would this undermine the overall meaning of an acquittal? These are the sorts of residual policy considerations to which the tort of negligent investigation gives rise. In my view, they provide us with reasons to be cautious about imposing on police officers a novel duty of care towards suspects.

2.5.3. Competing Policy Concerns not Resolved by Defining the Standard of Care

168 The Court of Appeal was of the opinion that the policy concerns weighing against imposing a duty of care could be addressed by a "carefully tailored" standard of care (para. 70). The court went on however to simply adopt the standard of "the reasonable police officer in like circumstances" as the appropriate standard, adding: "In an arrest and prosecution context, the standard becomes more specific and is directly linked to statutory and common law duties, namely did the police have reasonable and probable grounds to believe that the plaintiff had committed a crime?" (para. 83). McLachlin C.J. agrees that this is the correct standard (para. 67).

169 With respect, I fail to see how the ordinary negligence standard, even if linked to the reasonable and probable grounds standard, can reconcile the conflicting standards at play. In my view, the usual negligence standard cannot easily co-exist with governing criminal standards. By way of illustration, I will refer, first, to the hypothetical fact situation I have just discussed and, second, to the analysis in the courts below in this case.

170 In the hypothetical example I have discussed earlier, the plaintiff's action in negligence against the police is based on the allegation that the improper identification techniques caused the complainant to wrongfully identify him as the perpetrator which, in turn, led to his wrongful arrest and prosecution. As I have stated earlier, I believe there is no question in this hypothetical example that the identification techniques used by the police fell below acceptable standards. By showing the complainant a single photo of a suspect and by constructing a lineup with stand-ins who bore questionable resemblance with the suspect, the police investigator clearly did not meet the standard of the reasonable police officer in like circumstances. Therefore, under the usual negligence paradigm, this breach of standard of care could well result in civil liability, presumably — if one accepts the plaintiff's argument on causation — for all the damages that flowed from the initiation of criminal proceedings and the process that followed.

171 The problem that arises, however, is that in focussing on the investigating officer's conduct and the civil standard of negligence, we easily lose sight of both the complainant's role and the criminal standard for initiating process. In this hypothetical example, it could not seriously be disputed, from a criminal law standpoint, that the complainant's detailed description of her assailant as a person matching the suspect's appearance, together with her positive identification of the suspect as her assailant, amply meet the reasonable grounds standard for laying a criminal charge under s. 504 of the *Criminal Code*. Under s. 504, "[a]ny one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information" before a justice and where territorial jurisdiction is established, "the justice *shall* receive the information". Even if the police chose not to lay a charge, the complainant would be entitled to lay the information herself. It is further noteworthy that the complainant's identification evidence, potentially flawed as it may be (a matter to be

determined at trial), would not only meet the standard to *lay* a charge, but would also meet the standard for *committal* at the preliminary hearing under s. 548(1)(*a*) of the *Criminal Code*.

172 Similarly, it is instructive to consider how the negligence analysis played out in the courts below in this case. While all five members of the panel in the Court of Appeal for Ontario agreed on the standard to be applied, the court was divided on the application of that standard on the facts before them. Of particular relevance to the point I am making is how the criminal standard for initiating process all but gets lost in the negligence analysis. I will explain.

173 Much as in my hypothetical example, Mr. Hill's claim is based on alleged deficiencies in police identification techniques. In turn, he submits that these deficiencies led to his misidentification by witnesses, his wrongful arrest, and his conviction for the January 23, 1995 robbery. In particular, he alleges that the police failed to follow their own internal guidelines with respect to the presentation of photo lineups to witnesses and that the photo lineup of eleven Caucasians and one aboriginal person was structurally biased against him. In determining whether there was a breach of standard in this case, it therefore became incumbent upon the court to inquire whether the police, in using these identification techniques, met the "reasonable police officer in the same circumstances" standard. While all justices below proceeded with that analysis, they were divided on the result. The trial judge found that there was no breach of the standard ((2003), 66 O.R. (3d) 746 (Ont. S.C.J.)), and this finding was upheld by three of the five justices in the Court of Appeal. The two dissenting justices were of the opinion that the identification techniques used by the police fell below this standard.

174 However, despite the Court of Appeal expressly acknowledging that, in an arrest and prosecution context, the ordinary negligence standard must be linked to the reasonable and probable grounds standard, none of the judges below considered the criminal standard for initiating process in their analysis. In other words, beyond inquiring into the identification techniques used by the police, none of the judges asked themselves whether the charges were nonetheless laid on the basis of reasonable and probable grounds. The latter standard, of course, is the one by which the police are governed in the conduct of their criminal investigation and, it is important to stress, it is in the public interest that it be maintained as the operative standard. As this Court has observed in *Storrey*, at p. 249:

> The importance of this requirement [that police have reasonable grounds in order to affect an arrest] to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest.

175 Therefore, if the civil standard for liability is to be "carefully tailored" so as to complement and not conflict with governing criminal standards, the presence of reasonable and probable grounds for laying the charge must constitute a bar to any civil liability. It cannot be sufficient for the plaintiff to show that identification techniques used by the police were substandard. Rather, it must be established that the identification process was so flawed that it *destroyed* the reasonable and probable grounds for laying the charge. It is only when this standard is met that the plaintiff can be said to have suffered, as McLachlin C.J. puts it "compensable damage that would not have occurred but for the police's negligent conduct" (para. 92).

176 MacPherson J.A. alluded to this notion that process would have issued in any event, not in his discussion on standard of care, but in considering the question of causation. He stated as follows (at para. 97):

> There is a complete answer, on the facts, to this submission [that the unfair line-up tainted the entire identification procedure]. The appellant was originally charged with ten robberies, one of which took place on January 23, 1995. Ultimately, he faced a trial in relation to only this robbery. The photo line-up that the appellant attacks was *not* part of the evidence concerning this robbery. Rather, the identification evidence about the January 23 robbery was the sighting by P.C. Stewart and the positive identification of the appellant by two bank tellers based on a newspaper photograph on their desks. It follows that there is no causal link between the photo line-up and the appellant's arrest, detention and trial on the charge relating to the January 23 robbery. He would have been arrested on January 27, detained and tried regardless of any negligence in preparing the photo line-up. However, because the trial judge addressed the photo line-up issue, I will also consider it on the merits.

177 The Chief Justice, it seems, also alludes to the fact that a charge may have been laid regardless of any substandard conduct when she observes (at para. 78); "Nor is it clear that if these incidents [i.e., the alleged negligent conduct] had not occurred, Hill would not have been charged and convicted." The question of reasonable and probable grounds obviously goes to causation, in the sense that the claim in negligence is not made out if the criminal proceedings would have issued regardless of the negligent conduct in question. Indeed, the law would be rather incoherent if the investigating officer could be civilly liable for any harm to the suspect flowing from the initiation and continuation of criminal proceedings, even when such proceedings are not merely authorized but are in fact *desirable* under the standards set by the criminal law. In my view, however, it is not sufficient to consider the governing criminal standard simply on the issue of causation. To the contrary, the criminal standard for initiating process must also inform the standard of care itself. In other words, *even if* the impugned lineup had in fact been used with respect to the January 23, 1995 robbery, it

would not be sufficient for the purposes of the tort action to show that the identification techniques used by the police fell below the standard of the reasonable police officer. Such an approach would ignore the significant public interest in having criminal process issue on the basis of reasonable grounds to believe that an offence has been committed. Again, the determinative question would therefore have to be whether the identification process was so flawed as to *destroy* the reasonable and probable grounds provided by the witnesses's positive identification of Mr. Hill as the robber.

178 The two dissenting justices not only failed to incorporate the reasonable and probable grounds standard in their analysis; they adopted a very expansive view of causation. Even though the impugned photo lineups did not even form part of the evidence on the charge in respect of which Mr. Hill was convicted, the two justices were nonetheless satisfied that a sufficient causal link could be established between the lineups and the conviction for the following reasons, at para. 158:

> First, as noted by the trial judge in his reasons, on January 17, 1995, Detective Loft showed this photo line-up to a number of witnesses to the robberies. Most identified Mr. Hill as the robber, although they thought he did not have a goatee. It is apparent that these witnesses' misidentification of Mr. Hill as the robber materially contributed to Detective Loft's fixation on Mr. Hill as the perpetrator of the plastic bag robberies, and therefore to his initial arrest of Mr. Hill. It was because he was convinced that the witnesses had identified the right person that Detective Loft neglected to do any reinvestigation of the robberies in the face of the emerging exculpatory evidence. The misidentification from the photo line-up contributed to Detective Loft's tunnel vision on the issue of Mr. Hill, which resulted in Mr. Hill's arrest, detention, wrongful prosecution and the ensuing miscarriage of justice. Accordingly, we believe there is a clear causal link between the photo line-up and Mr. Hill's wrongful conviction.

179 The dissenting justices further relied on the fact that the trial judge also appeared to find that causation was made out. Although the trial judge did not provide any analysis on the question of causation, he expressed the view that the only element of the tort action which was in issue in this case was whether the standard of care had been met.

180 As evidenced by the above, the private nature of the tort action necessarily narrows the focus of the criminal investigation to the individual rights of the parties and, in the process, it is almost inevitable that courts lose sight of the broader public interests at stake. In short, tort law simply does not fit. In his article, Professor Kaiser aptly notes the following at p. 112:

> ... as Professors Cohen and Smith have argued, private law in general and torts in particular are singularly ill-suited to deal with issues which fundamentally concern the nature of the state and the relationship of the individual to the state and the law:

> ... the legislatures and courts, in developing rules of public conduct and responsibility premised on private law tort concepts, have failed to consider a wide range of factors which should be recognized in articulating the relationship of the private individual and the state ... [D. Cohen and J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 *Can. Bar Rev.* 1, at p. 5]
>
> > ... rights against the state are qualitatively different from rights against individuals. [*Ibid.*, at 12.]

2.5.4. Other Existing Remedies

181 By contrast to the proposed action in negligence, the existing torts of false arrest, false imprisonment, malicious prosecution and misfeasance in public office do not give rise to the policy concerns we have just discussed. With respect to each of these torts, where a police officer is acting within the scope of his or her powers, there can be no tort liability for simple negligence in the performance of his duty. The torts of false arrest and false imprisonment are properly circumscribed in recognition of the limited role of the police officer in the overall criminal process, and any interposition of judicial discretion effectively ends any civil liability. By contrast, how does the proposed tort action account for the fact that, once a criminal charge has been laid, the *Crown* controls the proceedings, not the police? (Indeed, in some jurisdictions, the Crown takes control earlier in the process — all charges are vetted by the Crown before they are laid.) How is the intervening verdict of a neutral third party to be considered in the negligence action? Is it a *novus actus interveniens* that breaks the chain of causation between the act of negligence and the injury? Does the answer depend on the strength of the evidence which was not tainted by the negligent conduct in question? Since the ultimate issue on the question of duty of care is whether it is fair and just to impose it, is it fair to saddle the police with the entire cost when responsibility for wrongful convictions has been attributed to all players in the justice system, including witnesses, scientists, Crown attorneys, judges and juries, none of whom is exposed to liability, with the exception of Crown Attorneys, for the tort of malicious prosecution?

182 The torts of malicious prosecution and misfeasance in public office concern allegations of *misuse* and *abuse* of the criminal process and of the police officer's position. These torts do not invite a second-guessing of the police officer's judgment in the investigation of a case but deal rather with the deliberate and malicious use of the police officer's position for ends that are improper and inconsistent with the public duty entrusted upon him or her. In short, there is no conflict between the duties imposed by the existing torts and the police officer's public duty to investigate crime and apprehend offenders. The creation of the new tort of negligent

investigation would effectively subsume all the existing torts and risk upsetting the necessary balance between the competing interests at play.

2.5.5. Civil Law in Quebec

183 Finally, a word must be said about the existing state of the civil law in Quebec. MacPherson J.A. found support for his conclusion that there was a common law duty of care in two decisions of the Quebec Court of Appeal: *André c. Québec (Procureur général)*, [2003] R.J.Q. 720 (Que. C.A.), and *Jauvin c. Québec (Procureur général)* (2003), [2004] R.R.A. 37 (Que. C.A.), stating that he was "impressed by the reasoning and the balanced results" achieved in those two cases (para. 66). In both cases, the court recognized a duty of care on police towards suspects based on the general provision found in art. 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Art. 1457 provides:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

184 I will briefly review the facts and findings in these two cases. In *André*, Alain André was charged with sexually assaulting his adopted daughter. Eight months later, after the charges were withdrawn prior to the commencement of a preliminary inquiry, Mr. André brought a suit against the police, claiming that they did not have reasonable and probable grounds for his arrest. At trial, damages in the amount of $326,100 were awarded and a further appeal was dismissed, the Quebec Court of Appeal holding that the police did not have reasonable and probable grounds when they arrested Mr. André.

185 In *Jauvin*, the accused John Jauvin was charged with conspiracy to commit fraud but, eventually, all the charges against him were dropped. Mr. Jauvin brought a suit against the police, claiming that the police inquiry and investigation had caused him great harm and seeking damages exceeding $4 million. Jauvin's suit was dismissed at trial, as was his appeal to the Quebec Court of Appeal. However, while the court held that there was no fault on the part of the respondent Attorney General of Quebec, the court did hold, that simple negligence on the part of the police could engage art. 1457 of the *Civil Code of Québec*, which concerns extra-contractual civil liability. In determining the standard of care, the court referred to its decision in *André* and stated that the conduct of a police officer was to be that of the normally competent, prudent and diligent officer in the same situation.

186 Both cases, in my view, provide little assistance in deciding the present appeal. There is no question that *André* and *Jauvin* provide some support for the proposition that police officers owe suspects a duty of care. However, three things are worth noting in this regard. First, in both *Jauvin* and *André* the duty owed arises primarily out of the codified provision in art. 1457 of the *Civil Code of Québec*. Thus, while interesting, neither case directly supports the proposition that police should owe suspects a common law duty of care. Second, *André* turned on whether the police had reasonable and probable grounds to arrest Mr. André; in the view of the courts, they did not. This is by no means a novel legal principle. Third, no liability was found in *Jauvin* and, while the Court of Appeal reiterated its finding in *André* that civil liability in negligence can be imposed, none of the policy considerations raised in this case were considered or discussed.

3. Conclusion

187 For these reasons, I conclude, as have other courts of common law jurisdictions, that the common law tort of negligent investigation should not be recognized in Canada. The recognition that the civil tort system is not the appropriate vehicle to provide compensation for the wrongfully convicted should not be viewed as undermining the importance of achieving that important goal. However, how this goal is to be achieved is a complex issue that has been discussed in the context of a number of inquiries and governmental studies: see for example *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001) (the Sophonow Inquiry); *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations* (1989) (the Marshall Inquiry); *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) (the Morin Inquiry); *Commission of Inquiry into the Wrongful Conviction of David Milgaard* (ongoing) (the Milgaard Inquiry); *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2007) (the Driskell Inquiry); *The Lamer Commission of Inquiry into the Proceedings Pertaining to Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes* (2006) (the Lamer Inquiry). It may be that compensation for the wrongfully convicted is a matter better left for the legislators in the context of a comprehensive statutory scheme. It is certainly not a matter that should be left to the vagaries of the proposed tort action.

188 I would allow the Crown's cross-appeal and dismiss Mr. Hill's appeal.

Appeal and cross-appeal dismissed.

Pourvoi et pourvoi incident rejetés.

Footnotes

* A corrigendum issued by the court on October 22, 2007 has been incorporated herein.

End of Document

TAB 12

2015 ONSC 998
Ontario Superior Court of Justice

Lambrou v. Voudouris

2015 CarswellOnt 1929, 2015 ONSC 998, 249 A.C.W.S. (3d) 666

Elie Lambrou, Plaintiff and Peter Voudouris, Voudouris & Zollo, Legend Property Services Inc., 2204883 Ontario Limited, Peter Tsatsaris and Rose Tsatsaris, Defendants

F.L. Myers J.

Heard: February 12, 2015
Judgment: February 13, 2015
Docket: CV-11-423520

Counsel: Douglas Best, Kate Genest, for Plaintiff
John Polyzogopoulos, Stephen Gaudreau, for Defendants, Peter Voudouris, Voudouris & Zollo, Legend Property Services Inc., and 2204883 Ontario Limited

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.i General principles

MOTION regarding injunction.

F.L. Myers J.:

1 This is the return of a motion for an interlocutory *Mareva* injunction that was adjourned under some asset freezing terms by order of Aston J. dated August 3, 2012. That order was continued to today by Spence J. by order dated January 9, 2015. The motion is dismissed.

2 Elements of the evidence of the defendant Voudouris challenge common sense, well-established business practice, and are, quite frankly, phantasmagorical. But the plaintiff sues for breach of fiduciary duty - not fraud. That is a deliberate choice to try to access the

defendant's professional errors and omissions insurance coverage. That choice has at least two important effects on this motion.

3 First, while the defendant Voudouris admits that the parties entered into the impugned transaction based upon mutual trust, the plaintiff is equally clear that he understood that the defendant Voudouris was in a conflict of interest and that he could not rely on Voudouris's advice concerning the transaction. The plaintiff says, with much force, that in agreeing to invest in the transaction he nevertheless relied on his long-term relationship with Mr. Voudouris as his accountant, Mr. Voudouris's representations concerning the acceptability of the defendant Peter Tsatsaris as a participant, and the fact that Mr. Voudouris claimed that he too was investing in the deal. This is all plausible and consistent with the plaintiff's lack of business sophistication. But does it put Mr. Voudouris in a fiduciary capacity to the plaintiff in respect of the impugned transaction? It may. The plaintiff has many factors to prove at trial and most are contested. See *Hunt v. TD Securities Inc.*, 2003 CarswellOnt 3141 (Ont. C.A.) at para. 40.

4 The plaintiff's evidence is not without its warts as one might expect from an unsophisticated party participating in an unfamiliar transaction with a professional who often operates in cash and with little or no documentation. But in a case that may turn on credibility and subjective concepts like vulnerability and reliance, I cannot say on this written record that the plaintiff is so plainly likely to succeed in establishing breach of fiduciary duty so as to find that he has a strong *prima facie* case on that cause of action. The undertaking to act selflessly required to find a fiduciary duty, as discussed by the Supreme Court of Canada in *Perez v. Galambos*, 2009 SCC 48 (S.C.C.), is a very contested issue especially if Mr. Voudouris was a participant in the deal for himself as he alleges. If, at trial, the judge finds that there is no proof that he really was in the deal because his cheques are equivocal and he cannot be believed, it may be that the requisite undertaking may be more readily inferred. I am not in a position on this motion to determine whether Mr. Voudouris was truly in the deal or if his participation was a sham.

5 The other effect of the claim being brought in fiduciary duties rather than fraud is that it makes an inference of dissipation of assets more difficult to draw absent supporting facts. There are no facts similar to those that were before Strathy J. (as he then was) in *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.) at para 68. While proof of fraud is not a prerequisite for obtaining a *Mareva* injunction, other causes of action do not necessarily lead as readily to an inference of asset dissipation absent other supporting facts. The defendant Voudouris has a house and is in family law proceedings with his wife. The house is encumbered and there is evidence that the bank is calling its loan rather than letting the defendant Voudouris bulk up on equity-destroying debt. If I cannot say that there is a strong *prima facie* case that Voudouris committed fraud (or even breach of fiduciary duty), then I do not see how I can draw an inference that he is likely to dissipate his assets on these

facts. Shoddy business practices is not enough. Absent tangible, objective evidence of asset dissipation or an inference of dissipation drawn from the strength of a cause of action that is predicated on dishonesty, prejudgment attachment by way of *Mareva* injunction is simply not available.

6 Accordingly, the order of Aston J dated August 3, 2012 as extended by the order of Spence J dated January 15, 2015 has lapsed and is dissolved. The following are terms of the dismissal of the motion under rule 1.05:

> a. If the defendant Voudouris proposes to sell, assign, transfer, or encumber in any way his interest in the property known municipally as 79 Burdenford Crescent, Markham, Ontario, to his spouse or to a third-party, the defendant Voudouris shall inform the plaintiff at least 30 days prior to entering into a binding commitment to do so in order that the plaintiff can seek relief if so advised based on the state of the facts at that time;
>
> b. In light of the extensive cross-examinations already held, each party to this motion is entitled to five further hours of examination for discovery of the party opposite. The examinations shall be completed by April 30, 2015. Answers to all undertakings given on examination for discovery shall be provided by May 29, 2015. The plaintiff will set the action down for trial by no later than June 26, 2015. If any matter arises that might imperil the foregoing schedule, the parties may arrange a case conference with me under rule 50.13 by contacting my Assistant.

7 Although the defendant ultimately succeeded in the motion, the plaintiff is invited to deliver his cost submissions first. They shall consist of no more than five pages of submissions plus a Costs Outline to be delivered by February 27, 2015. The defendant Voudouris may respond with no more than five pages of submissions plus his own Costs Outline by March 13, 2015. Costs include all costs reserved on prior appearances.

8 All costs submissions are to be made by searchable pdf attachment to an email to my Assistant. Case law, if any, shall not be provided but may be referenced by hyperlinks to CanLII or another reporting service in the submissions.

Motion dismissed.

TAB 13

1999 CarswellOnt 1625
Ontario Superior Court of Justice

Rexdale Mews Associates Partnership v. Kaiser

1999 CarswellOnt 1625, [1999] O.J. No. 1916, 25 R.P.R. (3d) 288, 36 C.P.C. (4th) 91

Rexdale Mews Associates Partnership and Barzel Five and Associates, Plaintiffs and Morris Kaiser, Lakefor Holdings Inc., 974846 Ontario Inc. and Halliwell Terrace Limited, Defendants

Epstein J.

Heard: April 16, 1999
Judgment: June 1, 1999
Docket: 97-CV-135782

Counsel: *P.K. Martin*, for Plaintiffs.
S.M. Turk, for Defendants Lakefor Holdings Inc. and 974846 Ontario Inc.
P.B. Fox, for Defendants Morris Kaiser and Halliwell Terrace Limited.

Subject: Civil Practice and Procedure; Corporate and Commercial; Property
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.2 Irreparable harm

MOTION by plaintiffs for order of injunction enjoining defendants from continuing with power of sale proceedings.

***Epstein J.*:**

1 The plaintiffs, Rexdale Mews Associates Partnership and Barzel Five and Associates (hereinafter collectively referred to as "Rexdale Mews") bring this motion for an interim injunction to restrain the defendant 974846 Ontario Inc. ("974 Inc.") from selling various properties pursuant to a Notice of Sale Under a Mortgage that was served on December 3,

1998. In the alternative, Rexdale Mews seeks an Order granting it leave to obtain and register a Certificate of Pending Litigation with respect to the properties in question. The subject of the dispute is 57 residential condominium units municipally known as 16-28-40 Rexdale Boulevard in Toronto (the "Properties").

2 The main issue is whether Rexdale Mews is entitled to enjoin 974 Inc. from exercising its rights under certain mortgages. The Court must determine whether, as a secondary form of relief, it is appropriate to order a Certificate of Litigation to protect whatever rights the plaintiffs may have with respect to the Properties.

The Facts

3 The factual background is complicated and significantly in dispute. What I am able to discern from the record is the following. On December 21, 1984 Rexdale Mews, a limited partnership, purchased the Properties. It would appear that this transaction was tax motivated. As part of the financing of this purchase Rexdale Mews granted third mortgages to the defendant Lakefor Holdings Inc. ("Lakefor"). Each of these mortgages was in the approximate amount of $12,500 per condominium unit. These mortgages are currently in default and are the subject of the power of sale proceedings initiated by 947 Inc.

4 The 1984 transaction also contemplated a "Repurchase Option". This option was negotiated between Mr. Stanley Goldfarb on behalf of Rexdale Mews and the defendant Morris Kaiser. The Repurchase Option was apparently agreed upon some time in January of 1984 but was not reduced to writing and signed until March 29, 1984. Kaiser signed the document on behalf of all parties. The significance of this and what agreement the document purports to record is one of the most difficult aspects of this case. One clause appears to provide that if the Properties were not repurchased when the option was exercised by Rexdale Mews, Kaiser would pay Rexdale Mews sufficient monies to enable it to discharge the Lakefor mortgages. With all due respect to the person who drafted the document entitled "Repurchase Option", the specifics of what the parties actually agreed to and who the parties to the agreement were, are not clear from what was reduced to writing and signed by Kaiser.

5 Specifically, the key clause, clause 2 of the document, is very difficult to understand. It is worded as follows:

> If the Limited Partnership elects to exercise its option hereunder, it shall provide written notice of the exercise to Servico prior to January 1 st, 1994, and Servico shall have ten (10) days to elect to do one (1) of the following:
>
> > (a) To purchase all of the condominium suites then owned by the Limited Partnership in the project known as Rexdale Mews on the terms and conditions herein set out and on an "as is" basis; or

> (b) To refuse to purchase the condominium suites owned by the Limited Partnership in the project known as Rexdale Mews and, thereupon, the promissory notes of the Limited Partnership and assigned to Servico, shall be forgiven as provided therein, and Morris Kaiser shall pay to the Limited Partnership the greater of:
>
> > (i) The sum of THREE THOUSAND DOLLARS ($3,000.00) per condominium suite; and
> >
> > (ii) The aggregate of the equity belonging to Lakefor Holdings Inc. in the third mortgage charges held by Lakefor Holdings Inc. against the condominium suites at the time of closing.

6 In addition to other problems associated with the way in which the clause reads, the specific wording of clause 2 may, in fact, fail to contemplate what actually transpired; namely, that Servico agreed to repurchase the Properties and then failed to close the transaction due to financing difficulties. The company referred to as Servico in the Repurchase Option is the defendant Halliwell Terrace Limited ("Halliwell").

7 In any event, Kaiser's evidence is that at all times he represented Halliwell and Lakefor in the transaction. This supports Goldfarb's position that Kaiser had authority to cause and in fact agreed to cause Lakefor to discharge its equity in the mortgages should Halliwell not purchase the Properties following exercise of the Repurchase Option. The problem is that Lakefor, for reasons that are very much in dispute, is not a party to the written document evidencing the Repurchase Option. The position of Rexdale Mews is that this is due to an oversight. Mr. Martin, counsel for Rexdale Mews, argues that, notwithstanding this oversight, Lakefor is required to discharge the equity it maintains in the mortgages pursuant to the agreement reached between Goldfarb on behalf of Rexdale Mews and Kaiser on behalf of himself, Halliwell and Lakefor.

8 The defendants submit that it was never intended that Lakefor be liable for any obligations under the Repurchase Option. In addition to the fact that Lakefor is not a party to the written agreement, Mr. Turk, counsel for Lakefor and 974 Inc., points to the fact none of the documentation relating to the very complicated transaction makes any reference to Lakefor in the context of the Repurchase Option. Mr. Turk also asks the Court to take into consideration that Rexdale Mews has not even sought rectification of the written form of the Repurchase Option in the prayer for relief contained in the Amended Statement of Claim.

9 The chronology of the events leading to this motion is as follows. In November 1994 Rexdale Mews exercised its option. In December of that year, Halliwell elected to purchase the Properties and then, as previously stated, failed to close the transaction. On

or about March 1, 1995 Kaiser gave security over his interest in the mortgages to Paragon Development Corporation ("Paragon") as security for a personal debt. Lakefor guaranteed Kaiser's debt to Paragon. Finally, on March 27, 1995, shortly after Halliwell elected to purchase the Properties, Lakefor assigned the mortgages to 974 Inc. for no consideration.

10 It appears from the record that Kaiser was the sole officer and director of Lakefor at the time that the mortgages were transferred to 974 Inc. It is the position of the plaintiffs that instead of directing Lakefor to discharge the mortgages, Kaiser directed Lakefor to assign the mortgages to 974 Inc. in anticipation of this litigation.

11 It followed that on November 12, 1997, Rexdale Mews commenced this action seeking, among other forms of relief including punitive and exemplary damages, a mandatory order requiring the defendants to discharge the mortgages in favour of Lakefor and currently held by 974 Inc. The original and amended Statements of Claim contain allegations that Kaiser owns and controls each of the defendants and that they are his alter ego. It is further pleaded that Kaiser caused Lakefor to assign the mortgages to 974 Inc. to avoid Lakefor's obligations under the Repurchase Option and that this constitutes a fraudulent conveyance.

12 A year following the commencement of this action; namely, in December 1998, Kaiser directed his lawyers to deliver the Notices of Sale Under Mortgage that form the subject of this motion for an injunction. At about that same time Kaiser directed his lawyers to attorn the rent for the Properties on behalf of 974 Inc.

13 It is further of note that since the mortgages matured in 1994, Rexdale Mews has not made any payments under the mortgage and none of the defendants have taken any steps to enforce their rights. It is Kaiser's evidence that he ordered the power of sale proceedings out of convenience as he was taking similar steps in relation to other unconnected properties.

14 I add that there is little evidence concerning the financial wherewithal of the parties. The record is clear that Halliwell could not finance the purchase. Goldfarb asserts that neither Kaiser, Halliwell nor Lakefor have any assets. When cross-examined about their financial status, Kaiser refused to answer any questions about his assets or those of Halliwell or about their ability to pay any judgment. Kaiser also indicated that at this point in time, he was no longer involved in Lakefor. There is no indication that Mr. Martin sought to have the refusals ruled upon by the Master or that he attempted to obtain financial information about Lakefor or the numbered company through other means.

15 Rexdale Mews has given the usual undertaking as to damages. Howard Goldfarb was asked about the assets available to Rexdale Mews to support the undertaking. His answer was that he did not know off-hand. Counsel for the defendants, curiously, did not ask for an undertaking to obtain information to answer the question.

Analysis

16 Traditionally Courts have refused to interfere with the proper exercise of a power of sale in all but the most extreme and exceptional circumstances. In the leading decision of *Arnold v. Bronstein* (1971), 15 D.L.R. (3d) 649 (Ont. H.C.), Lacourciere J. quotes, at p. 650, from Kerr on Injunctions, 5th ed., where at p. 538 the author says that "... the Court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keep within the terms of the power and no case of fraud be made out." From this the general rule has emerged that a mortgagee, acting in good faith and without fraud, will not be restrained from a proper exercise of his power of sale, except upon tender by the mortgagor of the principal monies due, interest and costs.

17 In this motion, Rexdale Mews tries to overcome the prohibition articulated in *Arnold v. Bronstein* in two ways. First, Mr. Martin argues that there is strong evidence of fraud in the circumstances of this case. Secondly, he submits that the rule in *Arnold v. Bronstein* has been departed from in a number of circumstances, some of which have application to the case at bar, and based on these precedents, there is not only good reason to enjoin the sale but also authority to do so.

18 I propose to examine the argument of the moving party first from the perspective that the bad faith or fraud exceptions identified in *Arnold v. Bronstein* apply so that the normal tests for the granting of an injunction should be analyzed to determine whether Rexdale Mews is entitled to the relief sought.

19 Steele J. in *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.* (1977), 81 D.L.R. (3d) 278, 17 O.R. (2d) 717 (Ont. H.C.) held that in circumstances where fraud is relied upon in support of an injunction to restrain the disposition of property "the Court need only be satisfied that there is a strong indication that the conveyance may have been fraudulent." A voluminous record was filed with the Court. Upon my review of the materials, I am of the view that there is sufficient evidence of, at the very least, suspicious manipulation to give rise to a concern about the legitimacy of what motivated the defendants or at least some of them, including Lakefor and 974 Inc., to participate in the various steps that are now the subject of this litigation. By way of example, Lakefor, under the direction of Kaiser, transferred the mortgages to a numbered company for no consideration at a time when Kaiser had arguably become financially obligated to Rexdale Mews. In my view, this transaction, when combined with the fact that the Lakefor mortgages were the basis of the obligation, is sufficient to satisfy me that this conveyance may have been made for illegitimate reasons.

20 This takes me to an analysis of whether an injunction ought to be granted on the basis of the standard tests applied in requests for injunctive relief.

21 First, it is clear that there is a serious issue to be determined. There are real issues surrounding the rights of Rexdale Mews following and arising out of this complicated series of agreements and subsequent transactions involving the 57 condominium units. The real question is whether there is a serious issue between the plaintiff and Lakefor and the company to which it assigned the mortgages; namely, 974 Inc. While there is some question about the extent to which, if at all, Lakefor and 974 Inc. should be involved in the dispute over the Repurchase Option since Lakefor was not a party to the written document, there is enough evidence before me to give rise to a real concern that the full story has not yet been told. It is apparent from the affidavits filed that that there was a close working relationship between Goldfarb and Kaiser when the original transaction was structured. In the circumstances, it is open to the trial judge to find that there was a collateral agreement concerning Lakefor's obligations under the Repurchase Option. I express no opinion on any of this other than to find that in all of the circumstances, there is an issue for trial between the plaintiffs and all of the defendants.

22 This takes me to the crux of the matter and that is whether Rexdale Mews has satisfied me that it will suffer irreparable harm if the relief is not granted. The Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), has made it clear that irreparable harm refers to the nature of the harm rather than its magnitude. Specifically, "it is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." This has been interpreted by Judges of this Court to mean that if there is evidence to support a finding that the responding parties may be unable to pay any award of damages then such a finding is sufficient to establish irreparable harm. See: *Radd Precision Inc. v. Lall* (1996), 65 C.P.R. (3d) 223 (Ont. Gen. Div.) and *Daishowa Inc. v. Friends of the Lubicon* (1995), 30 C.R.R. (2d) 26 (Ont. Gen. Div.), rev'd (1996), 27 O.R. (3d) 215 (Ont. Div. Ct.).

23 The irreparable harm relied upon by counsel for Rexdale Mews is that if the injunction is denied and 974 Inc. sells the Properties, the action would be defeated as any subsequent judgment in favour of Rexdale Mews would be of no value. Mr. Martin submits that Kaiser and Halliwell have no assets. Mr. Martin contends that an inference ought to be drawn from Kaiser's refusal to answer questions regarding the financial status of his companies and that this inference, when combined with the suspicion surrounding Lakefor's conveyance of the Properties to 974 Inc. without consideration, meets the requirement of demonstrating irreparable harm.

24 I have some difficulties in assessing the aspect of irreparable harm in this case. Upon reading the transcript of the cross-examination of Kaiser, I am of the view that his response to questions about the financial circumstances of the defendants was evasive. I am entitled to take into consideration such responses together with the other evidence before me.

25 However, the other evidence provided by the parties on this motion is murky at best. In fact, the record provided raises more questions than it answers. No evidence regarding the present value of the Properties or the outstanding balances on the mortgages has been presented. The first mortgagee has apparently attorned the rents from the Properties. Stanley Goldfarb has either a controlling position or a significant interest in the first mortgagee. There is no dispute that the third mortgages are valid, or that Rexdale Mews is in serious default on those mortgages. The timing of the mortgage assignment and the role of Kaiser in the transfer raise other questions. Consequently, I have genuine concerns about the propriety of the various steps taken by the parties on both sides. Furthermore, I am not all certain that there has been full disclosure of the relevant material.

26 From the evidence that has been provided to me, I am concerned that a decision either to grant or dismiss the motion for an injunction could lead to the Court's sanctioning bad faith dealing by one side or the other. In my view, enjoining 974 Inc. from continuing with the sale proceedings is not the appropriate remedy. However, I believe that the circumstances of this case are such that the Court should exercise its inherent jurisdiction to prevent abuse of its processes and to ensure that justice is done between the parties. (See *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.)). Consequently, an order will go directing that the net proceeds of the sale of the Properties under the 974 Inc. Notices of Sale after payment of the first and second mortgages will be paid into Court pending the outcome of the litigation between the parties.

27 The trial should be held at the earliest possible time. Having said that, as I have some considerable familiarity with the trial list I can advise the parties that as soon as counsel are ready to have the case tried, a date will be available from the Court. Accordingly, while I have expressed the opinion that the trial should essentially be expedited, how long it takes to get to trial is entirely in the hands of counsel.

28 In view of my disposition it is not necessary to deal with the Certificate of Pending Litigation sought as alternative relief.

29 The costs of this motion are reserved to the trial judge.

Order accordingly.

TAB 14

2011 SKCA 120
Saskatchewan Court of Appeal

Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership

2011 CarswellSask 678, 2011 SKCA 120, [2011] S.J. No. 627, [2012] 2 W.W.R. 659, 208 A.C.W.S. (3d) 184, 341 D.L.R. (4th) 407, 377 Sask. R. 78, 528 W.A.C. 78

Mosaic Potash Esterhazy Limited Partnership, Appellant (Defendant, Plaintiff by Counterclaim) and Potash Corporation of Saskatchewan Inc., Respondent (Plaintiff, Defendant by Counterclaim)

Richards, Smith, Herauf JJ.A.

Heard: September 16, 2011
Judgment: October 24, 2011
Docket: CACV2137

Proceedings: affirming *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership* (2011), 2011 SKQB 283, 2011 CarswellSask 509 (Sask. Q.B.)

Counsel: Douglas Hodson, Q.C., David Haigh, Q.C., Ryan Lepage, for Appellant
Gordon Kuski, Q.C., Kent Thomson, Maureen Armstrong, for Respondent

Subject: Civil Practice and Procedure; Natural Resources
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.1 Strength of applicant's case
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.2 Irreparable harm

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.3 Balance of convenience

APPEAL by defendant from judgment reported at *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership* (2011), 2011 SKQB 283, 2011 CarswellSask 509 (Sask. Q.B.), granting plaintiff's application for interlocutory injunction.

***Richards J.A.*:**

I. Introduction

1 Mosaic Potash Esterhazy Limited Partnership ("Mosaic") and Potash Corporation of Saskatchewan Inc. ("PCS") are potash producers. They are parties to an agreement whereby Mosaic mines certain of PCS's reserves and delivers processed product to PCS in amounts nominated by PCS.

2 A dispute arose as to when Mosaic's obligations under the agreement would come to an end. Mosaic and PCS were unable to resolve their differences in this regard and PCS sued Mosaic for the purpose of having the Court of Queen's Bench determine the amount of product yet to be delivered to it. Case management efforts were undertaken and the trial was scheduled for January of 2012.

3 Then, acting on its own assessment of the matter, Mosaic advised PCS in May of 2011 that it would stop providing product as of July 1, 2011. This in turn led PCS to apply to the case management judge (the "Chambers judge") for an injunction. PCS was successful and an order was made restraining Mosaic, pending the start of the trial, from terminating the agreement or interrupting the supply of product under the agreement.

4 Mosaic now asks this Court to set aside the injunction. It submits the Chambers judge made a number of errors in deciding to grant it. In Mosaic's view, the judge:

> (a) erroneously treated the factors to be considered in connection with the award of an injunction as "guidelines" rather than as requirements or prerequisites,
>
> (b) wrongly failed to require PCS to prove the merits of its claim to the strong *prima facie* case standard,

(c) erred in finding that PCS would suffer irreparable harm if the injunction was not granted, and

(d) improperly concluded that the balance of convenience favoured PCS.

5 I conclude, for the reasons set out below, that the Chambers judge made no reviewable error in his bottom-line decision. As a result, this appeal must be dismissed.

II. Background

6 Mosaic owns and operates a large potash mine at Esterhazy, Saskatchewan.

7 In 1971, Mosaic's corporate predecessor, International Minerals & Chemical Corporation (Canada) Limited ("IMC"), sold a portion of its reserves at the mine to AMAX Potash Limited. These reserves were specifically identified parcels interspersed in a checkerboard fashion among IMC's own reserves.

8 In 1978, PCS purchased these reserves (the "PCS Reserves") from AMAX and entered into an agreement (the "Mining Agreement") with IMC. Pursuant to the Mining Agreement, IMC agreed to "mine potash ore from the PCS Reserves" and process it into finished product for PCS. In return, PCS agreed to compensate IMC by sharing in certain costs.

9 Mosaic acquired IMC's interest in the Esterhazy mine in 2004 and assumed IMC's obligations under the Mining Agreement.

10 Pursuant to the Mining Agreement, PCS has a right to annually nominate the amount of finished product to be produced from the PCS Reserves. The Agreement prescribes both the maximum and minimum amount of such nominations.

11 Mosaic mines the reserves at Esterhazy as it reaches them in accordance with mining patterns dictated by a variety of considerations relating to geology and practical production factors. This means the amount of finished product delivered to PCS each year pursuant to its nomination does not necessarily correspond with the amount of finished product actually mined and processed from the PCS Reserves themselves. As a result of this, and over time, a substantial imbalance (the "Imbalance") has developed, *i.e.* PCS has nominated more finished product than has actually been produced from the PCS Reserves.

12 The Mining Agreement provides that Mosaic's obligation to deliver finished product to PCS will terminate on the day that it delivers to PCS the amount of finished product which can be produced from the ore taken from the PCS Reserves less those amounts previously delivered to PCS or its predecessor AMAX. That said, the Mining Agreement contains no formula or prescribed methodology for calculating the date on which Mosaic's obligations

will come to an end. Both PCS and Mosaic have developed their own methodology for this purpose. Their approaches yield significantly different results.

13 PCS commenced the action underpinning this appeal in May of 2009. It sued Mosaic seeking a declaration as to the amount of finished product remaining to be delivered under the Mining Agreement as well as interim and permanent injunctions restraining Mosaic from failing to deliver product pursuant to the Agreement. It took this step in alleged response to an expressed intention on the part of Mosaic to terminate the Mining Agreement. The pre-trial proceedings have been heavily case managed. The trial is anticipated to be both long and complex. It is scheduled to commence on January 16, 2012.

14 In the midst of the pre-trial proceedings, by letter to PCS dated May 2, 2011, Mosaic advised PCS that, on the basis of its calculations and methodology, the Imbalance meant Mosaic's obligations under the Mining Agreement would be fulfilled as of later that week. Mosaic indicated it would suspend delivery of finished product as of July 1, 2011. However, it set out three alternative ways in which PCS could continue to receive delivery of finished product. Each option involved terms different than those specified in the Mining Agreement.

15 PCS then sought the injunctive relief which is the subject of this appeal.

III. The Decision of the Chambers Judge

16 The Chambers judge began his analysis with a discussion of the general principles informing his decision-making. In this regard, he referred to the three standard factors typically considered in this type of situation: the strength of the plaintiff's case, the concept of irreparable harm and the balance of convenience. While indicating that he would consider each factor, the Chambers judge also said he would ultimately decide whether the injunction being sought was "just and equitable" in the circumstances.

17 The Chambers judge then worked through each of the factors he had referenced. He concluded that PCS had raised a serious issue to be tried, that it would suffer irreparable harm if Mosaic failed to deliver finished product and that the balance of convenience was in favour of issuing the injunction. In the end, he made an order enjoining Mosaic (until the commencement of the trial) from taking steps to terminate the Mining Agreement or interrupting the supply of finished product contemplated by it.

18 The decision of the Chambers judge, as expressed in his Fiat, is reproduced below:

> 1. Pending commencement of the trial of this action or further order:

a) Mosaic shall take no steps to terminate the restated mining and processing agreement dated January 31, 1978, as amended between the parties ("the Mining Agreement") either directly or indirectly;

b) Mosaic shall take no steps to interrupt or terminate the supply to PCS of potash under the Mining Agreement; and

c) Mosaic shall continue to supply potash to PCS on the terms and conditions specified in the Mining Agreement.

2. Mosaic shall pay costs of this application in any event of the cause.

IV. Analysis

19 As indicated at the outset, Mosaic says the Chambers judge made four main errors in deciding to issue the injunction. I propose to deal with each of those arguments in turn.

A. The Basic Approach to Granting Interlocutory Relief

20 As noted above, the Chambers judge said the three most commonly-referenced considerations in determining whether to grant an injunction (strength of case, irreparable harm and balance of convenience) should not be seen as a rigid set of prerequisites. Rather, he considered them to be more in the nature of guidelines. In summarizing his views, the Chambers judge wrote as follows:

> [16] Courts in other jurisdictions have also followed this approach of using the tripartite test as a series of guidelines to be considered in determining whether the injunctive relief sought would be just and equitable: *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1994] 7 W.W.R. 420 at para. 14 (Man. C.A.); *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.*, [1994] O.J. No. 844 (Ont. Ct. J.) (QL) at para. 14; and *Grey v. Edmonton (City)*, 2005 ABQB 231, 377 A.R. 350at para. 50. Accordingly, although I will consider each of the three factors, strength of case, irreparable harm and balance of convenience, I will ultimately determine whether the relief sought is just and equitable in the circumstances.

21 Mosaic says this was a fundamental error. In its submission, strength of case, irreparable harm and balance of convenience should have been approached as "a series of necessary hurdles," each of which had to be satisfied as a prerequisite to obtaining injunctive relief.

22 In my view, Mosaic's argument on this point overlooks the substance of what the Chambers judge did after making the comments it now impugns. The fact of the matter is that the judge proceeded to directly and carefully consider strength of case, irreparable harm and balance of convenience in turn. He found that each of those three factors supported the

granting of an injunction. In the end, therefore, it is not apparent how the comment to which Mosaic now objects can be seen to have influenced the bottom line of the Chambers judge's decision. In other words, he would have reached the same result even if he had treated the three factors as independent hurdles standing between PCS and the relief it sought.

23 That said, it may be useful to comment briefly at this point on the general way in which the considerations of strength of case, irreparable harm and balance of convenience should be approached. In order to address this issue, it is necessary to begin with reference to the Supreme Court's foundational decision in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.).

24 In *Metropolitan Stores*, the Court reviewed the approach to be used in deciding whether to grant interlocutory injunctive relief and referred to what it called three "tests." They concerned the strength of the plaintiff's case, irreparable harm and balance of convenience. Beetz J. summarized them as follows, at pp. 127-129:

> The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.
>
> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. ...
>
> . . .
>
> The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. ...
>
> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

25 The point raised by Mosaic's argument concerns how independently the tests or considerations referred to in *Metropolitan Stores* stand from each other and, as well, how they operate in relation to each other. These questions are not answered, or at least not answered with great clarity, by either the *Metropolitan Stores* decision itself or the Supreme Court's subsequent ruling in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

26 For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.

27 Mosaic says this Court's decision in *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.*, 2011 SKCA 82 (Sask. C.A.) is inconsistent with the view I have just expressed. In pressing this point, it relies on one of the opening paragraphs of that decision:

> [10] Neither side disputes that the Chambers judge correctly identified *RJR-MacDonald* as outlining the applicable law in this matter or that the Appellants must satisfy all three stages of the test set out in that case for the granting of interlocutory injunctive relief. As noted, the Chambers judge determined the Appellants had not satisfied *any* of the stages of that test. The Appellants submitted the Chambers judge erred in this finding because he acted on wrong principles of law, took irrelevant factors into consideration and overlooked or misapprehended material evidence. However, to succeed in their appeal, the Appellants must identify a reversible error made by the Chambers judge under *each* stage of the *RJR-MacDonald* test.

28 Two things about this passage warrant noting. First, it does not involve an adjudication of the point raised in this case by Mosaic. Rather, both parties simply proceeded on the basis that each of the three considerations discussed in *RJR-MacDonald*, *supra*, had to be satisfied. Second, and more to the point, the passage cited by Mosaic is not inconsistent with the notion that strength of case, irreparable harm and balance of convenience should be seen as a framework in which to analyze the merits of an injunction application. It says only that each matter must be addressed and, by implication, satisfied in the appropriate way. As a general rule, this is entirely correct. It is certainly not in conflict with anything contained in these reasons.

B. Serious Issue to be Tried

29 The Chambers judge dealt with the question of the strength of PCS's case by first looking at authorities which had considered whether a party seeking an interlocutory injunction should be obliged to demonstrate a *prima facie* case, a strong *prima facie* case, or merely a serious issue to be tried. In this regard, he also gave consideration to Mosaic's argument that the injunction sought was mandatory in nature and, as a result, attracted the strong *prima facie* case test.

30 In the end, the Chambers judge concluded the settled approach in Saskatchewan for situations of this kind involves use of the serious issue to be tried standard. On this point, he relied on this Court's recent decision in *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43 (Sask. C.A.). However, at the same time, the Chambers judge said he preferred to characterize the injunction as prohibitory in nature, rather than mandatory, because it prevented Mosaic from unilaterally deciding its obligations under the Mining Agreement had been fulfilled. He then applied the serious issue to be tried standard and found PCS had satisfied it.

31 Mosaic says the Chambers judge's analysis involved several errors. It contends he wrongly relied on *La Plante* (failing to realize it was a *Charter* case) and ignored more relevant authorities from this Court dealing with mandatory injunctions. It submits the Chambers judge failed to appreciate that the injunction sought was in fact mandatory and therefore attracted the strong *prima facie* case standard. In short, Mosaic says the strong *prima facie* case standard is applicable here and that, as a bottom line, it was not satisfied by PCS.

32 In dealing with Mosaic's arguments on this point, it is useful to begin by noting that the Supreme Court has clearly endorsed the use of the serious issue to be tried threshold for *Charter* cases. In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, *supra*, Beetz J. observed that the case law was "abundant as well as relatively fluid" with respect to the approach used to decide whether an interlocutory injunction should be granted. As indicated earlier, he said the first test involved a preliminary assessment of the merits of the case, traditionally approached by asking whether the plaintiff had made out a *prima facie* case. He went on to note the House of Lords decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (U.K. H.L.) which had held that it was necessary for a plaintiff to show only a serious issue to be tried. Beetz J. then endorsed the serious issue to be tried approach for *Charter* cases, while deliberately not taking a position one way or the other as to its appropriateness for other kinds of situations. He said this:

> In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *American Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, *Modern Equity* (12th ed. 1960), pp. 736-43). In my view, however, the *American Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

33 The Supreme Court revisited this issue seven years later in *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*, and reconfirmed the applicability of the serious issue to be tried approach. But, this too was a *Charter* case.

34 This was the background against which this Court rendered its decision in *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, *supra*, *i.e.*, the decision relied on by the Chambers judge for invoking the serious issue to be tried standard. I agree with Mosaic that *La Plante* does not necessarily stand for the proposition that the serious issue to be tried concept is applicable outside of the *Charter* context. This is because it concerned a circumstance where a woman who ran an animal shelter contended her *Charter* rights had been violated when her animals were seized by the S.P.C.A. She sought the return of the animals pending trial on the strength of *Charter*-based submissions. This Court characterized the proceedings as an application for a mandatory injunction and applied the serious issue to be tried test.

35 However, the mere fact that *La Plante* was a *Charter* case does not determine whether the serious issue to be tried standard should be applied here. That point stands to be decided.

36 As an initial consideration on this question, I note that the Supreme Court has said that the serious issue to be tried approach should be broadly used in the civil context. Specifically, in *RJR-MacDonald*, Sopinka and Cory JJ.A. said this at pp. 335 and 347:

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

37 A number of frequently-cited considerations confirm the wisdom of this approach. First, interlocutory injunctions are granted or denied on the strength of affidavit evidence. Typically, at least in this jurisdiction, the affiants are not cross-examined. This means that in cases where the evidence is important, and the material facts are contradicted or complex, it will be difficult for a plaintiff to establish a strong *prima facie* case. See: Robert Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 2010) at para. 2.150. This will be so because the judge will not be able to confidently choose one version of the matter over the other.

38 Second, and on a related note, if the root equitable purpose of issuing an interlocutory injunction is to be realized, it will typically be necessary to consider more than just the strength of the plaintiff's position. However, this will not be possible if the analysis of the equities of issuing or denying an injunction is truncated by the plaintiff's failure to establish a strong *prima facie* case. In applications where that standard is not met, a court considering an application for injunctive relief will be forced to disregard even the largest of irreparable harms and even the most convincing of equitable considerations. Lord Diplock made this point as follows in *American Cyanamid* at p. 509:

> In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

39 Third, it must be remembered that the decision to grant an interlocutory injunction is, of course, made in advance of trial. If a Chambers judge is drawn too far into an assessment of the merits of the case, there is a risk of putting the trial judge in an awkward situation if he or she ultimately feels obliged to take a different view of the matter. This may be particularly true in cases which turn largely on points of law and where, as a result, the Chambers judge and the trial judge are in relatively the same position when it comes to assessing the problem before them.

40 Thus, in the end, there are compelling reasons for preferring the serious issue to be tried standard over the *prima facie* case or strong *prima facie* case standards as a general or usual method of approach.

41 I pause here to observe that Mosaic points to Saskatchewan authorities to the effect that the strong *prima facie* case approach should be used in relation to mandatory injunctions in

particular. It says the Chambers judge erred by failing to follow those authorities. See, by way of examples in this regard: *M. (J.) (Litigation Guardian of) v. Regina Roman Catholic Separate School Division No. 81* (1994), 128 Sask. R. 206 (Sask. C.A.) and *Potash Corp. of Saskatchewan Mining Ltd., Lanigan Division v. Todd* (1987), 53 Sask. R. 165 (Sask. C.A.). There are also a number of Queen's Bench decisions to the same effect. See, for example, *St. Brieux (Town) v. Three Lakes No. 400 (Rural Municipality)*, 2010 SKQB 73, [2010] 11 W.W.R. 490 (Sask. Q.B.).

42 It is readily apparent, of course, that the decisions from this Court on this issue were rendered well before the Supreme Court's rulings in *Metropolitan Stores* and *RJR-MacDonald* and without direct reference to the concerns of principle underpinning those two decisions. Accordingly, they are now of questionable authority and must be reassessed. In my view, we must take our cue from the Supreme Court and hold that, going forward, use of the serious issue to be tried approach should be the general rule in relation to all applications for interlocutory injunctive relief, including applications for mandatory relief.

43 As an aside here, let me observe that there are also other considerations which recommend moving away from a regime which requires judges to make strict distinctions between prohibitory and mandatory injunctions. The reality is that the line between the two kinds of injunctions is not always easy to chart and a competent wordsmith can often succeed in dressing up a mandatory-type order in a prohibitory-type costume. As a result, much time and energy can be consumed by the challenge of working through the sometimes cloudy question of whether an injunction is, in fact, prohibitory or mandatory in effect. This is a case in point. PCS says the injunction is prohibitory because it prevents Mosaic from acting unilaterally to determine the effect of the Mining Agreement. Mosaic says the injunction is mandatory because it requires Mosaic to continue delivering potash.

44 There is another consideration as well. The substantive differences between the impact of mandatory and prohibitory injunctions can be easily overstated. This is because a prohibitory order can often have the effect of forcing the enjoined party to take considerable positive actions. For example, as Robert Sharpe points out in *Injunctions and Specific Performance*, *supra*, at para. 1.540, "a negative injunction restraining the continuation of a nuisance in effect usually requires the defendant to take positive steps to correct a situation and these steps may be extremely costly." All of this means that it is more useful for a judge to focus on the practical effects of the injunction than to get bogged down in attempting to make formalistic "all or nothing" distinctions between what is prohibitory and what is mandatory.

45 This said, I hasten to add that a change of approach in favour of the use of the serious issue to be tried standard should not shift the legal landscape. This is because the meaningful difference between prohibitory and mandatory injunctions in the present context is that mandatory-type injunctions, generally speaking, go beyond maintaining the *status quo*, are

more intrusive and have a larger potential to create losses that will be left uncompensated after trial if the plaintiff's claim be unsuccessful. Thus, the real question at play in this regard should be one of how best to account for these realities when deciding whether to grant an interlocutory injunction. My point here is that the business of accounting for the effects of mandatory-type injunctions on defendants does not have to involve the use of a demanding standard in relation to the strength of the plaintiff's case. Indeed, that approach involves the classic "blunt instrument." A more effective and more nuanced way to proceed is to consider the likely effect of a proposed mandatory order on a case-by-case basis and in the context of the balance of convenience analysis.

46 In other words, taking the position that the serious issue to be tried approach should be used in connection with applications for mandatory-type injunctions does not mean such injunctions will be easier to obtain than they have been historically. It means only that the analysis of the relevant risks and equities should not end, and the matter be resolved against the plaintiff, if the plaintiff can do no more than make out a serious issue to be tried. The potential burdens of the mandatory injunction on the defendant will, and must be, carefully weighed in the course of the balance of convenience analysis.

47 As a result, I conclude that the serious issue to be tried standard was applicable here. The Chambers judge acted correctly in employing it. Relatedly, I find the Chambers judge made no error in concluding the standard had been satisfied. Clearly it was and Mosaic, quite properly, does not contend otherwise.

48 Before leaving this point, let me also say that in endorsing the general use of the serious issue to be tried standard, I do not mean to foreclose the possibility of there being some limited exceptions to its overall applicability. The Supreme Court expressly recognized, in *RJR-MacDonald*, that significant attention to the merits of the plaintiff's case is required (a) where the interlocutory relief will in effect amount to a final determination of the action such as, for example, in an application to enjoin picketing, and (b) where the plaintiff's case presents itself as a simple question of law. There might arguably be other limited circumstances where a higher threshold is still appropriate. Obviously, it would not be wise to attempt to identify or analyze them in the abstract.

C. Irreparable Harm

49 The Chambers judge, relying on this Court's decision in *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.*, *supra*, concluded that, in order to be granted the injunction, PCS had an obligation to establish "something more than a mere possibility of irreparable harm." He then proceeded to analyze the affidavit material before him, particularly the affidavit of Garth Moore, the President of PCS Potash. The Chambers judge concluded that PCS would experience a shortfall in supply and be unable to honour its delivery commitments if it did not

continue to receive finished product from Mosaic. He saw this as causing losses incapable of calculation in monetary terms (*i.e.*, irreparable harm). Finally, the Chambers judge rejected Mosaic's argument that PCS would suffer no irreparable harm because Mosaic was prepared to continue delivering potash on new terms. The judge said a litigant seeking an interlocutory injunction to enforce a contract did not have to accept a change in the terms of the contract in order to obtain the injunction.

50 Mosaic submits the Chambers judge made three main errors in all of this. First, he employed an improperly low standard of proof with respect to irreparable harm. Second, and regardless of the proper standard of proof, he erred in finding that irreparable harm had been demonstrated on the facts. Third, he should have found that PCS had a duty to "mitigate" the risk of suffering irreparable harm. I will address these three issues in turn.

1. Standard of Proof

51 Beginning with the issue concerning the proper standard of proof, it is readily apparent that Canadian courts have no fixed view of how this matter should be approached. I will not refer to the full range of authorities on point beyond noting that they span a wide spectrum. On one extreme, the New Brunswick Court of Appeal has said that irreparable harm is not a condition precedent to granting injunctive relief and, as a result, it is unnecessary to identify any required standard of proof in relation to it. See: *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51, 315 N.B.R. (2d) 328 (N.B. C.A.). McLachlin J.A. (as she then was) described the appropriate test as follows in *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.) at p. 345:

> It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction.

Moving further down the spectrum, Ritter J.A., of the Alberta Court of Appeal, has said "[t]he proper approach is to assess whether or not it is probable that irreparable harm will be suffered." See: *Wang v. Luo*, 2002 ABCA 224 (Alta. C.A.) at para. 17. At the far end of the range, there are decisions of the Federal Court of Appeal indicating that "evidence as to irreparable harm must be clear and not speculative." See, for example: *Syntex Inc. v. Novopharm Ltd.* (1991), 126 N.R. 114 (Fed. C.A.) at para. 15.

52 The leading Supreme Court of Canada decisions do not serve to clarify the situation. In *Metropolitan Stores*, at p. 128, and in discussing the general approach to irreparable harm, Beetz J. said, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction *would*, unless the injunction is granted, suffer irreparable harm... (emphasis added)." However, in applying the test, he appears to have taken a much more accommodating approach. At p. 151, Beetz J. concluded that irreparable harm had been shown because imposing a first collective agreement (the applicant sought to enjoin labour

board proceedings which might have resulted in such an agreement being imposed) "may" have given the union a semblance of bargaining strength it did not have and "may" have permitted the union to benefit from a contract it might otherwise not have negotiated. Similarly, in *RJR-MacDonald*, the Court said, at p. 348, that "...the applicant *must convince* the court that it will suffer irreparable harm if the relief is not granted (emphasis added)." But, it had earlier found, at p. 342, that irreparable harm would be suffered by the employer seeking the injunction in that case because "[i]n light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial." In the result, the two Supreme Court cases on point appear to send somewhat mixed signals on this issue.

53 With that background, I return to the approach taken by the Chambers judge in this case. As noted, he relied on a recent decision of this Court, *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.*, for the proposition that the appropriate standard is "something more than a mere possibility of irreparable harm." This is not a proper reading of the *Agrikalium* decision.

54 *Agrikalium* concerned a dispute over, among other things, certain potash dispositions owned by a Mr. Medge and a Mr. Mann. An application was made for an injunction to restrain them from selling those properties. According to the Chambers judge, the applicants filed affidavit evidence saying they "may" wish to develop a potash mine, "may" determine that the Mann and Medge deposits were the best for that purpose, and "may" not be able to build a mine on the best property if Mann and Medge were allowed to sell it. The Chambers judge concluded, in effect, that the applicants had failed to establish irreparable harm with sufficient certainty. At para. 37 of his judgment, he stated: "The claims by the applicants that harm *may* result is not sufficient. They have not convinced the Court that harm *will* result (emphasis in original)."

55 On appeal to this Court, it was argued by the applicants that the Chambers judge had applied an overly demanding standard of proof with respect to irreparable harm. In rejecting their argument, the Court said:

> [21] As to the point of law, I am not persuaded that the Chambers judge erred. In *RJR-MacDonald*, when first discussing the irreparable harm stage of the test, the Supreme Court of Canada wrote (at para. 58):
>
> > ... the only issue to be decided is whether a refusal to grant relief *could* so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

> [Emphasis added.]
>
> However, when the Court later summarized the factors required for an interlocutory injunction, it held (at para. 79):
>
> > At the second stage the applicant must *convince* the court that it *will* suffer irreparable harm if the relief is not granted.
> >
> > [Emphasis added.]
>
> On this basis, the Chambers judge did not err in law by concluding the Appellants had to establish something more than the mere *possibility* of irreparable harm.
>
> [emphasis added]

56 In approaching the matter as it did, the Court did not purport to prescribe the precise standard of proof applicable in relation to claims of irreparable harm. Rather, it effectively said the applicants had done no more than establish the "mere possibility" of such harm and that, as a result, the Chambers judge had not erred by concluding this was not enough. The Court said the applicants had to establish something *more* than the mere possibility of irreparable harm should the injunction be denied but it deliberately did not say how *much more* than a mere possibility they had to establish.

57 What then is the proper approach to this issue? In my view, the answer to that question flows directly from the nature of the problem which confronts a judge considering whether to grant or deny an application for an interlocutory injunction. That problem is all about balancing. It is explained as follows by Robert Sharpe in *Injunctions and Specific Performance*, *supra*, at paras. 2.90 and 2.100:

> The problem posed by interlocutory injunction applications may, it is submitted, best be understood in terms of balancing the relative risks of granting or withholding the remedy. These risks may be simply stated as follows. The plaintiff must show a threat to his or her rights produced by the combination of the defendant's conduct and the delay until trial. The risk to the plaintiff in such cases is that, if an immediate remedy is withheld, his or her rights will be so impaired by the time of trial and final judgment that it will be too late to afford complete relief.
>
> Against this risk to the plaintiff must be balanced the risk of harm to the defendant, should the injunction be granted. This risk is inherent in that the court, on an interlocutory application, can only guess what the result at trial will be. It may well transpire that, although the plaintiff now appears to have a reasonable prospect of success, the plaintiff will fail in the end. ... Although it may now seem that the plaintiff

> will win, in the end the defendant may well prevail. Accordingly, inherent in the exercise lies a risk of harming the defendant by enjoining a course of conduct which may ultimately be shown to be rightful.
>
> [emphasis added]

58 This exercise involves, and must involve, a weighing of *risks* rather than a weighing of *certainties*. See: Norman Siebrasse, "Interlocutory Injunctions and Irreparable Harm in the Federal Courts" (2009) 88 Can. Bar Rev. 515 at p. 525. At the preliminary stage of the proceedings when interlocutory matters are resolved, it cannot always be known how strong a plaintiff's case might prove to be. As a result, the court must evaluate the limited materials before it with a view to assessing the *likely* merits of the plaintiff's position. It can often do no more. The same applies to the possibility of harm being suffered by one or both parties if the injunction is granted or denied. The overall exercise is one involving probabilities and possibilities.

59 Given this underlying reality, it seems wrong to demand that a plaintiff seeking an injunction must prove to a high degree of certainty that he or she will suffer irreparable harm if the injunction is not granted. In many situations, this approach would self-evidently frustrate the balancing exercise which a court should be undertaking in deciding if interlocutory relief is warranted. For example, assume that failure to grant a plaintiff an injunction involves only a medium probability that the plaintiff will suffer irreparable harm. But, assume as well that, if such harm is incurred, it will be catastrophic. If the analysis ends at the point of the plaintiff being unable to establish the prospect of irreparable harm to a high level of certainty, a full balancing of the risks concerning the relevant non-compensable damages will not be possible. In other words, the true overall risk of irreparable harm will always be a function of *both* the likelihood of the harm occurring and its size or significance should it occur. A sound analytical approach should take this into account.

60 In short, the same basic logic which recommends the serious issue to be tried standard in relation to the strength of the plaintiff's case consideration also recommends against requiring the plaintiff to prove to a high level of certainty that irreparable harm will result if the injunction is denied. The purpose sought to be achieved by giving a judge the discretion to grant interlocutory relief will be "stultified," to use Lord Diplock's term, if he or she could consider in the balance of convenience only such irreparable harm as is certain or highly likely to occur.

61 Therefore, in the end, it is sufficient that, as a general rule, a plaintiff seeking interlocutory injunctive relief be required to establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted. This is a relatively low standard which will serve to fairly easily move the

analysis into the balance of convenience stage of the decision-making. It is there that all of the relevant considerations can be weighed and considered with as much subtlety as the circumstances require. This said, I should add once again that I do not mean to deny any possibility of there being exceptions to this rule. The approach being endorsed here is one of general, but not necessarily universal, practice.

62 This line of thinking is consistent with *American Cyanamid* itself. In the key paragraph of his decision, Lord Diplock wrote as follows, at pp. 510-511:

> ... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. ...
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.
>
> [emphasis added]

63 More generally, *American Cyanamid* does not contemplate that the irreparable harm consideration should operate as a significant free-standing bar to the grant of injunctive relief. Rather, Lord Diplock appears to have seen irreparable harm as being more in the nature of an aspect or feature of the balance of convenience analysis. This is apparent from the following passage at p. 510 of his reasons:

> ... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
>
> As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

[emphasis added]

64 This emphasis on the balance of convenience was confirmed by Lord Diplock himself in the subsequent decision of *NWL Ltd. v. Woods*, [1979] 3 All E.R. 614 (U.K. H.L.), at 625:

> ... *American Cyanamid Co. v. Ethicon Ltd.*, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried...
>
> [emphasis added]

65 As I read them, *Metropolitan Stores* and *RJR-MacDonald* do not specify a different approach. In both cases, the Court used the term "tests" to describe the inquiries into the strength of the plaintiff's case, irreparable harm and balance of convenience. However, as indicated above, this does not suggest that the analysis within that framework should be truncated simply because the plaintiff is unable to establish a high likelihood of irreparable harm. Indeed, *RJR-MacDonald* tracks *American Cyanamid* by indicating (at p. 348) that, unless the case on the merits is frivolous or vexatious, a judge hearing a motion for injunctive relief "...must, as a general rule, consider the second *and* third stages of the *Metropolitan Stores* test (emphasis added)."

66 I should say, by way of clarification, that none of this means the relative likelihood of the plaintiff suffering irreparable harm is unimportant. To the contrary, in the typical case it will be very important. An injunction is obviously more likely to be granted in a case where the prospect of a given degree of irreparable harm is high than in one where there is a much lower probability of such harm occurring. Somewhat similarly, an injunction is more likely to be granted in a case where the irreparable harm under consideration is major than in one where it is minor. All of these factors should be reflected and weighed in the balance of convenience analysis.

67 Thus, in the end, I agree with Mosaic that the Chambers judge identified the wrong standard of proof in relation to irreparable harm. This, of course, is more than understandable in light of the inconsistent and unsettled nature of the case law in this area. However, I do not accept that PCS should have been required to establish the prospect of irreparable harm to a high degree of certainty. Rather, as indicated, the Chambers judge should have asked himself whether PCS had raised a meaningful doubt as to the adequacy of a remedy in damages should the injunction not be granted and it prevailed at trial.

68 This said, it remains to be seen whether this error with respect to the applicable standard of proof ultimately affected the bottom line of the Chambers judge's assessment of the irreparable harm issue. It is to this question that I now turn.

69 The key to PCS's irreparable harm argument revolves around the affidavit of Garth Moore. Mr. Moore describes PCS's sales commitments and other potash needs and offers the view that, if PCS loses the 500,000 tonnes of finished product due to it under the Mining Agreement in 2011, it will experience a shortfall and be unable to meet its commitments. He says this would damage PCS's reputation as a reliable supplier and cause its customers to look to alternate sources of supply.

70 For his part, the Chambers judge reviewed the contents of the Moore affidavit and accepted Mr. Moore's statement to the effect PCS would experience a shortfall of product if it did not receive supplies from Mosaic. He then used Mr. Moore's assessment of the situation to find that PCS would suffer irreparable harm (in the form of damage to its reputation as a reliable supplier) if it did not have access to product under the Mining Agreement. He said this:

> [38] Based upon Mr. Moore's statements, I am satisfied that, for the purposes of this application, PCS has established that it will suffer irreparable harm if Mosaic fails to deliver the finished potash products from the Mine which it is committed to provide pursuant to the Mining Agreement. If PCS is unable to meet its commitments for delivery of finished potash products to Canpotex and its other customers, it would be impossible to calculate in monetary terms how its reputation has been affected or what future sales have been lost. The effect that any failure to meet its Canpotex delivery obligations could also have on its market share for succeeding years, would also be difficult, if not impossible, to quantify in monetary terms.

71 Significantly, the Chambers judge did not conclude there was "more than a mere possibility of irreparable harm" if the injunction was refused and PCS was successful at trial. Rather, as I read and understand his decision, he accepted Mr. Moore's affidavit and found that PCS *would* suffer irreparable harm if it was unable to access product pursuant to the Mining Agreement. Accordingly, the Chambers judge's misformulation of the standard of proof applicable in the context of irreparable harm was ultimately of no moment one way or the other. He found that a much higher standard had been satisfied.

2. Demonstration of Irreparable Harm

72 I turn, therefore, to Mosaic's second submission, *i.e.* its argument that, on the facts, PCS simply failed to prove it was at risk of suffering any irreparable harm if the injunction was denied. On this point, Mosaic says the Chambers judge overlooked and misapprehended the evidence. It contends that, even without the benefit of finished product from Mosaic, PCS nonetheless has significant uncommitted production capacity to meet customer demands for 2011.

73 In order to deal with this argument, it is necessary to take a closer look at both the affidavit of Mr. Moore and at the reasoning of the Chambers judge.

74 I begin with Mr. Moore. At para. 72 of his affidavit, he says PCS forecast its overall production capacity for 2011 at 11.3 million tonnes, including 943,472 tonnes it was entitled to receive from Mosaic. He also says PCS forecast sales of approximately 9.8 million tonnes. The difference between forecast production and forecast sales is, obviously, 1.5 million tonnes.

75 Mr. Moore then goes on to refer to PCS's "inventory requirement" which he describes as being between 800,000 and 1 million tonnes for the end of 2011. He says this inventory is necessary to meet supply committals to customers into the spring of 2012. Assuming all of these inventory amounts were to come out of PCS's 2011 production, this would leave PCS with excess capacity of between 500,000 and 700,000 tonnes.

76 Next, at para. 73, Mr. Moore acknowledges that it is possible for PCS to meet its 2011 forecast and inventory requirements even if it loses the approximately 500,000 tonnes of product from Mosaic that remain due to it for 2011. However, he says "this would require PCS to produce from its mines every single tonne of potash that can theoretically be produced, and would also require demand not to exceed originally forecasted levels."

77 At this point in his affidavit, Mr. Moore turns to the circumstances which are the key to the suggestion that PCS will not be able to meet its customer commitments if it does not receive product from Mosaic. These circumstances involve a generally tight world market and expected sales to China and India. Paragraph 74 of the affidavit explains the situation as follows:

> The current worldwide market for potash, both domestic and off-shore, is tight. Worldwide demand is currently expected to challenge global production capability. It is also anticipated that Canpotex will settle two large contracts with China and India sometime in the next several weeks. ...

78 It is in light of this situation that Mr. Moore is able to go on, at para. 75, to describe an anticipated shortfall of supply relative to demand:

> Based on PCS's planned production, sales forecasts and current information with respect to world market supply and demand, if PCS loses the approximately 500,000 tonnes of Finished Potash Products that remain to be delivered to it from Esterhazy for the second half of 2011, PCS would experience a shortfall, and be unable to honour its delivery commitments.

79 On the other side of the equation, Mosaic filed the affidavit of Norman Beug, a former Senior Vice President with Mosaic. He asserts that PCS has the capacity to replace the 500,000 tonnes, if necessary, from its own mines. In this regard, Mr. Beug references January 27, 2011 and February 9, 2011 Earnings Conference Calls where Mr. Moore and Wayne Brownlee, PCS's Chief Financial Officer, had said PCS was capable of producing about 11.3 million tonnes if there was adequate demand. Mr. Beug summarized this material as follows at para. 79 of his affidavit:

> • In PCS's Q42010 Earnings Conference Call on January 27, 2011, Mr. Moore stated: 'So we're capable of bringing on those extra tonnes over and above what our forecast is right now, up to 11.3 million just at any time. It'll just be a matter of when it's required out in the marketplace.'
>
> • On February 9, 2011, PCS's CFO, Wayne Brownlee stated: 'But right now, the 11.3 is paid for, it's in place, it's ready to go. So when we talk about, in our guidance, tonnage between 9-and-a-half and 10 million tonnes, we could still do arguably another 1.5 million tonnes of sales if the market is there for us. So we have that growth opportunity, and then we have the subsequent growth opportunity of bringing on those expansions more quickly than any of our competitors'.

80 Mr. Beug also referred, at para. 80 of his affidavit, to a May 3, 2011 report from a Goldman Sachs analyst reporting a meeting where Mr. Brownlee was reported to have said:

> ... Esterhazy is near-term noise, doesn't change multi-year story... [PCS] can additionally accelerate production in some of its excess operational capability to fill the void should those tons be lost prematurely.

81 In working through this information, the Chambers judge chose to disregard the Goldman Sachs material. He cited Rule 319 and said he would not consider a third party report from Goldman Sachs unless the analyst who authored the report took the affidavit and confirmed the source of his information.

82 The key to the decision of the Chambers judge on irreparable harm is para. 35 of his reasons. It is there that he explains why he decided to accept Mr. Moore's assertion that PCS would experience a shortfall of supply if it did not have access to product from Mosaic. The Chambers judge wrote as follows:

> As to whether PCS has the capabilities to replace the potash from its own mines, Mr. Moore was not cross-examined on his affidavit and accordingly, I have no evidence as to whether the situation changed between the January 27, 2011 Q42010 Earnings Conference Call or the February 9, 2011 statement reported by Mr. Brownlee and the

> date of Mr. Moore's affidavit which was sworn May 24, 2011. Accordingly, Mr. Moore's statements as contained in para. 75 of his affidavit that PCS would experience a shortfall and be unable to honour its delivery commitments are accepted by me for the purposes of this application.

83 I should observe here that the operative standard of review in relation to the findings of the Chambers judge on this matter is a deferential one. At a general level, the standard of review applied by this Court to findings of fact based on affidavit evidence is one of reasonableness. See, for example: *Great Sandhills Terminal Marketing Centre Ltd. v. J-Sons Inc.*, 2008 SKCA 16, [2008] 7 W.W.R. 297 (Sask. C.A.) at para. 27.

84 More specifically, when considering matters involving interlocutory injunctive relief, the applicable standard of review was described as follows by Jackson J.A. in *Culligan Canada Ltd. v. Fettes*, 2009 SKCA 144, [2010] 6 W.W.R. 420 (Sask. C.A.):

> 13 As a preliminary matter, it is important to underscore the standard of review to be applied. It has been often said that appellate courts have a limited role in reviewing the granting of an interim or interlocutory injunction. In that regard, the Supreme Court of Canada has adopted the deferential approach established by Diplock J. in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.) and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 (S.C.C.). The reviewing court must not interfere with a Chambers judge's exercise of discretion merely on the ground that the members of the court would have exercised their discretion differently (*Hadmor*, at p. 1046; *Metropolitan Stores*, pp. 154-56). As the Supreme Court of Canada said recently in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764at p. 777: "[t]o interfere, there must be a clear mistake on the law or the evidence, or some other glaring error." From this Court see also: *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1992] 4 W.W.R. 712 (Sask. C.A.) and *Govan Local School Board v. Last Mountain School Division No. 29* (1991), 83 D.L.R. (4th) 685 (Sask. C.A.) at p. 690.
>
> 14 As Ball J. made clear, his task was not to pass conclusively on the evidence (*Culligan, No. 1*, para. 15); nor is it our task to do so. Rather, our task is to decide whether these interim conclusions of the Chambers judge reflect error in principle or are otherwise so unreasonable as to demand intervention. This Court might take issue with discrete aspects of his interpretation of the Employment Agreement or his general findings, but the fact remains that this is an interim order, made with a view to maintaining the status quo pending a trial, and is of short duration. The decision under review must be viewed in that light.

> 15 Counsel for the Appellants accepts this standard of review, but, nonetheless submits that this Court is in as good a position as the Chambers judge to assess and weigh the evidence. In keeping with this submission, Counsel asks the Court to look at discrete findings of fact made by the Chambers judge and, if error is found with respect to one or more of these findings of fact, submits that the Court can intervene and exercise its own discretion afresh. In my view, the standard of review with respect to interlocutory injunctions does not operate in this fashion. Leaving aside errors of law, the standard of review with respect to an interlocutory order requires the reviewing court to view the granting of the injunction more globally than this. It would be a rare finding of fact that would vitiate the exercise of discretion in refusing or granting an injunction.
>
> [emphasis added]

85 In this case, there is a further consideration which also recommends that the conclusions of the Chambers judge be reviewed with deference. He has been intimately involved in complex and ongoing case management and pre-trial settlement proceedings with Mosaic and PCS for some time. In my view, this provided him with a special vantage point from which to consider the issues raised by PCS and Mosaic.

86 With these cautions about the applicable standard of review in mind, I turn to the detail of Mosaic's submissions. They involve a catalogue of objections to the approach employed by the Chambers judge to his assessment of the irreparable harm issue. I will deal with them in turn.

87 First, Mosaic says the Chambers judge wrongly preferred Mr. Moore's affidavit over Mr. Beug's affidavit and the materials exhibited to it on the basis that Mr. Moore had not been cross-examined. I see no reviewable error on this point. The Chambers judge was presented with Mr. Moore's affidavit, sworn on May 24, 2011. It described anticipated PCS supply shortages if an injunction was not granted. The judge was also presented with materials from earlier in 2011, exhibited to Mr. Beug's affidavit, which suggested PCS had the production capacity to meet the demands of its customers. The Chambers judge chose the version of events recounted in Mr. Moore's affidavit, presumably because it was the most current. This was a conclusion open to him. Mosaic might not have had a *right* to cross-examine Mr. Moore but it did have an opportunity to seek leave to cross-examine him. If a decision was made by counsel — through agreement or otherwise — to forego cross-examination, that agreement cannot have the effect of forcing the Chambers judge to find the facts before him in one particular way or another.

88 Second, and on a related point, Mosaic says the Chambers judge erred at para. 35 of the decision in saying he had "no evidence as to whether the situation changed between the January 27, 2011 Q42010 Earnings Conference Call or the February 9, 2011 statement

reported by Mr. Brownlee and the date of Mr. Moore's affidavit which was sworn May 24, 2011." In so doing, Mosaic proceeds on the basis that the "situation" referred to by the Chambers judge was PCS's production capacity. It then highlights the reference at para. 72 of Mr. Moore's affidavit to PCS's production capacity being 11.3 million tonnes and says that, as a result and contrary to what the Chambers judge believed, there was evidence to the effect the situation had not changed up to the date Mr. Moore swore his affidavit. I do not accept this line of argument. It seems clear that the "situation" referenced by the Chambers judge is PCS's ability to meet expected sales from the production available to it, not its ability to annually produce 11.3 million tonnes of potash. Accordingly, the Chambers judge was correct that there was no evidence, as of May 24, 2011, directly inconsistent with the statements in Mr. Moore's affidavit.

89 Third, Mosaic says that, even if there was "no evidence" as to whether the situation changed from January and February of 2011 to May 24, 2011, that fact ought not to have been "held against" Mosaic by the Chambers judge. Again, I am not persuaded by this submission. The Chambers judge, as I read his decision, effectively said no more than that Mr. Moore's summary of PCS's affairs as of May 24, 2011 was not contradicted by any evidence describing the situation faced by the company as of that date. This did not shift the burden of proof. It simply recognized the contents of the record. It cannot be said that the approach of the Chambers judge in this regard involved a legal error or was unreasonable.

90 Fourth, Mosaic submits the Chambers judge should not have excluded the Goldman Sachs report pursuant to Rule 319. It contends this was an overly restrictive application of the Rule. I do not accept this argument. The contents of the report are hearsay and therefore engage Rule 319. Mr. Beug does not swear either that he believes the relevant contents of the report to be true or offer a basis for such a belief. Both of these things are required by Rule 319. Nor does Mr. Beug identify any "special circumstances" which, of course, are a prerequisite to admitting evidence pursuant to the Rule. In any event, it seems clear that the Goldman Sachs report would not have made a difference to the thinking of the Chambers judge. Its introduction or consideration would still have left uncontradicted Mr. Moore's assessment of affairs as of May 24, 2011.

91 Fifth, Mosaic says Mr. Moore does not make it clear what production capacity is needed to meet PCS's inventory requirements. It also says Mr. Moore's failure to provide any information about 2010 inventory levels means that it is entirely uncertain whether PCS needs uncommitted production capacity to maintain desired inventory. In my view, this is an overly demanding reading of Mr. Moore's affidavit. Paragraph 72 no doubt could have been more tightly drafted. Nonetheless, Mr. Moore's overall description of the situation was sufficient to give the Chambers judge the option of reading Mr. Moore as saying that PCS needed to divert 800,000 to one million tonnes of production into inventory in order to meet its supply commitments. His decision to interpret the affidavit in that way was not unreasonable.

92 Sixth, Mosaic contends Mr. Moore's predictions of supply shortages were based on nothing more than speculation and bald assertions. It submits that the Chambers judge failed to see this. I agree that the Chambers judge read Mr. Moore's affidavit and the record overall in a light favourable to PCS. But, he was clearly aware of, and indeed made detailed reference to, Mr. Beug's affidavit. As a result, it is difficult to characterize his findings of fact as being based on a failure to appreciate the evidence as a whole. As to the anticipated sales to India and China, the nature of future events, such as sales of this sort, is that they are often not certain in the same way that happenings in the past are certain. It seems to me that it was open to the Chambers judge to read the record as he did. Not all judges might have made the same findings of fact or reached the same conclusions but this does not mean the Chambers judge acted so unreasonably or improperly as to warrant the intervention of this Court.

93 Seventh, Mosaic argues that the potential loss of business reputation and market share described in Mr. Moore's affidavit do not amount to irreparable harm in that they are reducible to monetary damages. It refers to a number of cases which are said to establish this proposition. While I acknowledge some authorities generally to this effect, there are obviously many others to the contrary. Robert Sharpe, in *Injunctions and Specific Performance*, *supra*, at para. 2.410, says "typical cases" in which irreparable harm is found include those where the defendant's actions would "cause irrevocable damage to reputation or professional standing." As recently as 2009, this Court noted that "loss of market share can constitute irreparable harm." See: *Culligan Canada Ltd. v. Fettes*, *supra*, at para. 35. Mr. Moore says, at para. 76 of his affidavit, that, if PCS cannot meet its supply commitments, it will "suffer incalculable reputational harm." He also says that "[i]t is impossible to overstate the importance to PCS of maintaining its reputation as a reliable and consistent supplier. Customers that cannot 'take to the bank' the fulfillment by PCS of its supply commitments will no doubt look to the competitors of PCS to find alternate sources of supply." Against this background, I am not prepared to interfere with the assessment of the Chambers judge that, if PCS experiences a supply shortfall, it will suffer irreparable harm.

94 Accordingly, bearing in mind the applicable standard of review, I am not persuaded that the Chambers judge committed a reviewable error in relation to the issue of irreparable harm to the extent such harm was said to flow from the prospect of PCS supply shortages.

95 Before turning the page, I should also deal with the fact that the Chambers judge attached some significance to the effect a failure by Mosaic to maintain product delivery levels might have on PCS's contractual rights with Canpotex. (Canpotex is the central agency through which PCS, Mosaic and Agrium sell potash to buyers outside of Canada and the United States.) This issue is rooted in a letter sent by Mosaic to Canpotex in which Mosaic said it had satisfied its obligations to PCS under the Mining Agreement and requested, as a result, that Canpotex adjust the basic sales entitlements of PCS and Mosaic as of July 1,

2011 to reflect this change in relative production capacities. PCS, of course, opposed this suggestion.

96 I am unable to see how this situation raises any relevant potential for irreparable harm to PCS. This is because, given the litigation between Mosaic and PCS, Canpotex replied to Mosaic's correspondence by way of letter dated June 10, 2011 declining to make the requested adjustment. Ted Nieman, writing on behalf of Canpotex, said "Canpotex neither takes, nor at this time in our view should or can take, any position as to the requested adjustments...." Rather, Canpotex said it would "maintain a position of strict neutrality." The Canpotex letter suggests that the standoff between PCS and Canpotex on this subject might be resolved by arbitration and, we are told by counsel, the Canpotex agreement does provide for such problems to be addressed by arbitration if necessary. However, no such proceedings have been commenced and an issue of this complexity is self-evidently not going to be launched, presented to an arbitrator and decided in advance of the trial of the matters underpinning this appeal.

97 And this, with respect, is where the Chambers judge appears to have taken a misstep on this issue. The question of irreparable harm to PCS is not a question of irreparable harm over an indefinite time horizon. The issue is whether, if an injunction is not granted, PCS will suffer irreparable harm between now and *the trial*. In short, there is no risk that PCS's allotment under the Canpotex agreement will be adjusted before the trial and, accordingly, there is no risk that PCS will suffer irreparable harm on this front.

98 In summary, therefore, the Chambers judge did not deal correctly with the issue of irreparable harm as it relates to PCS's relationship with Canpotex. However, at the same time, he made no reviewable error in connection with the irreparable harm associated with PCS's ability to meet customer demands. As a result, and in light of the applicable standard of review, I would not interfere with his effective bottom-line conclusion that it was necessary to consider the matter of balance of convenience in order to determine if PCS should be granted the injunction.

3. Duty to Mitigate

99 Mosaic also argues that PCS had a "duty to mitigate" irreparable harm and that it should not be entitled to injunctive relief because it failed to take reasonable steps in this regard. This argument is grounded in the fact that, on May 2, 2011, Mosaic delivered a letter to PCS setting out three alternative courses of action that it was prepared to take. The second of the three proposals is the one in issue here. In it, Mosaic suggested a way in which PCS could continue to receive product. The proposal is set out below:

> Second, to eliminate any logistics or supply concerns PCS might otherwise have as a result of the end of its right to receive Esterhazy potash at cost under the Tolling

> Agreement, Mosaic is amenable to a Potash Supply Agreement with PCS that last through the end of trial (excluding any appeals), with delivery terms similar to those currently in place, provided that PCS pays a market price (versus cost) for the finished potash. If this alternative is of interest, we invite you to contact us.

100 The Chambers judge did not accept Mosaic's submission on the "mitigation" point. In his view, PCS was not required to accept an alteration to the terms of the contract it was seeking to enforce in order to avoid the irreparable harm it would otherwise suffer. The judge said that, taken to its logical conclusion, Mosaic's position meant any party to contract could avoid an interlocutory injunction aimed at enforcing the contract simply by repudiating the contract and then offering to perform it at a higher price.

101 I am not prepared to take issue with the assessment of the Chambers judge on this issue. Several features of the second option presented by Mosaic in its May 2, 2011 letter are significant in this regard. First, that second option contemplates PCS and Mosaic entering into a new "Potash Supply Agreement," *i.e.* entering into a wholly new contractual relationship. Second, and obviously, the terms of any such Agreement would have to be ironed out before it could be put in place. Mosaic's letter refers to the Agreement containing "delivery terms similar to those currently in place" but there would presumably be other terms which would have to be part of any such contract and the reference to "similar" delivery terms suggests at least some room for disagreement as to the specifics of the delivery terms themselves. Third, Mosaic's letter is entirely silent on the important question of where PCS would stand if it entered into a new Supply Agreement, paid market price for product pursuant to the Agreement and then prevailed at trial. More specifically, the letter says nothing about whether PCS would be entitled to a refund of amounts paid under the new Supply Agreement which, with the benefit of hindsight gained through the trial, it was not required to pay. This raises the question of whether, because of a new Supply Agreement, PCS would be foreclosed from claiming a refund from Mosaic or whether, perhaps, it would be required to commence new proceedings to recoup any such overpayment.

102 On this latter front, I note that Mr. Beug, at para. 57 of his affidavit, indicates that he has been authorized to say on Mosaic's behalf that "Mosaic will not argue or claim that such an arrangement [*i.e.* a new Supply Agreement] impacts or compromises PCS's position in the current litigation. Mosaic is not looking for tactical advantage here; rather, Mosaic is performing its contract." The meaning and scope of this representation is not entirely clear. It definitely does not say that Mosaic will "square the books" with PCS should PCS succeed at trial. When pressed during oral argument, counsel for Mosaic was not prepared to offer any such assurance either.

103 Accordingly, in the end, the situation involving Mosaic's offer to continue supplying PCS with potash appears to be considerably more complicated and salted with potential

problems than Mosaic suggests. In light of all of this, I find it difficult to conclude the Chambers judge erred in finding that Mosaic's offer should not stand as a road block to PCS's request for an injunction.

D. Balance of Convenience

104 I turn, finally, to the question of the balance of convenience. The Chambers judge found that this consideration strongly favoured the granting of the injunction. He based this conclusion on three main considerations: (a) PCS had filed affidavit material indicating it would suffer irreparable harm if the injunction was not granted and it prevailed at trial but, on the other hand, there was no suggestion in the evidence that Mosaic would suffer such harm if the injunction was granted and it then carried the day at trial, (b) if Mosaic is ultimately successful at trial, it will be easy to calculate the amount and value of product delivered to PCS after the termination date of the Mining Agreement and thus easy to precisely calculate the damages owing by PCS to Mosaic, and (c) an injunction would preserve the status quo.

105 Mosaic says this line of thinking involves a number of errors. First, it suggests the Chambers judge was wrong to proceed as if Mosaic had some obligation to provide evidence that it would suffer irreparable harm in order to tip the balance away from PCS. I see no merit in this argument. The balance of convenience analysis is exactly what its name suggests — a balance. On one arm of the scale lies the irreparable harm which might result if the injunction is denied and PCS ultimately succeeds at trial. On the other arm lies the irreparable harm, if any, to Mosaic if the injunction is granted and it carries the day. The Chambers judge cannot be faulted if there was nothing in the record before him to place on Mosaic's side of the scale.

106 Second, Mosaic points out that the affidavit of Norman Beug specifically says that, if Mosaic is not required to deliver product to PCS, the product would be sold in the market to third parties. This argument is also unpersuasive. The point made by the Chambers judge is that there is nothing in the materials suggesting Mosaic would suffer *irreparable* harm if the injunction is granted and PCS fails to succeed at trial.

107 Third, Mosaic says that reference to maintaining the status quo is of limited value and should not have been considered by the Chambers judge. I need not comment on this point in any detail one way or the other as it was clearly a subsidiary basis for the assessment of the balance of convenience.

108 I do note, however, that the Chambers judge, in referring to the *status quo*, might well have been alluding (at least in part) to the unusual procedural context in which Mosaic announced its intention to stop supplying product under the Mining Agreement. Some background is useful here. The statement of claim was issued by PCS in May of 2009 and the statement of defence and counterclaim was filed by Mosaic in June of the same year. Since

that time, we are told by counsel that PCS and Mosaic have been deeply involved in a case management process actively presided over by the Chambers judge.

109 There were, obviously, disagreements and discussions between Mosaic and PCS as to when Mosaic's obligations under the Mining Agreement would come to an end. Nonetheless, in September of 2010, PCS provided Mosaic with its annual tonnage nomination under the Agreement and elected to receive some 1,040,000 tonnes of product during 2011. In early January of 2011, in accordance with the same process followed by Mosaic and PCS throughout the term of the Mining Agreement, Mosaic confirmed in writing that it had scheduled PCS to receive the amount PCS had elected to take in its nomination. In so doing, Mosaic made no mention of its intention to shut down the supply of potash prior to trial.

110 At the end of March of 2011, a two-day pre-trial settlement conference was conducted by the Chambers judge with apparently no reference being made by Mosaic to any plan to stop supplying product under the Mining Agreement in advance of trial. A further settlement conference was scheduled for December. It was only on May 2, 2011 that Mosaic notified PCS of its intention to halt deliveries of potash. PCS applied for the injunction against this background.

111 In *RJR-MacDonald*, *supra*, at p. 342, the Supreme Court said "[t]he factors which must be considered in assessing the 'balance of inconvenience' are numerous and will vary in each individual case." In my view, the procedural context in which these proceedings have arisen was a factor that the Chambers judge was entitled to take into account when weighing the equities of granting or refusing the injunction. Further, it was a factor weighing in favour of his proceeding as he did.

112 Accordingly, in the end, I am unable to find a reviewable error in the Chambers judge's assessment of the balance of convenience.

V. Overview of Proper Approach

113 In the interest of clarity, it may be useful to recapitulate the basic points which have been developed in the course of these reasons and to summarize the approach a judge should typically take when deciding whether to grant interlocutory injunctive relief. This can be done as follows:

> (a) The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, *i.e.* the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.

(b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.

(c) The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

(d) The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.

114 I note as well that, although undertakings as to damages have not been examined in this decision, it is well established that, as a condition of obtaining an interlocutory injunction, generally a plaintiff must give to the defendant an undertaking to pay the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail to prevail at trial.

VI. Conclusion

115 I conclude, for the reasons outlined above, that Mosaic's appeal must be dismissed. PCS is entitled to costs in the usual way, with costs for two counsel in relation to item 10 of the Tariff.

***Smith J.A.*:**

I concur

***Herauf J.A.*:**

I concur

Appeal dismissed.

End of Document

TAB 15

2011 ONSC 2277
Ontario Superior Court of Justice

Atlas Copco Canada Inc. v. Hillier

2011 CarswellOnt 2349, 2011 ONSC 2277, 200 A.C.W.S. (3d) 1172

Atlas Copco Canada Inc., Plaintiff and David Hillier, Dirk Johannes Plate, Leo Caron, Paul Armand Caron, P.A. Caron Courtier D'Assurance Inc. and 3870901 Canada Inc., Defendants

Mesbur J.

Heard: February 28, 2011
Judgment: April 11, 2011
Docket: 08-CL-7349

Counsel: Jim Patterson, Kirsten Thoreson, for Plaintiff
Douglas Cunningham, for Defendant, Dirk Johannes Plate

Subject: Civil Practice and Procedure; Torts
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.i General principles

MOTION by plaintiff for continuation and extension of Mareva injunction.

***Mesbur J.*:**

Introduction:

1 This action arises out of what the plaintiff alleges was a scheme by the defendants that defrauded the plaintiff of over $20 million. This motion is for the continuation of a *Mareva* injunction against some of the defendants.

2 On September 13, 2010 the plaintiff obtained an interim order from Newbould J temporarily freezing the assets of the defendant Dirk Johannes Plate, his wife, Maria Van

Noorden Plate, and the defendant Leo Caron and his ex-wife Jeannette Bourque pending the hearing of a *Mareva* motion on a full evidentiary record. In addition to setting a timetable for delivery of materials, examinations and the like, the order also contained the following provisions:

> a) No transfers of real property and or disposition of bank accounts or other assets by the respondents [sic] until the determination of this motion is to take place, save and except Mr. Plate is entitled to draw on his bank accounts to pay ordinary living and business expenses and reasonable legal fees for the defence of this proceeding. Ms. Jeannette Bourque is also entitled to access to her bank accounts for ordinary living expenses and reasonable legal fees for the defence of this proceeding.
>
> b) All annuities payable to the respondents by Manulife and/or London Life are to be paid into court to the credit of this action.

3 On December 9, 2010, the parties were back in court. The *Mareva* motion was to have been argued then. For a variety of reasons, the parties had not met the timetable Justice Newbould had set for the motion. Accordingly, Wilton-Siegel J made an order amending the timetable. He also ordered that, on consent, Ms. Van Noorden Plate consent to provide an undertaking not to further encumber or sell the real properties that were the subject of Newbould J's earlier order. He also permitted the plaintiff to register the equivalent of certificates of pending litigation on the properties.

4 On February 16, 2011, Newbould J made a further order on consent that varied the original interim order he had made the previous November. The variation related to Jeannette Bourque. The order permitted Ms. Bourque to have full access to her bank accounts, and lifted the restriction on her transfer or disposition of assets, with the exception of the Manulife annuity payable to her, and jewellery she had received from any of the defendants. The order provided that all annuity payments would continue to be paid into court until further order and Ms. Bourque was to provide an itemized inventory of the jewellery.

5 In addition to this variation, Newbould J's order of February 16, 2011 ordered that Jeannette Bourque is to be added as a defendant in this action.

6 On this motion, the plaintiff seeks to continue the substantive terms of the prior freezing orders, and include all these defendants' assets anywhere in the world as part of the order. In essence, the plaintiff seeks a world-wide *Mareva* injunction against the defendants Dirk Johannes Plate and Leo Caron. The plaintiff also seeks to add Jeannette Bourque, the former wife of Leo Caron, and Maria Van Noorden Plate, the wife of Dirk Johannes Plate, as parties defendant to the action. If they are added as parties, the plaintiff seeks a worldwide *Mareva* injunction against them as well. I am puzzled why the plaintiff seeks to add Ms. Bourque as

a defendant, since that order has already been made, although the title of proceedings has not yet been changed to reflect this.

7 Leo Caron filed no material on this motion, nor did his ex-wife Jeannette Bourque. Mr. Plate's wife, Maria Van Noorden Plate also filed no material on this motion. They filed nothing in response to the first return of the motion in September of last year. They failed to file anything pursuant to the timetable set by Newbould J in September, 2010. As a result, only Mr. Plate opposes the relief the plaintiff seeks. He takes the position the plaintiff has failed to meet the test for granting a *Mareva* against him, and therefore says the existing order against him should be dissolved.

Facts giving rise to the action and this motion:

8 The plaintiff, Atlas Copco Canada Inc. is part of a multinational corporation in the business of supplying, servicing, and manufacturing mining and construction equipment, among other things. Mr. Plate has worked for Atlas worldwide for about thirty-seven years, first in his home country of the Netherlands, and then in Canada. While in Canada, Mr. Plate served as the plaintiff's general manager, the senior post in Canada. He began working for Atlas in Canada in 1993.

9 Mr. Plate is a Dutch national. His employment contract with Atlas describes him as an expatriate employee. As such, Mr. Plate was entitled to various perquisites and benefits not available to Canadian employees. For example, while he was an Atlas employee in Canada, he received a housing allowance of about $60,000 a year, and fully paid trips back to his home in the Netherlands. When Mr. Plate began to work for Atlas in Canada, he was not enrolled in Atlas' Canadian pension plan. He remained a member of the Dutch pension plan, whose terms were not nearly as favourable to him on retirement as the provisions of the Canadian plan. This was in large part because the plan placed a ceiling on his pensionable earnings, which in turn reduced the amount of pension payments available to Mr. Plate on his retirement.

10 Mr. Plate was unhappy with the lower benefits provided by the Dutch pension plan. Mr. Plate began to raise questions about the level of pension benefits available to him under the Dutch pension plan from as early as 1994. [1]

11 Atlas says that as a result of his dissatisfaction, Mr. Plate became a party to an allegedly fraudulent scheme that lies at the heart of this action. Atlas alleges that Mr. Plate, the defendant David Hillier (Atlas' Controller) and the defendant Leo Caron (Atlas' Director of Human Resources and a member of its Pension Committee) conspired with the defendant P.A. Caron Courtier D'Assurance Inc., (Atlas' outside benefits insurer) and its principal, the defendant Paul Armand Caron, to create fraudulent insurance invoices to submit to Atlas.

Atlas alleges that when it paid these false invoices to P.A. Caron Courtier D'Assurance Inc., the money was used to fund "kickbacks" in the form of cash or the purchase of annuities for the defendants. The plaintiff alleges that Mr. Plate was the principal beneficiary of this scheme, receiving $1.44 million in annuities, together with hundreds of thousands of dollars in unauthorized advances. There are fifteen annuities are registered in the names of both Mr. Plate and his wife. They were purchased between February of 2003 and January of 2007 from Manulife and London Life, using funds from Atlas. Other annuities were purchased for Mr. Hillier. Some ended up the name of Paul Caron's ex-wife, the defendant Jeannette Bourque.

12 Mr. Plate says the annuities purchased for him and his wife were simply purchased to "top up" his pension entitlements and were the equivalent of a special pension that would bring his retirement benefits more in line with what other senior Canadian employees with his income and years of service would reasonably expect to receive. He puts this level of pension at 2% of income per year of service.

13 Mr. Plate takes the position that in February of 2001, Leo Caron the Director of Human Resources, advised him in an email that Mr. Plate had been enrolled in Atlas' Canadian pension plan, retroactive to 1983, and that the European divisional authority to whom Mr. Plate reported, had approved his enrolment. Leo Caron's email reads: [2]

> This memo is to confirm your pension in Canada in the Canadian system. As per the discussion that I had with Airpower we will include you in our pension plan retroactively to January 83. [3]
>
> Should you need more detail please do not hesitate to contact me.

14 Mr. Plate says Steve Bookalam, the secretary of the Atlas pension committee [4] received a copy of the email. Mr. Plate goes further, and says that in March of 2001, Mr. Bookalam sent Mr. Caron's email to Atlas' outside actuaries, requesting a calculation of what Mr. Plate would receive from the Canadian plan, assuming he retired at the age of 61.

15 In July 2001, Mr. Plate says that Leo Caron sent another email to the outside actuary. He says this email again confirmed that Mr. Plate was enrolled in the Canadian pension plan and that his contributions would be sent by Pair Ltd. [5]

16 Indeed, an actuary at William Mercer, Atlas' pension plan actuary, sent a letter to Leo Caron in March 2002 to "provide an estimate of Mr. Plate's retirement income from the two registered Company pensions plans, the resulting 'shortfall' as compared to a more typical '2% per year of service' pension arrangement and a way to secure such shortfall." The letter and schedules make reference to benefits from the ACC plan. I am told this references

the Atlas Canadian pension plan, although it is by no means clear that Mr. Plate was ever a member of the Canadian plan.

17 In any case, the actuary assumes Mr. Plate would have a pension of $34,000 per year from the Canadian plan, leaving a "shortfall" of $35,000. The actuary opines that an annuity of $400,000 would create a stream of payments of $35,000 per year, which when added to the benefits under Mr. Plate's Dutch pension and "ACC plan" would bring him to the "target" of 2% × years of service x salary. This calculation was done in 2002, and was based on Mr. Plate's then salary of $212,000.

18 Mr. Plate says in 2002, Leo Caron advised him that Atlas had decided to purchase annuities for him to top up his Dutch pension. He says Leo Caron told him an insurance agent who was to purchase the annuities would contact him. Steve Doty, an insurance agent then contacted Mr. Plate. Mr. Plate says he completed various applications for various annuities with Mr. Doty, who then bought the annuities.

19 In the end, Mr. Plate says he and his wife were provided with the annuities, totalling $1.44 million. In all, a total of fifteen different annuities were purchased, with deposits from Atlas totalling $1.44 million. Those with Manulife show Mr. Plate and his wife as joint owners. Those with London Life were supposed to be purchased jointly, but instead were purchased in Mr. Plate's name, with his wife having survivor benefits. Mr. Plate attempted to add his wife as a beneficiary to all the London Life policies some time after they were purchased. The total monthly benefit under all the annuities comes to $10,000 per month, with just over $6,300 of that sum being paid from December 1, 2007.

20 Mr. Plate says the monthly benefits available under these annuities, when taken together with the monthly benefits available under his Dutch pension of about $8,000 per month, bring his total retirement income to the equivalent of 2%/year of salary for years of pensionable service. He says this level of pension benefit is commensurate with what other employees in similar positions to his would receive on retirement. He says this is how the annuity purchases came to be. He denies anything improper in their purchase.

21 Atlas says it did not authorize the purchase of any annuities for Mr. Plate. In particular, Atlas says if the annuities were to provide additional pension benefits for Mr. Plate, there is no reason why they would be purchased in the joint names of Mr. Plate and his wife. Mrs. Plate is not, and has never been an Atlas employee. Atlas takes the position that the emails and the request for actuarial calculations are simply part of the defendants' elaborate sophisticated, fraudulent scheme.

22 Atlas also points to Mr. Plate's various employment contracts to support its position. In none is there any reference to his being a member of the Canadian pension plan. In fact, his 1997 offer of employment specifically states: "The balance of the benefit package

should continue unchanged, including maintaining your pension in the Netherlands through Pair Ltd." The actual contract of employment in 1997 has the express provision: "You will remain in the Dutch pension plan for the expatriates", and "You will continue to participate in the Executive employee benefits package. You will also maintain your pension in the Netherlands through Pair Ltd.".

23 Mr. Plate's last contract of employment with Atlas makes specific reference to the fact that its terms apply in addition to "the Home Based Expatriate Programme under the Atlas Copco Group Terms and Conditions for Expatriate Employment, 2nd edition." From this, Atlas suggests it is clear Mr. Plate was always an expatriate employee, and thus not part of the Canadian pension plan. It takes the position as an expatriate employee, Mr. Plate's pension benefits were governed by the pension plan in the Netherlands. Because he was an expatriate employee, he enjoyed the benefit of a $60,000 per year housing allowance, unlike Canadian employees. All this, says Atlas, confirms Mr. Plate never was, and was never intended to be a member of the Atlas Canadian pension plan.

24 Atlas says there are many other flaws in Mr. Plate's argument. It says that the totality of the evidence points overwhelmingly to a fraudulent scheme involving Mr. Plate, rather than a legitimate employee benefit from Atlas to Mr. Plate. Atlas relies on the following as additional support for its position: [6]

a) P.A. Caron [the principal of P.A. Caron Courtier D'Assurance Inc., Atlas' former benefits provider] has given sworn testimony that it was Mr. Plate himself who gave the instructions to buy the annuities;

b) none of Mr. Plate's employment contracts make reference to the annuities or to Mr. Plate's enrolment in the Canadian pension plan; [7]

c) when the annuities were purchased, Atlas did not give Mr. Plate any documents to show that Atlas had bought them;

d) Mr. Plate's T4 slips make no reference to the annuities or any membership in the Canadian pension plan, although they do refer to the Dutch pension plan;

e) Atlas' pension committee minutes and minutes of Board meetings contain no reference to enrolling Mr. Plate in the Canadian plan, or buying annuities for him; [8]

f) there is no written indication or authorization from Mr. Plate's superiors that he was enrolled in the Canadian plan. The only written record is the single email from Leo Caron the Mr. Plate. There is no copy of this email in any Atlas file;

g) Mr. Plate learned about the amounts of the annuities from a third party broker, not from anyone at Atlas itself;

h) The annuities totalled 15, and were purchased over a period of four years. Although the actuarial calculation Mr. Plate refers to calculated the requisite annuity could be purchased for just over $450,000, the actual annuities purchased totalled $1.44 million;

i) Although the annuities were to supplement Mr. Plate's employment pension, the Manulife annuities were made in joint ownership with Mr. Plate's wife. Atlas says this is inconsistent with their being and employment pension;

j) Mr. Plate began to draw on the annuities in 2007, some four years before his intended retirement date;

k) Mr. Plate's last employment contract with Atlas continued to refer to him as an expatriate employee.

25 Atlas says it did not authorize the purchase of the annuities. It did not know about the purchase of annuities until it became concerned about the huge amounts it appeared to be paying to P.A. Caron Courtier D'Assurance Inc. for its employee benefits. It terminated P.A. Caron Courtier D'Assurance Inc. as its insurer and placed its business elsewhere. When it did, it found its fees dropped by about $7 million in the first year after the change.

26 This discovery prompted an investigation that Atlas says, uncovered this fraudulent scheme. Atlas confronted Leo Caron, who apparently confessed. The termination letter Atlas sent to Leo Caron on November 26, 2007 outlines the details of the improper actions justifying his termination. The letter confirms:

> You will recall that during out telephone conversation, in which William Thomas, General Counsel for Atlas Copco North America also participated, you admitted each of the forgoing transgressions, and you agreed with me that the company had cause to terminate your employment.

27 Atlas confronted Mr. Plate as well. First they suspended him, and then terminated his employment, effective November 15, 2007. On December 1, 2007 Mr. Plate transferred ownership of a Dutch property he owned jointly with his wife into his wife's name alone. On December 19, 2007 he did the same thing with two jointly held properties in Quebec, one an apartment in Dorval, and the other a parcel of vacant land in Morin Heights.

28 In January of 2008 Atlas commenced this action. Matters were complicated and delayed first by quarrels over whether Ontario was the appropriate forum, and second by the bankruptcies of P.A. Caron Courtier D'Assurance Inc., Mr. Paul Caron, and Mr. Leo Caron.

29 The motions concerning the proper forum were argued all the way to the Court of Appeal, which agreed with the motions judge's assessment that Ontario is the proper forum for this case. The Court of Appeal heard and dismissed the appeals on September 21, 2009.

30 The plaintiff then obtained various orders to continue the action against the bankrupt defendants.

31 As far as the action is concerned, all the defendants have defended. Although Mr. Hillier has defended, he later came to Atlas, with his counsel, and confessed to his participation in the scheme. He admitted he had obtained some $400,000 in annuities as a result of his assistance to his co-conspirators, but has since disgorged some of the funds and paid the money back to the plaintiff. He implicated Mr. Plate in the scheme. Atlas has reported the apparent defalcation to the police, who have an ongoing investigation. In the context of that investigation, the police conducted a videotaped interview with Mr. Hillier in which he implicated all the other defendants. Atlas says the police interview is consistent with Mr. Hillier's confession to them. Atlas says he clearly implicates Mr. Plate.

32 Not only has Mr. Plate defended the action denying any wrongdoing, he has also cross-claimed, and counterclaimed. In his counterclaim, he alleges Atlas wrongfully dismissed him. He claims substantial damages for wrongful dismissal, including *Wallace* damages. He denies what Mr. Hillier says. He takes the position the annuities are a "special pension" set up by Atlas to supplement his Dutch pension.

33 As Atlas' investigations continued, it uncovered more information. In August of 2010 it commenced proceedings against Manulife and London Life, seeking injunctions against them to prevent them from dealing with the annuities that had been purchased for Mr. Plate, his wife, Leo Caron, and his ex-wife Ms. Bourque. In September, 2010 the plaintiff also sought and obtained *Norwich Pharmaceuticals* orders that allowed them to obtain evidence from Manulife and London Life, who had issued the annuities. Shortly after, Atlas obtained the temporary freezing order. As I have said, the order also set a timetable for delivery of responding material and cross-examinations on this motion. Only Mr. Plate delivered a response.

34 P.A. Caron Courtier D'Assurance Inc., Paul Caron and Leo Caron have all declared bankruptcy. Atlas obtained orders to continue the action against Leo Caron and Paul Caron. In the context of the bankruptcy proceedings, Atlas conducted various s. 163(2) examinations under the *Bankruptcy and Insolvency Act*. These included examinations of Paul Caron's fourth wife, Deborah Bell, and of Steve Doty, financial security advisor, affiliated with London Life, who prepared a statement setting out the annuities purchased for Mr. Plate and his wife. He testified that Paul Caron instructed him to purchase these products for Mr.

Plate and his wife because "he was working with these individuals". Mr. Doty was the person who placed the London Life annuity policies for Mr. and Mrs. Plate.

35 From Deborah Bell's examination, Atlas learned particulars of her divorce settlement with Paul Caron. Through her counsel, Atlas learned that although Mr. Paul Caron listed his assets as more than $ 2 million, he showed a potential liability of $21 million for the Atlas Copco potential claim against him. From this Ms. Bell and her counsel inferred that Mr. Paul Caron viewed himself as being liable for a claim of this magnitude from Atlas.

36 As a result of all this evidence, and more, Atlas says it is clear that Mr. Plate, Leo Caron and Mr. Hillier all conspired together to defraud Atlas. It says the annuities each of them, or their wives, received are the proceeds of fraud. Atlas points to Mr. Plate's transfers of properties hard on the heels of his dismissal as evidence of his intention to divest himself of assets to defeat Atlas' claims. As a result, Atlas says the *Mareva* must be continued pending trial, and must enjoin disposition of all assets worldwide.

37 Mr. Plate takes a contrary view, and says the plaintiff has failed to make out the necessary factual underpinning to support a *Mareva*.

The law and analysis:

38 The two broad issues I must decide on this motion are first, whether to permit the plaintiffs to amend their statement of claim to add Ms. Van Noorden Plate as a defendant, and to assert claims against Ms. Van Noorden Plate and Ms. Bourque, and second, whether to grant a worldwide *Mareva* injunction against Mr. Plate, Ms. Van Noorden, Leo Caron and Jeannette Bourque.

Amending pleadings and adding parties

39 The *Rules of Civil Procedure* require a court to permit pleadings to be amended unless to do so would cause prejudice that is not compensable by an adjournment or costs.[9] If the amendment sought would add a party, rule 5.04(2) of the *Rules* governs. When a litigant moves to add a party it must not only meet the general criteria under rule 26, but must also satisfy the following:

a) adding the party should arise out of the same transaction or occurrences;

b) adding a party should not unduly delay or complicate the case, or cause undue prejudice to the other party; and

c) adding a party must not be done for an improper purpose.

40 Maria Van Noorden Plate filed no responding material on this motion. She does not object to being added as a party. Ms. Bourque has already been added as a party. No one has suggested the plaintiff is attempting to add a party for an improper purpose. The plaintiff alleges Ms. Van Noorden Plate has been unjustly enriched as a result of the fraudulent acts of her husband. As a result, the claims against her arise out of the same factual matrix as the main claims.

41 Discoveries have not yet occurred. As a result, adding a party now is unlikely to cause any undue delay or any prejudice that is not compensable by either an adjournment or costs.

42 Mr. Plate takes no position on the motion to add parties and amend the pleadings. In light of his lack of opposition, and the factors set out above, I conclude the plaintiff has met the necessary test to add the proposed parties and amend the claim. The requested order will issue.

Injunctions generally and Mareva injunctions in particular

43 Injunctions are an extraordinary remedy. This means they are out of the ordinary course, and should not be granted routinely. In order to obtain an injunction, the moving party must satisfy the following requirements: [10]

a) has the moving party presented a case which is not frivolous or vexatious, but presents a serious case to be tried?

b) will damages provide an adequate remedy?

c) is the undertaking as to damages adequate compensation?

d) what is the balance of convenience? and, if necessary

e) the strength of the case

44 A *Mareva* injunction goes farther. The object of this kind of injunction is to prevent the responding party from dealing with its assets pending the trial of the action or other order. Since *Lister & Co. v. Stubbs* [11] , it has been part of our jurisprudence that "execution cannot be obtained prior to judgment and judgment cannot be recovered prior to trial. Execution ... includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial." [12]

45 The general rule in *Lister* does, however, have exceptions. For example, rule 45 of the *Rules of Civil Procedure* provides for orders pending trial to preserve assets that form

the substance or subject matter of the litigation. Another prime exception to the *Lister* rule grew out of a number of shipping cases in the UK in the mid to late 1970s. These cases allowed the court to freeze a defendant's exigible assets where there was a genuine risk of the disappearance of those assets before trial. This type of injunctive relief is called a *Mareva* injunction.

46 To support a *Mareva* injunction, the plaintiff must first show a strong *prima facie* case, coupled with a real risk that the defendant will remove assets from the jurisdiction or dissipate those assets to avoid the possibility of a judgment. The balance of convenience must also favour the plaintiff. [13]

47 Clearly, in terms of the issue of a strong *prima facie* case, or serious issue to be tried and balance of convenience, there is overlap between the two tests. The question, of course, is whether the plaintiff meets the tests.

Serious issue to be tried

48 In my view the plaintiff has made out a strong *prima facie* case of fraud. The evidence from P.A Caron Courtier D'Assurance Inc.'s bookkeeper, who was also examined under s. 163 of the *Bankruptcy and Insolvency Act*, shows that Atlas purchased annuities worth at least $1.92 million through its benefits broker, P.A Caron Courtier D'Assurance Inc. for the personal benefit of Atlas' management employees and their wives, namely Leo Caron, David Hillier and Mr. Plate. Atlas did not authorize these purchases.

49 Leo Caron failed to show his annuity as an asset in his statement of affairs in his bankruptcy. He also failed to disclose the monthly income he received from the annuity.

50 Mr. Hillier provided a sworn statement setting out the nature of the fraud, and his and his co-defendants' involvement in it. Leo Caron has apparently also confessed.

51 This evidence alone supports the plaintiff's contention it has made out a strong *prima facie* case of fraud. Whether Mr. Plate was actively involved in the fraud or not, the annuities in his name and his wife's strongly appear to have been obtained through fraudulent means, that is to say, they were acquired without Atlas' knowledge or consent, using Atlas' funds to buy them. Since Atlas has made out a strong *prima facie* case of fraud, and has linked the annuities to that fraud, there is a very strong inference that the annuities are the proceeds of fraud. This is a very serious issue to be tried.

Irreparable harm/damages adequate

52 Will the plaintiff suffer irreparable harm if the annuities are not preserved? In that respect, the question is really whether damages provide an adequate remedy. In my view,

the plaintiff will suffer irreparable harm. If the plaintiff is correct, and the annuities were obtained by fraudulent means, only the plaintiff has a right to them. The defendants will suffer no harm at all if they are deprived of them, since they would have no right to them. The annuities diminish in value with each payment made from them. If they are not preserved, the plaintiff will forever lose the right to have them returned. While damages might provide a remedy, that remedy will be illusory here. Most of the defendants are bankrupt. Mr. Plate does not reside in Ontario. The bulk of his assets, such as they are, are outside Ontario, apart from the annuities. Damages may not be recoverable. I conclude damages would not create an adequate remedy regarding the annuities. The annuities themselves are in large part the subject matter of this lawsuit and should be preserved.

53 In my view, the appropriate way to preserve the annuities pending the trial is to enjoin each party, and particularly Mr. Plate, from accessing them in any way. Rule 45 is sufficient to support this order. This leaves the question of whether Mr. Plate should be enjoined from dealing with his other assets.

Undertaking as to damages adequate?

54 Atlas has given an undertaking as to damages. Atlas is a large multinational corporation. I have no evidence to suggest it is unable to pay any damages the defendants might suffer if Atlas fails in its suit. I conclude the undertaking as to damages is adequate.

Balance of convenience

55 Mr. Plate argues that the plaintiff's motivation in seeking this order is to dry up his funds, and effectively stop his litigation in its tracks. He points to the fact that without access to the income from the annuities, he is limited to the income generated from his Dutch pension. That pension gives him $96,000 per annum. That level of income hardly renders Mr. Plate impecunious.

56 I note that the original freezing order that was made on consent expressly permitted Mr. Plate and his wife to access their bank accounts for the purpose of meeting daily living expenses and paying their counsel. I have no evidence to suggest that Mr. Plate has been unable to meet his living expenses or pay his lawyer to this point. As I have said, if the court ultimately determines that Mr. Plate's position prevails, he will receive all the unpaid amounts under the annuities, together with interest. If he has suffered additional compensable damages, the plaintiff's undertaking will require that it pay him those damages.

57 If, however, no injunction is granted, and Mr. Plate dissipates his assets, and the plaintiff succeeds, the plaintiff will be left with a hollow judgment, and nothing against which to execute.

58 Having regard to these factors, I conclude the balance of convenience favours the plaintiff.

Strength of the case

59 Atlas has made out a strong *prima facie* case that Mr. and Mrs. Plate's annuities were purchased fraudulently. Atlas has shown the annuities were purchased without Atlas' consent or authority, and were purchased with Atlas' funds. They are part of the subject matter of the litigation and must be preserved.

60 Both Mr. Hillier and Leo Caron have confessed to the scheme. In my view, all this supports the conclusion the plaintiff has made a strong *prima facie* case of fraud in relation to the purchase of the annuities. Both of them link Mr. Plate directly to the scheme that led to the purchase of the annuities. This supports a strong *prima facie* case against Mr. Plate.

61 The plaintiff has satisfied the general criteria necessary for granting an injunction. The question is whether it has made out the additional criteria necessary to support a *Mareva* injunction.

Has Atlas met the additional criteria for a Mareva?

62 At the heart of a *Mareva* is the requirement that the plaintiff show a genuine risk the defendant's exigible assets will disappear. In that sense, the plaintiff must show either that the defendant is likely to remove assets from the jurisdiction, or alternatively, dissipate them. Here, the plaintiff takes the position that not only must Mr. Plate be enjoined from accessing or disposing of the various annuities, but also that he be enjoined from accessing or disposing of any of his other property, wherever it might be located in the world.

63 There is compelling evidence to show Mr. Plate has made attempts to divest himself of assets, including the annuities, after being dismissed and being advised Atlas was seeking return of funds improperly taken. His dismissal letter refers to abuse of trust, and improper advances of funds. It also states an investigation was ongoing. As a result of the ongoing investigation and additional information gleaned from it, the plaintiff has presented a compelling case that links Mr. Plate to the improper purchase of annuities.

64 Mr. Plate's actions in divesting himself of assets immediately after his termination are highly suspicious, and lead one to draw the inference he was trying to insulate himself against a potential judgment. While Mr. and Mrs. Plate each have an alternative explanation for the transfers, their explanations were not initially consistent with one another, and do little to eliminate suspicion. I am satisfied there is strong evidence of attempts to put assets out of the reach of the plaintiff.

65 I conclude a *Mareva* injunction is appropriate against Mr. Plate. The question is whether he should be enjoined from dealing with any asset, wherever situate, or whether the injunction should be limited to assets in Ontario, namely, the annuities.

Should the Mareva be worldwide?

66 Mrs. Plate has raised no objection to a worldwide *Mareva* injunction issuing against her. Similarly, Ms. Bourque has raised no objection, and in fact consents to a *Mareva*. The previous orders of Newbould J and Wilton-Siegel J are sufficient to accomplish what is required. Accordingly, their orders will continue, as set out below, until trial or further order.

67 I have determined that a *Mareva* injunction against Mr. Plate is appropriate. The question is whether it should be limited to the annuities, or whether it should attach to all Mr. Plate's assets, wherever situate.

68 A *Mareva* injunction is an order *in personam*. Since the Court of Appeal has determined Ontario is the proper forum for this case, as a result the Ontario court has personal jurisdiction over Mr. Plate.

69 The plaintiff's claim against Mr. Plate is not limited to the annuities alone. The plaintiff has raised a serious issue regarding additional allegedly improper payments Mr. Plate received. These payments are allegedly in the hundreds of thousands of dollars. The plaintiff says its overall claim is in excess of $20 million and it seeks recovery of this full amount from Mr. Plate. As a result, the plaintiff argues a *Mareva* must be worldwide.

70 While the plaintiff has presented a compelling case regarding the annuities, it has not done so with respect to the balance of its claim, and allegation that the defendants are responsible for losses of as much as $20 million. What I am left with at this point is a compelling case of defalcations totalling perhaps $1.8 million as far as the Plates are concerned. The annuities represent $1.44 million of that sum. I have already determined the annuities must be preserved, whether by way of rule 45, or by a *Mareva*. Is there justification to tie up Mr. Plate's other assets? In my view, there is not, particularly since the other assets Mr. Plate had, namely the three properties, have been transferred to his wife and she has not opposed the motion against her. As a result, the orders of Newbould J of September 13, 2010 and of Wilton-Siegel J of December 16, 2010 will continue against Ms. Van Noorden Plate.

Disposition:

71 For all these reasons an order will issue on the following terms:

a) Adding Maria Van Noorden Plate as a defendant to this action and granting the plaintiff leave to amend the statement of claim to include claims against the added

defendants Maria Van Noorden Plate and Jeannette Bourque. The plaintiff is to serve the amended statement of claim within 15 days of the release of these reasons. The added defendants will deliver their statements of defence, if any, within the times set by the *Rules of Civil Procedure*;

b) The provisions of the order of Newbould J of September 13, 2010, as amended by his order of February 16, 2011, will continue against Jeannette Bourque, pending the trial of this action, or further order;

c) The provisions of the orders of Newbould J of September 13, 2010 and of Wilton-Siegel J of December 16, 2010 will continue against Maria Van Noorden Plate pending the trial of this action or further order;

d) Restraining Dirk Johannes Plate, pending the trial of this action or further order, from accessing, or attempting to access, the annuities referred to in the notice of motion. Manulife and London Life will continue to to pay the monthly annuity payments into court to the credit of this action;

72 If the parties cannot agree on the issue of costs of this motion, they may make brief written submissions to me. Submissions are to include each lawyer's year of call, and his or her actual billing rate to his or her client. Submissions will be delivered within 15 days of the release of these reasons.

73 In order to provide some organization to this case, the plaintiff will create and maintain, for the court's use, an "Endorsements Record", containing, in chronological order, a copy of every endorsement and order made in this case. It is to have a yellow cover and backing page, and an index. The index will be updated each time a copy of another order is added to the Record. It will be maintained in a three-ring binder, so that new orders and endorsements, tabs, and an updated index can be added with ease. The endorsements record is to be provided to the presiding judge for each court attendance in this action, including the trial.

74 The parties will arrange a 9:30 appointment for the first mutually convenient time to present their discovery plan, have it approved and set a timetable for all necessary next steps to get the case trial ready.

Motion granted in part.

Footnotes

1 see plaintiff's supplemental motion record, volume II, Tab P — correspondence between Mr. Plate and Pair Ltd.

2 There is no copy of this email in Mr. Plate's personnel file.

3 It is unclear why there would be a reference to 1983, when Mr. Plate did not start working for Atlas in Canada until 1993.

4 in fact, according to Atlas, Mr. Bookalam was not a member of the Pension Committee *per se*, but simply took notes of the proceedings of the committee. Mr. Bookalam was Leo Caron's subordinate.

5 Plaintiff's supplemental motion record, volume ii, tab V, page 605. Pair Ltd. is an Atlas related company overseas.

6 for a list of references for each of these items, see the Plaintiff's compendium filed on the motion. The index sets out each issue, and reproduces the documentary evidence the plaintiff relies on to support its position for each.

7 In fact,

8 The Minutes of a meeting of the Board of Directors from May of 2002 do, however, make reference to the Board's considering implementing a supplemental retirement plan to provide additional pension benefits for senior employees over and above the general limits set under the *Income Tax Act*. There is no evidence, however, that Atlas ever established such a plan while Mr. Plate was their employee.

9 rule 26

10 *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.)

11 (1890), [1886-90] All E.R. Rep. 797 (Eng. C.A.)

12 *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.)

13 *Ibid.*

TAB 16

2001 CarswellOnt 1305
Ontario Court of Justice

Meridian Insurance Group Inc. v. Regional Group of Cos.

2001 CarswellOnt 1305, 104 A.C.W.S. (3d) 571

Meridian Insurance Group Inc., The Regional Group of Companies Inc. and 1550 Carling Inc.

Morin J.

Heard: April 6, 2001
Judgment: April 12, 2001
Docket: 01-CV-16380

Counsel: *Eric R. William*, for Applicant
Robert J. De Toni, for Respondents

Subject: Civil Practice and Procedure; Property; Insurance
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.xi Landlord and tenant
II.2.f.xi.B Possession of premises

APPLICATION by tenant for interlocutory injunction to restrain landlord from taking possession of premises pending trial.

***Morin J.*:**

Endorsement

1 The applicant, Meridian Insurance Group Inc. (Meridian), seeks an interim injunction restraining the respondents, The Regional Group of Companies Inc. (Regional) and 1550 Carling Inc. (Carling), pending the trial of this action, from dispossessing Meridian of certain leased premises.

The Facts

2 Meridian is a commercial tenant at 1550 Carling Avenue, Ottawa, Ontario, as a result of a written lease with a term of five years commencing the 30th day of March 1999 with an additional five-year term at the option of the tenant at a rent to be agreed or arbitrated. The premises occupied by Meridian is a portion of a building owned by Carling. Carling's exclusive agent for dealing with all matters concerning the building is Regional.

3 Meridian is a company incorporated to effect a partnership of three independent insurance companies (Bert Kerr Insurance Brokers Inc., Ralph L. Duclos and Son Ltd., and Claus Strahl Insurance Broker Ltd.) all of whom have carried on business in the Ottawa area for several decades.

4 On the evidence presently before the court, it would appear that the term of the subject lease was of significant importance to Meridian. The partners were moving to a new location and experience has shown that moving an office inevitably causes a loss of insurance clients. Meridian wished to remain in the same location for at least five years and it was anticipated that Meridian would likely exercise the option for a further five years. Bob Norman, the owner of one of the three partners, Bert Kerr Insurance Brokers Inc., deposed in his affidavit sworn February 13, 2001 at paragraph 11. thereof:

> We also took into consideration the need for stability. We knew that we had combined our three companies and relocated all the brokerage businesses. The result would be some concern and confusion for our clients so therefore, we wanted to have stability over the long term in order to recover from the negative financial impact caused in the short term by the inevitable loss of some of our clients due to the move.

5 As well, on the evidence presently before the court, it would appear that during the prelease negotiations no mention was made of any construction plans the owners may have had for the building in the upcoming years.

6 Meridian's leasehold interest began on March 30, 1999 with Meridian occupying approximately 4,700 square feet of office space on the second floor of the building. In February of 2000 the landlord consented to Meridian renting an additional 950 square feet on the second floor adjacent to Meridian's existing offices. Again with the consent of the landlord Meridian entered into a sub-tenancy agreement relating to this additional space with two individuals who ran a life insurance business.

7 In March 2000 the landlord advised Meridian that it would be doing extensive renovations to the building to accommodate Nortel and/or its subsidiaries on the ground floor. Certain construction has in fact been carried out to accommodate the landlord's commitment to Nortel, the commitment being approximately 105,000 square feet.

8 Meridian occupies second floor space in the building. The building immediately to the south of Meridian's premises is constructed to the level of the first floor only. The landlord now wishes to do construction directly adjacent to Meridian's second floor space in order to expand the second floor over the lower first floor. This construction would add approximately 4,800 square feet to the second floor. It is perhaps important to note for the purpose of this motion that this additional second floor space is not required by the landlord to meet its commitment to Nortel nor to any other tenant or prospective tenant. Indeed, on the evidence presently before the court, it would appear that the landlord does not presently have a prospective tenant for the proposed second floor addition.

9 In furtherance of its desire to proceed with construction directly adjacent Meridian's second floor space to expand it over the lower first floor, the landlord on November 1, 2000 served Meridian with a notice which read as follows:

> This shall constitute notice to you pursuant to Article 12.04 of your lease dated March 30, 1999 (as amended by an Addendum to Lease Agreement dated the 29th day of February 2000) that your lease will terminate effective six (6) months from the date hereof and you are required to provide vacant possession on or before such date.

10 It should be noted that the building is not and never has been vacant. At present it is leased and occupied to the extent of approximately fifty-five to sixty percent of the total square footage.

11 The general purpose of the landlord in wishing to expand the second floor, part of which Meridian presently occupies, is best illustrated by an exchange between Meridian's counsel, Mr. Williams, and the landlord's representative, Steven Gordon, on cross-examination which begins by Mr. Gordon indicating that the building was once occupied by Revelon.

> Answer --- Revelon, and the offices and meeting rooms and marketing rooms that were required where housed in that particular facility. In order for us to reposition the building to meet the demands of the marketplace in the year 2000 the floor plate doesn't lend itself to that mode.
>
> Question - Just let me stop you there. "Demands of the marketplace" means demands by a proposed tenant which yet does not exist. Is that fair?
>
> Answer - What that means is that there are many tenants that are in today's marketplace that require space that exist for their internal requirements that differs tremendously from space that was created fifteen and twenty years ago.
>
> Question - You mean bigger?

Answer - Bigger floor plates where they can house today's furniture and furnishings to make it work for their business operations.

Question - So you want Meridian to give up its rights because you guys want to increase the value of the building to a proposed tenant? Is that fair?

Answer - Our mandate, Mr. Williams, is to look at every building to try to increase the value of the building.

Question - Yes, but I'm talking about---

Answer - That's what we're retained for, Mr. Williams. What you're asking is, why do we want the space back? The reason we want the space back is we're under construction now, we have a construction program that deals with the west side of the second floor. That was demanded on us by Nortel's expansion. While we're already under construction on the west side it stands to reason that we continue the construction and redevelopment to finish the building and make the building into a year 2000 building which requires the vacant possession of Meridian to allow us to expand the second floor south and create a useable floor plate for the future.

Question - "Useable" means more attractive to tenants?

Answer - "Useable" means taking a 1950 building and creating it into a year 2000 building.

Question - More attractive to today's tenants?

Answer - More attractive to the future demand of tenancies.

12 It is on that basis that the landlord purports to dispossess Meridian of its demised premises approximately two years into what Meridian anticipated would likely be a ten year term.

The Law

13 In considering whether or not to grant an interlocutory injunction, the court must apply a three stage test:

(a) Is there a serious question to be tried?

(b) Will the applicant suffer irreparable harm if the application is not granted?

(c) What is the balance of convenience as between the parties?

See *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.)

Serious Issue to be Tried

14 Article 12.04 of the Lease provides as follows:

> **Article 12.04 Alterations by Landlord**
>
> The Landlord may: (a) alter, add to, subtract from, construct improvements to, rearrange, build additional storeys on and construct additional facilities in, adjoining or proximate to the Development; (b) relocate the facilities and improvements in or comprising the Development or erected on the Lands; (c) do such things on or in the Development as required to comply with any laws, by-laws, regulations, orders or directives affecting the Lands or any part of the Development; and (d) do such other things on or in the Development as the Landlord, acting reasonably, in the use of good business judgement determines to be advisable, including without limitation, the right to re-locate the tenant, if required, and provided the Landlord pays such costs of relocation. The Landlord shall relocate the tenant to a similar kind and quality of premise in the Development and endeavour to cause the lease disruption possible to the tenants business, all parties acting reasonably given the circumstances. In the event that the construction of the Development requires the Development to be vacant and the relocation as provided for herein is not possible, the Landlord has the right to terminate this Lease on Six (6) months prior written notice to the Tenant, without penalty.

15 The landlord in purporting to dispossess Meridian relies primarily on the last sentence of Article 12.04 having regard to all the circumstances of this case.

16 Article 1.01(2) of the Lease, under the heading SPECIAL DEFINITIONS, provides as follows:

> 1.01 (2) "Development" the Lands and the integrated buildings and improvements erected thereon and as may be varied from time to time, located at municipal address 1550 Carling Avenue East and Part South.

17 It would appear then, on the face of the lease, that the landlord has the right to terminate the lease and dispossess the tenant only in the event that construction being conducted on the development requires the development to be vacant *and* the relocation as provided for in Article 12.04 is not possible. In my view, there is a strong argument to be made that presently there is no factual evidence that meets the requirement of Article 12.04 of the lease enabling the landlord to extinguish the tenant's rights without penalty. The building is not presently vacant and it obviously is not required to be vacant for the landlord to carry out the desired

construction. Counsel for the landlord, Mr. De Toni, argues that in all of the circumstances of this case, a reasonable interpretation of the last sentence of Article 12.04 would result in it being read as follows:

> In the event that the construction of the development requires part of the development to be vacant or the relocation as provided for herein is not possible the landlord has the right to terminate this lease on six (6) months prior written notice to the tenant, without penalty.

In my view, the landlord will have difficulty making out such a case at trial. It should be noted that Article 12.04 was drafted by the landlord's solicitors.

18 I note in passing that there is presently no evidence before the court, in any event, that from a construction point of view Meridian's space is required to be vacant in order for the landlord to carry out the desired construction.

19 In the circumstances of this case, I conclude that there is a serious issue to be tried in this case and that is whether or not the landlord, having regard to the terms of the lease and all of the circumstances of this case, has the right in law to terminate Meridian's lease and demand possession.

Irreparable Harm

20 Mr. Justice Corey in *RJR-MacDonald Inc.* defined "irreparable harm" in the following way:

> Irreparable refers to the nature of the harm suffered rather than its magnitude. It is a harm which either cannot be quantified in monetary terms or which cannot be cured usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crane Inc. v. Hendry* (*1988*), *48 D.L.R. (4d) 228...*); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid Co. v. Ethicon Ltd.* [*1975*], *A.C. 396*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin* [*1985*], *3 W.W.R. 577, 61 B.C.L.R. 145* (*C.A.*).

21 Mr. Justice Killeen in *Matrix Photocatalytic Inc. v. Purifics Environmental Technologies Inc.* (1994), 58 C.P.R. (3d) 289 (Ont. Gen. Div.) said the following:

> A party in the position of Matrix does not have to demonstrate irreparable loss beyond doubt or even at this stage on a balance of probabilities. All that must be done, as it

seems to me, is to show a real risk of disastrous consequences for which damages will be of little or no comfort.

22 In his affidavit sworn February 13, 2001 and particularly in paragraph 8 thereof, Mr. Norman set out some of the reasons why Meridian chose to lease at 1550 Carling Avenue. The interior fit-ups and offices were already designed and completed so that Meridian could begin using them without making substantial renovations. The location offered good visibility from both Carling Avenue and the Queensway corridor allowing for good signage to attract new customers and allowing existing clients to easily find Meridian's new location. There was significant parking on site to accommodate both staff and clients and make access to the office relatively easy. The combination of base rent and expenses were competitive, particularly when budgeted over the first five years of what was to be a new venture.

23 On the evidence presently before me, it would appear that there is no similar space available to Meridian in the event it is dispossessed of its present demised premises. Certainly the landlord has offered no evidence that similar space would be available to Meridian in the event the present lease was terminated.

24 The materials presently before me disclose that the insurance business is an extremely competitive business and that loss of clientele inevitably results from a location move. Meridian, although a partnership of established insurance companies, is itself a fledgling company which has occupied its first location for a period of only two years. While Meridian is likely going to sustain damages in the event that it is dispossessed, at the same time it will be difficult for Meridian to ascertain the extent of that damage.

25 It would appear, from the evidence presently before the court, that Meridian's three partners spent considerable money in establishing and locating Meridian in the marketplace in 1999.

26 Meridian estimates that in the event that it is forced to relocate, it will incur costs in excess of $650,000.00. Mr. Douglas Duclos, one of Meridian's partners, deposes in his affidavit sworn March 23, 2001, that Meridian simply does not have the financial resources to fund the anticipated costs of relocation. The landlord has offered to compensate Meridian only to the extent of $50,000.00 in the event that it voluntarily relocates. It would appear on all of the evidence that a forced move could result in disastrous consequences for Meridian at this time.

27 I find, in all of the circumstances, that Meridian has made out a case that termination of its lease and forced dispossession at this time may well result in irreparable harm to it.

Balance of Convenience

28 The factors referred to under the heading "Irreparable Harm" are equally important in assessing the balance of convenience as between the parties. Meridian, having invested considerable monies with respect to its present location, is now threatened with dispossession, a short two years into what would likely have been a ten year term. It has been unable to find similar alternative space to meet its needs. It will suffer significant losses in the event that it is forced to vacate the present demised premises, losses which will be extremely difficult to ascertain with any exactitude. The risk exists that Meridian, if forced to vacate, will be faced with the disastrous consequences of being unable to continue in business as a partnership of three of some of the oldest insurance companies in the Ottawa area.

29 In the event of Meridian being dispossessed, the landlord will simply be able to increase its profit from the building which, on the evidence, has approximately tripled as a result of the addition of Nortel as a tenant. One must bear in mind in determining balance of convenience, that the landlord does not need the desired new second floor space to accommodate its commitment to Nortel nor to accommodate its commitment to any tenant or proposed tenant for such space. One must bear in mind as well that the proposed new second floor space constitutes only four percent of the entire development space.

30 On the other hand, if Meridian remains in possession pending the trial of this action, the landlord will continue throughout to receive from Meridian the rent bargained for in the original instance. At worse, if Meridian stays in possession, the landlord will be deprived of some additional income that it anticipates would be received from an expanded second floor space.

31 In all of the circumstances, I am satisfied that the balance of convenience strongly favours Meridian in this case.

Conclusion

32 In light of the above an order will issue restraining the respondents from dispossessing Meridian of the demised premises pending the trial of this action.

33 Unless there are special circumstances that have not been brought to my attention, the costs of this motion will be to the applicant in the cause. If counsel are not agreed, I will receive short written submissions on the question of costs.

Application granted.

TAB 17

1985 CarswellMan 19
Supreme Court of Canada

Aetna Financial Services Ltd. v. Feigelman

1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161, 29 B.L.R. 5, 29 A.C.W.S. (2d) 267, 32 Man. R. (2d) 241, 4 C.P.R. (3d) 145, 55 C.B.R. (N.S.) 1, 56 N.R. 241, J.E. 85-192

AETNA FINANCIAL SERVICES LIMITED v. FEIGELMAN et al.

Ritchie *, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

Heard: September 26, 1983
Judgment: January 31, 1985

Counsel: *D.C.H. McCaffrey, Q.C.*, for appellant.
W.P. Riley, Q.C., and *P. Simm*, for respondents.

Subject: Intellectual Property; Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure

Related Abridgment Classifications

Remedies
II Injunctions
II.1 Rules governing injunctions
II.1.e Mareva injunctions
II.1.e.iii Miscellaneous
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.ii Where statutory procedures available
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets
II.2.c.iii.C.1 Relevance of jurisdiction to which assets removed

Appeal from judgment of Manitoba Court of Appeal, [1983] 2 W.W.R. 97, 36 C.P.C. 20, 143 D.L.R. (3d) 715, 19 Man. R. (2d) 295 , dismissing appeal from judgment of Wilson J. dismissing application to set aside ex parte interlocutory injunction granted by Wilson J.

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

1 The Manitoba Court of Appeal affirmed the trial judge's order granting an injunction which restrained the appellant from transferring certain identified assets out of Manitoba to the appellant's offices in either Toronto or Montreal [reported at [1983] 2 W.W.R. 97, 36 C.P.C. 20, 143 D.L.R. (3d) 715, 19 Man. R. (2d) 295]. This appeal raises squarely and simply the question of the availability of interlocutory orders restraining a defendant in a civil action from disposing of or handling assets in any specific way prior to trial. In England this is said to have originated in a proceeding now identified by the expression "*Mareva* injunction".

2 The facts are few and simple. The appellant Aetna Financial Services Limited (for convenience hereinafter called "Aetna") is a company incorporated under the Canada Business Corporations Act, 1974-75-76 [Can.], c. 33, with its head office in the city of Montreal and offices in Toronto. At one time it had an office in Manitoba for the promotion of business but not for the processing of business. At the present time the company has contracted its operations largely, if not entirely, to the Montreal office. Its operations consist of the factoring of accounts receivable for its clients on a basis of recourse or non-recourse. In this business Aetna had only two accounts or customers in the province of Manitoba, one of them being the respondent Pre-Vue Company (Canada) Ltd. The asset in question was acquired from the collection in receivership proceedings concerning the second Manitoba customer Sakine. This realization was in the approximate sum of $270,000 which Aetna was about to transfer to its offices outside of Manitoba, either Toronto or Montreal, when these proceedings were commenced.

3 When the respondent Pre-Vue Company (Canada) Ltd. (for convenience hereafter called "Pre-Vue") went into default under the debentures issued to and held by Aetna, Aetna appointed a receiver by extra-judicial unilateral action according to an asserted right under the debenture. The appointment of the receiver was subsequently confirmed by the Court of Queen's Bench in Manitoba. The appointment of the receiver was without prejudice to any action by Pre-Vue or its shareholders against Aetna or the receiver. The action against which the present application for injunction rests arose out of this. By statement of claim dated 30th March 1981 Pre-Vue and its shareholders commenced action claiming unliquidated damages, and alleging, inter alia, that Aetna, in contravention of the terms of the debenture, failed to give Pre-Vue the allotted time to cure its default, and therefore the appointment of the receiver was improper. There may well be issues arising out of this appointment of the receiver but they are not of concern in the disposition of this appeal dealing as it does

with the interlocutory injunction only. Some two years after the confirmation by the court of the appointment of the receiver-manager, the respondents applied for and obtained the injunction in question, wherein it was ordered that the appellant be:

> ... restrained and enjoined, until the further order of the Court, from removing from Manitoba or otherwise disposing of or dealing with any of its assets within Manitoba, including and in particular any monies paid to or received by the receiver-manager appointed by the Defendant, Aetna Financial Services Limited, to take control and possession of the property and undertaking of Sekine Canada Ltd., save in so far as such assets do not exceed in value the sum of $997,711.21.

In July 1982 an application to set aside this ex parte interlocutory order was dismissed. The terms of the injunction were modified, however, so as to restrict the movement of assets by Aetna only to the extent of $250,000.

4 In the Court of Appeal, the majority determined that an injunction of the type herein issued by the Trial Division was available under the law of the province of Manitoba and that in the circumstances the exercise of discretion by the learned trial judge should not be the subject of intervention by the Court of Appeal. The majority varied the judgment of the Trial Division only to the extent of "permitting the discharge of the injunction, on the posting of security by Aetna" [p. 111].

5 Huband J.A. dissented, not on the grounds that the so-called *Mareva* injunction is not available in law in the province of Manitoba, but that under the circumstances injunctive relief should not have been granted. His Lordship summarized his position [pp. 119-20]:

> It seems to me that a Mareva injunction should be issued in this jurisdiction only where a strong case has been made out that it is necessary to do so to prevent an imminent injustice.
>
> Far from a strong case, I think the present application for injunctive relief is decidedly weak. It has none of the elements of fraud or sham or movement of assets in order to escape lawful claims which have become part of the jurisprudence justifying Mareva-type injunctions.

6 There are three threshold issues:

> a) As a matter of law, is this type of injunction available in Manitoba?
>
> b) Is this type of injunction available in the circumstances revealed in the record on this appeal?

c) Is the exercise of discretion by the court of first instance properly reviewable on appeal?

7 The rule as to the availability of an interlocutory injunction generally has been variously stated but, in my view, it is convenient to refer to the succinct description of that order as found in *Chesapeake & Ohio Ry. v. Ball*, [1953] O.R. 843 at 854-55, where McRuer C.J.H.C. stated:

> The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff would ever succeed in the action. I may put it in a different way: If on one hand a fair *prima facie* case is made out and there will be irreparable damage if the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.

Reconsideration of requirement that the plaintiff must show a "strong *prima facie* case" has come in the wake of the decision of the House of Lords in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504. However, the other principles enunciated by McRuer C.J.H.C. remain unimpaired. As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the Court prior to trial. Where the injunction maintains the status quo in a way which is fair to both sides, the order is attainable; but, simply because the order would not injure the defendant is not sufficient reason to move the Court to grant what is generally regarded as an extraordinary intervention. In *Law Soc. of Upper Can. v. MacNaughton*, [1942] O.W.N. 551 (C.A.), Rose C.J.H.C. stated at p. 551:

> I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury.

8 A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 at 799 (C.A.), as follows:

> I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.

Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets were referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532 at 533, affirmed 7 D.L.R. 72 (C.A.), by Boyd C.:

> The plaintiff may or may not get judgment in this case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.
>
> There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.

The principle has been restated in modern times in *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 at 193 (Ch. D.), where Megarry V.C. stated:

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

This problem has been stated and restated many times in this country in the courts of Manitoba and elsewhere: *OSF Indust. Ltd. v. Marc-Jay Invt. Inc.* (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446 (H.C.); *Pivovaroff v. Chernabaeff* (1977), 16 S.A.S.R. 329; *Bedell v. Gefaell*, [1938] O.R. 726, [1938] O.W.N. 437, [1938] 4 D.L.R. 443 (C.A.) ; *Hepburn v. Patton* (1879), 26 Gr. 597; *Pac. Invt. Co. v. Swan* (1898), 3 Terr. L.R. 125 (C.A.); *Ferguson v. Ferguson* (1916), 26 Man. R. 269, 10 W.W.R. 113, 29 D.L.R. 364 (K.B.).

9 The general rule in *Lister* has had wide application in the law: see Sharpe, Injunctions and Specific Performance (1983), at pp. 94-97. However, the abhorrence which the common law has felt toward allowing execution before judgment has always been subject to some obvious exceptions:

> 1. for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute:
>
> > To a large extent this exception to the *Lister* rule has been codified in the various provincial and federal procedural rules. Rule 330(1) of the Manitoba Queen's Bench Rules is typical and provides:
> >
> > > **330(1)** The court may, on the application of any party and on such terms as may be just, make an order for the detention or preservation of property, being the subject of the action...
>
> See also: Ontario Rules of Practice, R.R.O. 1980, Reg. 540, R. 372; Federal Court Rules, C.R.C. 1978, c. 663, R. 470(1); Nova Scotia Civil Procedure Rules, R. 43.02; Saskatchewan Queen's Bench Rules, R. 389; Alberta Rules of Court, R 468.
>
> That the courts had jurisdiction to make an order for the preservation of property pending litigation was, however, recognized even prior to passage of the Rules. In *Great Western Ry. Co. v. Birmingham & Oxford Junction Ry. Co.* (1848), 2 Ph. 597, 41 E.R. 1074 (L.C.), Cottenham L.C. observed, at p. 1076, as follows:
>
> > It is certain that the Court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the Court prevents by its injunction. Such are the cases *Echliff v. Baldwin* (16 Ves. 267), [603] *Curtes v. Lord Buckingham* (3 V. & B. 168), *Spiller v. Spiller* (3 Swan, 556), per Lord Redesdale in Dow. 440. It is true that the Court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the Plaintiff.
>
> Although the *Great Western Ry.* case was decided before *Lister v. Stubbs*, it is nonetheless still accepted that an injunction to preserve the very subject-matter of the

action is not to be equated with an injunction of the *Mareva* variety. This distinction was recently restated by Craig J. in *Rosen v. Pullen* (1981), 16 B.L.R. 28, 126 D.L.R. (3d) 62 at 74-75 (Ont. H.C.):

> It is unnecessary for the Court to consider the present case on the basis of a *Mareva* injunction because the very subject-matter of the action is the letter of credit in question. It is not a case of an action against a defendant based on a debt where there is a likelihood that the defendant will remove available assets. See Williston & Rolls, *The Law of Civil Procedure*, vol. 2 (1970), p. 585, cited with approval by Lerner J. in *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 20 O.R. (2d) 566 at p. 567, 88 D.L.R. (3d) 446 at p. 447, 7 C.P.C. 57, as follows:
>
> > (*a*) An injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment.

The result would be entirely different if the property likely to be disposed of is the very subject matter of the litigation.

2. where generally the processes of the court must be protected even by initiatives taken by the court itself;

3. to prevent fraud both on the court and on the adversary:

> In *Campbell v. Campbell* (1881), 29 Gr. 252, both the general rule and the exception to it on the basis of fraud, were succinctly stated by Boyd C. at pp. 254-55, as follows:
>
> > Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

More recent cases in which the fraud exception has been applied include *Toronto v. McIntosh* (1977), 16 O.R. (2d) 238 (H.C.); and *Mills v. Petrovic* (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.).

4. quia timet injunctions were generally permitted under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction.

10 Initially the Court of Appeal of the United Kingdom found its jurisdiction to issue this type of quia timet order in a section of the judicature legislation that ultimately became s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 [(15 & 16 Geo. 5), c. 49] which authorizes the court to issue an injunction where it appears to the court "to be just or convenient" that the order should be made. In the rise of the *Mareva* injunction in the Court of Appeal, the source of authority for the Supreme Court was found to reside in this provision which can be traced back through a succession of statutes reaching back to at least the Common Law Procedure Act, 1854 [(17 & 18 Vict.), c. 125]. In later pronouncements concerning this type of injunction, the jurisdiction to do so has been traced even further back into the antiquity of the London Commercial Court. As we shall see, Canadian legislation has followed the same course as s. 45. *Lister*, supra, and many other authorities, notably *Aslatt v. Southampton Corp.* (1880), 16 Ch. D. 143, have made it clear, however, that these words in the statute do not authorize a court to issue an injunction "because the court thought it convenient" [p. 148]. Nor in the words of the authors of Halsbury's Laws of England, 4th ed., vol. 24, p. 518, para. 918, has this provision altered the general rules applying to the issuance of interlocutory injunctions.

11 Section 19(1) of the Ontario Judicature Act is to the same effect as the United Kingdom provision, as are most of the comparable provisions in the provincial statutes across the country:

British Columbia, Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36;

Alberta, Judicature Act, R.S.A. 1980, c. J-1, s. 13(2);

Saskatchewan, the Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45(8);

Manitoba, the Queen's Bench Act, C.C.S.M., c. C280, s. 59;

Ontario, Judicature Act, R.S.O. 1980, c. 223, s. 19(1);

Nova Scotia, Judicature Act, 1972 (N.S.), c. 2, s. 39(9);

New Brunswick, Judicature Act, R.S.N.B. 1973, c. J-2, s. 33 [am. 1981, c. 6, s. 1];

Prince Edward Island, Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15(4);

Newfoundland, the Judicature Act, R.S.N. 1970, c. 187, s. 21(*m*).

We are here particularly concerned with s. 59(1) of the Queen's Bench Act of Manitoba.

12 The Quebec Code of Civil Procedure, R.S.Q. [1977], c. C-25, provides for interlocutory injunctions in art. 752 "when the applicant appears to be entitled to it". These words, given their plain meaning, clothe the court with at least much authority and latitude as the jurisdiction to enjoin where it is found "to be just and convenient". The article goes on to provide against the very eventuality contemplated by the application for the *Mareva* type of order here:

> ... and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

The authority of the superior court to respond to an application based on the appropriate facts and demonstrated in the manner prescribed by the Code is at least equal to that of the superior courts of the other provinces.

13 The statutory powers of the courts in Manitoba to issue such injunctive relief is undoubted; the question is, as Hamilton J. put it in *Hawes v. Szewczyk*, Man. Q.B., 18th April 1979, unreported, noted at [1979] 2 A.C.W.S. 274, should the jurisdiction be exercised? This question can only be answered by balancing the principles enunciated in *Lister* on the one hand and those of *Rasu* [*Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*Pertamina*), [1978] Q.B. 644, [1977] 3 All E.R. 324 (C.A.)] on the other.

14 In *Lister* itself, the issue turned on the narrow distinction on the facts of that case between the debtor-creditor relationship on the one hand (wherein no judicial intervention would be authorized before trial) and the cestui que trust relationship on the other hand (where judicial intervention would intervene to protect the trust res). *Lister* itself recognized at least three exceptions to the general principle: firstly, where the res of the action was demonstrably the property of the claimant; secondly, where the relationship between the adversaries included a condition whereby the defendant-debtor could not, without the acquiescence of the claimant-creditor, defend the claim; and thirdly, the trustee-beneficiary relationship.

15 While the law has long known exceptions to the *Lister* rule, it was not until a series of maritime disputes arose that the courts consciously began to build up a special code of rules or subrules for the intervention by the court before judgment, and indeed, before trial, where circumstances warranted such action in the interest of the parties, the community and the law generally. Beginning in 1975, these exceptions to the *Lister* rule came into judicial prominence. They have been grouped by the courts, and legal writers generally, under the new legal generic, the *Mareva* injunction.

16 Beginning in early 1975 there were four cases in England arising in the shipping business where the rule in *Lister* was suspended. These are, in their chronological order:

— *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 74, [1975] 3 All E.R. 282 (C.A.);

— *Mareva Companie Naviera S.A. of Panama v. Int. Bulk Carriers S.A.*, [1980] 1 All E.R. 213 (C.A.);

— *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak, etc.* (*Pertamina*), supra; and

— *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645, [1979] 2 All. E.R. 972 (C.A.).

In the midst of this development process in the United Kingdom came the Australian case, *Pivovaroff v. Chernabaeff*, supra, which reviewed the English authorities but declined to follow them.

17 In *Nippon* the shipowners, being unable to locate the defendant charterers, commenced an action for overdue hire and moved on an ex parte basis, as the defendants could not be located, for an order enjoining the defendants from transferring out of the jurisdiction moneys known to be in a London bank account in the name of the defendants. The order was granted as asked, Lord Denning M.R. stating, at p. 283:

> It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case.

Lane L.J. agreed because of the danger of the plaintiff losing money "... to which he is admittedly entitled" [p. 284], although no one made such an admission, as the defendant at no stage of the process appeared.

18 *Mareva* followed one month later although it was not reported until 1980. In *Mareva*, the defendant charterers again did not appear and the reference to their argument in Lord Denning's judgment appears to be in error. The ship was out of the jurisdiction, the defendants had disappeared, and the shipowners sought to enjoin the disposal of moneys known to be in a London bank account in the name of the defendants. Because the order in *Nippon* had been made without any reference to the *Lister* case, the High Court, on ex parte application, had refused the injunction. In the Court of Appeal the *Lister* case was avoided

by reliance upon s. 45 of the Supreme Court of Adjudicature Act mentioned above in the *Nippon* case and upon a commentary on the resultant powers of the court in Halsbury's. Lord Denning M.R. then continued, at p. 215:

> In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it.

In explanation of this conclusion, the Master of the Rolls stated on the same page:

> There is money in a bank in London which stands in the name of these charterers. The charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the shipowners may never get their charter hire. The ship is now on the high seas.

Lord Roskill, in concurring, distinguished the *Lister* case on the basis that by a clause in the charterparty, the shipowners "have a lien upon ... all sub-freights for any amounts due under this Charter..." [p. 216]. The order in *Mareva*, it can be seen, was therefore based on the broad powers given to the court under its jurisdictional statute and in part, at least in the view of one member of the court, on the existence of a contractual lien by the plaintiffs against the prepaid sub-charterparty revenues temporarily within the jurisdiction of the United Kingdom court.

19 In 1977, the Court of Appeal confirmed the denial of such an injunction in *Rasu*, supra. The defendants were clearly outside the jurisdiction but had some assets, or interest in assets, inside the United Kingdom. The debt claimed by the plaintiff arose under a charterparty between the plaintiff as a shipowner and the defendants as charterers. Some actions taken by the defendants were capable of interpretation as an effort to transfer or deal with their assets which were in the United Kingdom in a manner which would put them beyond the reach of the creditors. The injunction was denied, not because there was not a prima facie case of liability, but because the nature of the goods under attack was such that they were wholly unrelated to the action and the claim arising in the plaintiffs, the title to the equipment in question was unclear, the removal of the goods as planned to Germany increased the likelihood of the plaintiffs being able to obtain a *Mareva*-like injunction there, and the seizure and sale of the equipment would realize only a fraction of their true worth as an integral part of a plant being built by the defendants in Indonesia. What is important in the case is the catalogue of matters which Lord Denning set out in his judgment as being those to be taken into consideration by the court in determining whether the exercise of discretion under statute should occur. These matters are:

> 1. The plaintiff must demonstrate a good arguable case;
>
> 2. The assets in question need not be limited to money but could include goods within the jurisdiction;

> 3. Where the injunction might compel the defendant to provide security, it might tilt the scales in favour of issuance of the injunction.

In justifying the earlier decisions of *Nippon* and *Mareva*, the Master of the Rolls found roots for such an order in the practice in the courts in the city of London, particularly the commercial courts, where the seizure orders, or injunction orders, were issued substantially to compel the defendant to appear and provide bail or security. The historical prerequisite was absence of the defendant from the jurisdiction. Lord Denning noted that the practice, apparently has long been followed in the United States, except that it has been limited to cases where debt is due from the defendant in a liquidated discernible amount: see *De Beers Consol. Mines Ltd. v. U.S.; Soc. Inc. Forestière du Congo v. U.S.*, 325 U.S. 212 at 222-23, 89 L. Ed. 1566 (1945). Similar remedies have been, and continue to be, in widespread use in the maritime towns of continental Europe. Accordingly, Lord Denning observed, at p. 332:

> Now that we have joined the Common Market it would be appropriate that we should follow suit, at any rate in regard to defendants not within the jurisdiction. By so doing we should be fulfilling one of the requirements of the Treaty of Rome, that is the harmonization of the laws of the member countries.

He then returned to the theme of the *Lister* principle at p. 332 when he stated:

> So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

There appears to be a discrepancy between these comments of the learned Master of the Rolls and those at p. 336 of the report where His Lordship stated:

> I think the courts have a discretion, in advance of judgment, to issue an injunction to restrain removal of assets, whether the defendant is within the jurisdiction or outside it.

The trial judge in *Rasu* added the further qualification that the plaintiff "has what appears to be an indisputable claim against the defendant" [p. 353] and reference is made with approval to this condition by the Master of the Rolls [p. 334]. In *Rasu*, the turning point in the line of reasoning seesm to be reached when the defendants, unlike the defendants in *Mareva* and *Nippon*, appeared in court to defend the claim.

20 The final dissertation in the Court of Appeal of the United Kingdom on the subject of these injunctions to which I wish, at present, to refer is found in *Third Chandris*, supra, again principally through the judgment of Lord Denning. Here the injunction was issued in

the court of first instance and confirmed by the Court of Appeal, apparently because the defendants were outside the jurisdiction, provided no financial returns in the proceedings, or indeed in Panama, the country of registry of the defendants' business, but did have a bank account in London in which had been deposited the proceeds of a sub-charterparty entered into after the execution by the defendants of the charterparty from the plaintiff shipowners. The extraordinary factual feature was that the injunction restrained the removal from the jurisdiction of moneys in the defendants' London bank account, although the evidence clearly indicated that the account was in overdraft. Again, the Master of the Rolls catalogued the hurdles which a plaintiff must surmount in order to obtain this type of injunction. They are much the same in *Rasu* except that (at p. 985) the Master of the Rolls placed more emphasis on the requirement that the plaintiff demonstrated belief in a risk that the assets would be removed before the judgment or award is satisfied. "The mere fact that the defendant is abroad is not, by itself, sufficient." Additionally, a contrast is drawn between a foreign corporation of substance and one operating in a country where no financial disclosure is required and nothing is placed before the court to ascertain the magnitude of the risk of non-payment of any judgment recovered by the plaintiff. In particular, His Lordship went on to observe, at p. 985:

> There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat.

Lawton L.J. referred to the fact that the defendant's assets may be ships flying "the so-called flags of convenience" with little or no trace of substantive worth in the defendant, in or outside the jurisdiction. At p. 987 he expressed the sense of risk which must be found by the court to exist before the issuance of these extraordinary injunctions:

> There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction.

The mere fact that the defendant was a foreign corporation was not, in the view of Lawton L.J., by itself, sufficient to justify this injunction.

21 In *Pivovaroff v. Chernabaeff*, supra, Bray C.J., of the Supreme Court of South Australia, set aside the injunction which had been granted to a plaintiff to restrain the defendants from disposing of some real estate which was unrelated to the personal injury claims of the plaintiff. The injunction had been granted on the basis of a belief held by the plaintiff that the defendant, upon the sale of such assets, might leave the country before the trial of the action. The Chief Justice did not follow the *Mareva* cases, largely because the defendant resided in the jurisdiction, but His Lordship added at p. 338:

> I am far from satisfied that even in the case of a defendant outside the jurisdiction with assets within it it would be proper to issue an injunction of the type in question here.

The Chief Justice found no escape from the general principle enunciated in *Robinson v. Pickering* (1881), 16 Ch. D. 660 (C.A.) (*per* James L.J. at p. 661):

> You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property.

The Chief Justice then added, at p. 338:

> Those cases do not contain any exception for defendants outside the jurisdiction.

22 The Australian court referred to the judgment of Schroeder J.A. in *Bradley Bros. (Oshawa) Ltd. v. A to Z Rental Can. Ltd.*, [1970] 3 O.R. 787, 64 C.P.R. 189, 14 D.L.R. (3d) 171, in the Court of Appeal of Ontario, where authorities were applied with the same result. Both courts shied away from the obvious danger of judicial interference with the operations of corporate enterprises where a creditor might see in many management dealings a real risk of loss of assets before the creditor would be able to demonstrate his claim.

23 The United Kingdom *Mareva* rule might, as Lord Denning observed in *Rasu*, find harmony with the British position in the Common Market, but, as pointed out in *Pivovaroff*, that consideration has no relevancy in Australia, nor indeed would it have any relevancy in any country not bound by the Treaty of Rome.

24 As for the asserted jurisdiction founded on the judicature legislation in the United Kingdom, Chief Justice Bray described s. 45 as "a machinery section". In the words of the learned authors of Halsbury's Laws of England, 3rd ed., vol. 21, p. 348, para. 729 (Halsbury's Laws of England, 4th ed., vol. 24, p. 518, para 918), s. 45 "did not alter the principles upon which the court acted in granting injunctions". To the same effect, see Kerr on Injunctions, 6th ed., (1927), p. 6. Furthermore, Chief Justice Bray in *Pivovaroff* thought that (p. 340):

> It would seem unlikely that an alternative process of summary execution in anticipation of judgment, available for unliquidated damages as well as for liquidated debts due and payable, should have been slumbering unsuspected for over a century in the interstices of s. 29 and its predecessor and its analogues.

The learned justice was there referring to the Australian counterpart of s. 45 discussed by the Court of Appeal of the United Kingdom in the *Mareva* cases.

25 What therefore sprang out of the fertile ground of jurisprudence in the mid-1970's in the courts of the United Kingdom as a limited interlocutory injunctive remedy for plaintiffs

who were in pursuit of ubiquitous charterers of shipping, has matured into a sub-principle or exception to a general rule of long standing. The plaintiff in the United Kingdom must demonstrate that he has a good arguable case. At least once (*Rasu*, at p. 333), the courts have required the plaintiff to show an indisputable claim against the defendant. There must be assets of the defendant within the jurisdiction susceptible to execution. The defendant need not be outside the jurisdiction. There must be a real risk that the remaining significant assets of the defendant within the jurisdiction are about to be removed or so disposed of by the defendant as to render nugatory any judgment to be obtained after trial. *Mareva* injunctions are therefore available not just to prevent the removal of assets from the jurisdiction, but also disposal within the jurisdiction. This has been made certain by the enactment of s. 37(3), Supreme Court Act, 1981 (U.K.) [c. 54], which reads in part:

> (3) The power of the High Court ... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

However, Lord Denning is *Z. Ltd. v. A-Z and AA-LL*, [1982] Q.B. 558, [1982] 2 W.L.R. 288, (sub nom. *Z. Ltd. v. A)* [1982] 1 All E.R. 556 at 561 (C.A.), opines that this was the position prior to the enactment. The claim no longer need to be limited to debt or liquidated damages. The general rule requiring that the balance of convenience must favour the issuance of the order still exists. The overriding consideration qualifying the plaintiff to receive such an order as an exception to the *Lister* rule is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment. Short of that, the plaintiff cannot treat the defendant as a judgment-debtor, the defendant's right to defend the claim may not be impaired and the defendant in proper circumstances may within such an order, pay current expenses incurred in the ordinary course of his business.

26 The gist of the *Mareva* action is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable in the courts of England. However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue. This generally summarizes the position in this country, including the Nova Scotia Trial Division in *Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L. Da.* (1982), 141 D.L.R. (3d) 498, 53 N.S.R. (2d) 338, 109 A.P.R. 338; see also *Liberty Nat. Bank & Trust Co. v. Atkin* (1981), 31 O.R. (2d) 751, 20 C.P.C. 55, 121 D.L.R. (3d) 160, where Montgomery J. of the High Court of Ontario granted a *Mareva* injunction against a domestic defendant and restrained dealing with assets within the jurisdiction. These general rules are summarized by Lord Denning in *Prince Abdul Rahman bin Turki al Turki al Sudiary v. Abu-*

Taha, [1980] 1 W.L.R. 1268 at 1273, [1980] 3 All E.R. 409 (C.A.); see also *A.J. Bekhor & Co. v. Bilton*, [1981] 2 W.L.R. 601, [1981] 2 All E.R. 565 (C.A.), and *Z. Ltd. v. A-Z and AA-LL*, supra.

27 The harshness of the *Mavera* injunction, issued usually ex parte, is relieved against or justified in part by the Rules of Practice which allow the defendant, faced by risk of loss, an opportunity to move against the injunction immediately. On the other hand, the Court of Appeal of England seems to have blessed the practice of using this injunction as a means of coercing a vulnerable defendant into providing security in order to head off irreparable loss from the paralysis which follows the issuance of this type of injunction.

28 While the *Mareva* injunction is undoubtedly in personam, it matters not that on occasion the courts have classified it as in rem (see *Cretanor Maritime Co. v. Irish Marine Mgmt. Ltd.; The Cretan Harmony*, [1978] 1 W.L.R. 966 at 974-75, [1978] 3 All E.R. 164 (C.A.)), because the injunction affords no priority to the potential creditor, for to do so would, in the words of Goff J., "rewrite the ... law of insolvency": *Iraqi Min. of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 488 at 494, [1980] 1 All E.R. 480 (C.A.). Unsecured creditors holding a *Mareva* injunction cannot hold a preferred position over other claimants. Hence the practice of including in the order the right to meet legitimate debt payments accruing in the ordinary course of business.

29 The courts in Canada have given this type of injunction a mixed reception. The earlier decisions in the Ontario courts are reflected in *Bradley Bros.*, supra, where the Court of Appeal continued the principle of *Lister*, supra. Lerner J., in the High Court of Ontario, in a post-*Mareva* decision, maintained the same position: *OSF Indust. Ltd. v. Marc-Jay Invt. Inc.*, supra, p. 448. By 1981 the High Court appeared to assume that a quia timet jurisdiction was available on a more restricted basis than the *Mareva* formula provided in the United Kingdom: see *Liberty Nat. Bank & Trust Co. v. Atkin*, supra; *C.P. Airlines Ltd. v. Hind* (1981), 32 O.R. (2d) 591, 14 B.L.R. 233, 22 C.P.C. 179, 122 D.L.R. (3d) 498 (H.C.), where Grange J., as he then was, while raising the question of the existence of the *Mareva* principle in Ontario, found such dishonesty in the defendant's conduct that it was a certainty that he would dispose of all his assets in order to frustrate the plaintiff; and *Quinn v. Marsta Cession Services Ltd.* (1981), 34 O.R. (2d) 659, 16 B.L.R. 126, 24 C.P.C. 214, 133 D.L.R. (3d) 109 (H.C.), where such an injunction issued on the application of the rules of *Third Chandris Shipping Corp.*, supra. The Court of Appeal of Ontario reviewed the conflicting authorities in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, and although it refused the injunction in the circumstances of that case, it recognized in a detailed and comprehensive review of the authorities that the jurisdiction existed in the court to grant such a remedy in a proper case. The test there established is somewhat narrower than that generally applied by the courts in the United Kingdom (per MacKinnon A.C.J.O. at pp. 532-33):

> The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

30 The condition precedent to entitlement to the order is the demonstration by the plaintiff of a "strong *prima facie* case" (p. 522) and not merely as stipulated in some of the U.K. authorities, "a good arguable case": per Lord Denning in *Rasu*, supra, and per Megarry V.C. in *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 at 195. In summary, the Ontario Court of Appeal recognized *Lister* as the general rule, and *Mareva* as a "limited exception" to it [p. 531], the exceptional injunction being available only where there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets "to avoid the possibility of a judgment..." [p. 532].

31 In other provinces the courts have reached approximately the same result. The New Brunswick Court of Appeal in *Humphreys v. Buraglia* (1982), 135 D.L.R. (3d) 535, 39 N.B.R. (2d) 674, 103 A.P.R. 674 (C.A.), placed the basis for this kind of injunction on the danger that the defendant will abscond or dispose of his assets so as to prevent realization on any ultimate judgment. The earlier view of the Manitoba Court of Queen's Bench was expressed by Hamilton J. in *Hawes v. Szewczyk*, supra, where he concluded that the *Mareva* rule was "a dangerous innovation" and even if technically within the jurisdiction of the court, was one that "should not be exercised". The British Columbia Court of Appeal, in *Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima* (1982), 42 B.C.L.R. 1, 33 C.P.C. 42, recognized the general principles developed around this interlocutory injunction in the courts of the United Kingdom.

32 It has been argued by the appellant that the *Mareva* injunction has no place in the laws of this country because provincial legislation has filled the gap by providing statutory remedies. In Manitoba the appellant points to the Fraudulent Conveyances Act, C.C.S.M., c. F160; the Garnishment Act, C.C.S.M., c. G20; the Court of Queen's Bench Rules, c. XXIV, Attachment R. 582; and Queen's Bench R. 526, "garnishee" procedures. In other provinces, similar legislation and rules are to be found. In Ontario, for example, there is the Absconding Debtors Act, R.S.O. 1980, c. 2, s. 2, which authorizes the seizure of property of a resident of the province who leaves for the purpose of defrauding or defeating creditors; R. 372 of the present Consolidated Rules of Practice [of the Supreme Court of Ontario] which provides for the preservation of the subject matter of the proceeding; and the Fraudulent Conveyances Act, R.S.O. 1980, c. 176, which authorizes preventive orders where the plaintiff establishes a valid claim and prima facie that the conveyance in question was fraudulent. It is said by

counsel for the appellant that this type of statute indicates a legislative intent to provide interim relief of a type described in the statutes and no more. On this line of reasoning the courts, it is said, should not "legislate" by adopting the sweeping rules of the *Mareva* line of cases. This should be a matter for the legislature which is better placed to assess the problem, its incidence in the community and the range of solutions available. One should not assume that the British legislature has been entirely silent apart from s. 45, above: see 18 Hals. (4th) 166, para. 358, where reference is made to statutory authority to set aside fraudulent conveyances. However, the United Kingdom legislation is not as far-reaching as appears to be the case in this country.

33 The Manitoba Court of Appeal divided on the relevance of these statutes. The majority, speaking through Matas J.A., took the view that such legislation and rules of court provide for relief in specific circumstances and do not preclude the invocation by the court of s. 59(1) of the Queen's Bench Act for the issuance of a preventive injunction in the nature of the *Mareva* injunction. A similar view has been expressed by Tallis J., now of the Saskatchewan Court of Appeal, in *BP Explor Co. (Libya) v. Hunt*, [1981] 1 W.W.R. 209, 16 C.P.C. 168, 114 D.L.R. (3d) 35 at 58 (N.W.T.S.C.). Huband J.A., in dissent, acknowledged that the aforementioned statutes and rules of court do not assist the respondent here as there is no liquidated demand or debt or a conveyance in fraud of creditors. An attaching order might avail but the rule is more precise in its requirements that the *Mareva* rules as they presently stand. As the respondent was "registered to do business in Manitoba" and has an "authorized agent to accept service" (to quote Huband J.A. [at p. 119]), the respondent could not qualify for an attaching order. In the result, the learned justice would preclude recourse to a *Mareva* order where specific remedies are available at law; and if not so available, then "the courts should be cautious to fill the void by an injunction" [p. 119]. There are helpful discussions as to the significance of these and other provincial statutes in relation to *Mareva* injunctions in Stockwood, "Mareva Injunctions" (1981), 3 Advocates' Q. 85; Rogers and Hately, "Getting the Pre-trial Injunction" (1982), 60 Can. Bar Rev. 1; and McAllister, "Mareva Injunctions" (1982), 28 C.P.C. 1. Reference is made in the British cases to the availability of bankruptcy legislation which would allow the ultimately successful plaintiff to set aside any disposition made in fraud of creditors by way of preference or improper dealing. The same condition exists in this country where the federal Bankruptcy Act [R.S.C. 1970, c. B-3] has uniform application throughout the country.

34 I do not believe the presence of provincial or federal legislation of the type discussed above can preclude the issuance of a protective injunction or narrow the breadth of expression employed in s. 59(1) of the Manitoba Queen's Bench Act. If the court has the authority under such a legislative provision properly construed, then that authority must be expressly reduced by other legislation directed to the problem. Such is not the case here. That answer, of course, does not assist in determining the proper practice of the court when dealing

with an application for this type of interlocutory injunction other than to find jurisdiction in the court to respond in a proper case.

35 Before leaving this aspect of the matter, one should make note of the appellant's submission that the Bankruptcy Act of Canada is available to the respondent in the event that improper disposition is made of the appellant's assets followed by an assignment or petition under the Bankruptcy Act. This was a consideration in the early *Mareva* judgments in England. It is not decisive on the point of jurisdiction to make, or the propriety in these circumstances to issue, a *Mareva* injunction. The order was not made for the purpose of protecting the respondent from the consequences of any ultimate bankruptcy procedures. The entitlement springs, if it does at all, from the authority of the court at law to make the order and the qualification of the respondents under the rules and tests applied by the court in doing so. The Bankruptcy Act, which at times may be relevant to the issue presented to the chambers judge on a *Mareva* application, is not a controlling consideration, particularly on the facts in this appeal.

36 The majority of the Court of Appeal considered [at p. 110] that:

> One of the factors which is relevant in this case is the clear intention of Aetna to transfer its assets from Manitoba to Montreal, albeit that the intention is openly expressed. And Quebec is not a reciprocating province with respect to enforcement of judgments.

The Manitoba Reciprocal Enforcement of Judgments Act, C.C.S.M., c. J20, provides the machinery for the enforcement in Manitoba of judgments of the courts in other Canadian provinces which have reciprocal arrangements with the province of Manitoba. The Act also provides for the entry into such arrangements for the registration in other provinces of judgments of the courts of Manitoba. With the exception of Quebec, all the provinces of Canada, the Northwest Territories and the Yukon Territory have entered into such reciprocal arrangements and have like statutes. Twenty-five per cent of the assets of the appellant are in the province of Ontario, exceeding the value of the assets of the appellant in Manitoba which are affected by the order under appeal. The Manitoba Act and the Ontario Act each requires service upon the defendant to have been effected in the province of judgment in order to qualify such judgment for registration and enforcement in the other province (Ontario, in this case). The record here does not expressly show that the appellant was served within the province of Manitoba with a writ or other originating instrument, or with the notice of motion for this injunction. The respondent is, however, a federal company with an office in Manitoba and was at all relevant times doing business in Manitoba. Under the Manitoba Corporations Act, 1976 [Man.] c. 40 [also C.C.S.M., c. C225], such corporations are required to register and to nominate an agent for service, all as noted by Huband J.A. in dissent below. More importantly, the appellant appeared in and thereby attorned to the jurisdiction of the court in Manitoba. Thus, any judgment which may arise in these proceedings in

Manitoba will qualify for registration enforcement under the Ontario statute and hence could be executed there against the Ontario assets of the appellant in the same manner as though judgment had been issued out of the Supreme Court of Ontario.

37 In the province of Quebec, provision is found in the Code of Civil Procedure for action upon judgments outside the province of Quebec.

> 178. Any defence which was or might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada.
>
> 179. Any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered in any other province of Canada, provided that the defendant was not personally served with the action in such other province or did not appear in such action.
>
> 180. Any such defence cannot be pleaded if the defendant was personally served in such province, or appeared in the original action, except in any case involving the decision of a right affecting immoveables [sic] in this province, or the jurisdiction of a foreign court concerning such right.

In such proceedings reliance may be had upon art. 1220 of the Civil Code of the province of Quebec which supplements the procedure under art. 179, supra, by providing for the proof of judgments from courts outside the province of Quebec. The Civil Code differentiates between foreign judgments and those emanating from the courts of other provinces, and provides in the latter case for a limited process where the defendant in the extra-provincial proceeding was served in the province or appeared in a court of that province. The action in Quebec, upon any judgment later obtained in Manitoba by the respondent, would be a formal process of enforcement not different in substance and execution from the proceedings under the Ontario reciprocal statute. In the result, Quebec accords a means of enforcement of Manitoba judgments but the converse (which is of no concern in this appeal) is not the case because the reciprocity machinery in the Manitoba statute has not been brought into play. The access to the enforcement procedures under the laws of Quebec renders ineffective, in my view, any argument that the respondent was exposed to some inevitable or irreparable loss if, at the time any judgment issues in the courts of Manitoba, the assets of the appellant have been transferred from Manitoba to Quebec. Furthermore, Ontario is qualified as a "reciprocating state" under the Manitoba legislation, and the appellant, according to the record herein, had assets in that province in excess of the assets impounded in Manitoba by the order under appeal.

38 A large part of the respondent's factum filed herein, and of argument made in this court, centred upon the winding down of the appellant's business which presumably has created a risk of default by the appellant in meeting its obligations. The factum goes further and says

that by reason of this trend, in early 1982, "for all practical purposes, Aetna ceases to exist". The argument is not made that the respondent will go into bankruptcy or be wound up. Essentially, this line of submission must lead to the proposition that while the appellant "will not go into bankruptcy or default" (extract from respondent's factum), there is, in the words of the respondent's factum, "a sufficient risk of Aetna defaulting in its obligations to justify granting of a *Mareva* injunction". Such a default would, of course, invite a petition or force an assignment under the Bankruptcy Act. In either case, the respondent has extensive and easily enforceable rights. One right the respondent does not have, with or without the *Mareva* injunction "in aid", is a priority or preference if indeed the appellant has, as the respondent has elaborately calculated in its submissions in this court, become insolvent. It would not appear from the facts revealed on the record that there is any intention on the part of the appellant to default in any obligation to the respondent or to anyone else. An affidavit filed by the appellant states that "... Aetna is currently meeting all its liabilities as they become due". The deponent in this affidavit, Jean-Paul Lafontaine, was cross-examined by counsel for the respondent generally, but no questions were directed to this bald statement which remains uncontradicted in the record. This statement is obviously vital on the key question of the existence of any real risk of loss in the respondent as a basis for the issuance of this exceptional interlocutory order.

39 However, even assuming the appellant is wound up by its two shareholders, the Traders Group and the Royal Bank of Canada, it is a federal company. If it is solvent, the provisions of the incorporating Act, the Canada Business Corporations Act, 1974-75-76 [Can.], c. 33, apply. Dissolution may be effected only on "discharge of any liabilities". Provision is made for notice to creditors and liquidation is conditional upon "adequately providing for the payment or discharge of all its obligations" (s. 204(7)). All of this procedure is made subject to court supervision on the application of the officer designated in the statute or "any interested person", which includes a creditor such as the respondent. The Manitoba Corporations Act, ss. 186 and 187, requires a federal corporation to register under the Act and to appoint an agent for service of process in Manitoba. Thus there is a detailed pattern under the combined corporation legislation, provincial and federal, to cover a surrender of charter as a method of avoiding the payment of debts.

40 On the other hand, if the appellant is insolvent, the remedies under the Bankruptcy Act apply and not the procedures under the Canada Business Corporations Act. A *Mareva* injunction can neither advance nor interfere with these procedures.

41 All the foregoing considerations, while important to an understanding of the operation of this type of injunction, leave untouched the underlying and basic question: do the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada? The question in its simplest form arises in the principles enunciated in the earliest *Mareva* cases where the wrong to be prevented

was the removal from "jurisdiction" of assets of the respondent with a view to defeating the claim of a creditor. It has been found by the courts below that there was no such wrongdoing here. An initial question, therefore, must be answered, namely, what is meant by "jurisdiction" in a federal context? It at least means the jurisdiction of the Manitoba court. But is the bare removal of assets from the province of Manitoba sufficient? The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the provinces of Manitoba, Quebec and Ontario. No breach of law is asserted by the respondent. No improper purpose has been exposed. It is simply a clash of rights: the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capacity, federally confirmed (and the constitutionality of which is not challenged), to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province, above. None of these vital considerations was present in the United Kingdom where *Mareva* was conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce. In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of "residing" throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. There was no clandestine transfer of assets designed to defraud the legal process of the courts of Manitoba. There is no evidence that this federal entity has arranged its affairs so as to defraud Manitoba creditors. The terminology and trappings of *Mareva* must be examined in the federal setting. In some ways, "jurisdiction" extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. For other purposes, jurisdiction no doubt can be confined to the reach of the writ of the Manitoba courts. These parameters will have to develop in Canada as did the *Mareva* principle in the courts of the United Kingdom. The laws of this country, as developed here for jurisprudence originating in the United Kingdom and variously adopted in some of the provinces, have long included quia timet orders when justice and the protection of the judicial process required. "*Mareva*" is a refinement made necessary to accommodate in the same laws the primary principle of *Lister*. All this is as true in Canada as in the United Kingdom. I conclude that nothing has taken this jurisdiction away from the superior courts in the province. In establishing the rules under which superior courts will issue such interlocutory orders in this country, one must not apply in toto or verbatim the dicta of the decisions in other legal systems though they may have much in common with those of Canada. The *Mareva* consideration arising in this appeal is the effect of a rightful removal of assets in the ordinary course of business by a resident defendant to another part of the federal system. This by itself will not trigger such an exceptional remedy as it well might do in the United

Kingdom where the jurisdiction of the court and the boundaries of the country coincide. Even there, it will be seen in *Rasu Maritima*, supra, an interlocutory injunction was not issued on the removal of assets from the United Kingdom in part because the assets were being moved to another country of the Common Market where the law recognized judgment before trial and indeed execution before judgment. That reasoning is much amplified in its introduction into a federal system. The South Australian court, as we have seen in *Pivovaroff*, supra, has declined to adopt the *Mareva* principles.

42 Taking this added federal consideration into account, should the injunction have been issued in the first instance and renewed in the Court of Appeal? The *Mareva* rules of the United Kingdom as developed in our courts, do not, in my view of the circumstances here existing, properly reflect the federal concern. The movement of the assets in question was announced in public pronouncements of the two stockholders of the appellant and by the appellant itself. The respondents were expressly made aware of the impending transfer. There is no finding in either court below of any improper motive behind this transfer of assets. The transfer, indeed, was carried out in the ordinary course of business and reflected the history of the conduct of the appellant's business in the past in Manitoba. The appellant never did retain assets in its Manitoba branch operation, either before the appellant commenced dealings with respon dent or thereafter. There is no finding of any intention by the appellant to default on its obligations, either generally or to the respondent, if in law such an obligation is later found to exist. The appellant has not been found to be insolvent and the Court of Appeal expressly ruled this element out as a consideration governing the issuance or denial of the injunction. Finally, there is the federal fact and the procedures of pursuit open to the respondent in tracing these assets through to their destination in Quebec, or in recovering from the assets of the appellant in Ontario.

43 There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This subrule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. I would, with all respect to those who have held otherwise, conclude that the order should not have been issued under the principles of the interlocutory quia timet orders in Canadian courts functioning as they do in a federal system.

44 Finally, there is the question as to whether the appellate tribunal may properly step in and alter a discretionary order, such as an interlocutory order, issued by a court of first instance where no sufficient error in law on the part of the courts below has been revealed, or where the order in question was issued based upon a wrong or inapplicable principle of law. Where no significant error of law is revealed, in short, an appellate court should not intervene. We do not here have the benefit of reasons from the judge of first instance, Wilson J., issuing the order, but we do have the reasons of the Court of Appeal. That court, with all respect to those members who confirmed the issuance of the order, did not give due consideration and weight to the position of the courts and the position of the parties before those courts when dealing with an interlocutory quia timet order in a federal jurisdiction. Though I would have come to the opposite conclusion even aside from that element of the law involved in these proceedings, interference with the exercise of discretion in issuing the order would, apart from this consideration, be unwarranted. It is, however, in my view an error of law relating to the application of the principles properly governing the execution of the court's discretion in favour of the respondent in issuing the quia timet interlocutory order and, accordingly, I would intervene and set aside such order.

45 I therefore would allow the appeal and set aside the injunction issued in the courts below, with costs to the appellant throughout.

Appeal allowed.

Footnotes

* Ritchie J. did not take part in this judgment.

TAB 18

2011 ONSC 2951
Ontario Superior Court of Justice

Sibley & Associates LP v. Ross

2011 CarswellOnt 4671, 2011 ONSC 2951, [2011] O.J. No. 2656,
106 O.R. (3d) 494, 203 A.C.W.S. (3d) 831, 334 D.L.R. (4th) 645

Sibley & Associates LP, Plaintiff/Moving Party and Sean Ross and Olive Douglas, a.k.a. Olive Robinson, Defendants/Respondents

G.R. Strathy J.

Heard: April 19, 2011
Judgment: May 16, 2011
Docket: CV-11-424427

Counsel: John P. Ormston, James Brink, for Plaintiff / Moving Party
No one for Defendants / Respondents

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets
II.2.c.iii.C.3 Miscellaneous

MOTION by plaintiff for interim ex parte Mareva injunction.

G.R. Strathy J.:

1 This was a motion, made without notice, for an interim *Mareva* injunction.

2 The plaintiff, Sibley and Associates LP ("Sibley"), provides disability and rehabilitation management services to insurance companies, employers and government organizations.

3 The defendant, Sean Ross ("Ross"), is a former employee in Sibley's accounting department. The defendant, Olive Douglas ("Douglas"), also known as Olive Robinson, is Ross's mother.

4 Ross was employed by Sibley from March 2008 to March 2011. He resigned abruptly in March 2011 after being informed of an impending audit of the company's financial records.

5 In the course of that audit, it was discovered that unauthorized payments, amounting to at least $310,160.32, had been made to Douglas over a period of several years. Douglas did not appear on Sibley's payroll records and she was not identified as a service provider or as someone who was entitled to receive payments from Sibley. The payments to her had not been authorized by anyone at Sibley.

6 It was determined that regular payments, of approximately $5,000 per month or less, had been made to Douglas every two weeks between April 2008 and February 2011. The payments were made by cheque until November 2010, at which time Sibley converted from cheques to an electronic funds transfer ("EFT") system. After November 2010, most of the payments to Douglas were made by EFT.

7 Sibley discovered that the cheque "stubs" for the cheques in question were missing from the numerically-sequenced cheque records. It was unable to locate any records authorizing EFT payments to Douglas.

8 There is overwhelming circumstantial evidence that Ross made these payments to Douglas:

(a) Douglas is Ross's mother;

(b) Ross was directly responsible for preparation of cheques and EFT payments to external consultants;

(c) Ross had access to one of Sibley's cheque signature stamps — cheques of up to $5,000 required only one signature and almost all of the cheques at issue were under the $5,000 limit;

(d) the unauthorized payments began in April 2008, shortly after Ross's employment at Sibley began, and ended in February 2011, shortly before Ross left Sibley's employ;

(e) Ross quit his job at Sibley shortly after being advised that its auditors would be performing an audit;

(f) Ross was the only person in Sibley's accounting department who was employed throughout the relevant period and who had the capability to issue cheques or make EFT payments;

(g) there was no record of any of the banking information that would have been required to authorize Douglas to receive EFT payments from Sibley; and

(h) Ross has a bank account at the branch where Douglas's account was located.

9 This evidence establishes a very strong *prima facie* case that Ross fraudulently made the payments to Douglas and that Douglas was either an active or passive accomplice in the fraud.

10 Sibley has commenced an action against Ross and Douglas for conversion and fraud. It seeks an interim *ex parte Mareva* injunction.

Requirements of a Mareva Injunction

11 There are five requirements for a *Mareva* injunction:

(a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;

(b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;

(c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;

(d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and

(e) the plaintiff must give an undertaking as to damages.

See: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268 (Ont. C.A.), referred to C.A. by Andersen J. in 36 (1982), 36 O.R. (2d) 124, [1982] O.J. No. 3197 (Ont. H.C.); *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645, [1979] 2 All E.R. 972 (Eng. C.A.).

12 It is a condition-precedent to the order that the plaintiff demonstrate a strong *prima facie* case: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161 (S.C.C.), at 27.

13 When this matter initially came before me, I was satisfied that the plaintiff had made out a very strong *prima facie* case. I also concluded that the plaintiff had satisfied items (a), (b) and (e), which are requirements of the standard injunction test, as noted at 532 of *Chitel v. Rothbart*, above.

14 I was also reasonably satisfied that the plaintiff had met the requirement of item (c) as there is evidence that the defendants have assets, in the form of bank accounts, in this jurisdiction.

15 The difficulty I had in this case was that there was no direct evidence of Ross's or Douglas's financial circumstances. Nor was there any direct evidence that Ross or Douglas were dissipating their assets or proposing to remove them from the jurisdiction. There was therefore no direct evidence that there was a serious risk that the defendants would remove or dissipate their assets if an injunction was not granted.

The So-Called "Fraud Exception" — Mills v. Petrovic

16 Plaintiff's counsel anticipated this concern and submitted that this case does not fall within the rule against execution before judgment in *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (Eng. C.A.). He relies on what has been described as the "fraud exception" to that rule: see *Campbell v. Campbell* (1881), 29 Gr. 252, [1881] O.J. No. 201 (Ont. Ch.); *Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.), at 239; *Aetna Financial Services Ltd. v. Feigelman* at 14; *Toronto (City) v. McIntosh* (1977), 16 O.R. (2d) 257 (Ont. H.C.).

17 I indicated to counsel that I had some doubt about whether such an exception exists, and pointed out that in the leading Canadian text, Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Aurora, On: Canada Law Book, 2010), it is stated in the section on *Mareva* injunctions, at para. 2.880:

> Proof of a serious risk of removal or disposition of assets is required even where the action is based on fraud and it is shown that the defendant has committed a fraudulent act.

18 As well, the authority of *Mills v. Petrovic* has been called into question by the thorough analysis of Cullity J. in *663309 Ontario Inc. v. Bauman* (2000), 190 D.L.R. (4th) 491, [2000] O.J. No. 2674 (Ont. S.C.J.), aff'd [2001] O.J. No. 1213 (Ont. Div. Ct.).

19 I therefore asked counsel to consider these authorities and to make further submissions on the issue, which they subsequently did. After considering those authorities, I concluded that it was appropriate to grant a limited *Mareva* order freezing the defendants' bank accounts. These are my reasons for granting that order.

20 One of the leading cases is *Campbell v. Campbell*, above, a decision of Chancellor Boyd. The plaintiff had sued her husband for alimony. She also sued her brother-in-law, seeking to set aside a conveyance of property made to him by her husband. It was admitted that the husband and the brother-in-law had conspired to transfer the property to prevent the plaintiff from recovering alimony. Chancellor Boyd enjoined further dealing with the property, stating, at QL para. 7:

> Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

21 This statement of the law was clearly confined to a case where there had already been a fraudulent disposition of the property, to avoid a creditor, and the injunction related to that very property.

22 The genesis of the "fraud exception" appears to be the brief oral judgment of Galligan J. in *Mills v. Petrovic*. The plaintiffs brought an application for an interlocutory injunction restraining the defendants from disposing of a house that they jointly owned. One of the defendants had been employed by the plaintiffs as an accountant and it was alleged that she had stolen $100,000 from the plaintiff. She was charged with fraud. Galligan J. said, at 239, that "equity demands that there be an exception to that principle [against execution before judgment] where there is substantial evidence supporting an allegation that the defendant has defrauded or stolen from the plaintiff".

23 Galligan J. did not refer to *Campbell v. Campbell*. He noted, however, that the case was not on all fours with the facts before Steele J. in *Toronto (City) v. McIntosh*, above [1] and *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.* (1977), 17 O.R. (2d) 717, 25 C.B.R. (N.S.) 162 (Ont. H.C.) [2], but found, at 239, that it would not be an "unreasonable extension of the principle upon which he acted in those cases to permit equity to give a person who has been defrauded or stolen from by a defendant, some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues".

24 Galligan J. acknowledged that the order he was making "may be a somewhat novel one", but he noted that the evidence presented by the plaintiffs, which was unchallenged, was very strong. He concluded that "equity cries out for relief" and ordered that the defendants be restrained from selling or encumbering their residence.

25 It has been noted that *Mills v. Petrovic* represented a significant expansion of the "fraud exception", because there was no connection between the defendant's alleged fraud and the property that was the object of the order: see Loreta Zubas, "Interlocutory Injunctions to Preserve Assets for Future Judgments: The Convergence of the Fraud Exception and the *Mareva* Injunction" (2001-02) 25 Advocates Q. 323 at 339.

Doubts Concerning Mills v. Petrovic

26 It was not long before doubts were expressed about the authority of *Mills v. Petrovic*. In *Chitel v. Rothbart*, the seminal *Mareva* case in Ontario, Anderson J., at first instance, expressed the view that *Mills v. Petrovic* had been wrongly decided. He noted that *Toronto (City) v. McIntosh* and *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.*, which had been relied upon by Galligan J., were cases in which there had been an allegation of a fraudulent conveyance and the injunction pertained to the very property that was the subject of the litigation. Cases of that kind fell within an existing exemption to the *Lister & Co. v. Stubbs* principle expressed in *Campbell v. Campbell*, above, and acknowledged in *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 20 O.R. (2d) 566, [1978] O.J. No. 3460 (Ont. H.C.).

27 Anderson J. saw no justification for giving a plaintiff in an action alleging fraud an interlocutory injunction that would not be granted to a plaintiff in any other civil action. Rather than follow *Mills v. Petrovic*, he referred the case to the Court of Appeal under s. 35 of the *Judicature Act*, R.S.O. 1980, c. 223. Anderson J. noted that there was strong evidence that the defendant had converted the plaintiff's securities, but found that there was no convincing evidence of any intention to transfer or dissipate assets or to remove them from the jurisdiction.

28 The Court of Appeal held that the plaintiff had failed to make full and fair disclosure and, for that reason alone, would not continue the injunction. Nevertheless, it took the opportunity to comment on the law with respect to the then-new *Mareva* injunction.

29 Plaintiff's counsel had argued that it was not necessary to rely on the *Mareva* authorities and that there were two exceptions to the rule in *Lister & Co. v. Stubbs*, the first being where the asset being "frozen" is the very subject-matter of the dispute and the second where there is a strong *prima facie* case being made out of theft or fraud. The plaintiff relied on *Campbell v. Campbell* in support of the second exception. MacKinnon A.C.J.O. stated at 521 that:

> It would be difficult to conceive of a stronger case for the intervention of the court than *Campbell v. Campbell*. I have no reason to doubt that the court would take the same position today if similar facts were to arise, and hold that such an order was "just or convenient". In the instant case, of course, there is no admitted fraud and there is certainly no evidence of further intended alienation of any specific property by a co-conspirator in the fraud.

30 Turning to *Mills v. Petrovic*, he noted that the facts of the case were not given in any detail, but there was some evidence that the defendants had been attempting to sell the house that they jointly owned and "one can surmise that it was being alleged that some of the money stolen went into the purchase of the home" (at 521). He also noted that there were observations by Galligan J. that may have reflected a finding that theft had been committed. He concluded, at 521, "It may be that the facts justified the order made, but, in any event, that is not this case."

31 MacKinnon A.C.J.O. proceeded to set out the now well-known conditions for the grant of a *Mareva* injunction. At the conclusion of his reasons, he returned to the issue of the "fraud exception", stating at 534:

> Mr. Justice Anderson in the instant case said, 'I can see no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause'... I agree with this view and I have sought to point out the conditions that must be satisfied before a *Mareva* injunction can be granted.

32 This seems to be a clear statement that the standard requirements of a *Mareva* injunction must be met, even where the plaintiff's claim is in fraud.

33 In the subsequent case of *Ontario (Attorney General) v. Stranges* (1984), 46 O.R. (2d) 452, [1984] O.J. No. 2661 (Ont. H.C.), aff'd (1984), 47 O.R. (2d) 348, [1984] O.J. No. 3223 (Ont. Div. Ct.), Galligan J. suggested that the Court of Appeal in *Chitel v. Rothbart* had refrained from saying that his decision in *Mills v. Petrovic* had been correct due to the scarcity of facts, but suggested that the reasons of MacKinnon A.C.J.O. amounted to an approval of the principle expressed — at 456:

> As I read the reasons of MacKinnon A.C.J.O.... he approved the principle upon which I acted, namely, that equity can provide to a person who has been stolen from or defrauded some measure of relief that would not be available to a plaintiff in an action in which fraud or theft are not involved. When a person is stolen from I do not think equity should be reticent about helping him recover his loss from the thief nor particularly solicitous to the thief.

34 In *Aetna Financial Services Ltd. v. Feigelman*, the Supreme Court of Canada recognized the validity of *Mareva* injunctions, but noted that their application in cases involving the removal of assets from province to province required a consideration of factors unique to the Canadian federal system. The plaintiff relies on a portion of the reasons of Estey J., on behalf of the Court, in which he stated some of the exceptions to the rule in *Lister & Co. v. Stubbs*, at 12-14, namely:

> (a) "for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute";
>
> (b) "where generally the processes of the court must be protected even by initiatives taken by the court itself";
>
> (c) "to prevent fraud both on the court and on the adversary"; and
>
> (d) "under extreme circumstances, which include a real or impending threat to remove contested assets from the jurisdiction."

35 Estey J. referred to the third heading as the "fraud exception" and quoted the extract from the judgment of Chancellor Boyd in *Campbell v. Campbell*, to which I have referred above. He described *Mills v. Petrovic* and *Toronto (City) v. McIntosh* as cases in which that exception had been applied.

36 In *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564, [1995] O.J. No. 1855 (Ont. C.A.), Weiler J., concurring in the result, referred with approval to *Mills v. Petrovic*, suggesting that it represented an expansion of the "fraud exception" from being applicable only to the property at issue to having wider application. She observed, at 600-601:

> Thus, it would appear that an allegation of past dishonest conduct in the action may result in an injunction being obtained even *where there is no evidence of any intention to deal with the asset enjoined in any improper manner.*
>
> This decision is significant because often an allegation of fraud is made in an action in which an interlocutory *Mareva* injunction is sought. If evidence of improper purpose with respect to a transfer of assets were required, an unwarranted complication in the law would be introduced. It would then be necessary to consider whether the application for the injunction fit within the fraud exception (where no evidence of improper purpose in relation to the assets enjoined is required) or the *Mareva* exception (where improper purpose in relation to the assets enjoined would have to be shown). The real focus in

> either case should be on the availability of assets to satisfy a judgment which is likely to be obtained because a strong *prima facie* case has been made out.
>
> [Emphasis in original].

37 These observations were made in the context of Weiler J.A.'s consideration of whether it is necessary to show that a disposition of assets had been made for an improper purpose. She held, disagreeing with the majority, that it was not necessary to do so.

38 The "fraud exception" was re-visited by Cullity J. in *663309 Ontario Inc. v. Bauman*, above. He noted that while the existence of the exception had been recognized in a number of cases, including *Aetna Financial Services Ltd. v. Feigelman*, *Chitel v. Rothbart*, and *R. v. Consolidated Fastfrate Transport Inc.*, its significance in the context of *quia timet* injunctions, as opposed to under the *Fraudulent Conveyances Act*, was derived entirely from *Mills v. Petrovic*. He suggested, as did Anderson J. in *Chitel v. Rothbart*, that the authorities to which Galligan J. referred were cases under the statute.

39 After reviewing a number of the authorities, including *Chitel v. Rothbart*, Cullity J. concluded, not without some hesitation, that *Mills v. Petrovic* does not establish a special rule in the case of fraud that dispenses with the conditions required to support a *Mareva* injunction. He concluded that where there has been no fraudulent disposition, it is necessary, even in a case where fraud is alleged, to show the usual requirements of a *Mareva* injunction — at para. 29:

> On the present state of the authorities [proof of a real risk that assets will be removed or disposed of] is a requirement for *Mareva* orders and I believe I must follow what appears to me to be implicit in the reasons of the Court of Appeal in *Chitel* - the only decision cited to me in which the status of the decision in *Mills* and the relationship between "the fraud exception" and the requirements for *Mareva* orders were directly in issue - and proceed on the footing that *Mills* does not widen "the fraud exception" beyond its historical foundations in the *Fraudulent Conveyances Act* to the extent that it would cover any proceedings where fraud is alleged and nothing more than a strong *prima facie* case is shown. This means that, where no allegedly fraudulent disposition has occurred and it is sought to restrain the defendant from disposing of assets, the requirements for a *Mareva* order must be satisfied even where the plaintiff's cause of action is based on fraud.

40 Cullity J. acknowledged, however, that the court could infer a risk of disposition from the facts on which the plaintiff's claim was based — at para. 41:

> In principle, there is no reason why the existence of a sufficient risk of disposition should not be inferred from the evidence of the material facts on which the plaintiff's cause of

> action is based. I agree that this is particularly likely to be the case where, as in *Mills*, a strong *prima facie* case of fraudulent misappropriation is established on the material before the court. Even in such a case, the question must still, in my opinion, be whether such an inference can reasonably be drawn from the facts. I do not think relative degrees of moral turpitude that might be attributed to the conduct of the defendant on which the cause of action is based are, by themselves, necessarily relevant considerations.

41 He concluded, on the facts before him, that there was not a strong *prima facie* case of fraud and no sufficient evidence of a risk of dissipation. His decision was affirmed by the Divisional Court.

Subsequent Case Law

42 The subsequent case law concerning the "fraud exception" in *Mills v. Petrovic* on the one hand and the views of Cullity J. in *663309 Ontario Inc. v. Bauman* on the other hand does not point one in an entirely uniform direction.

43 *Mills v. Petrovic* was followed in *Manufacturers Life Insurance Co. v. Suggett* (1992), 13 C.P.C. (3d) 171, [1992] O.J. No. 2600 (Ont. Gen. Div.), a case in which the plaintiff sued a former employee for fraud and sought to restrain the employee and his spouse from disposing of their interest in their matrimonial home. Philp J. found that there was substantial unanswered evidence of misrepresentation, fraud and possible forgery and held that the case fell within an exception to the "no execution before judgment" rule and required that the defendants pay the proceeds of the sale of their house into court.

44 *Mills v. Petrovic* was also followed in the Alberta cases of *J.R. Paine & Associates Ltd. v. Cairns* (1987), 55 Alta. L.R. (2d) 293, [1987] A.J. No. 901 (Alta. Q.B.) and *Osman Auction Inc. v. Belland*, 1998 ABQB 1095, [1998] A.J. No. 1443 (Alta. Q.B.). The *Paine* case involved a former bookkeeper of the plaintiff who allegedly stole some $330,000. The court granted wide-ranging *Mareva* relief, finding that the case came within the fraud exception to the rule against execution before judgment. In the *Osman* case, the court stated, at para. 28:

> I am satisfied that where the cause of action is in fraud and the plaintiff has shown a reasonable likelihood that the cause of action will be established, the court may conclude, on that basis alone, that there are reasonable grounds for believing the defendant is likely to deal with his exigible property to the plaintiff's prejudice.

45 *Mills v. Petrovic* was also followed in *Brown v. Brewin*, [2003] O.J. No. 3905 (Ont. S.C.J.). Dawson J. held that although there was no clear evidence that the defendants would remove assets from the jurisdiction, there was relatively strong evidence of fraud. There was also evidence that the defendant had misappropriated funds that had been paid to him in trust.

46 In *Gateway Internet Solutions Inc. v. Gonsalves*, [2007] O.J. No. 2114 (Ont. S.C.J.), Lederer J. suggested that the conclusion in *Brown v. Brewin* could be interpreted as meaning that the evidence of fraud in a particular case, could, on its own, give rise to an inference of dissipation of assets, at para. 29:

> there may be cases where the fraud is so egregious and the theft so obvious that, on its own, the presence of fraud will infer dissipation of the defendant's assets. The circumstances of this case do not justify that determination.

47 Lederer J. also concluded, based on the observation of Estey J. in *Aetna Financial Services Ltd. v. Feigelman*, that the "fraud exception" could also be available, but held that a strong *prima facie* case was not present.

48 On the other hand, in *Don Bodkin Leasing Ltd. v. Dwyer*, [2001] O.J. No. 1581 (Ont. S.C.J.), Kealey J. found that a strong *prima facie* case of theft or fraud was not sufficient to support a *Mareva* injunction, unless there was a relationship between the alleged fraudulent activity and the assets sought to be "impounded".

49 Other cases have either rejected the "fraud exception" or have held that it was inapplicable on the facts. These include:

- *Israel Discount Bank of Canada v. Genova* (1992), 13 C.P.C. (3d) 104, [1992] O.J. No. 509 (Ont. Gen. Div.), in which Dunnet J. recognized the "fraud exception", but held that a case of fraud had not been made out in the case before her.

- *Allegretti v. Bertelsen*, [2002] O.J. No. 4157 (Ont. S.C.J.), where Lane J. recognized the "fraud exception" but declined to apply it because the case before him was a tort claim rather than a fraud claim.

- *Nippon Express Canada Ltd. v. Provan*, [2002] O.J. No. 2643 (Ont. S.C.J.), in which Blair J. suggested that the application of the "fraud exception" could support a *Mareva* injunction, if the other conditions of such an injunction were met.

- *Voketel Inc. v. More*, [2006] O.J. No. 4781 (Ont. S.C.J.) and *State Farm Insurance Co. v. Brijlal*, [2007] O.J. No. 2439 (Ont. S.C.J.), in which Brown J., referring to *Mills v. Petrovic* and Sarabia, Akman and Ricci, "The Case for Mills Injunctions" (2006), 31 Advocates Q. 355, suggested that a *Mareva* injunction can be granted even in the absence of evidence of a risk of dissipation if there is a *prima facie* case of fraud. In the former case, he found that the requisite strong *prima facie* case was not present. In the latter case, he granted a *Mareva* injunction, finding that there was a real risk of dissipation of assets as well as a strong *prima facie* case of fraud.

• *Patel v. Shikar Properties Inc.*, [2009] O.J. No. 1779 (Ont. S.C.J.), in which Richetti J., without deciding whether a strong *prima facie* case of fraud displaces the need to show dissipation of assets and the intention to avoid the plaintiff's claim, concluded that the plaintiff had not established the requisite *prima facie* case of fraud.

50 Still other cases have suggested that fraud, on its own, is not sufficient to justify a *Mareva* injunction, but that the circumstances of the case must be examined to determine whether there is a real risk of removal or dissipation of assets.

51 Dupont J. considered the "fraud exception" in an early, post-*Mareva* decision, *Caisse populaire Laurier d'Ottawa Ltée v. Guertin* (1983), 36 C.P.C. 63, [1983] O.J. No. 2221 (Ont. H.C.). The decision has received no consideration in Ontario, although it was followed at first instance in *Insurance Corp. of British Columbia v. Patko*, 2007 BCSC 743, 50 M.V.R. (5th) 200 (B.C. S.C. [In Chambers]), rev'd in part 2008 BCCA 65, 290 D.L.R. (4th) 687 (B.C. C.A.), and also mentioned in the decision of the British Columbia Court of Appeal. Dupont J. noted that counsel had referred him to the proposition that where a strong *prima facie* case of fraud had been made out, an injunction could be granted. He did not, in the result, find it necessary to find that fraud is a special category, but made some interesting observations about how a risk of dissipation can be found — at 72:

> To determine whether there is a "real risk" of the assets being removed or dissipated it is necessary to look at all of the circumstances, including the nature of the conduct alleged, the type of assets involved and the general circumstances are all to be considered in an application such as this. The "real risk" to be assessed is whether in all of those circumstances the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff's attempts to realize on any judgment they might obtain. Here, the defendants have also been charged and will be tried criminally. The fact of those charges are relevant only to the issue of "real risk".
>
> The assets in this case are all quite liquid, being in the form of bank accounts and term deposits. If an injunction is not granted, there is a real risk that the defendants will deal with the assets "in a manner clearly distinct from usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law", (*Chitel, supra*) pp. 532-33.

52 In *Transmaris Farms Ltd. v. Sieber* (1999), 30 C.P.C. (4th) 369, [1999] O.J. No. 300 (Ont. Gen. Div. [Commercial List]), Blair J. granted a *Mareva* injunction based on allegations of fraud, and referred to *Mills v. Petrovic*. There is language in the judgment to suggest that Blair J. considered all the surrounding circumstances, including the *nexus* between the alleged fraud and the property sought to be enjoined: see para. 74.

53 In *United States v. Yemec* (2003), 67 O.R. (3d) 394, [2003] O.J. No. 3863 (Ont. S.C.J.), aff'd (2005), 75 O.R. (3d) 52, [2005] O.J. No. 1165 (Ont. Div. Ct.), Gans J. dissolved an interim injunction on several grounds, including a failure to establish a *prima facie* case of fraud. At para. 50, he described the observations of Cullity J. in *663309 Ontario Inc. v. Bauman*, "that in some circumstances an inference of risk of dissipation of assets can be drawn from the nature of the fraudulent activity alleged", and suggested that this should be applied to override the requirement of evidence to establish a concern for the dissipation of assets necessary to satisfy judgment, as was set out in *Chitel v. Rothbart*.

54 The Divisional Court gave a somewhat more nuanced interpretation to the conclusions of Cullity J., stating, at para. 23:

> In *663309 Ontario Ltd. v. Bauman*... Cullity J. stated that a court can infer from the defendant's fraudulent conduct a sufficient risk of the dissipation of assets or removal from the jurisdiction (at para. 41). He noted that this was particularly the case where there is a strong *prima facie* case of fraudulent misappropriation, although he went on to say, "Even in such a case, the question must still, in my opinion, be whether such an inference can reasonably be drawn from the facts." However, he went on to conclude, based on the totality of the evidence, that the Plaintiff had not established a real risk of dissipation or hiding of assets. On appeal, the Divisional Court held that he made no error in his findings on the evidence in the case. [References omitted].

55 Although the decision was not fully reported, it appears that Jennings J. took an approach similar to this in a case referred to in *Zathy v. Bank of Nova Scotia*, [2004] O.J. No. 3636 (Ont. S.C.J.). He is reported as having observed that although there was no evidence of dissipation of assets, it was appropriate to conclude, based on the defendants. fraud and other circumstances, that there was a real risk of dissipation:

> There is no evidence before me that the Defendants are about to leave the jurisdiction, are without other assets, or, apart from the cross-application, about to dissipate their assets.
>
> What I am being asked to do is find that because of the strong evidence of fraud, or of assisting in a fraud, an inference should be drawn that dissipation is likely.
>
> The evidence of wrongdoing is not that shown in *Mills v. Petrovic*,... where its Defendant faced criminal charges for theft. Here, I have false representations made by Donna so as to enable her to negotiate the cheques, as well as a reasonably elaborate preparatory course of conduct.

> This was the situation facing my brother Cullity J. in *Refco v. Keuroghlian* 00-CV-185624 [unreported]. *Mareva* injunctions are draconian in effect, and are not to be given out for the asking.
>
> I consider that now that the scheme carried out by the Defendants has been detected, the funds are at risk. I also consider that because the proceeds of the scheme have remained in tact [sic], they are not immediately required to meet ordinary expenses. Having considered the matter carefully, and finding as I do that the other criteria in *Chitel* have been met, I find the very suspicious circumstances outlined tip the balance in favour of the injunction, as I draw the inference that the now discovered conduct proved makes dissipation likely.

56 In *Durnford v. Hayles*, [2001] O.J. No. 1949 (Ont. S.C.J.), Pitt J. continued an interim *Mareva* injunction, following *663309 Ontario Inc. v. Bauman*, noting that the defendants had not disputed the allegations of fraud and had filed no material.

57 In *Bank of Montreal v. Misir* (2004), 8 C.P.C. (6th) 91, [2004] O.J. No. 5223 (Ont. S.C.J. [Commercial List]), Cumming J. acknowledged that a strong *prima facie* case of fraud, on its own, is insufficient to sanction "the very exceptional remedy" of a *Mareva* injunction. However, in the case before him there was evidence that the defendant had a "*prima facie* history of fraudulently and surreptitiously attempting to remove and dispose of assets... from the reach of the Bank, a secured creditor. The strong *prima facie* case of fraud involves accomplices in an apparent conspiracy" (at para. 35). Cumming J. concluded, at para. 38, that the evidence "as a whole" suggested that there was a real risk of dissipation:

> In my view, the evidence as a whole relating to the actions of Mr. Misir to date pertaining to Integrated and the clinics and the secured financing by the Bank as seen in the record for the action at hand, #04-CL-5662, in itself suggests a real risk that Mr. Misir may fraudulently dissipate or dispose of his remaining assets in a manner clearly distinct from the ordinary course of business, such as to render the possibility of making it impossible, or at least significantly more difficult, to trace and realize upon such assets in enforcing any judgment in favor of the Bank.

58 In *Sansone v. D'Addario* (2006), 26 C.P.C. (6th) 156, [2006] O.J. No. 1434 (Ont. S.C.J. [Commercial List]), Mesbur J., relying on both *Chitel v. Rothbart* and the observations in Justice Sharpe's book, held that the requirements for a *Mareva* injunction must be met, even where the claim is for fraud.

59 In *Popack v. Lipszyc*, [2008] O.J. No. 3380 (Ont. S.C.J.), Pollak J. accepted the analysis of Cullity J. in *663309 Ontario Inc. v. Bauman* and said, at para. 57: "It is not clear in the jurisprudence that such an exception exists, in cases where there is substantial evidence of

fraud has been established." She concluded that there was not a *prima facie* case of fraud made out and the "Mills exception" would not be applicable in any event.

60 The issue has not escaped the attention of the academic writers. Zubas, above, has suggested that the "fraud exception" should be confined to its historic roots and that the expansion reflected in *Mills v. Petrovic* is unwise. She suggests that, as Cullity J. observed in *663309 Ontario Inc. v. Bauman*, evidence of improper purpose can be inferred from fraudulent conduct. She states, at 356:

> As *Bauman* suggests, in appropriate cases, evidence of improper purposes can be inferred from fraudulent conduct. However, this is not a reasonable or necessary inference in every case in which fraud is alleged.
>
> The practical judicial approach should take into account policy concerns. One writer has suggested that the courts should consider evidence regarding the defendant's character, gleaned from facts about the defendant's business, domicile, location of known assets and the circumstances under which the underlying issues arose. If the court concludes that the defendant is likely to dissipate assets, it must inquire into the nature of the harm the plaintiff will suffer as a result of the dissipation.

61 Other authors have expressed the view that the so-called "*Mills* injunction" should be available in all cases where fraud is alleged, without the necessity of proof that the alleged fraudster is likely to dissipate assets: see Sarabia et al, above. They argue that the *ad hoc* use of inferences and exceptions leads to uncertainty in the law and is confusing for lawyers and judges (at 359-60). They make the case, at 372, that:

> the courts should embrace Mills Injunctions in this era of heightened concern over fraud and dishonesty as a further tool to deter those willing to engage in fraudulent conduct. Even if the courts do not all agree with the reasoning of *Mills*, the public's and the legislatures. desire to combat fraud is reason enough to extend Mills Injunctions to all cases where a party alleges fraud. The focus should not be on the question of why a plaintiff should get an advantage in fraud cases. Rather, the focus should be on why alleged perpetrators of fraud should not be subject to an injunction to preserve their assets for innocent plaintiffs.

Conclusions

62 From *Chitel v. Rothbart* to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong *prima facie* case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand,

there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.

63 Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the *Mareva* requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

64 The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity: *Insurance Corp. of British Columbia v. Leland*, [1999] B.C.J. No. 2073 (B.C. S.C.); *Insurance Corp. of British Columbia v. Patko* (2008), 290 D.L.R. (4th) 687 (B.C. C.A.). In referring to these authorities, I have not overlooked the fact that British Columbia applies a somewhat more flexible approach to the grant of a *Mareva* injunction than the courts of Ontario have applied: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309, [1998] B.C.J. No. 2887 (B.C. C.A.); *Mooney v. Orr* (1994), 33 C.P.C. (3d) 31, [1994] B.C.J. No. 2652 (B.C. S.C.), supp. reasons (1994), 33 C.P.C. (3d) 54, [1994] B.C.J. No. 3242 (B.C. S.C.); *Clark v. Nucare PLC*, 2006 MBCA 101, 274 D.L.R. (4th) 479 (Man. C.A.) at paras. 28 — 48; *Pollard v. Falconer*, [2006] B.C.J. No. 424 (B.C. S.C. [In Chambers]). It seems to me, however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue.

65 I have concluded that this is one of those cases in which the evidence of fraud is so strong that, coupled with the surrounding circumstances, it gives rise to an inference that there is a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction.

66 In coming to this conclusion, I have considered, in particular, the following circumstances:

(a) There is evidence Ross has already attempted to hide his tracks by making the payments to his mother.

(b) There is reason to believe that Ross has destroyed evidence by removing the cheque stubs and electronic banking information in order to conceal his activities and avoid detection.

(c) Ross's conduct bears the badges of fraud - a pattern of clandestine and deceitful action over a prolonged period of time, including the attempt to avoid detection by using a nominee or a "dummy" to conceal the fraudulent activity.

(d) Ross resigned from Sibley shortly after being told of the forthcoming audit — this is indicative of an acknowledgment of guilt and a desire to avoid confrontation and questioning.

(e) The assets particularly at issue — the defendants. bank accounts — are liquid, easily transferable, and difficult to trace once transferred.

67 It is a reasonable inference from these circumstances, as well as the circumstantial evidence of fraud referred to earlier, that, knowing the plaintiff may be on his trail, Ross is likely to attempt other means to put the plaintiff's money out of its reach.

68 Bearing in mind the observations of MacKinnon A.C.J.O. in *Chitel v. Rothbart* that the injunction should, if possible, be directed towards specific assets or accounts, I have made an interim order enjoining dealings with Douglas's bank account into which the funds were paid and Ross's bank account at the same institution. I have also ordered that the financial institution disclose to the plaintiff the particulars of the transactions in those accounts.

69 I adjourned the balance of the relief sought to be brought on short notice, returnable on April 30, 2011. The parties appeared on that date and requested an adjournment, with the injunction to be continued in the interim. I so ordered.

Motion granted.

Footnotes

1 In *Toronto (City) v. McIntosh*, the defendant was a former employee of the City of Toronto, responsible for the collection of money from parking meters. He was charged and convicted of theft. Between the time of his arrest and his conviction he conveyed certain property to his children, the other defendants. The plaintiff brought proceedings against the defendant for conversion and against all the defendants to declare that the conveyance was void under the *Fraudulent Conveyances Act*, R.S.O. 1970, 182. A motion was brought for an interlocutory injunction restraining the defendants from dealing with the property until trial. Steele J. found that the case fell within *Campbell v. Campbell*. The defendant had been convicted of theft and there was strong *prima facie* case made out that the conveyance was fraudulent.

2 In *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.*, the plaintiff sued on two promissory notes and for the price of goods sold and delivered to the defendant. The plaintiff claimed that the defendant had sold the goods to a third party at a significant discount. Steele J. granted an injunction restraining the defendant from dealing with the goods, but ordered

that they could be sold in the normal course of business, provided the proceeds were paid into a trust account as security for the plaintiff's claim.

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TAB 19

2014 ONSC 6403
Ontario Superior Court of Justice

East Guardian SPC v. Mazur

2014 CarswellOnt 15935, 2014 ONSC 6403, 19 C.B.R. (6th) 317, 247 A.C.W.S. (3d) 181, 64 C.P.C. (7th) 90

East Guardian SPC, Applicant and Arie Mazur, Respondent

Penny J.

Heard: October 30, 2014
Judgment: November 13, 2014 *
Docket: CV-14-10714-00CL

Counsel: M. Jilesen, J. Spotswood, C. Hunter for Applicant
T. Lie, D. Cooney for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient
Evidence
XVII Privilege
XVII.2 Privileged communications
XVII.2.c Communications made without prejudice
Remedies
II Injunctions
II.1 Rules governing injunctions
II.1.e Mareva injunctions
II.1.e.i General principles

MOTIONS by lender for Mareva injunction and appointment of receiver in action against guarantor of loan; MOTION by guarantor to strike evidence based on settlement privilege.

***Penny J.*:**

Overview

1 This case involves motions for:

(1) a Mareva injunction preserving assets pending trial or arbitration;

(2) the appointment of an investigative receiver;

(3) the enforcement in Ontario of a "freezing injunction" issue by the High Court of Justice, Chancery Division in England on October 30, 2014; and

(4) the determination of the admissibility of an audio recording and transcript of a teleconference involving Mazur and the principal of East Guardian which took place in May 2014. The issue is whether the teleconference involved without prejudice settlement discussions.

2 East Guardian loaned money to two corporations which are in the biodiesel business. Mazur signed the loan documents on behalf of the two debtor corporations and personally guaranteed these loans. The outstanding indebtedness is about $21 million. The loans were to be used to finance the purchase of feedstock and the transport of finished product to market by a Norwegian biodiesel plant.

3 It is now alleged that the borrowed funds were, among other things, used to pay off other lenders and to make monthly payments to East Guardian. Both these uses were prohibited under the terms of the loan documents. The loans are now in default. Both are due and owing. The debtors are unable to pay. There is now an additional concern that Mazur is in the process of trying to put his assets (including his interest in a group of companies which includes the two debtors in this case) beyond the reach of his creditors. It is because of these concerns that motions were brought by East Guardian in the United Kingdom and in Canada for the preservation of Mazur's assets pending trial.

Background

4 East Guardian is a Cayman Islands company. It manages private portfolio investment funds. Its activities include the provision of debt financing to trading companies. Its chief representative in dealings with Mazur and the borrowers was Erik Wigertz.

5 Arie Mazur is a Canadian living in Toronto. He is the guarantor of loans made by East Guardian to Einer Energy SARL and North Sea Biodiesel. The nature of Mazur's status with the debtor corporations and the various corporations that own and control the debtors appears to have changed over time and is in dispute. Constantin Lutsenko lives in Russia. Lutsenko is also the guarantor of the East Guardian loans to Einer and NSB. Vic Kalra is

the CFO of Einer. A corporate chart illustrating the corporate structure of the ownership of the debtor companies is attached as Appendix A.

6 Between April and August 2013, East Guardian loaned Einer, in a series of cumulative transactions, a total of $17.5 million. The first loan of $4.5 million was guaranteed by Great Lakes Biodiesel, a company related to Einer and NSB, which is building a biodiesel plant in Welland, Ontario. Mazur witnessed the GLB guarantee as CEO of GLB.

7 The subsequent increases to this loan were guaranteed by Mazur personally. By the final increase of this loan to $17.5 million, Einer and NSB had become joint borrowers. The loan was repayable by August 21, 2014. Mazur signed all these loan agreements as a director and on behalf of Einer.

8 In February 2014, East Guardian agreed to a second loan to Einer and NSB as joint borrowers. This loan was initially for $3.5 million but was increased to $12.5 million in March 2014. Mazur gave personal guarantees for this loan.

9 Thus, as of March 2014, Einer, NSB and Mazur, as guarantor, were indebted to East Guardian in the total amount of $30 million. To date, approximately $9 million has been repaid, leaving an outstanding balance of some $21 million.

Misuse of Loan Proceeds

10 The loan documents contain express requirements on the use of the funds for the specific purpose of purchasing and refining raw material and transporting finished product to purchasers. The loan documents also required Einer to provide weekly reporting on the status of its operations and accounts.

11 In the months that followed the loan advances, East Guardian was provided with copies of trading contracts indicating substantial sales of inventory of Einer and NSB. The weekly reports also indicated that East Guardian's funds were being used to meet the demands of these trading contracts and that the loans were performing.

12 On May 16, 2014, however, Einer provided a weekly report which revealed that Einer had used loan proceeds to pay off interest due to East Guardian under its loans. This was expressly prohibited by the terms of the loan agreements. The same report also revealed a shortfall of over $950,000 with respect to the $17.5 million loan.

13 East Guardian made inquiries of Mazur and Kalra about these discrepancies and apparent contraventions. Initial responses were not satisfactory. On May 28, 2014, East Guardian demanded to know: a) how the loan accounts were going to be rectified; and b) how the loans were going to be repaid by maturity.

14 On May 29, 2014, Mazur e-mailed to East Guardian a document explaining how the loan proceeds had actually been used. It is alleged by Mazur that this report (the May 29 Report) constituted a settlement proposal which is therefore inadmissible in these proceedings. A teleconference took place later on May 29 between Mazur, Lutsenko, Wigertz and others. Mazur takes the position that this telephone conference, which was recorded, involved further settlement negotiations and is also inadmissible. I shall deal with these arguments below. It is clear, however, at the very least, that certain information provided in the May Report and during the teleconference was purely factual in nature and did not involve any attempts at compromise.

15 In particular, the May 29 Report revealed that a significant portion of the loan proceeds had been used for purposes prohibited by the loan agreements and which were inconsistent with prior representations and assurances. The May Report revealed the following prohibited uses of East Guardian's loans and other inconsistencies in Einer's weekly reporting:

> (a) over $3.4 million had been used to reduce a debt owed by NSB to Raiffeisen Bank;
>
> (b) over $2.4 million had been used to reduce a debt owed by one of Einer's affiliates to Mercuria, a third-party creditor;
>
> (c) over $600,000 had been used as a down payment in an auction for the purchase of a biodiesel plant in Estonia;
>
> (d) over $1.6 million had been used to repay interest due to East Guardian itself;
>
> (e) finished inventory had been overstated by $4.1 million;
>
> (f) tax credits issued by the U.S. government to encourage the production of biofuel had been overstated by over $2.8 million; and
>
> (g) receivables had been overstated by over $858,000.

16 The parties agree that following the May 29 teleconference, there were ongoing discussions which were arguably attempts at resolving the pending dispute. As a result of the possibility that these discussions were without prejudice, neither party attempted to explore the content of these discussions in evidence on this motion.

Legal Proceedings

17 By September, it became clear that a negotiated resolution to the loan defaults was not feasible. In addition, East Guardian discovered that GLB, which had been a significant

element in the settlement discussions, was being placed under receivership in Ontario and that Mazur was the subject of numerous other legal proceedings in other jurisdictions. As a result, East Guardian commenced this proceeding in conjunction with proceedings in the U.K.

18 On September 22, 2014, East Guardian obtained an *ex parte* worldwide freezing order from Mr. Justice Morgan of the High Court of Justice, Chancery Division in England against Mazur and Lutsenko. The worldwide freezing order provides that Mazur and Lutsenko shall not dispose of, deal with, or diminish the value of any of their assets, whether in or outside England and Wales, up to the value of $23 million. The worldwide freezing order applies to certain specific accounts and interests alleged to be owned or controlled by Mazur and/or Lutsenko. East Guardian has commenced an arbitration proceeding against Mazur and Lutsenko with the London Court of International Arbitration in England.

19 East Guardian's proceedings in the Ontario Superior Court of Justice were initiated by notice of application and notice of motion issued on September 24, 2014.

20 On October 30, 2014, the application was returned before Mr. Justice Morgan, on notice. A further order was issued by the Court freezing Mazur and Lutsenko's assets (up to a value of $23 million) worldwide "until seven days after the due date for collection of any final award on the merits or further order of the court."

Analysis

The Settlement Privilege Issue

21 Mazur takes the position that his May 29 Report and discussions by teleconference with Wigertz were without prejudice settlement negotiations. Mazur says he was asked by Wigertz on May 28, 2014 to provide a settlement proposal. He says this is what he did in his May 29 report. The content of that proposal, he says, was discussed in the May 29 teleconference. Thus, Mazur's position is that the content of the May 29 Report and teleconference was all without prejudice and is therefore inadmissible.

22 Rule 25.11 of the Rules of Civil Procedure gives the court discretion to strike out or expunge a pleading or other document where the pleading is frivolous, vexatious or otherwise an abuse of process of the court.

23 It is trite law that settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. There is, as a result, an overriding public interest in favor of settlement. Parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. If settlement communications were not protected, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes. If "settlement privilege" is

found to attach to a communication, it is *prima facie* inadmissible, *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (S.C.C.) at paras. 11-13.

24 There is a three part test for establishing settlement privilege:

> (1) a litigious dispute must be in existence or within contemplation;
>
> (2) the communication must have been made with the intention that it would not be disclosed to the court in the event that the negotiations failed; and
>
> (3) the purpose of the communication must be to attempt to effect a settlement.

In applying this test, the court must examine the communications between the parties as a whole, in context, to determine whether or not the rationale for settlement privilege exists in the circumstances.

Within Contemplation

25 Mazur argues that a litigious dispute was within the parties' contemplation because:

> (a) Mazur subjectively thought there was a litigious dispute about whether the loan had been used in accordance with the loan terms and whether the loan had become immediately due and payable; and
>
> (b) a default had, in any event, occurred, giving East Guardian the right to demand immediate payment.

26 I do not think the first element of the test for settlement privilege has been met. Mazur's subjective belief is not, in my view, a sufficient ground to meet the test for a without prejudice communication. Whether a litigious dispute was within the contemplation of the parties must be determined objectively in order to avoid abuse through the use of self-serving subjective intention evidence of precisely the kind adduced by Mazur in this case, see Marion et al. "The Unsettled Scope and Application of Settlement Privilege in Canada," Annual Review of Civil Litigation (Toronto: Thomson Carswell 2013) at pp. 9-10. The mere existence of a potential dispute, in the eyes of one of the parties, does not automatically give rise to the privilege, *Bercovitch v. Resnick*, 2011 ONSC 5082 (Ont. S.C.J.) at para. 26.

27 In this case, there were no lawyers involved at this stage. No demand had been made, *Bercovitch*, *supra*, at para. 32. The loan terms gave East Guardian the right to accurate weekly reporting and, on demand, to full disclosure of the use of the loan funds and the financial operations of the borrowers. On May 28/29, East Guardian was simply trying to gather information — information to which it was contractually entitled — so that it had the full

picture. Mazur was, in accordance with the borrowers' contractual obligations, attempting to provide that information.

28 I find there was no litigious dispute yet in contemplation on May 28/29. There were simply business communications with a view to bringing the borrowers on side their contractual obligations under the loan terms.

Intention Not to Disclose

29 Mazur argues that his May 29 Report and his participation in the May 29 teleconference were founded on his belief that he was involved in a "negotiation" which would remain confidential if the negotiation failed.

30 I am unable to accept this submission. First, no one ever said or noted that the communications were without prejudice. While obviously not dispositive, this fact is nevertheless a relevant factor to take into account.

31 Second, the teleconference was recorded by the teleconference service provider. The recorded prompts for participation in the call clearly stated that the call was being recorded. Mazur and Lutsenko each participated in the call from two separate locations. Neither objected to the call being recorded. Mazur's evidence is that he did not hear any reference to the call being recorded. I reject Mazur's subjective evidence on this point on the basis that it is contrary to the independent, documentary evidence of the call.

32 More importantly, as noted above, the information provided before and during the May 29 teleconference was in the context of East Guardian's contractual right and, as the borrowers' representative, Mazur's contractual obligation, to provide full disclosure about the use of the loan and the borrowers' financial and operational status. On May 28, Mazur sent an email to East Guardian with some information, indicating that "we will provide you with the rest of the info (a summary of the current position and how the funds provided by EWI Capital have been used and plan going forward) tomorrow." Mazur's May 29 email refers to his presentation of "the up to date most accurate position of the credit facility on a consolidated basis." There is simply no evidence to support Mazur's subjective and self-serving view that he was providing information on the implied condition that it would not be disclosed other than for purposes of so-called "settlement" discussions.

33 I find that there was no expectation that information disclosed on May 29 would only be used for the purposes of settlement negotiations during the teleconference.

Settlement/Compromise

34 Mazur argues that the May 29 Report and May 29 teleconference were the result of East Guardian's repeated demands for a "settlement proposal" after the misuse of borrowed funds was first discovered and his *bona fide* efforts at compromise to effect a settlement of the "dispute."

35 A critical hallmark of a settlement communication is that it involves at least a hint of compromise, *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 (Alta. C.A.) at para. 35.

36 I have reviewed the documentary and verbal content of these communications. There is, in my view, no hint of compromise. Neither East Guardian nor Mazur or Lutsenko made the slightest suggestion that anything less than full payment would be accepted or offered. East Guardian was simply concerned to know how and when the loan would be rectified. This was nothing more than a discussion between sophisticated businessman to clarify the status of the loan and how and when the defaults would be remedied.

37 It was only toward the end of the call, when the individual guarantors advised they could not, if called upon, satisfy the borrowers' obligations, that there was any reference to settlement in the relevant sense of that word - and that was simply to put off that discussion to another day. That is what happened. The discussions in June 2014 are not in issue on this motion.

38 There is, in my view, a complete absence of any attempt at compromise in the May 29 Report and teleconference. These communications simply did not involve settlement discussions of any kind. Accordingly, Mazur's motion to strike various paragraphs of East Guardian's application, motion and affidavit evidence on the basis of settlement privilege is dismissed.

The Motion for a Mareva Injunction

39 The Mareva injunction is an extraordinary remedy, in part because it constitutes a form of pretrial execution. Accordingly, a party seeking a Mareva injunction must demonstrate on the evidence that it has met a multipart test:

> (1) a strong *prima facie* case against the respondent;
>
> (2) the moving party would suffer irreparable harm if the order is not made;
>
> (3) the balance of convenience favours granting the order, in the sense that the harm suffered by the applicant if the order is not made exceeds the harm that will be suffered by the respondent if it is;

(4) the respondent has assets in the jurisdiction; and

(5) there is risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise put beyond the reach of the court such that the applicant will be unable to realize on a judgment in its favour.

40 It is not seriously contested that East Guardian has established a strong *prima facie* case that Einer and NSB have defaulted on their loans and that Mazur is liable under his guarantee. I find, in any event, on the basis of the facts outlined above, that East Guardian has shown a strong *prima facie* case for a claim against the respondent.

41 Mazur argues, however, that East Guardian has not shown that if Mazur's personal assets are not secured, East Guardian will suffer irreparable harm. The normal basis for irreparable harm in cases of this kind is that, if the respondent's assets are not secured, there will be no way for the applicant to collect on a money judgment. Mazur argues that:

(a) NSB, although it may not be able to pay off its debts currently, is worth a lot of money based on liquidation value alone;

(b) GSB is also a guarantor of the loans; and

(c) there is another personal guarantor, Lutsenko, who may have assets.

Thus, Mazur argues, East Guardian's allegation that Mazur is the "only principle source of recovery" has not been made out on the evidence and for this reason, irreparable harm has not been proved.

42 The only evidence of the financial status of NSB is to be found in its 2013 annual report which contains financial statements. NSB suffered an operating loss in 2013 of over 68.5 million Norwegian krone (about US$10 million). NSB has negative equity in that the value of its liabilities exceeds the value of its assets. Mazur argues that the total liabilities of NSB already include the East Guardian debt so that there probably would be sufficient assets, on liquidation, to pay East Guardian's loans.

43 I do not think this argument can be countenanced. There is no reliable evidence to support the proposition that NSB has sufficient assets to pay off its indebtedness to East Guardian. There is, for example, no evidence of what NSB would be worth in a liquidation, net of liquidation costs. What is known is that NSB has operated at a significant loss for the last two years and has significant negative equity. On the evidence, NSB is not a plausible source of funds to redeem East Guardian's loans.

44 GSB is a guarantor of the first tranche of the first loan of $4.5 million. The extent of GSB's liability for the additional advances on the first loan or any advances on the second loan is not clear. In any event, Pattillo J. made an order in August 2014 putting GSB in receivership. In supplementary reasons of October 10, 2014, *Heridge S.A.R.L. v. Great Lakes Biodiesel Inc.*, 2014 ONSC 5593 (Ont. S.C.J.), Pattillo J. found that GLB:

> cannot pay its liabilities as they come due. During the almost 8 month period ended August 27, 2014, Great Lakes lost $4.5 million. KPMG estimates that it will have borrowed almost $200,000 to pay Great Lakes operating costs and that it requires significant liquidity to pay its creditors... Great Lakes is insolvent with no prospect of being able to carry on.

45 In these circumstances GLB is also not a plausible source of funds for the repayment of East Guardian's loans.

46 While it is true that there is no direct evidence concerning Lutsenko's net worth, there is evidence of Lutsenko's admission that he is not able to make good on his obligations as guarantor of East Guardian's loans to Einer and NSB. Further, the evidence is that Lutsenko is a Russian national residing in Russia. I am not prepared to assume, for the purposes of this motion, that in the realm of international enforcement, collection on a London arbitration judgment against Lutsenko is likely to be readily available.

47 In the circumstances, I find on all the evidence that East Guardian has established that it will suffer irreparable harm if the injunction is not granted.

48 Mazur argues that the balance of convenience weighs against granting the injunction. His joint bank account with his wife has been frozen by virtue of the worldwide freezing order of the High Court of Justice in England. Not only Mazur but a third-party, his wife, has been negatively affected. He claims that the U.K. order made it impossible to pay his U.K. lawyers to defend against the order when it was returned to the High Court, on notice, on October 30, 2014. Mazur also argues that the receivership order sought is overbroad and invasive. All these factors represent harm not compensable in damages.

49 In my view, the balance of convenience favors granting the injunction, subject to the remaining two aspects of the test. The harm to East Guardian that would occur were Mazur to put assets beyond the reach of the court outweighs any harm that will be suffered by Mazur in the meantime.

50 I do not find the argument that Mazur's joint account is frozen to be persuasive. The order sought contemplates, and I will allow, the use of Mazur's funds for his and his

wife's reasonable living expenses. If the parties cannot agree on how to accommodate this requirement, I may be spoken to at 9:30 appointment.

51 The argument that Mazur was unrepresented before the High Court because he could not use his available cash to pay his U.K. counsel is hotly contested. East Guardian says it was willing to allow Mazur's funds to be used to pay his lawyers provided the funds were paid directly to the lawyers, not to Mazur personally, and that Mazur explained the source of the funds. Mazur, I am told, refused to agree to these conditions. In any event, Mazur's affidavit and a written submission, obviously prepared by his U.K. lawyers prior to their discharge, were before Mr. Justice Morgan on October 30, 2014.

52 The issue of the receivership I will deal with under that heading later in these Reasons.

53 I find that the balance of convenience favors granting the injunction.

54 The requirement of showing some assets in the jurisdiction is not an onerous one. This must be the case because, in most cases, the debtor will have all the information and a creditor will be on the outside looking in, with little or no access to the debtor's financial information, *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645 (Eng. C.A.) at p. 668; *DSLC Capital Corp. v. Credifinance Securities Ltd.*, 2011 ONSC 4044 (Ont. S.C.J. [Commercial List]) at para. 11.

55 In this case the evidence is clear that Mazur had a bank account in Ontario with about $70,000 at the beginning of October and about $20,000 by October 30. In August 2013 he sold his home for the net amount of $1.3 million. His current rented home costs $12,500 per month, which has been prepaid to February 2015. An advisory agreement which Mazur has with Einer Energy Holdings (the 100% owner of Einer) provides for him to receive about $500,000 per year.

56 East Guardian also alleges that Mazur has ownership interests in the parent companies of the debtors and other related companies, such as the parent companies of GLB.

57 Mazur relies on the fact that, in August of this year, Wilton-Siegel J. dismissed a motion for a Mareva injunction against Mazur on the basis that there was insufficient evidence that Mazur had assets in Ontario. Wilton-Siegel J. concluded that "either Mazur has no material assets or, if he does, that such assets are no longer in Ontario," *Petro-Diamond Inc. v. Verdeo Inc.*, 2014 ONSC 4538 (Ont. S.C.J.) at para. 13. *Petro-Diamond* is a double-edged sword for Mazur, however, given Wilton-Seigel J.'s finding that, "Given the finding in the Endorsement that Mazur participated in a fraudulent transfer in respect of the Orense Transaction, the Court cannot rely on his testimony on cross-examination in this proceeding in the absence of supporting documentary evidence" (at para. 18).

58 Mazur says that the $1.3 million he received on the sale of his home has been loaned to friends, given to charity, used to pay off various forms of debt and otherwise spent on living expenses.

59 Mazur argues that, while his contract with Einer Holdings says he is entitled to $500,000 per year, he has never been paid that much, receiving only about half that, most of which is spent on living expenses.

60 Mazur says that he has no ownership interest in any of the companies involved in the Praveen Investing group. He says he sold his interest to a business associate, Mr. Timofeev, for "a couple of hundred thousand dollars" in October 2013, although he has refused to produce the sales agreement.

61 Is clear that Mazur has some assets in the jurisdiction. That, in my view, is enough to meet the requirement for assets in Ontario. The extent of those assets is a matter of some controversy. Mazur's claim to have no interest whatsoever in Praveen or the companies which it owns and controls, however, on its face lacks credibility.

62 Mazur signed East Guardian's loan documents as a director of Einer. He signed GLB's guarantee as CEO of GLB. He gave personal guarantees for up to $30 million to obtain financing for NSB's operations. He was the face of all these corporations to the world. He appeared to be "the boss" in relation to the staff and operations at GLB in Welland. Pattillo J. found, in *Heridge*, *supra*, that:

> Mazur utilizes numerous companies in various jurisdictions to carry on his business. It is also clear that there are extensive inter-corporate transactions between the various corporate entities under Mazur's control.

63 Mazur's claims that he has no income is completely inconsistent with the documentary evidence of his contract with Einer Holdings, his apparent control or managerial responsibilities over the debtors and GLB and other aspects of his lifestyle.

64 In these circumstances, it would surpass credulity to accept that Mazur has no financial interest in the Praveen group of companies and that he has no assets in Ontario.

65 The final, and ultimately most critical, aspect of the test for a Mareva injunction is the requirement to prove that without the pretrial execution which is at the heart of a Mareva injunction, Mazur's assets will become unavailable to satisfy any money judgment.

66 In this case, there is no direct evidence of imminent transfers of property and the like. Mazur argues that all of his expenditures and dealings with property have been in the ordinary course of his business or incidental to daily living expenses. He says he has no assets

to speak of and, in any event, that there is no evidence he is about spirit anything away. He relies on the finding in *Petro-Diamond, supra*, that any assets are no longer in Ontario.

67 The flaw in this argument is that evidence that the respondent has already taken steps to shelter, hide or dispose of assets demonstrates a risk of further asset dissipation, *Massa v. Sualim*, 2013 ONSC 7520 (Ont. S.C.J.) and *Caisse populaire Laurier d'Ottawa Ltée v. Guertin*, [1983] O.J. No. 2221 (Ont. H.C.).

68 Is also now well settled that the court may infer risk of asset dissipation from the circumstances and the respondent's pattern of prior behavior, especially where those circumstances and prior behavior involve fraud or misrepresentations, *Sibley & Associates LP v. Ross*, [2011] O.J. No. 2656 (Ont. S.C.J.) and *Quality Haulage & Farming Ltd. v. Karda*, [2014] O.J. No. 1752 (Ont. S.C.J.).

69 East Guardian relies on admissions made by Mazur during the May 29 teleconference to the effect that, not only were reports and information from the borrowers about the use of East Guardian's funds false and misleading, but that Mazur himself was responsible for preparing and providing those false and misleading reports to East Guardian. For example, Mazur agreed during the teleconference and in cross examination that incorrect statements were made to East Guardian. During the teleconference, he went on to say that it was not Kalra (Einer's CFO) but "I mean obviously it is me, primarily me, who is telling [Kalra] what to do." Elsewhere, Mazur said, "Vik let me answer this because obviously I have directed you to reflect those numbers the way they were reflected."

70 Mazur has resiled from these admissions in his affidavit evidence on this motion. Whether Mazur did, or did not, participate in the preparation of the false and misleading reports is in controversy. However, for the purposes of this motion, there is evidence, in conjunction with other contradictions and prevarications contained in his cross-examination, upon which an inference may be drawn that Mazur knew about and was at least partially responsible for the false and misleading reports provided to East Guardian.

71 Further, the inference to be drawn from Mazur's claims that he has divested himself of all interest in the Praveen group of companies, whether or not believed, and his involvement with the production of false and misleading reports, is that Mazur is willing to continue to take steps to insulate himself from the effect of any judgment on his guarantees.

72 Accordingly, I find that East Guardian has made out an evidentiary basis sufficient to fulfill the last requirement of the test for a Mareva injunction.

Receiver

73 Section 101 of the *Courts of Justice Act* provides for the appointment of a receiver where it appears to a judge to be just and convenient to do so. The test for the appointment is similar to the test for an interlocutory injunction.

74 The appointment of receiver with broad investigatory powers is an equitable remedy. The court must consider the conduct of the parties and the effect on the parties of the receiver's appointment.

75 Proof of fraud is an important consideration but is not always a *sine qua non.* This is because, as noted above, the applicant creditor is often without information about the debtor's conduct while the respondent debtor has access to all the relevant information. The appointment of a receiver with investigatory powers can equalize this informational imbalance, *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]).

76 In this case, the debt is substantial, some $21 million. There is prima facie evidence that Mazur owned a controlling interest in all or part of the Praveen group and that he may have divested himself of that interest in some fashion.

77 More importantly, in this case there is evidence that East Guardian's contractual protections are insufficient to protect its interest. False and misleading information was given to it, in contravention of the loan terms. The truth was only revealed when Einer, NSB and Mazur's misdeeds were discovered through East Guardian's own efforts. Mazur has already refused to disclose material information in these proceedings, such as documentary evidence of the alleged sale of his interest in Praveen to Timofeev.

78 It is clear from the contradictions evidenced during his cross-examination that Mazur is not being entirely forthright about his role and responsibilities with the debtor and related companies.

79 As noted earlier, Pattillo J. has found, in respect of GLB itself, that Mazur utilizes numerous corporations to carry on his business and that there are extensive inter-corporate transactions between the various entities under Mazur's control. Pattillo J. rejected Mazur's evidence, which was inconsistent with the documentary record. He found Mazur's assertions were "not credible" and found that Mazur's defence to the application for a receiver was "concocted by Mazur, after default, in an attempt to defeat Heridge's remedies on default." Pattillo J. found that "the activities of the repondents and other related companies have been designed to avoid or diminish liability for" the loans. Very similar conduct has been evidenced in this case and I have drawn very similar conclusions.

80 While of limited direct relevance, my concerns in this regard are heightened by findings against Mazur in other proceedings of a similar nature, where Mazur has been found liable for fraudulent conveyances and, in the course of which, Mazur has been found to have given untruthful evidence, *Biourja Trading v. Verdeo Inc.*, Texas Cause No. 2011-32123; *Petro-Diamond Inc. v. Verdeo Inc.*, File No. 30-2011-00483442-CI-BC-CJC; and *Petro-Diamond Inc. v. Verdeo Inc.*, 2014 ONSC 4538 (Ont. S.C.J.) at para. 18.

81 In all of the circumstances, I find it is just and convenient to appoint a receiver with investigative powers to require disclosure of personal and corporate financial records so as to allow the applicant to trace the use of its funds and to identify and locate Mazur's assets.

Enforcement of Foreign Order

82 Much controversy surrounded East Guardian's attempts to seek Ontario enforcement of the order of Mr. Justice Morgan of the High Court of Justice, Chancery Division, made on October 30, 2014. Arguments ranged from the jurisdiction of the High Court to make the order in the first place to whether the order is final or interlocutory.

83 Given my findings that the tests for a Mareva injunction and the appointment of an investigative receiver in Ontario have been met, it is not necessary to decide whether Morgan J.'s order can or should be enforced by this court in Ontario.

84 I shall, therefore, leave that interesting question for another day when the resolution of that issue would not involve *obiter dicta.*

Conclusion

85 In conclusion, I grant a Mareva injunction over all the assets and property of Mazur in the form provided at Tab 1C of East Guardian's application record.

86 I also grant a receivership order under s. 101 of the *Courts of Justice Act* and Rule 41 of the Rules of Civil Procedure empowering KPMG to investigate, identify, quantify and locate all of Mazur's assets in Ontario. I agree with Mazur that the receivership powers sought are, at this stage, overly broad and invasive. The following paragraphs from the draft order at Tab 1D of East Guardian's Application Record shall be incorporated into my order:

> 3(a) (e) (m) and (r), 4 (excluding the closing phrase "and shall deliver all such Property to the Receiver upon the Receiver's request"), 5, 6, 8, 16, 24 to 27 and 29.

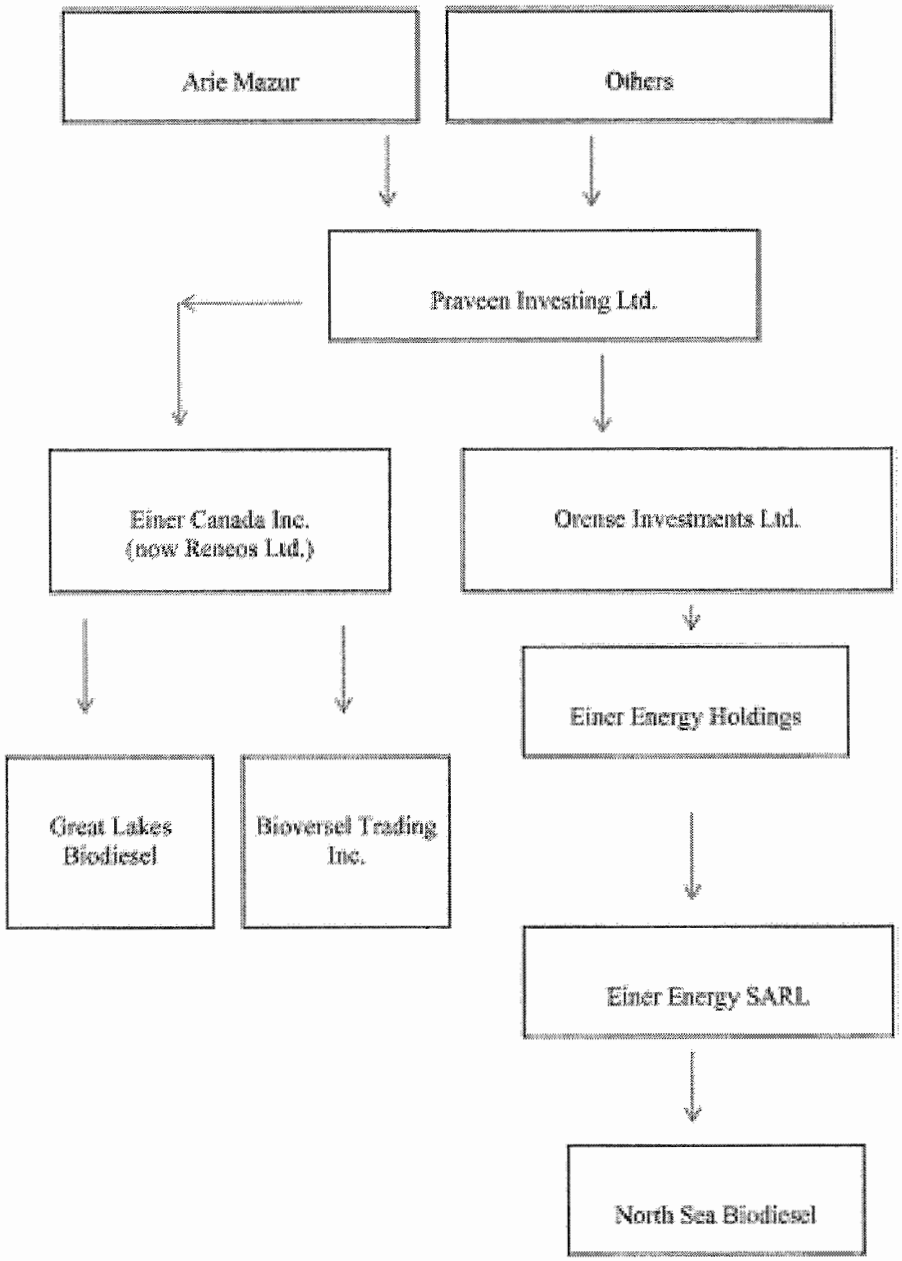
The cost of the receivership shall be born initially by East Guardian but shall be the subject of further proceedings after the receiver has had the opportunity to initiate its review.

Costs

87 In the absence of an agreement on costs, East Guardian may seek its costs by filing a brief written submission (no more than two typed double-spaced pages) together with a Bill of Costs and any supporting material within two weeks of the release of these Reasons. Mazur may reply to any request for costs by filing a brief written submission (subject to the same page limit) within a further ten days.

Order accordingly.

Appendix A



Graphic 1

Footnotes

* A corrigendum issued by the court on November 17, 2014 has been incorporated herein.

TAB 20

2018 ONSC 879
Ontario Superior Court of Justice

Noreast Electronics Co. Ltd. v. Danis

2018 CarswellOnt 1684, 2018 ONSC 879, 289 A.C.W.S. (3d) 389

Noreast Electronics Co. Ltd. (Plaintiff) and Eric Danis, EAJ Technical Corporation, Anya Watson and 8339724 Canada Inc. (Defendants)

Sally Gomery J.

Heard: December 7, 2017
Judgment: February 5, 2018
Docket: 17-72985

Counsel: Ira Nishisato, Maureen Doherty, for Plaintiff
Pierre Champagne, for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.i General principles
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.A Strong prima facie case
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets
II.2.c.iii.C.3 Miscellaneous

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.E Full and frank disclosure
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.e Anton Piller orders
II.2.e.i General principles
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.e Anton Piller orders
II.2.e.ii Threshold test
II.2.e.ii.D Real risk of removal or destruction of evidence
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.e Anton Piller orders
II.2.e.iii Full and frank disclosure

MOTION by employee, his wife, and their companies for order setting aside Anton Piller order and Mareva injunction.

***Sally Gomery J.*:**

1 This is a motion by the defendants to set aside two *ex parte* orders: an Anton Piller order and a Mareva injunction (the "Orders").

2 Noreast Electronics Co. Ltd. ("Noreast") is an electronics manufacturer in Hawkesbury, Ontario. It is suing its former employee Eric Danis and his wife Anya Watson for fraud. The other two defendants in the lawsuit are companies owned and directed by Danis and Watson.

3 Noreast obtained the Orders on June 20, 2017 from Justice Ryan Bell. On June 21, 2017, they were served on the defendants. The Anton Piller order was executed, with a search being conducted at Danis and Watson's home and records seized. The Mareva injunction was served on the financial institutions where the defendants have accounts and these accounts were frozen. Noreast terminated Danis' employment the same day.

4 The Orders were continued on consent until a decision on this motion.

The approach to be taken on the motion to set aside

5 On a motion to set aside an *ex parte* order, the court considers not only the evidence before the judge who first issued the order, but any further evidence since submitted by the parties, including evidence obtained as a result of the order. [1]

6 An Anton Piller order or a Mareva injunction obtained may be set aside for three reasons:

1) In obtaining the order, the moving party failed to fully and fairly disclose all material facts.

2) Based on the evidence before the reviewing court, the test for an order is not met.

3) The order was executed improperly.

7 According to the defendants, the Orders should be set aside on all three of these grounds.

What evidence was before Justice Ryan Bell?

8 The defendants argue that Noreast failed to disclose various material facts when it obtained the Orders. My analysis must therefore begin by reviewing the evidence that was before Justice Ryan Bell.

9 Noreast relied on two affidavits in support of its motion: an affidavit from Irma Maxwell, a Noreast director and general manager of payroll, accounting and financial administration support services, and an affidavit from Gary Timm, a forensic accountant with Deloitte Forensic Inc.

The Maxwell affidavit

10 In her June 12, 2017 affidavit, Maxwell stated that Danis had worked for Noreast since 1985 and was currently its Director of Sales. In June 2017 he was earning a base salary of $46,820 plus a commission of 1.5% on all company sales. He is also a 20% shareholder of Noreast through his company 8339724. Watson has never worked for Noreast.

11 Maxwell said that Danis encouraged Noreast in 2009 to begin sourcing electronic components and other parts from China. When Noreast accepted this suggestion, Danis assumed responsibility for the procurement from five Chinese suppliers, handling all communications with them on Noreast's behalf. According to Maxwell, her colleagues suggested on several occasions that someone else from Noreast could assist him with purchasing from and invoicing of Chinese suppliers. Danis refused these offers, saying he was the only person who should deal with them.

12 In April 2010, Danis forwarded an email to Maxwell which he said was from a Chinese supplier. In this email, the supplier asked Noreast to start paying the amounts owed on invoices to the bank account of a company called EAJ Technical Corporation ("EAJ") at Wells Fargo Bank in Wyoming. An invoice with the new banking direction, on the letterhead of the Chinese supplier, was attached. The name "EAJ" was familiar to Maxwell since this same supplier had previously instructed Noreast to send payments to EAJER Industrial Limited at HSBC Bank in Hong Kong. Noreast accordingly did not question the supplier's new instruction to make payments to the EAJ account in Wyoming.

13 Maxwell said that, in the months and years that followed, Danis provided hardcopy invoices to Noreast for products sold by its Chinese suppliers. These invoices directed that payment was to be made to the same Wells Fargo account in Wyoming.

14 On March 22, 2017, Noreast received a package from one of its Chinese suppliers. Unusually, there was an invoice enclosed with the package. It looked different than the ones that Danis had been delivering to Noreast in the preceding seven years. The direction on the invoice said that payment should be made to a Chinese bank. The prices on the new invoice were half the amount as much as those on the invoices that Noreast was accustomed to receiving through Danis.

15 Maxwell's colleague did an internet search on EAJ and found a website where Danis was listed as its president. This prompted Noreast to begin investigating further.

16 In her affidavit, Maxwell identified potential sources for further information in the defendants' possession and control. She expressed the view that, if an Anton Piller order was not issued, Danis would destroy evidence.

The Timm affidavit

17 After Noreast discovered Danis' connection to EAJ, it retained Deloitte Forensic Inc. to conduct an investigation of purchases from Chinese suppliers between April 1, 2010 and May 10, 2017. Timm led the investigation. His team searched publicly available information, interviewed Maxwell and Noreast's IT director and reviewed Noreast's records of purchases from Chinese suppliers. In his June 9, 2017 affidavit, Timm stated that:

- EAJ was incorporated in Wyoming in March 2010. The only officer or director identified in the corporate filing is EAJ's secretary, Gerald Pitts. Pitts is the president of Wyoming Corporate Services, a company that helps incorporate companies whose directors, officers and shareholders wish to remain off the public record. Wyoming law does not require companies to disclose this information.

• Despite the lack of disclosure in EAJ's incorporation documents, Timm found records that linked Danis to EAJ. EAJ's 2015 annual report identified Danis as its president. Danis also identified himself as an EAJ director in an email to a third party, and filed a T4 for 2011 indicating he had received employment income of over $121,000 from Noreast.

• Timm also located a cheque record that linked Watson to Noreast.

• Beginning April 2010, Chinese suppliers began submitting invoices to Danis through his Noreast email account. These invoices directed payment to accounts in banks in China and Hong Kong. Danis forwarded these invoices to a personal email account, then created new invoices that looked like they were issued by the Chinese suppliers. These new invoices directed payment to EAJ's Wells Fargo account in Wyoming. Danis delivered hard copies of these invoices to Noreast for payment.

• The unit prices on these invoices were inflated by 20% to 200% above the prices on the invoices actually submitted by the Chinese suppliers. On the invoices Noreast was directed to make payments to the Wells Fargo account in Wyoming.

• Noreast made payments of USD $1,882,886 to the Wells Fargo account between April 8, 2010 and May 10, 2017;

• In emails to Chinese suppliers, Danis directed that any pricing must be given only to him and to no one else at Noreast, and that no invoices should be sent with their shipments.

• Danis and Watson had assets, including a house, a cottage, cars a boat and various bank accounts in Ontario.

Justice Ryan Bell's Orders

18 In granting the Mareva injunction, Justice Ryan Bell used the test set out in *Aetna Financial Services Ltd. v. Feigelman* and *Chitel v. Rothbart*.[2] She held that Noreast was entitled to an injunction because:

1) Noreast had demonstrated a strong *prima facie* case;

2) it had provided particulars of the claim against the defendants and a fair statement of the points that could be made against it by the defendants;

3) there were grounds for believing that the defendants had assets in Ontario;

4) there were grounds for believing that there was a risk of the defendants' assets being removed from the jurisdiction or dissipated or disposed of before judgment. In this regard, the judge noted the strength of the evidence of fraud, an important factor in a Mareva injunction; and

5) Noreast provided an undertaking as to damages.

19 Justice Ryan Bell held that Noreast had met the test for an Anton Piller order established by the Supreme Court of Canada in *Celanese Canada Inc. v. Murray Demolition Corp.* [3] She found that:

1) Noreast had demonstrated a strong *prima facie* case;

2) it had established serious damage as a result of the defendants' alleged misconduct;

3) there was convincing evidence that Danis had relevant evidence at his property because he used computers and email accounts to carry out the alleged fraud; and

4) there was real risk of destruction of evidence if the order was not granted, based on Danis' alleged misconduct and the fact that some of it was in electronic form.

Did Noreast fail to fully and fairly disclose material facts when it sought the Orders?

The disclosure obligation on an applicant for ex parte order

20 A party applying for an *ex parte* order is obliged to disclose all material facts relevant to the order sought. Rule 39.01(6) of the *Rules of Civil Procedure* provides:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

21 Applicants for *ex parte* orders are required to make this disclosure because the respondent has no opportunity to present their version of the events. In the words of Justice Sharpe, "The situation is rife with danger that an injustice will be done to the absent party". [4]

22 Due to their draconian nature, the disclosure obligation is particularly important in the context of applications for Anton Piller or Mareva orders. An Anton Piller order permits an applicant to conduct a surprise search of the respondent's office or home. A Mareva injunction freezes the respondent's assets until trial. In granting such exceptional orders, the court must be certain that the supporting evidence gives it fair insight into both the applicant's case and the respondent's potential defence.

23 The applicant is accordingly "not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side." [5]

24 In order to ensure that all material facts are before the court, the applicant also has an obligation to conduct a reasonable investigation before seeking *ex parte* orders. As Justice Stinson observed in *Parallel Medical Services Ltd. v. Ward*:

> A judge hearing such a motion (not to mention the absent party who will be affected by any order granted) is at the mercy of counsel for the moving party and must expect and rely upon counsel's proper discharge of this important obligation. That obligation extends to fairly stating the case against granting the relief sought, and this can only be done where appropriate steps have been taken to verify the reliability of the information provided by the client and to determine what the defendant would likely say if given the opportunity to argue against the granting of the order. [6]

25 The applicant's disclosure obligation is, however, limited to *material* facts and the fruits of *reasonable* investigation. A fact is material if its non-disclosure could affect the outcome of the motion. [7]

Did Noreast fail to disclose material facts?

26 The defendants say that Noreast failed to provide Justice Ryan Bell with material facts and to acknowledge that there could be an innocent explanation for the defendants' conduct. In their submission, Noreast mischaracterized EAJ's role in purchases from Chinese suppliers. They say that EAJ was acting as a wholesaler or reseller, and that the mark-ups on the prices charged by the suppliers reflected standard industry practice to recover administrative costs and a profit.

27 They also argue that Noreast had an obligation to further investigate the situation before seeking the Orders. Had it done so, it would have realised that Danis never deliberately hid his involvement with EAJ from Noreast. He was simply never asked about any connection he had with the company. When he first discussed the possibility of Noreast sourcing parts from China with his boss at Noreast in 2009, he was told that purchasing was not part of his role as a salesperson and that he would not be compensated for this work. As a result, he did his work for EAJ in his spare time.

28 Finally, the defendants argue that Noreast has not proved any damages, because it made the choice to purchase components at the prices proposed by EAJ, and there is no evidence that it overpaid. They also contend that Noreast failed to advise the Court about the value of Danis' shares in Noreast through the defendant numbered company. According to the defendants, these shares are worth over a million dollars, enough to offset any loss by Noreast. The shares furthermore function as security since Danis cannot sell them without the company's consent.

29 I find that many of the defendants' assertions do not withstand scrutiny. They are furthermore not material, because they would not have caused Justice Ryan Bell to refuse to issue the Orders.

30 The idea underlying the defendants' argument is that EAJ's role as a middleman was not hidden from Noreast. This idea is inconsistent with the evidence available when Noreast applied for the Orders. The invoices submitted by Danis were made to look as though they came directly from Chinese suppliers. They were on the suppliers' letterhead. The Wells Fargo account was described on the invoices as "Our Account". Nothing on the invoices indicated that prices had been marked up.

31 There was furthermore evidence that contradicts Danis' assertion that he never took active steps to conceal EAJ's role. He submitted misleading or false invoices. He directed the Chinese suppliers not to send their actual invoices with shipments of their products. He insisted to Maxwell and others that he personally handle all dealings with the suppliers.

32 The argument that Noreast did not necessarily overpay for seven years is also inconsistent with the evidence. The company was able to purchase components from the same Chinese suppliers, without any markup, prior to April 2010.

33 I do not accept that the value of Danis' shareholder interest in Noreast is a material fact. The only evidence of this value has been provided by Danis, who is neither an expert in business evaluation nor a disinterested party. There is also no evidence that the shares have any value on the open market or could function as security for any damages suffered by Noreast.

34 I am of course not making a finding that the defendants' activities were fraudulent. This is a determination that can only be made by a trial judge. But the evidence before Justice Ryan Bell strongly suggests fraud. I cannot fault Noreast for failing to tell the judge that there could be an innocent explanation for the defendants' conduct. An applicant's obligation of fair disclosure does not extend to speculating that there might be further evidence that would fundamentally contradict the initial findings of a reasonably comprehensive investigation.

35 I also reject the defendants' argument that Noreast was obliged to confront Danis or the suppliers with the evidence before seeking the court's assistance. In her affidavit, Maxwell said that she feared Danis would destroy records if he knew that Noreast had discovered his involvement in EAJ. Given Danis' efforts over a seven year period to conceal his involvement in EAJ, her concern was reasonable. That is one of the bases for the Orders.

Did Noreast otherwise fail to meet the conditions to obtain interlocutory relief?

36 The defendants argue that, in addition to meeting the specific tests for the Orders, Noreast had to satisfy the test for an interlocutory injunction established by the Supreme Court of Canada in *RJR Macdonald.*[8] In *Johnson v. Helo Enterprises Inc.*, Justice Smith held that an applicant for an Anton Piller order also had to show that it would suffer irreparable harm if the order was not issued, and that the balance of convenience favoured the applicant.[9] The defendants say that Noreast cannot satisfy either of these parts of the *RJR Macdonald* test. First, Noreast has, at most, suffered an economic loss. Second, the balance of convenience favours the defendants, because the execution of their Orders violates their privacy rights and deprives them of access to their own assets.

37 In my view, the requirement of proving irreparable harm is imbedded in the recognized criteria for the Orders. To obtain an Anton Piller order, an applicant must convince the court that there is a real risk of destruction of evidence if the order was not granted. If the applicant meets this part of the test, they have also shown the risk of irreparable harm, since in the absence of the order sought they would be unable to prove their case and limit further damages. To obtain a *Mareva* injunction, a court must find that the defendant might otherwise dispose of or dissipate their assets, or remove them from the jurisdiction. In other words, unless the order is issued, the applicant may lose any ability to ever execute an eventual judgment. This is again a form of irreparable harm.

38 Similarly, exercising the discretion inherent in the tests requires the court to balance the potential harm to the applicant if *ex parte* relief is not granted with the harm inherent in the execution of such orders. That is why applicants have the onus to make full disclosure and provide strong *prima facie* proof. It is hard to imagine a situation where a judge could conclude that an applicant had met the test for Mareva or Anton Piller orders but that, on the same evidence, the balance of convenience favoured the defendant. We are certainly not in such a situation in this case.

39 The defendants make a further argument regarding Noreast's right to injunctive relief. They contend that Noreast did not have clean hands, because it engages in unethical business practices.

40 The doctrine of clean hands does not mean that an applicant for equitable relief has to have led "a blameless life":

> The misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief.... [10]

41 I do not see any link between the alleged misconduct by Noreast and the fraud allegations against the defendants. I accordingly reject the defendants' argument that Noreast was simply not entitled to any equitable order.

Does the evidence now before the Court justify the continuation of the Orders?

What further evidence is now before the Court?

42 The parties have filed further evidence since the Orders were issued. I have already alluded to the defendants' evidence. In Danis' affidavits, he denies that he ever sought to conceal his role in EAJ or that he was obliged to disclose it, since he had no formal contract of employment or fiduciary role within Noreast. He says that he was doing all of his work for Noreast in his spare time and therefore did not need to account to Noreast for it. He says that he remained at all times a dedicated and good employee.

43 At the same time, Danis contends that he was justified in concealing his link to EAJ given a hostile work environment at Noreast and his fear that he would be fired. He argues that Noreast was clearly satisfied with the prices it paid for to Chinese suppliers and the components it received from them, as it never sought to procure these same components from other sources after 2010.

44 In affidavits sworn by Watson, she says that she had only a modest administrative role in EAJ. She describes how the Orders were executed, and the impact this has had on her family.

45 New evidence filed by Noreast includes:

- Records showing Watson's extensive involvement in EAJ's operations. In addition to creating the invoices submitted to Noreast, she did all of EAJ's accounting and record keeping, and arranged for payments to Chinese suppliers on EAJ's behalf. Watson also dealt with and instructed EAJ's accountants, BDO, in the preparation of tax filings.

- A detailed account of Watson and Danis prepared the invoices delivered to Noreast. Watson admits that she created templates that looked as though they were issued by Chinese suppliers, and which described the EAJ Wells Fargo account as the suppliers'

"USA sales office account". The prices she indicated on the invoices were provided to her by Danis. The markups were not shown on the invoices.

• Records showing that Watson received $847,156.34 in salary from EAJ from 2011 to 2016, which she deposited in various US bank accounts.

• Emails and other records showing that Danis and Watson took active steps to conceal their role in EAJ when the company was incorporated.

• An admission by Watson that she and Danis had no property, business or family in Wyoming, and a lack of any explanation for why they decided to incorporate EAJ there or give the company a name similar to EAJER.

• An admission by Watson that Noreast was EAJ's only customer and its only source of revenue.

• A list of over 30 bank accounts held by the defendants at financial institutions in the US and Canada.

Does the evidence now before the Court justify the Anton Piller order?

46 On all of the evidence now before the court, I find that Noreast has met the test for an Anton Piller order. The additional evidence it has obtained through execution of the order has strengthened its already strong *prima facie* case that the defendants were conducting a fraudulent scheme. It has evidence of actual or potential serious financial loss. The defendants have incriminating records or other evidence in its possession.

47 I infer, based on all of the evidence, a real possibility that the defendants may have taken steps to destroy or conceal incriminating records before discovery could take place, if the order had not been granted. As pointed out in numerous decisions, a court may infer a risk of destruction of evidence from a defendant's dishonest conduct and the ease with which certain types of evidence may be removed or disposed of.[11] In this case, the evidence shows that Danis misled Noreast about his role in EAJ, and what exactly EAJ was doing in connection with purchases from China.

Does the evidence now before the Court justify the continuation of the Mareva injunction?

48 The defendants concede that Noreast has proved that they have assets in Ontario and that it has given an undertaking with respect to damages if it fails to prove its case at trial. They argue however that Noreast has not met the other elements of the test for a Mareva injunction.

49 I have already concluded that Noreast met its disclosure obligation when it applied for the Orders, and that it has presented strong *prima facie* evidence of fraudulent conduct by Danis, Watson and EAJ. Whether or not Danis had a fiduciary obligation to Noreast is not determinative of its right to recover excess amounts paid to EAJ. The defendants contend that Noreast's claim for monetary damages far exceeds its actual losses. In my view, however, the test for a Mareva injunction does not require me to conclude that Noreast will get all of the money it claims in its lawsuit. Based on the evidence, its actual damages are serious.

50 This leaves the question of the dissipation or removal of assets, the fourth leg of the Mareva test. The defendants say there is no evidence of any real risk. They point out that Danis and Watson have their family residence, their four cars, their boat and most of their bank accounts in Ontario. They admit that Watson deposited the money she received from EAJ into U.S. bank accounts in Wyoming and Georgia, but say that it was subsequently flowed back to Canada.

51 Canadian courts have long debated what a plaintiff in a fraud case must prove the risk of dissipation or removal of assets. A plaintiff without any direct evidence may argue that the defendant's conduct makes them inherently untrustworthy. This has led to consideration of whether there is a "fraud exception" to the usual criteria for a Mareva injunction.

52 In *Sibley & Associates LP v. Ross*, Justice Strathy (as he then was) did a comprehensive review of the caselaw on this question.[12] He concluded that there was no broad fraud exception, although strong proof of fraud is relevant to the assessment of risk. In considering whether to grant or continue a Mareva injunction, he was of the view that:

> It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.[13]

53 I agree. Using this approach, I infer a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction. Strong *prima facie* evidence of fraud is coupled with other circumstances that give rise to risk, including:

> 1) The use of a foreign corporation by Danis and Watson as a vehicle for the alleged fraud;
>
> 2) Watson's transfer of funds from that company to U.S. accounts; and
>
> 3) the existence of over 30 bank accounts in the name of the defendants in Canada and the U.S., and an additional 20 or so investment accounts and credit card accounts.

54 As Justice Strathy found in *Sibley*, the defendants' conduct in this case "bears the badges of fraud — a pattern of clandestine and deceitful action over a prolonged period of time, including the attempt to avoid detection by using a nominee or a "dummy" to conceal the fraudulent activity". [14] The defendants' activities in the U.S., and the complexity of their financial arrangements, tip the balance, tip the balance in favour of the plaintiff.

55 For all of these reasons, I conclude that the Mareva injunction should remain in place until the trial of the action.

56 If the injunction remains in place, defendants have asked that its scope be reduced. They say that the freezing order should not apply to accounts held solely by Watson, because she has "nothing to do" with the core litigation between Noreast and its former employee Danis. There are also some accounts held jointly by Watson and her children or father, and a Registered Education Savings Plan account.

57 Based on the evidence to date, it is absurd to say that Watson is not directly involved in the fraud alleged by Noreast. She was the direct recipient of most of EAJ's profits, as evidenced by her tax returns and her testimony on cross-examination. Until the money transferred to her U.S. accounts can be traced, there is no way to know whether it ended up in accounts opened only in her name, or jointly with other family members. I am therefore not prepared to limit the scope of the injunction to accounts only in Danis' name.

58 If there is an RESP account that has been frozen as a result of the Mareva injunction, the scope of the order should be reduced to exclude it. It is not clear whether this is actually an issue. Watson says in her June 26 affidavit that RBC account no. [055 # omitted] holds funds for her son Caleb's educational plan investments. In her June 28 affidavit, however, she identifies it as a joint savings account. She says something similar in her June 26 affidavit about RBC account no. [668 # omitted], but then lists it as an account solely in her own name in her June 28 affidavit.

Did Noreast improperly execute the Anton Piller order?

59 The defendants say that Noreast executed the Anton Piller order improperly. They allege that the search of Danis and Watson's home on June 21, 2017 was improper because:

- Deloitte is Noreast's accounting firm and as such is not a neutral third party.

- Noreast's lawyers at Borden Ladner Gervais ("BLG") were inappropriately involved in the search and may have had access to privileged information as a result.

- certain records and items, such as personal and medical information and Danis' cellphone, were improperly seized.

60 Based on these allegations, the defendants say that the Court should set aside the Anton Piller order, require that all records seized be returned to them, and order Noreast to pay an unspecified amount of damages.

61 In her June 26 affidavit, Watson describes how the Anton Piller order was executed at the family home. A competing account is set out in affidavits by Paul Lepsoe, the Independent Supervising Solicitor named in the order, and Laura Peacock, a law clerk with BLG who attended the search. The Lepsoe and Peacock affidavits, which I prefer, establish that the order was executed in a professional and appropriate manner.

62 In light of my finding on this point, I need not consider what remedy could flow from an improperly executed Anton Piller order.

63 There is a debate about who owns a cellphone seized during the search. In light of this, the ISS should make a copy of any electronic records on the phone and return the device to Danis. I assume that Noreast has already cancelled its contract for services for the phone.

Conclusions

64 For the reasons set out above, I dismiss the defendants' motion to set aside the Orders. I direct that, if the Mareva order currently affects an RESP account, it should be modified so that it no longer does so. I also direct that the iPhone seized from Danis' residence be returned to him, although the ISS should retain a copy of electronic data on it.

65 In the motion, the defendants seek an order permitting them to withdraw $12,655 per month for living expenses. Such an order was in fact already issued, on consent, on November 28, 2017. In oral argument, the defendants' counsel said that the order was not enforceable, but did not provide any specifics. Should the defendants require a clarification of the existing order, they should submit evidence and argument in support.

66 If the parties cannot agree on costs, counsel for the plaintiff may file a draft bill of costs and submission of no more than three pages within the next seven days. Counsel for defendants will then have seven days to file responding submissions of no more than three pages.

Motion dismissed on terms.

Footnotes

1 *Alberta Treasury Branches v. Leahy*, [2002] A.J. No. 524 (Alta. C.A.), leave to appeal denied [2002] S.C.C.A. No. 235 (S.C.C.).

2 *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.); *Chitel v. Rothbart*, [1982] O.J. No. 3540 (Ont. C.A.).

3 [2006] S.C.J. No. 35 (S.C.C.) at para. 35.

4 *United States v. Friedland*, [1996] O.J. No. 4399, 1996 CarswellOnt 5566 (Ont. Gen. Div.) at para. 26.

5 *United States v. Friedland* at para. 27.

6 [2002] O.J. No. 1498, 2002 CarswellOnt 1181 (Ont. S.C.J.) at para. 18.

7 *Pazner v. Ontario*, 1990 CanLII 6649, (1990), 74 O.R. (2d) 130 (Ont. H.C.) at para. 11. See to the same effect *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2000] O.J. No. 4341 (Ont. S.C.J. [Commercial List]) at para. 39 and *Coupey v. Hamilton Police Services Board*, [2005] O.J. No. 2223 (Ont. S.C.J.) at paras. 37 and 40.

8 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

9 *Johnson v. Helo Enterprises Inc.*, 2012 ONSC 5186 (Ont. S.C.J.) at para. 34.

10 *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at pp. 699-700.

11 *Dunlop Holdings Ltd. v. Staravia Ltd.*, (1981) Decision No. 1998 (C.A.) at 3, n 4-5; *Rank Film Distributors Ltd. v. Video Information Centre*, [1980] 2 All E.R. 273 (Eng. C.A.) at 286-87.

12 2011 ONSC 2951 (Ont. S.C.J.) at paras. 15 to 65.

13 *Sibley* at para. 63.

14 *Sibley* at para. 66.

End of Document

TAB 21

2004 CarswellOnt 5366
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Misir

2004 CarswellOnt 5366, [2004] O.J. No. 5223, [2004] O.T.C. 1114, 135 A.C.W.S. (3d) 1136, 8 C.P.C. (6th) 91

Bank of Montreal, Plaintiff and Devendranauth Misir also known as Dev Misir, Justin Mariani, Omar Rambhajan, Kashmira Handy, Shanta Persaud, George Misir, 984 Bay Street Inc., Lshan Holdings Limited, Janedal Plaza Inc. Metro Physio Rehab Clinics Ltd., Bay-Wellesley Health Services Inc., Integrated Health Diagnostic Services Inc., Dufferin Rogers Medical Centre Inc., Canadian Cardiac Health Centre Inc., Misir Holdings Inc., Bloor West Investments Ltd., Integrated Health Investments Corporation and Misir & Company, Defendants

Cumming J.

Heard: December 15, 2004
Judgment: December 16, 2004
Docket: 04-CL-5662

Counsel: Irving Marks, David Taub for Plaintiff
Fred Tayar, Scott Wheildon for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
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Remedies
II Injunctions
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Remedies
II Injunctions
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MOTION by bank for interim and interlocutory Mareva injunction.

***Cumming J.*:**

The Motion

1 The plaintiff, Bank of Montreal (the "Bank"), seeks *inter alia*, an interim and interlocutory Mareva injunction.

The Evidence

2 The affidavit of Greg Fedoryn dated December 10, 2004, on behalf of the Bank, sets forth the Bank's position.

3 The defendant Devendranauth Misir also known as Dev Misir ("Mr. Misir"), a lawyer, owns or owned and controlled a corporation, Integrated Health Care Services Inc. ("Integrated"), which managed six clinics, also owned through corporate entities by Mr. Misir. Integrated and the corporations having these clinics are defendants in another action, #04-CL-5562, referred to below.

4 The Bank provided financing to Integrated, secured by its and the clinics' assets and receivables. As of October 7, 2003 Integrated was indebted to the Bank in the sum of $2,995,772.80.

5 The Bank demanded repayment October 7, 2003, following which the parties entered into a series of written forbearance agreements, the last of which expired August 15, 2004. The record suggests that there were oral and written misrepresentations made to the Bank.

6 The 2003 fiscal year financial statements for Integrated, delivered to the Bank August 20, 2004 showed Integrated's receivables as being $2,700,000.00 whereas the information provided in January, 2004 had shown that the accounts receivable were $4,400,000.00. The Bank considered its security might be in jeopardy.

7 Integrated initially refused to consent to the Bank's request for the appointment of a Receiver. About September 14, 2004 Mr. Misir reportedly agreed to permit RSM Richter Inc. to act as Monitor and next to act as Receiver if there was any delay or problems with the monitorship.

8 However, by letter dated September 20, 2004 Mr. Misir advised the Bank that the landlords of the clinics had distrained and completed their distress against the assets of the clinics for non-payment of rent, and had re-entered the premises and terminated the leases. These reported, alleged events came as a shock to the Bank.

9 The Bank says that the purported rent default, completed duress and termination of the clinic leases had been concealed from the Bank until September 20, 2004.

10 The Bank immediately appointed RSM Richter Inc. as the Receiver and Manager of Integrated and the clinics pursuant to its security agreements with them. The Receiver could not locate any documentation relating to the purported distress and termination of leases.

11 Mr. Misir then reportedly claimed that the landlords for the clinics had distrained in September, 2003, had completed their distraints at that time, and permitted some of the clinics to continue to operate until the leases were finally terminated in July/August, 2004 when the assets were sold under the distraint to former employees of the clinics. Mr. Misir reportedly agreed to provide the Receiver with the books and records of Integrated and the clinics the week of September 27, 2004. This was not done and has not yet been done.

12 The Bank commenced court action #04-CL-5562, with RSM Richter Inc. appointed as Receiver and Manager of all of the assets of Integrated and the clinics by the Order of Lax J. dated September 29, 2004.

13 Mr. Misir had been served with the Bank's motion for the appointment of the Receiver September 27, 2004. He resigned as an officer of Integrated and the clinics that day. The next day, September 28, 2004, Integrated and the clinics made assignments into bankruptcy. Mintz & Partners was appointed as trustee in bankruptcy. Nevertheless, Mr. Misir had counsel appear to argue, unsuccessfully, against the appointment of the Receiver on September 29, 2004.

14 The Receiver's fourth report says that Mr. Misir has not yet complied with his obligation to deliver property and records.

15 The Bank then determined that one clinic, Metro Cardiac, had stopped operating some years ago, although the Bank was never advised. It was further determined that the five remaining clinics were operating in premises owned or controlled by Mr. Misir. The clinics

had purportedly defaulted on their rental payments in the summer of 2003. The landlords (all corporations controlled by Mr. Misir) had issued notices of default and then purchased from the clinics their assets for an agreed-upon purchase price. None of these sales was conducted at arm's length. No appraisals were obtained to value any of the clinics' assets. The documentation was signed by Mr. Misir, his cousin the defendant George Misir, and the defendant Omar Rambhajan.

16 The five clinics continued to operate for some eight months (with Integrated reporting the clinics' accounts receivable monthly to the Bank) following the sales of their assets until a purported second notice of default and termination was delivered in May or June, 2004.

17 The landlords then all purportedly sold the assets (including account receivables) to four new corporate tenants (the "purchasers") for nominal consideration ($1.00 and an agreement to enter into a new lease.). These four purchasers were all incorporated by Mr. Misir's law firm. He prepared the agreements of purchase and sale. None of the purchasers had independent legal representation. The alleged principals of the alleged purchasers all have a prior relationship with Mr. Misir.

18 After the date of the alleged sales, Mr. Misir applied to the Ministry of Health and Longterm Care for the transfer of licences from two clinics to Integrated (the applications being dated August 10, 2004 and received by the Ministry October 25, 2004) telling the Ministry that the transfers were simply part of a corporate reorganization and that he, Mr. Misir, was the shareholder for both transferors and transferee and that there was no money involved in the transfer.

19 The Receiver opined to the Bank that the above purported transactions either did not take place as alleged by Mr. Misir, or alternatively were part of a scheme on the part of Mr. Misir to place assets outside the reach of the Bank, as creditor.

20 The Bank states that the financial reporting of Integrated and the clinics did not report the fact of, and were inconsistent with, the purported distress and sale of the clinics' assets. The balance sheets up to March 31, 2004 did not reflect the alleged sale of all of the clinics' capital assets, but rather indicated a value of some $5 million.

21 The 2002 and 2003 consolidated financial statements of Integrated indicated that payments were made to related parties on account of overall occupancy costs, while a profit of some $304,308.00 was earned, implying that all rents were in fact paid by the clinics to landlords.

22 A letter from Integrated dated August 19, 2004 included a receivables list (from OHIP and medical insurers) as of July 31, 2004, placing total receivables at $3,957,595, two thirds of which were current or 30 days. Mr. Misir's representation is that by June 25, 2004 all of the

leases had been terminated and virtually all of the clinics' assets had been allegedly sold, that is, the clinics were out of business and incapable of generating new receivables for inclusion on the July 31, 2004 receivable list.

23 The statements filed in the September 28, 2004 bankruptcies of Integrated and the clinics allege that there were not any receivables at all, that is, that the bankrupts did not have any assets. The receiver has collected only an aggregate of some $40,660.00 from OHIP and insurance companies. Thus, the record indicates that the stated receivables of almost $4 million (constituting a significant component of the Bank's security) disappeared within the two-month period July 31, 2004 to September 28, 2004.

24 Declarations by Integrated up to August 19, 2004 all certified, *inter alia*, that there was no unpaid rent. Mr. Luciano Mariani, the manager of two of the clinics for some 12 years, was examined by the Receiver and testified he was unaware of any rent arrears, distress, asset sale or termination of leases. In July, 2004 the clinics all renewed their insurance policies.

25 Officers' compliance certificates given to the Bank up to December 31, 2003 certified that Integrated was in compliance with the provisions of the Bank's loan agreement and that there had been no events of default. A distress and sale would have constituted acts of default.

26 Given the results of the investigation, the Receiver commenced an action, #04-CL-5562, against Integrated and the clinics, in an attempt to recover the secured assets. A separate Order was consented to in that action December 13, 2004, directing a trial of an issue.

27 The Bank's and Receiver's investigations also led to this action at hand, #04-CL-5662, being instituted. The Bank alleges in this action, #04-CL-5662, that Mr. Misir, the defendant Justine Mariani, and their accomplices, fraudulently represented to the Bank the amount, enforceability and validity of the Bank's security, and fraudulently conveyed all of the assets that were subject to the Bank's security to non-arm's length third parties while retaining for themselves the benefit of the income derived from the assets.

28 (There is overlap in the two actions, although the action at hand, #04-CL-5662, is the broader action of the two. Consideration should be given to a consolidation of the two actions to reduce duplication, achieve economy of effort and simplify the overall proceedings.)

Disposition

29 Short notice was given in respect of the motion at hand for, *inter alia*, a Mareva injunction. At the outset of the return of the motion, counsel for the defendants requested an adjournment without terms. Counsel for the Bank submitted that there should not be any

adjournment without terms and that an interim and interlocutory Mareva injunction should be granted.

30 In my view, interim and interlocutory injunctive relief is appropriate. My reasons follow.

31 First, in my view, and I so find, the evidence put forward in the Bank's motion record establishes a strong *prima facie* case of fraud on the part of Mr. Misir. The record establishes that he is the controlling force behind Integrated and the clinics and all the relevant corporate entities involved in the matters which are the subject of the action. Second, there may well be irreparable harm to the Bank if injunctive relief is not given immediately. Third, the balance of convenience, in my opinion, is clearly in favour of the Bank.

32 A strong *prima facie* case of fraud, in itself, is insufficient to sanction the very exceptional interim remedy of a Mareva injunction. Estey J. stated in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.) at para. 43:

> There is ... a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award far less than the caged assets.

33 However, in a situation where there is genuine risk of disappearance of assets, either inside or outside the jurisdiction, an injunction may issue: *Aetna Financial Services Ltd. v. Feigelman*, *supra* at para. 26.

34 In *Chitel v. Rothbart*, 1982 CarswellOnt 508, 39 O.R. (2d) 513 (Ont. C.A.) MacKinnon A.C.J.O. sets forth the history and rationale for a Mareva injunction in exceptional circumstances, at paras. 21-62. He states at para. 58:

> Turning finally to item (iv) of Lord Denning's guidelines — the risk of removal of these assets before judgment — once again the material must be persuasive to the Court. The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct form his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

35 In my view, the actions of Mr. Misir, as related by the affiant for the Bank, set forth a *prima facie* history of fraudulently and surreptitiously attempting to remove and dispose of assets (the assets of Integrated and the clinics) from the reach of the Bank, a secured creditor. The strong *prima facie* case of fraud involves accomplices in an apparent conspiracy.

36 Mr. Misir appends to his affidavit valuations from an independent valuator indicating that he has real property with a market value in excess of $40 million. Mr. Misir states that he has equity in excess of $20 million in these properties; however, the independent valuations are simply in respect of market values of the properties.

37 Moreover, it is apparent that Mr. Misir is at this time under some financial stress due to other claims against him unrelated to the issues seen in the action at hand. Mr. Fedoryn's affidavit states that Mr. Misir is a defendant in an action by Vito and Sabrina Palmieri who allege he squandered almost $5 million of their money won in a lottery, Mr. Misir is a defendant in a counterclaim to a claim by Ernst & Young Inc. for some $11 million for alleged fraud, conspiracy and breach of fiduciary duty, Mr. Misir is in present default on three conventional first mortgages on property loans made by the Bank, and Mr. Misir is in default on a personal demand credit facility of some $160,000.00 from the Bank.

38 In my view, the evidence as a whole relating to the actions of Mr. Misir to date pertaining to Integrated and the clinics and the secured financing by the Bank as seen in the record for the action at hand, #04-CL-5662, in itself suggests a real risk that Mr. Misir may fraudulently dissipate or dispose of his remaining assets in a manner clearly distinct from the ordinary course of business, such as to render the possibility of making it impossible, or at least significantly more difficult, to trace and realize upon such assets in enforcing any judgment in favor of the Bank.

39 The Bank has provided the requisite undertaking as to damages.

40 For the reasons given, the Mareva interim and interlocutory injunction is granted. The terms of this proposed Order have been reviewed with counsel in the course of the submissions made. Many of the terms initially requested by the Bank have not been granted. While the injunction extends to a number of real properties held directly or indirectly by Mr. Misir, and the shares he owns in corporations holding properties, this is necessary at this time because of the uncertainty of his assets and equity positions. It is to be noted that clause 17 included in the Order enables Mr. Misir to narrow considerably the reach of the Order such as to, in effect, provide security of only $1,700,000.00, being the amount now owed to the Bank in respect of the Integrated and clinic indebtedness, together with interest.

41 The Order attached hereto as Appendix "A" has been signed. Costs for the matter at hand are reserved to be dealt with by the judge determining the ultimate disposition of this action.

Cumming J.:

THIS MOTION by the Plaintiff, Bank of Montreal (the "Bank") for a Mareva Injunction and the appointment of a Receiver of the Defendant Misir & Company was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Greg Fedoryn sworn December 10, 2004 and the Affidavit of Devendranauth Misir dated December 15, 2004, filed and on hearing submissions of Counsel for the Plaintiff and for the Defendants, Devendranauth Misir also known as Dev Misir ("Misir"), 984 Bay Street Inc., Lashan Holdings Limited, Janedal Plaza Inc., Misir Holdings Inc., Bloor West Investments Ltd and Integrated Health Investments Corporation and Misir & Company, no-one appearing for the other Defendants,

SERVICE

1. THIS COURT ORDERS that service of the Motion Record herein on the Defendant, Devendranauth Misir, also known as Dev Misir is hereby validated, *nunc pro tunc*.

2. THIS COURT ORDERS that the time for service of the Motion Record and the Plaintiff's factum is hereby abridged.

SCHEDULE

3. THIS COURT ORDERS that the Bank's motion is adjourned to March 16, 2005 on the terms set out herein.

4. THIS COURT ORDERS that the Respondents deliver their Responding Materials by no later than January 31, 2005.

5. THIS COURT ORDERS that the Bank deliver any Reply Materials no later than February 10, 2005.

6. THIS COURT ORDERS that all Cross-Examinations be completed no later than March 1, 2005 and may be used as examinations for discovery.

7. THIS COURT ORDERS that the Defendants shall deliver their statements of defence on or before January 17, 2005.

8. THIS COURT ORDERS that the parties shall exchange Affidavits of Documents on or before January 31, 2005.

INTERIM RELIEF - REAL AND PERSONAL PROPERTY

9. THIS COURT ORDERS that, pending the return of this motion, the Defendants, Misir, 984 Bay Street Inc., Lashan Holdings Limited, Janedal Plaza Inc., Misir Holdings Inc., Bloor West Investments Ltd and Integrated Health Investments Corporation (Collectively, the "Property Owners"), are restrained from transferring, conveying or encumbering their real property including the property listed on *Schedule "A"* attached hereto, except with leave of the Court or the written Consent of the Bank. This Order shall not prevent Misir or the Property Owners from refinancing any existing encumbrances provided that the Court is satisfied that the refinancing is with an arm's length lender for no more than the outstanding indebtedness on commercially reasonable terms.

10. THIS COURT ORDERS that, pending the return of this motion, Misir is restrained from transferring, conveying or encumbering any of his securities in the Property Owners.

11. THIS COURT ORDERS that the restrictions in paragraphs 9 and 10 herein may be set aside upon the posting of reasonable security in Court to the credit of this action in the sum of $1,700,000. The security must be in a form acceptable to the Bank or to the Court.

12. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

13. THIS COURT ORDERS that the costs of this day are reserved to the Court hearing the Motion.

Motion granted.

APPENDIX — "A"

Property	***P.I.N. and Legal Description***	***Registered Owner***
86 Yonge Blvd, Toronto	10354-0108 (LT) Lot 159, Plan 1965; North York, City of Toronto	Misir
16 Roseneath Gardens, Toronto	10473-0239 (LT) PT LT 103, P1 927 TWP of York as in TB479587, S/T & T/W TB479587, Toronto (York), City of Toronto	Misir
880 St. Clair Avenue West, Toronto	10474-0025 (LT) PCL 38-3 SEC M427; PT LT	Misir Holdings Inc.

	38 PL M427 Toronto PARTS 1 and 8; 66R7611; T/W a row for all those now and hereafter entitled thereto over, along and upon that PT of LT 38, PL M427 designated as PT 7, 66R7611; S/T a row at all times in common with all others entitled thereto over, along and upon PT 8, 66R7611; Toronto, City of Toronto	
884-886 St. Clair Avenue West, Toronto	10474-0026 (LT) PCL 38-6 SEC M427; PT LT 38 PL M427 Toronto; PT LT 39 PL M427 Toronto PARTS 2, 6 and 10, 66R7611; T/W a row for all those now and hereafter entitled thereto over, along and upon that PT of LT 38, PL M427 designated as PARTS 5, 7 and 8, 66R7611; S/T row at all times in common with others entitled thereto over along and upon the said PARTS 6 and 10, 66R7611; Toronto, City of Toronto	Misir
255 Westmount Avenue, Toronto	10475-0519 (LT) Lot 32, Plan 1765, East side of Westmount Avenue City of York Municipality of Metropolitan Toronto Metropolitan Toronto Registry Division (No. 64)	Misir
323 Lauder Avenue, Toronto	10475-0229 (LT) Part Lot 15, Plan 1559 Part Lot 1, Plan 1575 As in TB 523109 City of Toronto The Land Titles Division of the Toronto Registry Office No. 66	Misir
262 Winona Drive, Toronto	10473-0002 (LT) PCL 69-1, SEC M427 LT 69 W/S Ossington Av PL M427 North York T/W row over the SLY 3 Ft 9 Inches of LT 70, by depth of 60 Ft from the ST Line; S/T row over the NLY 3 Ft 9 Inches of said LT 69, by a depth of 60 Ft from the ST line. The said two	Misir Holdings Inc.

	strips of land to form together a driveway or passageway for the use in common of the owners and occupiers of the premises immediately adjoining thereto; Toronto, City of Toronto	
33 University Avenue, Suite 2203, Toronto	11932-0182 (LT)	Misir Holdings Inc.
	Unit 3, Level 22 Metropolitan Toronto Condominium Plan No. 932; PT LT 3 PL 699E; PT LTS 1 & 2 S/S Wellington St and PT LTS 4, 5, & 6 W/S York St PL 86; PT Back Rd closed by ES55295 & CT974508, PT Back Rd (not dedicated), PTS 1, 2, 4, 5, 6 & 7 66R1610, as in Schedule "A" of Declaration D224621; Toronto, City of Toronto	
33 University Avenue, Suite 2204, Toronto	11932-0309 (LT)	Misir Holdings Inc.
	Unit 25, Level B Metropolitan Toronto Condominium Plan No. 932; PT LT 3 PL 699E; PT LTS 1 & 2 S/S Wellington St and PT LTS 4, 5, & 6 W/S York St PL 86; PT Back Rd closed by ES55295 & CT974508, PT Back Rd (not dedicated), PTS 1, 2, 4, 5, 6 & 7 66R1610, as in Schedule "A" of Declaration D224621; Toronto, City of Toronto	
	11932-0183 (LT)	
	Unit 4, Level 22 Metropolitan Toronto Condominium Plan No. 932; PT LT 3 PL 699E; PT LTS 1 & 2 S/S Wellington St and PT LTS 4, 5, & 6 W/S York St PL 86; PT Back Rd closed by ES55295 & CT974508, PT Back Rd (not dedicated), PTS 1, 2, 4, 5, 6 & 7 66R1610, as in Schedule "A" of Declaration D224621; Toronto, City of Toronto	
	11932-0310 (LT)	
	Unit 265, Level B Metropolitan Toronto Condominium Plan No. 932; PT LT 3 PL 699E; PT LTS 1 & 2 S/S Wellington St and PT LTS 4, 5, & 6 W/S York St PL 86; PT Back Rd closed by	

	ES55295 & CT974508, PT Back Rd (not dedicated), PTS 1, 2, 4, 5, 6 & 7 66R1610, as in Schedule "A" of Declaration D224621; Toronto, City of Toronto	
984 Bay Street, Toronto	21415-0079 (LT)	984 Bay Street Inc.
	PT LT F, G PL 891 Toronto as in CA30416; City of Toronto	
2489 Bloor Street, West, Toronto	21382-0335 (LT)	Bloor West Investments Ltd.
	FIRSTLY: Parcel I-3, Section M-443, being part of Block I, Plan M-443, City of Toronto, Municipality of Metropolitan Toronto; and, SECONDLY: Parcel I-8, Section M-443, being Part of Block I, Plan M-443, City of Toronto, Municipality of Metropolitan Toronto; Being the Whole of the Said Parcels. Land Titles Division of Metropolitan Toronto(No. 66	
901-911 Jane Street, Toronto	10512-0031 (LT)	Janedal Plaza Inc.
	PT LT 38 CON 3 FTB TWP of York as in TB702773; Toronto (York), City of Toronto	
2045 Dufferin Street, Toronto	10455-0146 (LT)	Lashan Holdings Limited
	LT 9 PL 1540 TWP of York; LT 10 PL 1540 TWP of York; LT 11 PL 1540 TWP of York; LT 12 P1 1540 TWP of York; LT 13 PL 1540 TWP of York; LT 14 PL 1540 TWP of York S/T & T/W CY492804; Toronto (York), City of Toronto	
2053 Dufferin Street, Toronto	10455-0146 (LT)	Lashan Holdings Limited
	LT 9 PL 1540 TWP of York; LT 10 PL 1540 TWP of York; LT 11 PL 1540 TWP of York; LT 12 P1 1540 TWP of York; LT 13 PL 1540 TWP of York; LT 14 PL 1540 TWP of York S/T & T/W CY492804; Toronto (York), City of Toronto	

2009 Long Lake Road, Sudbury	73595-0174 (LT) PCL 39445 SEC SES; PT LT 6 CON 1 MCKIM PT 3 to 7 & 12 to 15 53R5036; PT LT 6 CON 1 MCKIM PT 5 53R13501; S/T PT 2 & 3 53R13501 as in LT717184; S/T LT25019, LT735739; Greater Sudbury 73595-0333 (LT) PCL 39000 SEC SES; PT LT 6 CON 1 MCKIM PT 9 to 11 53R5036; T/W a row over PT 1 & 2 53R5036; S/T LT25019; Greater Sudbury 73595-0102 (LT) PCL 8259 SEC SES; PT LT 6 Con 1 MCKIM except LT52588, LT53059, LT109847, PT 7 53R4520 & PT 4 53R13501; S/T LT25019; Greater Sudbury	Integrated Health Investments Corporation

End of Document

TAB 22

2013 ONSC 7520
Ontario Superior Court of Justice

Massa v. Sualim

2013 CarswellOnt 17330, 2013 ONSC 7520, 235 A.C.W.S. (3d) 795

Leon Massa, Plaintiff and Alex Sualim, Sandra Sualim, Sandra Oluwole-Aina, 2078749 Ontario Ltd., Bauhaus Home Builder Ltd. and Ozili Inc., Defendants

Stinson J.

Heard: December 5, 2013
Judgment: December 5, 2013
Docket: CV-13-494002

Counsel: Ruth Promislow, for Plaintiff
No one for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets
II.2.c.iii.C.1 Relevance of jurisdiction to which assets removed

Stinson J.:

1 This is a motion for a *Mareva* injunction and related relief, brought without notice to the defendants. I heard it in two stages, on December 4 and 5 2013. When plaintiff's counsel appeared before me on December 4 she had available only a slim affidavit from the plaintiff, by reason of perceived urgency in obtaining the relief sought. The matter was further complicated by the fact that the plaintiff resides in British Columbia and was not personally available here in Toronto. When I indicated to counsel that, in my view, the initial evidence was insufficient to warrant the granting of *Mareva* relief, she requested an opportunity to obtain a more detailed affidavit from the plaintiff. I granted that request and she returned

today with a further supplementary motion record containing detailed evidence from the plaintiff in support of his claim.

2 Read as a whole, the evidence presented on behalf of the plaintiff supports the conclusion that he has been the victim of a fairly sophisticated fraud. A similar scheme has been used to defraud at least 10 other victims, all in the United States. The total loss exceeds $13 million. The defendant Alex Sualim has been arrested and indicted for fraud in Arizona, where he currently remains in custody. The plaintiff has never met Mr. Sualim, but he alleges Mr. Sualim was the perpetrator of the fraud. All of their communications were via email and telephone conversations.

3 In general, the fraudulent scheme was as follows:

a) The fraudster or his associates would contact the victim through an unsolicited email that was purportedly being sent by a representative of a company. In the email, the victim would be offered an opportunity to serve as a distributor of the product — silicon germanium, a semiconductor product used in computer chips — that the company wished to purchase from a Chinese supplier.

b) If the victim responded favorably to the initial inquiry, the fraudster would next exchange further communications with the victim in an effort to build trust. The fraudster would not ask for any money during the initial communications — instead he would suggest that he intended to obtain a loan to fund the purchase of the product from China, and that the victim could serve as a distributor without any upfront investment. In addition, the fraudster would provide the victim with electronic copies of seemingly legitimate identification documents and passports to support his fictitious persona.

c) Once trust was built in this fashion, the fraudster would typically tell the victim that he had not been able to obtain the loan and that the transaction could not proceed unless some other source of funding was obtained. The fraudster would then ask the victim if he would be willing to split the upfront purchase price.

d) If the victim agreed to this proposal, the fraudster would provide wiring instructions that explained how the victim could remit his portion of the purchase price to the Chinese supplier. These wiring instructions typically called for the victim to wire the money to a foreign bank account.

e) After the victim would make an initial transfer into the foreign bank account, the fraudster would typically contact the victim to explain that, due to some unforeseen change in circumstances (e.g. a change in the Chinese supplier's minimum purchase requirement) the victim needed to wire more money to the foreign bank account before the transaction could be completed.

4 Having been lured to participate in the scheme through the foregoing steps, Mr. Massa advanced and lost $840,000. He now comes to court seeking *Mareva* and other relief against the defendants, who are Mr. Sualim and his spouse and several corporations controlled or associated with them.

5 As I have noted, Mr. Massa never met Mr. Sualim. The first question to determine, therefore, is whether the evidence supports the conclusion that Mr. Sualim was the perpetrator or one of the perpetrators of the fraud against Mr. Massa. In support of this conclusion, counsel relies on extensive material furnished by American law enforcement authorities, which was prepared in connection with the indictment obtained in Arizona as against Mr. Sualim. Having reviewed that material in detail, I find there are extensive similarities and overlaps between the fraud perpetrated against Mr. Massa and those that are the subject of the Arizona criminal proceeding. This supports the inference that they were carried out by the same person and thus the conclusion that Mr. Massa was victimized by the same fraudster involved in the Arizona cases.

6 The next question to answer is whether Mr. Sualim was the fraudster. In support of their conclusion that the fraudster was Mr. Sualim, the American law enforcement agencies examined emails and email addresses that were used in those frauds. There is an overlap between some of the email contact information in the Arizona cases and those in the present case. The US information also reveals a connection between Mr. Sualim and the underlying email addresses.

7 Based on the foregoing, I conclude that there is strong circumstantial evidence to support the conclusion that Mr. Sualim was the fraudster or otherwise complicit in the fraudulent activity of which Mr. Massa was a victim. I therefore conclude that, on the motion before me, the plaintiff has made out a strong prima facie case that he was defrauded by Mr. Sualim.

8 I should mention at this juncture that I was concerned that there may have been certain conduct by Mr. Massa that might have disentitled him to injunctive relief. The first was the possibility that Mr. Massa should have known that he was being asked to engage in a scheme by which his new business partner would be defrauding or taking secret commissions from the partner's employer. The supplementary affidavit provided by Mr. Massa explains that, based upon the telephone information provided by the fraudster, Mr. Massa took steps to satisfy himself that there was nothing improper about the intended course of dealings

9 Secondly, at a late stage in the transaction, Mr. Massa sought to have the Chinese supplier reduce the face price of the product being supplied, in order to avoid paying tax. He now admits that this was an impropriety on his part. Needless to say, the transaction was never concluded and thus there was no actual tax evasion.

10 Counsel submits, however, that this impropriety on the part of Mr. Massa is not such that he should be denied equitable relief. She relies on several authorities to support the proposition that "the iniquity must be done to the defendant himself" to amount to a basis for denying equitable relief. See *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at pages 699 - 70; *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc.*, [2005] O.J. No. 3566 (Ont. C.A.) and *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (Ont. S.C.J.). On the basis of the foregoing authorities, I conclude that the "clean hands" doctrine does not apply, and that I may consider the claim for an injunction on the merits

11 The evidence of the plaintiff does not implicate anyone other than Mr. Sualim in the actual fraudulent schemes. That said, the information obtained from FINTRAC regarding financial transactions among Mr. Sualim, his co-defendant spouse Sandra — who is named as a defendant in both her birth name and her married name — and the three corporate defendants suggests that there have been extensive transfers of funds among these various parties. As matters stand, there is evidence that would support the conclusion that at least some of the proceeds of the fraud perpetrated upon the plaintiff may have been shared among the various defendants. At this early stage in the proceedings the plaintiff has not had the opportunity to complete a forensic analysis of the defendants' financial dealings, which is not surprising. The evidence does support the conclusion, however, that there are grounds for believing that the defendants have assets in this jurisdiction.

12 The final prerequisite for granting *Mareva* relief is that the plaintiff must give some grounds for believing that there is a risk of the assets being removed or dissipated before the judgment or award is satisfied, or why a marina injunction is necessary to prevent a fraud on the court or the adversary: *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.), at 168 . In the present case, the defendant Sandra has recently disposed of at least one of the properties owned by her in Toronto. Based on the conduct of the defendant Alex Sualim, there is some basis to infer a sufficient risk of dissipation of assets that would render remote the possibility of future tracing of assets, and the resulting frustration of the enforcement of any judgment the plaintiff may ultimately obtain.

13 I therefore conclude that the plaintiff has made out a case for the relief sought. He has filed the required undertaking with the Court. On this basis, an order shall issue in the form of the draft submitted by counsel and vetted by me. I have signed the original order.

End of Document

TAB 23

2006 CarswellOnt 5787
Ontario Superior Court of Justice

Sabourin & Sun Group of Cos. v. Laiken

2006 CarswellOnt 5787, [2006] O.J. No. 3847, 151 A.C.W.S. (3d) 686

Sabourin and Sun Group of Companies (Plaintiff) and Judith Laiken (Defendant)

S.N. Lederman J.

Heard: September 14, 2006
Judgment: September 25, 2006
Docket: 00-CV-187887CM4

Counsel: Peter W.G. Carey, Konstantine J. Stavrakos for Plaintiff / Defendant by Counterclaim
Peter R. Jervis, Christine Snow for Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities; Insolvency

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.A Strong prima facie case

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.B Assets within jurisdiction

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets

II.2.c.iii.C.3 Miscellaneous
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.D Undertaking as to damages
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.E Full and frank disclosure
Securities
III Trading in securities
III.7 Miscellaneous

***S.N. Lederman J.*:**

1 This is a motion by Judith Laikin ("Laikin") for an order to continue the *Mareva* injunction granted *ex parte* by C. Campbell J. on May 4, 2006 whereby he ordered *inter alia* that:

a) A Certificate of Pending Litigation be issued and registered against the "Mary Lake" property; and

b) The Sabourin Group be enjoined from disposing of any of their assets, including the "Sea Ray" boat.

2 Laikin states that in response to advertisements in the newspapers in respect of facilitating off-shore investing in the British Virgin Islands, she contacted the Sabourin Group who represented to her that they were experts in investing off-shore, that their business was well established and that they track investments in its client's account through a modern on-line trading system. As a result, Laikin transferred approximately $885,000 into various bank accounts held by the Sabourin Group at the Bank of Montreal in Toronto for these purposes. Ultimately, these funds were lost.

3 Through admissions made on discovery by Sabourin, it has been shown that:

a) Sabourin has had no professional or other formal training in respect of securities, investments or other financial matters;

b) Though Sabourin was to place Laikin's funds into off-shore investment accounts, the fact is that the funds never left Canada. Rather, they were deposited into Sabourin's account at the Bank of Montreal in Toronto and were pooled with his other general funds;

c) The investment account statements which had been emailed to Laikin by Sabourin and his staff made no sense and Sabourin could not explain the inconsistencies in such statements during his examination for discovery;

d) The Sabourin Group did not have any offices in any of the locations in the Caribbean that they purported to have. All of the offices were fictional. Sabourin admitted that the companies were shells and had been purchased for a nominal fee.

e) Sabourin was unable to identify a single trading agreement that the Sabourin Group had with any dealer to trade securities;

f) There was no investment account in the Caribbean in Laikin's name.

4 In effect, Laikin has alleged that her monies were never placed in any off-shore accounts, that no trading has ever taken place and that she has never received a proper accounting for the use of her funds. She has alleged that the Sabourin Group has fraudulently misappropriated her monies.

5 No affidavit from the Sabourin Group has been filed to contest any of these allegations. Rather, they take the position that there had been a serious material non-disclosure to the Court when Laikin obtained the *ex parte* order. In particular, they allege that she did not disclose to the Court that in a Family Law application against her ex-common law husband, Godfrey Tanku Tatsanbong ("Tanku") she blamed her entire loss on Tanku and not on the Sabourin Group and has indicated that he was solely responsible for the loss of her money and not the Sabourin Group. They also allege that there was a failure to disclose to the Court various emails from Laikin to the Sabourin Group which indicated that she, in fact, had a high degree of sophistication and knowledge about trading securities and in particular, taking short positions in the market. Such evidence is consistent, the Sabourin Group submits, with the fact that their defence has been that from the beginning, Laikin lost all of her money in high risk trades on margin, taking short positions that relied upon their success on her and Tanku's gamble that the market would fall when, in fact, it did just the opposite. The Sabourin Group's position in essence, is that Laikin and/or her ex-common law husband, Tanku, proceeded to trade away all her money, mainly by adopting short positions on stocks in a rising market and, thus, were the authors of their own misfortune.

6 As to the issue of non-disclosure of Laikin's allegation that it was Tanku who was solely responsible for the losses, the Family Law Application materials were before Campbell J. and, indeed, paragraph 82 of the Factum filed in support of the *Mareva* injunction, reads as follows:

> During the course of those proceedings, Ms. Laikin had prepared affidavits on her own behalf which appeared to be contradictory to some of the statements that she had made in this action. In particular, some of the documents that were filed by Ms. Laikin in support of the Family Law Application stated that the losses that she had experienced with Sabourin and S & S Group were the result of Tanku's negligence and fraud. At the time that Ms. Laikin prepared those affidavits, she was confused about how the losses had occurred. She feared that Sabourin and Tanku may have somehow acted in cahoots in order to cheat her out of her money.
>
> Reference: Affidavit of Judith Laikin, sworn May 3, 2006, Motion Record of the Moving Party, Tab B, para. 119.
>
> Affidavit of J. Laikin, Exhibit "52" to the Affidavit of Judith Laikin, sworn May 3, 2006, Tab B52.

7 Accordingly, the position of the Sabourin Group that Laikin was holding Tanku fully responsible for the losses was appropriately disclosed when the *ex parte* order was obtained.

8 As to the alleged failure to put forth evidence in the form of the various emails which would indicate to the Court that Laikin had a certain level of knowledge with respect to trading in securities and in particular, short selling, it should be noted that the bases of the claim by Laikin are that there was never any trading account or trading in securities; that no off-shore investments were, in fact, made; that the trading offices in the British Virgin Islands were fictitious; and that the Sabourin Group took her money and co-mingled it with their own funds and misappropriated them for their own business and personal use. The issue in the case, therefore, is not whether Laikin, with the assistance of Tanku, had control of or managed the accounts and trades and all times gave direction with respect to the buying and selling of securities. Laikin's position is that there was never any trading in fact, and that the Sabourin Group simply stole her funds. That being so, the level of Laikin's knowledge in respect of trading in securities and whether she provided trading instructions become irrelevant.

9 In order to justify a *Mareva* injunction, the applicant must:

> a) establish a strong *prima facie* case;

b) make a full and frank disclosure of all matters in her knowledge which are material for the motions judge to know;

c) give some grounds for believing that the defendants have assets in the jurisdiction; and

d) give grounds for believing that there is a risk of the assets being removed before any judgment can be satisfied.

10 Laikin has clearly established a strong *prima facie* case in this proceeding, demonstrating that her funds were not invested in off-shore investments as represented, that no real trading took place, and she has received no proper accounting for the use of her funds.

11 I am satisfied that Laikin has made ample disclosure in the proceeding and has not left out anything material to the issues in question.

12 Laikin has demonstrated that there are certain specific assets in this jurisdiction, including the Mary Lake property and the Sea Ray speed boat.

13 The Sabourin Group is in the process of selling a company to another party in a transaction that has yet to close.

14 Although there has been delay in bringing this *Mareva* injunction, it was adequately explained on the basis that certain information only came to the attention of counsel in recent months and no affidavit material has been filed by the Respondent to show that the Sabourin Group would in any way be prejudiced by the fact that such a delay has taken place.

15 The fact that there were phantom trading offices off-shore in the name of the Sabourin Group, raises concern and a real risk that assets may be removed out of Ontario. Moreover, it is instructive that when prior certificates of pending litigation came off other properties, the properties were quickly disposed of.

16 Given the fact that Laikin is insolvent, it would be wrong to deny her a *Mareva* injunction to which she would otherwise be entitled on the grounds that her undertaking as to damages would be of little value. Accordingly, the necessity for an undertaking as to damages is dispensed with in this case.

17 The elements for obtaining a *Mareva* injunction have been satisfied and the order of Campbell J. should be continued until the trial, or until further order of this Court.

18 I am inclined to order that costs of the motion be reserved to the trial judge, but if counsel wish to assert a different position they may file written submissions within 30 days.

End of Document

TAB 24

2011 BCSC 1675
British Columbia Supreme Court

Taseko Mines Ltd. v. Phillips

2011 CarswellBC 3478, 2011 BCSC 1675, [2011] B.C.J. No. 2350, [2012] 3 C.N.L.R. 298, [2012] B.C.W.L.D. 1018, [2012] B.C.W.L.D. 1026, [2012] B.C.W.L.D. 1129, [2012] B.C.W.L.D. 1155, [2012] B.C.W.L.D. 1156, [2012] B.C.W.L.D. 1157, [2012] B.C.W.L.D. 1158, 212 A.C.W.S. (3d) 1025, 64 C.E.L.R. (3d) 84

Taseko Mines Limited (Plaintiff) and Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste, John Doe #1, John Doe #2 and John Doe #3 (Defendants)

Marilyn Baptiste, on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation (Petitioner) and Her Majesty the Queen in Right of the Province of British Columbia, the Chief Inspector of Mines, the District Manager Resource Operations, Cariboo-Chilcotin, and Taseko Mines Limited (Respondents)

Grauer J.

Heard: November 28, 2011 - December 1, 2011
Judgment: December 2, 2011
Docket: Vancouver S117685, 114556

Counsel: Joan Young, Melanie Harmer for Taseko Mines Limited
Jay Nelson, Dominique Nouvet, M. Boulton (A/S) for Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation
Erin Christie for Her Majesty the Queen in Right of the Province of British Columbia, Chief Inspector of Mines and the District Manager Resource Operations, Cariboo-Chilcotin

Subject: Civil Practice and Procedure; Public; Property; Natural Resources; Constitutional
Related Abridgment Classifications
Aboriginal law
II Reserves and real property
II.4 Rights and title
II.4.g Miscellaneous
Civil practice and procedure
XXIV Costs

XXIV.6 Effect of success of proceedings
XXIV.6.b Successful party deprived of costs
XXIV.6.b.ii Grounds
XXIV.6.b.ii.K Misconduct of parties
Natural resources
II Mines and minerals
II.4 Mining operations
II.4.e Miscellaneous
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.1 Strength of applicant's case
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.2 Irreparable harm
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.3 Balance of convenience
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.A Threshold test
II.2.b.ii.A.4 Miscellaneous

APPLICATION by mining company for injunction preventing First Nation from blocking its access to area for exploration project; APPLICATION by First Nation for injunction preventing mining company from continuing with exploration project until application for judicial review was determined.

***Grauer J.* (orally):**

Introduction

1 Taseko Mines Limited, the plaintiff in Vancouver Action No. S117685, and Marilyn Baptiste, a defendant in that action and petitioner in Victoria Action No. 114556, apply for competing interim injunctions, each restraining the other in relation to a program of exploration work in an area of the traditional territory of the Tsilhqot'in Nation.

2 For a period approaching 20 years, Taseko has pursued the development of a major open pit gold and copper mine in the Cariboo-Chilcotin area of British Columbia, known as the Prosperity Project. The resource is said to be one of Canada's largest known undeveloped gold and copper deposits. To this end, Taseko has acquired various mineral claims and a mining lease, all lawfully granted under the *Mineral Tenure Act*, R.S.B.C., 1996, c. 292.

3 The proposed Prosperity mine is potentially a billion-dollar project. Should it proceed, its impact on both the economy and the environment will be unquestionably substantial.

4 This proceeding is not about whether the project should or will proceed.

5 The location of the proposed mine is in an area over which the Tsilhqot'in Nation assert aboriginal title, and within which they claim aboriginal rights. In *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.), the appeal from which has been heard but not decided, the area is described as the "Eastern Trapline Territory". Mr. Justice Vickers concluded that the Tsilhqot'in had failed to prove aboriginal title to the Eastern Trapline Territory, but had established aboriginal rights throughout the area. Among that territory's distinguishing features are Fish Lake (Teztan Biny), Little Fish Lake (Y'anah Biny), and their surrounding area, the Nabas.

6 In its initial iteration, the Prosperity Project failed to satisfy a Review Panel established by the Federal Minister of the Environment. Among its perceived flaws were the required sacrifice of Fish Lake, Little Fish Lake and the Nabas.

7 The review process included public hearings in the Cariboo-Chilcotin area in the spring of 2010, in which the Tsilhqot'in Nation participated. The Panel's Report, described by some as "scathing", was issued on July 2, 2010. The Federal Government's response came on November 2, 2010:

> Taking into consideration the Report of the Panel and the implementation of any mitigation measures that the RAs consider appropriate, and in weighing the socio-economic benefits and potential significant adverse environmental effects, the

> Government of Canada has determined that the significant adverse environmental effects cannot be justified in the circumstances.
>
> The Government of Canada wishes to see resource projects developed, however, it must balance the economic benefits of projects with responsible resource development. The Government is not opposed to the mining of the Prosperity ore body, however, it cannot justify providing the authorizations that would enable the Project to be carried out as proposed. The Government notes that this decision does not preclude the proponent from submitting a project proposal that includes addressing the factors considered by the panel.

8 Taseko Mines did just that. The rise in the prices for gold and copper, and the economic outlook, allowed Taseko to develop a viable proposal that eliminated the most significant adverse environmental effects of the original project; in particular, the destruction of Fish Lake. This redesigned proposal, named the "New Prosperity Project", would add $300 million to the projected development cost, but this was justified by the increase in commodity prices. Accordingly, in August of 2011, Taseko submitted a revised comprehensive project description for the New Prosperity Project to the Canadian Environmental Assessment Agency.

9 Since then, Taseko has obtained two provincial permits that allow it to carry out a program of exploration designed principally to obtain geological information of relevance to the engineering of the new project. Taseko expects that this information will assist in the environmental assessment of the New Prosperity Project, particularly in relation to the environmental impact of the changes that were made to preserve Fish Lake. These two permits were a Notice of Work (NOW) approved by the Senior Inspector of Mines, and an Occupant Licence to Cut and Remove Timber (OLC) approved by the District Manager Resource Operations, Cariboo-Chilcotin.

10 Taseko's attempts to embark on the program covered by these permits were stymied by the refusal of Marilyn Baptiste to recognize their authority to proceed into what she described as Tsilhqot'in territory. In a blockade that appeared to me to be more moral than physical, but was nonetheless effective, she declined to let Taseko's convoy of trucks and equipment pass. To its credit, Taseko turned its convoy around and left, avoiding any action that might escalate the confrontation.

11 Marilyn Baptiste is the elected Chief of the Xeni Gwet'in, one of the six bands that constitute the Tsilhqot'in Nation. Within the Tsilhqot'in Nation, the Xeni Gwet'in have a particular responsibility for the stewardship of that portion of Tsilhqot'in traditional territory that includes Fish Lake, Little Fish Lake and the Nabas.

12 In the circumstances, Taseko applies for an injunction preventing Chief Baptiste and any others with notice of the order from obstructing, impeding or restricting its access to the area where its program of exploration is to be carried out.

13 The Xeni Gwet'in and the Tsilhqot'in, meanwhile, through Chief Baptiste, had filed a petition seeking judicial review of the decisions to issue the permits required by Taseko to carry out this program. I will refer to them collectively as the petitioners. They seek an injunction preventing Taseko from proceeding with its exploration program until they have had an opportunity to have their application for judicial review heard and determined.

14 When the Taseko injunction application came before me on November 18, 2011, I adjourned it to this week, and ordered that it be heard together with the petitioners' injunction application. That has now taken place.

15 For the reasons that follow, I have decided that the petitioners are entitled to the interim injunction they seek, subject to terms to be discussed. In these circumstances, I can find no basis to support the granting of the injunctive relief sought by Taseko Mines.

Background

16 The bands of the Tsilhqot'in Nation vigorously opposed the original Prosperity Project, and put a great deal of blood, sweat and tears into educating the Federal Review Panel about their concerns, and how the project would impact them. This was an exhausting exercise, and they were dismayed by the project's resurrection as the New Prosperity mine. From their perspective, the revised project did not adequately address the factors considered by the Federal Review Panel, but continued to represent significant adverse environmental effects that remained unjustifiable.

17 In the circumstances, the Tsilhqot'in National Government, through Chief Baptiste and others, entered into a process of consultation with the Federal Government in the hope of persuading it to reject the New Prosperity Project without the need for holding another environmental assessment with all the expense and effort that that would entail. It was their position that the revised proposal was based on an alternate mine plan that the previous Federal Review Panel had already considered and rejected.

18 On August 30, 2011, the Canadian Environmental Assessment Agency wrote to the Tsilhqot'in National Government to advise that it had accepted the Project Description for the New Prosperity Gold-Copper Mine Project Proposal. The agency indicated that it had 90 days from August 9, when the proposal was received, within which to determine whether to commence a comprehensive study of the proposed project. That determination was to be

made by November 7, 2011. The Agency then discussed meeting with the Tsilhqot'in National Government for information gathering and further discussion of their views.

19 The parties appear to have had a materially different appreciation of the significance of this process. Taseko, it seems, assumed that all that remained to be determined was by which route the Agency's environmental assessment would proceed. The Tsilhqot'in National Government, on the other hand, understood that the agency would be determining whether to proceed with an environmental assessment at all, and if so, by what route. In short, unlike Taseko, the Tsilhqot'in understood that the possibility remained that the project would be rejected at that point, without further assessment.

20 I accept the parties' assertions as to their respective states of mind. The affidavit evidence before me supports the conclusion that the understanding of the Tsilhqot'in was likely the correct one.

21 In anticipation of this process, Taseko wrote to the BC Ministry of Energy and Mines on May 11, 2011, stating as follows:

> Please find enclosed a Notice of Work (NOW) application for Taseko's proposed 2011 exploration drilling and test pitting for the Prosperity Gold-Copper Project.
>
> In 2011, we intend to conduct exploration activities to provide information supporting the detailed engineering of the project. The program includes:
>
> • Approximately 59 test pits to inform detailed engineering of new tailings storage facility (TSF) and ore stockpile foundations;
>
> • 10 geophysical lines along the proposed main, west and south embankments of the TSF;
>
> • Approximately 8 geotechnical drill holes of approximately 50 to 75 m in depth to inform detailed engineering of the new TSF embankments;
>
> • Approximately 10 diamond drill holes of up to roughly 250 m in depth within the pit area to collect samples for confirmatory metallurgical work to be performed this winter; and,
>
> • Approximately 23.5 km of exploration trail required to access exploration sites.

22 The letter went on to indicate that the total disturbance of the 2011 program was expected to be 13.1 ha, including 12 ha due to clearing timber and brush for exploration trails and geophysical lines. The timber volume was estimated at 1,048 m^3, most of which was attributed to trail clearing. Reclamation of the trails would be accomplished by pulling

wood waste back over them to discourage recreational and ATV use, and breaks in the debris would be provided to allow for cattle and horse travel. It was expected that the work would begin August 1, 2011 and would require three months to complete.

23 On June 23, 2011, Ms. Bev Wassenaar, Land and Resource Specialist, Resource Authorizations, First Nation Consultation Coordination, Ministry of Forests, Lands and Natural Resource Operations, wrote to Chief Baptiste to advise of the notice of work application, attaching a copy. Ms. Wassenaar acknowledged that the proposed work was within an area of proven aboriginal rights, and advised that she would be the consultation contact for the NOW application, and the related occupant licence to cut. She went on to say:

> To support the consultation process for this distinct and separate exploration phase of the overall revised Project proposal, the province has begun to conduct an initial analysis of the potential impacts of this exploration on known Aboriginal rights and Aboriginal Interests of the Tsilhqot'in Nation in the area of the proposed work. In doing that the province has also proposed some preliminary mitigations in relation to the identified potential impacts from exploration.... The attached initial assessment of potential impacts to known Aboriginal Rights and Interests relates only to the specific activities presented in the NOW application and its related Occupant License to Cut and outlines draft mitigation options and proposed permit conditions for you to consider. Your contribution to the development and refinement of this draft table is being requested.

24 Ms. Wassenaar went on to request comments in the next 30 days, and indicated a desire to set up a meeting with appropriate representatives from the province, Xeni Gwet'in and Taseko.

25 A response to this letter came from counsel representing the petitioners addressed to the Minister of Forests, Lands and Natural Resource Operations and copied to Ms. Wassenaar. This letter outlined their opposition to the project as a whole, to the notice of work, and to any other steps being taken to further the development of the mine in an area of "profound cultural importance for the Tsilhqot'in people".

26 The letter also raised particular objections to proceeding with the consideration of the notice of work at that time. This was said to be premature given that the Federal Government had yet to decide whether to proceed further in the regulatory process. Consequently, it was suggested,

- the NOW's extensive drilling and roadwork with its impact upon Tsilhqot'in established rights, culture and traditional use, should be avoided pending that decision;

• the Tsilhqot'in ought not to be put to the further effort and expense of dealing with the application until it was decided that the project would proceed to further stages of review; and

• the Tsilhqot'in were already involved in a federal consultation process, and had neither the manpower nor the economic resources to deal with a provincial consultation process that may prove to be unnecessary.

27 In this letter, and the exchanges of correspondence that succeeded it, three significant areas of disagreement emerged. The first was the issue of prematurity as just discussed. Ms. Wassenaar's response was that the relevant decision-makers were by statute required to consider applications such as this and to make decisions.

28 The second was the assessment of both the required degree of consultation and the potential impact of the proposed NOW activities on proven aboriginal rights. Ms. Wassenaar assessed the former at the middle range, and the latter as low. The Tsilhqot'in position was that they were entitled to a deep level of consultation in the circumstances, and that the impact upon their aboriginal rights was high.

29 This dispute arose in part from the third area: Ms. Wassenaar limited her assessment to the specific activities presented in the NOW and the OLC, contrary to the Tsilhqot'in position that the assessment should take into account the cumulative effect of this exploration program on top of previous programs, together with the potential impact of the full mining operation towards which this program was a step. Both positions find some support in the case law.

30 On September 22, 2011, Ms. Wassenaar wrote to the Tsilhqot'in National Government:

> As stated, Statutory Decision-Makers are required to consider all relevant information provided to them including points you made requesting deferral of the NOW decision until after the CEAA (Canadian Environmental Assessment Agency) decision. In addition to the timing of the CEAA decision, the decision-maker will also need to balance factors such as the restrictive timing window Taseko Mines Limited (TML) will have with regard to their ability to be able to conduct exploration activity in the fall of 2011. As I indicated previously, my summary and recommendations on this will be provided to the decision makers September 29, 2011. A decision by each of the Statutory Decision-Makers will follow. The decision-makers can choose to approve or refuse to issue the authorizations based in part on the information included in my report. If the Decision-Maker concludes that further consultation or information is needed prior to making a decision, then these further steps would occur.

31 Ms. Wassenaar went on to reiterate an offer to meet, and advised that any additional comments received prior to September 29, 2011, would be reflected in her recommendations to the decision-makers.

32 At 5:43 PM on September 29, 2011, Mr. J. P. Laplante, Mining, Oil and Gas Manager for the Tsilhqot'in National Government, sent an e-mail in response to Ms. Wassenaar's letter and a subsequent voicemail requesting a meeting. The e-mail reiterated its opposition to "the continued fragmentation and impacts to this sensitive area from the proposed exploration program", and confirmed the Tsilhqot'in's interest in meeting with the statutory decision-makers prior to any permits being issued. The position was restated that no permits should be issued until meaningful consultation and accommodation occurs, including a meeting with the Minister, and responses to various requests that were previously made.

33 On September 29, 2011, the Inspector of Mines issued a *Mines Act*, R.S.B.C. 1996, c. 293, permit authorizing the activities detailed in the notice of work. The Tsilhqot'in were advised of this on October 4, 2011.

34 On October 7, 2011, Chief Baptiste and other representatives of the Tsilhqot'in National Government and its bands met with Mike Pedersen, the Ministry of Forests decision-maker with respect to the Occupant Licence to Cut Timber. Mr. Pedersen had not yet rendered his decision. Mr. Pedersen had not reviewed the relevant documentation, in order to keep an open mind. As a result, he was unable to answer questions concerning what support there was for the need to do some or all of the work at that time. He noted that his responsibility was limited to the cutting permit; the justification for the trails would be dealt with through the Ministry of Mines.

35 The Occupant Licence to Cut Timber was approved and issued on October 12, 2011.

36 On October 13, 2011, the Tsilhqot'in National Government wrote to Taseko concerning the proposed 2011 exploration program and the approval of the NOW application, stating:

> TNG has still not received any rationale for the decision. At this stage, TNG considers the authorization to be in breach of the Crown's duties of consultation, and an unjustified infringement of its aboriginal rights, and accordingly unconstitutional and unlawful. We advise you not commence any activities on the basis of such an authorization. We further advise that any reliance placed by [Taseko] on such an authorization is at the company's risk, as TNG is presently reviewing its options for response, including legal challenge.

37 On November 7, 2011, the Canadian Environmental Assessment Agency issued its decision that the New Prosperity Project would be referred to a Review Panel for assessment. The project accordingly remained alive.

38 The Ministry of Energy, Mines and Petroleum Resources' reasons for its September 29 decision approving the exploration program (the rationale referred to in the Tsilhqot'in letter of October 13) were set out in a letter dated October 10, 2011. On the evidence, however, that letter was signed on November 4, mailed on November 7, and reviewed at the Tsilhqot'in office following the long weekend on November 14, 2011, after the events on the ground that led to Taseko's application had begun to unfold.

39 In the meantime, the petition for judicial review had been filed on November 10, 2011, and the petitioners' application for an interim injunction was filed on November 14, the same date as the filing of Taseko's Notice of Civil Claim.

Discussion

1. The Petitioners' Application

40 I propose to assess the petitioners' application for an injunction first. This is because if they are entitled to the relief they seek, being an order restraining Taseko from proceeding with the program covered by the permits at issue in the application for judicial review, then the basis for Taseko's application arguably disappears. Conversely, if they are not entitled to injunctive relief, then Taseko's application could be considered in a more discrete context.

a. The Test

41 In British Columbia, the test for interlocutory injunctions is the two-part test established in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), at 345, aff'd [1991] 1 S.C.R. 62 (S.C.C.), and described in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), at 101:

> The two-pronged test is this: "first, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

See also *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 (B.C. C.A.) and *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676 (B.C. S.C.).

42 The threshold for the first part, whether there is a fair question to be tried, is relatively low and does not require the applicant to prove a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 49.

43 Weighing the balance of convenience as required by the second part will, of course, include a consideration of irreparable harm, and the question of who will suffer the greater harm from the granting or refusal of the interlocutory injunction pending a determination on the merits: *RJR-MacDonald Inc.* at para. 62.

b. Is there a fair question to be tried?

44 The question to be tried is whether, in its conduct of the process that led to granting the NOW and OLC approvals, the Crown breached its duties of consultation owed to the Xeni Gwet'in and Tsilhqot'in Nation.

45 That such duties were owed is beyond doubt. That the Crown in fact engaged in a process of consultation and accommodation is also beyond doubt. The question is whether it did so sufficiently in the circumstances.

46 The petitioners point out that this is a case in which both the entitlement to aboriginal rights and the importance of the lands in question to the Xeni Gwet'in and Tsilhqot'in Nation have been established and recognized, through both the *Tsilhqot'in Nation* decision and the previous environmental assessment process. They argue that, in all of the circumstances, the scope of the duty required here was deep consultation, as discussed in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.). They assert further that the Crown fell short of its consultation obligations in a number of ways including: rushing to approval without any need to do so and imposing arbitrary deadlines; limiting its consideration of potential impacts to the 2011 program in isolation from the cumulative impact of years of exploration work, and the future impact of a full mining operation; failing to consider cultural impacts including impact on the exercise of aboriginal rights, as opposed to the environment alone; carrying out its perceived duties of consultation on the basis of an erroneous assessment of the scope of those duties; failure to provide necessary information; and failure to provide timely notice of its reasons.

47 The Crown and Taseko submit that even though the threshold for this test is low, the petitioners fail to cross it. They argue that the Crown was correct to focus on the effect of the work to be performed in this particular program, relying on *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.). They contend that given the limited nature of this work, the required scope of consultation fell at the lower end of the *Haida* spectrum. They assert that the permits, having validly issued, must be assumed lawful until proven otherwise, relying on *Moulton Contracting Ltd. v.*

British Columbia, 2011 BCCA 311, 20 B.C.L.R. (5th) 35 (B.C. C.A.). They maintain that the petitioners could have started their challenge much sooner, and, most importantly, failed in their own obligation to participate in the consultation process in a meaningful way. Instead, they held fast to their opposition to anything that might advance the mine, and waited until Taseko had vested rights before raising their challenge.

48 I am satisfied that the petitioners have established that there is a fair question to be tried. I am unable to conclude on the evidence before me (which was not the entire consultation record) that the Xeni Gwet'in and Tsilhqot'in Nation failed in their own consultation obligations, particularly given their limited resources and all with which they were having to contend. Moreover, this is not the place to determine whether the Crown's focus on the work to be performed was appropriate, as suggested in *Rio Tinto*, or whether the circumstances are such that *Rio Tinto* should be distinguished, as our Court of Appeal concluded was the case in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (B.C. C.A.). Questions such as the appropriate focus, and the scope of consultation required, must be determined at the hearing of the petition for judicial review. For my part, I have no difficulty in concluding that the petitioners have established a serious case to be tried. The first part of the test, then, has been met.

c. Does the balance of convenience favour an injunction?

49 Taseko and the Crown argue that the balance of convenience strongly favours the denial of the petitioners' application for injunctive relief, and, it follows, the granting of an injunction to Taseko.

50 They point to a number of factors. These include the following submissions:

a) the status quo favours Taseko: it is the holder of permits which must be presumed valid until proven otherwise, and therefore is entitled to go about its lawful business;

b) preventing Taseko from going about its lawful business of itself constitutes irreparable harm;

c) delaying the process of gathering information for the environmental assessment constitutes irreparable harm to Taseko; time is an asset, and the redesign of the project, which would involve an additional expenditure of $300 million, is based on time-sensitive conditions;

d) even if the petitioners can successfully establish that the Crown had breached its duties of consultation, it does not follow that the permits would be quashed.

e) Taseko continues to incur ongoing expense as a result of the delay, and has lost the availability of expertise it had lined up but has been obliged to let go because of this proceeding;

f) there is no prospect of recovering any losses from the Xeni Gwet'in and Tsilhqot'in Nation, thereby once again giving rise to irreparable harm;

g) the petitioners have given no undertaking in damages, disentitling them to an injunction in the circumstances, or at least constituting a significant factor in weighing the balance of convenience;

h) the potential loss of the procedural right of consultation at the appropriate level that might flow from the failure to grant an injunction to the Xeni Gwet'in and Tsilhqot'in Nation does not in law constitute irreparable harm. That harm must arise in relation to their substantive rights;

i) the Xeni Gwet'in and Tsilhqot'in Nation have been unable to demonstrate satisfactorily any harm to their substantive rights (that is, their aboriginal rights) from this particular scope of work, and the ultimate development of the mine itself remains far too speculative to be taken into account;

j) the actual harm flowing from the permitted program is minimal, consisting of small drill holes and shallow test pits that will be refilled and recovered, the cutting of timber that is largely pine beetle kill, and the clearing of trails that will be subject to reclamation, all in an area that is no longer pristine, having been subjected to various mining related activities in the past;

k) it is in the public interest that Taseko have available to it all of the best information to submit to the environmental assessment process; and

l) having illegally prevented Taseko from exercising its lawful rights, the petitioners do not come to court with the clean hands required of a party seeking the equitable remedy of injunctive relief, and this should at least be taken into account in assessing the balance of convenience.

51 I do not propose to deal with each of these points individually. Rather, I will endeavour to explain as best I can why, in my view, the balance of convenience favours the petitioners. I turn first to the question of delay.

52 I think it clear on the evidence that Taseko indeed pursued its permits with dispatch. It began the application process before it even submitted the New Prosperity Project to

the Canadian Environmental Assessment Agency, initially proposing to carry out the work between the beginning of August and the end of October, 2011.

53 That target could not be achieved. The "timing window" referred to by Ms. Wassenaar in her letter of September 22, 2011, evaporated for reasons that had little to do with the petitioners, who remained mystified as to why there could not be a further delay at least to determine from the environmental assessment agency's pending decision whether there was any point to the exercise. Taseko never took the position that it wanted to proceed with the program regardless of whether the project would be accepted for environmental assessment. Yet no reason was ever given by either Taseko or the Crown for proceeding with the timetable the Crown imposed, other than the fact of Taseko's application

54 Taseko originally took the position that the Federal Government established a 12-month window for the environmental assessment process so that any delay irreparably harmed its ability to fulfill its obligations within that mandated time. On the evidence, however, this position proved to be incorrect; the 12-month period does not include the time it would take Taseko to respond to information requests, or the time that it would take Taseko to prepare and submit its environmental impact studies.

55 Taseko then took the position that time is still an asset, and as it is in the business of developing mines, delay in this process constitutes irreparable harm. Yet Taseko has pointed to its efforts over 20 years to bring the Prosperity Project to fruition. One wonders how irreparable a few more months would be? Its new project is based upon long-term forecasts, not short-term market fluctuations. That does not mean that delay is not harmful, and I accept that delay is contrary to Taseko's interests. What does follow is that the delay weighs less heavily in the balance.

56 I next turn to the question of what harm alleged by the petitioners is relevant. Taseko and the Crown rely on *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044 (B.C. S.C.), for the proposition that "the loss of the constitutional right ... to be consulted does not itself amount to irreparable harm" (para.30). Mr. Justice Willcock went on, however, to reflect at paragraph 34 that "it ought not to be said that irreparable harm arises in every case where there is a failure to consult". What he makes clear in paragraph 32 is that while a failure to consult need not without more signify irreparable harm, it nevertheless remains to be weighed in determining the balance of convenience.

57 In my view, it follows from that case and many others that in weighing the balance of convenience, it is proper to take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot. Granting the injunction, on the other hand, will not deprive Taseko of the opportunity to obtain the geological and

engineering information it requires, except to the extent that their proposed program is properly curtailed by the process of appropriate consultation. If the petitioners are ultimately unsuccessful, and the permits upheld, then Taseko will be behind by a few months, but in the overall scheme of its billion-dollar project, I consider that to be a real but relatively minor inconvenience.

58 Like Dillon J. in the *Canada Forest Products* case at para. 75, I consider the words of MacPherson J.A. in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (Ont. C.A.), to be apropos the issue we are considering here:

> [46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
>
> . . .
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101.

59 This leads me to the public interest aspect of the balance of convenience. I fully accept Taseko's submission that it is in the public interest for Taseko to obtain the best available information for the purpose of informing the environmental assessment process. I do not, however, see that interest as being significantly at risk should the petitioners obtain their injunction, for the reasons just discussed.

60 On the other hand, it is also very much in the public interest to ensure that, in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.

61 I observe that the importance of that interest in this case is magnified by the reality that the petitioners and Taseko will be involved for the foreseeable future in an ongoing relationship with the Crown in the middle. In these circumstances, it seems to me that the public interest in ensuring that the process of consultation and accommodation is set on a proper footing is particularly high.

62 I turn next to the question of actual damage. Beside the fact of delay, Taseko points to the expense to which it has been put in marshalling its contractors and equipment only to have to release them all, without any assurance of ongoing availability, when its access to the work area was denied. We are speaking of thousands, and perhaps tens of thousands of dollars, and I accept that there is little chance of recovering such losses from the petitioners should the petition for judicial review ultimately fail. I further accept that this constitutes irreparable harm. At the same time, it must be viewed in the context of the hundreds of millions of dollars that Taseko is prepared to spend on this project, and by my comments above as to the cost of doing business. Moreover, there is no evidence here of widespread unemployment or damage to the community that would result from the injunction as there was in cases such as *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 392 (B.C. C.A.).

63 Turning to the potential effect of the program on the aboriginal rights of the petitioners, I bear in mind that the result of a successful challenge by the petitioners is on balance unlikely to eliminate the work altogether, though it may reduce it or effect an improved program of mitigation, or both.

64 Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:

> [61] ...The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

65 It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

66 The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.

67 In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the *status quo*.

68 Next, I consider the point that the petitioners are unable to offer any undertaking as to damages. They request relief from the requirement of Rule 10-4(5) of the *Supreme Court Civil Rules*, which provides:

> (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

69 That relief is to be provided only under special circumstances, which circumstances include the strength of the respective cases and the balance of convenience: *Delta (Municipality) v. Nationwide Auctions Inc.* (1979), 100 D.L.R. (3d) 272, [1979] 4 W.W.R. 49 (B.C. S.C.). There is no general exemption to the obligation for aboriginal litigants asserting aboriginal rights and title: *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (B.C. S.C.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 345 (B.C. S.C.).

70 I conclude that the circumstances of this case justify an order relieving the petitioners of the obligation to give an undertaking as to damages. Those circumstances are: my assessment of the balance of convenience as outlined above; the importance of ensuring that matters proceed on an appropriate basis between these parties for the foreseeable future; and the relative economic strength of the parties and the relative harm each is likely to suffer. I also take into account the petitioners' letter to Taseko of October 13, 2011, in which they notified Taseko of their position, and advised Taseko not commence any activities under the permits while the Tsilhqot'in National Government considered its options for response.

71 Finally, I turn to the question of whether the conduct of Chief Baptiste and others in effectively blocking Taseko from exercising its rights under the permits in question should disentitle the petitioners from injunctive relief, or otherwise weigh into the balance of convenience.

72 The conduct in question is not irrelevant, but on the state of the evidence, I question whether it is appropriate to conclude that the Xeni Gwet'in and the Tsilhqot'in Nation have

come to court with unclean hands because of the unlawful action of Chief Baptiste and those who assisted her. In my view, this conduct is more properly to be taken into account in considering Taseko's application, which I do below.

73 Taking all these matters into consideration, I conclude that petitioners will suffer greater harm from the refusal of the injunction then will Taseko from the granting of it. Accordingly, the balance of convenience weighs in favour of granting the injunction requested by the petitioners.

d. Conclusion

74 The petitioners have satisfied the test for an interim injunction, and the order will go subject to terms that I will discuss with counsel. The costs of the petitioners' application for an interim injunction will be at the discretion of the judge who hears the judicial review application.

2. Taseko's Application

75 Given that Taseko is to be enjoined, for the time being, from proceeding with the exploration program that is covered by the two permits that are at issue, I am unable to see any need for injunctive relief for Taseko.

76 Taseko submitted that it has other reasons for going into the area in question in the ordinary course of its business, and therefore should be protected from any further interference. Taseko has been exercising its rights under its permits, claims and lease over many years. Never before has it encountered difficulty of the sort it encountered here. The evidence does not establish any risk that Taseko will again be impeded in the circumstances that now exist. I therefore see no basis to support the granting of injunctive relief to Taseko at this time. Taseko will of course have leave to renew its application should events justify it doing so.

77 I am also mindful of the fact that Taseko has acted lawfully throughout and ought not to have been put in a position where it had to seek the injunctive relief set out in its application. In the circumstances, because of the unlawful conduct of Chief Baptiste and the other defendants to Taseko's action, I exercise my discretion in relation to costs to award Taseko the costs of its application payable forthwith in any event of the cause of either proceeding. The hearing of these applications took 3 $^{1}/_{2}$ days. I would attribute 1 $^{1}/_{2}$ days to Taseko's application, and the other 2 days to the petitioners' application.

3. Terms

78 I will now hear from counsel as to appropriate terms for the interim injunction awarded to the petitioners.

[DISCUSSION WITH COUNSEL]

79 The terms the order in Victoria Action No. 114556 will be these:

- Taseko Mines Limited and its agents, employees and contractors, are hereby enjoined from undertaking any of the activities authorized by the permit granted by the Inspector of Mines on September 29, 2011, pursuant to Taseko's Notice of Work application, and/or the Occupant Licence to Cut permit granted on October 12, 2011;

- This order will remain in effect for 90 days from the date hereof unless extended upon application by the petitioners upon notice to the respondents, and in any event for no longer than is required for the petitioners' application for judicial review to be heard and determined;

- Upon any application to extend the term of this order beyond 90 days, the petitioners will be required to establish that they are proceeding with the petition in a timely manner and in good faith, but will not otherwise have to re-establish their entitlement to an injunction as outlined in these reasons;

- The Victoria Registry of this Court is directed to schedule the hearing of this petition to take place within 90 days or as soon thereafter as is practicable.

80 Finally, as discussed, the parties are encouraged to re-engage in consultation immediately with a view to resolving the differences and competing interests that have been so capably articulated over the last week.

Order accordingly.

TAB 25

2006 CarswellOnt 1887
Ontario Superior Court of Justice

Benjamin v. Toronto Dominion Bank

2006 CarswellOnt 1887, [2006] O.J. No. 1253, [2006] O.T.C. 310, 146 A.C.W.S. (3d) 1061, 23 E.T.R. (3d) 149, 80 O.R. (3d) 424

Sheldon Benjamin (Plaintiff) and The Toronto-Dominion Bank (Defendant)

Perell J.

Heard: March 30, 2006
Judgment: April 3, 2006
Docket: 06-CV-307565PD3

Counsel: Martin Sclisizzi, Elissa Goodman for Plaintiff
Thomas N.T. Sutton for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.d Mandatory injunctions
II.2.d.ii Threshold test
II.2.d.ii.A Strength of applicant's case

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.d Mandatory injunctions
II.2.d.ii Threshold test
II.2.d.ii.B Irreparable harm

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.d Mandatory injunctions
II.2.d.ii Threshold test
II.2.d.ii.C Balance of convenience

Remedies
II Injunctions
II.3 Procedure on application
II.3.f Undertaking regarding damages
II.3.f.vi Miscellaneous

APPLICATION by plaintiff for interlocutory mandatory injunction requiring defendant bank to release funds from his account.

***Perell J.*:**

Introduction

1 The plaintiff, Sheldon Benjamin, who is a lawyer, moves for an interlocutory mandatory injunction to require the defendant, The Toronto Dominion Bank, to release $190,000 being held by the Bank at its branch at 312 Sheppard Avenue East, Toronto.

2 The money is being held — or "frozen" as the parties would have it — in the trust account that the Bank provides for Mr. Benjamin's law practice.

3 The $190,000 being held by the Bank does not belong to Mr. Benjamin. The money belongs to Mr. Benjamin's client, Mr. Acheampong, who is a purchaser that requires it to close a real estate transaction.

4 The Bank, however, refuses to release Mr. Acheampong's money. The Bank relies on the banking agreement it has with Mr. Benjamin, "the TD Canada Trust Business Banking and Services Agreement." The Bank says that under that agreement, if a credit to Mr. Benjamin's trust account is reversed by reason of an unpaid instrument having been credited to the account, then the Bank may freeze or claim a subsequent deposit to the account.

5 In particular, the Bank submits that pursuant to its banking agreement with Mr. Benjamin, it may reverse a $190,000 credit to Mr. Benjamin's trust account that was based on two uncertified cheques drawn on the account of a Mr. Moon and it may freeze the money deposited from two cheques drawn by Mr. Acheampong. The Bank says it may do all this because it has now discovered that the Moon cheques were forged.

6 For the reasons set out below, it is my conclusion that Mr. Benjamin, who — like the Bank — was not aware that the Moon cheques he was depositing were forgeries, has a strong case that the Bank cannot rely on its banking agreement to claim the monies that it knows do not belong to Mr. Benjamin. The Bank cannot force Mr. Benjamin to suffer the loss caused by the forger.

7 It is further my conclusion that Mr. Benjamin will suffer irreparable harm if the relief he seeks is not granted and that the balance of convenience favours granting this relief. Finally, it is my conclusion that Mr. Benjamin has satisfied the requirement of giving an undertaking as to damages. Based on these conclusions, Mr. Benjamin is entitled to the order he seeks, and I grant his motion.

8 To explain my conclusions, I will set out the factual background and I will consider the law that governs the granting of an interlocutory mandatory injunction and apply it to the circumstances of the immediate case. I will also discuss several issues of law associated with negotiable instruments, the *Bills of Exchange Act*, R.S.C. 1985, C. B-4, the interpretation of the banking agreement, and briefly the law of trusts. During the discussion, I will address the arguments of both parties.

Factual Background

9 Mr. Benjamin, who was called to the bar in September 2004, began to practice law in August 2005, when he opened his office on Sheppard Avenue East to practice as a sole practitioner focusing on residential and commercial real estate.

10 Mr. Benjamin does his banking with the defendant Bank, primarily at its Sheppard Avenue East branch and he has five accounts, including the trust account that is relevant to the matter before the court.

11 The trust account (and Mr. Benjamin's other accounts) have a "no hold status". This means that Mr. Benjamin may withdraw funds from the accounts before deposits have been processed and cleared.

12 The Bank submits that no hold status is a provisional credit, in effect, a loan that may yield an overdraft if the credit is subsequently reversed, which is what it submits happened in the circumstances summarized above and described in more detail below.

13 The Bank relies on section 7(b) of the TD Canada Trust Business Banking and Services Agreement. It is the crucial provision, and I have underlined the most critical part. Section 7(b) states:

> [The Bank] may charge any of your accounts, even if that creates an overdraft, with the amount of the following:
>
> (b) any Instrument cashed or negotiated by us for you to any of your accounts for which payment is not received by us [the Bank] or which is returned to us [the Bank] by reason of a forged, unauthorized or missing endorsement, plus any expenses incurred by us

in that connection. You agree that the charging of any unpaid Instrument will not be considered to be payment of it and that our rights against all parties liable are preserved;

14 On Friday, February 3, 2006, Mr. Benjamin attended at the Sheppard branch of the Bank to make a deposit into his trust account of two uncertified cheques in the amounts of $102,000.00 and $88,000.000. The cheques had been drawn on the account of on one Jong Yeol Moon, a customer at another branch of the Bank, the Yonge and Finch branch.

15 Mr. Benjamin had received the two cheques from a client who held himself to be one Jong Yeol Moon. Unfortunately, Mr. Benjamin did not know that the client was impersonating the Mr. Moon who had an account at the Yonge and Finch branch.

16 The impostor Mr. Moon had retained Mr. Benjamin in December 2005 to act on a purchase and sale of a condominium unit in London, Ontario for the price of $189,000.00. The imposter Mr. Moon was the purchaser, and Mr. Benjamin was also retained to act for the vendors, Mehboob Ali Khan and Tazeem Afsahn Khan. Mr. Moon and the Khans represented themselves as being friends engaged in a private transaction. Mr. Moon and the Khans provided Mr. Benjamin with copies of their drivers' licenses and social insurance cards.

17 On February 3rd, while waiting in line to make his deposit of the Moon cheques, Mr. Benjamin met Mr. Rahim Mamdani, a Financial Services Representative at the Sheppard branch, who volunteered to make the deposit for Mr. Benjamin.

18 In making this deposit for Mr. Benjamin, Mr. Mamdani first did a computer inquiry to determine whether there were sufficient funds in the Moon account at the Yonge and Finch branch, and being satisfied that there were sufficient funds, Mr. Mamdani electronically credited the Benjamin Trust account and he electronically debited the Moon Trust account.

19 Mr. Benjamin obviously was aware that his own trust account had been credited. He was not aware that Mr. Moon's account had been debited electronically. There is now a very substantial contest between the parties to the case at bar about the legal significance of what Mr. Mamdani did, but I will postpone the discussion of this controversy.

20 After the deposit had been made, Mr. Benjamin left the Sheppard branch, but he returned later in the day, and he withdrew $185,132.87 from his trust account. Of this sum, $2,500 was withdrawn in cash, $1,138.65 was transferred to Mr. Benjamin's general account at the Bank, and $181,494.22 was a bank draft payable to Finmark Financials.

21 Mr. Benjamin then proceeded to close the condominium transaction, and in the course of doing so, he gave Mr. Khan the bank draft and the $2,500 cash.

22 On February 14, 2006, Mr. Benjamin was contacted by an employee of the Bank's Yonge and Finch branch, and the employee advised Mr. Benjamin that the Moon cheques might have been forged. Mr. Benjamin was not advised that the Bank might freeze funds in his trust account.

23 Early on February 28, 2006, Mr. Benjamin deposited into his trust account two cheques drawn by Mr. Kingsley Acheampong totaling $337,944.46. These funds had been provided to Mr. Benjamin in order to close a real estate transaction in which Mr. Acheampong was purchasing a home from a Mr. Rojas.

24 Later on February 28, 2006, Mr. Benjamin attempted to withdraw the funds from his trust account in order to close the Acheampong/Rojas transaction, and he was then advised for the first time that the Bank had frozen all of the funds of the account. Later the freeze was adjusted to apply only to $190,000 in the trust account.

25 As noted at the outset, the Bank refuses to release the frozen money, and Mr. Benjamin now sues the Bank and seeks an interlocutory mandatory injunction compelling it to release the $190,000 so that he can close the Acheampong/Rojas transaction.

The Test for an Interlocutory Mandatory Injunction

26 In order to obtain interlocutory injunctive relief, Mr. Benjamin must demonstrate: (a) that there is a serious question to be tried; (b) that he will suffer irreparable harm if the injunction is not granted; and (c) that the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). He must also give a meaningful undertaking as to damages.

27 Because of its more intrusive nature, where the interlocutory relief is a mandatory injunction, Mr. Benjamin must show a strong and clear case with a high degree of assurance that an injunction would be rightly granted: *Ticketnet Corp. v. Air Canada*, [1987] O.J. No. 782 (Ont. H.C.); *Canadian Tire Corp. v. Dufrat* (1993), 108 D.L.R. (4th) 363 (Ont. Gen. Div.); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.).

The Risk of Payment on a Forged Cheque

28 The Bank submits that pursuant to the terms of the banking agreement, the *Bills of Exchange Act*, and the common law, it is entitled to recover the $190,000 from Mr. Benjamin's trust account. Before, addressing the Bank's argument, it is necessary to consider several general principles of the law of negotiable instruments and the law's treatment of who bears the risk of forgery of a cheque. It is also necessary to consider the steps in the progress of

making a payment by a cheque. The consideration of these matters is required because they provide the context for interpreting the underlined words in paragraph 7 (b) of the banking agreement between Mr. Benjamin and the Bank that governed his trust account. It is also necessary to have this background information in order to determine whether Mr. Benjamin has shown a clear and strong case.

29 Typically, there are three parties to a bill of exchange. The person who writes a bill of exchange, including a cheque, is known as the "drawer". In writing a bill of exchange, the drawer requests a person known as the "drawee" to pay a sum of money to a third person, who is known as the "payee." Translated into everyday affairs, a customer of a bank (the drawer) writes a cheque to withdraw money from his or her bank account (the drawee) to pay a creditor (the payee).

30 The law is that the drawee bank, which is deemed to know the signature of its customer, and not the payee, bears the risk of payment on a forged cheque. The venerable text, J.D. Falconbridge, *The Law of Negotiable Instruments in Canada* (12th ed). (Toronto: The Ryerson Press, 1960) states at p. 141:

> The drawee of a cheque is bound to know the signature of its customer. If, therefore, in the ordinary course of dealing there comes through one bank to another a cheque purporting to bear the signature of a customer of the latter, which pays the cheque and charges the amount to the customer, the implication from the transaction is that the drawee bank pays the cheque in reliance upon its knowledge of the customer's signature, and not any supposed representation or warranty of its genuineness by the bank that presents it. Accordingly, the general rule is that the drawee bank which pays upon a forged or unauthorized signature of its customer is not entitled to recover back the amount from the presenting bank, unless the latter is a mere agent for collection and has not yet paid the money out.

See also: *Bills of Exchange Act*, s. 48; *Arrow Transfer Co. v. Royal Bank*, [1972] S.C.R. 845 (S.C.C.); *Productions Mark Blandford inc. c. Caisse populaire St-Louis de France*, [2000] J.Q. No. 1877 (Que. C.A.); *R. v. Bank of Montreal* (1907), 38 S.C.R. 258 (S.C.C.); *Royal Bank v. Concrete Column Clamps (1961) Ltd.* (1976), [1977] 2 S.C.R. 456 (S.C.C.); *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2005] B.C.J. No. 1662 (B.C. S.C.).

31 In the case at bar, the drawer was Mr. Moon, the payee was Mr. Benjamin, and the drawee bank was the Yonge and Finch branch of the Bank. The Sheppard branch of the defendant Bank was the presenting or collecting bank. Here it may be noted that under the law of negotiable instruments, generally speaking, the branches of a bank are treated as separate entities.

32 In the case at bar, the presenting bank and the drawee bank are both branches of the defendant Bank, and as a result of sharing the same computer system, there was an electronic debit made to Mr. Moon's account without the drawee bank taking the opportunity of validating the signature of its customer. The evidence was that this was an internal decision of the Bank. Its policy for internal electronic transactions of this type was not to submit the cheques to the clearing system; instead, the Bank sent the cheques to its own storage location, unless a specific request was made to confirm the validity of the signatures, which verification is apparently done by the collecting bank obtaining and reviewing a copy of the other branch's customer signature card. (See Chan transcript: pp.32-39, Qs. 166-194.)

33 With this background, it is now possible to address what is a pivotal dispute between the parties. The Bank says that it may rely on paragraph 7(b) to freeze $190,000 in Mr. Benjamin's trust account. Mr. Benjamin responds that the normal law of negotiable instruments about the drawee bank bearing the risk of forgery applies and that the Bank has not succeeded in contracting out of that law.

34 Mr. Sclisizzi, Mr. Benjamin's counsel, argues that paragraph 7(b) does not apply because neither of its two legs is available to the Bank. The second leg is not available because the case at bar does not involve any endorsements. The critical first leg does not apply because it applies only where "*payment is not received by us [the Bank]*" and in the case at bar payment was received when an electronic debit was made to Mr. Moon's account.

35 Put somewhat differently, on the facts of this case, by reason of the defendant Bank's policy of allowing debits to be made electronically, it caused payment to be made and the drawee bank missed the opportunity to verify its customer's signature. While the banking agreement would have protected the Bank if there was no payment, this is not the situation in the case at bar, and thus Mr. Sclisizzi submits that the Bank and not Mr. Benjamin must bear the loss from the forgery.

36 Relying, in part, on an article by R.M. Goode, "When is a Cheque Paid?" [1983] J. Bus. L. 164, Mr. Sutton, the Bank's counsel, makes a counterargument that the payment was not "complete" because it was provisional under the Bank's internal arrangements and, accordingly, the Bank can rely on paragraph 7(b).

37 I do not need to decide this dispute; all I need do is decide whether there is a substantial likelihood of success for Mr. Sclisizzi's argument. Since my own view is that his argument is correct, I find that it has a substantial likelihood of success and that Mr. Benjamin has satisfied the first stage of the test for a for an interlocutory mandatory injunction.

38 I prefer Mr. Sclisizzi's argument because it provides a common sense and operative meaning to the word payment. There is no denying that a debit was electronically made to

Mr. Moon's account, viz., he had to take steps to satisfy the Bank that his signature had been forged to regain his money. In my view, there was a payment made on a forged cheque, and unfortunately the payment was made to an innocent party, Mr. Benjamin, for the ultimate benefit of forgers, Mr. Moon and the Khans, who at the moment it seems, cannot be found.

39 I see no reason to interpret the word payment provisionally and qualified by a contractual arrangement with the presenting bank and their customer, especially when to do so would be inconsistent with the sound policy behind the rule that the drawee bank bears the risk of forgeries. In the immediate case, the Bank's policy and its computer system permitted a presenting Bank to make a debit to the account of a customer of the drawee bank and then left it for the defrauded customer to complain that an unlawful debit had been made to his account. The rationale behind the rule that makes the drawee bank bear the risk, however, is that the drawee bank is best placed to prevent frauds because it has knowledge of the signature of its customers. The idea is that before debiting the customer's account, that is, before completing payment, the drawee bank can verify the customer's signature. Mr. Sutton's argument would extend the completion of payment to something that rests in the will of the Bank and makes the notion of payment uncertain.

40 In the immediate case, the Bank might have avoided there being a payment and it might have been in a position to rely on paragraph 7 (b), if Mr. Mamdani had *not* taken the step of electronically debiting Mr. Moon's account. Thus, before a payment was made, the Bank could still have granted the no hold privileges to Mr. Benjamin but sent the cheque to the drawee bank for verification or it could have called on the drawee bank to send the signature card so that verification of the signature could have been made.

The Law of Trusts

41 There is a second argument based on the law of trusts that supports Mr. Benjamin's request for an interlocutory mandatory injunction. The funds in the Benjamin trust account were known, ought to have been known, and are now undoubtedly known by the Bank to be the property of Mr. Acheampong. The bank knows that by freezing these funds it may be placing Mr. Benjamin in a position where as the trustee of those funds for his client he is breaching his trust. The argument is that the Bank cannot knowingly use its banking agreement with Mr. Benjamin to have him breach a trust with a client. In this regard, in their factum, Mr. Sclisizzi and Ms. Goodman quote Underhill and Hayton, *Law Relating to Trust and Trustees* (London: Butterworths, 1995) at p. 919.

> Where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice, not only that they are trust moneys, but also that payment to them constitutes a breach of trust.

42 The trust argument advanced on behalf of Mr. Benjamin will take this action into some very complicated legal and factual territory. See *Glenko Enterprises Ltd. v. Ernie Keller Contractors Ltd.*, [1996] 5 W.W.R. 135 (Man. C.A.); *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), leave to appeal to S.C.C. refused, (1994), 19 O.R. (3d) xvi (S.C.C.); *Cypress-Batt Enterprises Ltd. v. Bank of British Columbia*, [1994] 9 W.W.R. 438 (B.C. S.C.); *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.); *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.).

43 Having regard to my conclusion that Mr. Benjamin has a substantial likelihood of success on his first argument, it is not necessary for me to make a ruling on whether he has an alternative argument that also has a substantial likelihood of success. I will say, however, that based on the oral argument, he certainly has gone well beyond the standard of showing that there is a serious issue to be tried and has demonstrated a likelihood of success on his trust argument.

Irreparable Harm

44 I turn now to the other elements of the test for an interlocutory injunction. I conclude that Mr. Benjamin will suffer irreparable harm if the mandatory injunction is not granted. There is a substantial risk that the Acheampong/Rojas transaction, which is at the day to day sufferance and indulgence of Mr. Rojas will fail and that Mr. Benjamin will be exposed, if he is not already so exposed, to claims of professional negligence, breach of trust, and, more remotely, professional misconduct.

45 Mr. Sutton, counsel for the Bank, argues that there is no irreparable harm because any adverse consequences of the Bank's freezing the funds can be quantified in money and that the Bank, being a bank, is good for it. Thus, he submits that Mr. Benjamin is not entitled to the extraordinary equitable remedy of a mandatory injunction because the common law remedy of damages is adequate.

46 However, as Publilius Syrus remarked in the First Century B.C.E., "A good reputation is more valuable than money." For a lawyer, young or old, the loss of a good reputation is not reparable by money. In a sense, a lawyer's reputation is his or her claim to a share of the marketplace for legal services. In my opinion, the present circumstances that confront Mr. Benjamin do threaten his reputation and his early efforts to build a law practice. There is irreparable harm to Mr. Benjamin if the present state of affairs continues.

Balance of Convenience

47 I conclude that the balance of convenience favours granting the mandatory injunction. From the Bank's perspective, the imposition of the mandatory injunction would

be inconvenient because it forgoes what amounts to security for its claim that Mr. Benjamin is responsible for the overdraft in his trust account caused by the deposit of a forged cheque.

48 For the Bank to have this security would no doubt be convenient, but for the reasons expressed above, I rather doubt that the Bank is entitled to this convenience. In effect, the Bank has obtained by self-help something akin to a *Mareva* injunction against Mr. Benjamin by freezing his trust account. This is objectionable not only because the law in Ontario stands against pre-judgment execution (except in the extraordinary circumstances of where a *Mareva* injunction is genuinely available) but also because the Bank has seized somebody else's money, which is something that it could not do even under a properly granted *Mareva* injunction.

49 From Mr. Benjamin's perspective, the refusal of his request for a mandatory injunction confronts him with the inconvenience of finding a way to close the Acheampong/ Rojas transaction with his own or somebody else's money. This may be possible, but it is inconvenient. If it proves not possible for Mr. Benjamin to finance the pending transaction, then there is the inconvenience to Mr. Benjamin having to defend the professional liability claims that must inevitably come, because, one way or the other, Mr. Acheampong is entitled to his money and Mr. Rojas may be entitled to the closing proceeds or compensation for breach of contract.

50 In assessing the balance of convenience, there is also the factor of considering the effect of granting or not granting the injunction on third parties. This factor clearly favours granting the injunction and facilitating the closing of the Acheampong/Rojas transaction.

Undertaking as to Damages

51 Mr. Benjamin has given an undertaking as to damages, and Lawpro, his professional liability insurer, has indicated that it will stand behind him if he is found liable to the Bank as a result of professional negligence. It is not clear to me, however, whether Lawpro's assurances would cover the circumstances of the case at bar.

52 The Bank challenges the adequacy of Mr. Benjamin's undertaking as to damages because he has no assets to speak of other than his license to practice law. In my opinion, in the circumstances of this case that is good enough to constitute a meaningful undertaking as to damages.

53 I find it ironic and somewhat disingenuous that the Bank challenges Mr. Benjamin's undertaken as to damages when it gave him no hold privileges precisely because he had established a credible relationship with the Bank and it felt it could rely on him to honour his obligations. (See Chan transcript: pp. 18-19, Qs. 86-90.) If it was necessary, which it is

not, I would exercise the court's discretion to forgo the undertaking as to damages in the circumstances of this case.

Conclusion

54 For the above reasons, I grant the request for an interlocutory mandatory injunction. If the parties cannot agree as to the matter of costs of this motion, then they may make submissions in writing within 30 days of the release of these reasons for decision.

Application granted.

TAB 26

1979 CarswellBC 96
British Columbia Supreme Court

Delta (Municipality) v. Nationwide Auctions Inc.

1979 CarswellBC 96, [1979] 4 W.W.R. 49, 100
D.L.R. (3d) 272, 11 B.C.L.R. 346, 11 C.P.C. 37

DELTA v. NATIONWIDE AUCTIONS INC. and NATIONWIDE REALTY SERVICE LTD.

Locke J. [in Chambers]

Judgment: March 20, 1979
Docket: New Westminster No. C790106

Counsel: R. H. Nelson (applicant), president of defendant Nationwide Realty Service Ltd., in person.
M. H. Thomas, for respondent.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.a Principles
II.2.a.viii Adequacy of other remedies
II.2.a.viii.B Special statutory proceedings available
II.2.a.viii.B.1 Motion to quash
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.xii Restraint of government acts
II.2.f.xii.E Miscellaneous
Remedies
II Injunctions
II.3 Procedure on application
II.3.f Undertaking regarding damages
II.3.f.v Discretion of court

Annotation

The purpose of requiring an undertaking as to damages to be given where an interlocutory injunction is granted is to give the court granting it jurisdiction to award damages should it turn out that the injunction ought not to have been granted. Without the undertaking, no damages could be awarded in the proceeding, in which the injunction was granted and a fresh action for damages would have to be commenced by the aggrieved party (*Paulson v. Murray*. [1921] 2 W.W.R. 735,31 Man. R. 258). The Court need not, however, order an enquiry as to damages when an injunction is dissolved. It has a discretion not to order an enquiry, for example when the damages sustained are trivial or remote or if there is delay in making the application (*Smith v. Day* (1882), 21 Ch. D. 421 (C.A.); *McBratney v. Sexsmith*, [1924] 2 W.W.R. 455 [1924] 3 D.L.R. 84 (C.A.); *Baud Corp. N.V. v. Brook; Asamera Oil Corpn. v. Sea Oil & Gen. Corpn.* (1972), 25 D.L.R. (3d) 374 (Atla. T.D.)). The reasons given by the learned Judge in the present case for refusing to require any undertaking to be given seem more appropriate to a consideration of whether an enquiry should be held after dissolution of an injunction. The refusal to require an undertaking might cause loss or inconvenience, whereas requiring it to be given could not.

John W. Horn

Application for an interlocutory injunction.

***Locke J.*:**

1 This is an application for an injunction brought by the defendants against the plaintiff municipality to restrain the municipality from repealing By-law 2876/1978 and from releasing land-use contract SA No. 3234. Apparently the repeal and release is to be brought about by means of By-law 2942/1979, which awaits third and final reading.

2 The affidavits filed and statements made at the hearing show that By-law 2876/1978 received third reading on 2nd October 1978 and was finally adopted in early January 1979. That by-law authorized the municipality to enter into a land-use contract with the defendant corporations pursuant to subdivision application 3234. This contract was registered by the defendants ("Nelson") in the land registry office but had apparently not been properly executed by the plaintiff ("Delta"). It was re-executed and subsequently re-registered on 17th January 1979.

3 On 8th January 1979 Nelson had delivered to Delta three cheques for $41,000, $5,263.34 for 1978 taxes, and $5,263.34 for estimated 1979 taxes. They were deposited after the Delta treasurer had ascertained the bank held covering funds. In fact payment was stopped by Nelson on 9th January 1979, but Delta did not receive notice of this until 17th January 1979, after the contract had been re-registered.

4 One assumes the new By-law 2942/1979 was put forward because of this and other differences with Nelson. On 12th February 1979 he brought a motion for an injunction to restrain Delta from holding the public hearing essential to its passage. The record shows only that by consent Anderson J. granted an injunction restraining Delta from proceeding further "if the following amounts of money are paid before 20th February, 1979 ..." The amounts are those set out above.

5 The money was not paid, but Nelson purported to do it in the terms of a letter of 19th February 1979 to Delta enclosing a cheque for $525.68 and offering to reconvey certain land. Delta's solicitor replied on 20th February 1979 returning the money and advising that Delta would proceed with the hearing on 20th February 1979. The by-law apparently awaited third and final reading when Nelson brought this application. It has been tabled pending these reasons.

6 Delta commenced the action on 19th January 1979, claiming specific performance of the land-use contract, alternatively damages and a lis pendens. Nelson filed a defence and counterclaim on 8th February 1979 and an amended one on 19th February 1979. It is irregular in form and not served on all the proposed defendants to the counterclaim. He claims specific performance, alternate relief and a lis pendens. Some of the allegations include allegations of malice against Delta aldermen and appear to contain other matters of doubtful relevance, nor is relief claimed on the proper grounds.

7 The material shows that Nelson has standing disagreements with Delta; another defendant by counterclaim named Sur-Del Builders Development Ltd., which holds land-use contract S.A. 3181; and others. At the hearing of this application Nelson advanced 33 points of argument, many of which were not material. He did however say he wanted to maintain the contract.

8 Counsel for Delta submitted four principal points:

9 1. The applicant had not shown a fair question to be tried;

10 2. There was no irreparable injury in the sense that damages would be an adequate remedy;

11 3. The balance of convenience was not in favour of the applicant;

12 4. A court would not be quick to enjoin the passage of a by-law which could conceivably be illegal if there was another adequate remedy available, e.g., quashing the by-law.

13 I have considered all of these arguments, but I propose to grant the injunction for the following reasons.

14 Delta is signatory to a contract and proposes to unilaterally cancel it by by-law. It is said Nelson has no fair question to be tried in the language of *Brady v. Heinekey* (1960), 24 D.L.R. (2d) 737 (B.C.C.A.). Further, it is said that Nelson is in fundamental breach of his contract as he has failed to pay certain required money, and that this alone would disentitle him to relief. The contract by cls. 6, 7 and 9 imposes certain financial obligations on the developer; it does not specifically say that payment of these is a condition precedent to execution or delivery of the documents, and indeed it appears that whatever may have been the interpretation of Delta at the time of the consent injunction and in spite of the similar language used in cls. 6 and 9 ("agrees to pay") it did not then stipulate that the payments in cl. 9(*c*) were a prerequisite. In the absence of clear language or evidence that there is a prior collateral obligation to pay which Nelson has breached, I decline to infer it, as surely such evidence would be available to the court if it were a fact. I have no material before me nor can I speculate as to the precise reasons for the stipulations of the consent injunction or the reasoning which impelled them.

15 In opposition to the injunction it was pressed on me that the principle of *Keay v. Regina (City)* (1912), 5 Sask. L.R. 372, 2 W.W.R. 1072, 6 D.L.R. 327, was applicable, and that the by-law should be proceeded with and Nelson left to his remedy to quash for illegality. In that case Wetmore C.J. said at p. 331:

> ... I agree with what was laid down by Middleton, J., in *London v. Newmarket*, 20 O.W.R. 929, 2 D.L.R. 244, that
>
> > an injunction is an extraordinary remedy, and ought not to be resorted to when there is an appropriate remedy in a motion to quash.
>
> I may merely add that, in my opinion, when there is a procedure provided by statute which will *practically* serve the same purpose as an injunction, the injunction ought not to be granted. I am of the opinion that a proceeding under sec. 242 of the City Act [R.S.S. 1909, c. 84] would practically serve every purpose that the injunction would serve. If the city council acted wrongly or without authority, and a proceeding is properly taken, under sec. 242, the by-law would be quashed (or I must assume that it would), and any act done by the city under it would fall with it. There was no necessity for proceeding before the by-law passed that I can see.

(The italics are mine.)

16 But note that the alternate remedy must "practically serve the same purpose as an injunction". Will it in this case? I think not. If the by-law is passed, on the face of it Delta would be in breach of contract, and while a damage action would lie I do not think that in this case of a development contract in a form now abolished by statute, interrelated as it is

with other contracts, damages are an adequate remedy. The contract is unique and can never be replaced and, if cancelled, it is gone forever.

17 In *Lawrason v. Dundas* (1920), 18 O.W.N. 22, the new municipal council passed a by-law annulling a previous by-law which authorized two contracts. Latchford J. said [p. 23]:

> In the following year, on the 7th July, the municipal council, then differently constituted passed a by-law, No. 845, which, after reciting that the two agreements were entered into and made part of by-law 828, that nothing had been done under the agreements, that the ratepayers did not favour but opposed them, and that the council considered them detrimental to the best interests of the townspeople, purported to repeal by-law 828.
>
> In this action the plaintiff asked that by-law 845 should be set aside and quashed, that an injunction be issued restraining the defendants from acting under it, and that by-law 828 be declared valid and binding on it.
>
> By sec. 283 of the Municipal Act [R.S.O. 1914, c. 192], the Court, upon application of a person interested, is empowered to quash a by-law for illegality.
>
> Reference to *Connor v. Middagh; Hill v. Middagh* (1889), 16 O.A.R. 356 at 368.
>
> By-law 845 was not illegal, in the learned Judge's opinion: it purported merely to repeal a by-law which the plaintiff relied on as validly passed. The council has power, without acting illegally, to repeal a by-law which it has power to pass.
>
> What was intended to be alleged by the plaintiff was, that by-law 845 was ineffective; and what he sought was in effect a declaration that in 1919 the council could not and did not derogate from the contracts made by the council, though differently constituted, in the previous year.
>
> That a municipal council of one year is not bound by the contract of the same council in a previous year is a proposition which has no merit but that of novelty. A corporation is as fully bound by a contract which it has power to make as an individual: Halsbury's Laws of England, vol. 8, p. 379; and the corporation in 1919, though the council was differently composed, was the identical corporation which contracted with the plaintiff.

18 I agree with Murphy J. of this court in *Burnaby v. B.C. Elec. Ry.* (1913), 3 W.W.R. 628, 12 D.L.R. 320, that the principles of law applicable to this application are not those applicable to quashing by-laws but those applicable to contracts. This contract contains no express negative covenants on the part of Delta; but as it deals with real property and grants specific rights of user and is specifically enforceable, in my view a negative covenant should be implied: that Delta will not adversely alter the rights it has granted, in accordance with the

principle expressed in 21 Hals. (3d) 389-91, paras. 816 to 818. Nelson has a right of property in these covenants and should have his order.

19 I would have granted the injunction without further consideration for the above reasons, but I have been obligated to reflect on two matters which have given me pause.

20 As Nelson comes to an equitable court his conduct is relevant. I have searched the material and considered statements at the hearing. If surmise were permitted, the relationship between the cheques, the credit inquiry and the re-execution of the by-law before knowledge of the stop order might raise suspicions concerning the applicant's bona fides. But Spry on Equitable Remedies at pp. 370-71 states:

> It is not uncommon to find broad statements that a plaintiff in equity will not be granted an injunction if he does not have clean hands. Properly understood, these statements are doubtless correct; but they should be applied cautiously, for it is by no means true that a plaintiff who has acted unconscionably will be refused all access to courts of equity or that he will be considered there to be caput lupi for all purposes and to be beyond protection. The court will decline to intervene only if the inequitable conduct in question is shown to have had 'an immediate and necessary relation' to the relief which is sought. The principle upon which courts of equity act is that protection will be denied the plaintiff 'where the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for what he claims involves protection for his own wrong. No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim.'

21 There was no allegation that either the contract or passage of the by-law had been obtained by fraud or breach of a prior collateral contract. In the absence of substantial evidence of these matters, I will not deprive Nelson of his remedies, and so I grant the injunction asked for.

22 The second matter is that Nelson has declined to give an undertaking as to damages, and indeed stated pretty specifically that he was financially unable to do so. The practice has perhaps altered. Prior to the passage of the new rules the undertaking as to damages in an interlocutory matter was exacted as a matter of practice of the court and not enshrined in a rule. The only British Columbia case I have been able to find which deals with the history of the practice is *New Vancouver Coal Co. v. E. & N. Ry. Co.* (1898), 6 B.C.R. 222. Martin J. (later C.J.B.C.) there concluded that previous British Columbia practice had not invariably required the undertaking, but in view of the English and Ontario cases there cited to him he considered himself practically deprived of any discretion and ordered the undertaking. It was succinctly put in *Tucker v. New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249 at

253 (C.A.), that "an undertaking is the price of the injunction". This uncompromising view appears to have been followed in more modern times in Ontario, and was commented on unfavourably by Miller C.J.M. in the Manitoba case of *Man. Dental Assn. v. Byman* (1962), 39 W.W.R. 608 at 611, 34 D.L.R. (2d) 602 (C.A.), though he felt compelled to require the commitment.

23 The cases uniformly express the requirement as a matter of practice of the court. The matter is discussed in Spry (op. cit.) from pp. 435-41 in detail, and the author emphasizes the nearly invariable practice; but significantly enough he says at p. 437:

> It has indeed been suggested that an undertaking as to damages 'ought to be given on every interlocutory injunction', but it is the preferable view that in exceptional cases this course may be found to be either unnecessary or else otherwise inappropriate. Thus on one occasion it was said by North J., 'If in the exercise of his discretion a judge should think fit to dispense with such an undertaking he could of course do so, and there are cases in which judges have done so; but this would only be under special circumstances.' Indeed, in the absence of a contrary intention, an order granting an interlocutory injunction is made on the implied condition that a undertaking by the plaintiff in the ordinary form will be duly given, and such an undertaking will therefore be included in the formal order of the court when it is drawn up; and similarly, where no injunction is granted, but instead an undertaking is given by the defendant not to perform the particular acts which are complained of before the matter is finally disposed of at the final hearing, it is assumed in the absence of a contrary indication that an undertaking as to damages is given by the plaintiff.

24 The authority for the statement of North J. is *A.G. v. Albany Hotel Co.*, [1896] 2 Ch. 696 at 700 (C.A.).

25 The framers of the new rules have apparently adopted this view: R. 45(6) reads:

> (6) Unless the Court otherwise orders, an order for an interlocutory or interim injunction shall contain the applicant's undertaking to abide by any order which the Court may make as to damages.

26 Acutely conscious of the fact that I can find no previous reported British Columbia decision on this point, I so "otherwise order" that an undertaking in this particular set of circumstances not be exacted. Obviously the particular facts and legal arguments of each individual case must be closely considered and the relative strengths of the parties' cases and the balance of convenience weighed. The applicant appears to me to have a strong case for breach of contract where damages will not alone be an adequate remedy. He faces a municipal body which commenced this action for specific performance of the agreement, which is the same position adopted by the applicant. Later the municipality changed its posture and is

endeavouring to cancel the agreement. One wonders whether, even if Nelson is wrong, any real damage would accrue to the municipality by the granting of this interlocutory injunction. I have also considered the detailed reasoning of Lord Diplock in *Amer. Cyanamid v. Ethicon*, [1975] A.C. 396, [1975] 1 All E.R. 504 at 510-11 (H.L.), and find this at the latter page:

> Where other factors appear to be evenly balanced it is a counsel-of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

27 On the best consideration I can give to all of the facts put before me in this particular interlocutory application, resting as it does upon affidavits, statements by counsel and statements by a litigant in person, I have decided that the order need not contain an undertaking as to damages.

28 However, this court has always had an inherent jurisdiction to order an early trial and it is a condition of the granting of this temporary injunction that the applicant apply to the registry not later than 26th March 1979 to set the matter of this injunction down for trial on the dates of either 9th April 1979 or 30th April 1979 as a separate issue if necessary. Should service of a notice of trial not be served on the respondent's solicitor by 4:00 p.m. 26th March this injunction will stand dissolved without further order upon filing an affidavit in appropriate form. There will be liberty to apply before that time and I consider myself seized of this matter for the purpose of setting a trial date only.

Application granted.

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TAB 27

2016 ONCA 300
Ontario Court of Appeal

Business Development Bank of Canada v. Aventura II Properties Inc.

2016 CarswellOnt 8631, 2016 ONCA 300, 268 A.C.W.S. (3d) 424, 37 C.B.R. (6th) 219

Business Development Bank of Canada, Applicant and Aventura II Properties Inc., Pavilion Sports Clubs Inc., Pavilion Sports Ice Inc., Pavilion Sports Food and Beverage Inc. and Pavilion Aquatic Club Inc., Respondents

van Rensburg J.A., In Chambers

Heard: April 5, 2016
Judgment: April 22, 2016
Docket: CA M46240, M46279, M46303 (C61854)

Proceedings: refusing leave to appeal *Business Development Bank of Canada v. Aventura II Properties Inc.* (2016), 2016 CarswellOnt 3746, 2016 ONSC 1545, Hainey J. (Ont. S.C.J. [Commercial List])

Counsel: Sean N. Zeitz, for Revital Druckmann and Jean-Jacques Myara
Kelli Preston, for Receiver, Pollard & Associates Inc.
Catherine Francis, for DUCA Financial Services Credit Union Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.c Actions by debtor in receivership
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iv Miscellaneous

MOTION by wife of debtors' principal for leave to appeal judgment reported at *Business Development Bank of Canada v. Aventura II Properties Inc.* (2016), 2016 ONSC 1545, 2016

CarswellOnt 3746 (Ont. S.C.J. [Commercial List]), extending Mareva order and repatriating funds originally issued to debtor.

***van Rensburg J.A., In Chambers*:**

A. The Motions

1 There are three motions before the court, in respect of an appeal and proposed appeal of the order of Hainey J. dated March 4, 2016 made in the context of a court-appointed receivership (the "Order"). Pollard & Associates Inc. is the court-appointed receiver (the "Receiver") of the debtor companies (the "Debtors"). A receivership order was granted by McEwen J. on September 8, 2014 (the "Receivership Order").

2 The Order at issue on these motions extended a Mareva injunction against Revital Druckmann ("Revital"), who is the spouse of Johny Druckmann, the principal of the Debtors. The Order also directed that the Receiver is entitled to immediate possession or "repatriation" of certain monies, which are the proceeds of an HST refund paid to one of the Debtors and diverted in contravention of the Receivership Order. The Order dismissed the claim by Jean-Jacques Myara ("Myara") to an interest in the monies.

3 Revital seeks leave to appeal the Order under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Importantly, she asserts no claim of her own to the monies in question and does not oppose the repatriation of the funds. Rather, she challenges the procedure followed by the Receiver in obtaining, on an *ex parte* motion, the original interim Mareva injunction against her.

4 In his appeal, Myara claims that the monies are his and resists the repatriation of the funds. The Receiver and the secured creditor, DUCA Financial Services Credit Union Ltd. ("DUCA") each move for security for costs of Myara's appeal.

5 For the reasons that follow, I dismiss Revital's motion and grant an order for security for costs against Myara in favour of the Receiver and DUCA.

B. Brief History

6 The history of this matter is described in some detail in the reasons of the motion judge reported at 2016 ONSC 1545 (Ont. S.C.J. [Commercial List]). For the purpose of these motions, the relevant facts are as follows.

7 The Debtors and their representatives failed to advise a court-appointed monitor, contrary to its appointment order dated October 24, 2013 and a subsequent order dated January 23, 2014, that on December 4, 2013, one of the Debtors (Pavilion Sports Clubs Inc.

or "PSCI") was issued an HST refund by the Canada Revenue Agency (the "CRA") in the sum of $986,594.96 (the "HST Refund").

8 In September 2014, pursuant to an order dated August 20, 2014, the monitor made inquiries of the CRA and learned that the HST Refund had been issued to the Debtors eight months earlier. The monitor was then appointed as receiver by order dated September 8, 2014 in a contested receivership application. After obtaining an order dated October 28, 2014 requiring the Toronto-Dominion Bank ("TD") to release certain information, the receiver traced the HST Refund from a new TD account opened in the name of PSCI into a TD account in the name of "S. Stern" (Revital's sister), over which Revital had power of attorney. That account had been debited by a bank draft issued to S. Stern in the amount of $1,016,007.50 on August 26, 2014.

9 On April 17, 2015, Pollard & Associates Inc. was substituted as receiver of the Debtors. The Receiver learned from TD that the bank draft had been cashed on March 6, 2015 and deposited into an unknown account.

10 On December 4, 2015, Hainey J. granted the Receiver's *ex parte* motion for an interim "freeze and disclosure" order against Revital (the "Mareva Order"). The Mareva Order provided that it would cease to have effect if Revital provided security by paying the sum of $1,016,007.50 into court. The Mareva Order was later extended on consent to January 29, 2016.

11 As a result of obtaining the Mareva Order, the Receiver traced the HST Refund through the S. Stern account (the draft had in fact been held and then re-deposited into that account on March 6, 2015) to, among other things, two non-registered mutual fund accounts with TD and Royal Bank of Canada ("RBC"), a personal account at RBC, and a 2015 Volkswagen Jetta, all in the name of Revital. Some funds remained in the S. Stern account.

12 The Receiver brought a motion against Revital to repatriate the funds, also returnable on January 29, 2016. On January 26, 2016, counsel for Myara contacted the Receiver to advise that his client claimed an interest in the funds in the S. Stern account, and was seeking an adjournment.

13 The motion to extend the Mareva Order and to repatriate the funds was heard on February 26, 2016. Myara attended at the motion. He sought intervener status, claiming to be a "former lender" to the Debtors. He claimed a beneficial interest in all the funds that were in the S. Stern account and in the two mutual fund accounts. He claimed to be an investor in the Debtors and referred to "loan advancements" totalling $1,241,290.01 made between March 2003 and August 2005 to Aventura II Properties Inc. [1] Myara said that after he wanted his money back in 2012, Johny Druckmann had promised to pay him the HST

Refund, and he had directed it to be deposited into the S. Stern account. He had directed Revital to issue a bank draft in the name of S. Stern in August 2014, and seven months later to make investments on his behalf in her name. He claimed that internal records showing that he had been paid back were inaccurate.

14 Of course, Revital's dealings with the HST Refund, that Myara claims occurred on his behalf, took place after the appointment of the monitor and in violation of court orders requiring the disclosure of the HST Refund. At no time prior to January 26, 2016 did anyone suggest that the HST Refund had been received but belonged to Myara. Revital's affidavit of December 28, 2015 stated that the mutual funds were her property.

15 On March 4, 2016, Hainey J. granted the Order. He found that the diversion of the HST Refund was in breach of the order dated January 23, 2014, which required the Debtors to advise the monitor immediately on the receipt of any refund from the CRA and prohibited the deposit or disbursement of any refund received. The Debtors breached the order and Revital was party to the breach. They engaged in deliberate and blatant acts of fraud. Hainey J. also found that Revital was in breach of the Receivership Order. He referred to the Receiver's powers under that order and para. 4, which required anyone with notice of the order to advise the Receiver of any property of the Debtors in their possession or control and to deliver such property to the Receiver at the Receiver's request. He rejected Revital's arguments that the Mareva Order was procedurally defective.

16 Hainey J. rejected Myara's claim, which he characterized as a fraudulent attempt to divert the HST Refund away from the Receiver. Even if Myara had a claim to the funds, it would be as an unsecured creditor of a bankrupt company, and his alleged interest would be subordinate to the Receiver's interest in the HST funds. He extended the Mareva Order until further order of the court, and granted the Receiver's motion to repatriate the funds.

C. Revital's Motion for Leave to Appeal

17 Revital seeks leave to appeal the Order under s. 193(e) of the *BIA*. Leave is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (Ont. C.A.), at para. 29.

18 The second part of the test requires the applicant to convince the court that there are "legitimately arguable points raised so as to create a realistic possibility of success on the appeal": *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at paras. 28-29; see also *Osztrovics (Trustee of) v. Osztrovics Farms Ltd.*, 2015 ONCA 463 (Ont. C.A.), at para. 11.

Although this is a relatively low bar, I am not persuaded that there is any arguable merit to Revital's proposed appeal.

19 First, Revital does not claim any interest in the HST Refund, or in the funds in the S. Stern account, or, even now, the property and investments she acquired using such funds. As such, she does not and cannot appeal the repatriation part of the Order. Nor does Revital challenge the substantive grounds on which the Mareva Order was made and extended. Rather, as her counsel acknowledges, Revital's concerns are strictly procedural.

20 In her proposed appeal to this court Revital raises the same procedural issues she argued before the motion judge. She asserts that the motion judge erred in continuing the Mareva injunction against her because there were procedural defects in the *ex parte* Mareva Order dated December 4, 2015.

21 Revital says that Hainey J. erred in granting the Order because (a) the Receiver had not made full and frank disclosure on the original *ex parte* motion; (b) he did not require an undertaking for damages from the moving party or grant an order dispensing with that requirement; and (c) the Order could not be made against her as a "third party" where there was no pending or intended proceeding against her.

22 I do not see any merit to any of Revital's arguments.

23 There is no question that the Receiver, in moving for the *ex parte* order, was required to make full and frank disclosure of material facts, and to inform the court of any material facts or points of law that favoured the other side: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(6); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.). Revital's complaint is not with respect to the *facts* that were put to the court; rather, she says that the Receiver ought to have delivered a factum and provided the court with legal authorities on Mareva injunctions, in particular referring to the need for an undertaking as to damages and a pending legal action against the target of the order.

24 First, the obligation on a moving party to file a factum in an injunction motion applies in contested, but not *ex parte*, motions: see r. 40.04(1). Second, the motion judge's granting of the Mareva Order was based on the application of settled principles and entirely justified by the evidence placed before him. And, as I will explain, the points that Revital raises were not in fact impediments to the relief granted by the court in this case.

25 As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed receivership. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been

determined": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel. 24), 4th ed. (Toronto: Canada Law Book, 2012), at para. 2.470. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the receivership order and to act honestly and in the best interests of all parties, including the debtor: *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), at para. 30, leave to appeal refused, [2001] S.C.C.A. No. 217 (S.C.C.). The Receiver has a duty to recover the property of the Debtors, including the HST Refund, and the order sought was in aid of powers granted to the Receiver by court order. The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.

26 Finally, Revital says that the Mareva Order should not have been issued against her because there was no existing or proposed action in which she was a defendant. She relies on cases stating that such orders cannot be made in the absence of a law suit or "litigation process" in which she could assert her defences: see e.g. *Standal Estate v. Swecan International Ltd.* (1989), 26 C.P.R. (3d) 421 (Fed. C.A.). Without commencing proceedings against her, Revital says it was impossible for the Receiver to meet the "strong *prima facie* case" requirement for a Mareva order.

27 Again, this argument has little merit, and I reject entirely the suggestion that the Receiver had an obligation to sue Revital in a separate action for recovery of the funds before moving for a Mareva injunction.

28 In the typical "Mareva" case, the moving party seeks security for a future judgment, where neither liability nor the amount of the judgment has been determined. Here, however, the order granted was contemplated by and expanded upon powers granted to the Receiver under the Receivership Order. Those powers authorize the Receiver to take possession and control of the Debtors' property and proceeds from such property, receive and collect all monies owing to the Debtors, and apply to the court for assistance in carrying out its duties: see especially paras. 2, 3(a), 3(f), 12 and 28 of the Receivership Order. The Receiver had the duty and right to collect the HST Refund, and Revital was in breach of the Receivership Order when she placed it beyond the Receiver's reach and failed to disclose its existence. Indeed, the misappropriation of the HST Refund precipitated the appointment of the Receiver and part of the Receiver's mandate was to find and recover the HST Refund.

29 The Mareva Order was granted on the basis of overwhelming evidence. The Receiver not only had a strong *prima facie* case that Revital had misappropriated the HST Refund proceeds, but had directly traced the monies into the S. Stern account, the mutual fund accounts, Revital's personal RBC account, and the automobile. Revital admitted she had used or disposed of the remaining funds. Any requirement for a pending action is met by the fact that the motion was brought in the context of the receivership proceedings. This is the

framework in which the Mareva Order was made, and contrary to Revital's assertions, this was the forum in which she could assert any available defences.

30 While this is sufficient to dispose of Revital's motion for leave to appeal, I also note that there is nothing in her proposed appeal that raises any issue of general importance to bankruptcy and insolvency practice or the administration of justice. Contrary to Revital's submission, the motion judge did not apply a new test for the order he granted, exempting receivers from the usual requirements for a Mareva injunction. The motion judge applied settled legal principles to the facts of the case that demanded the relief he granted.

D. Security for Costs Motions

31 The Receiver and DUCA are respondents to Myara's appeal and both move against him for security for costs of his appeal. Their motions are under r. 61.06(1)(a). The moving party must establish that there is "good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal."

32 The second part of the test is not in dispute. Myara lives in Florida and apparently owns a casino in Peru. There is no evidence that he has assets in Ontario.

33 The first part of the test involves a consideration of "[t]he apparent merits of the appeal, the presence or absence of an oblique motive for the launching of the appeal, and the appellant's conduct in the prosecution of the appeal" as well as other factors that may be specific to the case: *Schmidt v. Toronto Dominion Bank* (1995), 24 O.R. (3d) 1 (Ont. C.A.), at para. 18.

34 The moving parties rely on the fact that the motion judge found Myara's version of events had no air of reality and did not accord with common sense, and that his "story" was simply another fraudulent attempt to divert the HST Refund away from the Receiver. They say there is no merit to his appeal and that its purpose is to simply further delay the Receiver's recovery of the Debtors' property. [2]

35 Myara contends that his appeal has merit. He says that, because he was not cross-examined on his affidavit, his evidence about his claim to the HST Refund was uncontroverted and ought to have been believed by the motion judge. He argues that DUCA lacks standing to bring the motion for security for costs. Finally, he says that an order for security for costs should not be made against him because he was "forced into" the jurisdiction: see *Diversitel Communications Inc. v. Glacier Bay Inc.* (2004), 181 O.A.C. 6 (Ont. C.A.), at para. 8.

36 I am satisfied that each of the Receiver and DUCA is entitled to security for costs of Myara's appeal. The appeal appears to have little chance of success. Myara seeks to overturn

the motion judge's factual findings, which were made on a compelling record with little, if anything, to support Myara's claim and much to contradict it.

37 The fact that DUCA is a respondent to Myara's appeal and that Myara seeks costs of the appeal and of his motion in the court below from DUCA, is sufficient to satisfy the standing requirement for its motion for security for costs.

38 Myara's reliance on the *Diversitel* case is misguided. In that case, this court considered a motion for security for costs of an appeal under r. 61.06(1)(b), which allows this court to make an order for security for costs where it appears that "an order for security for costs could be made against the appellant under rule 56.01". Interpreting the combined effect of those provisions, this court in *Diversitel* held that r. 61.06(1)(b) is confined to making an order for security for costs against an appellant who was the plaintiff or applicant in the initial proceeding. A respondent on appeal may not rely on rule 61.06(1)(b) to obtain an order for security for costs against an appellant who was the defendant or respondent in the initial proceeding. Armstrong J.A. explained that "[t]he policy rationale is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others." See also *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2010 ONCA 137 (Ont. C.A. [In Chambers]).

39 Here, the motions are brought under r. 61.06(1)(a), which permits security for costs to be ordered against an appellant where there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal. Application of this subrule is not restricted to appeals by appellants who were plaintiffs or applicants in the initial proceedings. In any event, Myara was not "forced into" court by anyone. He brought himself into the jurisdiction to assert a claim to the HST Refund proceeds, by attempting to intervene in the motion below.

40 I fix the amount to be paid by Myara as security for the costs of his appeal in the sum of $15,000 for each of the Receiver and DUCA. This is a reasonable estimate of the party and party costs each of these respondents might expect to recover if successful in responding to Myara's appeal.

E. Disposition

41 For the foregoing reasons, Revital's motion for leave to appeal the Order is dismissed and the Receiver's and DUCA's motions for security for costs are granted. I order Myara to pay into court as security for the costs of his appeal the sum of $30,000 on or before May 2, 2015, failing which a judge of this court may dismiss the appeal on motion. No assets covered by the Receivership Order may be disposed of or pledged in order to post security for costs.

42 The Receiver and DUCA shall have their costs of responding to Revital's motion fixed in the sum of $10,000 each, inclusive of HST and disbursements. The Receiver and DUCA shall have their costs of their motions for security for costs against Myara fixed in the sum of $5,000 each, inclusive of HST and disbursements. These costs amounts are inclusive of the costs of the March 27, 2016 attendances before Roberts J.A.

Motion dismissed.

Footnotes

1 Myara explained that the loans were recorded on the ledger of "Aventura Properties Inc.", which is not one of the Debtors, but claimed that this corporation and Aventura II Properties Inc. are in fact the same corporate entity.

2 They also contend that Myara has no standing to appeal the repatriation order. That issue was directed by Roberts J.A. on consent to be heard by the panel hearing the appeal.

TAB 28

2015 ONSC 6286
Ontario Superior Court of Justice

House v. Lincoln (Town)

2015 CarswellOnt 15633, 2015 ONSC 6286, 258 A.C.W.S. (3d) 683

Brett House, (Applicant) v. The Corporation of the Town of Lincoln, the Minister of Tourism, Culture and Sport for Ontario and the District School Board of Niagara, (Respondents)

R.A. Lococo J.

Judgment: October 14, 2015
Docket: St. Catharines 55947/15

Counsel: Mark Polley, Jeffrey Haylock, for Applicant
Michael A. Hines, Stephen A. Gleave, for Respondent, District School Board of Niagara

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.h Miscellaneous

RULING concerning costs.

***R.A. Lococo J.*:**

1 The Respondent, the District School Board of Niagara, seeks a cost award against the Applicant, Brent House arising from injunction proceedings and a judicial review application brought by Mr. House. Mr. House argues that as a public interest litigant, no costs should be awarded. The other Respondents did not file costs submissions.

2 On July 20, 2015, I dismissed Mr. House's motion to extend an interim injunction I had previously granted on an *ex parte* basis, and gave oral reasons for that decision. At the same hearing, I heard the School Board's motion to dismiss Mr. House's judicial review application based on delay or laches. I did not need to decide the latter motion, based on Mr. House's position at the hearing that he would not proceed with the judicial review application

if the interim injunction was not extended. Costs were left to be determined based on written submissions.

3 By way of background, the interim injunction restrained the School Board from demolishing a portion of the old school building for Vineland Public School in the Town of Lincoln. That portion of the old school building was previously a one-room school house constructed in 1895. A new consolidated public school for the Town of Lincoln was in the process of being built on the same parcel of land as the old school building.

4 Mr. House is a former student of Vineland Public School with an interest in the preservation of historic buildings. On July 7, 2015, I granted an *ex parte* interim injunction in order to permit Mr. House to proceed with a judicial review application with respect to decisions of the Town of Lincoln and the Ontario Minister of Tourism, Culture and Sport not to designate the 1895 school building as a heritage property under the *Ontario Heritage Act*.[1] In doing so, I was satisfied Mr. House was justified in bringing an emergency motion given the imminent demolition of the 1895 school building. I was also satisfied that the test for granting interim relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*[2] had been met. In the exercise of discretion under rule 40.03 of the *Rules of Civil Procedure*,[3] I did not require an undertaking as to damages from Mr. House, who did not stand to derive any personal gain from the preservation of the 1895 school house and was using his own funds to bring the litigation.

5 After hearing Mr. House's extension motion, I decided not to extend the interim injunction. In my oral reasons for that decision, I found that with the benefit of the additional evidence that the Respondents provided, Mr. House had not established one of the three elements of the test for granting interim relief, that is, that the balance of interest favoured granting that relief. In reaching that decision, I took into account competing public interests: (i) providing premises for public school students to attend classes in September; and (ii) preserving a historical building that was likely already beyond saving on any reasonable basis. I also indicated in my reasons that in dismissing Mr. House's motion, I was not being critical of his actions in seeking the interim injunction, finding that he acted in good faith. In this regard, I noted the apparent urgency of the situation, and found that the information he provided to support the *ex parte* motion was appropriate, considering the constraints involved when pulling together the necessary material for a motion of this nature.

6 In its written costs submissions, the School Board seeks a costs award in the amount of $12,500. The School Board provided a Bill of Costs, which indicated actual costs of over $85,000 and partial indemnity costs of over $50,000. The School Board argued that $12,500 was appropriate in light of the factors listed in rule 57.01 of the *Rules of Civil Procedure*, taking into account Mr. House's position that he was acting in the public interest in bringing these proceedings.

7 In its costs submissions, the School Board questioned Mr. House's status as a public interest litigant, noting that he was a non-resident with an emotional, nostalgic attachment to the building. By contrast, according to the School Board, its publicly elected school trustees were, by statute, charged with advancing the public interest in matters of public education. The School Board also argued that Mr. House's actions irresponsibly caused the School Board to expend scarce resources on a hopeless cause, to the detriment of local taxpayers. As well, the School Board argued that Mr. House pursued unnecessary vexatious issues with no realistic prospect of success, including an allegation not supported by the evidence that the School Board had accelerated its demolition of the 1895 school house after receiving notice of Mr. House's intention to pursue legal action to stop the demolition.

8 As indicated by our Divisional Court in *DeLarue v. Kawartha Pine Ridge District School Board*,[4] there is a generally accepted principle that individuals or groups that pursue litigation in the public interest and for unselfish reasons are subject to unique costs considerations, and that it is not usual to order costs against an unsuccessful public interest litigant. That decision also indicated that unsuccessful public interest litigants will not always be shielded from a costs award, and that there are no categorical rules about the exercise of the court's discretion in public interest litigation.

9 The factors a court should consider when determining whether a party is a public interest litigant has been considered in previous decisions of our court,[5] applying or adapting the following criteria proposed by the Ontario Law Reform Commission in its *Report on Standing*:[6]

> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
>
> (b) The litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if the litigant has an interest, it clearly does not justify the proceeding economically;
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant;
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding; and
>
> (e) The litigant has not engaged in vexatious, frivolous or abusive conduct.

10 From previous court decisions, it is apparent that not all of these factors need to be present in order for a party to qualify as a public interest litigant.[7]

11 In this case, I am satisfied that Mr. House qualifies as a public interest litigant. As the School Board argued, the exercise by school trustees of their statutory powers reflects an important public interest in matters of public education. However, I also agree with Mr. House that the preservation of historic buildings is a public good and one of the key purposes that the legislature sought to further through the *Ontario Heritage Act*. While the former interest prevailed over the latter when applying the balance of convenience factor in this case, public policy favours promoting both of these interests, to the extent possible.

12 In concluding Mr. House qualifies as a public interest litigant, I also considered the fact that he did not stand to derive any personal gain from the preservation of the 1895 school house, as previously noted. After unsuccessfully engaging public officials, he litigated the issue with his own funds, without other financial support.

13 The School Board argued that rather than expecting local taxpayers to bear the full cost of this litigation, it was reasonable to expect Mr. House to attempt to raise funds from other like-minded persons, a course of action that other individuals and groups have taken in similar circumstances. No doubt, it would have been prudent financially if he had done so, recognizing the possibility that he would not succeed in convincing public officials to preserve the 1895 school house without resorting to litigation. However, in all the circumstances, I do not consider his status as a public interest litigant to have been affected in this case by the fact that he did not attempt to raise money from others to further the bringing of court proceedings, a course of action he pursued to advance a public good recognized by statute in Ontario.

14 When considering the issue of Mr. House's status as a public litigant, I also considered the question of whether Mr. House had engaged in any vexatious, frivolous or abusive conduct, one of the factors referred to in previous cases. In this regard, the School Board placed particular reliance on what its counsel characterized as the scandalous theory that the School Board had accelerated the demolition of the old school building to include the original 1895 school house after receiving notice of Mr. House's intention to pursue legal action to stop the demolition. In the School Board's submission, given Mr. House's vigorous persistence in advancing this allegation in the face of clear evidence to the contrary, he could not reasonably expect to be completely shielded from the costs consequences of this litigation.

15 In my oral reasons refusing to extend the interim injunction, I noted that Mr. House's counsel asked me to draw the inference that the demolition of the old school building was accelerated upon the direction of the School Board in order to pre-empt legal proceedings once School Board officials became aware that legal action was being pursued. I made a finding of fact that such was not the case. However, I also stated that I could understand Mr. House's suspicions on this issue, based on the timing of events, including the delivery to the

School Board of written notice from Mr. House's lawyers shortly prior to commencement of demolition of that portion of the old school building.

16 While I did not find in Mr. House's favour on this issue, I did not consider it scandalous or vexatious that he advanced this position. Consistent with my previous observations, although Mr. House was ultimately unsuccessful, I consider Mr. House to have acted reasonably throughout the proceedings. Unlike in *DeLarue v. Kawartha Pine Ridge District School Board* and *Sydenham District Assn. v. Limestone District School Board*,[8] Mr. House did not pursue a "no holds barred" approach in this case or otherwise conduct himself in a manner that would justify a costs award against him.

17 In all the circumstances, I see no reason to depart from the usual practice in public interest litigation by ordering costs against Mr. House.

18 Accordingly, the parties shall bear their own costs.

Order accordingly.

Footnotes

1 R.S.O. 1990, c. O.18.

2 [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) at 400.

3 R.R.O., Reg. 194.

4 2012 ONSC 7372, [2012] O.J. No. 6251 (Ont. Div. Ct.) at paras. 4-5.

5 *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. v. Durham (Regional Municipality)*, 2011 ONSC 7143, [2011] O.J. No. 6343 (Ont. S.C.J.), *Brunton v. Fort Erie (Town)*, 2011 ONSC 235, [2011] O.J. No. 63 (Ont. S.C.J.) *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (Ont. S.C.J.).

6 Toronto: Minister of the Attorney General, 1989.

7 *Durham Citizens Lobby for Environmental Awareness and Responsibility Inc.*, *supra* note 5 at paras. 51-52.

8 2015 ONSC 594, [2015] O.J. No. 492 (Ont. Div. Ct.).

KSV KOFMAN INC. in its capacity as Receiver and Manager of Certain Property of Scollard Development Corporation, et al.
Plaintiff

v.

JOHN DAVIES et al.

Defendants
Divisional Court File No.: 533/77
Court File No: CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE RESPONDING PARTY
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