Court File No. COA-22-CV-0206

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

BOOK OF AUTHORITIES OF THE RESPONDENT, THE RECEIVER

(Appellant's Further Evidence Motion)

September 7, 2023

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INDEX

Tab	Description
1	*Barendregt v. Grebliunas*, 2022 SCC 22
2	*R. v. Lévesque*, 2000 SCC 47
3	*Palmer v. The Queen,* 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759
4	*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2
5	*ONCRPO v. Went*, 2023 ONCRPO 1
6	*McLaughlin v. McLaughin*, 2020 ONSC 5666
7	*College of Physicians and Surgeons of Ontario v. Aboujamra*, 2022 ONPSDT 14
8	*R. v. El-Azrak*, 2023 ONCA 440
9	*R. v. Shahnawaz*, 51 O.R. (3d) 29 (C.A.)

SUPREME COURT OF CANADA

2022 SCC 22 (CanLII)

CITATION: Barendregt *v.* Grebliunas, 2022 SCC 22

APPEAL HEARD: December 1 and 2, 2021
JUDGMENT RENDERED: December 2, 2021
REASONS FOR JUDGMENT: May 20, 2022
DOCKET: 39533

BETWEEN:

Ashley Suzanne Barendregt
Appellant

and

Geoff Bradley Grebliunas
Respondent

\- and -

Office of the Children's Lawyer, West Coast Legal Education and Action Fund Association and Rise Women's Legal Centre
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 190)	Karakatsanis J. (Wagner C.J. and Moldaver, Brown, Rowe, Martin, Kasirer and Jamal JJ. concurring)

REASONS DISSENTING IN PART: (paras. 191 to 231)	Côté J.

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2022 SCC 22 (CanLII)

Ashley Suzanne Barendregt *Appellant*

v.

Geoff Bradley Grebliunas *Respondent*

and

Office of the Children's Lawyer,
West Coast Legal Education and Action Fund Association and
Rise Women's Legal Centre *Interveners*

Indexed as: Barendregt *v.* Grebliunas

2022 SCC 22

File No.: 39533.

Appeal heard: December 1, 2, 2021.
Judgment rendered: December 2, 2021.
Reasons delivered: May 20, 2022.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

2022 SCC 22 (CanLII)

Family law — Custody — Change of residence — Best interests of child — Primary residence of children awarded to mother at trial, allowing children to relocate some ten hours away from father's residence — Father successfully appealing relocation order — Whether trial judge erred in relocation analysis such that appellate intervention was warranted — Framework governing determination as to whether relocation in child's best interests.

Evidence — Additional evidence on appeal — Father appealing relocation order awarding primary residence of children to mother — Court of Appeal admitting new evidence adduced by father about financial situation — Whether Court of Appeal erred in admitting new evidence — Test governing admission of additional evidence on appeal.

The mother met the father in northern British Columbia in 2011, and followed him to Kelowna in 2012. Soon after, they got married, bought a house, and had two boys. The home purchase proved to be a project, as significant money was needed to bring it into livable condition. When the relationship ended in 2018, the house remained an ongoing construction project. After the father assaulted the mother during an argument, the mother brought the boys to her parents' home in Telkwa, some 10 hours away from Kelowna. A parenting arrangement emerged, splitting parenting time alternately between Telkwa and Kelowna, before it was agreed that the children would remain in Kelowna with the father. The parents were to alternate weekly parenting time when the mother returned to Kelowna, which never occurred. Rather,

2022 SCC 22 (CanLII)

the mother applied to the court to relocate the children to Telkwa. She indicated that she was willing to move to Kelowna if her application was unsuccessful, but the father was unwilling to move to Telkwa under any circumstances.

The trial judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. He found that two key issues favoured the move: the more significant issue was the parents' acrimonious relationship and its implications for the children; and the less significant issue was the father's financial situation, particularly with respect to his ability to make the Kelowna home habitable. The father appealed and sought to adduce additional evidence about his finances and the renovations he had made to the house since trial. The Court of Appeal characterized this as "new" evidence because it had not existed at the time of trial. The court applied a different test than that set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In its view, *Palmer* — and in particular, the due diligence criterion — did not strictly govern the admission of new evidence on appeal. The court then admitted the evidence on the basis that it undermined a primary underpinning of the trial decision and the assumptions that the father might not be able to remain in the Kelowna home had been displaced. As one of trial judge's two main considerations no longer applied, the court held that relocation could no longer be justified. The court thus concluded that the children's best interests were best served by staying in Kelowna with both parents.

Held (Côté J. dissenting in part): The appeal should be allowed.

2022 SCC 22 (CanLII)

Per Wagner C.J. and Moldaver, **Karakatsanis**, Brown, Rowe, Martin, Kasirer and Jamal JJ.: Regardless of whether the evidence relates to facts that occurred before or after trial, the test laid out in *Palmer* governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The *Palmer* test is sufficiently flexible to respond to any unique concerns that arise with "new" evidence. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice. Moreover, the trial judge did not err in his relocation analysis, which was consonant with the mobility framework set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

Appellate courts have the discretion to admit additional evidence to supplement the record on appeal. When parties seek to adduce such evidence, the four criteria in *Palmer* typically apply: (a) the evidence could not, by the exercise of due diligence, have been available for the trial; (b) the evidence is relevant in that it bears upon a decisive or potentially decisive issue; (c) the evidence is credible in the sense that it is reasonably capable of belief; and (d) the evidence is such that, if believed, it could have affected the result at trial. This framework applies when evidence is

2022 SCC 22 (CanLII)

adduced on appeal for the purpose of asking the court to review the proceedings in the court below. The test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties narrow rather than expand as a case proceeds up the appellate ladder. The test strikes a balance between two foundational principles: finality and order in the justice system, and reaching a just result in the context of the proceedings.

The first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been available for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial, which ensures finality and order for the parties and the integrity of the judicial system. On an individual level, the principle of finality speaks to the profound unfairness in providing a party the opportunity to make up for deficiencies in his or her case at trial. On a systemic level, it preserves the distinction between the roles of trial and appellate courts: evaluating evidence and making factual findings are the responsibilities of trial judges, while appellate courts are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction. Accordingly, evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal. With respect to post-trial evidence, the reason why the evidence was unavailable for trial may very well have its roots in the parties' pre-trial conduct. Courts should

2022 SCC 22 (CanLII)

accordingly consider whether the party's conduct could have influenced the timing of the fact they seek to prove.

The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the due diligence criterion, which focuses on the conduct of the party, these three criteria focus on the evidence adduced and are conditions precedent to the evidence being adduced. Evidence that falls short of any of them cannot be admitted on appeal. These criteria reflect the importance of reaching a just result in the context of the proceedings, a principle that is directly linked to the correctness of the trial decision and the truth-seeking function of the trial process.

In the family law context, evidence that does not satisfy the due diligence criterion should generally not be admitted on an appeal of a best interests of the child determination. Finality and order are particularly important in such cases. Children should be afforded the comfort of knowing, with some degree of certainty, where they will live and with whom. Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Only in rare instances should an absence of due diligence be superseded by the interests of justice, such as in urgent matters requiring an immediate decision. This could also be the case where admitting the additional evidence does not offend the principle of finality despite the failure to meet the due diligence criterion, such as where the appellate court has already identified a material error in the trial judgment below and

2022 SCC 22 (CanLII)

further evidence may help determine an appropriate order. Such exceptional circumstances do not dispense with the other *Palmer* criteria. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal.

In family law cases, the admission of post-trial evidence on appeal may be unnecessary because legislative variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. The interest in reaching a just result can therefore be fostered through means other than an appeal and admission of post-trial evidence on appeal can therefore unnecessarily undermine finality and order in family law decisions. Courts must be wary of litigants using the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding nor to seek a fresh determination after remedying gaps in a trial strategy with the assistance of the trial judge's reasons. Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is in substance a disguised application to vary, a court may refuse to admit additional evidence without considering the *Palmer* criteria.

The Court's decision in *Gordon* sets out a two-stage inquiry for determining whether to vary a parenting order and permit a custodial parent to relocate

2022 SCC 22 (CanLII)

with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications. As the first stage of the *Gordon* inquiry will likely not raise a contentious issue in relocation cases, determining the child's best interests will often constitute the crucial question.

For the past 25 years, case law has refined the *Gordon* framework. The 2019 amendments to the *Divorce Act* largely codified these refinements. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors. While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement (s. 16.93). And although *Gordon* restricted whether courts could consider a moving party's reasons for relocating, this is now an express consideration in the best interests of the child analysis (s. 16.92(1)(a)).

The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades. The language in s. 16(6) now expressly recognizes that the so-called maximum contact principle is only significant to the extent that it is in the child's best interests. This principle is better referred to as the parenting time factor, and must not be used to detract from the child-centric nature of the inquiry. Section 16.92(2) provides that trial judges shall not consider a parent's testimony that

2022 SCC 22 (CanLII)

they would move with or without the child, and ss. 16(3)(j) and 16(4) instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child. This consideration is especially important in mobility cases.

In light of these refinements, the common law relocation framework can be restated as follows: courts must determine whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary, and the scope of appellate review is narrow. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. How the outcome of an application would affect either parties' relocation plans should not be considered.

In the instant case, there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna, and the mother needed her family's support to care for the children, which was only

2022 SCC 22 (CanLII)

available in Telkwa. Moreover, the mother was more willing to facilitate a positive relationship between the children and the father than the converse, and there were findings of family violence. Accordingly, there was no reason to set aside the trial judge's decision that relocation was in the children's best interests.

Per **Côté** J. (dissenting in part): The appeal should be allowed in part. The new evidence should be admitted, and the appeal should be remanded to the trial court for reconsideration of the children's best interests in light of the new evidence.

There is agreement with the majority that the test laid out in *Palmer* governs, as it applies to both fresh and new evidence, yet there is disagreement with the majority's application of *Palmer* to the facts of the appeal. The Court of Appeal's ultimate conclusion that the evidence is admissible should be upheld, but its treatment of *Palmer* and its decision to reassess the best interests of the children should be rejected. The *Gordon* framework is not properly before the Court, as the parties did not raise the issue. It should be left for another day.

The *Palmer* test must be applied flexibly in all cases involving the welfare of children. A child's welfare is ongoing and fluid, and an accurate assessment of their current situation is of crucial importance on appeal. Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, the best interests of a child may provide a compelling reason to admit evidence on appeal. An application to vary may in some circumstances be the appropriate procedure, but it remains

2022 SCC 22 (CanLII)

adversarial in nature; as such, it would also cause strains on the parties' resources and delays.

Narrowing *Palmer*'s flexibility to exceptional cases is unduly rigid and undermines the specificity needed in cases involving children's welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case. Additionally, a rigid view of the *Palmer* criterion of due diligence focuses inordinately and narrowly on the litigant's conduct. The mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child. To be sure, a failure to meet the due diligence criterion is not always fatal, as it is not a condition precedent to admission. When this occurs, it must be determined whether the strength of the other *Palmer* criteria is such that failure to satisfy the due diligence requirement is overborne.

Appellate courts are not entitled to overturn trial court decisions simply because they would have made a different decision or balanced the factors differently. While the Court of Appeal was correct to admit the new evidence, it should not have used it as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

In this case, the new evidence could have affected the result at trial, as it bore on a critical aspect of the trial judge's reasoning. Finality, although important,

2022 SCC 22 (CanLII)

should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. The matter should be remitted to the trial judge because of his extensive knowledge of the family and the children. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess the best interests of the children in light of their father's current circumstances.

2022 SCC 22 (CanLII)

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2022 SCC 22 (CanLII)

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2022 SCC 22 (CanLII)

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2022 SCC 22 (CanLII)

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2022 SCC 22 (CanLII)

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, DeWitt-Van Oosten and Voith JJ.A.), 2021 BCCA 11, 45 B.C.L.R. (6th) 14, 50 R.F.L. (8th) 1, [2021] B.C.J. No. 38 (QL), 2021 CarswellBC 46 (WL), setting aside in part a decision of Saunders J., 2019 BCSC 2192, 34 R.F.L. (8th) 331, [2019] B.C.J. No. 2460 (QL), 2019 CarswellBC 3770 (WL). Appeal allowed, Côté J. dissenting in part.

Darius Bossé, *Mark Power* and *Ryan Beaton*, for the appellant.

Georgialee A. Lang, for the respondent.

Ian Ross, *Caterina E. Tempesta* and *Samantha Wisnicki*, for the intervener the Office of the Children's Lawyer.

2022 SCC 22 (CanLII)

Claire E. Hunter, *Q.C.*, *Kate Feeney*, *Kimberley Hawkins* and *Diana C. Sepúlveda*, for the interveners the West Coast Legal Education and Action Fund Association and the Rise Women's Legal Centre.

2022 SCC 22 (CanLII)

The reasons for judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[1] An appeal is not a retrial. Nor is it licence for an appellate court to review the evidence afresh. When appellate courts stray beyond the proper bounds of review, finality and order in our system of justice is compromised. But not every trial decision can weather a dynamic and unpredictable future. Once it is rendered, lives go on and circumstances may change. When additional evidence is put forward, how should appellate courts reconcile the need for finality and order in our legal system with the need for decisions that reflect the just result in the proceedings before the court? And conversely, what framework should guide trial judges when they determine whether relocation is in a child's best interests, to ensure a just result that can navigate what lies ahead? This appeal raises both questions.

[2] The Court must first determine the test that applies to the admission of additional evidence on appeal. The Court is asked to decide whether a legal distinction should be drawn between admitting "fresh evidence" (concerning events that occurred before trial) and "new evidence" (concerning events that occurred after trial).

[3] In my view, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, regardless of whether the evidence relates to facts that occurred before or after trial. Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[4] In cases where the best interests of the child are the primary concern, the *Palmer* test is sufficiently flexible to recognize that it may be in the interests of justice for a court to have more context before rendering decisions that could profoundly alter the course of a child's life. At the same time, finality and order are critically important in family proceedings, and factual developments that occur subsequent to trial are usually better addressed through variation procedures.

[5] In this case, the Court of Appeal for British Columbia held that *Palmer* did not strictly govern the admission of new evidence on appeal. Instead, it applied a different test and admitted the evidence. It erred in doing so.

2022 SCC 22 (CanLII)

[6] In my view, the evidence did not satisfy the *Palmer* criteria. The respondent sought to overturn an unfavourable trial outcome by adducing evidence on appeal that could have been available at first instance, had he acted with due diligence. Effectively, he was allowed to remedy the deficiencies in his trial evidence on appeal — with the benefit, and guidance, of the trial reasons. This gave rise to considerable unfairness. And in any event, evidence in family law appeals that is tendered for the purpose of showing a material change of circumstances is more appropriately raised at a variation hearing. *Palmer* should not be used to circumvent a variation scheme that Parliament specifically designed to address such developments. Admission of this evidence on appeal was not in the interests of justice.

[7] The second broad issue in this case relates to the legal framework for determining whether it is in a child's best interests to allow a parent to relocate with the child, away from the other parent. It concerns the application of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined by the case law over the past two decades and viewed in light of the recent amendments of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[8] Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult — the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child. The challenge is even greater in mobility cases. Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child. The forward-

2022 SCC 22 (CanLII)

looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity.

[9] The law relating to the best interests of the child has long emphasized the need for individualized and discretionary decision making. But children also need predictability and certainty. To balance these competing interests, the law provides a framework and factors to structure a judge's discretion. This case calls on the Court to examine how some of those considerations apply in mobility cases. In particular, I clarify that a moving parent's reasons for relocation and the "maximum contact factor" are relevant only to the extent they bear upon the best interests of the child; a parent's testimony about whether they will move regardless of the outcome of the relocation application should not be considered; and family violence is a significant factor impacting the best interests of the child.

[10] Here, the trial judge did not err in his conclusion that relocation was in the best interests of the children. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. In the absence of any reviewable error, the Court of Appeal was wrong to intervene.

[11] At the conclusion of the hearing, the Court (Côté J. dissenting in part) allowed the appeal and restored the trial judge's order, for reasons to follow. These are the reasons.

2022 SCC 22 (CanLII)

II. Background

[12] Ashley Barendregt, the mother, met Geoff Grebliunas, the father, in 2011 in the Bulkley Valley, in northern British Columbia. She followed him to Kelowna in 2012, where he had moved for a change of scenery. Soon after, they got married. They bought a house and had two boys, who were aged three and five at the time of trial in 2019. They shared parenting duties throughout the marriage.

[13] The home purchase, already a burden on their modest finances, proved to be a project. An electrical fire shortly after they moved in exposed underlying problems — "rodents, water ingress, mould, and compromise of a structural floor joist" (2019 BCSC 2192, 34 R.F.L. (8th) 331, at para. 6) — that the father, with his background in carpentry, pledged to repair. He tore out drywall, planning to proceed room by room. But progress was slow. By trial, six years later, the house remained an "ongoing construction project" (trial reasons, at para. 5), with a makeshift kitchen and an only recently completed upstairs bathroom. The father's own expert witness described it as "a working environment, not a living environment": para. 33. Significant money was needed to bring it to marketable condition — funds the couple lacked, being well into six figures of debt by trial.

[14] Their relationship ended in November 2018, when the father "likely" assaulted the mother during an argument. That night, she drove the 2 boys some 10 hours to her parents' home in Telkwa, a village in the Bulkley Valley. The parenting arrangement that emerged in the aftermath was formalized in an interim order, splitting

2022 SCC 22 (CanLII)

parenting time between the parents, alternately in Telkwa and Kelowna, before they agreed to keep the children in Kelowna with the father. When the mother returned to Kelowna, they were to alternate weekly parenting time. But she did not return. A court order gave her parenting time with the boys in Telkwa in August 2019, but she had no further parenting time before the trial, which was held later that year.

2022 SCC 22 (CanLII)

[15] The central issue at trial was whether the children should be relocated to Telkwa with the mother or remain in Kelowna. She was willing to move to Kelowna if the father prevailed; he was unwilling to move to the Bulkley Valley under any circumstances.

[16] After a nine-day trial, the judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. The father appealed and sought to adduce additional evidence. The Court of Appeal admitted the evidence, set aside the trial decision, and ordered the children to be returned to Kelowna. That decision was stayed pending appeal to this Court.

III. Decisions Below

A. *Supreme Court of British Columbia, 2019 BCSC 2192, 34 R.F.L. (8th) 331 (Saunders J.)*

[17] The trial judge found that both parents played active parts in raising the children, and relocation to Telkwa would have a significant impact on the children's relationship with their father. Two key issues, however, favoured the move.

[18] The more significant issue was the parties' acrimonious relationship and its implications for the children. He doubted they could collaborate to promote the children's best interests. Their marriage had involved "possibly some degree of emotional abuse"; the father had assaulted and emotionally traumatized the mother; and his conduct at trial was "abusive, and profoundly offensive": para. 41. There was, he found, "compelling evidence of [the father's] continuing animosity towards [the mother]": para. 42.

[19] He concluded that granting the mother primary care of the children would be in their best interests. She was more likely than the father to promote a positive attitude in the boys toward the other parent, and distancing the parents would help isolate the children from their discord. It was also unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future. The children would furthermore benefit indirectly from the mother living in Telkwa, where she had a stronger support network.

[20] The "less significant" issue was the parties' financial situation: para. 31. The house needed an influx of money to make it habitable. The father said he would accelerate the renovations but had not prepared a budget for the ongoing work. His plan to live in the house with the boys depended on his parents paying off the mortgage and

2022 SCC 22 (CanLII)

line of credit, an arrangement they had yet to confirm by trial. The judge concluded that the father's ability to remain in the house, or even in West Kelowna, was less than certain.

[21] The trial judge concluded that relocation would best promote the children's interests. He awarded the mother primary residence and granted her application.

B. *Court of Appeal for British Columbia, 2021 BCCA 11, 45 B.C.L.R. (6th) 14 (Newbury, DeWitt-Van Oosten and Voith JJ.A.)*

[22] The appeal proceeded, and the hearing had nearly ended, when the father's counsel informed the court that her client's financial situation had suddenly changed. The father later elaborated in an affidavit: he had taken steps to purchase the mother's interest in the property; his parents had purchased a half interest in the home and had increased their personal line of credit to finance renovations; the three of them had refinanced the home, nearly halving the monthly mortgage payments; he had completed the bathroom and master bedroom; and a contractor had been hired to finish the kitchen. He sought to admit evidence of all of these developments in the appeal.

[23] Voith J.A., for the court, characterized this as "new" evidence because it had not existed at the time of trial. As such, it was not subject to the *Palmer* test, and the due diligence criterion did not strictly govern its admission. Instead, "new evidence" could be admitted if it established "that a premise or underpinning or

2022 SCC 22 (CanLII)

understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered": para. 43.

[24] The court admitted the evidence, finding that it undermined a primary underpinning of the trial decision, namely, the judge's findings on the parties' finances. Specifically, the father had done almost exactly what he had said he would; and the "assumption[s]" that he might not be able to remain in the family home and might not "possibly even [be] able to remain in West Kelowna" had been displaced: para. 57. One of trial judge's two main considerations no longer applied.

[25] And given this, the other consideration — the parties' acrimonious relationship — could "no longer support the ultimate result arrived at by the trial judge": para. 69. The mother's need for emotional support could not justify relocation, even at the cost of "some friction between the parties": paras. 74-75. And the trial judge should have considered whether the children could have stayed with their father in Kelowna. The court concluded that the children's best interests were best served by staying in Kelowna with both parents and ordered accordingly.

IV. Issues

[26] This appeal raises two broad issues:

2022 SCC 22 (CanLII)

(i) What test governs the admission of additional evidence on appeal, and did the Court of Appeal err in admitting the evidence in this case?

(ii) Did the trial judge err in his relocation analysis, warranting appellate intervention?

2022 SCC 22 (CanLII)

[27] In brief, I answer as follows. Regardless of whether the evidence relates to facts that occurred before or after trial, the *Palmer* test governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice.

[28] Moreover, the trial judge did not err in his relocation analysis. His analysis of the best interests of the children is consonant with the mobility framework set out in *Gordon* as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

V. Analysis

A. *The Test for Admitting Additional Evidence on Appeal*

[29] Appellate courts have the discretion to admit additional evidence to supplement the record on appeal: *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at p. 188; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at para. 43. Whether in criminal or non-criminal matters (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107), courts have typically applied the four criteria set out by this Court in *Palmer* when parties seek to adduce evidence on appeal:

(i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);

(ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;

(iii) the evidence is credible in the sense that it is reasonably capable of belief; and

(iv) the evidence is such that, if believed, it could have affected the result at trial.

2022 SCC 22 (CanLII)

[30] *Palmer* applies when evidence is adduced on appeal "for the purpose of asking the court to review the proceedings in the court below": *Shulman*, at para. 44. *Palmer* does not, however, apply to evidence going to the validity of the trial process itself (*R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 76-77), nor to evidence adduced "as a basis for requesting an original remedy in the Court of Appeal", such as a stay of proceedings for an abuse of process (*Shulman*, at paras. 44-46).

[31] The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties should "narrow rather than expand as [a] case proceeds up the appellate ladder": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44, at para. 10.

[32] The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be relevant, credible and could have affected the outcome — are concerned with reaching a just result.

[33] While the interest in the finality of a trial decision and order in the justice system must sometimes give way to reach a just result, as I will explain, a proper

2022 SCC 22 (CanLII)

application of *Palmer* reflects and safeguards both principles, as well as fairness to the parties.

[34] For the reasons that follow, I conclude that the *Palmer* test applies to all evidence tendered on appeal for the purpose of reviewing the decision below. In my view, the *Palmer* test ensures the proper balance and is sufficiently flexible to respond to any unique concerns that arise when considering whether to admit evidence regarding facts or events that occurred after the trial.

[35] My analysis proceeds as follows. First, I discuss the four *Palmer* criteria. Second, I address the unique challenges that arise when litigants seek to adduce "new" evidence. Third, I consider how *Palmer* applies in the family law context. Finally, I address the use of properly admitted evidence, before turning to the merits of the fresh evidence motion in this case.

(1) The *Palmer* Criteria

(a) *Due Diligence*

[36] Functionally, the first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been obtained for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial. This ensures finality and order in the judicial process: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 130; *R. v. G.D.B.*,

2022 SCC 22 (CanLII)

2000 SCC 22, [2000] 1 S.C.R. 520, at para. 19; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 15.

[37] The relationship between due diligence, and finality and order are deeply rooted in our common law. The law generally "requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. This animates, for example, the cause of action estoppel doctrine, which safeguards "the interest of an individual in being protected from repeated suits and prosecutions for the same cause" and "the finality and conclusiveness of judicial decisions": K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at pp. 3-4. This doctrine achieves these ends through a due diligence component: it precludes a party from bringing an action against another party where the basis of the cause of action was argued or could have been argued in the prior action if the party in question had exercised reasonable diligence (*Grandview (Town of) v. Doering*, [1976] 2 S.C.R. 621, at pp. 634-38, citing *Henderson v. Henderson* (1843), 3 Hare 100).

[38] The *Palmer* test's due diligence criterion plays a similar role: it ensures that litigants put their best foot forward when first called upon to do so.

[39] The principle of finality and order has both individual and systemic dimensions in this setting. On an individual level, it speaks to the profound unfairness in providing "a party the opportunity to make up for deficiencies in [their] case at trial": *Stav v. Stav*, 2012 BCCA 154, 31 B.C.L.R. (5th) 302, at para. 32. A party who has not

2022 SCC 22 (CanLII)

acted with due diligence should not be afforded a "second kick at the can": *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177, at para. 24. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.

[40] On a systemic level, this principle preserves the distinction between the roles of trial and appellate courts. Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contrast, are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.

[41] By requiring litigants to call all evidence necessary to present their best case at first instance, the due diligence criterion protects this distinction. This, in turn, sustains the proper functioning of our judicial architecture (*R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 30), and ensures the efficient and effective use of judicial resources (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 16).

[42] The importance of the due diligence criterion may vary, however, depending on the proposed use of the evidence. Evidence sought to be adduced as a basis for intervention — to demonstrate the first instance decision was wrong — raises

2022 SCC 22 (CanLII)

greater concerns for finality and order than evidence that may help determine an appropriate order *after* the court has found a material error. Since appellate intervention is justified on the basis of a reviewable error in the decision below, there is less concern for finality and order. Accordingly, in such cases, the due diligence criterion has less bearing on the interests of justice.

2022 SCC 22 (CanLII)

[43] In sum, the due diligence criterion safeguards the importance of finality and order for the parties and the integrity of the judicial system. The focus at this stage of *Palmer* is on the *conduct* of the party. This is why evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal.

(b) *The Criteria That the Evidence Be Relevant, Credible and Could Have Affected the Result*

[44] The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the first criterion, which focuses on the *conduct* of the party, these three criteria focus on the *evidence* adduced. And unlike due diligence, the latter three criteria are "conditions precedent" — evidence that falls short of them cannot be admitted on appeal: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 14.

[45] These criteria reflect the other principle that animates the *Palmer* test: the importance of reaching a just result in the context of the proceedings (*Sipos*, at

paras. 30-31; *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 56). This principle is directly linked to the correctness of the trial decision and the truth-seeking function of our trial process. Evidence that is unreliable, not credible, or not probative of the issues in dispute may hinder, rather than facilitate, the search for the truth. And as Cory J. observed in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 13, "[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth."

2022 SCC 22 (CanLII)

[46] After a court has decided to admit evidence on appeal, it should remain mindful that the evidence has not been put to the test of cross-examination or rebuttal at trial, and the adverse party may not have had the ability to verify its accuracy: *Lévesque*, at para. 25. If the evidence is challenged or its probative value is in dispute, appellate courts may, among other things, provide the opposing party an opportunity to respond, allow cross-examination of a witness, permit the submission of expert evidence in response to additional expert evidence, or remit the matter to the court of first instance: *Lévesque*, at para. 25; see also *Child and Family Services of Winnipeg v. J.M.F.*, 2000 MBCA 145, 153 Man. R. (2d) 90, at para. 27; *Children's Aid Society of Windsor-Essex (County) v. B. (Y.)* (2004), 5 R.F.L. (6th) 269 (Ont. C.A.), at paras. 12 and 19.

(c) *Palmer Resolves the Tension Between the Need for Finality and Order, and the Interest in Reaching a Just Result*

[47] The *Palmer* test reconciles the tension between these two foundational principles — the need for finality and order, and the interest in reaching a just result —

to determine the interests of justice in the circumstances of each case: *Sipos*, at para. 31. It is against this backdrop that I address whether the *Palmer* test applies to what has been called "new" evidence (more accurately referred to as evidence of facts or events that occurred after trial).

2022 SCC 22 (CanLII)

(2) The *Palmer* Test Applies to Evidence of Facts that Arise After Trial

[48] The primary issue in this appeal is whether and how the *Palmer* test applies to "new" evidence. According to the Court of Appeal, evidence is "new" if it pertains to facts that occurred after trial; "fresh" evidence pertains to facts that occurred before trial, but which, for one reason or another, could not be put before the court.

[49] Appellate courts across the country have differed in their approaches to "new" evidence. Some have applied the *Palmer* criteria (*J.W.S. v. C.J.S.*, 2019 ABCA 153, at para. 37 (CanLII); *Sheikh (Re)*, 2019 ONCA 692, at para. 7 (CanLII); *Riel v. Riel*, 2017 SKCA 74, 99 R.F.L. (7th) 367, at para. 16; *Hellberg v. Netherclift*, 2017 BCCA 363, 2 B.C.L.R. (6th) 126, at paras. 53-54), while others have applied a different or modified test (*North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (C.A.), at paras. 25-26; *Jens v. Jens*, 2008 BCCA 392, 300 D.L.R. (4th) 136, at paras. 24-29; *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5, at paras. 159-61 and 166 (CanLII); *Miller v. White*, 2018 PECA 11, 10 R.F.L. (8th) 251, at para. 19; *Beauchamp v. Beauchamp*, 2021 SKCA 148, at para. 36 (CanLII)).

[50] This dissonance in the jurisprudence reflects two apparent paradoxes that arise in applying the first and fourth *Palmer* criteria to "new" evidence. Courts have queried whether new evidence could ever fail the due diligence criterion, since it relates to facts not yet in existence at the time of trial: see *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.), at paras. 21 and 28-29; *J.M.F.*, at para. 21. Others have asked how such evidence could possibly have affected a trial outcome that it postdated: *North Vancouver (District)*, at para. 25; *Radcliff v. Radcliff* (2000), 7 R.F.L. (5th) 425 (Ont. C.A.), at para. 10; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), at p. 211.

2022 SCC 22 (CanLII)

[51] In the face of conflicting British Columbia case law, the Court of Appeal concluded that the *Palmer* test only applies to fresh evidence, and the due diligence criterion did not strictly govern the admission of new evidence. It outlined the following test:

> . . . depending on the circumstances, new evidence may be admitted if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered. [para. 43]

[52] The mother takes issue with the Court of Appeal's approach: she submits that the *Palmer* criteria apply to both fresh and new evidence. The father argues that the test applied below was appropriate because the new evidence "falsified" the trial decision.

[53] I conclude that the Court of Appeal erred by applying a different test to "new" evidence.

[54] Applying a different test for admitting new evidence — which dispensed with the due diligence criterion — failed to safeguard the delicate balance between finality and order, and the interest in a just result. It is also inconsistent with this Court's *Palmer* jurisprudence. Indeed, this Court has consistently applied *Palmer* to evidence pertaining to events that occurred between the trial and appeal: see, for example, *Catholic Children's Aid Society*, at p. 188; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 50-51; *Sipos*, at paras. 29-30. The evidence in *Palmer* concerned facts that occurred both before and after trial and thus included both "fresh" and "new" evidence. The additional evidence included sworn declarations made by one of the key trial witnesses who recanted his testimony after trial, declaring that the RCMP promised him money before trial and made the payment after trial.

[55] The *Palmer* test is sufficiently flexible to deal with both types of evidence. As I will explain, the core inquiries under all four criteria remain the same regardless of when the evidence, or the specific fact, came into existence. Because the same test applies, it is unnecessary to distinguish between "fresh" and "new" evidence. *Palmer* applies to the admission of all additional evidence tendered on appeal for the purpose of reviewing the decision below.

(a) *The Due Diligence Criterion*

2022 SCC 22 (CanLII)

[56] A common thread running through the parties' submissions and the Court of Appeal's decision is that conceptual difficulties arise when applying the due diligence criterion to evidence about facts arising after trial. The mother accepts that due diligence should be eased in instances where it was impossible to adduce the evidence at trial. For the father, it is "by definition . . . not an appropriate consideration" in such cases: R.F., at para. 75. Similarly, the Court of Appeal decided that the due diligence criterion does not strictly govern the admission of new evidence.

[57] But under such a formalistic approach, the timing of events — and not the litigant's conduct — would dictate the application of the due diligence criterion. For events occurring subsequently, the criterion would effectively be eliminated. This would run counter to our jurisprudence, ignore the litigant's conduct and would fail to safeguard finality and order within the *Palmer* test. That is precisely what happened in this case. Focusing exclusively on whether the decision would be different gives undue weight to the interest in reaching a just result — and distorts the delicate balance that the *Palmer* test seeks to maintain.

[58] The due diligence criterion is sufficiently flexible to adapt to any unique concerns raised by evidence of facts that occurred subsequent to trial. As this Court held in *Bent v. Platnick*, 2020 SCC 23, at para. 60, the due diligence criterion is not a rigid one and has been held to be a practical concept that is context-sensitive.

[59] Ultimately, this criterion seeks to determine whether the party could — with due diligence — have acted in a way that would have rendered the evidence

2022 SCC 22 (CanLII)

available for trial. The due diligence inquiry should focus on the *conduct* of the party seeking to adduce such evidence rather than on the evidence itself. And in doing so, a court should determine, quite simply, why the evidence was not available at the trial: *G.D.B.*, at para. 20.

[60] The reason why "new" evidence was unavailable for trial may have its roots in the parties' pre-trial conduct. For facts arising after trial, courts should consider whether the party's conduct could have influenced the timing of the fact they seek to prove. Consider this case. If finances are at issue and a party does not take steps to obtain a financing commitment until after trial, the court may ask why the evidence could not have been obtained for trial. Parties cannot benefit from their own inaction when the existence of those facts was partially or entirely within their control. Again, litigants must put their best foot forward at trial. In the end, what matters is that this criterion properly safeguards finality and order in our judicial process.

[61] In sum, the focus of the due diligence criterion is on the litigant's conduct in the particular context of the case. Considering whether the evidence could have been *available* for trial with the exercise of due diligence is tantamount to the requirement that the evidence could not, with the exercise of due diligence, have been *obtained* for trial. Where a party seeks to adduce additional evidence on appeal, yet failed to act with due diligence, the *Palmer* test will generally foreclose admission.

(b) *The Other Palmer Criteria*

2022 SCC 22 (CanLII)

[62] There is no suggestion by the parties that the remaining *Palmer* criteria should operate differently depending on when the fact the evidence seeks to prove occurred. Needless to say, the evidence must be relevant and credible regardless of when it arose. The interest in reaching a just result requires nothing less.

[63] As for the fourth factor — whether the evidence, if believed, could have affected the result at trial — the logic remains the same: a court must approach this criterion purposively. While it is tempting to conclude that evidence of facts arising *after* trial could never have affected the result *at* trial, the inquiry is not so narrow. The question is not the evidence's timing but whether the evidence is sufficiently probative of the trial issues, had it been available. An overly formalistic approach at this stage ignores the underlying rationale of the *Palmer* criteria — here, the interest in reaching a just result in the context of the proceedings.

[64] As noted in *Palmer*, at p. 776, the fourth criterion will be satisfied if the evidence, assuming it was presented to the trier of fact and believed, possesses such strength or probative force that it might, taken with the other evidence adduced, have affected the result.

(3) The *Palmer* Test in Family Law Cases Involving the Best Interests of the Child

[65] I turn now to an underlying question raised by this appeal: the flexible application of *Palmer* in cases involving the best interests of the child.

2022 SCC 22 (CanLII)

[66] This Court has explained that these cases may require a more flexible application of the fourth *Palmer* criterion: *Catholic Children's Aid Society*, at p. 188. The Court recognized that the best interests analysis — which takes into account a broad range of considerations, including the needs, means, condition and other circumstances unique to the child before the court — widens the scope of evidence that could affect the result. This criterion, however, remains a condition precedent for the admission of evidence in family appeals. But the flexible approach to the fourth criterion is not the only aspect of *Palmer* that warrants further discussion in the family law context. Two other aspects include (i) the exceptional circumstances where a failure to meet due diligence is not fatal; and (ii) the existence of variation schemes that address factual developments that postdate trial. I address each in turn.

(a) *A Failure to Meet Due Diligence Is Not Fatal in Exceptional Circumstances*

[67] First, given both the premium placed on certainty in cases involving children and the importance of having accurate and up-to-date information when a child's future hangs in the balance (*Catholic Children's Aid Society*, at p. 188), evidence that does not meet the due diligence criterion may nonetheless be admitted in exceptional circumstances. Let me explain. Finality and order — in both their individual and systemic dimensions — are *particularly* important in cases involving the best interests of the child: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13. Children should be afforded the comfort of knowing, with some

2022 SCC 22 (CanLII)

degree of certainty, where they will live and with whom. And unfortunately, an appeal only prolongs the cloud of uncertainty and the hardship and stress a child must endure.

[68] Protracted litigation also places additional strain on the parties' resources. In the context of a spousal separation, families who resort to the adversarial process are often in crisis, with two households now in need of support. As this Court recognized in *Moge v. Moge*, [1992] 3 S.C.R. 813, family litigants, particularly women, are often already shouldering the economic consequences of a marital breakdown. Some will be unable to afford the financial and emotional cost of court proceedings at first instance, let alone the strain of relitigating the facts on appeal. Needlessly prolonging this adversarial process does little to assist parties who must find a way to restructure their relationships and cooperate for the sake of their children.

[69] Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Evidence that does not satisfy the due diligence criterion should therefore generally not be admitted, even on an appeal of a best-interests-of-the-child determination.

[70] That said, an absence of due diligence may in rare instances be superseded by the interests of justice: see *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 32 R.F.L. (6th) 7 (Ont. C.A.), at para. 56. There may be exceptional cases involving a child's best interests where the need for finality and order may need to yield in the interests of justice. The intervener the Office of the Children's Lawyer provides one such example: in urgent matters requiring an immediate decision — a pressing

2022 SCC 22 (CanLII)

medical or other issue bearing on the child's best interests — it may not serve the interests of justice to require a party to show due diligence and further prolong or delay proceedings.

[71] In other cases, admitting the additional evidence may not offend the principle of finality at all, despite the failure to meet the due diligence criterion. For instance, where the appellate court has already identified a material error in the trial judgment below, evidence that may help determine an appropriate order — whether to show the need for a new trial, support a substitute order, or otherwise — may exceptionally warrant admission: *Children's Aid Society of Halton (Region)*, at paras. 27 and 52-56; *Children's Aid Society of Toronto v. P. (D.)* (2005), 19 R.F.L. (6th) 267 (Ont. C.A.), at paras. 8-9. This may promote timely justice, consistent with a child's need to have their future determined with due dispatch: C. Leach, E. McCarty and M. Cheung, "Further Evidence in Child Protection Appeals in Ontario" (2012), 31 *C.F.L.Q.* 177.

[72] To be clear, such exceptional circumstances do not dispense with the other *Palmer* criteria — the evidence still must be relevant, credible, and have some material bearing on the outcome. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal. An appeal is not the continuation of a trial. Rather, the party must satisfy the judge that the interest of finality and order is clearly outweighed by the need to reach a just result

2022 SCC 22 (CanLII)

in the context of the proceedings. In such circumstances, the interests of justice may demand additional evidence to be admitted on appeal.

(b) *The Existence of Variation Schemes That Address Factual Developments That Postdate Trial in Parenting Cases*

[73] Turning to the second feature that arises in the family law context, the admission of post-trial evidence on appeal may be unnecessary because, unlike decisions that award damages in one final order, litigation about ongoing parenting arrangements remains subject to court oversight. Specifically, variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. As I will explain, the admission of post-trial evidence on appeal unnecessarily undercuts both finality and order in family law judgments, as well as Parliament's statutory design.

[74] Because variation procedures are available in parenting cases to address changes arising post-trial, the interest in reaching a just result can be fostered through other means. The admission of post-trial evidence on appeal therefore unnecessarily undermines finality and order in family law decisions.

[75] Moreover, courts must be wary of permitting parties to use the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal cannot serve as an indirect route of varying the original parenting

2022 SCC 22 (CanLII)

order. A variation application and an appeal are distinct proceedings based on fundamentally different premises.

[76] In a variation proceeding, "[t]he court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision": *Gordon*, at para. 11. The applicant bears the burden of proving that a child's best interests differ from those determined in the original decision because the circumstances on which that decision was based have materially changed since trial. Once an applicant discharges this burden, the assessment is prospective: a variation judge must enter into a fresh inquiry to determine where the best interests of the child lie, considering the findings of fact of the judge who made the previous order, together with the evidence of new circumstances (*Gordon*, at para. 17). Finality in this context respects the trial judge's original determination of the child's best interests: *Gordon*, at para. 17; *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 688, per Sopinka J.

[77] An appeal, in contrast, is designed to determine whether there is an error in the trial decision. In other words, the correctness of the previous decision — and not the implications of subsequent events — is the focal point in an appeal. This assessment is inherently retrospective, with the review typically circumscribed within the four corners of the judgment below. Here, finality in the original decision is preserved unless the court identifies a material error.

[78] It is essential that variation procedures and appeals remain distinct in the family law context: holding otherwise would unfairly require the opposing party to

2022 SCC 22 (CanLII)

defend the original order — absent a material error — in the wrong forum, with appellate judges effectively performing the work assigned to first instance judges in variation procedures. This would displace the corrective function of appellate courts and allow litigants to circumvent Parliament's variation scheme.

[79] Litigants must not be permitted to game the system in this way: an appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding; nor is it an opportunity to seek a fresh determination, after remedying gaps in a trial strategy with the assistance of the trial judge's "preliminary" reasons. Such a tactical approach in family cases will often be at the expense of the children.

[80] Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is "in substance a disguised application to vary" (*Riel*, at para. 20), a court may refuse to admit additional evidence without considering the *Palmer* criteria.

(4) The Use of Properly Admitted Evidence on Appeal

[81] As a final observation, even when evidence is properly admitted on appeal, appellate courts must defer to the trial judge's factual findings that are unaffected by the additional evidence. While assessing the proper outcome in light of additional evidence may require a global consideration of the case (*St-Cloud*; *Gordon*), appellate

2022 SCC 22 (CanLII)

courts are not entitled to reweigh or disregard the trial judge's underlying factual findings absent palpable and overriding error.

(5) Did the Court of Appeal Err in Admitting the Additional Evidence?

[82] In this case, the Court of Appeal erred in admitting the father's evidence on appeal. It applied the wrong test and failed to consider whether the father exercised due diligence. The evidence could have been available for trial with due diligence. And in any event, this matter could have been dealt with solely on the basis that a fresh evidence motion was not in the interests of justice given the availability of a variation procedure.

[83] The father sought to adduce an affidavit at the conclusion of the appeal hearing. He deposed that he had taken steps to pay the mother her interest in the family property "to comply with the order of the trial judge": C.A. reasons, at para. 27. He also deposed that he refinanced the home and his parents increased their personal line of credit, which went towards renovations that had been partially completed.

[84] The father argues that the evidence addressed the trial judge's concerns that because of their financial position, his ability to remain in the family home, or even in West Kelowna, was "less than certain": see R.F., at para. 5; see also trial reasons, at para. 40. These preoccupations, he says, are now "demonstrably incorrect": R.F., at para. 31.

2022 SCC 22 (CanLII)

[85] In a similar vein, the Court of Appeal admitted the evidence because it was "cogent and material", and it "directly addresse[d] one of the two primary underpinnings of the trial decision" (para. 51), since the trial judge's "concern, or expectation, or 'assumption'" regarding the father's ability to remain in the family home "ha[d] been displaced" (para. 57).

[86] The trial judge's predictions about the state of the father's finances and his ability to remain at his residence, however, should not be mischaracterized. It was open to the trial judge to make an assessment about the future and make a finding of fact based on the evidence before him. Here, the fact that the father later moved to cure evidentiary deficiencies regarding his ability to finance and renovate the home does not mean that the trial judge erred in his findings or conclusions.

[87] More to the point, the father failed to act with due diligence. Most obviously, the facts he now seeks to prove and rely upon on appeal — that he had the necessary financing to keep his home and make it habitable for the children — were squarely at issue before the trial judge. He could have taken reasonable steps to obtain financing before trial, since he was aware that he needed to refinance to stay in the house: trial reasons, at para. 35. His plan was contingent on obtaining financing from his father, whose testimony was "less definite" (para. 36):

> Mr. Grebliunas Sr. has no commitment letters regarding financing. Asked whether he was prepared to offer any more than the amount of the debt, he hedged, saying "We'll see what the final number is", and offered his opinion that the property would be "a good investment". [Emphasis added; para. 38.]

2022 SCC 22 (CanLII)

As the trial judge concluded, the practicability of that arrangement remained "an open question": para. 39.

[88] Allowing the father to resolve these concerns and redraw the factual landscape at the eleventh hour of the appeal occasioned considerable unfairness. In effect, he was allowed to relitigate the same issues on the basis of more favourable facts, displacing the corrective function of the appellate court. Nothing on the record indicates that he was prevented from obtaining the financing commitments before trial. This ran firmly against the interest in finality and order that due diligence is meant to safeguard.

[89] Further, as noted above, an alternative legislative mechanism for varying the trial order was available to deal with any material changes of circumstances arising after trial: *Divorce Act*, s. 17(5); *Gordon*, at para. 10. By successfully adducing the additional evidence, the father was able to circumvent the burden he would have faced in a variation application — that is, proving a change of circumstances from those that justified the children's relocation to Telkwa. Instead, he received what amounted to a near fresh evaluation of the children's best interests.

[90] A flexible approach to *Palmer* in cases involving the welfare of children must not permit what is "in substance a disguised application to vary": *Riel*, at para. 20. And as stated above, courts should be mindful of not permitting parties to use the *Palmer* framework to circumvent and undermine parliamentary schemes that provide specific procedures for review or variation upon shifts in the factual landscape.

2022 SCC 22 (CanLII)

[91] There are no circumstances here that render the admission of this evidence necessary in the interests of justice. The Court of Appeal erred in admitting the additional evidence on appeal.

2022 SCC 22 (CanLII)

B. *The Framework Governing Relocation Cases*

[92] I turn now to the second question in this appeal: whether the trial judge erred in his analysis of the mother's application to relocate to Telkwa with the children.

[93] The father argues that the trial judge erred in his application of the common law framework that governs relocation applications, and that this framework should be updated. He raises concerns regarding the trial judge's application of *Gordon* to the parties' shared parenting arrangement; his treatment of the "maximum contact principle"; the weight he afforded to the mother's reasons for moving; his neglect of the mother's testimony that she would stay in Kelowna and co-parent if her application failed; and the impact of family violence and discord between the parties on his analysis: R.F., at paras. 24-29, 33-37, 67 and 84-88.

[94] These submissions all bring into focus how case law across the country has refined and supplemented the *Gordon* framework for over 25 years. Indeed, the *Gordon* framework is flexible by design; it is not an unyielding set of rules. And with decades of *Gordon* jurisprudence as a guide, the federal government and many provinces have now enacted statutory relocation regimes that largely reflect the judicial experience evinced in the case law. As I will explain, this jurisprudential and legislative lineage

provides a clear framework for all family arrangements going forward. The trial judge's assessment of the best interests of the child is consistent with this refined framework. It was free from material error and entitled to deference on appeal.

[95] My reasons proceed as follows. First, I touch on the best interests of the child and the unique nature of mobility cases. Second, I underline the importance of deference in cases involving parenting issues. Third, I set out the refined *Gordon* framework in light of jurisprudential and legislative refinements that have occurred over the past two decades. Finally, I turn to the specific issues raised in this case: whether the trial judge erred in his application of the *Gordon* framework.

(1) The Best Interests of the Child

[96] The best interests of the child are an important legal principle in our justice system: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9. It is a staple in domestic statutes, international law, and the common law: see, for example, *Divorce Act*, s. 16; *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1); *Gordon*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909.

2022 SCC 22 (CanLII)

[97] But, even with a wealth of jurisprudence as guidance, determining what is "best" for a child is never an easy task. The inquiry is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law*, at para. 11; *Gordon*, at para. 20.

[98] The difficulties inherent to the best interests principle are amplified in the relocation context. Untangling family relationships may have profound consequences, especially when children are involved. A child's welfare remains at the heart of the relocation inquiry, but many traditional considerations do not readily apply in the same way.

[99] In *Gordon*, this Court set out a framework for deciding whether relocation is in the best interests of the child. Under this framework, a judge has the onerous task of determining a child's best interests in the tangle of competing benefits and detriments posed by either outcome: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, 334 D.L.R. (4th) 49, at para. 23. And as Abella J.A. (as she then was) once observed, "[i]t can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

(2) The Importance of Deference in Parenting Cases Affecting the Best Interests of the Child

2022 SCC 22 (CanLII)

[100] The scope of appellate review in family law cases is narrow: *Van de Perre*, at para. 11. Determining a child's best interests is always a fact-specific and highly discretionary determination: *Van de Perre*, at para. 9. And as Gonthier J. observed, "Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge's discretion": *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1374.

[101] The trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial: *R. v. G.F.*, 2021 SCC 20, at para. 81. After hearing from the parties directly, weighing the evidence, and making factual determinations, the trial court is best positioned to determine the best parenting arrangement.

[102] An appellate court's role, as noted, is instead generally one of error correction; it is not to retry a case. Permitting appellate courts to become venues for dissatisfied parties to relitigate issues already resolved at trial erodes the public's confidence in the judicial process and the rule of law. The proper functioning of our judicial system requires each level of court to remain moored to its respective role in the administration of justice.

[103] Therefore, an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12; *Van de Perre*, at para. 11.

[104] Absent an error of law or a palpable and overriding error of fact, deference is vital: *Housen*, at paras. 8, 10, 36 and 39. Appellate courts must review a trial judge's

2022 SCC 22 (CanLII)

reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *G.F.*, at para. 79. As I have explained, an appeal is not a litigant's opportunity for a "second kick at the can", especially in parenting cases where finality is of paramount importance: *Van de Perre*, at para. 13.

(3) The Legal Principles Governing Relocation Applications

[105] For over 25 years, *Gordon* has been the governing authority for mobility applications. McLachlin J. (as she then was) set out a two-stage inquiry for determining whether to vary a parenting order under the *Divorce Act* and permit a custodial parent to relocate with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. *Gordon* then provided factors to be considered in relocation cases.

[106] Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications: see *Nunweiler v. Nunweiler*, 2000 BCCA 300, 186 D.L.R. (4th) 323, at paras. 27-28; *L.D.D. v. J.A.D.*, 2010 NBCA 69, 364 N.B.R. (2d) 200, at paras. 10, 24-25, 27 and 29; *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236 (C.A.), at para. 18. As well, courts have applied the framework in cases governed by provincial family law acts, even though *Gordon* concerned an application under the *Divorce Act*: *Bjornson*, at paras. 8 and 17; *G.J. v. C.M.*, 2021 YKSC 20, at para. 26 (CanLII); *Droit de la famille — 2294*, 2022 QCCA 125, at paras. 11-12 (CanLII).

2022 SCC 22 (CanLII)

[107] At the time *Gordon* was rendered, the *Divorce Act* and provincial family legislations did not contain any provisions pertaining to relocation. In 2019, Parliament amended the *Divorce Act* to provide a statutory regime that governs relocation applications. Several provinces have enacted similar statutory relocation regimes in recent years: see *Family Law Act*, S.B.C. 2011, c. 25, ss. 65 to 71; *The Children's Law Act, 2020*, S.S. 2020, c. 2, ss. 13 to 17; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 39.4; *Family Law Act*, S.N.B. 2020, c. 23, ss. 60 to 66; *Parenting and Support Act*, R.S.N.S. 1989, c. 160, ss. 18E to 18H; *Children's Law Act*, S.P.E.I. 2020, c. 59, ss. 46 to 52.

[108] Subject to some notable exceptions, the *Divorce Act* and these provincial statutes largely codified this Court's framework in *Gordon*. As I will explain, where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years.

[109] The *Divorce Act* amendments came into force on March 1, 2021, after the courts below decided this case. Therefore, the mobility application under appeal proceeded under the *Gordon* framework. That said, the transitional provision in s. 35.3 of the amended *Divorce Act* provides:

> **35.3** A proceeding commenced under this Act before the day on which this section comes into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with this Act as it reads as of that day.

2022 SCC 22 (CanLII)

[110] This Court did not receive any submissions on the application of s. 35.3. As I will explain, however, the outcome would be the same regardless of whether this case were decided under the amended *Divorce Act* or the refined *Gordon* framework. The new relocation provisions in the *Divorce Act* largely mirror developments in the common law since *Gordon*. As a result, I leave the discussion of the transitional provision for another day. This case, however, provides an opportunity to bring the common law framework in line with the amended *Divorce Act* to assist judges in dealing with future mobility cases.

[111] In the sections that follow, I clarify how certain aspects of the framework for determining parental relocation issues have evolved since this Court decided *Gordon*.

(a) *Determining Relocation Issues at First Instance and by Way of Variation Applications*

[112] The approach to mobility issues when they are raised at first instance, as in this case, differs from the approach to such issues when they are raised by way of a variation application, as in *Gordon*. Without a pre-existing judicial determination, a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child. Therefore, the first stage of *Gordon* — which sets out the usual requirement for a variation order — has no application.

2022 SCC 22 (CanLII)

[113] Even where there is an existing parenting order, relocation will typically constitute a material change in circumstances and therefore satisfy the first stage of the *Gordon* framework: *Gordon*, at para. 14; see also *Divorce Act*, s. 17(5.2).

2022 SCC 22 (CanLII)

[114] Therefore, regardless of how the relocation issue is brought before the court, the first stage of the *Gordon* inquiry will likely not raise a contentious issue. That said, when the relocation issue arises by way of a variation application, a court must consider the findings of fact of the judge who made the previous order, together with the evidence of new circumstances: *Gordon*, at para. 17. The history of parenting arrangements is always relevant to understanding a child's best interests.

(b) *Determining a Child's Best Interests in Mobility Cases*

[115] Accordingly, the so-called second stage of the *Gordon* framework is often the sole issue when determining a relocation issue. The crucial question is whether relocation is in the best interests of the child.

[116] Five considerations that bear upon the best-interests-of-the-child analysis arise in this case: (i) the application of *Gordon* to shared parenting arrangements and the so-called "great respect principle"; (ii) a moving parent's reasons for relocation; (iii) the "maximum contact principle"; (iv) a moving parent's testimony about how the outcome of the application will influence their decision to relocate; and (v) the impact of family violence. I address each in turn, looking at their evolution in the case law since *Gordon* and their reflection in amendments to the *Divorce Act*.

(i) <u>The Application of *Gordon* to Shared Parenting Arrangements and the So-Called "Great Respect Principle"</u>

2022 SCC 22 (CanLII)

[117] In determining the best interests of the child, *Gordon* first instructs that "[t]he inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect": para. 49.

[118] In this case, the father contends that this aspect of *Gordon* is of limited value where there is a shared parenting arrangement: R.F., at para. 28. He says the trial judge should not have paid special "respect" to the mother's decision to move given their history of shared parenting roles. He relies on Newbury J.A.'s observation in *Q. (R.E.) v. K. (G.J.)*, 2012 BCCA 146, 348 D.L.R. (4th) 622, at para. 58, that "[i]t is not clear how the 'great respect' principle should work where both parents are custodial parents."

[119] The parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests: *Gordon*, at para. 48. This logic applies to both parents in a shared parenting arrangement, and accordingly, both of their views are entitled to great respect in an assessment of the child's best interests. This makes sense: a court always pays careful attention to the views of the parents. In my view, it adds little value to this analysis to label it a separate principle of "great respect".

[120] As for any legal presumption in relocation cases, the Court in *Gordon* noted that the wording of the *Divorce Act* belied the need to defer to the custodial

parent. Rather, the Act expressly stipulated that the judge hearing the application should be concerned only with the best interests of the child, and the variation provisions did not place a burden on any parent at the merits stage of the analysis: paras. 37 and 39.

[121] But over time, certain patterns have emerged. In practice, a move is more likely to be approved where the clear primary caregiver for a child seeks to relocate and more likely to be denied if there is a shared parenting arrangement. Professor Thompson refers to this as the unspoken "primary caregiver presumption": see D. A. R. Thompson, "Ten Years After *Gordon*: No Law, Nowhere" (2007), 35 *R.F.L.* (6th) 307, at p. 317; R. Thompson, "Where Is B.C. Law Going? The New Mobility" (2012), 30 *C.F.L.Q.* 235.

[122] In discussing presumptions, *Gordon* relied on the fact that Parliament had not set out any general rules. It has since done so. In 2019, Parliament enacted a burden of proof, set out in s. 16.93 of the *Divorce Act*, which corresponds to the broad trends in the jurisprudence.

[123] Therefore, in all cases, the history of caregiving will be relevant. And while it may not be useful to label the attention courts pay to the views of the parent as a separate "great respect" principle, the history of caregiving will sometimes warrant a burden of proof in favour of one parent. Indeed, federal and provincial legislatures have increasingly enacted presumptions, bringing clarity to the law. In all cases, however, the inquiry remains an individual one. The judge must consider the best interests of the

2022 SCC 22 (CanLII)

particular child in the particular circumstances of the case. Other considerations may demonstrate that relocation is in the child's best interests, even if the parties have historically co-parented.

(ii) The Reasons for Relocation

[124] The second refinement to the *Gordon* framework concerns the moving parent's reasons for relocating. Here, the father and the Court of Appeal took issue with the weight the trial judge ascribed to the mother's reasons for relocation, the implication being that this consideration detracted from his focus on the child's best interests.

[125] In *Gordon*, McLachlin J. cautioned that courts should avoid "descend[ing] into inquiries into the custodial parent's reason or motive for moving" because "[u]sually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability": paras. 22-23. Therefore, "absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry": para. 23. To hold otherwise, McLachlin J. reasoned, would shift the focus from the best interests of the child to the conduct of the custodial parent: para. 22.

[126] In practice, courts across the country have found that the reason for the move often bears on the best interests of the child: N. Bala, "Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's *Divorce Act*" (2020), 39 *C.F.L.Q.* 45,

2022 SCC 22 (CanLII)

at p. 71; Thompson (2007); E. Jollimore and R. Sladic, “Mobility — Are We There Yet?” (2008), 27 *C.F.L.Q.* 341.

[127] Recent amendments to the *Divorce Act* now instruct courts to consider the moving parent’s reasons for relocation: s. 16.92(1)(a). Similarly, provinces across Canada have incorporated the moving parent’s reasons for relocation within their statutory relocation regimes: *Family Law Act*, s. 69(6)(a) (B.C.); *The Children’s Law Act, 2020*, s. 15(1)(a) (Sask.); *Children’s Law Reform Act*, s. 39.4(3)(a) (Ont.); *Family Law Act*, s. 62(1)(a) (N.B.); *Parenting and Support Act*, s. 18H(4)(b) (N.S.); *Children’s Law Act*, s. 48(1)(a) (P.E.I.).

[128] Indeed, isolating the custodial parent’s reasons for the move from the broad, individualized inquiry of the child’s best interests has frequently proven impractical. There will often be a connection between the expected benefits of the move for the child and the relocating parent’s reasons for proposing the move in the first place. Relocation for financial reasons, for instance, will clearly carry implications for a child’s material welfare. Considering the parent’s reasons for moving can be relevant, and even necessary, to assess the merits of a relocation application.

[129] That said, the court should avoid casting judgment on a parent’s reasons for moving. A moving parent need not prove the move is justified. And a lack of a compelling reason for the move, in and of itself, should not count against a parent, unless it reflects adversely on a parent’s ability to meet the needs of the child: *Ligate v. Richardson* (1997), 34 O.R. (3d) 423 (C.A.), at p. 434.

2022 SCC 22 (CanLII)

[130] Ultimately, the moving parent's reasons for relocating must not deflect from the focus of relocation applications — they must be considered only to the extent they are relevant to the best interests of the child.

(iii) The "Maximum Contact Principle" or "Parenting Time Consistent With the Best Interests of the Child"

[131] *Gordon* requires courts to consider "the desirability of maximizing contact between the child and both parents": para. 49. This consideration has been referred to as the "maximum contact principle": see *Gordon*, at para. 24; see also *Young v. Young*, [1993] 4 S.C.R. 3, at p. 53, per L'Heureux-Dubé J., and p. 118, per McLachlin J. (as she then was). In this case, the father contends that the trial judge neglected this consideration.

[132] Concerns about parenting time with the child will inevitably be engaged in relocation cases: the crux of the dispute is whether it is in the child's best interests to move notwithstanding the impact on their relationship with the other parent. In other words, this concern is folded into the central inquiry before the court.

[133] What is known as the maximum contact principle has traditionally emphasized that children shall have as much contact with each parent as is consistent with their best interests. A corollary to this is sometimes referred to as the "friendly parent rule", which instructs courts to consider the willingness of a parent to foster and support the child's relationship with the other parent, where appropriate: see *Young*, at

2022 SCC 22 (CanLII)

p. 44. Both of these considerations have long been recognized by the *Divorce Act*: see *Divorce Act*, pre-amendments, ss. 16(10) and 17(9); and *Divorce Act*, post-amendments, ss. 16(6) and 16(3)(c).

[134] Although *Gordon* placed emphasis on the "maximum contact principle", it was clear that the best interests of the child are the sole consideration in relocation cases, and "if other factors show that it would not be in the child's best interests, the court can and should restrict contact": *Gordon*, at para. 24; see also para. 49. But in the years since *Gordon*, some courts have interpreted what is known as the "maximum contact principle" as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access: *Folahan v. Folahan*, 2013 ONSC 2966, at para. 14 (CanLII); *Slade v. Slade*, 2002 YKSC 40, at para. 10 (CanLII); see also F. Kelly, "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011), 49 *Osgoode Hall L.J.* 277, at pp. 278 and 296-98. Indeed, the term "maximum contact principle" seems to imply that as much contact with both parents as possible will necessarily be in the best interests of the child.

[135] These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is *only* significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended *Divorce Act* recasts the "maximum contact principle" as "[p]arenting time consistent with best interests of child": s. 16(6). This shift in language is more neutral

2022 SCC 22 (CanLII)

and affirms the child-centric nature of the inquiry. Indeed, going forward, the "maximum contact principle" is better referred to as the "parenting time factor".

(iv) A Parent's Testimony About Whether They Will Relocate Regardless of the Outcome of the Relocation Application

[136] *Gordon* is silent as to whether, and how, a trier of fact may consider how the outcome of an application would affect the parties' relocation plans. In this case, the mother indicated that she would return to Kelowna if her application was refused, while the father indicated he would not move to the Bulkley Valley if her application was granted.

[137] In the years since *Gordon*, many courts have recognized the danger that such evidence will place parties in a "double bind". As Paperny J.A. explained in *Spencer v. Spencer*, 2005 ABCA 262, 257 D.L.R. (4th) 115, at para. 18:

> In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

2022 SCC 22 (CanLII)

[138] I agree. Considering a parent's willingness to move with or without the child can give rise to a double bind: a parent can either appear to be putting their own interests ahead of their child, or they risk undermining the strength of their relocation application (see *D.P. v. R.B.*, 2009 PECA 12, 285 Nfld. & P.E.I.R. 61, at para. 32; Jollimore and Sladic, at pp. 373-74).

[139] This risk has led appellate courts in many provinces to discourage trial judges from relying on a parent's representations about whether they will move without the children: see *Hopkins v. Hopkins*, 2011 ABCA 372, at para. 6 (CanLII); *Hejzlar*, at paras. 24-27; *D.P.*, at para. 32; *N.T. v. W.P.*, 2011 NLCA 47, 309 Nfld. & P.E.I.R. 350, at para. 9; *Morrill v. Morrill*, 2016 MBCA 66, 330 Man. R. (2d) 165, at para. 12.

[140] The same approach is now reflected in the *Divorce Act*: s. 16.92(2) precludes the court from considering whether the moving parent would relocate with or without the children. I would add that a responding parent could just as easily fall victim to the problematic inferences associated with the double bind: see *Joseph v. Washington*, 2021 BCSC 2014, at paras. 101-11 (CanLII). Therefore, in all cases, the court should not consider how the outcome of an application would affect the parties' relocation plans.

(v) Family Violence as a Relevant Factor

[141] In this case, the acrimonious relationship between the parties — featuring abusive conduct during the marriage, at separation, and at trial — was a significant

2022 SCC 22 (CanLII)

factor in the trial judge's relocation analysis. On appeal, the father argues that such "friction" is "not unusual for separating couples": R.F., at para. 35.

[142] Since *Gordon*, courts have increasingly recognized that any family violence or abuse may affect a child's welfare and should be considered in relocation decisions: see *Prokopchuk v. Borowski*, 2010 ONSC 3833, 88 R.F.L. (6th) 140; *Lawless v. Lawless*, 2003 ABQB 800, at para. 12 (CanLII); *Cameron v. Cameron*, 2003 MBQB 149, 41 R.F.L. (5th) 30; *Abbott-Ewen v. Ewen*, 2010 ONSC 2121, 86 R.F.L. (6th) 428; *N.D.L. v. M.S.L.*, 2010 NSSC 68, 289 N.S.R. (2d) 8, at paras. 22-23 and 35; *E.S.M. v. J.B.B.*, 2012 NSCA 80, 319 N.S.R. (2d) 232, at paras. 55-57. Courts have been significantly more likely to allow relocation applications where there was a finding of abuse: Department of Justice, *A Study of Post-Separation/Divorce Parental Relocation* (2014), at ch. 3.3.4.

[143] The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., "A Comprehensive Review of the Literature on the

2022 SCC 22 (CanLII)

Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014), 5 *I.J.C.Y.F.S.* 493, at p. 497.

[144] Domestic violence allegations are notoriously difficult to prove: P. G. Jaffe, C. V. Crooks and N. Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009), 6 *J. Child Custody* 169, at p. 175; A. M. Bailey, "Prioritizing Child Safety as the Prime Best-Interest Factor" (2013), 47 *Fam. L.Q.* 35, at pp. 44-45. As the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, family violence often takes place behind closed doors and may lack corroborating evidence: see S. B. Boyd and R. Lindy, "Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence" (2016), 35 *C.F.L.Q.* 101, at p. 115. Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support.

[145] The prospect that such findings could be unnecessarily relitigated on appeal will only deter abuse survivors from coming forward. And as it stands, the evidence shows that most family violence goes unreported: L. C. Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (2nd ed. 2020), 2017 CanLIIDocs 2 (online), at ch. 4.5.2.

[146] The recent amendments to the *Divorce Act* recognize that findings of family violence are a critical consideration in the best interests analysis: s. 16(3)(j) and (4). The *Divorce Act* broadly defines family violence in s. 2(1) to include any violent

2022 SCC 22 (CanLII)

or threatening conduct, ranging from physical abuse to psychological and financial abuse. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child.

[147] Because family violence may be a reason for the relocation and given the grave implications that any form of family violence poses for the positive development of children, this is an important factor in mobility cases.

(c) *Summary of the Framework for Determining Whether Relocation Is in the Best Interests of the Child*

[148] More than two decades ago, this Court set out a framework for relocation applications in *Gordon*: paras. 49-50. It applies to relocation issues that arise at first instance and in the context of applications to vary existing parenting orders.

[149] Since then, our jurisprudence has refined the *Gordon* framework, and, subject to two notable exceptions, the *Divorce Act* has largely codified it. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors. While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement: s. 16.93. And although *Gordon* restricted whether courts could consider a moving party's reasons for relocating, this is now an express consideration in the best-interests-of-the-child analysis: s. 16.92(1)(a).

2022 SCC 22 (CanLII)

[150] The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades, which did not arise in *Gordon*. Section 16.92(2) now provides that trial judges shall not consider a parent's testimony that they would move with or without the child. Furthermore, ss. 16(3)(j) and 16(4) of the *Divorce Act* now instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child.

[151] In light of the jurisprudential and legislative refinements, the common law relocation framework can be restated as follows.

[152] The crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary.

[153] Our jurisprudence and statutes provide a rich foundation for such an inquiry: see, for example, s. 16 of the *Divorce Act*. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and shall give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. These examples are illustrative, not exhaustive. While some of these

2022 SCC 22 (CanLII)

factors were specifically noted under *Gordon*, they have broad application to the best interests of the child.

[154] However, traditional considerations bearing on the best interests of the child must be considered in the context of the unique challenges posed by relocation cases. In addition to the factors that a court will generally consider when determining the best interests of the child and any applicable notice requirements, a court should also consider:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision making responsibility or contact, taking into

2022 SCC 22 (CanLII)

consideration, among other things, the location of the new place of residence and the travel expenses; and

- whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

The court should not consider how the outcome of an application would affect either party's relocation plans — for example, whether the person who intends to move with the child would relocate without the child or not relocate. These factors are drawn from s. 16.92(1) and (2) of the *Divorce Act* and largely reflect the evolution of the common law for over 25 years.

[155] As I have explained, several pillars underlying the Court's reasoning in *Gordon* have shifted over time, leading courts and now legislatures to refine, modify, and supplement the *Gordon* factors. These refinements leave us with a clear framework going forward.

(4) Did the Trial Judge Err in His Relocation Analysis?

[156] The father raises four issues with the trial judge's analysis. He argues that (i) the trial judge failed to account for the historical parenting roles of the parties;

2022 SCC 22 (CanLII)

(ii) the trial judge's decision was inconsistent with the parenting time factor; (iii) the mother's need for emotional support could not justify relocation in this case; and (iv) the trial judge paid undue attention to the acrimonious relationship between the parties.

[157] I would not accede to any of these submissions. The trial judge's *Gordon* analysis was free from a material error, serious misapprehension of evidence, or error of law.

(a) *The Trial Judge's Decision Considered the Historical Parenting Roles of the Parties*

[158] The father first contends the trial judge's analysis did not reflect the parties' shared parenting responsibilities throughout the marriage and after separation. This submission relies on the trial judge's statement, derived from *Gordon*, that "barring an improper motive, relocation must be approached from the perspective of respect for a parent's decision to live and work where they choose": para. 21. This statement, says the father, may be applicable to the views of a "custodial" parent, but it is not applicable where both parents have been fully engaged in a shared parenting arrangement.

[159] In my view, the trial judge's reasons do not suggest that he gave more "respect" or undue weight to the mother's desire to live and work in Telkwa. Rather, the trial judge canvassed, in detail, why staying in Kelowna with their father was not

2022 SCC 22 (CanLII)

best for the children. Most notably, the trial judge was concerned about the father's animosity towards the mother and the possibility that it could influence or otherwise impact the children: paras. 41-42. There were significant issues with the Kelowna residence, which was described as a working environment, not a living environment: para. 33. And the children and the mother would benefit from family support in Telkwa, including from her parents and siblings: para. 44.

[160] Nevertheless, the Court of Appeal concluded that the trial judge erred by failing to consider Kelowna as a viable option, especially because the mother testified that she was willing to move to Kelowna should the application be denied. The mother's evidence on this point, however, could not be determinative. The trial judge understood the risk posed by the double bind.

[161] The Court of Appeal also took issue with the trial judge's failure to consider whether the children should stay with their father in Kelowna since he also concluded that either "parent was, in concept, able to care for the children": C.A. reasons, at para. 86. However, the trial judge expressed serious reservations about whether the father would foster a positive relationship between the children and their mother: para. 42. The trial judge was right to take this into consideration when determining the options before him.

[162] The trial judge's reasoning on these points disclosed no reviewable error. It was owed deference on appeal.

2022 SCC 22 (CanLII)

(b) *The Trial Judge Considered Parenting Time Consistent With the Best Interests of the Child*

[163] The father submits the trial judge failed to give due weight to the parenting time factor. The Court of Appeal took a similar position, concluding that "[p]ermitting the relocation was inconsistent with the object of maximizing contact between the children and both their parents. Indeed the relocation was likely to permanently and profoundly alter the relationship of the children with their father": para. 87. I have two concerns with this line of reasoning.

[164] First, the question before the trial judge was not how to best promote the parenting time factor; it was how to best promote the best interests of the children. These considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor *to the extent* that it is in the best interests of the child.

[165] Second, the trial judge did not fail to consider that children should have as much contact with each parent as is consistent with their best interests. He considered that "the children would suffer a very significant loss in being deprived of frequent care from and contact with their father" and "[t]here would also be some detriment to the children in removing them from the community they have lived in and the friends they have made": para. 50. He was clearly alive to the risk of reducing contact with the father.

2022 SCC 22 (CanLII)

[166] The trial judge also did not fail to consider the corollary of the parenting time factor: whether either parent would be willing to facilitate contact and help foster a positive relationship between the children and the other parent. Again, the trial judge concluded that the father harboured animus towards the mother, and that she was more likely to build a positive relationship between the children and him than the converse.

[167] On the whole, the trial judge found that relocation would best promote the children's welfare, notwithstanding the impact on the relationship between the children and their father. This was a determination the trial judge was entitled to make, and it was owed deference on appeal.

(c) *The Mother's Need for Emotional Support*

[168] The father submits the trial judge gave undue weight to the mother's need for emotional support. The Court of Appeal similarly held that a parent's need for emotional support, "even with some friction between the parties", cannot justify relocation: para. 74.

[169] The mother's need for emotional support was a relevant consideration in the best interests analysis. The mother followed the father to Kelowna, but her family remained in Telkwa. A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent: *Burns v. Burns*, 2000

2022 SCC 22 (CanLII)

NSCA 1, 183 D.L.R. (4th) 66, at pp. 81-82; *L. (S.S.) v. W. (J.W.)*, 2010 BCCA 55, 316 D.L.R. (4th) 464, at para. 33; *Bjornson*, at para. 30; *Orring v. Orring*, 2006 BCCA 523, 276 D.L.R. (4th) 211, at para. 57.

2022 SCC 22 (CanLII)

[170] It is also simplistic to suggest that emotional support for the mother was the only benefit that weighed in favour of relocation. The trial judge described, in great detail, how the continuing animosity between the parents would impact the children should they stay in Kelowna. He also noted that the move would provide the mother with the benefit of housing support, childcare, better employment, and opportunities to advance her education: paras. 1, 44 and 46-47.

[171] These considerations all have direct or indirect bearing on the best-interests-of-the-child assessment. Relocation that provides a parent with more education, employment opportunities, and economic stability can contribute to a child's wellbeing: *Larose v. Larose*, 2002 BCCA 366, 1 B.C.L.R. (4th) 262, at paras. 6 and 19; *H.S. v. C.S.*, 2006 SKCA 45, 279 Sask. R. 55, at para. 26; see also E. El Fateh, "A Presumption for the Best?" (2009), 25 *Can. J. Fam. L.* 73, at pp. 80-83.

[172] Similarly, the additional support of family and community at the new location can enhance the parent's ability to care for the children: *D.A.F. v. S.M.O.*, 2004 ABCA 261, 354 A.R. 387, at para. 17. Extended family, for example, can provide additional support to children while their parents begin to navigate the new terrain of post-separation life: *Harnett v. Clements*, 2019 NLCA 53, 30 R.F.L. (8th) 49, at paras. 22 and 42; *C.M. v. R.L.*, 2013 NSFC 29, at para. 139 (CanLII).

[173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, “the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent” is far from novel: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also *Willick*, at pp. 724-25, per L’Heureux-Dubé J. A child’s welfare is often advanced in tandem with improvements in the parent’s financial, social, and emotional circumstances. The trial judge found this to be the case here.

[174] At all times, the trial judge remained focused on the child’s best interests. He only considered the mother’s needs — emotional or otherwise — to the extent that they were relevant to the children. The trial judge was clearly of the view that relocation would both directly and indirectly benefit the children, whereas “they would at least suffer indirectly to some degree if their mother remained in the Okanagan”: para. 46.

[175] Once again, his analysis on this point was free from any reviewable error.

(d) *The Parties’ Acrimonious Relationship*

[176] The father also submits the trial judge erred in placing undue emphasis on the acrimonious relationship between the parties. For the father, the “friction” was a “thing of the past” (R.F., at para. 34), it was nothing unusual for parties who are separating, and there was no evidence that it occasioned any distress for the children.

2022 SCC 22 (CanLII)

[177] I disagree. The trial judge’s factual findings were well supported by the evidence.

[178] The trial judge carefully explained why he viewed the parties’ relationship as acrimonious, both during the marriage and at the time of trial. He found that there was friction during the marriage: the mother had been subject to the father’s controlling and overbearing personality; there was “possibly some degree of emotional abuse”; she had been physically assaulted; and she was emotionally traumatized.

[179] And the father’s continued animosity towards the mother became readily apparent during the trial itself. The trial judge found his conduct at trial to be abusive: para. 41. Most notably, the father adduced a nude “selfie” of the mother in an affidavit, which the trial judge found served no purpose but to humiliate her. The trial judge also noted that the assault, and the father’s denials that it had occurred, was “likely to be an ongoing source of acrimony”: para. 41 (emphasis added).The trial judge concluded that this high-conflict relationship between the parties had “particularly significant” implications for the children: para. 41. These considerations weighed in favour of the children staying primarily with the mother. In these circumstances, it was open for the trial judge to conclude that a co-parenting arrangement could only work in Telkwa. If the mother returned to Kelowna, she would likely be socially isolated and reliant on the father.

2022 SCC 22 (CanLII)

[180] Despite the trial judge's findings, which were well supported by the record, the Court of Appeal intervened because "the trial judge's concerns about Mr. Grebliunas' behaviour towards Ms. Barendregt warrant some context": para. 70.

[181] The court identified four factors that purportedly "attenuated" the seriousness of the circumstances. First, the mother never argued that hostility between the parties supported her move; her evidence was that the parties were getting along better than when they first separated. Second, many of the issues the judge had been concerned about had taken place in the past. Third, there was no evidence of any event involving or taking place in the presence of the children since separation. And fourth, the trial judge failed to consider the evidence that the parties' relationship was improving.

[182] None of these factors gave the Court of Appeal licence to disturb the trial judge's factual findings regarding the relationship between the parties.

[183] First, although counsel for the mother did not advance the father's animus as a factor that supported relocation, the state of the parties' relationship was obviously relevant. And as the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, it is important to be aware of the social and legal barriers to women disclosing family violence in family law proceedings.

[184] Second, the parties' acrimonious relationship was far from a relic of the distant past. Again, the acrimony surfaced during the trial itself. And abusive dynamics

2022 SCC 22 (CanLII)

often do not end with separation — in fact, the opposite is often true: Jaffe, Crooks and Bala, at p. 171; Neilson, at ch. 4.5.1, 7.2.2 and 7.2.6. Trial judges have the advantage of observing the dynamic between the parties first-hand; any resulting assessment of their ability to work together in the future must attract deference.

[185] Third, the fact that there was no evidence of any event involving the children, or taking place in the children's presence, could not be determinative. Not only can *indirect* exposure to conflict have implications for the children's welfare, the trial judge found there was a significant risk that conflict between the parties would spill over and *directly* impact the children. He was entitled to make that finding on the evidence before him.

[186] Fourth, the record discloses no indication that the trial judge forgot, ignored, or misconceived the evidence showing improvements in the parties' relationship. An omission in the reasons, in and of itself, does not mean that the appellate court is permitted to review the evidence heard at trial. And in any event, cooperating, staying, or reconciling with a party does not necessarily indicate that an incident of abuse or violence was not serious: see D. Martinson and M. Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017), 30 *Can. J. Fam. L.* 11, at p. 34. In the end, what mattered was the trial judge's conclusion that it was unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future: para. 42.

2022 SCC 22 (CanLII)

[187] Nevertheless, the Court of Appeal concluded that the trial judge's findings regarding the acrimonious relationship between the parties could "no longer support the ultimate result arrived at by the trial judge": para. 69.

[188] Quite simply, however, it was not the place of the Court of Appeal to decide that the broader context could "attenuate" the seriousness of the father's behavior in the absence of an overriding and palpable error. Nor was it the court's place to reweigh a factor that had been carefully considered by the trial judge. A difference in opinion does not provide an appellate court licence to eclipse the trial court's judgment in favour of its own. The Court of Appeal was wrong to dispense with deference in the absence of a reversible error.

(e) *The Other Gordon Factors*

[189] I am satisfied that the trial judge's *Gordon* analysis was free from material error. The following factors all supported the trial judge's conclusion that relocation was in the children's best interests: there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna; the mother needed her family's support to independently care for the children, which was only available in Telkwa; she was more willing to facilitate a positive relationship between the children and the father than the converse; and there were findings of family violence. I see no reason to set aside the trial judge's decision.

VI. Disposition

2022 SCC 22 (CanLII)

[190] The appeal is allowed. The decision of the Court of Appeal is set aside, and paras. 1 to 6 of the trial judge's order regarding the primary residence of the children are restored. The mother is entitled to her costs in this Court and the courts below.

2022 SCC 22 (CanLII)

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[191] I have had the benefit of reading my colleague Justice Karakatsanis's reasons. While I agree that the test laid out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, governs, as it applies to both "fresh" and "new" evidence, I disagree with my colleague's application of *Palmer* to the facts of this appeal. For the reasons that follow, I would uphold the Court of Appeal's ultimate conclusion that the evidence is admissible, but reject its treatment of *Palmer* and its decision to reassess the best interests of the children.

[192] I respectfully part company with my colleague's analysis on two points. First, it is in my view inappropriate to comment on the *Gordon v. Goertz*, [1996] 2 S.C.R. 27, framework in the context of this appeal. This issue was not raised by the appellant, Ms. Barendregt ("mother"), nor was it formally raised by the respondent, Mr. Grebliunas ("father"), who did not cross-appeal. It is therefore not properly before

this Court. Even if it were, I do not believe it prudent to comment on amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), without the benefit of submissions and of a full evidentiary record on the matter. It follows that I cannot agree with my colleague's analysis as set out in paras. 105-89 of her reasons. I will say no more on this issue; it ought to be left for another day.

[193] Second, as I mentioned, I disagree with my colleague's application of *Palmer* to the facts of this case. Appellate courts that strictly apply the *Palmer* test tend to focus too narrowly on the potential for further evidence to distort the appellate standard of review rather than properly focusing on the best interests of the child as the overriding consideration. The *Palmer* test must be applied flexibly in *all* cases involving the welfare of children. My colleague recognizes this well-established principle, yet her application of *Palmer* is devoid of flexibility.

[194] On a proper application of *Palmer*, I would admit the new evidence and remand the appeal to the trial court for reconsideration of the children's best interests in light of the new information regarding the father's financial situation and the condition of the West Kelowna home. The effect of holding otherwise would be to relocate 2 children 1,000 km away from their father based on an inaccurate picture of reality.

II. Analysis

2022 SCC 22 (CanLII)

[195] As my colleague rightfully notes, the *Palmer* test must be applied more flexibly in family law cases involving the best interests of a child (para. 67; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165). In such cases, an accurate assessment of the current situation of the parties, and of the children in particular, is of crucial importance (*Catholic Children's Aid*, at p. 188). A child's welfare is "ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context" (*T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, 316 N.S.R. (2d) 202, at para. 82).

[196] Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, it is trite law that the best interests of a child "may provide a compelling reason to admit evidence on appeal" (*C.K.S. v. O.S.S.*, 2014 ABCA 416, at para. 10 (CanLII)). After all, a custody appeal "is ultimately about a child and will affect the welfare of a child" (*Bacic v. Ivakic*, 2017 SKCA 23, 409 D.L.R. (4th) 571, at para. 24; see also *P. (J.) v. P. (J.)*, 2016 SKCA 168, 89 R.F.L. (7th) 92, at para. 24; *O. (A.) v. E. (T.)*, 2016 SKCA 148, 88 R.F.L. (7th) 34, at paras. 115-17; *C.L.B. v. J.A.B.*, 2016 SKCA 101, 484 Sask. R. 228, at paras. 21-22).

[197] This flexibility is borne out by a review of the relevant case law. Over the last decade, Canadian appellate courts admitted additional evidence in family law cases in 48 out of 152 reported cases reviewed. Notably, however, the national rate of admission was considerably higher in cases involving child custody and the welfare of children. In 85 such cases, the court admitted the evidence almost half the time (41 out

2022 SCC 22 (CanLII)

of 85). By contrast, the national rate of admission in cases not concerning children was closer to one tenth (7 out of 67). This supports my view that the rules for admitting further evidence ought to be relaxed — and in practice *are* relaxed — where the best interests of a child are at stake.

2022 SCC 22 (CanLII)

[198] My colleague appears to accept the importance of flexibility in this context. She notes that there may be "exceptional cases" where a child's best interests favour admitting further evidence. For instance, she observes that the need for "finality" and "order" may yield "in the interest of justice" in "urgent matters requiring an immediate decision" (para. 70).

[199] But, respectfully, my colleague's approach — narrowing *Palmer*'s flexibility to "exceptional cases" — is unduly rigid and undermines the specificity needed in cases involving children's welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case.

[200] Contrary to my colleague's reasoning, all of the criteria must be applied flexibly in cases involving the best interests of children. I will briefly explain why this is so with respect to the first and fourth of the *Palmer* criteria — due diligence and whether the evidence could have affected the result at trial — as only these criteria are at issue in this appeal. I will then move on to apply *Palmer* — with the requisite flexibility — to the facts of this case.

A. *Palmer Test*

(1) Flexibility in Assessing Due Diligence

[201] Finality and order are not judicial straitjackets. Infants grow quickly into toddlers and then — in what may seem like the blink of an eye — into young adults. This development and maturation process demands that our courts have ample flexibility to decide each child custody case based on the most current information available. I could not agree more with the intervener the Office of the Children's Lawyer that a flexible approach "recognizes the need to be aware of children's updated circumstances to understand how appellate decisions will impact their current lives, not the lives they had when the original decision was made" (para. 6).

[202] With respect, my colleague takes a rigid view of due diligence. She focuses inordinately and narrowly on the "litigant's conduct", stating that parties should not be permitted to "benefit from their own inaction" (paras. 60-61). She asserts that only in exceptional circumstances may courts admit evidence that does not meet the due diligence criterion. I respectfully disagree with this rigid approach for three reasons.

[203] First, I believe the reason for flexibility in this context to be obvious. It is to ensure that reviewing courts have the full context, given the ongoing nature of a child's welfare — the undammed stream. This is precisely why appellate courts nationwide have held that due diligence is to be applied flexibly (*Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61, 315 D.L.R. (4th) 498, at para. 87; *Jiang v. Shi*, 2017

2022 SCC 22 (CanLII)

BCCA 232, at para. 11 (CanLII); *PT v. Alberta*, 2019 ABCA 158, 88 Alta. L.R. (6th) 235, at para. 61; *G (JD) v. G (SL)*, 2017 MBCA 117, [2018] 4 W.W.R. 543, at para. 39). These cases stand for a clear, principled proposition: the mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child (see, e.g., *Babich v. Babich*, 2020 SKCA 25; *Bacic*, at para. 24). Moreover, even if some of the evidence could have been adduced at trial, this does not end the *Palmer* analysis, as it is well established that a "failure to meet the due diligence criterion is not always fatal" (*R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 42). Where there has been such a failure, it must be determined whether the strength of the other *Palmer* criteria "is such that failure to satisfy the due diligence requirement is overborne" (*ibid.*). This clearly further supports my view that due diligence in the child custody context must be applied with greater flexibility than my colleague's approach permits.

[204] Second, finality is a double-edged sword. My colleague is rightly concerned about the impact of protracted litigation on "women, [who] are often already shouldering the economic consequences of a marital breakdown" and who "will be unable to afford the financial and emotional cost of court proceedings" (para. 68). But she seems to overlook the fact that a strict application of due diligence would only add to the burden she describes. By requiring all family law litigants to "put their best foot forward at trial" (para. 60), my colleague would require a self-represented single mother of modest means to advance her claim while simultaneously assembling

2022 SCC 22 (CanLII)

up-to-date financial documentation, the relevance of which may not be apparent until after the initial hearing. Otherwise, this single mother runs the risk that new and potentially decisive evidence about her present circumstances will be ruled inadmissible. The result of my colleague's approach to *Palmer* is that such a single mother would face a significant legal hurdle in pursuing custody of her children simply because she is unable to get her finances in order in a timely fashion. I fail to see how this promotes my colleague's conception of "the interests of justice".

[205] Third, I acknowledge that an application to vary may in some circumstances be the appropriate procedure. But an application to vary, like a motion to adduce further evidence on appeal, is "adversarial". It would also place "additional strain on the parties' resources" and generate further delays (para. 68). This begs the question: How does the variation mechanism mitigate the "financial and emotional" cost which so concerns my colleague? I do not find an answer for this in her reasons. Put simply, and with respect, my colleague's conception of the due diligence criterion undercuts the interests of *all* family litigants, and "particularly women", in child welfare cases (para. 68).

(2) Flexibility in Assessing Whether the New Evidence Could Have Affected the Result

[206] The fourth *Palmer* criterion requires the court to ask whether the further evidence, if believed, could have affected the result.

2022 SCC 22 (CanLII)

[207] As with due diligence, however, flexibility is once again nowhere to be found in my colleague's analysis. She does of course recite the definition of this criterion from *Palmer* and note that it must be approached "purposively". But she leaves it to readers to discern for themselves what this might mean (para. 63).

[208] Such an approach fails to recognize that in *Catholic Children's Aid*, this Court explicitly contemplated the need for flexibility in applying the fourth *Palmer* criterion. L'Heureux-Dubé J., writing for a unanimous Court, held as follows:

> Counsel for the child supports the approach advanced by the respondent society and also relies on *Genereux*. . . as the appropriate test in matters where the best interests of the child are the paramount concern.
>
> Although I doubt that *Genereux*. . . intended to depart significantly from the test of *Palmer* . . . its approach is to be commended. . . . If *Genereux*. . . has enlarged the scope of the admission of fresh evidence on appeal, it has done so, in the present case at least, with regard to the final arm of the [*Palmer*] test, that is, whether the fresh evidence may affect the result of the appeal when considered with the other evidence. If that is so, and the fact that the admission of up-to-date evidence is essential in cases such as the one at hand, *Genereux*. . . should be applied in cases determining the welfare of children. [Emphasis added; pp. 188-89.]

[209] This excerpt affirms what is by now beyond dispute: the *Palmer* criteria — particularly the fourth criterion — are more flexible in appeals concerning the best interests of children, "where it is important to have the most current information possible '[g]iven the inevitable fluidity in a child's development'" (*K.K. v. M.M.*, 2022 ONCA 72, at para. 17 (CanLII) (text in brackets in original)).

2022 SCC 22 (CanLII)

[210] In light of the foregoing, I will now apply *Palmer* to the situation in the case at bar.

B. *Application of Palmer*

[211] As I mentioned above, only the first and fourth of the *Palmer* criteria are in issue in this appeal. With respect to the first criterion, the mother argues that the new evidence could, with proper diligence, have been adduced at trial. In any event, relying on the fourth criterion, she contends that the new evidence could not have affected the outcome of the case.

[212] As I will explain, I disagree with the mother on both counts.

(1) <u>Due Diligence</u>

[213] First, due diligence is not a barrier to admitting the new evidence. By its nature, the evidence could not have been adduced at trial. I acknowledge that the father could have acted more expeditiously in taking steps to address his financial situation and the condition of the family home, and in bringing these matters to the court's attention. However, an inescapable fact remains: The evidence the father produced on appeal was not in existence at the time of the trial. The first *Palmer* factor therefore does not preclude its admission.

2022 SCC 22 (CanLII)

[214] Further, even if the evidence in question could have been obtained for the trial, this would not end the analysis. As I have indicated, giving effect to the need for flexibility in the child custody context demands that we apply the well-established principle that due diligence is *not* a condition precedent to admission. Yet this is precisely how my colleague treats due diligence, contrary to this Court's holding in *Lévesque*.

[215] Unlike my colleague, I do not accept that the existence of the variation procedure weighs against admission. She asserts that "[a] variation application and an appeal are distinct proceedings based on fundamentally different premises" (para. 75), and I agree with her. But in this case the father's appeal would have gone ahead regardless of whether he brought a separate application to vary in the trial court. Hence, the mere existence of the possibility of a variation order does not foreclose a litigant's right to appeal and therefore the right to present a motion to adduce additional evidence, particularly where the evidence in question is linked to the alleged error.

(2) Whether the New Evidence Could Have Affected the Result

[216] Applying the fourth *Palmer* criterion, I conclude that the new evidence could have affected the result.

[217] It is noteworthy that my colleague does not even reach this branch of the *Palmer* test. She bases her conclusion on the father's alleged lack of due diligence and on an absence of "circumstances" which might "render the admission of this evidence

2022 SCC 22 (CanLII)

necessary in the interests of justice" (para. 91). All I would say in this regard is that I do not understand "necessity in the interests of justice" to be a *Palmer* criterion.

[218] More to the point, however, the fourth *Palmer* criterion favours admission of the new evidence. I say this for three reasons.

[219] First, the new evidence bears on a critical aspect of the trial judge's reasoning. The trial judge found that the "parties' financial situation, particularly as it pertains to the house", was an issue that "significantly impact[ed]" his analysis of the children's best interests (paras. 30-31). It matters not in my view that this issue was *comparatively* less significant than the relationship between the parties. The trial judge devoted 10 paragraphs of his best interests analysis to the financial issues related to the West Kelowna home. It is thus plain that the new evidence, which suggests that the father's financial position and the condition of the home are much improved, *could* have affected the trial judge's ultimate conclusion on the question whether permitting the children to relocate with their mother was in their best interests.

[220] Second, the new evidence addresses concerns the trial judge had regarding the home environment the father would provide for the children. If believed, the new evidence suggests that the house is now much closer to a "living environment" than to a "working environment", as it was described at the time of trial (para. 33). The new evidence indicates that the father has renovated the bathroom and the master bedroom, and has definite plans to complete the kitchen renovation.

2022 SCC 22 (CanLII)

[221] Finally, the new evidence undermines the trial judge's conclusion that, given the father's dire financial straits, his ability to remain in the West Kelowna home was "less than certain" (para. 40). The trial judge found that the father's "plan to continue living in the house with the boys [was], for all practical purposes, entirely dependent on the willingness and ability of his parents to pay off the mortgage and the debt on the line of credit secured by the home, and finance the remainder of the renovations" (para. 39). As of the date of the trial, this was uncertain. His father had spoken with bankers about buying an interest in the home, but nothing concrete about this plan had been filed in evidence. If believed, the new evidence shows that the father's plan has come to fruition.

[222] The best interests analysis is of course highly contextual and fact-dependent. It is thus impossible to gauge exactly how this new evidence might have affected the trial judge's carefully calibrated analysis. However, I agree with the father that the new evidence plainly bears on "one significant pillar" of the trial judge's two-pronged rationale (R.F., at para. 67). In my view, this evidence could have altered the trial judge's view that the children's best interests would be better served by their living with their mother in Telkwa rather than in a shared parenting arrangement with both parents in the Kelowna area.

(3) Conclusion on *Palmer*

[223] Accordingly, on a properly flexible application of *Palmer*, I would admit the new evidence. I see no reason why the interest in "finality and order", to which my

2022 SCC 22 (CanLII)

colleague refers numerous times, should have tied the Court of Appeal's hands in admitting new evidence that was plainly relevant to the issues it had to decide in any event. I will now turn to the separate question of the proper use of that evidence.

2022 SCC 22 (CanLII)

C. *Proper Use of the New Evidence*

[224] I agree with the Office of the Children's Lawyer that the real concern with the new evidence in this appeal is not about appellate courts having up-to-date information on current circumstances which may affect a child's best interests. Rather, it is about the *use* of new evidence by appellate courts without proper deference to lower courts, which is contrary to the principles developed by this Court in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014. This issue should be dealt with separately from the admissibility analysis so as not to discourage the admission of new evidence about children's current circumstances that may be invaluable to appellate courts.

[225] The parties agree that an appellate court admitting further evidence in child custody matters may use that evidence in one of two ways: (1) to justify remanding the matter to the trial court for reconsideration in light of a potentially material change in circumstances or (2) to make its own determination of the best interests of the child.

[226] The mother concedes that if the new evidence is admitted, "the matter should [be] remitted to the trial judge because. . . he ha[s] 'extensive knowledge of this family and [these] child[ren]'" (A.F., at para. 71).

[227] I agree with the mother's concession. In my view, while the Court of Appeal was correct to admit this evidence, it should not have used the new evidence regarding the father's financial situation as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

[228] As this Court held in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, appellate courts are not entitled to overturn trial court decisions in family law matters "simply because [they] would have made a different decision or balanced the factors differently" (para. 12).

[229] The Court of Appeal accordingly erred in making its own determination based on the new evidence. Moreover, I agree with the father that finality, although important, should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. In this case, the new evidence bears directly — and perhaps decisively — on a matter of significance to the children's welfare. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess whether it is in the children's best interests to live closer to their father in his *current* circumstances. I would add that an application to vary in these circumstances would be pointless, since it would likewise, as was discussed above, involve further delay and expense to both parties.

III. Disposition

2022 SCC 22 (CanLII)

[230] For the foregoing reasons, I would admit the new evidence and allow the appeal in part, with costs to the father in this Court and in the court below.

[231] In the result, I would remand the appeal to the trial court for reconsideration of the children's best interests in light of the new evidence.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting in part.*

Solicitors for the appellant: Power Law, Ottawa.

Solicitors for the respondent: Georgialee Lang & Associates, Vancouver.

Solicitor for the intervener the Office of the Children's Lawyer: Office of the Children's Lawyer, Toronto.

Solicitors for the interveners the West Coast Legal Education and Action Fund Association and the Rise Women's Legal Centre: Hunter Litigation Chambers, Vancouver; West Coast Legal Education and Action Fund Association, Vancouver; Rise Women's Legal Centre, Vancouver.

2022 SCC 22 (CanLII)

Her Majesty The Queen *Appellant*

v.

Renaud Lévesque *Respondent*

INDEXED AS: R. v. LÉVESQUE

Neutral citation: 2000 SCC 47.

File No.: 26939.

2000: March 23; 2000: October 12.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Evidence — Fresh evidence — Appeals against sentence — Criteria applicable to admission of fresh evidence on appeal from sentence — Whether criteria are the same regardless of whether appeal relates to verdict or to sentence — Whether Court of Appeal erred in admitting fresh evidence.

The accused pleaded guilty to 15 counts arising from a robbery at a residence. He was sentenced to several terms of imprisonment to be served concurrently, the longest of which was a term of ten years and six months for kidnapping. In appealing his sentence, the accused is seeking to have two new reports admitted in evidence to which the Crown objects. The first was prepared by a psychologist for Correctional Service Canada, and the second was written by a psychiatrist at the accused's request. The Court of Appeal unanimously held that the trial judge committed an error in sentencing by comparing this case with cases involving hostage-taking — a finding that is not in issue in this appeal. The majority of the Court of Appeal also allowed the motions to adduce fresh evidence and, in view of the error by the trial judge, substituted a sentence of five years and six months for the sentence of ten years and six months imposed by the trial judge.

Sa Majesté la Reine *Appelante*

c.

Renaud Lévesque *Intimé*

RÉPERTORIÉ: R. c. LÉVESQUE

Référence neutre: 2000 CSC 47.

N° du greffe: 26939.

2000: 23 mars; 2000: 12 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Preuve — Éléments de preuve nouveaux — Appels de la sentence — Critères applicables à l'admission d'éléments de preuve nouveaux en appel d'une sentence — Ces critères sont-ils les mêmes que l'appel porte sur un verdict ou sur une sentence? — La Cour d'appel a-t-elle fait erreur en admettant les éléments de preuve nouveaux?

L'accusé plaide coupable à 15 chefs d'accusation reliés à un vol qualifié dans une résidence. Il est condamné à plusieurs peines d'emprisonnement concurrentes, dont la plus sévère est une peine de dix ans et six mois pour enlèvement. En appel de sa sentence, l'accusé cherche à faire admettre en preuve deux nouveaux rapports auxquels le ministère public s'oppose. Le premier a été préparé par un psychologue pour le compte du Service correctionnel du Canada et le second a été rédigé par un psychiatre à la demande de l'accusé. La Cour d'appel, à l'unanimité, conclut que le juge de première instance a commis une erreur lors de la détermination de la peine en comparant la présente affaire à des affaires de prise d'otage — une conclusion qui n'est pas en cause dans le présent pourvoi. La cour, à la majorité, accueille également les requêtes pour la production d'une nouvelle preuve et, étant donné l'erreur du juge de première instance, substitue une peine de cinq ans et six mois à la peine de dix ans et six mois imposée par ce dernier.

2000 SCC 47 (CanLII)

Held (Arbour J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache and Binnie JJ.: Although the rules concerning sources and types of evidence are more flexible in respect of sentence, the criteria for admitting fresh evidence on appeal are the same regardless of whether the appeal relates to a verdict or a sentence. If a court of appeal thinks fit to admit fresh evidence, it will do so because it is in the interests of justice to admit it. The criteria set out in *Palmer* call for a relaxed and flexible application and to relax them any further would be contrary to the interests of justice. These criteria, including the due diligence criterion, are therefore applicable to applications to tender fresh evidence in an appeal from a sentence. Moreover, while the admission of fresh evidence in an appeal from a sentence cannot lead to a new trial, unlike admission of fresh evidence in an appeal from a verdict, this difference does not justify the application of different tests. The integrity of the criminal process and the role of appeal courts could be jeopardized by the routine admission of fresh evidence on appeal. A two-tier sentencing system incompatible with the high standard of review applicable to appeals from sentences and the underlying profound functional justifications would thus be created.

In the context of the admission of fresh evidence on appeal, the concepts of admissibility and probative value overlap. To be admissible, fresh evidence must be relevant and credible and, when taken with the other evidence adduced at trial, be expected to have affected the result. The probative value of fresh evidence must thus be considered in order to determine whether it is admissible on appeal. To facilitate determination of the probative value of fresh evidence, the party challenging it should test it by making a formal motion to the court of appeal and explaining how it wishes to proceed. The court of appeal may in this regard exercise all the powers set out in s. 683 of the *Criminal Code*. Failure by a party to test fresh evidence does not relieve a court of appeal from applying the criteria established in *Palmer*.

The strict rules of a trial do not apply to a sentencing hearing, since to determine the appropriate sentence the

Arrêt (le juge Arbour est dissidente): Le pourvoi est accueilli.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache et Binnie: Bien que les règles relatives aux sources et genres de preuve soient assouplies en matière de sentence, les critères d'admission d'éléments de preuve nouveaux en appel sont les mêmes que l'appel porte sur un verdict ou une sentence. Si une cour d'appel croit utile de recevoir une preuve nouvelle, c'est qu'elle estime qu'il est dans l'intérêt de la justice de la recevoir. Les critères établis dans l'arrêt *Palmer* commandent une application souple et flexible et les assouplir davantage serait contraire à l'intérêt de la justice. Ces critères, y compris le critère de la diligence raisonnable, sont donc applicables aux requêtes en production d'une preuve nouvelle en appel d'une sentence. En outre, bien que l'admission d'une preuve nouvelle en appel d'une sentence n'engendre pas la tenue d'un nouveau procès, contrairement à l'admission d'éléments de preuve nouveaux en appel d'un verdict, cette différence ne justifie pas l'application de critères différents. L'intégrité du processus en matière pénale et le rôle des cours d'appel pourraient être menacés par l'admission d'éléments de preuve nouveaux de façon routinière en appel. Un système de détermination de la peine à deux niveaux incompatible avec la norme de contrôle élevée applicable aux appels de sentence et les profondes justifications fonctionnelles qui la sous-tendent serait ainsi créé.

Dans le contexte de l'admission d'éléments de preuve nouveaux en appel, les concepts d'admissibilité et de valeur probante se chevauchent. Pour être admissible, une preuve nouvelle doit être pertinente, plausible et susceptible d'avoir influé sur le résultat si elle avait été produite en première instance avec les autres éléments de preuve. Ainsi la valeur probante d'un élément de preuve nouveau doit être considérée afin de déterminer son admissibilité en appel. Afin de faciliter la détermination de la valeur probante de la nouvelle preuve, la partie qui la conteste devrait la mettre à l'épreuve en présentant une requête formelle à la cour d'appel et en précisant de quelle façon elle souhaite procéder. La cour d'appel peut, à cette fin, exercer tous les pouvoirs énumérés à l'art. 683 du *Code criminel*. Le défaut d'une partie de mettre un élément de preuve nouveau à l'épreuve ne dispense pas une cour d'appel de l'application des critères établis dans l'arrêt *Palmer*.

Les règles strictes du procès ne s'appliquent pas à l'audience relative à la sentence puisque pour détermi-

2000 SCC 47 (CanLII)

judge must have as much information as possible about the accused. The *Palmer* criteria do not compromise the more flexible nature of the rules, since the criteria concerning the admission of fresh evidence on appeal do not relate to the sources and types of evidence. The purpose of the due diligence criterion is to protect the interests and the administration of justice and to preserve the role of appeal courts. Before admitting new opinion evidence on appeal, it may be necessary to determine the basis of that opinion and to establish whether the facts on which the opinion is based have been proven and are credible. Whether or not consent is given, the production of fresh evidence on appeal is possible only with the leave of the court of appeal. The court of appeal may properly take into account the fact that the Crown has consented or that admission is uncontested particularly when assessing the relevance, credibility and probative value of fresh evidence.

In this case, the majority of the Court of Appeal found that the two reports were admissible because they provided greater detail or shed additional light on the evidence adduced at trial. These grounds are inadequate to justify the admission of the reports, since they could justify the admission of a very broad range of additional evidence on appeal, which would be contrary to the *Palmer* criteria and the limited role of appellate courts in respect of sentencing. The reports should not have been admitted in evidence, since their probative value was not such that they might have affected the result if they had been adduced at trial with the other evidence. The probative value of an expert opinion depends on the amount and quality of admissible evidence on which it relies. Both the psychologist and the psychiatrist, whose report also does not meet the due diligence criterion, based their opinions on a version of the facts that was not established or adopted at trial.

For the reasons stated by the dissenting judge in the Court of Appeal, it is, however, appropriate to substitute a sentence of imprisonment of eight years and six months for the sentence imposed by the trial judge in view of the error he committed in sentencing.

Per Arbour J. (dissenting): The Court of Appeal was entitled to admit the reports. The trial judge fundamentally mischaracterized the principal crime of which the accused had been convicted in determining the just and

ner la sentence appropriée, le juge doit disposer des renseignements les plus complets possibles sur l'accusé. Les critères de l'arrêt *Palmer* ne compromettent pas cet assouplissement des règles car les critères relatifs à l'admission d'une preuve nouvelle en appel n'ont pas trait aux sources et genres de preuve. Le critère de diligence raisonnable vise à protéger l'intérêt et l'administration de la justice et à sauvegarder le rôle des cours d'appel. Avant de recevoir une nouvelle preuve d'opinion en appel, il peut être nécessaire de déterminer le fondement de cette opinion et de vérifier si les faits à la base de l'opinion ont été prouvés et sont crédibles. Consentement ou pas, la production d'éléments de preuve nouveaux en appel n'est possible qu'avec la permission de la cour d'appel. Le consentement du ministère public ou l'absence de contestation peut légitimement être pris en considération par la cour d'appel, notamment lors de son évaluation de la pertinence, de la plausibilité et de la valeur probante de la nouvelle preuve.

En l'espèce, la majorité de la Cour d'appel a jugé que les deux rapports étaient admissibles parce qu'ils ajoutaient certains détails ou clarifiaient la preuve produite en première instance. Ces raisons ne sont pas suffisantes pour justifier l'admission des rapports, car elles pourraient justifier l'admission d'un éventail très large d'éléments de preuve supplémentaires en appel, ce qui serait contraire aux critères de l'arrêt *Palmer* et au rôle limité des cours d'appel en matière de détermination de la peine. Les rapports n'auraient pas dû être reçus en preuve car leur valeur probante n'était pas telle qu'ils auraient pu influer sur le résultat s'ils avaient été présentés en première instance avec les autres éléments de preuve. La valeur probante à accorder à l'opinion d'un expert dépend de la quantité et de la qualité des éléments de preuve admissibles sur lesquels elle est fondée. Tant le psychologue que le psychiatre, dont le rapport ne respectait pas en outre le critère de diligence raisonnable, ont fondé leur opinion sur une version des faits qui n'a pas été établie ou retenue en première instance.

Pour les motifs exposés par le juge dissident en Cour d'appel, il y a lieu toutefois de substituer une peine de huit ans et six mois d'incarcération à la peine imposée par le juge de première instance étant donné son erreur lors de la détermination de la peine.

Le juge Arbour (dissidente): La Cour d'appel pouvait admettre en preuve les rapports. Lorsqu'il a déterminé la peine juste et appropriée, le juge du procès a fondamentalement mal qualifié le crime principal dont

2000 SCC 47 (CanLII)

appropriate sentence, with the result that the Court of Appeal was, for all intents and purposes, required to sentence afresh. In these specific circumstances, it was for the Court of Appeal to equip itself, pursuant to its broad statutory discretion under s. 683(1) of the *Criminal Code*, with whatever evidence it deemed fit and necessary to decide the question of sentence. In view of the fundamental error committed by the trial judge, the principles governing the admission of fresh evidence in appeals against sentence articulated by the majority are not germane to the disposition of this appeal. Further, the majority's stringent application of *Lavallee* was disagreed with. The nature of the sentencing process, and of the statutory rules that govern it, contemplate that the sentencing court should have the benefit of the fullest possible information concerning the background of the offender, from the widest array of sources. It is therefore inappropriate to tie the probative value of evidence tendered under these rules to the probative value of evidence proffered at trial, and thus, more specifically, to assess the weight of an expert opinion on the basis of the quantity and quality of non-hearsay evidence introduced to support that opinion. A sentencing court must be entitled to receive and rely on any credible and trustworthy evidence which assists it in obtaining as complete an understanding of the offender as possible. The extent to which evidence presented on sentencing conflicts with the facts upon which the conviction was founded is a matter for the sentencing court to take into consideration, but is not, as such, a matter for exclusion of the evidence in question. Here it was open to the Court of Appeal to find both reports sufficiently credible and trustworthy to assist in the development of a fuller picture of the accused, based as they were on the experts' face-to-face psychological assessment and evaluation of the former.

l'accusé avait été reconnu coupable, de sorte que la Cour d'appel a à toutes fins utiles dû déterminer à nouveau la peine. Dans ces circonstances particulières, il revenait à la Cour d'appel de se doter, en application du large pouvoir discrétionnaire que lui confère à cet égard le par. 683(1) du *Code criminel*, de tout élément de preuve qu'elle croyait utile et nécessaire pour statuer sur la question de la peine. Compte tenu de l'erreur fondamentale commise par le juge du procès, les principes régissant l'admission d'éléments de preuve nouveaux dans les appels relatifs à la peine, qu'ont énoncés les juges majoritaires, ne sont pas pertinents en ce qui concerne l'issue du présent pourvoi. En outre, il y a désaccord avec les juges majoritaires quant à l'application stricte de l'arrêt *Lavallee*. La nature du processus de détermination de la peine ainsi que les règles légales qui régissent ce processus visent à assurer que le tribunal qui prononce la peine dispose des renseignements les plus complets possible sur les antécédents de l'accusé et que ces renseignements proviennent du plus large éventail de sources possible. Il n'est par conséquent pas approprié de lier la valeur probante des éléments de preuve produits en vertu de ces règles à la valeur probante des éléments de preuve produits au procès, et ainsi, plus précisément, de déterminer le poids à accorder à l'opinion d'un expert en se fondant sur la quantité et la qualité des éléments de preuve ne constituant pas du ouï-dire qui ont été déposés au soutien de cette opinion. Le tribunal qui détermine une peine doit être autorisé à recevoir tout élément de preuve crédible et fiable qui l'aide à comprendre aussi complètement que possible la situation du délinquant, et à se fonder sur un tel élément. La mesure dans laquelle un élément de preuve présenté dans le cadre de la détermination de la peine est incompatible avec les faits sur lesquels repose la déclaration de culpabilité est un facteur qui doit être pris en considération par le tribunal chargé de déterminer la peine, mais qui ne justifie pas en soi l'exclusion de l'élément de preuve en question. En l'espèce, il était loisible à la Cour d'appel de considérer que les deux rapports étaient suffisamment crédibles et fiables pour l'aider à se faire une image plus complète de l'accusé, puisque ces rapports étaient fondés sur l'évaluation psychologique faite par les experts à la suite de leur rencontre avec l'accusé.

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By Gonthier J.

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2000 SCC 47 (CanLII)

(1979), 50 C.C.C. (2d) 439; *R. v. Edwards* (1996), 105 C.C.C. (3d) 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lockwood* (1971), 5 C.C.C. (2d) 438; *R. v. Irwin* (1979), 48 C.C.C. (2d) 423; *R. v. Langille* (1987), 77 N.S.R. (2d) 224; *R. v. Archibald* (1992), 15 B.C.A.C. 301; *R. v. Lemay* (1998), 127 C.C.C. (3d) 528; *R. v. Gauthier*, [1996] Q.J. No. 952 (QL); *R. v. McDow* (1996), 147 N.S.R. (2d) 343; *R. v. Riley* (1996), 107 C.C.C. (3d) 278; *R. v. Mesgun* (1997), 121 C.C.C. (3d) 439; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *McMartin v. The Queen*, [1964] S.C.R. 484; *R. v. Stolar*, [1988] 1 S.C.R. 480; *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5; *R. v. Berry* (1997), 196 A.R. 398; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. McAnespie*, [1993] 4 S.C.R. 501.

By Arbour J. (dissenting)

R. v. Lavallee, [1990] 1 S.C.R. 852; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

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APPEAL from a judgment of the Quebec Court of Appeal (1998), 130 C.C.C. (3d) 107, [1998] Q.J. No. 2680 (QL), J.E. 98-2019, allowing the accused's appeal against his sentence. Appeal allowed, Arbour J. dissenting.

Henri-Pierre Labrie and *Dannie Leblanc*, for the appellant.

Pauline Bouchard, for the respondent.

Hogan (1979), 50 C.C.C. (2d) 439; *R. c. Edwards* (1996), 105 C.C.C. (3d) 21; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. Lockwood* (1971), 5 C.C.C. (2d) 438; *R. c. Irwin* (1979), 48 C.C.C. (2d) 423; *R. c. Langille* (1987), 77 N.S.R. (2d) 224; *R. c. Archibald* (1992), 15 B.C.A.C. 301; *R. c. Lemay*, [1998] A.Q. n° 1947 (QL); *R. c. Gauthier*, [1996] A.Q. n° 952 (QL); *R. c. McDow* (1996), 147 N.S.R. (2d) 343; *R. c. Riley* (1996), 107 C.C.C. (3d) 278; *R. c. Mesgun* (1997), 121 C.C.C. (3d) 439; *Morris c. La Reine*, [1983] 2 R.C.S. 190; *McMartin c. The Queen*, [1964] R.C.S. 484; *R. c. Stolar*, [1988] 1 R.C.S. 480; *R. c. Shropshire*, [1995] 4 R.C.S. 227; *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5; *R. c. Berry* (1997), 196 A.R. 398; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. Gardiner*, [1982] 2 R.C.S. 368; *R. c. McAnespie*, [1993] 4 R.C.S. 501.

Citée par le juge Arbour (dissidente)

R. c. Lavallee, [1990] 1 R.C.S. 852; *R. c. Gardiner*, [1982] 2 R.C.S. 368; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500.

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Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal: Thémis, 1999.
Ruby, Clayton C. *Sentencing*, 5th ed. Toronto: Butterworths, 1999.
Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

POURVOI contre un arrêt de la Cour d'appel du Québec (1998), 130 C.C.C. (3d) 107, [1998] A.Q. n° 2680 (QL), J.E. 98-2019, qui a accueilli l'appel formé par l'accusé contre sa sentence. Pourvoi accueilli, le juge Arbour est dissidente.

Henri-Pierre Labrie et *Dannie Leblanc*, pour l'appelante.

Pauline Bouchard, pour l'intimé.

2000 SCC 47 (CanLII)

English version of the judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Bastarache and Binnie JJ. delivered by

GONTHIER J. —

I. Issue

1 This appeal concerns the rule that applies to the admission of fresh evidence on appeal from a sentence. In *Palmer v. The Queen*, [1980] 1 S.C.R. 759, this Court set out the principles governing the admission of fresh evidence on appeal from a verdict. In the case at bar, it must be determined whether the criteria that apply are the same for both types of appeal, and whether the majority of the Court of Appeal erred by admitting in evidence the two expert reports tendered by the respondent, despite the objections of the appellant.

II. Facts

2 On June 22, 1996, the respondent and his two accomplices went to the home of the Fortier family intending to make off with large amounts of money that he believed were kept in a safe. While these three individuals were in the shed located behind the house, they were surprised by David Fortier, aged thirteen. After grabbing him and tying him up, the respondent questioned him about the location of the safe and the people who were in the house. He put a shotgun cartridge in his mouth, which he then taped shut, and threatened him several times, both verbally and with his gun. The respondent then left the shed, taking David, with his gun pointed at the boy's head, and escorted him towards the house. The two accomplices followed. Once the respondent was inside the house, he attacked Bertrand Fortier, David's father, as he sat watching television with his wife. A fight broke out and a shot was fired in the fray. While this was going on, the two accomplices fled and one of the Fortier boys called the police. Mr. Fortier ultimately wrestled the respondent to the ground and the police arrived shortly afterward.

Le jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Iacobucci, Bastarache et Binnie a été rendu par

LE JUGE GONTHIER —

I. La question en litige

Le présent pourvoi soulève la question de la règle applicable à l'admission d'éléments de preuve nouveaux en appel d'une sentence. Dans l'arrêt *Palmer c. La Reine*, [1980] 1 R.C.S. 759, notre Cour a énoncé les principes gouvernant l'admission d'une nouvelle preuve en appel d'un verdict. Il s'agit de déterminer en l'espèce si les critères applicables sont les mêmes pour les deux types d'appel et si la majorité de la Cour d'appel a erré en admettant en preuve les deux rapports d'expert présentés par l'intimé, en dépit des objections de l'appelante.

II. Les faits

Le 22 juin 1996, en compagnie de deux complices, l'intimé se rend à la résidence de la famille Fortier dans le but de s'emparer de fortes sommes d'argent qu'il croit gardées dans un coffre-fort. Alors qu'ils se trouvent dans la remise située derrière la maison, les trois individus sont surpris par David Fortier, un adolescent de treize ans. Après l'avoir agrippé et ligoté, l'intimé le questionne au sujet de l'emplacement du coffre-fort et des personnes qui sont dans la maison. Il lui met une cartouche de fusil dans la bouche, qu'il recouvre de ruban adhésif, et le menace à plusieurs reprises, tant verbalement qu'avec son arme. Par la suite, l'intimé sort de la remise avec David, son arme pointée sur la tête du jeune garçon, et se dirige avec lui vers la maison. Les deux complices les suivent. Une fois dans la maison, l'intimé se jette sur Bertrand Fortier, le père de David, alors que celui-ci regarde la télévision avec son épouse. Une bagarre éclate et un coup de feu est tiré pendant l'échauffourée. Pendant ce temps, les deux complices s'enfuient et un des fils Fortier appelle la police. Monsieur Fortier réussit finalement à maîtriser l'intimé au sol et les policiers arrivent sur les lieux peu de temps après.

2000 SCC 47 (CanLII)

3

On December 18, 1996, the respondent pleaded guilty to fifteen counts arising from the events of June 22, 1996. In appealing his sentence, the respondent is seeking to have three new reports admitted in evidence. The first, dated April 3, 1997, is entitled [TRANSLATION] "Psychological/psychiatric assessment report". This report was prepared by Marc Daigle, a psychologist, for Correctional Service Canada. The second report was written by Louis Morissette, a psychiatrist, at the respondent's request. It is dated March 17, 1998. The appellant objects to the admission of these two reports in evidence, but consents to the admission of the third report, which is by Jacques Bigras, a psychologist. That report is dated March 31, 1998, and was prepared for Correctional Service Canada at the end of a course taken by the respondent during his incarceration.

Le 18 décembre 1996, l'intimé plaide coupable à quinze chefs d'accusation reliés aux événements survenus le 22 juin 1996. En appel de sa sentence, l'intimé cherche à faire admettre en preuve trois nouveaux rapports. Le premier, daté du 3 avril 1997, est intitulé «Compte rendu d'évaluation psychologique/psychiatrique». Il a été préparé par le psychologue Marc Daigle pour le compte des services correctionnels canadiens. Le second rapport a été rédigé par le psychiatre Louis Morissette à la demande de l'intimé. Il est daté du 17 mars 1998. L'appelante s'oppose à ce que ces deux rapports soient admis en preuve, mais elle consent à l'admission du troisième rapport, soit celui du psychologue Jacques Bigras. Ce dernier est daté du 31 mars 1998 et a été préparé pour le compte des services correctionnels canadiens au terme d'un cours entrepris par l'intimé dans le cadre de sa détention.

III. Relevant Legislation

III. Les dispositions législatives pertinentes

4

The relevant provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, are as follows:

683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

(*a*) order the production of any writing, exhibit or other thing connected with the proceedings;

(*b*) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,

(i) to attend and be examined before the court of appeal, or,

(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

(*c*) admit, as evidence, an examination that is taken under subparagraph (*b*)(ii);

(*d*) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

Les dispositions pertinentes du *Code criminel*, L.R.C. (1985), ch. C-46, se lisent ainsi:

683. (1) Aux fins d'un appel prévu par la présente partie, la cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice:

a) ordonner la production de tout écrit, pièce ou autre chose se rattachant aux procédures;

b) ordonner qu'un témoin qui aurait été un témoin contraignable lors du procès, qu'il ait été appelé ou non au procès:

(i) ou bien comparaisse et soit interrogé devant la cour d'appel,

(ii) ou bien soit interrogé de la manière prévue par les règles de cour devant un juge de la cour d'appel, ou devant tout fonctionnaire de la cour d'appel ou un juge de paix ou autre personne nommée à cette fin par la cour d'appel;

c) admettre, comme preuve, un interrogatoire recueilli aux termes du sous-alinéa *b*)(ii);

d) recevoir la déposition, si elle a été offerte, de tout témoin, y compris l'appelant, qui est habile à témoigner mais non contraignable;

687. (1) S'il est interjeté appel d'une sentence, la cour d'appel considère, à moins que la sentence n'en soit une que détermine la loi, la justesse de la sentence dont appel est interjeté et peut, d'après la preuve, le cas échéant, qu'elle croit utile d'exiger ou de recevoir:

2000 SCC 47 (CanLII)

(*a*) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(*b*) dismiss the appeal.

a) soit modifier la sentence dans les limites prescrites par la loi pour l'infraction dont l'accusé a été déclaré coupable;

b) soit rejeter l'appel.

IV. Proceedings

A. *Court of Québec, Criminal and Penal Division*, No. 505-01-008036-960, February 19, 1997

5 On December 18, 1996, the respondent pleaded guilty to charges of kidnapping, confinement, assault with a weapon, uttering threats, disguise with intent, pointing a firearm, possession of an unregistered restricted weapon, robbery, breaking and entering a dwelling-house, and conspiracy to commit robbery. After the guilty pleas were entered, Judge Yves Lagacé ordered that a pre-sentence report be prepared pursuant to s. 721 of the *Criminal Code*. On February 19, 1997, after hearing submissions from both counsel and the testimony of Bernard Fortier, the accused's brother, the probation officer Philippe David, and the respondent himself, Judge Yves Lagacé sentenced the respondent to several terms of imprisonment to be served concurrently. The longest sentence was imprisonment for a term of ten years and six months on the kidnapping charge.

B. *Quebec Court of Appeal*, [1998] Q.J. No. 2680 (QL)

6 On appeal, the respondent filed two motions seeking leave to adduce fresh evidence, in the form of the reports by Marc Daigle, a psychologist, and Louis Morissette, a psychiatrist. On April 6, 1998, a panel of three judges of the Court of Appeal (Beauregard, Gendreau and Baudouin JJ.A.) referred that request to the panel that would determine the application to appeal the sentence.

7 These motions were heard by Deschamps, Chamberland and Nuss JJ.A. on July 8, 1998. They unanimously allowed the application for leave to appeal, since in their view the trial judge had erred

IV. L'historique des procédures

A. *Cour du Québec, chambre criminelle et pénale*, nº 505-01-008036-960, 19 février 1997

Le 18 décembre 1996, l'intimé plaide coupable à des accusations d'enlèvement, de séquestration, d'agression armée, d'avoir proféré des menaces, de déguisement dans un dessein criminel, d'avoir braqué une arme à feu, de possession d'une arme à autorisation restreinte non enregistrée, de vol qualifié, d'introduction par effraction dans une maison d'habitation et de complot en vue de commettre un vol qualifié. Suite aux plaidoyers de culpabilité, le juge Yves Lagacé demande la confection d'un rapport présentenciel en vertu de l'art. 721 du *Code criminel*. Le 19 février 1997, après avoir entendu les représentations des deux procureurs et les témoignages de Bertrand Fortier, du frère de l'intimé, de l'agent de probation Philippe David et de l'intimé lui-même, le juge Yves Lagacé condamne ce dernier à plusieurs peines d'emprisonnement à être purgées de façon concurrente entre elles. La peine la plus sévère est une peine de dix ans et six mois d'emprisonnement pour le chef d'enlèvement.

B. *Cour d'appel du Québec*, [1998] A.Q. nº 2680 (QL)

En appel, l'intimé dépose deux requêtes demandant l'autorisation de produire une nouvelle preuve, soit les rapports du psychologue Marc Daigle et du psychiatre Louis Morissette. Le 6 avril 1998, un banc de trois juges de la Cour d'appel (les juges Beauregard, Gendreau et Baudouin) défère cette requête au banc saisi de la requête pour permission d'en appeler de la sentence.

Le 8 juillet 1998, les requêtes sont entendues par les juges Deschamps, Chamberland et Nuss. Ils sont unanimes pour accueillir la requête en autorisation d'appel, car ils sont d'avis que le juge de

2000 SCC 47 (CanLII)

2000 SCC 47 (CanLII)

by comparing this case with cases involving hostage-taking for ransom in determining the appropriate sentence. That finding is not in issue in this appeal. The majority of the Court of Appeal also allowed the motions to adduce fresh evidence, Chamberland J.A. dissenting.

première instance a commis une erreur en comparant la présente affaire à des affaires de prise d'otage en vue d'obtenir une rançon pour déterminer quelle était la sentence appropriée. Cette conclusion n'est pas en cause dans le présent pourvoi. La majorité de la Cour d'appel accueille également les requêtes pour la production d'une nouvelle preuve. Le juge Chamberland est dissident.

1. Deschamps J.A. (Nuss J.A. concurring)

1. Le juge Deschamps (avec l'appui du juge Nuss)

8

After stating that the principles laid down in *Palmer*, *supra*, are to be applied more flexibly in criminal cases than in civil cases, and that the provisions governing the admission of fresh evidence on appeal are different, depending on whether the Court is ruling in respect of a verdict (s. 683 of the *Criminal Code*) or a sentence (s. 687 of the *Criminal Code*), Deschamps J.A. said that a liberal approach must be taken on an appeal from a sentence when the admissibility of fresh evidence is in dispute. At para. 12, she concluded: [TRANSLATION] "while the two sections [ss. 683 and 687 of the *Criminal Code*] do not establish different rules, it is my view that at the very least the wording of s. 687 prescribes a flexible and liberal approach".

Après avoir souligné que les principes dégagés dans l'arrêt *Palmer*, précité, doivent être appliqués de façon plus souple en matière criminelle qu'en matière civile et que les dispositions régissant l'admission d'une nouvelle preuve en appel diffèrent selon que la Cour statue sur un verdict (art. 683 du *Code criminel*) ou sur une sentence (art. 687 du *Code criminel*), le juge Deschamps affirme qu'une attitude libérale doit être adoptée en appel d'une sentence lorsque l'admissibilité d'éléments de preuve nouveaux est litigieuse. Elle conclut au par. 12: «si les deux articles [art. 683 et 687 du *Code criminel*] n'autorisent pas des règles différentes, j'estime à tout le moins que le texte de l'article 687 dicte une approche souple et généreuse».

9

Deschamps J.A. was of the opinion that the report prepared by the psychologist, Marc Daigle, met the requirements for admissibility. She noted that the appellant did not ask to have this assessment done and that the report was written less than two months after the probation officer's report, which was submitted to the trial judge. In addition, the report could not have been tendered at trial, since the psychological assessment takes place after sentencing. She says at para. 15:

Le juge Deschamps est d'avis que le rapport préparé par le psychologue Marc Daigle satisfait aux conditions d'admissibilité. Elle note que l'appelant n'a pas demandé à être soumis à cette évaluation et que le rapport a été rédigé moins de deux mois après celui de l'agent de probation qui a été soumis au juge de première instance. De plus, le rapport n'aurait pas pu être produit en première instance, car l'évaluation psychologique est postérieure à l'imposition de la sentence. Elle affirme au par. 15:

> [TRANSLATION] While it is true that the appellant could have requested a separate expert opinion following receipt of the pre-sentence report, I cannot criticize him for failing to do so since, first, the appellant could not have foreseen that Mr. Daigle would have had an opinion diametrically opposed to that of Mr. David and, second, that would amount to encouraging competing expert opinions in cases where accused persons are dissatisfied with pre-sentence reports.

> S'il est vrai que l'appelant aurait pu demander une expertise distincte à la suite de la réception du rapport prédécisionnel, je ne peux lui reprocher de ne pas l'avoir fait car, premièrement, l'appelant ne pouvait prévoir que monsieur Daigle aurait une opinion diamétralement opposée à celle de monsieur David et, deuxièmement, ce serait encourager une enchère d'expertises dans les cas où les accusés ne sont pas heureux des rapports prédécisionnels.

Ultimately, Deschamps J.A. felt that it was in the interests of justice to admit the psychologist's report by Mr. Daigle in evidence, since [TRANSLATION] "it explains the appellant's past in greater detail and shows his personality from a perspective that was not evident in the trial record. Whereas the pre-sentence report refers to a significant probability of reoffending, the psychologist's report by Mr. Daigle states the opposite" (par. 16).

En définitive, le juge Deschamps estime qu'il est dans l'intérêt de la justice que le rapport du psychologue Daigle soit admis en preuve, car «il fait ressortir avec plus de détails le passé de l'appelant et fait voir sa personnalité sous une perspective qui n'apparaissait pas au dossier de première instance. Alors que le rapport prédécisionnel fait état de probabilités de récidive importantes, le rapport du psychologue Daigle est à l'effet contraire» (par. 16).

10 According to Deschamps J.A., the admissibility of the report prepared by the psychiatrist, Dr. Morissette, was more debatable. She commented that the report was prepared at the respondent's request and that thirteen months had intervened between sentencing and the preparation of the report. She also stated that the portion of the report in which Dr. Morissette responded to the probation officer's report did not carry much weight. Nonetheless, she determined that the report was admissible, since it shed additional light on Mr. Daigle's report.

Selon le juge Deschamps, l'admissibilité du rapport préparé par le psychiatre Morissette est plus discutable. Elle fait remarquer que le rapport a été préparé à la demande de l'intimé et qu'un délai de treize mois s'est écoulé entre l'imposition de la sentence et la préparation du rapport. En outre, elle affirme que la partie du rapport où le Dr Morissette réplique au rapport de l'agent de probation n'a pas beaucoup de poids. Néanmoins, elle juge le rapport admissible, car il apporte un éclairage additionnel au rapport du psychologue Daigle.

11 In view of the error committed by the trial judge and in light of the fresh evidence, Deschamps J.A. substituted a sentence of five and a half years for the sentence of ten and a half years imposed by Judge Lagacé.

En raison de l'erreur commise par le juge de première instance et à la lumière de la nouvelle preuve, le juge Deschamps substitue une peine de cinq ans et demi à la peine de dix ans et demi imposée par le juge Lagacé.

2. Chamberland J.A. (dissenting)

2. Le juge Chamberland (dissident)

12 In the view of Chamberland J.A., the reports by Mr. Daigle and Dr. Morissette should not be admitted in evidence. It was his opinion that the respondent, by exercising minimal diligence, could have sought other opinions for the purpose of countering the probation officer's opinion concerning his personality and submitted them to the trial judge. At para. 31 he stated:

> [TRANSLATION] I appreciate that the provisions governing fresh evidence differ depending whether the Court is being asked to rule as to guilt (section 683 Cr. C.) or the sentence (section 687 Cr. C.) but not, in my view, to the point that the Court must, unless there are completely exceptional circumstances (which are not found in the case at bar) or unless, of course, the other party consents, admit evidence that was readily available at trial (*R.* v. *Stolar*, [1988] 1 S.C.R. 480; *Palmer*

Le juge Chamberland estime que les rapports du psychologue Daigle et du psychiatre Morissette ne doivent pas être admis en preuve. À son avis, l'intimé aurait pu, avec un minimum de diligence, solliciter d'autres opinions afin de contredire l'opinion de l'agent de probation sur sa personnalité et les présenter au juge de première instance. Il conclut au par. 31:

> Je comprends que la disposition régissant la nouvelle preuve diffère selon que la Cour est appelée à statuer sur la condamnation (article 683 C. cr.) ou sur la sentence (article 687 C. cr.) mais, à mon avis, pas au point où la Cour doive, à moins de circonstances tout à fait exceptionnelles (que le présent dossier ne recèle pas) ou à moins, bien sûr, que l'autre partie y consente, recevoir une preuve aisément disponible en première instance (*R.* c. *Stolar*, [1988] 1 R.C.S. 480; *Palmer et Palmer* c. *R.*,

2000 SCC 47 (CanLII)

and Palmer v. *R.*, [1980] 1 S.C.R. 759). In short, it is my view that the present adversarial debate concerning the appellant's personality should have been conducted at trial rather than on appeal.

[1980] 1 R.C.S. 759). En somme, je suis d'avis que le débat, ici contradictoire, sur la personnalité de l'appelant devait se faire en première instance, pas en appel.

13 In view of the error committed by the trial judge in sentencing, Chamberland J.A. would have substituted a sentence of imprisonment for eight years and six months for the sentence imposed by Judge Lagacé. He allowed the motion to submit fresh evidence for the sole purpose of admitting in evidence the report by Jacques Bigras, the psychologist.

Étant donné l'erreur commise par le juge de première instance lors de la détermination de la peine, le juge Chamberland substitue une peine de huit ans et six mois d'incarcération à la peine prononcée par le juge Lagacé. Il accueille la requête pour la production d'une nouvelle preuve à la seule fin d'admettre en preuve le rapport du psychologue Jacques Bigras.

V. Analysis

V. Analyse

A. *The Criteria Laid Down in Palmer*

A. *Les critères établis dans l'arrêt Palmer*

14 In *Palmer*, *supra*, this Court considered the discretion of a court of appeal to admit fresh evidence pursuant to s. 610 of the *Criminal Code*, the predecessor of s. 683. After emphasizing that, in accordance with the wording of s. 610, the overriding consideration must be "the interests of justice", McIntyre J. set out the applicable principles, at p. 775:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410, Doherty J.A. wrote the following concerning these principles:

The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. The first criterion,

Dans l'arrêt *Palmer*, précité, notre Cour a examiné le pouvoir discrétionnaire d'une cour d'appel d'admettre des éléments de preuve nouveaux en vertu de l'art. 610 du *Code criminel*, soit le prédécesseur de l'art. 683. Après avoir souligné que, d'après le libellé de l'art. 610, la considération prépondérante doit être «l'intérêt de la justice», le juge McIntyre énumère les principes applicables à la p. 775:

(1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de manière aussi stricte dans les affaires criminelles que dans les affaires civiles: voir *McMartin c. La Reine*.

(2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès.

(3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi, et

(4) elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat.

Dans l'arrêt *R. c. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (C.A. Ont.), à la p. 410, le juge Doherty écrit au sujet de ces principes:

[TRADUCTION] Les trois derniers critères constituent des conditions d'admissibilité d'éléments de preuve en appel. De fait, les deuxième et troisième critères font partie de l'analyse qualitative plus large requise par le

2000 SCC 47 (CanLII)

due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence: *McMartin v. The Queen*, *supra*, at pp. 148-50; *R. v. Palmer*, *supra*, at p. 205.

quatrième facteur. Le premier critère, celui de la diligence raisonnable, n'est pas un préalable à l'admissibilité d'éléments de preuve «nouveaux» dans les appels en matière criminelle; il est plutôt un facteur qui doit être pris en considération pour décider si l'intérêt de la justice justifie l'admission de l'élément de preuve: *McMartin c. The Queen*, précité, aux pp. 148 à 150; *R. c. Palmer*, précité, à la p. 205.

In my view this is a good description of the way in which in the principles set out in *Palmer* interact.

J'estime qu'il s'agit d'une bonne description de la façon dont les principes énumérés dans l'arrêt *Palmer* interagissent.

15 This court was recently asked to apply these criteria in *R. v. Warsing*, [1998] 3 S.C.R. 579. In that case, the British Columbia Court of Appeal determined that the accused had not satisfied the due diligence criterion and refused to admit fresh evidence. At para. 51, Major J., for the majority, pointed out that due diligence is only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. In other words, failure to meet the due diligence criterion should not be used to deny admission of fresh evidence on appeal if that evidence is compelling and it is in the interests of justice to admit it.

Notre Cour a été appelée récemment à appliquer ces critères dans l'arrêt *R. c. Warsing*, [1998] 3 R.C.S. 579. Dans cette affaire, la Cour d'appel de la Colombie-Britannique avait jugé que l'accusé n'avait pas satisfait au critère de diligence raisonnable et avait refusé d'admettre la nouvelle preuve. Le juge Major, pour la majorité, rappelle au par. 51 que la diligence raisonnable n'est qu'un facteur parmi d'autres et que son absence, particulièrement en matière criminelle, devrait être appréciée en fonction d'autres circonstances. Autrement dit, le défaut de satisfaire au critère de diligence raisonnable ne devrait pas être retenu pour écarter l'admission d'éléments de preuve nouveaux en appel si ceux-ci sont convaincants et s'il est dans l'intérêt de la justice de les admettre.

B. *Criteria Applicable to Appeals Against Sentence*

B. *Critères applicables aux appels de sentence*

16 Relying on the different wording of ss. 683 and 687 of the *Criminal Code* and the fact that the words used in s. 687, in her view, convey [TRANSLATION] "a much more discretionary connotation" (para. 10), Deschamps J.A. expressed the view that the rules set out in *Palmer* are to be applied more flexibly in an appeal from a sentence. With respect, I do not share that view. Although the rules concerning sources and types of evidence are more flexible in respect of sentence, the criteria for admitting fresh evidence on appeal are the same, regardless of whether the appeal relates to a verdict or a sentence.

Se fondant sur le libellé différent des art. 683 et 687 du *Code criminel* et sur le fait que les mots utilisés à l'art. 687 sont, selon elle, «à connotation beaucoup plus discrétionnaire» (par. 10), le juge Deschamps exprime l'opinion que les règles énoncées dans l'arrêt *Palmer* sont assouplies en appel d'une sentence. Avec égards, je ne partage pas cet avis. Bien que les règles relatives aux sources et genres de preuve soient assouplies en matière de sentence, les critères d'admission d'éléments de preuve nouveaux en appel sont les mêmes que l'appel porte sur un verdict ou une sentence.

17 For purposes of comparison, I will reproduce again the relevant passages of ss. 683 and 687 of the *Criminal Code*:

Pour fins de comparaison, je reproduis à nouveau les passages pertinents des art. 683 et 687 du *Code criminel*:

2000 SCC 47 (CanLII)

683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice, . . .

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, . . . [Emphasis added.]

At first glance, it seems to me that the applicable criterion is not different: see *R. v. Hogan* (1979), 50 C.C.C. (2d) 439 (N.S.C.A.), at p. 449; and *R. v. Edwards* (1996), 105 C.C.C. (3d) 21 (Ont. C.A.), at p. 27. If a court of appeal thinks fit to admit fresh evidence, it will do so because it is in the interests of justice to admit it. Furthermore, I do not see how the discretion conferred on courts of appeal by s. 687 could be broader than the discretion conferred by s. 683 since, if such were the case, courts of appeal could exercise their discretion in a manner contrary to the interests of justice. However, it is assumed that the legislator did not intend statutes to apply in a way contrary to justice: P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 373. Like McIntyre J. in *Palmer*, *supra*, at p. 775, I believe that the overriding consideration must be the interests of justice, regardless of whether the appeal is from a verdict or a sentence.

18 In any case, it is my belief that the criteria stated by this Court in *Palmer* already call for a relaxed and flexible application and could hardly be relaxed any further. In accordance with the last three criteria, a court of appeal may admit only evidence that is relevant and credible, and could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. If these criteria were made more flexible, it would be open to a court of appeal to accept evidence that was not relevant or credible, and that could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result to which they led at trial. In my view, it would serve no purpose and be contrary to

683. (1) Aux fins d'un appel prévu par la présente partie, la cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice: . . .

687. (1) S'il est interjeté appel d'une sentence, la cour d'appel considère, à moins que la sentence n'en soit une que détermine la loi, la justesse de la sentence dont appel est interjeté et peut, d'après la preuve, le cas échéant, qu'elle croit utile d'exiger ou de recevoir: . . . [Je souligne.]

À première vue, le critère applicable ne me semble pas être différent: voir *R. c. Hogan* (1979), 50 C.C.C. (2d) 439 (C.A.N.-É.), à la p. 449; et *R. c. Edwards* (1996), 105 C.C.C. (3d) 21 (C.A. Ont.), à la p. 27. Si une cour d'appel croit utile de recevoir une preuve nouvelle, c'est qu'elle estime qu'il est dans l'intérêt de la justice de la recevoir. De plus, je vois mal comment le pouvoir discrétionnaire conféré aux cours d'appel à l'art. 687 pourrait être plus large que celui conféré à l'art. 683, car, s'il en était ainsi, les cours d'appel pourraient exercer leur pouvoir discrétionnaire d'une façon qui est contraire à l'intérêt de la justice. Or, on ne peut présumer que le législateur a voulu faire des lois dont l'application conduirait à des conséquences contraires à la justice: P.-A. Côté, *Interprétation des lois* (3e éd. 1999), à la p. 562. À l'instar du juge McIntyre dans *Palmer*, précité, à la p. 775, je crois qu'il faut donner prépondérance à l'intérêt de la justice, et ce, peu importe que l'appel porte sur un verdict ou une sentence.

En tout état de cause, je crois que les critères établis par notre Cour dans l'arrêt *Palmer* commandent déjà une application souple et flexible et peuvent difficilement être assouplis davantage. Conformément aux trois derniers critères, une cour d'appel ne peut admettre que des éléments de preuve qui sont pertinents, plausibles et dont on peut raisonnablement penser qu'ils auraient influé sur le résultat s'ils avaient été produits en première instance avec les autres éléments de preuve. Assouplir ces critères aurait pour conséquence qu'une cour d'appel pourrait recevoir des éléments de preuve qui sont non pertinents, invraisemblables et qui n'auraient pas pu influer sur le résultat s'ils avaient été produits en première instance.

2000 SCC 47 (CanLII)

the interests of justice to introduce this kind of flexibility.

19 Failure to satisfy the first criterion, due diligence, is not always fatal. As Major J. said in *Warsing*, *supra*, at para. 51:

> It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission.

This passage clearly shows that the due diligence criterion must be applied flexibly. In my view, it is not necessary to make it more flexible in the context of appeals from sentence. While due diligence is not a necessary prerequisite for the admission of fresh evidence on appeal, it is an important factor that must be taken into account in determining whether it is in the interests of justice to admit or exclude fresh evidence. As Doherty J.A. said in *M. (P.S.)*, *supra*, at p. 411:

> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of

J'estime qu'un tel assouplissement ne servirait à rien et serait contraire à l'intérêt de la justice.

Pour ce qui est du premier critère, soit le critère de diligence raisonnable, le défaut d'y satisfaire n'est pas toujours fatal. Comme le juge Major l'a affirmé dans *Warsing*, précité, au par. 51:

> Il est souhaitable que la diligence raisonnable ne reste qu'un facteur parmi d'autres, et son absence, particulièrement en matière criminelle, devrait être appréciée en fonction d'autres circonstances. Si la preuve est convaincante et s'il est dans l'intérêt de la justice de l'admettre, alors le défaut de satisfaire à ce critère ne devrait pas être retenu pour en écarter l'admission.

Ce passage démontre clairement que le critère de diligence raisonnable doit être appliqué de façon souple et flexible. À mon avis, il n'est pas nécessaire de l'assouplir davantage dans le contexte des appels de sentence. Même si la diligence raisonnable n'est pas une condition essentielle à l'admission d'éléments de preuve nouveaux en appel, il s'agit d'un facteur important dont il faut tenir compte pour déterminer s'il est dans l'intérêt de la justice de recevoir ou non une nouvelle preuve. Comme le dit le juge Doherty dans l'affaire *M. (P.S.)*, précitée, à la p. 411:

> [TRADUCTION] Bien que l'omission de faire preuve de diligence raisonnable ne soit pas un facteur déterminant, il ne saurait en être fait abstraction dans la détermination de l'admissibilité d'un élément de preuve «nouveau». L'intérêt de la justice mentionné à l'art. 683 du *Code criminel* vise non seulement l'intérêt qu'a l'accusé à ce que sa culpabilité soit déterminée à la lumière de toute la preuve disponible, mais également l'intégrité du processus en matière criminelle. Le caractère définitif et le déroulement ordonné des procédures judiciaires sont essentiels à cette intégrité. Le système de justice criminelle est organisé de telle manière que le procès donne aux parties la possibilité de présenter leur preuve, et l'appel la possibilité de contester la justesse de ce qui s'est produit au procès. L'alinéa 683(1)*d*) du *Code* reconnaît que le rôle des cours d'appel peut être élargi dans des cas exceptionnels, mais le processus d'appel ne peut être utilisé couramment pour étoffer le dossier constitué au procès. S'il en était autrement, le procès perdrait son caractère définitif et serait repris en appel chaque fois qu'une partie réussirait à recueillir d'autres éléments de preuve avant l'audition de l'appel. Voilà pourquoi le caractère exceptionnel de l'admission

2000 SCC 47 (CanLII)

"fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.

The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.

d'éléments de preuve «nouveaux» en appel a été souligné: *McMartin c. The Queen*, précité, à la p. 148.

Le critère de la diligence raisonnable vise à préserver l'intégrité du processus, et il faut lui accorder le poids qui convient dans la détermination de l'admissibilité d'éléments de preuve «nouveaux» en appel.

Selon moi, ces considérations sont également pertinentes dans le contexte d'un appel d'une sentence. Par conséquent, la diligence raisonnable à produire une nouvelle preuve est un facteur dont il faut tenir compte lors d'un appel de sentence, au même titre que les trois autres critères énumérés dans l'arrêt *Palmer*.

2000 SCC 47 (CanLII)

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While the admission of fresh evidence in an appeal from a sentence cannot lead to a new trial, unlike admission of fresh evidence in an appeal from a verdict (see the wording of ss. 687 and 683 of the *Criminal Code*), I do not believe that this difference justifies the application of different tests. The integrity of the criminal process and the role of appeal courts could be jeopardized by the routine admission of fresh evidence on appeal, since this would create a two-tier sentencing system. That kind of system would be incompatible with the high standard of review applicable to appeals from sentences and the underlying "profound functional justifications": see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91. Despite the fresh evidence, the sentencing judge, unlike the appeal judge, has the benefit of being able to directly assess the other evidence, the testimony and the submissions of the parties, as well as being familiar with the needs and current conditions of and in the community where the crime was committed: see *M. (C.A.)*, *supra*, at para. 91. Furthermore, appeal courts are not the appropriate forum in which to determine questions of fact, and they should do so only when the fresh evidence presents certain characteristics such as would justify expanding their traditional role. This Court has already identified those characteristics, in *Palmer*. In my view, whether the appeal relates to a verdict or a sentence, the criteria laid down by this Court in *Palmer* are the criteria that are to be applied

Il est vrai que l'admission d'une preuve nouvelle en appel d'une sentence ne peut pas engendrer la tenue d'un nouveau procès, contrairement à l'admission d'éléments de preuve nouveaux en appel d'un verdict: voir le libellé des art. 687 et 683 du *Code criminel*. Néanmoins, je ne crois pas que cette différence justifie l'application de critères différents. L'intégrité du processus en matière pénale de même que le rôle des cours d'appel pourraient être menacés par l'admission d'éléments de preuve nouveaux de façon routinière en appel, car un système de détermination de la peine à deux niveaux serait ainsi créé. Un tel système à deux niveaux serait incompatible avec la norme de contrôle élevée applicable aux appels de sentence et les «profondes justifications fonctionnelles» qui la sous-tendent: voir *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, au par. 91. En effet, malgré la nouvelle preuve, le juge qui a infligé la peine, contrairement au juge d'appel, a l'avantage d'avoir pu apprécier directement les autres éléments de preuve, les témoignages et les observations présentées par les parties, en plus de bien connaître les besoins de la communauté où le crime a été commis et les conditions qui y règnent: voir *M. (C.A.)*, précité, au par. 91. Par ailleurs, les cours d'appel ne sont pas le forum approprié pour trancher des questions de fait et elles ne devraient le faire que lorsque la nouvelle preuve possède certaines caractéristiques justifiant l'élargissement de leur rôle traditionnel. Notre Cour a déjà identifié ces caractéristiques dans l'arrêt *Palmer*. À mon avis, peu importe que l'appel porte sur un verdict ou une sentence, les critères énumérés par notre Cour dans

where a court of appeal is determining whether to admit fresh evidence.

Palmer sont les critères applicables lorsqu'une cour d'appel détermine si elle doit recevoir des éléments de preuve nouveaux.

21 In addition to citing the different wording of ss. 683 and 687 of the *Criminal Code*, Deschamps J.A. refers to cases decided in other provinces. A number of courts of appeal have considered the issue of admission of fresh evidence on an appeal from a sentence: see *R. v. Lockwood* (1971), 5 C.C.C. (2d) 438 (Ont. C.A.); *Hogan*, *supra*; *R. v. Irwin* (1979), 48 C.C.C. (2d) 423 (Alta. C.A.); *R. v. Langille* (1987), 77 N.S.R. (2d) 224 (C.A.); *R. v. Archibald* (1992), 15 B.C.A.C. 301; *R. v. Lemay* (1998), 127 C.C.C. 528 (3d) (Que. C.A.); *R. v. Gauthier*, [1996] Q.J. No. 952 (QL) (C.A.); *R. v. McDow* (1996), 147 N.S.R. (2d) 343 (C.A.); *Edwards*, *supra*; *R. v. Riley* (1996), 107 C.C.C. (3d) 278 (N.S.C.A.); and *R. v. Mesgun* (1997), 121 C.C.C. (3d) 439 (Ont. C.A.). Some courts of appeal have maintained that the criteria to be applied are the same, whether the appeal relates to a verdict or a sentence: see *Hogan*, *supra*, at p. 449, and *Edwards*, *supra*, at p. 27. Others have stated that the rules relating to the admission of fresh evidence were applied more flexibly or informally in the context of an appeal from a sentence: see *Hogan*, *supra*, at p. 453; *Langille*, *supra*; *Edwards*, *supra*, at p. 28; and *Riley*, *supra*, at p. 283. However, a careful review of the jurisprudence reveals that, far from applying different criteria, courts of appeal have invariably applied the criteria set out in *Palmer*, whether expressly or by implication (for examples of the application of the due diligence criterion, see *Lockwood*, *Hogan*, *Irwin*, *Langille*, *Edwards* and *Mesgun*; for examples of the application of the relevance criterion, see *Edwards* and *Lemay*; and for an example of the application of the criteria relating to credibility and effect on the result, see *Langille*). In addition, as I have already explained, it is neither desirable nor really possible to relax the rule laid down in *Palmer*, in view of its inherent flexibility and the requirements associated with the interests of justice.

En plus d'invoquer le libellé différent des art. 683 et 687 du *Code criminel*, le juge Deschamps fait référence à la jurisprudence des autres provinces. Plusieurs cours d'appel se sont penchées sur la question de l'admission d'éléments de preuve nouveaux en appel d'une sentence: voir *R. c. Lockwood* (1971), 5 C.C.C. (2d) 438 (C.A. Ont.); *Hogan*, précité; *R. c. Irwin* (1979), 48 C.C.C. (2d) 423 (C.A. Alta.); *R. c. Langille* (1987), 77 N.S.R. (2d) 224 (C.A.); *R. c. Archibald* (1992), 15 B.C.A.C. 301; *R. c. Lemay*, [1998] A.Q. n° 1947 (QL) (C.A.); *R. c. Gauthier*, [1996] A.Q. n° 952 (QL) (C.A.); *R. c. McDow* (1996), 147 N.S.R. (2d) 343 (C.A.); *Edwards*, précité; *R. c. Riley* (1996), 107 C.C.C. (3d) 278 (C.A.N.-É.); et *R. c. Mesgun* (1997), 121 C.C.C. (3d) 439 (C.A. Ont.). Certaines cours d'appel ont soutenu que les critères applicables étaient les mêmes, que l'appel porte sur un verdict ou une sentence: voir *Hogan*, précité, à la p. 449, et *Edwards*, précité, à la p. 27. D'autres ont affirmé que les règles relatives à l'admission d'éléments de preuve nouveaux étaient appliquées de façon plus souple ou informelle dans le contexte d'un appel d'une sentence: voir *Hogan*, précité, à la p. 453; *Langille*, précité; *Edwards*, précité, à la p. 28; et *Riley*, précité, à la p. 283. Toutefois, un examen attentif de la jurisprudence révèle que loin d'appliquer des critères différents, les cours d'appel ont invariablement appliqué les critères énoncés dans l'arrêt *Palmer*, que ce soit de façon implicite ou explicite (pour des exemples d'application du critère de diligence raisonnable, voir *Lockwood*, *Hogan*, *Irwin*, *Langille*, *Edwards* et *Mesgun*; pour des exemples d'application du critère de pertinence, voir *Edwards* et *Lemay*; et pour un exemple d'application des critères de plausibilité et d'influence sur le résultat, voir *Langille*). Par ailleurs, comme je l'ai expliqué ci-dessus, un assouplissement de la règle établie dans l'arrêt *Palmer* n'est ni souhaitable ni vraiment possible, étant donné sa souplesse inhérente et les exigences reliées à l'intérêt de la justice.

2000 SCC 47 (CanLII)

I therefore find that the criteria set out in *Palmer* are applicable to applications to tender fresh evidence in an appeal from a sentence. Before applying these criteria to the two reports in the case at bar, I believe it is worthwhile to briefly discuss the concepts of admissibility and probative value in the context of the admission of fresh evidence on appeal, as well as certain specific characteristics of the sentencing process.

22 Je conclus donc que les critères énumérés dans l'arrêt *Palmer* sont applicables aux requêtes en production d'une preuve nouvelle en appel d'une sentence. Avant d'appliquer ces critères aux deux rapports en cause en l'espèce, j'estime qu'il est utile de discuter brièvement des concepts d'admissibilité et de valeur probante dans le contexte de l'admission d'éléments de preuve nouveaux en appel, ainsi que de certaines particularités du processus de détermination de la peine.

2000 SCC 47 (CanLII)

C. *The Concepts of Admissibility and Probative Value*

C. *Les concepts d'admissibilité et de valeur probante*

In the law of evidence, admissibility and probative value are two separate concepts: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, at pp. 192 (McIntyre J.) and 203 (Lamer J.). The general principle that applies in respect of admissibility is that relevant evidence is admissible unless it is subject to any exclusionary rule: see *Morris*, *supra*, at p. 201, and J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 23. The probative value of admissible evidence is a question for the trier of fact: *Morris*, *supra*, at p. 193 (McIntyre J.).

23 En droit de la preuve, les notions d'admissibilité et de valeur probante sont deux concepts distincts: voir *Morris c. La Reine*, [1983] 2 R.C.S. 190, aux pp. 192 (le juge McIntyre) et 203 (le juge Lamer). Le principe général applicable en matière d'admissibilité est qu'un élément de preuve pertinent est admissible, sauf s'il est assujetti à une règle d'exclusion: voir *Morris*, précité, à la p. 201, et J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), à la p. 23. Il appartient au juge des faits de déterminer la valeur probante qui doit être attribuée aux éléments de preuve admissibles: *Morris*, précité, à la p. 193 (le juge McIntyre).

In the context of the admission of fresh evidence on appeal, however, the concepts of admissibility and probative value overlap. To be admissible, it is not sufficient that the fresh evidence meet the prerequisite of relevance. It must also be credible and such that it could, when taken with the other evidence adduced at trial, be expected to have affected the result. Accordingly, the probative value of the fresh evidence must, to some degree, be reviewed by a court of appeal when it is determining the admissibility of the fresh evidence. The question to be considered was expressed as follows by McIntyre J. in *Palmer*, *supra*, at pp. 776-77:

> If presented to the trier of fact and believed, would the [fresh] evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? [Emphasis added.]

24 Dans le contexte de l'admission d'éléments de preuve nouveaux en appel, cependant, les concepts d'admissibilité et de valeur probante se chevauchent. En effet, pour être admissible, il n'est pas suffisant qu'une preuve nouvelle rencontre l'exigence liminaire de pertinence. Elle doit également être plausible et susceptible d'avoir influé sur le résultat si elle avait été produite en première instance avec les autres éléments de preuve. Par conséquent, la valeur probante des éléments de preuve nouveaux doit, dans une certaine mesure, être examinée par une cour d'appel lorsqu'elle détermine l'admissibilité d'une preuve nouvelle. La question à se poser a été formulée ainsi par le juge McIntyre dans *Palmer*, précité, à la p. 777:

> Si [la preuve nouvelle] est présentée au juge du fond qui y ajoute foi, aura-t-elle un poids et une force probante tels qu'elle puisse, compte tenu des autres éléments de preuve produits, influer sur le résultat? [Je souligne.]

See also *McMartin v. The Queen*, [1964] S.C.R. 484, at p. 491, and *R. v. Stolar*, [1988] 1 S.C.R. 480, at pp. 491-92. The assessment of the probative value of the fresh evidence is, however, limited, since after determining that the evidence is credible, the court of appeal must assume that the trial judge would have believed it. If the fresh evidence is admitted, the court of appeal must again consider its probative value as well as the probative value of all the other evidence in order to determine whether the sentence imposed by the trial judge was "demonstrably unfit": *R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 46 and 50; *M. (C.A.)*, *supra*, at para. 90; and *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 125.

Voir également *McMartin c. The Queen*, [1964] R.C.S. 484, à la p. 491, et *R. c. Stolar*, [1988] 1 R.C.S. 480, aux pp. 491 et 492. L'évaluation de la valeur probante de la preuve nouvelle est toutefois limitée, car, après avoir conclu que la preuve est plausible, la cour d'appel doit présumer que le juge de première instance y aurait ajouté foi. Si la preuve nouvelle est admise, la cour d'appel doit à nouveau considérer sa valeur probante ainsi que celle de tous les autres éléments de preuve afin de déterminer si la peine imposée en première instance est «manifestement inappropriée»: *R. c. Shropshire*, [1995] 4 R.C.S. 227, aux par. 46 et 50; *M. (C.A.)*, précité, au par. 90; et *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, au par. 125.

25 Determining the probative value of fresh evidence on appeal may be a difficult task, since the evidence has not been put to the test of cross-examination or rebuttal at trial. Some courts of appeal express reluctance when they are asked to admit fresh evidence containing information which the adverse party has not been able to verify. In *Riley*, *supra*, at p. 284, Pugsley J.A. wrote, for the majority of the Nova Scotia Court of Appeal:

> The panel was concerned, however, about the manner in which critical information was presented to the court by defence counsel and the lack of opportunity afforded to the Crown to assess, let alone contest the information.

See also *Archibald*, *supra*. In my view, where fresh evidence is challenged, or where its probative value is in dispute, it is desirable that it be tested before being admitted, primarily for two reasons: (1) this facilitates the determination of the probative value of the fresh evidence, and (2) this is fairer to the party objecting to the admission of the fresh evidence. This "testing" can be done in a number of ways. In *Riley*, for example, the Nova Scotia Court of Appeal gave the Crown the opportunity to file affidavits in response to those submitted by the accused. Courts of appeal may also, for example, allow cross-examination of a witness or submission of expert evidence in response to fresh expert evidence. In other words, they can do

Déterminer la valeur probante d'éléments de preuve nouveaux en appel peut s'avérer une tâche difficile, car ceux-ci n'ont pas subi l'épreuve du contre-interrogatoire ou de la réfutation en première instance. Certaines cours d'appel expriment des réticences lorsqu'on leur demande d'admettre des éléments de preuve nouveaux qui contiennent des informations qui n'ont pu être vérifiées par l'autre partie. Dans l'affaire *Riley*, précitée, à la p. 284, le juge Pugsley écrit pour la majorité de la Cour d'appel de la Nouvelle-Écosse:

> [TRADUCTION] La formation a des réserves, toutefois, relativement à la façon dont des renseignements cruciaux ont été présentés à la cour par l'avocat de la défense et au fait que le ministère public n'a pas eu l'occasion d'apprécier ces renseignements et encore moins de les contester.

Voir également l'arrêt *Archibald*, précité. À mon avis, lorsque des éléments de preuve nouveaux sont contestés, ou lorsque le débat porte sur leur valeur probante, il est souhaitable qu'ils soient mis à l'épreuve avant d'être admis, et ce, principalement pour deux raisons: (1) cela facilite la détermination de la valeur probante de la nouvelle preuve et (2) cela est plus équitable à l'endroit de la partie qui s'oppose à l'admission de la nouvelle preuve. Cette «mise à l'épreuve» peut se faire de plusieurs façons. Dans l'affaire *Riley*, par exemple, la Cour d'appel de la Nouvelle-Écosse a donné à la Couronne l'occasion de produire des affidavits en réponse aux affidavits présentés par l'accusé. Les cours d'appel peuvent également permettre, par

2000 SCC 47 (CanLII)

everything that the powers conferred on them by s. 683 of the *Criminal Code* permit them to do. Courts of appeal may exercise the powers set out in s. 683 of the *Criminal Code*, in both an appeal from a sentence and an appeal from a verdict: for an example of the application of s. 683 in an appeal from a sentence, see *R. v. Berry* (1997), 196 A.R. 398 (C.A.), at pp. 400-401.

exemple, le contre-interrogatoire d'un témoin ou la production d'une preuve d'expert en réponse à une nouvelle preuve d'expert. Bref, elles peuvent faire tout ce que les pouvoirs qui leur sont conférés à l'art. 683 du *Code criminel* leur permettent de faire. En effet, les cours d'appel peuvent exercer les pouvoirs énumérés à l'art. 683 du *Code criminel* tant en appel d'une sentence qu'en appel d'un verdict: pour un exemple d'application de l'art. 683 lors d'un appel de sentence, voir *R. c. Berry* (1997), 196 A.R. 398 (C.A.), aux pp. 400 et 401.

2000 SCC 47 (CanLII)

26

A party who wishes to tender evidence in response to fresh evidence, cross-examine the deponent of an affidavit or an expert, or challenge the fresh evidence in any other way should make a formal motion to the court of appeal for that purpose. It is not sufficient, as occurred in this case, to say during argument on the merit of the motion to introduce fresh evidence, that a party would have liked to cross-examine the authors of the reports. In my view, the appellant cannot rely on the fact that there was no cross-examination to argue that the fresh evidence should not have been admitted, since it was up to the appellant to seek leave from the court of appeal, at the appropriate time, to cross-examine the authors of the reports in dispute.

La partie qui désire produire une preuve en réponse à la nouvelle preuve, contre-interroger un affiant ou un expert ou contester de toute autre façon la nouvelle preuve devrait présenter une requête formelle en ce sens à la cour d'appel. Il n'est pas suffisant, comme cela s'est produit en l'espèce, de mentionner au moment des plaidoiries sur le mérite de la requête visant la production d'éléments de preuve nouveaux que l'on aurait souhaité contre-interroger les auteurs des rapports. L'appelante ne peut pas, à mon avis, invoquer l'absence de contre-interrogatoire pour soutenir que la nouvelle preuve n'aurait pas dû être admise, car il lui appartenait de demander à la cour d'appel, en temps voulu, l'autorisation de contre-interroger les auteurs des rapports contestés.

27

Nonetheless, the failure to put the fresh evidence to the test is not fatal and does not make it automatically admissible or inadmissible. To be admissible on appeal, fresh evidence must satisfy the criteria set out in *Palmer*. Despite its not having been tested, the court of appeal must assess the *prima facie* relevance, credibility and probative value of the fresh evidence. It must determine whether the fresh evidence has such probative force that if presented to the trial judge and believed it could be expected to have affected the result. In the case of an expert opinion, the probative value to be assigned to it is directly related to the amount and quality of admissible evidence on which it relies: *R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 897.

Néanmoins, le défaut de mettre une preuve nouvelle à l'épreuve n'est pas fatal et ne la rend pas automatiquement admissible ou inadmissible. Pour être admissible en appel, un élément de preuve nouveau doit rencontrer les critères établis dans l'arrêt *Palmer*. Malgré l'absence de mise à l'épreuve, la cour d'appel doit évaluer quelles sont, à première vue, la pertinence, la plausibilité et la valeur probante de la preuve nouvelle. Elle doit déterminer si la nouvelle preuve a une force probante telle qu'elle aurait influé sur le résultat si elle avait été présentée au juge de première instance et que celui-ci lui avait ajouté foi. Dans le cas de l'opinion d'un expert, la valeur probante à accorder est directement reliée à la quantité et à la qualité des éléments de preuve admissibles sur lesquels elle est fondée: *R. c. Lavallee*, [1990] 1 R.C.S. 852, à la p. 897.

28 To summarize, the probative value of fresh evidence must be considered in order to determine whether it is admissible on appeal. To facilitate determination of the probative value of fresh evidence, it is desirable that it be tested by the party challenging it. For this purpose, that party should make a formal motion to the court of appeal and explain how it wishes to test the fresh evidence. Failure by a party to test fresh evidence does not relieve a court of appeal from applying the criteria established in *Palmer*.

En résumé, la valeur probante d'un élément de preuve nouveau doit être considérée afin de déterminer son admissibilité en appel. Afin de faciliter la détermination de la valeur probante de la nouvelle preuve, il est souhaitable que la partie qui la conteste la mette à l'épreuve. Pour ce faire, elle devrait faire une requête formelle à la cour d'appel et préciser de quelle façon elle souhaite mettre la nouvelle preuve à l'épreuve. Le défaut d'une partie de mettre un élément de preuve nouveau à l'épreuve ne dispense pas une cour d'appel de l'application des critères établis dans l'arrêt *Palmer*.

29 The application of those criteria in the context of an appeal from a sentence will inevitably be influenced by the specific characteristics of the sentencing process, even though the criteria for the admission of fresh evidence remain fundamentally the same. I will now briefly consider some of these specific characteristics and their interaction with the *Palmer* criteria.

L'application de ces critères dans le contexte d'un appel de sentence sera inévitablement teintée par les particularités propres au processus de détermination de la peine, même si, à la base, les critères d'admission d'une preuve nouvelle demeurent les mêmes. Je vais maintenant examiner brièvement quelques-unes de ces particularités et leur interaction avec les critères de l'arrêt *Palmer*.

D. *Application of the Criteria in the Context of an Appeal Against Sentence*

D. *Application des critères dans le contexte d'un appel de sentence*

30 As pointed out by Macdonald J.A. in *Langille*, *supra*, the strict rules of a trial do not apply to a sentencing hearing. For example, hearsay evidence may be accepted at the sentencing stage where found to be credible and trustworthy: see *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 414. This relaxation of the rules is explained by the fact that the judge must determine the appropriate sentence for the accused, and to do so must have as much information as possible about him. In my view, the *Palmer* criteria do not compromise the more flexible nature of the rules relating to the sources and types of evidence on which judges may base their sentences. The criteria concerning the admission of fresh evidence on appeal do not relate to the sources and types of evidence and do not demand that the strict rules of a trial apply to fresh evidence proffered on an appeal from a sentence. To be admissible, the fresh evidence need only be relevant and credible and, when taken with the other evidence adduced at trial, be expected to have affected the result. The purpose of the due diligence criterion is to protect the interests and the

Comme le souligne le juge Macdonald dans l'affaire *Langille*, précitée, les règles strictes du procès ne s'appliquent pas à l'audience relative à la sentence. Par exemple, le juge peut recevoir des éléments de preuve par ouï-dire à l'étape de la détermination de la peine s'ils sont crédibles et fiables: voir *R. c. Gardiner*, [1982] 2 R.C.S. 368, à la p. 414. Cet assouplissement des règles s'explique par le fait qu'un juge doit déterminer la sentence appropriée en fonction de l'accusé et que, pour ce faire, il doit disposer des renseignements les plus complets possibles sur celui-ci. À mon avis, les critères de l'arrêt *Palmer* ne compromettent pas cet assouplissement des règles quant aux sources et genres de preuve sur lesquels un juge peut fonder sa sentence. En effet, les critères relatifs à l'admission d'une preuve nouvelle en appel n'ont pas trait aux sources et genres de preuve et ne commandent pas que les règles strictes du procès s'appliquent aux éléments de preuve nouveaux soumis en appel d'une sentence. Pour être admissible, la preuve nouvelle doit seulement être pertinente, plausible et susceptible d'avoir influé sur le résultat si elle

2000 SCC 47 (CanLII)

administration of justice and to preserve the role of appeal courts: see: *M. (P.S.)*, *supra*.

avait été produite en première instance avec les autres éléments de preuve. Le critère de diligence raisonnable, quant à lui, vise à protéger l'intérêt et l'administration de la justice et à sauvegarder le rôle des cours d'appel: voir *M. (P.S.)*, précité.

2000 SCC 47 (CanLII)

31

Another specific characteristic of the sentencing process that should be emphasized is the importance of opinion evidence. At the sentencing stage, judges must often consider reports prepared by probation officers, correctional service officers, psychologists or psychiatrists reporting their opinions concerning the personality of the accused, and his or her chances of rehabilitation and risk of reoffending. As I have already noted, the probative value to be assigned to an expert opinion is directly related to the amount and quality of admissible evidence on which it relies: *Lavallee*, *supra*, at p. 897. Accordingly, before admitting new opinion evidence on appeal, it may be necessary to determine the basis of that opinion (for example, the version of events relied on by the expert, the documents he or she consulted, and so forth) and to establish whether the facts on which the opinion is based have been proven and are credible.

Une autre particularité du processus de détermination de la peine qu'il vaut la peine de souligner est l'importance de la preuve d'opinion. À l'étape de l'imposition de la sentence, le juge est souvent appelé à consulter des rapports préparés par des agents de probation, des agents des services correctionnels, des psychologues ou des psychiatres faisant état de leur opinion quant à la personnalité de l'accusé, ses chances de réhabilitation et les risques de récidive. Comme je l'ai noté plus tôt, la valeur probante à accorder à l'opinion d'un expert est directement reliée à la quantité et à la qualité des éléments de preuve admissibles sur lesquels elle est fondée: *Lavallee*, précité, à la p. 897. Par conséquent, avant de recevoir une nouvelle preuve d'opinion en appel, il peut être nécessaire de déterminer le fondement de cette opinion (par exemple, la version des événements sur laquelle l'expert s'est fondé, les documents qu'il a consultés, etc.) et de vérifier si les faits à la base de l'opinion ont été prouvés et sont crédibles.

32

Quite often, fresh evidence submitted to an appeal court in the context of an appeal from a sentence relates to events subsequent to the sentence, or consists of information from the penitentiary administration relating to an accused's progress in terms of adjustment and rehabilitation: see, for example, *Archibald*, *Lemay*, *Gauthier*, *McDow*, *Riley* and *Mesgun*. It is frequently the case that the Crown consents to the introduction of this fresh evidence, since the facts reported are seldom controversial: see *Edwards*, *supra*, at p. 28; *Gauthier*, *supra*, at para. 14; *McDow*, *supra*, at para. 18; *Mesgun*, *supra*, at para. 8; and C. Ruby, *Sentencing* (5th ed. 1999), at p. 607. In the case at bar, the appellant consented to the production of the report by Jacques Bigras, the psychologist. It is important to bear in mind that whether or not consent is given, the production of fresh evidence on appeal is possible only with the leave of the court of appeal: *Hogan*, *supra*, at p. 448. Evidence

Bien souvent, les éléments de preuve nouveaux soumis à une cour d'appel dans le contexte d'un appel de sentence portent sur des événements postérieurs à la sentence ou constituent des informations de l'administration pénitentiaire concernant la démarche de réadaptation et de réhabilitation d'un accusé: voir par exemple les affaires *Archibald*, *Lemay*, *Gauthier*, *McDow*, *Riley* et *Mesgun*. Il arrive fréquemment que la Couronne consente à la production de ces éléments de preuve nouveaux, car les faits rapportés prêtent rarement à controverse: voir *Edwards*, précité, à la p. 28; *Gauthier*, précité, au par. 14; *McDow*, précité, au par. 18; *Mesgun*, précité, au par. 8; et C. Ruby, *Sentencing* (5e éd. 1999), à la p. 607. En l'espèce, l'appelante a consenti à la production du rapport du psychologue Jacques Bigras. Il est important de rappeler que consentement ou pas, la production d'éléments de preuve nouveaux en appel n'est possible qu'avec la permission de la

relating to events subsequent to the sentence or an accused's rehabilitation process normally meet the due diligence criterion, since by their very nature they were not available at the time of sentencing. However, in order to be found to be admissible, the evidence must also satisfy the other criteria, particularly the criterion relating to the likelihood that the result would be affected. The court of appeal may properly take into account the fact that the Crown has consented or that admission is uncontested particularly when assessing the relevance, credibility and probative value of fresh evidence.

cour d'appel: *Hogan*, précité, à la p. 448. Les éléments de preuve portant sur des événements postérieurs à la sentence ou sur la démarche de réadaptation et de réhabilitation d'un accusé rencontrent généralement le critère de diligence raisonnable, car, de par leur nature même, ils n'étaient pas disponibles au moment du prononcé de la sentence. Toutefois, pour être jugée admissible, la preuve doit également rencontrer les autres critères, notamment celui d'être susceptible d'influer sur le résultat. Le consentement de la Couronne ou l'absence de contestation peut légitimement être pris en considération par la cour d'appel, notamment lors de son évaluation de la pertinence, de la plausibilité et de la valeur probante de la nouvelle preuve.

33 Having completed my review of the concepts of admissibility and probative value and of the specific characteristics of the sentencing process, I now turn to the application of the *Palmer* criteria to the two reports in question in the instant case.

Ayant complété mon examen des concepts d'admissibilité et de valeur probante et des particularités du processus de détermination de la peine, je passe maintenant à l'application des critères de l'arrêt *Palmer* aux deux rapports en cause dans la présente affaire.

E. *Application to the Case at Bar*

E. *Application à l'espèce*

34 In this case, the majority of the Court of Appeal found (at para. 16) that the report by the psychologist, Mr. Daigle, was admissible because it explained the respondent's past in greater detail and showed his personality from a perspective that was not evident in the trial record. The report by the psychiatrist, Dr. Morissette, was admitted in evidence because it shed additional light on Mr. Daigle's report (para. 17). In my opinion, these grounds are inadequate to justify the admission of those two reports, since they could justify the admission of a very broad range of additional evidence on appeal. Furthermore, the admission of any evidence on appeal which merely adds certain details to or clarifies the evidence adduced at trial would be contrary to the *Palmer* criteria and the limited role of appellate courts in respect of sentencing.

En l'espèce, la majorité de la Cour d'appel a jugé (au par. 16) que le rapport du psychologue Daigle était admissible parce qu'il faisait ressortir avec plus de détails le passé de l'intimé et faisait voir sa personnalité sous une perspective qui n'apparaissait pas au dossier de première instance. Pour ce qui est du rapport du psychiatre Morissette, il a été reçu en preuve parce qu'il apportait un éclairage additionnel au rapport du psychologue Daigle (par. 17). Ces raisons ne sont pas suffisantes, selon moi, pour justifier l'admission de ces deux rapports, car elles pourraient justifier l'admission d'un éventail très large d'éléments de preuve supplémentaires en appel. En outre, recevoir en appel toute preuve qui ajoute certains détails à la preuve produite en première instance ou qui clarifie celle-ci serait contraire aux critères de l'arrêt *Palmer* et au rôle limité des cours d'appel en matière de détermination de la peine.

35 In my view, neither of these two reports should have been admitted in evidence. It is worthwhile to

À mon avis, aucun des deux rapports n'aurait dû être admis en preuve. Il est utile de reproduire de

2000 SCC 47 (CanLII)

reproduce the applicable criteria again, that is, the criteria set out in *Palmer*:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.

(3) The evidence must be credible in the sense that it is reasonably capable of belief.

(4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

1. Report by the Psychologist, Mr. Daigle

The report by Mr. Daigle, a psychologist, is relevant in that it expresses opinions regarding the respondent's personality, dangerousness and risk of reoffending. In addition, this report is reasonably capable of belief, particularly in that it was prepared independently and not at the request of the respondent. In addition, it can be concluded that this report satisfies the due diligence criterion. Although Mr. Daigle relied on facts prior to sentencing and the respondent could have sought the opinion of another psychologist concerning his personality and dangerousness, this particular report was not available at the time of sentencing and the respondent could not have obtained it before sentencing. This report was prepared for classification purposes for Correctional Service Canada, while the respondent was at the Regional Reception Centre in Québec.

Despite the foregoing, I find that Mr. Daigle's report should not have been admitted in evidence by the Court of Appeal, since its probative value is not such that if it had been presented to the trial judge it might have affected the result. I note, first, that Mr. Daigle did not look into the proceedings

nouveau les critères applicables, c'est-à-dire les critères énumérés dans l'arrêt *Palmer*, avec les adaptations nécessaires:

(1) On ne devrait généralement pas admettre un élément de preuve qui, avec diligence raisonnable, aurait pu être produit en première instance, à condition de ne pas appliquer ce principe général de matière aussi stricte dans les affaires criminelles que dans les affaires civiles.

(2) La preuve doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant à la sentence.

(3) La preuve doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi.

(4) La preuve doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits en première instance, elle aurait influé sur le résultat.

1. Rapport du psychologue Daigle

36 Le rapport du psychologue Daigle est pertinent, car celui-ci se prononce sur la personnalité de l'intimé, sa dangerosité et les risques de récidive. De plus, on peut raisonnablement ajouter foi à ce rapport, d'autant plus qu'il a été préparé de façon indépendante et non à la demande de l'intimé. Par ailleurs, il est possible de conclure que ce rapport particulier respecte le critère de diligence raisonnable. Bien que le psychologue Daigle se soit fondé sur des faits antérieurs au prononcé de la sentence et que l'intimé aurait pu solliciter l'opinion d'un autre psychologue quant à sa personnalité et sa dangerosité, ce rapport particulier n'était pas disponible au moment du prononcé de la sentence et l'intimé n'aurait pas pu l'obtenir avant. En effet, ce rapport a été rédigé à des fins de classification pour le compte des services correctionnels canadiens, alors que l'intimé se trouvait au Centre régional de réception de Québec.

37 Malgré ce qui précède, je conclus que le rapport du psychologue Daigle n'aurait pas dû être reçu en preuve par la Cour d'appel, car sa valeur probante n'est pas telle qu'il aurait pu influer sur le résultat s'il avait été présenté au juge de première instance. Je note tout d'abord que le psychologue Daigle n'a

2000 SCC 47 (CanLII)

at trial, did not read the testimony and did not consult the court documents (p. 1 of the report). While he did not prepare his report at the respondent's request, he relied only on his version of the facts. That version portrays the respondent as a victim who did not wish to commit the robbery and was allegedly acting in response to threats by his accomplices (pp. 1-2 of the report). This account makes no mention of the violence and the threats against the child. In addition, according to the report, Bertrand Fortier attacked the respondent rather than the reverse (p. 2 of the report). As well, the respondent told Mr. Daigle that he wanted to commit the robbery in order to win back his former girlfriend (p. 7 of the report).

pas pris connaissance des procédures en première instance, n'a pas lu les témoignages ni consulté les documents de la cour (p. 1 du rapport). Bien qu'il n'ait pas préparé son rapport à la demande de l'intimé, il ne se fonde que sur sa version des faits. Or, cette version présente l'intimé comme étant une victime qui ne voulait pas commettre le vol et qui aurait agi sous la menace de ses complices (pp. 1 et 2 du rapport). La violence et les menaces faites à l'enfant sont évacuées du récit. De plus, selon le rapport, ce serait Bertrand Fortier qui se serait jeté sur l'intimé et non l'inverse (p. 2 du rapport). En outre, l'intimé a affirmé au psychologue Daigle qu'il avait voulu commettre ce vol afin de ramener auprès de lui son ex-compagne (p. 7 du rapport).

38 The version of the facts set out in Mr. Daigle's report differs in quite a few respects from the version given by the respondent under oath at trial. I will point out only the most obvious contradictions: the respondent stated during his testimony that he wanted to commit the robbery to repay a drug debt; that he planned the crime with one of his accomplices; and that he grabbed Bertrand Fortier while he was sitting in the living room.

La version des faits qui est rapportée dans le rapport du psychologue Daigle est différente à bien des égards de celle que l'intimé a donnée sous serment en première instance. Je ne souligne que les contradictions les plus évidentes: l'intimé a affirmé dans son témoignage avoir voulu commettre le vol pour rembourser une dette de drogue; avoir planifié le coup avec un de ses complices; et avoir agrippé Bertrand Fortier alors qu'il était assis dans le salon.

39 It is true that the version of the facts set out in Mr. Daigle's report is not wholly inconsistent with the respondent's testimony at trial. In that testimony, the respondent also sought to portray himself as a victim by claiming that he did not want to commit the robbery; that he would have run away if the opportunity had presented itself; and that he was only following the orders of his accomplices when he tied up the Fortier boy, put a cartridge in his mouth and took him hostage. However, the respondent's testimony is confused and full of contradictions, and is also inconsistent with the account given by the Fortier family. The trial judge clearly rejected the respondent's version of the facts. He found that the crime was planned (pp. 4-6 of the reasons) and that the respondent scratched the face of the Fortier boy with his weapon (p. 6 of the reasons) and threatened to kill him several times (p. 4 of the reasons). He also stated, at p. 7 of his reasons:

Il est vrai que la version des faits rapportée dans le rapport du psychologue Daigle n'est pas complètement incompatible avec le témoignage de l'intimé en première instance. Dans son témoignage, l'intimé a aussi tenté de se présenter comme une victime en soutenant qu'il ne voulait pas aller commettre le vol; qu'il se serait sauvé s'il en avait eu l'occasion; et qu'il ne faisait qu'obéir aux ordres de ses complices lorsqu'il a attaché le jeune Fortier, lui a mis une cartouche dans la bouche et l'a pris en otage. Toutefois, le témoignage de l'intimé est confus et bourré de contradictions, en plus d'être incompatible avec le récit des membres de la famille Fortier. Le juge de première instance n'a clairement pas retenu la version des faits de l'intimé. Il a conclu que le coup avait été préparé (pp. 4 à 6 des motifs), que l'intimé avait égratigné le visage du jeune Fortier avec son arme (p. 6 des motifs) et l'avait menacé de mort à plusieurs reprises (p. 4 des motifs). Il affirme également à la p. 7 de ses motifs:

2000 SCC 47 (CanLII)

[TRANSLATION] Your submissions at the beginning of the sentencing submissions dealt a lot with how you were in fact a victim, I was talking about bad luck just now, we choose our friends, we choose our girlfriends. When something goes wrong, you can't always blame other people.

It is quite clear from an exchange between the trial judge and counsel for the respondent just before sentencing that the judge did not assign much weight to the defence theory that the respondent was a victim in this case.

Mr. Daigle therefore relied on a version of the facts that was not accepted by the trial judge, or on facts that were not established in evidence. Since the probative value of an expert opinion depends on the amount and quality of admissible evidence on which it relies (*Lavallee*, *supra*, at p. 897), I find that little probative value can be assigned to the psychologist's report prepared by Mr. Daigle. Having regard to that low probative value and the fact that the trial judge, on passing sentence, stressed the seriousness of the offences committed by the respondent rather than his personality, I am of the view that Mr. Daigle's report would not have affected the result if it had been introduced at trial with the other evidence. Accordingly, the Court of Appeal should not have admitted it in evidence, since it does not meet the *Palmer* criteria.

2. Report by the Psychiatrist, Dr. Morissette

The report prepared by Dr. Morissette, a psychiatrist, does not meet the due diligence criterion. It is dated March 17, 1998, that is, more than a year after sentencing. Unlike the report by the psychologist, Mr. Daigle, Dr. Morissette's opinion was solicited by the respondent. I agree with Chamberland J.A. that the respondent, by exercising minimal diligence, could have sought this opinion before sentence was passed and submitted Dr. Morissette's report to the trial judge for the purpose of countering the probation officer's opinion concerning his personality (see *Mesgun*, *supra*, at para. 8).

Il a été beaucoup question depuis vos représentations, au début des représentations sur sentence, que vous étiez effectivement une victime, je parlais de malchance tout à l'heure, on choisit ses amis, on choisit ses compagnes. Quand quelque chose ne marche pas, il ne faut pas toujours blâmer les autres.

Il ressort aussi clairement d'un échange qui s'est produit entre le juge de première instance et l'avocat de l'intimé juste avant le prononcé de la sentence que le juge n'accordait pas beaucoup de crédit à la théorie de la défense à l'effet que l'intimé était une victime dans la présente affaire.

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Le psychologue Daigle s'est donc fondé sur une version qui n'a pas été retenue par le juge de première instance ou sur des faits qui n'ont pas été établis en preuve. Étant donné que la valeur probante à accorder à l'opinion d'un expert dépend de la quantité et de la qualité des éléments de preuve admissibles sur lesquels elle est fondée (*Lavallee*, précité, à la p. 897), je conclus qu'on ne peut accorder qu'une faible valeur probante au rapport préparé par le psychologue Daigle. Compte tenu de cette faible valeur probante et du fait que le juge de première instance a surtout insisté, lors du prononcé de la sentence, sur la gravité des infractions commises par l'intimé plutôt que sur sa personnalité, je suis d'avis que le rapport du psychologue Daigle n'aurait pas influé sur le résultat s'il avait été produit en première instance avec les autres éléments de preuve. Par conséquent, la Cour d'appel n'aurait pas dû le recevoir en preuve, car il ne rencontre pas les critères de l'arrêt *Palmer*.

2. Rapport du psychiatre Morissette

41

Le rapport préparé par le psychiatre Morissette ne respecte pas le critère de diligence raisonnable. Il est daté du 17 mars 1998, soit plus d'un an après le prononcé de la sentence. Contrairement au rapport du psychologue Daigle, l'opinion du psychiatre Morissette a été sollicitée par l'intimé. Je partage l'avis du juge Chamberland selon lequel l'intimé aurait pu, avec un minimum de diligence, solliciter cette opinion avant le prononcé de la sentence et présenter le rapport du psychiatre Morissette au juge de première instance dans le but de contredire l'opinion de l'agent de probation sur sa personnalité (voir *Mesgun*, précité, au par. 8).

2000 SCC 47 (CanLII)

42 Nonetheless, failure to meet the due diligence criterion is not always fatal: *Warsing*, *supra*, at para. 51. It is therefore necessary to consider the other three criteria set out in *Palmer* in order to determine whether their strength is such that failure to satisfy the due diligence requirement is overborne: *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-3.

Néanmoins, le défaut de satisfaire au critère de diligence raisonnable n'est pas toujours fatal: *Warsing*, précité, au par. 51. Il faut donc examiner les trois autres critères énumérés dans *Palmer* afin de déterminer s'ils ont un poids tel qu'ils l'emportent sur l'omission de satisfaire au critère de diligence raisonnable: *R. c. McAnespie*, [1993] 4 R.C.S. 501, aux pp. 502 et 503.

43 Like the psychologist's report prepared by Mr. Daigle, the psychiatrist's report written by Dr. Morissette is relevant, since it communicates an opinion concerning the respondent's personality, danger to others and risk of reoffending. Furthermore, there is nothing to indicate that it is not reasonably capable of belief, even though it was prepared at the respondent's request. However, its probative value is low. Like the psychologist, Mr. Daigle, Dr. Morissette based his opinion on a version of the facts that was not established or adopted at trial. Although he reviewed the report prepared by the probation officer, he does not seem to have read the testimony or consulted the trial transcript. His description of the events of June 22, 1996, is very brief and does not reflect the seriousness of the offences committed or the violence employed. Furthermore, the respondent gave Dr. Morissette an explanation that was completely different from the explanation he gave under oath in respect of his participation in the events. At p. 15 of the report we read:

> [TRANSLATION] Mr. Lévesque now explains that at the time of his arrest and when he arrived at the penitentiary, he did not to want to say that he had committed a robbery for a woman . . ., he did not want to say that he was so dependent on a woman that he would commit a robbery . . . He felt that it would look "better" if he explained the reason for his robbery in terms of a drug debt. He is now telling us that he never had a drug debt, that he never cheated a drug dealer. According to his explanation, the only purpose of the robbery was financial gain in order to impress Francine, since Mr. Lévesque felt that if he had more money she might come back to him.

In addition, none of the details of the respondent's love life referred to by Dr. Morissette were established in evidence at trial. Thus, for the reasons I

Comme le rapport préparé par le psychologue Daigle, le rapport rédigé par le psychiatre Morissette est pertinent, car il communique une opinion sur la personnalité de l'intimé, sa dangerosité et les risques de récidive. En outre, rien n'indique qu'on ne puisse raisonnablement y ajouter foi, même s'il a été préparé à la demande de l'intimé. Cependant, sa valeur probante est faible. À l'instar du psychologue Daigle, le psychiatre Morissette a fondé son opinion sur une version des faits qui n'a pas été établie ou retenue en première instance. Bien qu'il ait pris connaissance du rapport préparé par l'agent de probation, il ne semble pas avoir lu les témoignages ni consulté la transcription de ce qui s'est déroulé en première instance. La description qu'il fait des événements du 22 juin 1996 est très courte et ne reflète pas la gravité des infractions commises ni la violence qui a été employée. De plus, l'intimé a donné au psychiatre Morissette une explication complètement différente de celle qu'il a donnée sous serment en ce qui concerne sa participation aux événements. On peut lire à la p. 15 du rapport:

> M. Lévesque explique maintenant que lors de son arrestation et lors de son arrivée au pénitencier, il ne voulait pas dire qu'il avait volé pour une femme [. . .], il ne voulait pas dire qu'il était suffisamment dépendant d'une femme pour voler [. . .] Il avait l'impression qu'il paraîtrait "mieux" s'il expliquait le motif de son vol par une dette de drogue. Il nous dit maintenant qu'il n'a jamais contracté de dette de drogue, qu'il n'a jamais fraudé un revendeur de drogue. Il explique que le seul but du vol était un gain financier pour impressionner Francine, M. Lévesque ayant l'impression que s'il avait plus d'argent, elle pourrait revenir à lui.

En outre, tous les détails de la vie amoureuse de l'intimé auxquels réfère le psychiatre Morissette n'ont pas été établis en preuve en première ins-

2000 SCC 47 (CanLII)

stated concerning the psychologist's report by Mr. Daigle, I find that the psychiatrist's report by Dr. Morissette is of little probative value and would not have affected the result if it had been adduced at trial with the other evidence.

tance. Donc, pour les raisons que j'ai énoncées pour le rapport du psychologue Daigle, je conclus que le rapport du psychiatre Morissette possède une faible valeur probante et n'aurait pas influé sur le résultat s'il avait été produit en première instance avec les autres éléments de preuve.

44

In my view, as in *McAnespie*, *supra*, at pp. 502-3, "the strength of the other factors is not such that failure to satisfy the due diligence requirement in this case is overborne by the other factors" (emphasis in original). Accordingly, the report by the psychiatrist, Dr. Morissette, should not have been admitted in evidence on appeal.

À mon avis, comme dans l'affaire *McAnespie*, précitée, aux pp. 502 et 503, «les autres facteurs n'ont pas un poids tel en l'espèce qu'ils l'emportent sur l'omission de satisfaire au critère de la diligence raisonnable» (souligné dans l'original). Par conséquent, le rapport du psychiatre Morissette n'aurait pas dû être admis en preuve en appel.

VI. Disposition

VI. Dispositif

45

For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal of Quebec and, for the reasons stated by Chamberland J.A., substitute a sentence of imprisonment for eight years and six months for the sentence imposed by the trial judge.

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, d'annuler le jugement de la Cour d'appel du Québec et, pour les raisons données par le juge Chamberland, de substituer une peine de huit ans et six mois d'incarcération à la peine imposée par le juge de première instance.

The following are the reasons delivered by

Version française des motifs rendus par

46

ARBOUR J. (dissenting) — I have had the benefit of the reasons of my colleague, Justice Gonthier, on this appeal. With respect, on the very particular facts of this case, I believe that the majority of the Court of Appeal was entitled to admit the reports prepared respectively by Marc Daigle and Dr. Louis Morissette. Here, the trial judge fundamentally mischaracterized the principal crime, of which the respondent had been convicted, in determining the just and appropriate sentence, with the result that the Court of Appeal was, for all intents and purposes, required to sentence afresh. In these specific circumstances, it was for the Court of Appeal to equip itself, pursuant to its broad statutory discretion under s. 683(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, with whatever evidence it deemed fit and necessary to decide the question of sentence. Accordingly, I would dismiss the appeal.

LE JUGE ARBOUR (dissidente) — J'ai pris connaissance des motifs de mon collègue le juge Gonthier dans le présent pourvoi. En toute déférence, j'estime qu'en raison des faits très particuliers de la présente affaire la majorité de la Cour d'appel pouvait admettre en preuve les rapports rédigés respectivement par M. Marc Daigle et par le Dr Louis Morissette. En l'espèce, lorsqu'il a déterminé la peine juste et appropriée, le juge du procès a fondamentalement mal qualifié le crime principal dont l'intimé avait été reconnu coupable, de sorte que la Cour d'appel a à toutes fins utiles dû déterminer à nouveau la peine. Dans ces circonstances particulières, il revenait à la Cour d'appel de se doter, en application du large pouvoir discrétionnaire que lui confère à cet égard le par. 683(1) du *Code criminel*, L.R.C. (1985), ch. C-46, de tout élément de preuve qu'elle croyait utile et nécessaire pour statuer sur la question de la peine. Par conséquent, je rejetterais le pourvoi.

47

I am in general agreement with the statement of the law governing the admission of fresh evidence

Dans l'ensemble, je suis d'accord avec l'exposé que fait mon collègue, aux par. 16 à 22 de ses

2000 SCC 47 (CanLII)

in appeals against sentence, provided by my colleague at paras. 16-22 of his opinion. However, in view of the fundamental error committed by the trial judge, I do not believe that the principles articulated by Gonthier J. are germane to the disposition of this appeal. I must also emphatically disagree with Gonthier J. that *R. v. Lavallee*, [1990] 1 S.C.R. 852 (*per* Wilson J.), applies as stringently as he suggests in the sentencing context.

motifs, du droit régissant l'admission d'éléments de preuve nouveaux dans les appels relatifs à la peine. Toutefois, compte tenu de l'erreur fondamentale commise par le juge du procès, je ne crois pas que les principes énoncés par le juge Gonthier sont pertinents en ce qui concerne l'issue du présent pourvoi. Je suis en outre fortement en désaccord avec le juge Gonthier sur un autre point, puisqu'à mon avis l'arrêt *R. c. Lavallee*, [1990] 1 R.S.C. 852 (le juge Wilson), ne s'applique pas aussi strictement qu'il le prétend en matière de détermination de la peine.

2000 SCC 47 (CanLII)

48 The Court of Appeal was unanimous that the trial judge erred in concluding that kidnapping for ransom was the dominant offence committed by the respondent. There is no challenge before us to the unanimous conclusion of the Court of Appeal that robbery was the central, predominant offence, the hostage-taking being merely [TRANSLATION] "ancillary to the main criminal operation carried out by the [respondent] and his cohorts" ([1998] Q.J. No. 2680 (QL), at para. 35).

La Cour d'appel a jugé à l'unanimité que le juge du procès avait commis une erreur en concluant que l'enlèvement en vue d'obtenir une rançon était l'infraction dominante commise par l'intimé. Personne n'a contesté devant nous la conclusion unanime de la Cour d'appel selon laquelle le vol qualifié constituait l'infraction centrale et dominante, et la prise d'otage était seulement «accessoire à l'opération criminelle principale menée par l'[intimé] et ses acolytes» ([1998] A.Q. n° 2680 (QL), au par. 35).

49 The trial judge's initial error in identifying kidnapping as the [TRANSLATION] "central matter alleged" against the respondent, which he described as [TRANSLATION] "one of the most serious crime in the Criminal Code . . . right after murder" (see C.Q., No. 505-01-008036-960, February 19, 1997, at p. 2), tainted his entire analysis, and produced a sentence that did not accurately reflect the circumstances of the offence. The Court of Appeal's task was thus not simply to assess the fitness of the sentence imposed at first instance, and, to this end, to determine the admissibility of the reports tendered by the respondent as fresh evidence on appeal. Instead, having set aside the sentence, the Court of Appeal was required to intervene essentially for the purpose of sentencing the respondent anew. In these circumstances, I believe that the Court of Appeal was entitled to consider what it deemed to be evidence relevant to the exercise of determining a just and appropriate

L'erreur qu'a commise au départ le juge du procès en considérant l'enlèvement comme «le fait central reproché» à l'intimé, fait qu'il a décrit comme «l'un des crimes les plus graves au Code criminel [. . .] juste derrière le meurtre» (voir C.Q., n° 505-01-008036-960, 19 février 1997, à la p. 2), a vicié l'ensemble de son analyse et entraîné l'infliction d'une peine qui ne reflétait pas adéquatement les circonstances de l'infraction. La tâche de la Cour d'appel ne consistait donc pas simplement à vérifier la justesse de la peine infligée en première instance et, à cette fin, à décider de l'admissibilité des rapports produits en appel par l'intimé à titre d'éléments de preuve nouveaux. Au contraire, ayant écarté la peine, la Cour d'appel devait intervenir, essentiellement afin de procéder à nouveau à la détermination de la peine à infliger à l'intimé. Dans ces circonstances, j'estime que la Cour d'appel avait le droit de prendre en considération ce qu'elle estimait être des éléments de preuve pertinents pour déterminer la peine juste et appropriée. À l'instar du juge chargé de déterminer

sentence. Like a sentencing judge, a court of appeal, in circumstances such as these, must

> ha[ve] wide latitude as to the sources and types of evidence upon which to base [its] sentence. [It] must have the fullest possible information concerning the background of the accused if [it] is to fit the sentence to the offender rather than to the crime.

(*R. v. Gardiner*, [1982] 2 S.C.R. 368, *per* Dickson J. (as he then was), at p. 414.)

This "wide latitude" reflects the legal environment of a sentencing hearing — described in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92, as an "inherently individualized process" — wherein the sentencing judge's task is to develop a composite picture or understanding of the offender, including his past and present circumstances as well as his prospects for rehabilitation and the danger that he will re-offend, with a view to crafting a just and appropriate sentence. In this environment, as was recognized in *Gardiner*, *supra*, at p. 414:

> . . . it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. . . .
>
> It is commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy.

The holding in *Lavallee*, *supra*, that the weight properly attributable to expert opinion is a direct function of the amount and quality of admissible evidence on which it is based, is a product of the general rule governing the inadmissibility of hearsay evidence at trial, where considerations of probative value are critical to the presumption of innocence and the fundamental fairness of the trial process. The sentencing environment is entirely different and permits, indeed encourages, recourse to evidentiary materials that would not be appropriate in the determination of guilt or innocence.

la peine, une cour d'appel doit, en pareilles circonstances

> joui[r] d'une grande latitude pour choisir les sources et le genre de preuves sur lesquelles [elle] peut fonder sa sentence. [Elle] doit disposer des renseignements les plus complets possibles sur les antécédents de l'accusé pour déterminer la sentence en fonction de l'accusé plutôt qu'en fonction de l'infraction.

(*R. c. Gardiner*, [1982] 2 R.C.S. 368, le juge Dickson (plus tard Juge en chef), à la p. 414.)

50

Cette «grande latitude» reflète le contexte juridique d'une audience de détermination de la peine — décrite dans l'arrêt *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, au par. 92, comme un «processus intrinsèquement individualisé» — où la tâche du juge qui inflige la peine consiste à dégager une image ou compréhension de l'accusé, notamment de sa situation passée et présente ainsi que de ses chances de réadaptation et des risques qu'il récidive, en vue de prononcer une peine juste et appropriée. Dans ce contexte, tout comme il a été reconnu dans l'arrêt *Gardiner*, précité, à la p. 414:

> . . . il est manifeste qu'on ne doit pas enlever au juge la possibilité d'obtenir des renseignements pertinents en imposant toutes les restrictions des règles de preuve applicables à un procès . . .
>
> Tout le monde sait que les règles strictes qui régissent le procès ne s'appliquent pas à l'audience relative à la sentence et il n'est pas souhaitable d'imposer la rigueur et le formalisme qui caractérisent normalement notre système de procédures contradictoires. La règle interdisant le ouï-dire ne s'applique pas aux audiences relatives aux sentences. On peut recevoir des éléments de preuve par ouï-dire s'ils sont crédibles et fiables.

51

La règle énoncée dans l'arrêt *Lavallee*, précité, selon laquelle le poids qu'il convient d'accorder à l'opinion d'un expert est directement lié à la quantité et à la qualité des éléments de preuve admissibles sur lesquels elle est fondée, découle de la règle générale qui régit l'inadmissibilité du ouï-dire au procès, où les considérations relatives à la valeur probante sont cruciales vu la présomption d'innocence et l'équité fondamentale requise au procès. Le contexte de la détermination de la peine est tout à fait différent; il permet et même encourage le recours à des éléments de preuve qui ne

2000 SCC 47 (CanLII)

Hearsay evidence is admissible in sentencing proceedings (see s. 723(5) of the *Code*). For example, probation officers' reports, produced pursuant to s. 721 of the *Code*, will inevitably contain opinions and hearsay of the type that would not be admissible at trial. Similarly, victim impact statements, prepared in accordance with s. 722(2) of the *Code*, must be considered by the sentencing judge, and may be given whatever weight the sentencing judge sees fit, regardless of the fact that they often contain non-expert opinions and hearsay information that would have no probative value, even if relevant, in the trial proper. Finally, s. 724(1) of the *Code* explicitly provides that "[i]n determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings. . .".

52 In my opinion, the nature of the sentencing process, and of the statutory rules that govern it, contemplate that the sentencing court should have the benefit of "the fullest possible information concerning the background of the [offender]", from the widest array of sources. It is therefore inappropriate to tie the probative value of evidence tendered under these rules to the probative value of evidence proffered at trial, and thus, more specifically, to assess the weight of an expert opinion on the basis of the quantity and quality of non-hearsay evidence introduced to support that opinion. Indeed, such a requirement would largely rob the permissive use of hearsay, recognized and endorsed by this Court in *Gardiner*, *supra*, of all its utility. A sentencing court must be entitled to receive and rely on any credible and trustworthy evidence which assists it in obtaining as complete an understanding of the offender as possible. The extent to which evidence presented on sentencing conflicts with the facts upon which the conviction was founded is a matter for the sentencing court to take into consideration, but is not, as such, a matter for exclusion of the evidence in question. A

seraient pas appropriés pour statuer sur la culpabilité ou l'innocence. Le ouï-dire est admissible dans le cadre des procédures de détermination de la peine (voir le par. 723(5) du *Code*). Par exemple, les rapports des agents de probation admissibles en preuve, conformément à l'art. 721 du *Code*, contiennent inévitablement des opinions et du ouï-dire, éléments qui ne seraient pas admissibles au procès. De même, les déclarations des victimes, préparées conformément au par. 722(2) du *Code*, doivent être prises en considération par le juge qui détermine la peine, et il peut leur accorder le poids qu'il estime approprié, indépendamment du fait qu'elles contiennent souvent des opinions n'émanant pas d'experts et des renseignements constituant du ouï-dire qui, mêmes s'ils étaient pertinents, n'auraient aucune valeur probante au procès lui-même. Finalement, le par. 724(1) du *Code* indique expressément que «[l]e tribunal peut, pour déterminer la peine, considérer comme prouvés les renseignements qui sont portés à sa connaissance lors du procès ou dans le cadre des procédures de détermination de la peine . . .».

Selon moi, la nature du processus de détermination de la peine et les règles légales qui régissent ce processus visent à assurer que le tribunal qui prononce la peine dispose «des renseignements les plus complets possibles sur les antécédents de l'accusé» et que ces renseignements proviennent du plus large éventail de sources possible. Il n'est par conséquent pas approprié de lier la valeur probante des éléments de preuve produits en vertu de ces règles à la valeur probante des éléments de preuve produits au procès, et ainsi, plus précisément, de déterminer le poids à accorder à l'opinion d'un expert en se fondant sur la quantité et la qualité des éléments de preuve ne constituant pas du ouï-dire qui ont été déposés au soutien de cette opinion. En fait, une telle exigence aurait pour effet de rendre illusoire la possibilité d'utiliser le ouï-dire, qui a été reconnue et approuvée par notre Cour dans l'arrêt *Gardiner*, précité. Le tribunal qui détermine une peine doit être autorisé à recevoir tout élément de preuve crédible et fiable qui l'aide à comprendre aussi complètement que possible la situation du délinquant, et à se fonder sur un tel élément. La mesure dans laquelle un élément de preuve

2000 SCC 47 (CanLII)

sentencing court is entitled to discount any part of an expert opinion that may be based on a misapprehension of the circumstances of the offence as found by the trial judge, while making use of any insight that the opinion may properly provide into the personality of the accused, his personal and emotional life, as well as his dangerousness and risk of recidivism.

présenté dans le cadre de la détermination de la peine est incompatible avec les faits sur lesquels repose la déclaration de culpabilité est un facteur qui doit être pris en considération par le tribunal chargé de déterminer la peine, mais qui ne justifie pas en soi l'exclusion de l'élément de preuve en question. Le tribunal qui détermine la peine a le droit de rejeter toute partie de l'opinion d'un expert qui est fondée sur une mauvaise compréhension des circonstances de l'infraction, telles qu'elles ont été déterminées par le juge du procès, mais il peut utiliser tout éclairage que jette l'opinion de l'expert sur la personnalité de l'accusé, sa vie personnelle et affective, ainsi que sa dangerosité et les risques qu'il récidive.

53

In the case at bar, while I accept that the Daigle and Morissette reports each contain an account of the events surrounding the offences committed by the respondent that differ from facts accepted by the trial judge, I cannot agree that they are of little probative value.

En l'espèce, même si j'admets que les rapports Daigle et Morissette contiennent tous deux un récit des événements entourant les infractions commises par l'intimé qui diffère des faits retenus par le juge du procès, je ne peux souscrire à l'opinion selon laquelle ces rapports n'ont qu'une faible valeur probante.

54

In my opinion, it was open to the Court of Appeal to find both reports sufficiently credible and trustworthy to assist in the development of a fuller picture of the respondent, based as they were on the experts' face-to-face psychological assessment and evaluation of the former. As such, I believe that the Court of Appeal was entitled to consider and rely on all or part of the opinions offered therein in sentencing the respondent. Even though the Daigle and Morissette reports were tendered as fresh evidence on appeal, they were not tendered simply to demonstrate that the sentence imposed by the trial judge was unfit, in light of the subsequent opinions offered by these experts. As indicated above, the sentence imposed by the trial judge was unfit because of his misunderstanding of the central offence of which the respondent was convicted. Having set aside that sentence, the Court of Appeal was free to admit any evidence that it deemed to be of assistance in discharging its sentencing function.

À mon avis, il était loisible à la Cour d'appel de considérer que les deux rapports étaient suffisamment crédibles et fiables pour l'aider à se faire une image plus complète de l'intimé, puisque ces rapports étaient fondés sur l'évaluation psychologique faite par les experts à la suite de leur rencontre avec l'intimé. Par conséquent, j'estime que la Cour d'appel était autorisée à se fonder sur tout ou partie des opinions exprimées dans ces rapports pour déterminer la peine à infliger à l'intimé. Même si les rapports Daigle et Morissette ont été présentés comme des éléments de preuve nouveaux en appel, il n'ont pas été introduits seulement dans le but de démontrer que la peine infligée par le juge du procès était inappropriée, eu égard aux opinions exprimées subséquemment par ces experts. Comme je l'ai dit précédemment, la peine infligée par le juge du procès était inappropriée parce qu'il avait mal saisi quelle était l'infraction centrale dont l'intimé était déclaré coupable. Après avoir écarté cette peine, la Cour d'appel était donc libre d'admettre tout élément de preuve qu'elle estimait propre à l'aider à s'acquitter de son rôle dans la détermination de la peine.

2000 SCC 47 (CanLII)

55 For these reasons, I believe that the Court of Appeal's decision to admit the reports by Marc Daigle and Dr. Morissette was correct and should be upheld. I would therefore dismiss the appeal.

Appeal allowed, ARBOUR J. *dissenting*.

Solicitor for the appellant: The Attorney General of Quebec, Longueuil.

Solicitors for the respondent: Silver, Morena, Montréal.

Pour ces motifs, j'estime que la décision de la Cour d'appel d'admettre les rapports préparés par M. Marc Daigle et par le Dr Morissette était bien fondée et qu'elle doit être confirmée. Je rejetterais donc le pourvoi.

Pourvoi accueilli, le juge ARBOUR *est dissidente.*

Procureur de l'appelante: Le procureur général du Québec, Longueil.

Procureurs de l'intimé: Silver, Morena, Montréal.

2000 SCC 47 (CanLII)

SUPREME COURT OF CANADA
Palmer v. The Queen, [1980] 1 S.C.R. 759
Date: 1979-12-21

Douglas Garnet Palmer and Donald Palmer *Appellants;*

and

Her Majesty The Queen *Respondent.*

1979: June *26, 27;* 1979: December 21.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Appellants convicted of conspiring to traffic in heroin — Subsequent declarations by principal Crown witness asserting his trial evidence untrue — Refusal of Court of Appeal to admit this new evidence — No error in law on part of Court of Appeal — Criminal Code, R.S.C. 1970, c. C-34, s. 610(1)(d).

This was an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. (See *[1980]* 1 *S.C.R. 783.)*

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was one Ford, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal, under s. 610(1)(d) of the *Criminal Code,* to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. The present appeal was taken by leave of this Court upon two points as follows:

[Page 760]

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received

1979 CanLII 8 (SCC)

$25,000 from the police "in payment for services" about a week after the trial judgment herein?

2. Did the trial judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973, when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

Held: The appeal should be dismissed.

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them. The following principles have emerged: (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The approach thus taken follows that of this Court in *McMartin v. The Queen,* [1964] S.C.R. 484.

In the present case it was evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. Also, although it might not be necessary to do so in view of this conclusion, the view was expressed that the Court of Appeal was fully justified in reaching the conclusion it

[Page 761]

did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

With respect to the matter of affording protection to witnesses, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

As to the second point raised in the appeal, the trial judge, as stated by McFarlane J.A. for the Court below, gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. The finding against the credibility of Palmer was made upon much more than the evidence of the three events in question. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer.

1979 CanLII 8 (SCC)

R. v. Stewart (1972), 8 C.C.C. (2d) *137; R. v. Foster* (1977), *8* A.R. l; R. *v. McDonald, [1970] 3 C.C.C.* 426; *R. v. Demeter* (1975), *25 C.C.C.* (2d) *417; McMartin v. The Queen,* [1964] S.C.R. 484, referred to.

APPEAL against the refusal of the Court of Appeal for British Columbia to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. Appeal dismissed.

Harry Walsh, Q. C., for the appellants.

Mark M. de Weerdt, Q.C., for the respondent. The judgment of the Court was delivered by

MCINTYRE J.—This is an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert

[Page 762]

Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. Although the appeals were heard together, these reasons will deal with the Palmers only.

The indictment dated November 24th, 1975, charged in count 1 a conspiracy to traffic in heroin between the 1st day of February 1969 and the 30th day of April 1975. This count is the only one in issue on this appeal. A preliminary hearing commenced in February of 1975, after a postponement from September 1974, because the witness Ford, of whom much more will be said, had then absented himself. The trial, which lasted several weeks, commenced on January 12, 1976. The appellants were found guilty on March 23, 1976.

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was Frederick Ford, referred to above, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. This appeal is taken by leave of this Court upon two points which are set out hereunder:

1979 CanLII 8 (SCC)

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000.00 from the police "in payment for services" about a week after the trial judgment herein?

[Page 763]

2. Did the trial Judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973 when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined there—on, and did the Court of Appeal err in not quashing the convictions accordingly?

The principal point argued in this Court was point 1. It will, of course, be seen at once that this point raises no question as to the conduct of the trial and attacks no determination made by the trial judge. The sole issue raised relates to the disposition made by the Court of Appeal.

Ford gave evidence both at the preliminary hearing and at the trial that in June of 1971 he had approached Douglas Palmer, whom he had known for some fifteen years, and asked for a job in the drug business. After some delay, he was introduced into the business and he worked with the Palmers in the trafficking of heroin during the period covered by the indictment. He said that on numerous occasions he had received bulk heroin from Douglas Palmer. It was then his task, with the assistance of others, to put the heroin into gelatin capsules and bundles of the capsules, into glass containers and to bury the containers at locations, particulars of which he would give to Palmer. As the heroin was sold, Palmer, or others under his direction, were thus enabled to direct purchasers to the hidden heroin to complete the sales. During this period, Ford was paid for his services by Douglas Palmer.

Ford said that during the summer of 1972 he had employed his nephew to plant out caches of heroin for him. The nephew was caught by the police and Ford was able, by giving the police information which led to the arrest of one of his associates named DeRuiter, to procure the release of his nephew and have the prosecution dropped. It seems that it was this contact with the police which led Ford at or about that time to furnish information concerning the activities of the Palmers to the police.

Ford said that he received a call from Douglas Palmer on January 20, 1973, in which he was

[Page 764]

instructed to get together all the heroin in his possession and to meet another member of the organization for the purpose of getting rid of the heroin all at once so a purchase of newer stock could be made. In compliance with these instructions, the heroin was disposed of at night by throwing it from a moving car in a garbage bag. When this was completed, Ford reported to Palmer who told him

1979 CanLII 8 (SCC)

that he was fired. He gave evidence at trial of the conversation which passed between them on this occasion in these words:

> A. Well, I said "What do you mean?" He said, "Well, I found out that you are the one that set up De Ruiter for the bust" he said, "So you are fired." And I just said, you know, "I don't know what you are talking about." And then I said, "Well, what about my money you owe me?" and he said, "You are not getting any money." And I said, "Well, you know, you owe me the money" and he said, "Tough", you know.
>
> Q. How much money did he owe you at that time? A. Oh, 12,500 or something.
>
> Q. Did you ever receive that from him? A. No.
>
> Q. Was there any further conversation on that occasion when he terminated your services?
>
> A. Well, other than "If I ever find out for sure it was you ...", you know, that's all. Other than that. I am lucky to be alive, that's all.
>
> Q. I am sorry, would you speak up?
>
> A. He said that I am lucky to be alive. If he finds out for sure that it's me that set up DeRuiter, I am in big trouble.

Ford continued trafficking independently until on January 6, 1975, he was shot in the street near his home. A police officer, one Steer, a member of the Vancouver City Police and not connected with the investigation of this case, attended at the scene of the shooting and had a conversation with Ford just before he was taken to hospital. Steer asked "Who shot you?". Ford replied "Pick up Doug Palmer". The officer then said "Did Palmer shoot you?". Ford said "Just pick up Doug Palmer". Ford was taken to hospital and while still in the emergency section had another conversation with a

Vancouver police officer named Caros. The version given by the police officer follows:

> CAROS: "Who shot you?"
>
> FORD: "I don't know."
>
> CAROS: "You mentioned a man at the scene of the shooting."
>
> FORD: "Yes, Doug Palmer. He didn't do it, he's too chicken. He hired someone."
>
> CAROS: "Why did he do it?"
>
> FORD: "Guess he didn't like me."
>
> CAROS: "How many men involved?"
>
> FORD: "One."
>
> CAROS: "Did he have two guns?"

1979 CanLII 8 (SCC)

FORD: "Yes."

CAROS: "Did you see a car?"

FORD: "No."

CARDS: "What did he look like?"

FORD: "He had a dark mask, a toque and a dark coat on."

CARDS: "Did you know him?"

FORD: "No."

I consider it significant that moments after the shooting Ford identified Palmer as either his assailant or the instigator of the attack. The circumstances of the shooting, the earlier dismissal from the organization coupled with the disagreement about money, furnish a motive for Ford's later conduct.

After Ford's dismissal by Palmer, he agreed to testify for the Crown. The precise date of such agreement is unclear. He gave evidence at the preliminary hearing and at the trial, and on each occasion his evidence was essentially the same. He. was cross-examined closely on both occasions. He admitted that in return for his agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family. To that end he said he had been paid an allowance of $1,200 per month up to the time of the trial. He said the

police had agreed as well to provide for relocation and maintenance expenses after the trial for himself and his family until they were reestablished in life and secure from danger.

The defence was a flat denial by Palmer of any involvement with drugs and with Ford. It was asserted that Ford's evidence was completely fabricated.

At the outset of the appeal, in which various other grounds were raised, the appellants moved under s. 610(1)(d) of the *Criminal Code* to have the Court receive evidence in the form of declarations from Douglas Palmer, Donald Palmer, Edith Twaddell and Thomas Ford. Section 610(1)(d) of the *Criminal Code is* set out hereunder:

> 610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

On this motion, the Court of Appeal had before it the various declarations referred to above and in addition affidavits in reply from Crown counsel and several police officers including affidavits from officers of the Vancouver Police Force concerning the words spoken by Ford after the shooting incident. Upon a consideration of this material, the Court refused the motion and disposed of the other grounds raised and dismissed the appeal.

1979 CanLII 8 (SCC)

The argument in this Court centered on the declarations made by Ford and the Crown affidavits in reply. The declaration of Edith Twaddell is of no significance and requires no further mention. The other declarations produced in support of the motion are largely explanatory of the events leading to the production of Ford's documents. Ford made four declarations dated, respectively, April 20, 1976, May 21, 1976, October 7, 1976, and October 13, 1976. In his first declaration, he said that he received $25,000 in cash from the R.C.M.P. in April 1976 for services rendered which he described as testifying in the Palmer drug conspiracy trial. He exhibited a receipt to the

[Page 767]

declaration prepared by the R.C.M.P. which he had signed. It was on a printed form acknowledging the receipt of $25,000 from R.C.M.P. Inspector Eyman. The printed words "Payment in full for services rendered" had been struck out and the words "Payment for services" had been written in.

In his second declaration, he referred to and verified a hand written statement which he had signed dated May 21, 1976, in these terms:

> May 21, 1976. To whom it may concern
>
> Any evidence I gave at the Douglas Palmer trial in 1976 was not of my own free will. I was pressured into saying what I said and also promised payment of $60,000 dollars. I never had any drug dealings with Doug Palmer, Don Palmer, Tom Duncan or Jake Smith. Any drug dealings I had were on my own and had nothing whatsoever to do with the above mentioned names. In April 1976 I rec. $25,000 Cash from the R.C.M.P.
>
> Fred Ford
>
> Also I had dealings with Roy Twaddell and he asked me to introduce him to Doug Palmer and I said I knew nothing about him and as far as I know he only dealt with me in drugs until he went to jail. Fred Ford.
>
> Witnessed: J. Wood
>
> J. B. Clarke

In his third declaration dated October 7, 1976, he swore to the truth of another statement he had prepared and which bears date October 7, 1976, and which is in these terms:

> Oct. 7/1976
>
> To whom it may concern.
>
> My name is Frederick Thomas Ford of Vane. B.C. Everything I am about to write in this statement is the truth and I am writing it of my own free will without any threats or inducements from anyone! I started dealing in Heroin (drugs) in 1972. My nephew worked for me burying drugs and got caught, I went to the police and made a deal to turn someone in if they gave him a stay of proceedings (which they did). I talked with R.C.M.P. Staff Sgt. Jim Locker. He asked me if I knew a person named Doug Palmer, I said Yes and he said we

1979 CanLII 8 (SCC)

> want him for dealing in drugs and we will let you deal in drugs without getting caught if you can help us nail Doug Palmer. I didn't really know a thing about Doug Palmer but I saw an easy way for me to stay on the street and make money. I kept telling them different stories about Palmer none of them true! In Jan. 1975 I was shot in front of my home 3475 Triumph St. The R.C.M.P. (Neil McKay) came and saw me at the hospital he said it was a hired killer paid for by Doug Palmer. I knew this was not so but in order for me to get their protection I played along with what they said. In Feb. or Mar. 1975 I went to a Preliminary hearing concerning a drug case against Doug Palmer and some assoc. I got up on the stand and made up a bunch of lies only because I didn't want to go to jail also I was promised a large cash settlement new I.D. and transportation to anywhere I wanted to go. Naturally I would not turn this down.
>
> The R.C.M.P. kept me and provided myself and family with $1200.00 per month to live on. In Jan. 1976. They took me to the Plaza 500 Hotel on 12th Ave Vanc. There Staff Sgt. Almrud, Neil McKay and other R.C.M.P. officers kept harrassing me and threatening me to get on the stand and say some things about Doug Palmer. By then I was in so deep I had to go along. Niel McKay said he could not tell me personally how much I would get but he told Corp. Hoivik to tell me I would get $60,000 some I.D. and relokate me. The Prosecutor Art McLennan and Neil McKay came to see me and threatened me with all kinds of charges if I did not give evidence at the trial of Doug Palmer. They said make sure I brought up Doug Palmer's name any chance I got. So I gave the same evidence was before (All Lies) After the trial they took me and my family to Victoria B.C. At the end of April 1976 they took me to there office on Heather St. and offered me $25,000 so I said no. Finally I went to the Bank of Commerce (Main Branch) Hastings St. with Inspector Elman and got $25,000. He said I would have to wait for the other $35,000 and take it up with Neil McKay when he got back from holidays. I'm still waiting! In regards to "Roy Twaddell" I sold him drugs for months and months. He owed me $2,000 I had him beat tip to make him pay me. It was the day after that I was shot. I believe he had it done! There is no proof, but I heard through the grape vine it was him! He couldn't possibly have been getting drugs from anyone else as he had no money. I had to give him credit every time he got heroin off of me. I believe like me he was scared and promised lots of things

> to induce him to take the stand against Doug Palmer. The Police (R.C.M.P.) told me time and again they would do anything to nail Doug Palmer.
>
> This Statement is all true—

His final declaration dated October 13, 1976, contains serious charges against the police and Crown counsel. It takes the form of answers to a series of questions put to him in writing by solicitors acting for the appellants in the matter.

1979 CanLII 8 (SCC)

The questions were not leading in nature, they merely directed Ford's attention to matters and incidents that he had apparently raised. Since the answers are contained in the declaration, and provide such evidence as the declaration is capable of giving, I have omitted the questions. I reproduce the declaration hereunder:

CANADA

PROVINCE OF

BRITISH COLUMBIA

IN THE MATTER OF FREDERICK THOMAS FORD AND DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER AND CLIFFORD LUTHALA

TO WIT:

I, FREDERICK THOMAS FORD, of the City of Vancouver, in the Province of British Columbia, DO SOLEMNLY DECLARE:

1) I think I met Twaddell late 1973 or early 1974. Sold him drugs of and on for 1 yr. Was introduced to him through Oscar Hansen on the 1900 Turner St. I sold him drugs on credit!

2) Neil McKay and Art Mclennan [Crown counsel] came to the Plaza 500 Hotel in January 1976 and told me I had better testify at Doug Palmer's trial or I would have so many charges against me I would never see day light. Also they said you'll be killed as soon as you get in the Pen (jail). Also they said to use Doug P. name every chance I got!

[Page 770]

3) They said not to mention money promised only to answer that I would be relocated elsewhere not to elaborate any further. This was said to me many times.

4) They came to me in Jan. 1976, at Plaza 500 and showed me pictures of Doug P., his brother, Roy Dorn, Tom Duncan, and many others and the same thing as before. Kept insisting I take stand and give evidence against Doug P. They said they really wanted him.

5) It was in 1975 Jan. I was shot! They put me into protective custody. I was really scared! I would have done or said almost anything at that point. They said they would pay me $25,000 and relocate me. I agreed! They are—Neil McKay and Art Mclennan.

6) Stayed at Plaza 500 1 wk. before and 1 wk. after. Corporal Art Hoivik was instructed to make sure I read transcripts and to memorize. He read me questions and I answered them.

7) Neil McKay came to see me after and kept on insisting I testify or I would be charged with many charges. He kept saying Doug P. had me shot and it was my only way to get even.

1979 CanLII 8 (SCC)

8) My nerves were shot. So the R.C.M.P. on Neil McKay's orders went to a doctor and get me sleeping pills (I was taking 3 at once) also I had codine pills 1 wk. before and 1 wk. after trial.

9) Same as question (2).

10) I had 2 robbery and poss. jewellery against me they said these would be dropped. But if I did not testify I would be charged with a lot more than that!

11) Art Mclennan came to see me 2 or three times at Plaza 500. He also said I had no choice but to testify at Doug P. trial. He said you will make money and be clear of all charges. If you don't testify you will have many charges against you.

12) Neil McKay and Art Mclennan both told me I would be paid the date after I gave my evidence!

13) After I gave my evidence Neil McKay Art Hoivik and other R.C.M.P. officers were in room with me. They all said we have got Palmer for sure now.

14) While at Plaza 500 I told Staff Sgt. Almrud I would not testify for $25,000. He said how much do you

want? I said $60,000. He(said I do not have the authority to authorize it, I'll be back later with answer. He came back a couple of hours later and said okay you can have $60,000 if you give evidence, Art Hoivik was there at the time. He also told me Neil McKay said $60,000 but for me not to mention money on stand.

15) Neil McKay told Corp. Hoivik to tell me about money as if he told me himself and was asked directly on stand about money and me he would have to answer truthfully, but if someone else told me he could say I never talked with Mr. Ford regarding any monies.

16) Same as No. (14).

17) Art Mclennan gave the transcripts to Neil McKay and he gave them to me. They both said to read trans. and to be more specific!

18) Neil McKay Art Mclennan and every R.C.M.P. officer I came in contact with kept saying I should testify against D. Palmer.

19) As I've said before—I was in 24 hr. contact with R.C.M.P. they all kept at me to testify and nail D. Palmer.

20) Went to Heather St. as it is main office. Inspector Ehman was there. He took me to Main Branch of C. Imperial Commerce on Hastings. Signed money draft and I was paid right in Bank. Cash and travellers cheques. I told him I was to get $60,000 not $25,000. He said he was not aware of this but to take it up with Neil McKay and Inspector White when they returned from holidays in 2 wks. Which I did. They said they were sorry but Ottawa would not pay anymore than $25,000. I'm still waiting for my other $35,000.00.

1979 CanLII 8 (SCC)

21) Met White after I was shot. He said in his office that any deals I was to make would be through Neil McKay.

22) Have telephoned Art Mclellan and he said he told R.C.M.P. to pay me the other $35,000. He can't understand why they haven't kept up there part of bargain!

23) Whenever I refer to D. Palmer or Doug P. in this statutory declaration I am in fact referring to Douglas Palmer.

AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same

force and effect as if made under oath and by virtue of the "Canada Evidence Act".

DECLARED before me at the City of Vancouver, in the Province of British Columbia, this 13th day of October, A.D. 1976,

"Fred Ford"

____

Frederick Thomas Ford

____

A commissioner for taking Affidavits for British Columbia

In reply to this motion, the Crown filed extensive material. Arthur MacLennan, Crown counsel, denied, in his affidavit, all improprieties alleged by Ford. He swore that he saw Ford in the Plaza Hotel only once. They had an interview lasting three or four minutes during which he showed Ford some photographs and left a transcript of Ford's evidence taken at the preliminary hearing so any mistakes could be corrected. He explained his actions regarding money in paras. 6, 7 and 8 in these words:

6. THAT I at no time, nor did Sgt. McKay at any time in my presence, say to Ford that he would receive $25,000.00 or any sum whatsoever, nor that Ford would be paid the day after he gave his evidence, or at any time;

7. THAT in or about the month of May 1976, Ford telephoned me to request that I assist him in obtaining a further $35,000.00 from the RCM Police. At that time I had become aware that Ford had already received $25,000.00 in lieu of the relocation arrangements to which he had testified at the trial. I told Ford that notwithstanding he had himself elected after the trial to receive $25,000.00 instead of the relocation he had been promised, I had already tried to get for him some additional money because I felt he might come to harm if he remained in the Vancouver vicinity; that a lump sum payment totalling $60,000.00 was perhaps not excessive to keep him out of danger until he could establish himself elsewhere. I also informed Ford on that occasion that a superintendent of the RCM Police had refused to recommend payment of any further money as considered Ford's insistence

1979 CanLII 8 (SCC)

on a further payment to be close to blackmail. Ford replied that he would never try to blackmail the RCMP; that he had already given his evidence and was not about to change that;

[Page 773]

8. THAT I never at any time told Ford I could not understand why the RCMP had not "kept up their part of the bargain;"

The various police officers mentioned by Ford in his declarations denied any impropriety in their affidavits. They denied any harassing of Ford or the putting of any pressures upon him. From their affidavits the Crown position is made clear. There was an arrangement with Ford that he would give evidence against the Palmers. At the preliminary hearing as at the trial Ford admitted the particulars of this arrangement. A condition of the arrangement was that the police would provide protection, and maintenance payments in the amount of $1,200 a month, until the trial was over. Thereafter provision would be made for the maintenance and relocation of Ford and his family, as well as for their protection until he could reestablish himself elsewhere. The payments made for relocation would have included travelling and moving expenses and, if necessary, a down payment on a new house. Pursuant to this arrangement, Ford gave evidence at the preliminary and no difficulties arose until just before the trial.

According to the police affidavits, at that time Ford seemed to have changed his mind. He decided that he wanted a cash payment rather than relocation expenses as agreed. He requested a sum in the neighbourhood of $50,000 and indicated that he would go to England to live after the trial and from this cash payment he would cover his own expenses. The police officers who were responsible for the immediate custody and protection of Ford agreed to take the matter up with superior officers and, in discussions between themselves, considered that a $60,000 payment would not be unreasonable in the circumstances. This figure would presumably have replaced all payments for maintenance, moving and relocation expenses until Ford was reestablished after trial and what could be required for a down payment on a house. It is not clear from the evidence what recommendations were made to superior officers on this subject but the Crown, after the trial, was prepared to pay only $25,000. This payment was arranged by R.C.M.P. Inspector Eyman who met

[Page 774]

Ford, took him to the bank, procured $25,000 by cashing a cheque, and gave it to Ford in cash and travellers cheques. At the time of payment, he procured the receipt from Ford exhibited to Ford's first declaration. The Crown submits that Ford, dissatisfied by the payment of $25,000, and no doubt influenced by fear as well, has changed his story.

The Court of Appeal, when dealing with the motion, had before it in addition to the materials already referred to some fifty-four volumes of evidence from the preliminary hearing and the trial and therefore had a much greater knowledge of the evidence than could be drawn from the brief summary I have set out above. In dealing with the motion, McFarlane J. A., speaking for the Court, said:

1979 CanLII 8 (SCC)

> Section 610(1) provides that for the purposes of an appeal under Part XVIII of the Code the Court of Appeal may, if it considers it in the interests of justice, receive the evidence of any witness. Parliament has here given the Court a broad discretion to be exercised having regard to its view of the interests of justice. In my opinion it would not serve the interests of justice to receive the tendered evidence of Ford and Twaddell because it is simply not capable of belief. I am satisfied that it is untrue and that any intelligent adult would reject it as wholly untrustworthy. Moreover, the trial Judge was well aware of the weaknesses in the testimony of Ford and Twaddell. He had not found them to be honourable, upright witnesses but he accepted testimony which they gave because it was consistent with, and in harmony with, other testimony placed before him. He found the testimony, not the witnesses, to be credible. In my opinion the tendered evidence if adduced before the trial Judge or other tribunal of fact could not possibly affect the verdict. This view is in accord with the decision of this Court in *R. v. Stewart* (1972), 8 C.C.C. (2d) 137.
>
> I have considered the judgments of the Supreme Court of Canada in *McMartin v. The Queen* [1964] S.C.R. 484 and *Horsburgh v. The Queen* [1967] *S.C.R.* 746. I find nothing in those judgments which requires me to accept this evidence. With particular reference to the latter judgment, I should add that I do not reject the evidence of Ford on the ground that he testified and was cross-examined at the trial.

[Page 775]

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them—see for example *Regina v. Stewart*[1]; *Regina v. Foster*[2]; *Regina v. McDonald*[3]; *Regina v. Demeter*[4]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*[5].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

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[1] (1972), 8 C.C.C. (2d) 137 (B.C.C.A.).

[2] (1977), 8 A.R. 1 (Alta. C.A.).

[3] [1970] 3 C.C.C. 426 (Ont. C.A.).

[4] (1975), 25 C.C.C. (2d) 417 (Ont. C.A.).

[5] [1964] S.C.R. 484.

1979 CanLII 8 (SCC)

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The leading case on the application of s. 610(1) of the *Criminal Code is McMartin v. The Queen, supra.* Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate

[Page 776]

court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

The evidence was admitted and a new trial ordered.

In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin.* The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and

[Page 777]

1979 CanLII 8 (SCC)

believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

It was argued for the appellants that Ford's trial evidence was totally fabricated as a result of police pressures and inducements. In his declarations, Ford says that he was frightened and under pressure and accordingly when the time for the preliminary hearing came he merely got in the witness box and made up a bunch of lies. It should be noted, however, that at the trial, almost a year later, he gave the same evidence and, despite strenuous cross-examination on both occasions, no assertion is made that there was any significant difference in the evidence. The accurate repetition of extemporaneous inventions after such a long interval would be a remarkable performance on Ford's part under any circumstances but, when one adds the fact that the trial judge considered that his evidence was in harmony with the general picture of events which emerged from the evidence of many other witnesses, it becomes impossible to believe that the evidence was fabricated on the spur of t e moment. Furthermore, it should be observed that the modification of the financial arrangements with Ford occurred, according to Ford's own declaration, after the preliminary hearing where he had given evidence and before the

trial when, it is conceded, he repeated it. It is impossible to believe that the nature of his evidence given at trial was affected by the payment or promise of money. Considering the suggestion that this arrangement was undisclosed and that the trial judge could therefore have been misled in his assessment of Ford's credibility, reference may be made to a passage in his reasons for judgment where he said:

> Ford testifies that the police promised to protect him and his family if he gave evidence on behalf of the Crown, and that they have fulfilled this promise by paying for the cost of relocating him and his family, and of maintaining them since February 1975. The cost of such maintenance said to have been $l,200 a month.

A careful review of the police evidence drawn from the affidavits filed confirms the version of the agreement made with Ford which he himself described in evidence at the trial. The police contention that Ford changed his mind shortly before the

1979 CanLII 8 (SCC)

trial and wanted cash in lieu of unspecified relocation expenses is confirmed, at least in part, by Ford's later acceptance of the sum of $25,000 and his insistence upon more. It seems clear that he abandoned the original arrangement in favour of a sum of money as contended by the police. It was argued that the police had offered $60,000 when all that Ford had sought was $50,000. The police affidavits confirm that Ford requested a sum in the neighbourhood of $50,000. It also appears from the affidavits that the police officers themselves said, after some discussion between themselves, that they would recommend $60,000 to their superior officers. When it is considered that this payment was to be in lieu of all other provision for Ford after the trial and that it would serve to cover all the expenses involved in maintenance for Ford and his family including travel and relocation expenses and even a possible down payment on a new house, it does not seem an unreasonable amount.

The manner of payment of the $25,000 to Ford, which involved no secrecy and was done openly by cheque, negates improper motives on the part of the police. The use of the words "services rendered" and "services" on the receipt has, in my

[Page 779]

opinion, no sinister significance. It is evident that these words were employed to describe the arrangement here discussed. In my opinion, the rejection of Ford's evidence by the Court of Appeal was amply justified.

I cannot leave this part of the case without making some general remarks upon the situation it reveals. There can be no doubt that from time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper. When the need arises, the form of protection and the amount and method of the disbursement of moneys will vary widely and it is impossible to predict the precise form the required protection will take.

The dangers inherent in this situation are obvious. On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice. However, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or

1979 CanLII 8 (SCC)

corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be

permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

I now turn to the second point raised in this appeal. There was evidence at trial, resulting from police surveillance, that Ford and Douglas Palmer met on three separate occasions. It was presumably led to afford some evidence of association between them. On July 18, 1972, Ford was seen to leave a car and walk up Palmer's driveway then return to the car in three or four minutes and depart. Ford, in giving evidence in chief, was not asked about this incident and he was not cross-examined about it. Palmer disclaimed any knowledge of Ford's visit. On November 8, 1972, Palmer was seen travelling in Ford's automobile as a passenger with Ford driving. Ford was not examined or cross-examined on this incident. Palmer said that he had been waiting at a bus stop near his home because he was going to pick up a truck which was under repair and Ford happened by in his car and gave him a lift. The event he said was not prearranged. On January 23, 1973, at 11:30 p.m., Ford was observed leaving his automobile from which he went down a driveway to Palmer's house and spoke to Douglas Palmer for a few minutes then returned to his car and left. Ford, as before, gave no evidence relating to this event and was not cross-examined upon it. Palmer said that Ford had come to his house and offered to sell some tires at a reasonable price and Palmer had merely sent him away. Palmer was not cross-examined on his evidence relating to the three meetings.

The trial judge found that Palmer was not a credible witness and indicated that he was not willing to accept his testimony on important matters. In dealing with this question, he made reference to these incidents as well as much other evidence. Counsel for Palmer objects to this on the basis that Palmer's version of what occurred on these occasions stands uncontroverted and, particularly in view of the Crown's failure to examine Ford upon these matters, it is argued that the trial

judge should have accepted Palmer's version of events and not drawn inferences adverse to him. The point was summarized in the appellants' factum in these words:

> It is submitted that the Court of Appeal for British Columbia erred in concluding that it was not necessary for the prosecution to have examined Ford in-chief with respect to the three incidents and that it was not necessary to cross-examine the Appellant Douglas Garnet Palmer when he testified with respect to the said three incidents. Had the Court of Appeal for British Columbia found that the learned trial Judge had erred in rejecting the testimony of Douglas Garnet Palmer with respect to the said three incidents then the basis for the learned trial Judge's acceptance of Ford's testimony

1979 CanLII 8 (SCC)

> would have disappeared and the Court of Appeal would then have quashed the convictions against the Appellants.

In dealing with this argument in the Court of Appeal, McFarlane J.A. said for the Court:

> The second ground of appeal argued was that the trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn* (1894) 6 The Reports 67 and to *Rex v. Hart* (1932) 23 C.A.R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:
>
> > I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.
>
> In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. Canadian Pacific Limited* (1976) 63 D.L.R. (3d) 294 and cases cited there by Robertson, J.A. at 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a careful explanation for his acceptance of the story of Ford and

rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer. I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Walsh, Micay & Co., Winnipeg.

Solicitor for the respondent: Roger Tassé, Ottawa.

1979 CanLII 8 (SCC)

Public School Boards' Association of Alberta, Board of Trustees of the Edmonton School District No. 7 and Cathryn Staring Parrish *Appellants*

and

Board of Trustees of Calgary Board of Education No. 19 and Margaret Ward Lounds *Appellants*

v.

Her Majesty the Queen in right of Alberta, the Attorney General for Alberta and the Minister of Education *Respondents*

and

Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 and Dwayne Berlando *Respondents*

INDEXED AS: PUBLIC SCHOOL BOARDS' ASSN. OF ALBERTA *v.* ALBERTA (ATTORNEY GENERAL)

Neutral citation: 2000 SCC 2.

File No.: 26701.

2000: January 14.*

Present: Binnie J.

MOTION TO INTRODUCE FRESH EVIDENCE

Practice — Supreme Court of Canada — Fresh evidence — Motion to introduce fresh evidence of legislative fact — Traditional test for admission of fresh evidence on appeal applicable — Fresh evidence test not met — Lack of due diligence to adduce part of fresh evidence — Fresh evidence not related in any precise way to propositions for which it is sought to be adduced —

*Revised January 19, 2000.

Public School Boards' Association of Alberta, Board of Trustees of the Edmonton School District No. 7 et Cathryn Staring Parrish *Appelants*

et

Board of Trustees of Calgary Board of Education No. 19 et Margaret Ward Lounds *Appelants*

c.

Sa Majesté la Reine du chef de l'Alberta, le procureur général de l'Alberta et le ministre de l'Éducation *Intimés*

et

Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 et Dwayne Berlando *Intimés*

RÉPERTORIÉ: PUBLIC SCHOOL BOARDS' ASSN. OF ALBERTA *c.* ALBERTA (PROCUREUR GÉNÉRAL)

Référence neutre: 2000 CSC 2.

N° du greffe: 26701.

2000: 14 janvier*.

Présent: Le juge Binnie.

REQUÊTE EN PRODUCTION DE NOUVEAUX ÉLÉMENTS DE PREUVE

Pratique — Cour suprême du Canada — Nouveaux éléments de preuve — Requête en production de nouveaux éléments de preuve relativement à un fait législatif — Applicabilité du critère traditionnel concernant la recevabilité de nouveaux éléments de preuve — Exigences du critère non respectées — Manque de diligence dans la production des nouveaux éléments de preuve — Absence de lien précis entre ces nouveaux éléments et les allégations qu'ils sont censés appuyer —

*Révisée le 19 janvier 2000.

2000 SCC 2 (CanLII)

Fresh evidence could not affect result — Motion dismissed.

Practice — Supreme Court of Canada — Fresh evidence — Due diligence — Motion to introduce fresh evidence cannot be justified solely on basis that new jurisprudence has given relevance to evidence available but not adduced at trial.

Practice — Supreme Court of Canada — Fresh evidence — Applicants seeking to introduce fresh evidence of legislative fact over objection — Controversial evidence — Fairness suggesting that applicants should be precise as to points sought to be established by fresh evidence and what is relied on in support thereof — Precision allowing court to better evaluate importance and weight of fresh evidence and enabling opposing counsel to evaluate extent of controversy posed by fresh evidence — Fresh evidence motion should include draft of paragraphs to be inserted in factum, with supporting references, in event motion successful.

Evidence — Fresh evidence — Motion to introduce fresh evidence of legislative fact — Concept of "legislative fact" not excuse to put before court controversial evidence without providing proper opportunity for its truth to be tested.

Cases Cited

Applied: *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Warsing*, [1998] 3 S.C.R. 579; **considered:** *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; **referred to:** *Dormuth v. Untereiner*, [1964] S.C.R. 122; *Varette v. Sainsbury*, [1928] S.C.R. 72; *K.V.P. Co. v. McKie*, [1949] S.C.R. 698.

MOTION to introduce fresh evidence. Motion dismissed.

Written submissions by *Dale Gibson* and *Rangi J. Jeerakathil*, for the appellants/applicants Public School Boards' Association of Alberta, Board of

Nouveaux éléments non susceptibles d'influencer le résultat — Requête rejetée.

Pratique — Cour suprême du Canada — Nouveaux éléments de preuve — Diligence raisonnable — Une requête en production de nouveaux éléments de preuve ne peut être justifiée uniquement par le fait qu'une nouvelle décision judiciaire vient rendre pertinente une preuve qui était disponible au moment du procès.

Pratique — Cour suprême du Canada — Nouveaux éléments de preuve — Requérants demandant à produire de nouveaux éléments de preuve relativement à un fait législatif — Requête contestée — Éléments de preuve controversés — L'équité commande que les requérants précisent ce qu'ils entendent établir au moyen des nouveaux éléments de preuve et lesquels parmi ces éléments seront invoqués au soutien de leur thèse — Ces précisions permettent au tribunal de mieux évaluer l'importance et la valeur probante des nouveaux éléments de preuve, en plus de permettre aux avocats de la partie adverse de déterminer dans quelle mesure ces nouveaux éléments prêtent à la controverse — La requête en production de nouveaux éléments de preuve devrait être accompagnée de l'ébauche des paragraphes qui seront intégrés au mémoire, avec références à l'appui, si la requête est accueillie.

Preuve — Nouveaux éléments de preuve — Requête en production de nouveaux éléments de preuve relativement à un fait législatif — Le concept de «fait législatif» ne peut être invoqué pour présenter au tribunal un élément de preuve controversé sans donner la possibilité d'en contester la véracité.

Jurisprudence

Arrêts appliqués: *Palmer c. La Reine*, [1980] 1 R.C.S. 759; *R. c. Warsing*, [1998] 3 R.C.S. 579; **arrêts examinés:** *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; **arrêts mentionnés:** *Dormuth c. Untereiner*, [1964] R.C.S. 122; *Varette c. Sainsbury*, [1928] R.C.S. 72; *K.V.P. Co. c. McKie*, [1949] R.C.S. 698.

REQUÊTE en production de nouveaux éléments de preuve. Requête rejetée.

Argumentation écrite par *Dale Gibson* et *Rangi J. Jeerakathil*, pour les appelants/requérants Public School Boards' Association of Alberta, Board of

2000 SCC 2 (CanLII)

Trustees of the Edmonton School District No. 7 and Cathryn Staring Parrish.

Written submissions by *Robert Maybank* and *Margaret Unsworth*, for the respondents Her Majesty the Queen in right of Alberta, the Attorney General for Alberta and the Minister of Education, respondents on the motion.

Written submissions by *Kevin P. Feehan*, for the respondents Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 and Dwayne Berlando, respondents on the motion.

The following is the order delivered by

1 BINNIE J. — This is an application by the appellants, the Public School Boards' Association of Alberta, the Board of Trustees of the Edmonton School District No. 7 and Cathryn Staring Parrish (hereinafter collectively called "PSBAA") to introduce fresh evidence to demonstrate two "underlying constitutional principles" in the present appeal, which they define as (a) "the reasonable (limited, supervised) governmental autonomy of municipal institutions"; and (b) "the basic constitutional equality of public and separate schools". The fresh evidence sought to be introduced includes several batches of statistics, a couple of newspaper columns, a report by the Canada West Foundation entitled *Cities @ 2000: Canada's Urban Landscape* and the interim report of the Education Property Tax Committee of the Alberta Legislative Assembly.

2 The present motion is the latest "fresh evidence" skirmish between the appellants and respondents. Initially, the Attorney General for Alberta sought to adduce fresh statistical evidence. This was opposed by the PSBAA. The application was dismissed by order of McLachlin J. (as she then was) dated May 19, 1999. Subsequently, the Attorney General for Alberta took exception to certain material included in the book of authorities and record book filed by the PSBAA, and much of the impugned material was struck out by my order dated November 18, 1999, [1999] 3 S.C.R. 845,

Trustees of the Edmonton School District No. 7 et Cathryn Staring Parrish.

Argumentation écrite par *Robert Maybank* et *Margaret Unsworth*, pour les intimés Sa Majesté la Reine du chef de l'Alberta, le procureur général de l'Alberta et le ministre de l'Éducation, intimés à la requête.

Argumentation écrite par *Kevin P. Feehan*, pour les intimés Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 et Dwayne Berlando, intimés à la requête.

Version française de l'ordonnance rendue par

LE JUGE BINNIE — Il s'agit d'une demande présentée par les appelants, Public School Boards' Association of Alberta, Board of Trustees of the Edmonton School District No. 7 et Cathryn Staring Parrish (appelés collectivement la «PSBAA»), pour produire dans le cadre du présent pourvoi une preuve nouvelle relativement à deux [TRADUCTION] «principes constitutionnels sous-jacents» savoir a) [TRADUCTION] «l'autonomie gouvernementale raisonnable (limitée, contrôlée) des institutions municipales» et b) «l'égalité constitutionnelle fondamentale des écoles publiques et des écoles séparées». La preuve nouvelle en question comprend plusieurs lots de statistiques, des articles de journaux, un rapport de la Canada West Foundation intitulé *Cities @ 2000: Canada's Urban Landscape* et le rapport provisoire du comité sur la taxe scolaire de l'assemblée législative de l'Alberta.

La présente requête est le fruit de la plus récente escarmouche entre les parties en matière de «preuve nouvelle». Initialement, le procureur général de l'Alberta a tenté de produire une preuve nouvelle constituée de données statistiques. La PSBAA s'y est opposée, et la demande a été rejetée par le juge McLachlin (maintenant Juge en chef) en date du 19 mai 1999. Par la suite, le procureur général de l'Alberta s'est opposé à certains documents compris dans le recueil de jurisprudence et de doctrine et du dossier produits par la PSBAA, et bon nombre des documents visés ont

2000 SCC 2 (CanLII)

without prejudice to the right of the PSBAA, to bring a motion to adduce fresh evidence in the ordinary way if so advised. The present motion seeks to reinstate some of the material earlier struck out, as well as to adduce additional fresh evidence, including statistical information and two reports.

été radiés en application de l'ordonnance que j'ai rendue le 18 novembre 1999, [1999] 3 R.C.S. 845, sous réserve du droit de la PSBAA de présenter une requête pour produire une preuve nouvelle suivant le mode habituel si elle le jugeait opportun. La présente requête vise la réintégration de certains des documents radiés précédemment, de même que la production de nouveaux éléments de preuve, y compris des données statistiques et deux rapports.

I am of the view that the motion must be dismissed for the reasons which follow.

3 Je suis d'avis que la requête doit être rejetée pour les motifs suivants.

Legislative Fact and Adjudicative Fact

Fait législatif et fait en litige

In the earlier decision of November 18, 1999, reference was made to the distinction between legislative fact and adjudicative fact. Adjudicative facts are those that concern the immediate parties and disclose who did what, where, when, how and with what motive or intent. Legislative facts are traditionally directed to the validity or purpose of a legislative scheme under which relief is being sought. Such background material was originally put before the courts of the United States in constitutional litigation through what became known as the Brandeis brief. As Sopinka J. pointed out in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099:

> Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements. . . .

4 Il est fait mention, dans la décision antérieure du 18 novembre 1999, de la distinction entre un fait législatif et un fait en litige. Un fait en litige touche les parties directement intéressées et indique qui a fait quoi, où, quand, comment, pourquoi et dans quelle intention. Un fait législatif se rapporte traditionnellement à la validité ou à l'objet du texte législatif sur le fondement duquel un redressement est demandé. Des documents énonçant de tels faits ont été déposés pour la première fois devant les tribunaux aux États-Unis dans le cadre d'une affaire constitutionnelle au moyen de ce qui a été appelé le mémoire de Brandeis. Comme le juge Sopinka l'a fait remarquer dans *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, à la p. 1099:

> Les faits législatifs sont ceux qui établissent l'objet et l'historique de la loi, y compris son contexte social, économique et culturel. Ces faits sont de nature plus générale et les conditions de leur recevabilité sont moins sévères. . .

The usual vehicle for reception of legislative fact is judicial notice, which requires that the "facts" be so notorious or uncontroversial that evidence of their existence is unnecessary. Legislative fact may also be adduced through witnesses. The concept of "legislative fact" does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested. In this application, PSBAA is endeavouring to adduce apparently controversial material without the intermediary of a knowledge-

5 Un fait législatif est habituellement admis au moyen de la connaissance d'office, qui exige que les «faits» soient à ce point notoires ou exempts de controverse qu'il ne soit pas nécessaire d'en faire la preuve. Un fait législatif peut également être présenté par un témoin. Cependant, on ne peut, sous le couvert d'un «fait législatif», saisir le tribunal d'un élément de preuve controversé, au détriment de la partie adverse, sans permettre convenablement à cette dernière d'en contester la véracité. En l'espèce, la PSBAA tente de produire des éléments apparemment controversés sans recourir à

2000 SCC 2 (CanLII)

able witness. There is a supporting "information and belief" affidavit from a member of the Board of Trustees of the Edmonton School District No. 7, who essentially identifies the various categories of fresh evidence based on information provided by one of his counsel on this appeal. The deponent does not claim in his affidavit either relevant expertise or relevant personal knowledge.

un témoin averti. Elle a produit à l'appui un affidavit faisant état de «la connaissance et la croyance» d'un membre du Board of Trustees of the Edmonton School District No. 7, qui énumère essentiellement les différentes catégories de la preuve nouvelle à partir de renseignements fournis par l'un des avocats de la partie appelante. L'auteur de l'affidavit ne fait pas mention de compétences ou de connaissances personnelles pertinentes.

2000 SCC 2 (CanLII)

Test for Fresh Evidence

Critère relatif à la preuve nouvelle

6 The traditional test for the admission of fresh evidence on appeal was stated by this Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Le critère traditionnel concernant la recevabilité de nouveaux éléments de preuve en appel a été énoncé par notre Cour dans l'arrêt *Palmer c. La Reine*, [1980] 1 R.C.S. 759, à la p. 775:

(1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de manière aussi stricte dans les affaires criminelles que dans les affaires civiles: voir *McMartin c. La Reine*, [1964] R.C.S. 484.

(2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès.

(3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi, et

(4) elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat.

7 The *Palmer* case dealt with adjudicative fact. A key Crown witness gave a declaration that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money by the police. The evidence was considered wholly unreliable by the Court and the application was refused.

Dans l'affaire *Palmer*, il était question de faits en litige. Un témoin clé du ministère public avait affirmé que son témoignage était faux, entièrement fabriqué, et qu'il avait été influencé par des menaces et des incitations, y compris la promesse de paiements d'argent faite par la police. La preuve a été jugée non digne de foi dans sa totalité, et la demande a été rejetée.

8 A comparable rule in terms of fresh evidence of adjudicative fact is applied in civil cases: see *Dormuth v. Untereiner*, [1964] S.C.R. 122, at pp. 130-31, *Varette v. Sainsbury*, [1928] S.C.R. 72, and *K.V.P. Co. v. McKie*, [1949] S.C.R. 698.

Une règle semblable a été appliquée en matière civile relativement à la preuve nouvelle d'un fait en litige dans *Dormuth c. Untereiner*, [1964] R.C.S. 122, aux pp. 130 et 131, *Varette c. Sainsbury*, [1928] R.C.S. 72, et *K.V.P. Co. c. McKie*, [1949] R.C.S. 698.

9

A recent application of the fresh evidence test in this Court was in *R. v. Warsing*, [1998] 3 S.C.R. 579, where a psychiatric report was successfully sought to be submitted by the defence over the Crown's objections. The case illustrates the less strict application in criminal cases of the due diligence requirement in *Palmer*. The accused offered a thin argument on the issue of due diligence, but Major J. held for the majority, at para. 56:

> While the fresh evidence failed the due diligence test in *Palmer*, the evidence sought to be introduced was credible and if believed could affect the verdict. It is my opinion that the Court of Appeal's decision to admit the evidence after balancing the factors described was correct and should be upheld. The respondent's failure to meet the due diligence requirement is serious and in many circumstances would be fatal; however it is overborne by the interests of justice and as Carthy J.A. stated in *R. v. C. (R.)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.), at p. 87, a failure to meet the due diligence requirement should not "override accomplishing a just result".

Notre Cour a récemment appliqué le critère relatif à la preuve nouvelle dans *R. c. Warsing*, [1998] 3 R.C.S. 579, où la défense a réussi à produire un rapport psychiatrique malgré les objections formulées par le ministère public. Il s'agit d'un exemple de l'application moins stricte en matière pénale du critère de la diligence raisonnable énoncé dans *Palmer*. Les arguments avancés par l'accusé relativement à la question de la diligence raisonnable étaient minces, mais le juge Major a statué ce qui suit au nom de la majorité au par. 56:

> Même si le nouvel élément de preuve ne satisfaisait pas au critère de diligence raisonnable énoncé dans l'arrêt *Palmer*, la preuve que l'on cherchait à produire était plausible et pourrait influer sur le verdict, si on y ajoutait foi. Je suis d'avis que la décision de la Cour d'appel d'admettre cette preuve après avoir soupesé les facteurs décrits était juste et doit être confirmée. Le défaut de l'intimé de satisfaire à l'obligation de diligence raisonnable est grave et serait fatal dans bien des cas; toutefois, l'intérêt de la justice l'emporte et, comme le juge Carthy de la Cour d'appel l'a affirmé dans l'arrêt *R. c. C. (R.)* (1989), 47 C.C.C. (3d) 84 (C.A. Ont.), à la p. 87, le défaut de satisfaire à l'obligation de diligence raisonnable ne doit pas [TRADUCTION] «l'emporter sur l'obtention d'un résultat juste».

10

The requirements of due diligence, relevance, credibility and decisiveness are also pertinent to an application to adduce fresh evidence of legislative fact. While, as pointed out by Sopinka J. in *Danson*, *supra*, at p. 1099, proof of legislative fact is "subject to less stringent admissibility requirements", this does not mean that the *Palmer* requirements are altogether dispensed with. The *Palmer* principles reflect a broader judicial policy to achieve finality on the factual record at the trial level, with very limited exceptions. The matters in issue should narrow rather than expand as the case proceeds up the appellate ladder. The present application would, if allowed, broaden the field of combat.

Les exigences que sont la diligence raisonnable, la pertinence, la crédibilité et le caractère décisif doivent être également pris en considération aux fins d'autoriser ou non la production d'une preuve nouvelle se rapportant à un fait législatif. Comme l'a signalé le juge Sopinka dans *Danson*, précité, à la p. 1099, lorsqu'il s'agit de faits législatifs, «les conditions de leur recevabilité sont moins sévères», mais les exigences énoncées dans *Palmer* s'appliquent néanmoins. Les principes dégagés dans *Palmer* traduisent un principe judiciaire plus général qui consiste à n'admettre la preuve de faits que pendant le procès, sous réserve de très rares exceptions. Les questions en litige devraient être davantage circonscrites au fur et à mesure que l'affaire progresse devant les tribunaux jusqu'au stade de l'appel, et non le contraire. S'il était fait droit à la requête en l'espèce, l'étendue du débat s'élargirait.

11

Further, it is not fair to the other parties for an applicant seeking to adduce this type of fresh

En outre, il n'est pas juste pour les autres parties qu'un requérant tente de produire ce genre de

2000 SCC 2 (CanLII)

evidence simply to lay a lot of material before the Court with a generalized explanation of its utility, leaving to the other party the need to guess at its precise significance. This is not a case where published social science commentary is adopted as part of counsel's argument, in which case any "facts" referred to would be treated by the Court simply as unproven assertions. These materials are sought to be established as evidence, albeit legislative fact evidence. They have a direct bearing on the matters in dispute, and they are (according to the respondents) controversial. In these circumstances, where it is sought to adduce such fresh evidence over objection, fairness suggests that the applicant should be precise as to the points sought to be established by the fresh evidence and what, in particular, is relied on in support thereof in the mass of "fresh" material presented. So far as the Court is concerned, such precision allows a better evaluation of the importance and weight of the so-called fresh evidence. So far as opposing counsel are concerned, such precision will enable them to evaluate the extent of the controversy posed by the fresh evidence, and whether, if admitted, it will have to be responded to. A reasonable practice would be to include in the fresh evidence application a draft of the paragraphs to be inserted in the factum, with supporting references, in the event the application is successful. The present application is deficient in this respect. The case is now at the final stage of appeal and as the appellants have chosen to seek the indulgence of the Court to enlarge the factual record, it should have been done in a way that identified in some detail the exact propositions for which the evidence was sought to be adduced, and related thereto the evidence to be relied upon. Neither the Court nor opposing counsel should have to engage in clairvoyance.

preuve nouvelle simplement en déposant devant la Cour un ensemble de documents dont il justifie l'utilité de manière générale, de sorte que la partie adverse doive deviner quelle en est la portée exacte. Il ne s'agit pas, en l'espèce, d'un cas où l'avocat reprend, dans sa plaidoirie, un commentaire publié touchant les sciences sociales, auquel cas les «faits» mentionnés seraient tout simplement assimilés à des affirmations non prouvées. On demande que les éléments en cause soient admis à titre de preuve, mais de preuve d'un fait législatif. Ces éléments ont une incidence directe sur les questions en litige et (selon les intimés) ils suscitent la controverse. Dans les circonstances, lorsqu'une partie tente de produire de tels éléments de preuve nouveaux malgré l'opposition de la partie adverse, l'équité exige que la partie requérante précise ce qu'elle entend établir au moyen de la preuve nouvelle et ce qu'elle invoque en particulier à l'appui de sa thèse parmi tous les éléments de preuve «nouveaux». Pareille précision permet à la Cour de mieux évaluer l'importance et la valeur probante de la prétendue preuve nouvelle. Elle permet également aux avocats de la partie adverse de déterminer dans quelle mesure la preuve nouvelle prête à la controverse et, dans le cas où elle serait utilisée, s'il y a lieu d'y répondre. Il serait raisonnable d'exiger que la demande visant la production d'une preuve nouvelle renferme une ébauche des paragraphes devant être intégrés au mémoire, références à l'appui, pour le cas où la demande serait accueillie. La requête présentée en l'espèce ne satisfait pas à cette exigence. L'affaire en est maintenant au dernier stade de la procédure d'appel et, comme les appelants ont choisi de demander à la Cour de faire preuve d'indulgence et de les autoriser à étoffer le dossier des faits, ils auraient dû le faire en indiquant précisément les allégations dont ils cherchent à faire la preuve et les éléments de preuve sur lesquels ils comptaient se fonder à cet égard. Ni la Cour ni les avocats de la partie adverse ne devraient avoir à faire appel à la voyance.

Due Diligence

12 Much of the "fresh" statistics sought to be introduced in this application predates the trial. The

Diligence raisonnable

Une bonne partie des statistiques «nouvelles» visées par la demande sont antérieures au procès.

2000 SCC 2 (CanLII)

applicants seek to excuse the failure to adduce this material at trial on the basis of this Court's subsequent decision in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, where the Court identified "respect for minorities" as a fundamental constitutional principle. From this starting point, the applicants seek to excuse the omission to adduce the available evidence at trial as follows:

Because the "protection of minorities" submission did not become possible until this Court decided the *Secession Reference* in 1998, there would have been no reason to tender the statistics in Exhibit "A" to the courts below, which heard the arguments in this case before then.

Such a submission cannot be accepted. The appellate courts bring down decisions in a steady stream. Recent decisions do not authorize a party to relitigate the trial by bringing in evidence that was either withheld or overlooked at the original hearing. Applications for fresh evidence cannot be justified solely on the basis that new jurisprudence has given counsel a new twist on an old argument.

Specific Categories of "Fresh" Evidence

1. *Statistics*

13

PSBAA seeks to adduce a breakdown of the student population by faith (Catholic vs. non-Catholic) in both Edmonton and Calgary Separate Catholic Schools in support of its submission that the bulk of Alberta students affiliated with religious minorities attend public schools. It is not suggested that the student profile today is significantly different from what it was at the time of trial. The introduction of these statistics is challenged by the Alberta Catholic School Trustees' Association, both as to the methodology of their collection and the significance to be drawn. This is a prime illustration of the desirability of having statistical information presented to the court in a timely way through an expert who can be cross-examined on their provenance and significance. If the evidence was important, it ought to have been led at trial.

Les requérants tentent de justifier leur omission de les produire au procès par le fait que notre Cour a déterminé ultérieurement, dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, que le «respect des minorités» constituait un principe constitutionnel fondamental. Partant, ils demandent à être excusés de l'omission de déposer les éléments de preuve dont ils disposaient au procès, dans les termes suivants:

[TRADUCTION] Comme l'argument du «respect des minorités» ne pouvait être avancé avant que la Cour ne tranche dans le *Renvoi sur la sécession du Québec* en 1998, il n'y aurait eu aucune raison de présenter les statistiques correspondant à la pièce «A» devant les juridictions inférieures, qui avaient alors déjà entendu les plaidoiries en l'espèce.

On ne peut faire droit à une telle prétention. Les cours d'appel rendent constamment des décisions. Une partie ne peut invoquer une décision récente pour rouvrir le procès en présentant un élément de preuve qui ne l'a pas été lors de l'audition initiale. Une demande visant le dépôt d'une preuve nouvelle ne peut être justifiée uniquement par le fait qu'une nouvelle décision judiciaire permet à un avocat de présenter un vieil argument sous un angle nouveau.

Catégories particulières de la preuve «nouvelle»

1. *Les statistiques*

La PSBAA demande à mettre en preuve la répartition de l'effectif des élèves en fonction de la confessionnalité (catholique et non catholique) dans les écoles catholiques séparées d'Edmonton et de Calgary à l'appui de son allégation selon laquelle la majorité des élèves albertains appartenant aux minorités religieuses fréquentent l'école publique. Il ne s'agit pas de montrer que le profil des élèves a sensiblement changé depuis le procès. L'Alberta Catholic School Trustees' Association s'oppose à la mise en preuve de ces statistiques en raison, d'une part, de la méthodologie employée pour les compiler et, d'autre part, de la signification des données. La présente situation illustre bien l'opportunité de faire en sorte que de telles données statistiques soient présentées au tribunal en temps opportun par un expert susceptible d'être

2000 SCC 2 (CanLII)

The post-trial "up-dated" statistics do not provide a bootstrap to get into the record other statistical evidence which, with due diligence, might have been led at trial. Lack of due diligence is fatal to this aspect of the application.

contre-interrogé au sujet de leur provenance et de leur signification. Si la preuve était importante, elle aurait dû être présentée au procès. Les données statistiques «à jour» postérieures au procès ne permettent pas de verser au dossier d'autres éléments de preuve statistique qui, si la partie en cause avait fait preuve de diligence raisonnable, auraient pu être présentés au procès. Le défaut de diligence raisonnable est fatal quant à ce volet de la demande.

2000 SCC 2 (CanLII)

2. *The Newspaper Articles*

14 I held in the previous order that the two newspaper articles sought to be adduced by the PSBAA do not constitute "legislative fact". The two columns represent the opinion of two individuals writing in daily newspapers who may or may not have the underlying facts straight and whose opinion may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial. No basis has been made out by the applicants for admission of this material. It will therefore be rejected.

2. *Les articles de journaux*

Dans l'ordonnance précédente, j'ai conclu que les deux articles de journaux que la PSBAA souhaitait mettre en preuve ne constituaient pas des «faits législatifs». Il s'agit de l'opinion de deux personnes dont les articles sont publiés dans des quotidiens. On ignore si ces personnes connaissent bien les faits en cause et si leur opinion est valable ou non. Les auteurs ne peuvent être contre-interrogés. La teneur des articles est apparemment sujette à la controverse. Les requérants n'ont pas justifié l'admission en preuve de ces documents. La demande est donc rejetée à leur égard.

3. *The Cities @ 2000 Report*

15 This report by the Canada West Foundation consists of 78 pages of argument and related information. The executive summary gives an accurate summary of its content:

> *Cities @ 2000: Canada's Urban Landscape* begins to explore the importance of cities in Canada by meeting three objectives:
>
> 1) Detailing how urbanization has proceeded in Canada within a national, regional and provincial context.
>
> 2) Constructing a profile of Canadian cities based on population growth, demographic change, and a variety of social and economic indicators.
>
> 3) Constructing a future research agenda to address the issues facing municipal governments.

3. *Le rapport Cities @ 2000*

Ce rapport établi par la Canada West Foundation compte 78 pages d'argumentation et d'information connexe. Le résumé donne un bon aperçu de sa teneur:

> [TRADUCTION] *Cities @ 2000: Canada's Urban Landscape* se penche tout d'abord sur l'importance des villes au Canada en fonction de trois objectifs:
>
> 1) Préciser la façon dont l'urbanisation s'est faite au Canada dans les contextes national, régional et provincial.
>
> 2) Établir un profil des villes canadiennes fondé sur l'accroissement de la population, les changements démographiques et divers facteurs sociaux et économiques.
>
> 3) Concevoir un programme de recherche ultérieure pour résoudre les questions avec lesquelles les gouvernements municipaux sont aux prises.

16 While the report includes a good deal of statistical information, much of it is said to be "*[d]erived* by Canada West from Statistics Canada Census

Bien que le rapport renferme une grande quantité de données statistiques, il y est précisé que ces dernières sont [TRADUCTION] «*[t]irées* par Canada

Reports, 1966 to 1996" (emphasis added). There is no way of testing either the methodology or the validity of opinions expressed in the report at this late stage of the litigation. There is no affidavit by an author of the report who could be cross-examined on its contents. In effect, PSBAA seeks to use the report in part as untested expert opinion and in part as a general warehouse of unexplained and (in this litigation) untested extrapolations of statistical data. Neither role is a permissible objective of a fresh evidence application.

West des rapports sur les recensements de Statistique Canada de 1966 à 1996» (italiques ajoutés). À un stade aussi avancé de la procédure, il n'y a aucun moyen d'évaluer la méthodologie employée ou la validité des avis exprimés dans le rapport. Il n'existe aucun affidavit signé par un auteur du rapport, qui pourrait être contre-interrogé concernant sa teneur. En fait, la PSBAA tente d'utiliser le rapport en partie comme une preuve d'expert non vérifiée et en partie comme un ensemble d'extrapolations non expliquées et (dans le cadre de l'instance) non vérifiées sur des données statistiques. Aucune de ces utilisations ne correspond à un objectif légitime d'une demande de production d'une preuve nouvelle.

4. *The Interim Report: Education Property Tax Committee*

4. *Le rapport provisoire du comité sur la taxe scolaire*

17

This document was prepared by a committee of members of the Legislative Assembly to assess the education property tax system in Alberta. The document consists of 19 pages highlighting "key issues" that the committee proposes to inquire into, together with a number of comments on process and some interim steps. The report is preliminary in nature. It shows that legislators are pursuing concerns in the area, but such pursuit does not expand or contract the constitutional provisions which are the subject matter of the appeal. This material is too tentative to have any bearing on the outcome of the appeal.

Ce document a été rédigé par un comité composé de députés pour évaluer le système de perception de la taxe scolaire en Alberta. Le document compte 19 pages mettant en évidence les «questions clés» que le comité entend examiner, ainsi que certaines remarques sur la procédure et certaines mesures provisoires. Il s'agit essentiellement d'un rapport provisoire. Il montre que le législateur poursuit sa réflexion dans le domaine, mais cette démarche n'a pas pour effet d'accroître ou de réduire la portée des dispositions constitutionnelles qui font l'objet du pourvoi. Le document revêt un caractère trop provisoire et ne saurait avoir quelque incidence sur l'issue du pourvoi.

Conclusion

Conclusion

18

In summary, the evidence offered in this application is controversial. Much of it is not fresh. It is not related in any precise way to the propositions for which it is sought to be adduced, and so far as can be determined none of it could reasonably be expected to affect the result on the matters at issue in this appeal in a significant way. The application is therefore dismissed with costs.

En résumé, les éléments de preuve prêtent à la controverse. Une bonne partie d'entre eux ne sont pas nouveaux. Ils ne sont pas liés de manière précise aux allégations qu'ils sont censés appuyer et, pour autant que l'on puisse le déterminer, on ne peut raisonnablement s'attendre à ce qu'ils puissent modifier de manière importante le règlement des questions en litige dans le présent pourvoi. La demande est donc rejetée avec dépens.

Motion dismissed with costs.

Requête rejetée avec dépens.

2000 SCC 2 (CanLII)

Solicitors for the appellants/applicants Public School Boards' Association of Alberta, Board of Trustees of the Edmonton School District No. 7 and Cathryn Staring Parrish: Dale Gibson Associates, Edmonton.

Solicitor for the respondents Her Majesty the Queen in right of Alberta, the Attorney General for Alberta and the Minister of Education, respondents on the motion: The Department of Justice, Edmonton.

Solicitors for the respondents Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 and Dwayne Berlando, respondents on the motion: Fraser Milner, Edmonton.

Procureurs des appelants/requérants Public School Boards' Association of Alberta, Board of Trustees of the Edmonton School District No. 7 et Cathryn Staring Parrish: Dale Gibson Associates, Edmonton.

Procureur des intimés Sa Majesté la Reine du chef de l'Alberta, le procureur général de l'Alberta et le ministre de l'Éducation, intimés à la requête: Le ministère de la Justice, Edmonton.

Procureurs des intimés Alberta Catholic School Trustees' Association, Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 et Dwayne Berlando, intimés à la requête: Fraser Milner, Edmonton.

2000 SCC 2 (CanLII)

Discipline Committee of the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario Erreur ! Référence non valide pour un signet.

Citation: ONCRPO v. WENT, 2023 ONCRPO 1

Date of written reasons: February 10, 2023

Docket: C2021-17_C2021-20

2023 ONCRPO 1 (CanLII)

IN THE MATTER OF the *Regulated Health Professions Act, 1991, S.O. 1991*, c. 18, as amended, and the regulations thereunder, as amended;

IN THE MATTER OF the *Psychotherapy Act, 2007, S.O. 2007, c. 10, Sched. R*, as amended and the regulations thereunder, as amended;

AND IN THE MATTER OF a discipline proceeding against John Went, a Registrant of the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario.

Between: **COLLEGE OF REGISTERED PSYCHOTHERAPISTS AND REGISTERED MENTAL HEALTH THERAPISTS OF ONTARIO**

- and -

JOHN WENT (REGISTRATION #002153)

Before: Panel	**Kenneth Lomp (Chair)** **Henry Pateman** **Jeffrey Vincent** **Radhika Sundar** **Kathleen (Kalie) Hewitt-Blackie**
Date of hearing:	**January 17, 2023**

Appearances:

Rebecca Durcan,	**Counsel for College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario**
Jennifer Hunter,	**Independent Legal Counsel**
John Went, Registrant/Member	**Lisa Hamilton, Counsel for John Went**

2023 ONCRPO 1 (CanLII)

DECISION AND REASONS

PRELIMINARY ISSUE

This hearing involved two separate Notices of Hearing in respect of two separate proceedings by the College against John Went (the 'Registrant'). The first proceeding was in respect of matter C2021-17. The second proceeding was in respect of matter C2021-20. On consent of the parties, Counsel for the College asked the Panel to hear the two matters together, pursuant to section 9.1(1)(a) of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22. The Panel agreed to this request.

These matters came before a panel of the Discipline Committee (the "Panel") of the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (the "College") on January 17, 2023. The hearing proceeded via videoconference on consent of the parties. The hearing was uncontested. It proceeded by way of an Agreed Statement of Facts ("ASF") and a Joint Submission on Penalty and Costs, which were jointly proposed on behalf of the College and the Registrant, John Went (the "Registrant").

The Panel made findings of professional misconduct and, at the conclusion of the hearing, delivered its finding and penalty order orally, with written reasons to follow. These are those reasons.

THE ALLEGATIONS (C2021-17)

The allegations of professional misconduct against the Registrant were listed on the Notice of Hearing, dated February 24, 2022, which was filed as Exhibit 1, and read as follows:

The Registrant

1. John Went (the "Registrant") registered with the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (the "College") on or about April 21, 2015. The Registrant is a Registered Psychotherapist that is authorized for independent practice.
2. The Registrant is self-employed and has offices in Bradford and/or Toronto.
3. At the relevant time, the Registrant was the founder and/or owner and/or co-owner

of Integral Healing Centre (IHC).

4. The Registrant was an instructor and/or supervisor at IHC.

Integral Healing Centre

5. It is alleged that the Registrant did the following:

   a. Provided misleading and/or false and/or inadequate information to applicants and/or students of IHC including but not limited to the following:

      i. That IHC was registered as and/or in the process of being registered as a private career college;

      ii. That he needed to apply to the Ministry of Colleges and Universities in order for the College to accredit the IHC program;

      iii. That IHC was under the control of the College; and/or

      iv. That graduates of IHC would be prepared to register with the College.

6. It is alleged that the Registrant concurrently treated and taught and evaluated IHC students.

Allegations of Professional Misconduct

7. It is alleged that the above conduct constitutes professional misconduct pursuant to section 51(1)(c) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code") as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 317/12 made under the Psychotherapy Act, 2007:

   a. **Paragraph 1**. Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession including but not limited to the following:

      i. 1.6 – Conflict of Interest; and/or

      ii. 1.7 – Dual or Multiple Relationships;

   b. **Paragraph 16**. Acting in a professional capacity while in a conflict of interest or being in a conflict of interest when acting in a professional capacity;

2023 ONCRPO 1 (CanLII)

c. **Paragraph 26**. Signing or issuing, in his or her professional capacity, a document that the member knows or ought to know contains a false or misleading statement;

d. **Paragraph 52**. Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and/or

e. **Paragraph 53**. Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

2023 ONCRPO 1 (CanLII)

THE ALLEGATIONS (C2021-20)

The allegations of professional misconduct against the Registrant were listed on the Notice of Hearing, dated February 24, 2022, which was filed as Exhibit 2, and read as follows:

The Registrant

1. John Went (the "Registrant") registered with the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (the "College") on or about April 21, 2015. The Registrant is a Registered Psychotherapist that is authorized for independent practice.
2. The Registrant is self-employed and has offices in Bradford and/or Toronto.
3. At the relevant time, the Registrant was the founder and/or owner and/or co-owner of Integral Healing Centre (IHC).
4. The Registrant was an instructor and/or supervisor at IHC.

The Client

5. It is alleged that the Registrant commenced treatment of the Client in or around February 2015.
6. It is alleged that the Client commenced her studies at IHC in or around September 2015.
7. It is alleged that the Registrant did not discuss and/or recommend and/or suggest that the Client be referred to another therapist as a result of the Client registering at IHC.

8. It is alleged that the Registrant continued to treat the Client while she was a student at IHC.

9. It is alleged that the Registrant was the Client's instructor for her final three years at IHC.

10. It is alleged that the Registrant evaluated the Client's work at IHC.

11. It is alleged that the Client felt exposed during class at IHC as the Registrant was aware of her personal life from therapy and/or she could not stand up to the Registrant at IHC in fear of losing him as a therapist.

12. It is alleged that the Registrant referred clients to the Client.

13. It is alleged that the Registrant offered his office to the Client for no cost. It is alleged that despite his offer, he then delivered an invoice to the Client for $1400.00.

14. It is alleged that during her third and/or fourth year at IHC the Client tried to terminate her therapeutic relationship with the Registrant. It is alleged that the Registrant conceded but then pressured the Client to return.

15. It is alleged that the Client tried again to terminate the therapeutic relationship. It is alleged that the Client communicated her intent in an email to the Registrant. It is alleged that the Registrant did not promptly respond to and/or acknowledge the email. It is alleged that when the Registrant did respond he told the Client that he "felt hurt and dismissed."

Allegations of Professional Misconduct

16. It is alleged that the above conduct constitutes professional misconduct pursuant to section 51(1)(c) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code") as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 317/12 made under the Psychotherapy Act, 2007:

    a. **Paragraph 1.** Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession, including but not limited to:

2023 ONCRPO 1 (CanLII)

i. 1.6 – Conflict of Interest;

ii. 1.7 – Dual or Multiple Relationships; and/or

iii. 1.8 – Undue Influence or Abuse;

b. **Paragraph 16.** Acting in a professional capacity while in a conflict of interest or being in a conflict of interest when acting in a professional capacity;

c. **Paragraph 52**. Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and/or

d. **Paragraph 53**. Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

2023 ONCRPO 1 (CanLII)

AGREED STATEMENT OF FACTS

The Agreed Statement of Facts was filed as Exhibit 3 and provides (without attachments) as follows:

The Registrant

1. John Went (the "Registrant") registered with the College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (the "College") on or about April 21, 2015. The Registrant is a Registered Psychotherapist that is authorized for independent practice. Attached at Tab A is a copy of the Registrant's registration history as set out in the College's public register.
2. The Registrant is currently self-employed and has offices in Bradford and Toronto.
3. The Registrant and the College consent to the two Notices of Hearing dated February 24, 2022 to be heard together pursuant to s 9.1(1)(a) of the *Statutory Powers Procedure Act.*

Integral Healing Centre

4. The Registrant was the founder and owner of Integral Healing Centre (IHC). IHC was created to provide a professional psychotherapy training program. The Registrant agrees the IHC ought to have been registered as a private career college under the Ministry of Colleges and Universities (the "Ministry") but this did not occur. As of January 2021, IHC is no longer operating. Attached at Tab B is an excerpt of the IHC website from approximately 2015 onwards. On its website, IHC described its program as follows:
   a. In-Class therapy sessions are a component of the program;
   b. Group supervision, clinical supervision and attendance in personal psychotherapy

are requirements;

c. "Our goal is to graduate competent beginning therapists who practice safe and effective use of self."

d. "Students must seek regular personal therapy with a registered Psychotherapist. Working with a graduate from IHC is strongly encouraged to help students further integrate the teaching and modalities."; and

e. "In order to successfully complete the course and receive recognition of completion, each student will complete the academic activities below to the satisfaction of John Went, Founder and Program Director."

2023 ONCRPO 1 (CanLII)

5. The application to IHC was located on the website. One of the questions asks if the applicant "intend[s] to complete all of the requirements for registration in the CRPO?"
6. The Registrant was listed as an available therapist on the website of IHC.
7. The Registrant was an instructor and supervisor at IHC. It is agreed that the Registrant would evaluate and grade the final papers of IHC students even if he had provided therapy to them as part of the IHC academic requirements.

Student 1

8. In August 2018, the Registrant advised Student 1 and all Year IV students that IHC comes "under the control of the College of Registered Psychotherapists of Ontario and the Ministry of Training, Colleges and Universities, Private Career Colleges Division." It is agreed that this was not correct. However, if the Registrant were to testify, he would state that he honestly believed that the pending application to the Ministry for accreditation of IHC as a private career college would be accepted, and that CRPO would register graduates of the IHC program. If he were to testify, the Registrant would admit that he never asked the Ministry to confirm his incorrect assumption. He would further testify that but for ███, he would have continued the process of seeking the College's recognition of IHC. Note that the College's process of recognition never resulted in an endorsement or recommendation of an educational program. Rather, the process was intended to inform graduates that the education requirements for registration would be met upon completion of the program. Included at Tab C is a copy of the email correspondence between the Registrant and Student 1.
9. In or around 2018 and/or 2019 Student 1 sought documentation from the Registrant as

she was applying to the College. In 2018 and/or 2019, the Registrant provided Student 1 with the application to the Ministry to achieve private career college designation for IHC. The Registrant admits that he prepared and issued this application and that he had not yet received any indication from the Ministry that it would be accepted or rejected. The Registrant provided this to Student 1 so that she could include it in her application to the College but agrees that it would have no relevance to College applications for registration.

The application was incomplete and unsigned. In the application, the Registrant listed the program code for psychologists (4151) yet describes how the program will prepare graduates to become registered psychotherapists. If the Registrant were to testify, he would state that the final copy of the application was delivered to the Ministry by courier, and that version had a signature and enclosures. It was his honest belief that if the Ministry had the authority to approve private career colleges that taught psychology, it followed that the Ministry also had the authority to approve private career colleges that taught psychotherapy, and that the Ministry's application form simply had not yet been updated to reflect that Registered Psychotherapist was a very newly created profession. The Registrant admits that he never asked the Ministry to correct his assumption. Included at Tab D is a copy of the application.

2023 ONCRPO 1 (CanLII)

Student 2

10. In or around the summer of 2015 a person contacted the Registrant and asked if IHC was accredited with the College. The Registrant advised the person that IHC was in the process of applying to become accredited. If the Registrant were to testify, he would say that he honestly believed that this statement was true, as he had not yet heard from the Ministry that it was in fact the College that determined whether programs would be "accredited" for purposes of College registration. The Registrant now realizes that the College never accredited educational programs. The Registrant also advised the person that other graduates had become registered with the College, which was true, i.e. pursuant to the "grandparenting" registration process that continued until April 2017. However, the Registrant admits that the grandparenting process was distinct from the process that would have been in place by the time Student 2 would have graduated from IHC. If the Registrant were to testify, he would state that he honestly believed that since the College had registered prior graduates of IHC, this was a strong indication that graduates of this

program would continue to be registered once the grandparenting period ended in April 2017, consistent with section 6(1)(1)(iii) or (iv) of the Registration Regulation. He now recognizes that his belief was simply incorrect. The Registrant's comments reassured the person who then registered with IHC in September 2015 (and became Student 2). It is agreed that the Registrant provided misleading or inadequate information to Student 2.

The Client

Treatment

[redacted] The Registrant commenced treatment of the Client in or around February 2014. Her treatment included discussion of personal matters including [redacted]

11. The Client had learned of the Registrant via the IHC website. Attached at Tab E is a copy of the website as it looked in March 2015. The website described an "affiliation" between IHC and Canadian Association for Psychodynamic Therapists, Ontario Society of Psychotherapists, and the College and the Ministry of Human Resources and Skills. The Registrant agrees that despite this information on the IHC website, the references to CRPO and ISO related to him individually and not the IHC.

Registering at IHC

12. Following her commencement of treatment with the Registrant, the Client advised the Registrant that she was interested in attending IHC. The Client did commence her studies at IHC in or around September 2015. She also continued to see the Registrant for treatment while she was a student at IHC.
13. The Registrant never discussed with or recommended to or suggested that the Client be referred to another therapist as a result of the Client registering at IHC.
14. The Registrant was the Client's instructor for her final three years at IHC with the exception of the period from February 2019 to July 2019 when the Registrant was [redacted]. During this time, the class was taught by another registrant. In July 2019, the Registrant, in consultation with the other RP, read the final papers submitted by the Client and other students and together they decided whether the students (including the Client) had completed the training at a satisfactory level. If the Registrant were to testify, he would state that he verily believed that the involvement of the other RP in assessing the Client was a safeguard against any concern of conflict-of-interest in

2023 ONCRPO 1 (CanLII)

relation to the objective assessment of the Client. The Registrant and the other RP did concur that the Client had met the standards to complete the training. The Registrant now understands that it was not appropriate for him to be involved – in any capacity – in the evaluation of the Client's work at IHC.

In-Class Therapy

15. The curriculum for IHC included class therapy. Students would take on the role of client and therapist and then vice versa. The Registrant would observe students take on these roles and provide feedback to the students. The Client felt exposed during in-class therapy as the Registrant was aware of her personal life from their private therapy sessions. The Registrant acknowledges that he should have ensured that all students, including the Client, were aware that any personal information that had been shared would not be disclosed to the class unless the student decided to share. The Registrant acknowledges that had he done so, the Client would likely not have felt exposed.
16. It is agreed that despite the fact that the Registrant provided private therapy to the Client, the Registrant evaluated the Client's academic and performance at IHC.
17. If the Client were to testify, she would state that she felt she could not stand up to the Registrant at IHC in fear of losing him as a therapist.

Registrant offers his office to Client

18. In her third year at IHC, the Registrant referred clients to the Client. The clients were incoming IHC students and were being treated under the supervision of another RP. The Client was given the use of the Registrant's office ████ when the Registrant was not using it, i.e. on weekends and evenings rent free, to assist her in establishing a private practice. By the end of September 2017, the Client's practice had grown sufficiently that she also needed an office all day Friday. As she was charging the clients that she saw, she could afford to pay rent, and she agreed to pay $150 per month for the use of ████ every Friday. This arrangement continued in 2018, at which point the Client was given a receipt for $1400 representing the amount that she had paid.

Client's attempts to terminate relationship

19. The Client tried to terminate her therapeutic relationship with the Registrant but he encouraged her to remain. She did so. However, in approximately November 2018, the

2023 ONCRPO 1 (CanLII)

Client did terminate her therapeutic relationship with the Registrant via email. He did not respond. If the Registrant were to testify, he would state that the intention to terminate was expressed in such a definitive manner that it seemed a response was not expected.

20. In April 2019, the Registrant emailed the Client about outstanding payments (for IHC and therapy). The Client expressed her concern that he had not responded to her email of November 2018. He did not respond until May 2019 and said he expected more from her and that he "felt hurt and dismissed." Attached at Tab F is a copy of this email exchange. If the Registrant were to testify, he would state that his May 2019 email was sent in the context of being very recently [redacted].

2023 ONCRPO 1 (CanLII)

Standards of Practice

21. The College maintains Standards of Practice that assist registrants and clients understand the role of the registrant. It is agreed that the following standards of practice (excerpts of which have been included below but can be found at Tab G) have been breached by the above noted conduct:

   a. Standard 1.6 – Conflict of Interest

   (1) A conflict-of-interest exists when a member is in any arrangement or relationship where a reasonable person could conclude that the exercise of the member's professional expertise or judgment may be compromised by, or be influenced inappropriately by, the arrangement or relationship. A conflict-of-interest may be actual, potential or perceived.

      a. Examples include:

         1. Entering into an agreement or arrangement that interferes with the member's ability to properly exercise his/her professional judgment.

   b. Standard 1.7 – Dual or Multiple Relationships

   (1) Whenever possible, members should avoid dual or multiple relationships with clients in addition to their professional one (e.g. relative, friend, student, employee). In remote areas with few other psychotherapists, it may be impossible not to have some other relationship with a client (if only as a member of the same small community). In those circumstances, the member must use his/her professional judgment, and ensure that safeguards are in

place, e.g. appropriate supervision, ensuring that any conflict-of interest concerns are addressed, etc.

(2) Multiple relationships are prone to cause confusion for both the member and the client. For example, the therapist or client may not know in which relationship certain information is being provided.

(3) If the member is in a position of authority over the client (e.g. as employer), the client (e.g. as employer), the client may feel the need to acquiesce to a request from the member as a therapist. Dual or multiple relationships may also affect the member's professional judgment (e.g. the member might say things to a client who is also a friend that s/he would not otherwise say to a client).

(4) Note: Students in some psychotherapy training programs undertake personal psychotherapy as part of program requirements. In this instance, teachers in the program may engage with students in therapy. An important safeguard would be to ensure that a member engaged in such therapy does not also evaluate the students' academic or other performance in the program.

c. Standard 1.8 – Undue Influence and Abuse

(1) Clients and/or their representatives may be emotionally and otherwise vulnerable. At the same time, clients may be particularly influenced by the views or suggestions of their psychotherapist. It is important therefore to ensure that clients feel safe with their therapist, and that they are not subjected to inappropriate influence or abuse.

(2) A member demonstrates compliance with the standard by, for example:

1. practising the profession with integrity and professionalism;
2. refraining from any form of verbal, physical, emotional, psychological or sexual abuse;
3. being cognizant of the individual vulnerabilities of clients and/or representatives;
4. being respectful of the best interests of clients;
5. apologizing for minor lapses in courtesy or inappropriate language;
6. ensuring that the member's influence does not affect the personal decision making of a client, particularly in financial matters and end of life decision making;

2023 ONCRPO 1 (CanLII)

7. consulting another member or the College if the member finds him/herself in questionable circumstances.

Admission of Professional Misconduct

22. It is admitted that the above conduct constitutes professional misconduct pursuant to section 51(1)(c) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the “Code”) as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 317/12 made under the Psychotherapy Act, 2007:
    a. **Paragraph 1** – Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession, including but not limited to the following:
        i. 1.6 – Conflict of Interest;
        ii. 1.7 – Dual or Multiple Relationships; and
        iii. 1.8 – Undue Influence or Abuse;
    b. **Paragraph 16** – Acting in a professional capacity while in a conflict of interest or being in a conflict of interest when acting in a professional capacity;
    c. **Paragraph 26** – Signing or issuing, in his or her professional capacity, a document that the member knows or ought to know contains a false or misleading statement; and
    d. **Paragraph 52** – Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as unprofessional.

Withdrawal of Allegations

23. The College seeks leave to withdraw the allegation in the Notices of Hearing of contravention of section 51(1)(c) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991(the “Code”) as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 317/12 made under the *Psychotherapy Act, 2007:*
    a) **Paragraph 53**. Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

2023 ONCRPO 1 (CanLII)

Admission of Facts

24. By this document, the Registrant admits to the truth of the facts referred to in paragraphs 1 to 22 above (the "Agreed Facts").

25. By this document, the Registrant states that:

    a. he understands that by signing this document he is consenting to the evidence as set out in the Agreed Facts being presented to the Discipline Committee;

    b. he understands that any decision of the Discipline Committee and a summary of its reasons, including reference to his name, will be published in the College's annual report and any other publication or website of the College;

    c. he understands that any agreement between himself and the College with respect to any penalty proposed does not bind the Discipline Committee; and

    d. he understands and acknowledges that he is executing this document voluntarily, unequivocally, free of duress, free of bribe, and that he has been advised of his right to seek legal advice.

2023 ONCRPO 1 (CanLII)

REGISTRANT'S PLEA

The Registrant admitted the acts of professional misconduct as set out in the Agreed Statement of Facts.

The Panel conducted an oral plea inquiry and was satisfied that the Registrant's admissions were voluntary, informed, and unequivocal.

SUBMISSIONS OF THE PARTIES ON FINDING

Counsel for the College submitted that the facts and admissions contained in the Agreed Statement of Facts constitute professional misconduct admitted to by the Registrant.

The Registrant agreed with College Counsel's submissions, namely that the facts admitted in the Agreed Statement of Facts support a finding of professional misconduct as set out therein.

DECISION

On reading the Notices of Hearings, considering the Agreed Statement of Facts, and on hearing the submissions of counsel for the College and the submissions of the Registrant, the Panel finds that the Registrant has committed acts of professional misconduct pursuant to:

1. Section 51(1)(c) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code").
    a. **Paragraph 1** – Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession, including but not limited to the following:
        i. 1.6 – Conflict of Interest;
        ii. 1.7 – Dual or Multiple Relationships; and
        iii. 1.8 – Undue Influence or Abuse;

    b. **Paragraph 16** – Acting in a professional capacity while in a conflict of interest or being in a conflict of interest when acting in a professional capacity;

    c. **Paragraph 26** – Signing or issuing, in his or her professional capacity, a document that the member knows or ought to know contains a false or misleading statement; and

    d. **Paragraph 52** – Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as unprofessional.

REASONS FOR DECISION

Having considered the Registrant's admission of professional misconduct and the facts contained in the Agreed Statement of Facts, the Panel concluded that the College had provided clear, cogent and convincing evidence in support of the allegations and succeeded in proving on a balance of probabilities that the Registrant had committed the acts of professional misconduct. The Panel was satisfied the Registrant's admission was voluntary, informed, and unequivocal.

2023 ONCRPO 1 (CanLII)

THE JOINT SUBMISSION ON PENALTY AND COSTS

The Joint Submission on Penalty and Costs was filed as Exhibit 4. Counsel for the College and the Registrant agreed and jointly submitted that the following would be an appropriate order as to penalty and costs in the matter:

2023 ONCRPO 1 (CanLII)

1. The Registrant is required to appear before a Panel of the Discipline Committee to be reprimanded immediately following the hearing.

2. The Registrar is directed to suspend the Registrant's certificate of registration for a period of five months, to commence on the date of this order, with the ability to remit three months in the event that the Registrant successfully completes the terms, conditions and limitations in subparagraphs 3(a) and 3(b) within the timeframes indicated therein:

   a. The Registrant shall serve the first two months of the suspension consecutively; and

   b. If the remitted portion of the suspension is required to be served by the Registrant because he fails to complete the remedial requirement specified in subparagraphs 3(a) and 3(b), that portion of the suspension shall be served consecutively and shall commence on the day immediately after the timeframes for completing the requirements in subparagraphs 3(a) and 3(b) have expired, whichever is later.

3. The Registrar is directed to immediately impose the following specified terms, conditions and limitations on the Registrant’s certificate of registration, all of which shall be fulfilled at the expense of the Registrant and to the satisfaction of the Registrar:

   a. The Registrant shall successfully complete the College’s Jurisprudence e-Learning Module within six months of the date of this order;

   b. The Registrant shall successfully complete a course with a professional ethics consultant chosen by the Registrar, regarding the issues raised by the facts and findings of professional misconduct in this case, within twelve months of the date of this order; and

c. The Registrant shall agree to clinical supervision, by a supervisor, pre-approved by the Registrar, to address dual relationships, conflict of interest, and undue influence and abuse for twelve months immediately following the Registrant's return to practice after the completion of the suspension described in paragraph 2.

   i. Before the supervision commences, the Registrant shall provide the supervisor a copy of the Agreed Statement of Facts, the Joint Submissions on Penalty and Costs, and the reasons of the Panel;

   ii. The Registrant shall co-operate with the supervisor and abide by all the terms of the clinical supervision agreement put into place by the supervisor and the College; and

   iii. Within thirty days of the completion of the supervision, the Registrant shall ensure that the supervisor submits a written report to the Registrar which confirms that the Registrant co-operated and complied with the supervision, incorporated advice from the supervisor, and which sets out the position of the supervisor as to the Registrant's skills for addressing dual relationships, conflict of interest, and undue influence and abuse.

   iv. If the remitted portion of the suspension is required as described above, clinical supervision shall resume immediately after the Registrant has served the remitted portion.

4. The Registrant is required to pay costs fixed in the amount of $6,055.00 payable within thirty days of the date of this order.

DECISION ON ORDER

The Panel accepted the Joint Submission on Penalty and Costs as submitted by the parties and makes an Order in accordance with the terms set out above.

2023 ONCRPO 1 (CanLII)

REASONS FOR DECISION ON ORDER

The panel considered the Registrant's apparent willingness to cooperate with the College, the Registrant's voluntary admission of the acts noted in the Agreed Statement of Facts and other mitigating factors noted by Counsel and the Registrant's recognition that his conduct was unprofessional. The panel concluded that the Joint Submission on Penalty and Costs is reasonable, serves the public interest and provides reasonable remediation opportunities for the Registrant. Public safety is addressed by both general and specific deterrence.

REPRIMAND

At the conclusion of the hearing, having confirmed that the Registrant waived any right to appeal, the panel delivered its oral reprimand. A copy of the reprimand is attached at Schedule "A" of these reasons.

I, Kenneth Lomp, sign this Decision and Reasons for the decision as Chairperson of this Discipline panel and on behalf of the Registrants of the Discipline panel as listed below:

Kenneth Lomp, RP Chair, Discipline Panel February 10, 2023

Radhika Sundar, Professional Member
Kathleen (Kali) Hewitt-Blackie, Professional Member
Henry Pateman, Public Member
Jeffrey Vincent, Public Member

2023 ONCRPO 1 (CanLII)

Schedule "A"

Oral Reprimand

Mr. Went,

You are required to appear before this panel of the discipline committee for an oral reprimand. The committee has found that your conduct constitutes unprofessional behaviour. Maintaining boundaries by not engaging in multiple relationships with clients is integral to keeping the therapeutic relationship safe.

You're continuing to maintain a therapeutic relationship with your client after they became a student at IHC and failing to refer them to another therapist created a situation that put an already vulnerable individual at risk of harm. As a registered psychotherapist, the panel reminds you that it is your responsibility to be aware of the inherent power imbalances that exists both in your role as a teacher, as well as a registered psychotherapist. This places a greater onus on you as a professional to be mindful that your conduct reflects on the profession as a whole and has put the profession in ill repute.

The panel reminds the registrant that lack ill intent, does not excuse misleading information presented as fact. Such behaviour can cause significant harm to the public in a broad sense and more specifically to vulnerable individuals. We wish to make clear to you that, although the Order we imposed is appropriate in relations to our findings, a more significant Order will likely be imposed by another Discipline panel in the event that you are ever found to have engaged in further professional misconduct.

Discipline Panel:
Kenneth Lomp, Chair, Professional Member
Radhika Sundar, Professional Member
Kathleen (Kali) Hewitt-Blackie, Professional Member
Henry Pateman, Public Member
Jeffrey Vincent, Public Member

2023 ONCRPO 1 (CanLII)

CITATION: McLaughlin v. McLaughlin, 2020 ONSC 5666
COURT FILE NO.: CV-20-1847
DATE: 2020 09 21

2020 ONSC 5666 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PATRICIA ELAINE MCLAUGHLIN, Applicant

AND:

JOANNE LENORE MCLAUGHLIN et al, Respondents

BEFORE: TRIMBLE J.

COUNSEL: R. Douglas Elliott, delliott@cambridgellp.com, and Joseph Figliomeni, jfigliomeni@cambridgellp.com, for the Applicant/Moving Party

for the Respondents/Responding Parties, Joanne Lenore McLaughlin and Julie Marie McLaughlin, Ian Hull, Ihull@hullandhull.com, and Rebecca Rauws, Rrauws@hullandhull.com,

for the proposed added Respondents/Responding Parties, 2147957 Ontario Inc. and 1355754 Alberta Ltd., Peter J. Osborne, posborne@litigate.com, and Chris Trivisonno, ctrivisonno@litigate.com,

for the Respondent, Stuart Owen McLaughlin, Allan Coleman, acoleman@osler.com,

for the Respondents/Responding parties Stephen Rockett, Peter Paauw and Stuart Owen McLaughlin, in his capacity as Trustee of the S. Bruce McLaughlin 2001 Family Trust, Melanie Yach, myach@airdberlis.com,

for the Respondents/Responding Parties 926100 Alberta Ltd., 926109 Alberta Ltd., Peel Financial Services Limited and Halton Hills South Property Corporation, David Chernos, dchernos@cfscounsel.com, and S. Finkelstein, afinklestein@cfsounsel.com

for the Respondent/Responding Parties 3 Angels Holdings Limited, Daniel Murdoch, dmurdoch@stikeman.com,

for the proposed Respondents/Responding Parties 2147957 Ontario Inc. and 1355754 Alberta Limited, Peter Osborne, posborne@litigate.com, C. Trivisonno, ctrivisonno@litigate.com, and Sarah Bittman, sbittman@litigate.com.

HEARD: 14 September 2020 by Zoom Videoconference

2020 ONSC 5666 (CanLII)

ENDORSEMENT

The Motion

[1] On this motion the Court is asked to resolve four questions:

(1) Should 2147957 Ontario Inc. and 1355754 Alberta Ltd. be added as respondents to this Application as necessary parties?

(2) Should the Court grant leave to the Applicant to file the Affidavit of Timothy J.L. Phelan, sworn September 10, 2020, in support of the Applicant's request to eliminate or restrict oral cross-examination?

(3) Should the Applicant, Patricia Elaine McLaughlin, be cross-examined orally or in writing and, if orally, what accommodations should to be made?

(4) What is the scope of current cross-examinations?

The Basic Facts

[2] This Application involves a dispute between Patricia McLaughlin, the widow of the late S. Bruce McLaughlin ("Bruce"), and three of their children, Stuart, Julie, and Joanne, over Bruce McLaughlin's Estate's failure to pay to Patricia a specific bequest of $5,000,000 and an annual stipend.

[3] In these reasons, I refer to the personal litigants by their first names, not out of familiarity or disrespect, but for clarity since they all share the same last name.

[4] While Patricia's claim may be simply stated, factually, it is complicated, in part because the assets of the Estate are held in a complex web of a Family Trust and many corporations, the complete details of which are unnecessary for the purposes of this motion, and in part because it involves mistrust and enmity between various members of two family camps: Patricia, Stuart, and Laurel (Patricia and Bruce's fourth child) on one side, and Julie and Joanne on the other.

[5] Julie and Joanne believe that the real litigant (not withstanding Patricia's statements in her Affidavits to the contrary), is Laurel, who was estranged from the family for a long time, but has now reconciled with Patricia.

[6] Patricia, on the other hand, believes that Julie and Joanna, for eight years, have denied her the bequest that Bruce made. Instead, they have operated the Family Trust and the Estate and the complex web of companies.

[7] Bruce and Patricia were married for roughly 60 years. Bruce died in July 2012.

[8] Throughout their marriage, Patricia helped Bruce run his real estate development business. Patricia was also the primary caregiver for their five children.

[9] Bruce was a successful real estate developer who developed large tracts of land in Peel and Halton Regions in Ontario, Grouse Mountain in B.C., and properties in Texas, among others.

[10] From the early 1980s until approximately 2010, Bruce carried out various corporate restructuring and estate planning measures, including the creation of the "2001 Family Trust", and the preparation of various Primary and Secondary Wills.

2020 ONSC 5666 (CanLII)

[11] Patricia says that beginning in 2002, Bruce began to demonstrate signs of dementia. At that time, Joanne, Julie, and Stuart began to manage Bruce's businesses pursuant to a Power of Attorney for Property, dated October 22, 2001.

[12] In his last Will, dated September 16, 2008, Bruce appointed Joanne, Julie and Stuart as his Estate Trustees. Bruce left a bequest of $5,000,000 to Patricia, to be paid within 36 months of his death, and ordered that the residue of the Estate be held for Patricia's benefit.

[13] To date, Patricia has received no money from the Estate or the 2001 Family Trust. Since Bruce's death, Patricia has been repeatedly told by Joanne, Julie, and Stuart (Bruce's original Estate Trustees) that Bruce's Estate lacked the liquid assets to pay Bruce's specific bequest to Patricia. Julie, Joanne, and Stuart have paid Patricia funds from their corporation, 3 Angels, to meet Patricia's needs so that she has not had to touch her own assets in order to live. 3 Angels has paid for Patricia’s support worker, home repairs, and a monthly stipend.

[14] Patricia says that Julie, Joanne and Stuart have benefitted from the sale of several valuable Estate assets including the Grouse Mountain Resort in British Columbia, resulting in each of Joanne, Julie, and Stuart each receiving approximately $60,000,000.

[15] Patricia has never been provided with an accounting or the financial statements for the Estate or the 2001 Family Trust, of which she is a beneficiary.

Procedural Background

[16] Patricia commenced this Application in May 2020, having first completed the procedure under the Chief Justice's *Notice to the Profession* for an urgent motion.

2020 ONSC 5666 (CanLII)

[17] I heard the first appearance in this matter, in writing on 14 May 2020 based on Patricia's letter to the Court asking for an urgent motion. By endorsement dated 20 May 2020, I determined that the following issues raised in the Application were likely urgent (subject to an argument on the merits):

(a) An accounting from the McLaughlin Estate and the 2001 Family Trust);

(b) An order preserving the Estate and 2001 Family Trust property; and

(c) An order for an interim disbursement of $500,000, and a monthly stipend of $25,000 per month to the Applicant, both of which will be credited as advances of any entitlement the Applicant has to funds from the Estate or the 2001 Family Trust.

[18] The hearing of the three urgent issues on an opposed basis was originally scheduled for 31 August, but re-scheduled to 14 September, then 14 October 2020. The balance of the Application must proceed in the normal course.

[19] By Endorsement dated 2 September 2020, I determined that the following additional issues are also urgent, as they had to be decided before the three urgent issues defined on 20 May could be decided:

(a) Whether 214 Ontario and 1355 Alberta should be added as parties to the Application, and if so,

(b) Whether 214 Ontario and 1355 Alberta are to be included in the "preservation order" that was defined as urgent in May.

2020 ONSC 5666 (CanLII)

Analysis and Disposition

<u>Issue 1: Should 2147957 Ontario Inc. and 1355754 Alberta Ltd. be Joined as Respondents to these Proceedings as Necessary Parties?</u>

Facts:

[20] From the Affidavits from Julie and Joanne filed in this Application in early July, Patricia first learned that:

(a) There was an entity known as the Halton Trust,

(b) Halton Trust indirectly holds a 25% interest in undeveloped land in Halton Hills, Ontario, which were received by the Halton Trust as part consideration for the sale of assets previously controlled by Bruce and the 2001 Family Trust,

(c) The 25% interest is actually owned by 214 Ontario which acts as trustee for the Halton Trust,

(d) Julie is the sole officer and director of 214 Ontario,

(e) 214 Ontario is wholly owned by 1355 Alberta, a company owned equally by Stuart, Julie, and Joanne. 1355 Alberta's sole asset is one share of 214 Ontario,

(f) The sole beneficiary of 214 Ontario is 926109 Alberta.

[21] The 2001 Family Trust has as its beneficiaries, Bruce, Patricia, Joanne, Stuart, Julie, and any grandchildren of Bruce and Patricia.

[22] Patricia was already aware that 926109 Alberta is a wholly owned subsidiary of Peel Financial Services Limited (PFSL). The Estate's primary asset

2020 ONSC 5666 (CanLII)

is several classes of shares in PFSL. The 2001 Family Trust owns 100 common shares of PFSL.

[23] Prior to receiving the Respondents' Affidavits in this Application in early July, Patricia did not know about the existence of the Halton Trust. Patricia has never been provided with an accounting from, or the financial statements of the Halton Trust, 214 Ontario or 1355 Alberta.

[24] Patricia learned, only in the course of this litigation, that 214 Ontario has negotiated a Letter of Intent to sell its 25% share in the undeveloped land in Halton Hills for approximately $31.5 million.

[25] The only evidence about 214 Ontario and 1355 Alberta comes from Joanne and Julie who say that 1355 Alberta has no interest in the Estate or the Family Trust. It is merely a holding company whose sole asset is one share of 214 Ontario. 1355 Alberta is owned by July, Joanne and Stuart, equally.

Positions of the Parties:

[26] Patricia says that 214 Ontario and 1355 Alberta are necessary and proper parties to this proceeding and should both be added.

[27] 214 Ontario consents to be added, provided a) it has full rights of any other party (which might necessitate its cross-examining those already cross-examined), and b) that it should not be bound by any 'preservation order' currently in effect.

[28] 1355 Alberta says it is not a necessary party and should not be added.

Result:

[29] The motion is allowed. 214 Ontario is added on consent. 1355 Alberta is a necessary party. Both shall have full rights as a party.

2020 ONSC 5666 (CanLII)

The Law:

[30] Two rules apply here. Rule 26 says that pleadings shall be amended unless there is non-compensable prejudice to the parties resisting the amendment. The court has discretion in order to ensure procedural fairness.

[31] Rule 5.03(4) permits the addition of "necessary parties", defined as those who "… ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceedings…"

[32] In *Amon v. Raphel Tuck & Sons Ltd.* (1955), [1956] Q.B. 357 (Eng), cited with approval in *Stevens v. Canada (Commissioner, Commission of Inquiry)*, 1998 CarswellNat 1049 at para. 20 and *McCutecheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644 (S.C.J.), the court said:

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. **The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.** [emphasis added]

[33] The question is whether on 1355 Alberta is a "necessary party".

2020 ONSC 5666 (CanLII)

Analysis:

[34] 214 Ontario owns a 25% interest in the Halton Hills Development's undeveloped land which it holds in trust for 926109 Alberta Ltd. 926109 Alberta is wholly owned by Peel Financial Services Ltd. whose shares are held between the Estate and the Family Trust. 1355 Alberta is a corporation owned by Julie, Joanne, and Stuart, equally. 1355 Alberta owns the only share in 214 Ontario. Joanne is the sole officer and director of 214 Ontario. 214 Ontario, as the trustee for 926109 Alberta, owes fiduciary duties as trustee to it. 1355 Alberta owes no such duties to anyone involved in the 25% interest in the land.

[35] In argument, Patricia said that there is potential for 'sideways' or 'backdoor' movement of assets from 214 Ontario to 1355 Alberta. This concern is based on a) that Joanne is the sole officer or director of 214 Ontario and is also a director and officer of the 1355 Alberta, and b) that Patricia (and those family members allied with her) do not trust Julie and Joanne.

[36] While I recognize that the level of distrust between the two family camps is very high, that is not sufficient, alone, to make 1355 Alberta a necessary party. There is no evidence, subject to one fact I address next, that there will be, or whether there is a potential to be, a movement of assets from 214 Ontario to 1355 Alberta, such that the assets properly due to the Estate and Family Trust are depleted by Julie and Joanne.

[37] What makes1355 Alberta a necessary party is Julie's evidence at para 186 of her Affidavit[1] where she says:

> It was anticipated that the interest in the 450 acres of land would be put into the Halton Trust, to be controlled and managed by 214 Inc. *and 1355 Ltd.* (emphasis added)

---

[1] Julie Mclaughlin's affidavit in the file is not sworn. Counsel advise that it was served on 3 July 2020. No counsel have a signed and sworn copy, but all counsel treat it as if sworn.

2020 ONSC 5666 (CanLII)

[38] Various family members, in their various capacities with the parties, were at pains to describe 214 Ontario as the trustee of the 25% interest in the undeveloped Halton Hills Project land which and owed fiduciary obligations to the Estate and the Trust. 1135 Alberta should not be a party because it was not an Estate or Trust asset, had no claim to assets held by the Estate or the Trust, and had no duties or obligations to anyone similar to those of 214 Ontario. It is merely a holding company.

[39] That evidence does not alter the fact that Julie said that the 25% interest in the Halton Hills land would be controlled and managed by 214 Ontario and 1355 Alberta. I was directed to no evidence from anyone else that contradicted Julie's evidence in para 186 of her affidavit, and said that it was not correct.

<u>Issue 2: Should the Court Receive the Affidavit of Timothy J.L. Phelan, sworn 10 September 2020?</u>

Facts:

[40] Mr. Phelan's Affidavit addresses solely the issue of Patricia's ability to withstand oral cross-examination, and whether she should be cross-examined by written questions.

[41] In response to requests by Joanne and Julie to conduct an oral cross-examination of Patricia, on 14 July 2020 Patricia swore an affidavit expressing her anxiety regarding being orally cross-examined as it would pose a threat to her health and wellbeing. Patricia cited her long-standing blood pressure problems, age, and need to social distance during the Covid-19 pandemic as reasons for her concerns.

[42] On 22 July 2020, the opinion of Patricia's general practitioner (G.P.) was discussed during a teleconference between all counsel. Patricia's counsel reported to the others that the G.P. thought that Patricia should not be subjected to an oral

2020 ONSC 5666 (CanLII)

cross-examination because of the stress that it would cause. Respondents' Counsel were advised that they could expect an update following Patricia's appointment with her cardiologist, Dr. Kimball, on 19 August 2020.

2020 ONSC 5666 (CanLII)

[43] On the 22 July 2020 teleconference call, counsel also agreed on a schedule for cross-examinations for everyone else. No provision was made for the oral cross-examination of Patricia. No party raised any objection to receiving Dr. Kimball's letter after 19 August 2020. All but the cross-examination of Joanne McLaughlin was scheduled for dates before 19 August 2020.

[44] The issue of how Patricia McLaughlin would be cross-examined was not placed on the list of urgent issues until 2 September 2020, to be heard 14 September 2020 pursuant to my Endorsement of September 2 which also provided that all materials for the 14 September motion were to be filed by 10 September at 4:00 PM. Mr. Phelan's Affidavit was served after 10 September.

[45] It appears that notwithstanding the efforts of Patricia's counsel, the letter from Dr. Kimball was not obtained until September 9, 2020. He said:

> Not only would [cross-examining Patricia in person] create considerable stress in this otherwise frail elderly woman with significant underlying heart disease, her general state of weakness would make proceeding somewhat risky and impair the accuracy of the statements at that time. If I might, one would suggest the introduction into evidence of written responses to questions of concern.

[46] The Affidavit attaching the letters of Dr. Patel and Dr. Kimball was sworn on September 10, 2020, the day after Dr. Kimball's letter was received.

Result:

[47] In this case, I admit Mr. Phelan's Affidavit for the reasons articulated by Corbett J., in *ADT Security Services v. Fluent Home*, 2018 ONSC 3092. This matter is moving rapidly and is highly fluid. What in other actions might take a year or more to transpire, is compressed in this matter into only a few months.

Arguments such as that the applicant ought to have had this affidavit or the information contained in it earlier, is splitting hairs. It appears that counsel acted expeditiously in obtaining and sending medical opinion.

[48] I do not admit the medical opinion either in the form of the letters attached to Mr. Phelan's Affidavit, or in the form of Mr. Phelan's report of what any doctor said to him.

Law:

[49] In *1944949 Ontario Inc. (OMG ON THE PARK) v. 2513000 Ontario Ltd.*, 2019 ONCA 628, at para. 33, the Court of Appeal said that the court must consider the following criteria in determining whether a party should be granted leave to respond to a matter raised on cross-examination:

a. Is the evidence relevant?

b. Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

c. Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

d. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[50] The court's approach should be flexible and contextual, having regard to the overriding principle outlined in Rule 1.04 of the Rules of Civil Procedure that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel (see: *First Capital Realty Inc. v. Centrecorp Management Services Ltd.* (2009), 258 O.A.C. 76 (Div. Ct.), at para. 13 & 14).

2020 ONSC 5666 (CanLII)

Analysis:

[51] I do not admit the reports of the two doctors attached as exhibits to Mr. Phelan's affidavit nor Mr. Phelan’s evidence as to the opinions he received in telephone conversations from the doctors. The Applicant wishes me to receive these opinions for the truth of their contents, namely that Patricia cannot withstand oral cross-examination. I cannot do so, as a matter of evidence.

[52] The Respondents say that I should not accept the opinions as they do not comply with Rule 53.03. I agree with this argument. The Doctors did not provide their undertaking to the court concerning their duty, or the factual basis for their opinions. That is sufficient to deal with the medical reports.

[53] Mr. Phelan's reports of what the doctors told him are also not admissible. Rule 39 governs evidence on applications and motions. Rule 39.01(4) says that an affidavit on a motion may contain information and belief (hearsay) so long as the source of the information and the fact of the belief are specified in the affidavit. Rule 39.01(5) says the same about affidavits filed on applications but adds that the hearsay cannot be on a contentious matter.

[54] In this case, the medical opinion which the Applicant seek to have admitted for the truth of its contents is brought in a motion within an application. Regardless, submitting hearsay regarding medical opinion for the truth of its contents (as opposed to the act that it was made) is inappropriate.

[55] Doctor's notes and reports can be admitted in a summary judgment motion if the doctor files an affidavit, or by the submitting party meeting the notice required by s. 35 and 52 of the *Evidence Act* (see: *Dupont Heating & Air Conditioning Limited v. Bank of Montreal*, 2009 CanLII 2906 (ONSC); *Golding v. Philip* (1996), 48 C.P.C. (3d) 368 (Gen. Div.); *Dutton v. Hospitality Equity Corp.* (1994), 26 C.P.C.

2020 ONSC 5666 (CanLII)

(3d) 209 (Gen. Div.); *Deslauriers v. Bowen* (1994), 36 C.P.C. (3d) 64 (Gen. Div.); *Suwary v. Women's College Hospital*, [2008] O.J. No. 883 (S.C.J.)

[56] This principle is equally applicable to an application.

[57] The Applicant says that the opinion should be admissible because it is what they could get in limited time, and it goes only to procedural (not substantive) relief sought.

[58] I disagree. The opinion is tendered for its truth, not the fact that it was made. It is not admissible for its truth, as indicated above. While the evidence is submitted with respect to procedural relief, it is significant procedural relief: dispensing with a presumed right to cross-examine a witness in person.

[59] Applying a flexible and contextual approach to the four criteria set out by the Court of Appeal in 1944949 Ontario Inc., I admit the affidavit of Mr. Phelan with respect to all other evidence stated in that affidavit except the two medical documents attached, and Mr. Phelan's evidence about opinions expressed by doctors.

[60] The issue to which supplementary affidavit is relevant is Patricia's ability to withstand oral cross-examination. Therefore, the evidence is relevant insofar as the admissible evidence deals with what forewarning the Respondents had with respect to Patricia's position.

[61] The Respondents submit that the new evidence should not be admitted because it fails to meet the 2nd and 4th criteria set out by the Court of Appeal, namely that the evidence does not respond to a matter raised in cross-examination and that Patricia no reasonable or adequate explanation for not getting evidence earlier.

2020 ONSC 5666 (CanLII)

[62] With respect to the timelines of the evidence, because of the procedures imposed following the court shut down during the Covid-19 pandemic, timelines in this matter are very short. It is a fluid and dynamic case. The Respondents knew since mid-July that Patricia wanted to be cross-examined in writing, knew from Patricia's counsel that her G.P. recommended this, and knew that further medical opinion would be available after the 19 August cardiac specialist's appointment.

[63] With respect to the second of the Court of Appeal's criteria, the Court of Appeal was addressing a party's attempt to introduce new evidence on the merits of the dispute, after cross-examination had begun. By applying the second criterion the circumstances in this case, the Respondents apply a mechanistic approach. The issue here is not whether new evidence can be tendered on the merits of the motion after the beginning of cross-examination on the evidence filed in respect of that motion. Rather, the issue is whether the Applicant should be able to introduce "new evidence" with respect to a procedural aspect of her cross-examination that had not begun. Therefore, the second criterion put by the Court of Appeal, in these circumstances, using a flexible and contextual approach, should be rephrased as "Does the proposed evidence pertain to a procedural issue that does not affect the substantive merits of the Motion or Application?".

[64] As indicated, Patricia's ability to withstand oral examination has been an issue since mid-July. So has the issue of obtaining medical evidence. The situation is fluid and rapidly changing. The Affidavit is admitted, subject to the limitations stated.

Issue 3: Should Patricia be Cross-Examined Orally or in Writing, and if the Former, What Accommodations Should be Made for Her?

Facts:

[65] There is no dispute among the parties about Patricia's health. Except for the individual respondents Stephen Rockett in his capacity as Trustee of the S.

2020 ONSC 5666 (CanLII)

Bruce McLaughlin 2001 Family Trust, and Peter Paauw in his capacity as Trustee of the S. Bruce McLaughlin 2001 Family Trust, the other individual respondents are three of Patricia's four children. All of the corporate or institutional respondents are corporations which Patricia's children control directly or indirectly.

2020 ONSC 5666 (CanLII)

[66] Patricia is 93 years old. She suffers from edema in her legs, atrial fibrillation, and as of April is recovering from a Staphylococcus infection. She recently had a health scare when she was tested for Covid-19. She suffers from chronic high blood pressure. She continues to live in the home that she and her husband owned, with assistance from her long-time caregiver. Patricia also relies on private nursing services who visit her at her home twice daily to take vital signs and report to her physician.

[67] Patricia has been under the care of a cardiologist since 1995.

Position of the Parties:

[68] Patricia says that an oral cross-examination would put an enormous amount of stress on her, which can aggravate her atrial fibrillation and blood pressure problems with potentially deadly consequences. Furthermore, her edema makes getting and staying comfortable for extended periods of time extremely difficult. Her age, recent infections, and other health issues limit Patricia's energy and her ability to focus. Finally, her need for regular health monitoring would require interruption of cross-examination. Patricia, however, is willing to submit to cross-examination via written interrogatories.

[69] Patricia has made her position clear to the respondents. Today, however, they have received no written interrogatories nor have been advised why written interrogatories are insufficient.

[70] The Respondents argue that Patricia's medical conditions are long-standing and are well controlled. She has chosen to commence highly contentious

litigation against family members that has only exacerbated deteriorated relationships between the family members. It is not appropriate for her to avoid being cross-examined orally. The Respondents are concerned that written interrogatories will be answered by Laurel and counsel through carefully crafted responses. Written interrogatories will deprive them of the spontaneity of oral cross-examination as well as the ability to follow-up, immediately, with other relevant questions.

Result:

[71] Patricia will be examined, orally with the following terms and conditions applying:

(a) her examination will be held, remotely, with Patricia participating from her home or other place she feels comfortable;

(b) Patricia will be under oath or solemn affirmation;

(c) she may have present with her a support person and/or medical person;

(d) she may have present with her a legal representative to assist her with documents;

(e) any person present with Patricia shall observe Covid-19 protocols, such as appropriate social distancing, wearing a mask, and frequent hand washing or sanitization;

(f) the cross-examination will be limited to four hours for all parties, held over two days. Each day shall comprise one hour of cross-examination followed by a 30 minute rest break, followed by another hour of cross-examination.

2020 ONSC 5666 (CanLII)

The Law:

[72] In *Ozerdinc Family Trust v. Gowling Lafleur Henderson LLP*, 2015 ONSC 2366, MacLeod J. held, albeit in the case of an examination for discovery, as follows:

(a) There is a presumption that each party to an application will be cross-examined on his or her affidavit served by an adverse party (paragraph 23);

(b) Oral examinations are not an absolute right. The court has the jurisdiction to curtail or modify the discovery rights of the parties or to give direction as to how those rights are to be exercised to ensure procedural fairness (paragraph 22. See also *Kidd v. Lake*, (1998) 1998 CanLII 14714 (ON SC), 42 O.R. (3d) 312 (Gen. Div.) at para. 17);

(c) The court requires compelling evidence to restrict the right to orally examine another party (paragraph 23);

(d) In order to displace the presumption of entitlement to oral examinations, in the absence of discovery abuse, the onus was on the party resisting oral examination to establish by persuasive medical evidence the party was unable to attend for discovery. That the party is upset or the process special is not sufficient (at paragraph 23 to 25. See also: *Ferrara v. Roman Catholic Episcopal Corp. for the Diocese of Toronto in Canada*, [1996] O.J. No. 2164; 1996 CarswellOnt 2056; (1996) 2 C.P.C. (4th) 64 (Gen. Div.);

(e) The evidence must persuade the Court that the stress of an examination under oath would create a real likelihood of a serious harm sufficient to deny the examining party the presumption of an oral

2020 ONSC 5666 (CanLII)

examination (paragraph 28. See also *Kong Wah Holdings Ltd. (Liquidator of) v. Yong*, [2006] O.J. No. 3714, para. 33, and *Mohanadh v. Thillainathan* (2010) 2010 CarswellOnt 2851 (Master Muir, at para 6; and *Melki v. Reid*, 2018 ONSC 1646, para. 24 & 25);

(f) The party seeking to avoid an oral examination in favour of interrogatories has a high onus to meet. Oral examinations are preferable. The party must answer spontaneously and honestly. The witness does not have time to craft an answer that although not dishonest, is not entirely forthright. The witness must answer the question without seeing the examiner's entire strategy. Only the witness answers the question. Examinations in writing lose the spontaneity of the oral examination, and allow others to draft the answers, giving them a spin or carefully filtering them. (see: *Botiuk v. Cambell*, 2011 ONSC 1632 at paras. 44-48)

[73] While the above principles arise mainly in the confines of an examination for discovery in an action, they have been extended to apply to cross-examinations on applications (see: *Marc Andrew Arnold v. John James Arnold et al.*, 2019 ONSC 6097 at paras. 17-20).

Analysis:

[74] Given my ruling on Issue1, there is no compelling evidence that Patricia has real likelihood of suffering serious harm such that I should deny the Respondents their presumed right of oral examination. Patricia's Affidavits set out her physical conditions. They indicate Patricia's clear preference to answer questions in writing. That evidence does not indicate a real likelihood of serious harm being caused by being examined orally.

2020 ONSC 5666 (CanLII)

[75] Patricia's counsel says that I can take judicial notice of the frailties and risks that a 93 year old woman of Patricia's health suffers or is exposed to.

[76] This submission was made without authority. Even if I could take judicial notice of the risks 93 year old women of Patricia's general health may be subject to and the stresses that they face while being cross-examined, what risks and stress 93 year old women like Patricia may face, is not the question. Patricia must establish what risk of serious harm SHE is exposed to.

[77] My determination of this issue would not be different had I admitted the medical opinions.

[78] In his email of 22 July 2020 to all counsel at 11:18:200 pm, Mr. Figiomeni reports to the respondents' counsel that Dr. Patel, Patricia's G.P. said that Patricia:

> "…is not fit to be cross examined virtually or in person as it would likely cause worsening lower limb edema and put her at risk of another blood infection. In addition, the stress could cause worsening of her blood pressure and heart condition. It would be safer for her to answer questions put to her in writing so that she could have some flexibility in managing the stress."

[79] In his letter of opinion of 21 July, Dr. Patel reports that Patricia suffered a blood infection as a result of a skin infection caused by leg swelling. Her leg swelling is made worse when her legs are down or she is stressed. As of July, she was still weak and continued to recover from that weakness caused by her infection. He says that she also continues to have lower limb edema and takes medication for this. He says that cross-examination in person or virtually would likely cause worsening of lower limb edema and put her at risk of another blood infection. Dr. Patel indicates that Patricia's blood pressure, temperature and swelling were controlled in part by daily nursing care.

[80] Dr. Patel's opinion is of limited assistance. The G.P.'s opinion is current only to 21 July. He comments on her weakness from her original illness in April. It

2020 ONSC 5666 (CanLII)

does not opine on Patricia’s state of health in September 2020. He does not state his assumptions with respect to the timing or duration of cross-examination, although he appears to have made some assumptions. He does not address accommodations that might eliminate or reduce the risk.

[81] Her cardiologist, Dr. Kimball, says:

> It's my understanding [Patricia has] been asked to provide a verbal deposition regarding an estate matter of her late, deceased husband Mr. Bruce McLaughlin. Not only would this create considerable stress in this otherwise frail elderly woman with significant underlying heart disease, her general state of weakness would make proceeding somewhat risky and impair the accuracy of the statements at that time. If I might, one would suggest the introduction into evidence of written responses to questions of concern.

[82] His evidence is tentative and hesitant.

[83] Neither opinion, if admitted, creates a real likelihood of serious harm sufficient to deny the examining party the presumption of an oral examination. Neither doctor considers what effect accommodations may have on an oral examination.

[84] In order to accommodate Patricia's medical or health conditions, I impose the following conditions:

(a) her examination will be held, remotely, with Patricia participating from her home or other place she feels comfortable;

(b) Patricia will be under oath or solemn affirmation;

(c) she may have present with her a support person and/or medical person;

(d) she may have present with her counsel or another legal representative to assist her with documents;

2020 ONSC 5666 (CanLII)

(e) any person present with Patricia shall observe Covid-19 protocols, such as appropriate social distancing, wearing a mask, and frequent hand washing or sanitization;

(f) the cross-examination will be limited to four hours for all parties, over two days. Each day shall comprise a one hour cross-examination followed by a 30 minute rest break, followed by another hour cross-examination.

2020 ONSC 5666 (CanLII)

Issue 4: Undertakings and Refusals and should the scope of cross-examinations.

[85] This issue arose from a fundamental disagreement on the scope of cross-examination during the applicant's cross-examination of Julie McLaughlin, when Julie's counsel refused to answer 17 questions.

[86] Counsel for Patricia took the position that he could ask any question on cross-examination that is relevant, fair, and asked in good faith even if the question was outside of the four corners of the affidavit. Given the fact-finding role of cross-examination on an Affidavit for an interlocutory a motion, the examiner should be given greater leeway (see: *Seaway Trust Co v. Markle*, [1988] OJ No. 164 (HCJ) and *Volk v. Volk*, 2020 ONCA 256).

[87] Counsel for Julie and Joanne take the position that the scope of cross-examination on an affidavit is limited by the nature of the relief sought on that motion (see: *Volk*, para 10). It in the circumstances of this motion, the nature of the relief sought is limited to the three issues which were defined by my Endorsement of 20 May as possibly urgent.

Result:

[88] Cross-examination of all parties is limited to the three issues defined as urgent by my Endorsement of 20 May. This is without prejudice to the parties to

cross-examine on other aspects of the Affidavits at another time as they pertain to other issues in the Application.

The Law:

[89] The most recent and highest authority on the issue of the scope of cross-examination is *Volk v. Volk*, 2020 ONCA 256. In that case, the Applicant alleged that two of the respondents abused their Power of Attorney for the grantor by dispersing property of the grantor improperly. The Applicant sought to freeze assets and transfer other assets to his name in trust for the grantor. The order was on consent. The two Respondents who transferred the property originally, and the PGT did not appear or file opposing material. The two non-appearing Respondents appealed the order and brought a motion to stay the order appealed from as it related to the sale of the grantor's home.

[90] One of the two non-appearing respondents was cross-examined on her affidavit filed in respect of the motion to stay the underlying order. She refused to answer several questions. Those refusals spurred a motion to attack them.

[91] Paciocco J.A., said in paragraph 10:

> [10] As Borins J. noted in *Moyle v. Palmerston Police Services Board*, 1995 CanLII 10659 (ON SC), [1995] O.J. No. 627 (Div. Ct.), at para. 11, "the nature of the relief sought on an interlocutory motion often plays a significant role in determining the proper scope of cross-examination". This is because the cross-examination is meant to serve the fact-finding needs that the motion requires. Accordingly, as Borins J. affirmed, quoting Gale J. from *Thomson v. Thomson*, [1948] O.W.N 137 (H.C.) at 138, a person cross-examining on an affidavit is not confined to the four corners of the affidavit but may cross-examine on matters that are relevant to the issue in respect of which the affidavit was filed. Therefore, although the cross-examiner is not free to cross-examine on all matters that touch upon the underlying action, if the cross-examiner has a bona fide intention to direct questions to the issues relevant to the resolution of the motion and those questions are fair, the question should be answered, not refused. This includes questions relevant to credibility determinations that are within the competence of the motion judge, which would include questions intended to expose "errors, omissions, inconsistencies, exaggerations or improbabilities of the deponent's testimony contained in his or her affidavit": *Moyle*, at para. 14.

2020 ONSC 5666 (CanLII)

[92] The learned appeal judge then turned from the general to the specific, and said :

> [11] The motion in this case is for the stay of an order to preserve the disputed asset. A motion for a stay pending appeal engages the same general legal standards from *RJR-MacDonald Inc. v. Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, which are employed in granting interlocutory injunctions, namely, consideration of whether the appeal raises a serious issue, whether the applicant will suffer irreparable harm if the stay is not granted, and the balance of convenience: see *Buccilli v. Pillitteri*, [2013] O.J. No. 6110 (C.A.), at para. 34 (Gillese J.A., in Chambers). In *Moyle,* Borins J. noted that because of the nature of the discretionary remedy to grant in interlocutory injunction, the scope of cross-examination for such motions is apt to be broader than in respect of many motions for other remedies: at para. 18. The same is necessarily true of motions for a stay pending appeal.

Analysis:

[93] The central issue of this aspect of the dispute between the parties is what is "the nature of the relief sought on an interlocutory motion"? Is the central issue in dispute the issues raised in the application as a whole (as the applicant's submit) or is the central issue in dispute limited to the three issues defined on 20 May defined as urgent (as Julie and Joanne submit)? If it is the latter, are the parties still free to cross-examine at another time on all other issues than the three that are defined as urgent (as Patricia submits)?

[94] The central issues that define the scope of cross-examination on this motion are the three issues that I defined as urgent in my Endorsement of 20 May.

[95] In March 2020, the Superior Court of Justice ceased its normal operations in response to the Covid-19 pandemic. The Superior Court remained open, however, for urgent matters as defined by the Chief Justice's *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media Re: Expanded Operations of Ontario Superior Court of Justice, effective May 19,* found at

2020 ONSC 5666 (CanLII)

https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/.

[96] The Notice to the Profession indicates, generally, that during the pandemic, regular in court operations were suspended. The court called upon all users of the court system and all members of the courts to do business in a different way so that essential emergency services could continue. Lawyers and parties were exhorted to take a more active role in moving cases forward to final settlement or disposition.

[97] The *Notice to the Profession* and that case law since 16 March have delivered three clear messages to the Profession:

- Be frugal in the relief sought. Ask for only what is necessary, for now.
- Be lean in the material filed. File only that which is necessary for the court to review when considering the frugal relief sought.
- Be surgical with submissions to the court.

[98] In keeping with this message, it is only reasonable that, in applying the test in *Volk*, in the circumstances of this case cross-examination should be limited to the three issues that I decided on 20 May were urgent.

[99] I also define the scope of examinations in this matter narrowly as an issue of allocation of scarce resources.

[100] As I have advised counsel at two case conferences, I am concerned about the public resources that the parties wish to have devoted to their dispute.

[101] In my 20 May Endorsement, I defined the three issues which may be urgent, set a date for the hearing of those three issues, and addressed a timetable. I advised the parties that I would informally case manage the file procedurally, to make sure the hearing date was maintained. I advised the parties that I could not

2020 ONSC 5666 (CanLII)

case manage the file formally. In order to obtain a case management judge, they had to write to RSJ Ricchetti.

[102] Since 20 May, these parties appear to think that they have the right to call my assistant and convene case conferences in this matter, at their hearts desire.

[103] This is not the case.

[104] I agreed to case manage only the procedural aspects of the motion on the three urgent issues in order to get it to a hearing on the merits. Notwithstanding all of this, including the attendance for this interlocutory Motion within this Application we have had not fewer than nine case conferences and appearances, including the full day it took to argue this motion.

[105] While the parties' pockets appear to be bottomless, the public's is not. It is only appropriate to limit the scope of cross-examination (without prejudice to full cross-examination on the remaining issues at another time) to protect the use of the public's resources.

[106] But for the issue of this proceeding's draw on scare public resources, I would have ordered that Julie's and Joanne's cross examination was not so limited, based on their own evidence.

[107] In paragraph 6 of her Affidavit, Julie said:

> The within affidavit is therefore addressing the matters listed in the May 20 Endorsement as being urgent, and which are intended to be addressed at the hearing on August 31, 2020. Should any additional issues be addressed at the August 31, 2020 hearing, my sister, Joanne McLaughlin, and I reserve our right to file additional affidavit material. We also reserve our right to file additional affidavit material in relation to the balance of the issues raised in my mother's Application, at such time as is relevant.

[108] She said in paragraph 217:

2020 ONSC 5666 (CanLII)

> Both the contents of this affidavit, and Joanne's Affidavit, are relevant to the urgent issues as identified in the May 20 Endorsement, and will be available for this Honourable Court's consideration at the hearing on August 31, 2020.

2020 ONSC 5666 (CanLII)

[109] In other words, Julie said that everything in Joanne's and her Affidavits is relevant to the urgent issues that I defined. Joanne did not take issue with this statement.

[110] In argument, Julie's counsel took the position that certain of the information in Julie's Affidavit is background, not central to the issues defining the scope of cross examination, and therefore cannot be cross-examined on.

[111] I do not accept this submission. It does not lie in the mouth of counsel to disagree with the position taken by his clients that everything she avers to in their Affidavit(s) is relevant to the three issues. Even if I did accept counsel's submission, I would only have exempted paragraphs 7 to 14 of Julie’s affidavit as begin background because that is all Julie labeled as such in her Affidavit.

[112] The use of limited public resources, the rate that those resources are being consumed by this litigation, and the principle of proportionality, require that I limit cross examination as stated. Given these limitations, refusals 1 to 7, and 9 to 17 as listed in Schedule C to Julie’s and Joanne’s Motion Material do not have to be answered as they pertain to issues in the Application that are not at issue in the motion on urgent matters. The Applicant has abandoned refusal 8. This ruling regarding the refusals is without prejudice to all parties' right to cross-examine on all issues in the Application at the appropriate time.

Costs:

[113] I will address the matter of costs in writing. Submissions are limited to 3 double-spaced typed pages, excluding offers to settle and bills of costs. The

Applicant's (and those allied with her) must be served and filed by 4 pm, 9 October 2020 and the Respondents' shall be served and filed by 4 pm 23 October 2020.

____

Trimble J.

Date: September 21, 2020

2020 ONSC 5666 (CanLII)

CITATION: McLaughlin v. McLaughlin, 2020 ONSC 5666
COURT FILE NO.: CV-20-1847
DATE: 2020 09 21

2020 ONSC 5666 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PATRICIA ELAINE MCLAUGHLIN,

Applicant

– and –

JOANNE LENORE MCLAUGHLIN et al,

Respondents

ENDORSEMENT

Trimble J.

Released: September 21, 2020

OPSDT TDMCO
Ontario Physicians and Surgeons Discipline Tribunal
Tribunal de discipline des médecins et chirurgiens de l'Ontario

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Aboujamra,* 2022 ONPSDT 14
Date: April 21, 2022
Tribunal File No.: 21-001

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Jamal Aboujamra

MOTION REASONS

Heard: April 19, 2022, by videoconference

Panel:

Mr. David A. Wright (Tribunal Chair)

Appearances:

Ms. Carolyn Silver and Ms. Andrea Dias, for the College
Mr. Robin McKechney, Mr. Akshay Aurora and Mr. Marc Flisfeder, for Dr. Aboujamra

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the name of the witness to whom the allegations of misconduct of a sexual nature relate or publish any information that could disclose the identity of that witness, as referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

The Ontario Physicians and Surgeons Discipline Tribunal is the Discipline Committee established under the Health Professions Procedural Code.

2022 ONPSDT 14 (CanLII)

Introduction

[1] These reasons address the admissibility of expert evidence Dr. Aboujamra wishes to introduce at the upcoming hearing into allegations that he sexually abused a patient. In April 2014, four months after the patient arrived in Canada and before the alleged events, a psychotherapist assessed her and prepared a report in support of her application for refugee status. During their meeting, the patient reported “blanking out” following a traumatic event that occurred in her country of origin. The psychotherapist expressed her “clinical impression” that the patient showed symptoms consistent with posttraumatic stress disorder (PTSD) featuring dissociative episodes.

[2] The proposed expert evidence from Dr. Graham Glancy suggests that people who experienced dissociative episodes in the past are more likely to experience them in the future, and that dissociation can affect perception and memory. Dr. Aboujamra will ask the panel to draw the inference that, as a result what she told the psychotherapist about her reaction to the traumatic event, the patient’s memories of what happened several years later during her interactions with him are less reliable.

[3] The prejudicial effect of the proposed evidence outweighs its probative value and I find it is not admissible. Its benefits are small both because the opinion establishes a relatively weak link between the patient’s purported medical conditions and the reliability of the patient’s evidence and because the evidence that she had those conditions is tenuous. Its benefits are outweighed by its risks, including distraction from the main issues, a risk of over relying on the expert and the consumption of hearing time.

Background

[4] The patient alleges that during appointments between 2015 and 2018, Dr. Aboujamra made sexualized comments about her, touched her in a sexual manner and rubbed his body against her. Dr. Aboujamra says that his interactions with the patient did not occur as she describes, and that he always acted professionally, appropriately and for the purpose of medical treatment. Since Dr. Aboujamra and the patient were the only people in the room during the interactions, the panel’s decision will be based principally on the credibility and reliability of their evidence.

2022 ONPSDT 14 (CanLII)

2022 ONPSDT 14 (CanLII)

The psychotherapist's letter

[5] The registered psychotherapist, Jena Ledson, is a graduate of the Centre for Training in Psychotherapy. In her April 2015 letter, she explained that she had conducted an "assessment" of the patient through a 60-to-90-minute meeting. She claimed:

> My clinical impression is based on my training, my clinical experience, and my ability to evaluate and assess the causation, symptoms and effects of trauma, anxiety, depression, and other symptomology as outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed., DSM-V) and the Psychodynamic Diagnostic Manual (PDM).
>
> As my report will show, I believe that [the patient] exhibits symptoms consistent with posttraumatic stress disorder, featuring dissociative episodes. Current symptomatology is understood as the psychological and physiological effects of the traumatic events that preceded her arrival in Canada, the threat that awaits her should she return, and the acute stress associated with the uncertainty of her future.

[6] Without delegation, registered psychotherapists cannot perform the controlled act of communicating a diagnosis in circumstances in which it is reasonably foreseeable that an individual will rely on the diagnosis. The controlled act they can perform is to treat mental health disorders through psychotherapy technique, delivered through a therapeutic relationship: *Regulated Health Professions Act*, SO 1991, c. 18, s. 27; *Psychotherapy Act*, *2007*, SO 2007, c. 10.

[7] Ms. Ledson states that the patient told her that she experienced "blanking out" that first occurred after the traumatic event in her country of origin. The patient, she says, told her that these experiences frightened her and caused her self-doubt. The psychotherapist's report commented on other symptoms the patient experienced and concluded by recommending accommodations for the patient at the refugee hearing and suggesting that her mental health would not improve unless she obtained refugee status.

Dr. Glancy's opinion

[8] The proposed expert is Dr. Graham Glancy, a forensic psychiatrist whose many qualifications include academic appointments at two faculties of medicine,

authorship of numerous academic publications, membership on the Ontario Review Board and a part-time staff position at the Centre for Addiction and Mental Health. His 2021 report is, quite properly, not an evaluation of the patient whom he has not met, but an explanation of the literature on the links between PTSD and dissociative episodes and perception and memory. He says:

- “There appears to be a relationship” between people who experience dissociation at the time of a trauma and being prone to dissociative states later.
- Those with dissociative symptoms may have alteration in perception and memory retrieval and may perceive or recall “objectively benign events as threatening or dangerous.”
- There is a body of opinion in the literature that PTSD with dissociative symptoms may affect perception “at the material time” and the retrieval of such memories.
- “These disorders tend to last for considerable periods in many cases.”

Analysis

[9] Opinion evidence is usually not admissible; witnesses testify about what happened, not the inferences they draw about the events. Expert evidence, where the witness gives an opinion based on their specialized knowledge, is an exception.
For expert evidence to be admissible, the party that wants to call that evidence must show that it is relevant, necessary, that it is not inadmissible because of another rule of evidence and that it comes from a properly qualified expert: *R. v. Mohan*, 1994 CanLII 80 (SCC). If these criteria are met, the Tribunal then conducts a cost-benefit analysis to decide whether the probative value of the evidence outweighs its prejudicial effect: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 16-25.

[10] The admissibility analysis is significant; the Tribunal must exercise a “gatekeeper” role, as there are significant risks of expert evidence. These include that it may be given more weight than it deserves because of the expert’s qualifications, that the expert may rely on material that is not proven and not subject to cross-examination, that it may distract from the main issues in the hearing or unduly complicate and

2022 ONPSDT 14 (CanLII)

lengthen the hearing: *White Burgess* at para. 18; *R. v. Abbey*, 2009 ONCA 624 at paras. 90-91. The Tribunal must carefully weigh the value of the evidence against these drawbacks.

[11] The proposed evidence from Dr. Glancy meets the four *Mohan* criteria. The evidence is relevant. It addresses a central issue in the case, the reliability of the patient's evidence. If the panel accepts that the patient experienced dissociative episodes before she came to Canada, Dr. Glancy's opinion suggests that this makes them more likely to recur. If they recurred, they may have affected perception and memory. This could affect the reliability of her evidence. Necessity, in this context, refers to whether the expert is providing knowledge that is outside the experience of the trier of fact. The effects of previous PTSD with dissociative episodes on the likelihood of future episodes and on perception and memory are things panel members would not know without the help of someone with expertise. There is no rule of evidence prohibiting testimony about the nature of these illnesses and Dr. Glancy is highly qualified to give such evidence.

[12] However, the evidence is of low probative value for two main reasons. First, assuming the patient had PTSD with dissociative episodes due to trauma in her country of origin, Dr. Glancy's analysis provides only a tenuous link to a possible impact on the reliability of her testimony about her interactions with Dr. Aboujamra in the following years. There is no evidence the patient had dissociative symptoms at the time of her appointments with Dr. Aboujamra, or indeed at any time after she arrived in Canada. Therefore, at best Dr. Glancy's evidence shows "a relationship" between past and possible subsequent episodes, that the condition can last for some time and that perception and memory may be affected by an episode.

[13] What is more, the evidence that the patient had PTSD with dissociative symptoms in her country of origin is extremely weak. As a registered psychotherapist, Ms. Ledson's professional qualifications are in treating conditions through therapy, not performing assessments or communicating a diagnosis. The most that could reasonably be taken from her report is that in 2015, the patient reported previous episodes of having "blanked out." It is not this Tribunal's role to determine whether the content of Ms. Ledson's "assessment' involves controlled acts outside her scope of practice as a psychotherapist, and the defence does not seek to qualify her as an expert. Therefore, her 2015 suggestion that the "blankouts" were

2022 ONPSDT 14 (CanLII)

dissociative episodes or related to PTSD is not admissible. Even if the defence attempted to do so and overcame the hurdle of the fourth *Mohan* criterion in relation to Ms. Ledson, her opinion, based on a short meeting, that the patient's symptoms reflected a specific psychiatric diagnosis set out in the DSM-V could only reasonably be given the most limited weight.

2022 ONPSDT 14 (CanLII)

[14] The risks of overemphasis on the expert evidence in the analysis on the ultimate issue of reliability, detouring the hearing into the multiple issues about the links between the description of her previous symptoms and her perceptions of the events in Dr. Aboujamra's office significantly outweigh the minimal gains of admitting this evidence.

[15] Counsel for Dr. Aboujamra argues that issues of weight should be for the panel to determine at the end of the day, and that the weaknesses in the evidence should not be confused with admissibility. In deciding probative value, though, what the evidence would contribute to the search for truth is part of the analysis. The discretion to exclude evidence based on the probative value/prejudicial effect balancing requires consideration of these issues at the admissibility stage. The Tribunal must take seriously its role as gatekeeper, and that means that the balancing of probative value and prejudicial effect is a meaningful and careful step in the analysis. Inappropriate evidence should be excluded, rather than just left to a determination of weight.

Conclusion

[16] The proposed expert evidence of Dr. Graham Glancy is not admissible.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. El-Azrak, 2023 ONCA 440
DATE: 20230620
DOCKET: C67472

2023 ONCA 440 (CanLII)

Fairburn A.C.J.O., Harvison Young and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Shereen El-Azrak

Appellant

James Lockyer and Riaz Sayani, for the appellant

Geoffrey Roy and Marina Elias, for the respondent

Heard: December 22, 2022

On appeal from the ruling on a pre-trial *Charter* application by Justice Chris de Sa of the Superior Court of Justice, dated July 19, 2018, with reasons reported at 2018 ONSC 4450, the convictions entered on September 25, 2018, with reasons reported at 2018 ONSC 5613, and the sentence imposed on October 10, 2019, with reasons reported at 2019 ONSC 5845.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] The appellant was convicted of trafficking in fentanyl and possession of fentanyl for the purpose of trafficking. She used her position as a pharmacist to dispense fentanyl patches that were later trafficked on the streets of Sudbury. She received a 13-year sentence. She appeals from both conviction and sentence.

[2] The central question for resolution at this judge-alone trial was whether the appellant was a knowing participant in the trafficking scheme or whether there was a reasonable doubt as to whether she was the unwitting dupe of others. That question was informed by highly incriminating text messages taken from her two cell phones, both of which were seized during the execution of a search warrant at her home.

[3] This search warrant was the focus of a s. 8 and s. 24(2) *Canadian Charter of Rights and Freedoms* application at trial. The appellant argued that her s. 8 rights were breached: (a) when the police warrantlessly obtained private information about the appellant from the Ontario College of Pharmacists (the "OCP") and then used that information to build their grounds for the search warrant that resulted in the seizure of the phones; and (b) when the search warrant issued on insufficient grounds. The s. 8 application was dismissed.

[4] The conviction appeal rests entirely on alleged errors in that s. 8 ruling.

2023 ONCA 440 (CanLII)

[5] If the conviction appeal fails, the appellant asks this court to vary the 13-year sentence imposed and to substitute one that better meets her unique situation, which is very much informed by extraordinary collateral circumstances.

[6] For the reasons that follow, I would dismiss the conviction appeal, but would grant leave to appeal sentence and allow the sentence appeal.

B. CONVICTION APPEAL

(1) Background Facts

[7] The appellant owned a pharmacy in Toronto. The OCP launched an investigation into that pharmacy, one focussed upon the inventory and management of narcotics. On December 2, 2015, OCP investigator Andrew Hui attended at the pharmacy, made inquiries, conducted audits and printed a report showing the amounts of fentanyl dispensed by the pharmacy from October 1, 2015 to November 27, 2015. This report was referred to at trial as the "Drug Usage Report".

[8] It turns out that, as the OCP investigation was ongoing, there was a parallel police investigation into fentanyl trafficking that also led to the appellant's pharmacy. The Greater Sudbury Police Service were investigating a local fentanyl trafficker by the name of Sean Holmes. The police discovered that Mr. Holmes was receiving his fentanyl from Liridon Imerovik in York Region.

2023 ONCA 440 (CanLII)

[9] The question became: who was supplying the fentanyl patches to Mr. Imerovik? The York Regional Police (the "YRP") began investigating the matter and soon suspected that the appellant was Mr. Imerovik's supplier.

2023 ONCA 440 (CanLII)

[10] On December 7, 2015, Det. Nick Ibbott of the YRP reached out to the OCP to inquire about the appellant's pharmacy. He and Mr. Hui met the next day, at which time Mr. Hui shared a few pieces of information, including the names of employees of the pharmacy, and the fact that the OCP investigation was related to the management of narcotics. Mr. Hui had also been told by the appellant that she had a previous delivery driver named "Donny" who, at that time, occasionally helped deliver flyers. Police knew the name "Donny" was associated with Mr. Imerovik. Mr. Hui told Det. Ibbott that if he wanted any more information, he would have to make the request in writing by filling out a form and sending it to the OCP.

[11] Later that day, Mr. Hui sent a blank copy of the form to Det. Ibbott, along with a copy of s. 36 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "*RHPA*"), setting out the circumstances under which the OCP could release information to law enforcement. Later in these reasons, more will be said about s. 36 of the *RHPA*.

[12] Det. Ibbott returned the form to Mr. Hui, asking for more information than what had already been provided earlier that day. Specifically, Det. Ibbott asked for more personal information pertaining to the appellant. The OCP then provided the

appellant's home address, telephone number, email address, date of birth and OCP number to the officer in writing.

[13] Over a month later, during a conversation with Mr. Hui, Det. Ibbott was also provided with the names of two drug suppliers. Det. Ibbott also submitted another form, requesting a "Drug Usage Report" from October 1, 2015 to November 27, 2015, "generated from [the appellant's pharmacy] in December of 2015." This would have been the report that Mr. Hui generated when he was at the pharmacy on December 2, 2015.

[14] On January 14, 2016, Mr. Hui provided Det. Ibbott with the heavily redacted Drug Usage Report, with all third-party information removed. Here is an excerpt from the report that provides a sense of what the officer received from the OCP:

2023 ONCA 440 (CanLII)

WESTON PHARMACHOICE
2013A LAWRENCE AVE. WEST UNIT05, TORONTO, ONTARIO M9N-0A3, CANADA
Tel: (416) 235-1500 Fax: (416) 235-1502

Drug Usage - Details

Date Range: Sep 22, 2015 - Dec 02, 2015

Rx Date	Rx #	Patient Name	Doctor Name	DIN	Drug Name	Strength	Form	Mfr.	Pack	Qty	Mix. #
Sep 22, 2015											
Sep 22, 2015											
Sep 22, 2015											
Sep 23, 2015											
Sep 24, 2015											
Sep 25, 2015											
Sep 25, 2015											
Sep 25, 2015											
Sep 25, 2015											
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Sep 25, 2015											
Sep 27, 2015											
Sep 28, 2015											
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Sep 29, 2015											
Sep 29, 2015											
Sep 29, 2015											
Sep 30, 2015											
Sep 30, 2015											
Sep 30, 2015											
Sep 30, 2015											
Sep 30, 2015											
Sep 30, 2015											
Oct 01, 2015	N004819			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 02, 2015	N004684			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 02, 2015	N004685			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 02, 2015	N004816			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 02, 2015	N004688			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 02, 2015	N004689			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	10.00	0
Oct 02, 2015	N004690			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	5.00	0
Oct 03, 2015	N004744			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 03, 2015	N004770			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 03, 2015	N004746			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 05, 2015	N004706			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	10.00	0
Oct 05, 2015	N004745			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 05, 2015	N004747			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 05, 2015	N004748			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	30.00	0
Oct 05, 2015	N004708			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	60.00	0
Oct 06, 2015	N004712			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	40.00	0
Oct 07, 2015	N004722			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	7.00	0
Oct 08, 2015	N004735			02282984	TEVA-FENTANYL TRANS	100MCG/HR	PATCH	TEV	5	42.00	0

Dec 02, 2015 (13:37) C872 Page 1

[15] While Det. Ibbott later inquired as to whether he could obtain an unredacted copy of the Drug Usage Report, Mr. Hui responded that the "confidentiality legislation does not permit disclosure of any information with respect to a person other than a member (i.e. the pharmacist)." The officer was told that if he wished to obtain more information, he would need a production order.

[16] Det. Ibbott compared the content of the Drug Usage Report with phone data, specifically data that had been provided to the police by Mr. Imerovik's phone provider pursuant to judicial authorization. By conducting this comparison, Det. Ibbott was able to identify what he thought was a pattern that suggested that Mr.

2023 ONCA 440 (CanLII)

Imerovik was using his phone in the general vicinity of the appellant's pharmacy on dates when fentanyl patches were being distributed in large numbers.

[17] By the time that the appellant was arrested on January 20, 2016, there was an abundance of information connecting Mr. Imerovik with the appellant, and Mr. Imerovik with Mr. Holmes, including:

- Phone records showing the appellant and Mr. Imerovik in communication over 1300 times in less than a 4-month period.
- Phone data showing Mr. Imerovik communicating with Mr. Holmes while Mr. Imerovik was in the vicinity of the appellant's pharmacy.
- Surveillance that showed Mr. Imerovik attending at the appellant's apartment building and meeting with her brother. Mr. Imerovik had a bag in his hands with contents shaped like a stack of currency bills.
- Surveillance that placed Mr. Imerovik and Mr. Holmes together on or just after dates when Mr. Imerovik had been at the appellant's pharmacy.
- Surveillance that showed a meeting between Mr. Imerovik and Mr. Holmes at a hotel, with Mr. Imerovik emerging from the meeting with a flowered gift bag in his hand.
- At his arrest, Mr. Imerovik was found to be in possession of the same flowered gift bag which contained $31,905 in cash. Also in his possession were empty fentanyl boxes bearing prescription labels from the appellant's pharmacy, one of which bore the name of the appellant's brother.

2023 ONCA 440 (CanLII)

[18] Following the arrest of Mr. Holmes and Mr. Imerovik, the police obtained and executed a search warrant at the appellant's home. The appellant's two cell phones, the ones containing the incriminating text messages, were seized pursuant to that warrant.

2023 ONCA 440 (CanLII)

(2) The *Charter* Ruling

[19] The appellant argued that the police breached her s. 8 rights when they obtained information from the OCP without obtaining prior judicial authorization. She argued that the private information provided to the police, including her home address, email address, phone number and the Drug Usage Report, was all cloaked in s. 8 protection. As such, according to the appellant, the police required a search warrant before taking possession of that information.

[20] The remedy for this alleged breach was said to be excision from the information to obtain the warrant (the "ITO") of all information obtained from the OCP, as well as any investigative fact derived from that information. With excision complete, the appellant argued that there would be insufficient grounds to support the warrant.

[21] No excision ever occurred because the trial judge rejected that there had been a s. 8 breach triggered by the OCP passing along information to the police.

[22] In the alternative, the appellant argued that, even if the OCP information remained intact, the grounds contained in the ITO still fell short of what was

required to support the search warrant executed at the appellant's home. Among other arguments, the appellant suggested that even if there were reasonable grounds to believe that the appellant and her pharmacy supplied the drugs, there was no basis to believe evidence would be located at her home.

2023 ONCA 440 (CanLII)

[23] In other words, on a straight *Garofoli* review, it was the appellant's position that the reviewing justice could not have issued the warrant because of the insufficiency of the grounds: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452. The trial judge also rejected these arguments.

[24] While it was unnecessary to do so, in the event that he was wrong in his s. 8 analysis, the trial judge conducted a brief s. 24(2) analysis, explaining why he would not have excluded the evidence even if there had been a s. 8 breach.

(3) Analysis

(a) *Introduction*

[25] In this court, the appellant advances largely the same arguments advanced before the trial judge. I start with what I will call the "OCP issue" and then turn to what I will call the "*Garofoli* issue".

(b) *The OCP Issue*

[26] There are three components to the OCP issue. The appellant argues that the trial judge erred by: (1) defining the subject matter of the search too narrowly; (2) deciding that the regulatory framework within which pharmacists operate

2023 ONCA 440 (CanLII)

diminished the appellant's objectively reasonable expectation of privacy; and (3) rejecting that the appellant's biographical core was implicated by the information that the OCP provided to the police. I will address each of these arguments in turn and explain why I do not accept the appellant's position. First, though, I turn to the broad legal framework within which each of the issues operates.

(i) The Applicable Legal Principles

[27] Section 8 of the *Charter* does not exist to protect that which people want to keep private, solely because they want to keep it private. Nor does it exist to hide things that are incriminating, solely because they are incriminating. Rather, s. 8 exists for one purpose and one purpose only: to extend constitutional protection against unreasonable state intrusions to those individuals who have a reasonable expectation of privacy over the subject matter of a search: *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, 352 C.C.C. (3d) 525, at para. 37; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 292; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 17-18; and *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60.

[28] In determining any s. 8 issue, the court must start by considering whether s. 8 is even engaged, in the sense that there was a search or seizure within the meaning of s. 8 of the *Charter*. This turns on whether the accused has a reasonable expectation of privacy in relation to the subject matter of the search: *R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 16. It is the accused's onus to establish a reasonable expectation of privacy, failing which, s. 8 protection is not extended. Conversely, success in establishing a reasonable expectation of privacy is what grants the accused standing to pursue the s. 8 claim.

2023 ONCA 440 (CanLII)

[29] Where the accused gets over this hurdle, barring some well-known exceptions, state intrusion into the accused's privacy interest will only be reasonable when it was authorized by law, the authorizing law was itself reasonable and the execution of the search was itself reasonable: *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 34-37; *Spencer*, at para. 68; and *Tessling*, at para. 18.

[30] Three broad categories of privacy have emerged over time: territorial, personal and informational privacy. This case involves the latter, informational privacy, which in turn engages with three different concepts of privacy, namely, privacy as secrecy, privacy as control and privacy as anonymity: *Spencer*, at para. 38. Privacy as secrecy involves the ability to keep in confidence information that the individual wishes to be kept private. Privacy as control involves the ability to decide when, how and to what extent information about oneself will be shared. And privacy as anonymity involves the ability to act publicly while remaining anonymous: *Spencer*, at paras. 37-43.

[31] Whatever the form of privacy at issue, and in this case it is informational privacy in its various iterations, determining whether someone has a reasonable expectation of privacy necessitates both a factual and a normative inquiry. The factual inquiry necessitates a command over all of the circumstances at work in the case: *R. v. Edwards*, [1996] 1 S.C.R. 128, at paras. 31, 45; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 10; and *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26. The normative inquiry is broader in nature, with an eye to protecting that for which we ought to expect protection from a privacy perspective in a free and democratic society. In this sense, s. 8 does not simply focus on the here and now but also concerns itself with the long-term consequences of government action on society as a whole. Properly viewed through a normative lens, privacy interests will rise to constitutional status when those interests reflect the “aspirations and values” of the society in which we live: *Orlandis-Habsburgo*, at para. 41. See also: *Tessling*, at para. 42; *Spencer*, at para. 18; *Patrick*, at paras. 14-20; and *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 60-74.

[32] The factors for consideration in determining whether there exists a reasonable expectation of privacy are well-known and grouped under four headings that allow for analytical convenience: *Marakah*, at paras. 10-11; *Spencer*, at paras. 16-18; and *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, at para. 13. The test asks the following:

2023 ONCA 440 (CanLII)

1. What is the subject matter of the search?

2. Does the accused have a direct interest in that subject matter?

3. Does the accused have a subjective expectation of privacy in the subject matter?

4. Would an expectation of privacy be objectively reasonable in the circumstances of the case?

2023 ONCA 440 (CanLII)

[33] Only where the answer to the fourth question is "yes" does the claimant have standing to assert a s. 8 right: *Marakah,* at para. 12. If the court determines that the answer is "no", then the state action cannot violate s. 8. The answer here is no.

(ii) The Subject Matter of the Search

[34] I will start with the Drug Usage Report.

[35] The appellant argues that the trial judge wrongly characterized the subject matter of the search when he found that the Drug Usage Report did not reveal any information about patients or "drug usage patterns of specific targets". The appellant contends that the trial judge erroneously branded the subject matter of the search as a report showing "dispositions of fentanyl from the pharmacy, the names of employees working at the location, and the owner of the pharmacy."

[36] The appellant argues that the subject matter of the search should have been defined more broadly, beyond the raw data received by the police from the OCP. According to the appellant, the subject matter should have included inferences that

were drawn by combining the Drug Usage Report with the results of other investigative steps. In particular, the appellant contends that when the Drug Usage Report was combined with Mr. Imerovik's cell phone records, the police were able to glean a lot more information, including the inference that Mr. Imerovik was likely at the appellant's pharmacy on dates that fentanyl was dispensed.

[37] As well, the appellant argues that, had the police obtained a Drug Usage Report with other types of prescriptions reflected on it, ones like Viagra or anti-depressants, and had the police conducted surveillance at the pharmacy, then they could have drawn inferences about what prescriptions certain patients attending at the pharmacy were obtaining. To be clear, that did not happen, but the appellant says that it could have and, therefore, should inform the subject matter of the search.

[38] In determining the subject matter of the search, we apply a functional and holistic approach, one that derives from the actual circumstances of the case. Undoubtedly, this approach requires that we look beyond the actual information provided and ask whether, with that information in hand, something further is revealed about the individual to whom the information relates: *Spencer*, at paras. 26, 31 and 47*; R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at paras. 14-15, 35-39. This requires consideration of not only the raw data that the state came to possess, but also the nature of the information that could be inferentially derived

2023 ONCA 440 (CanLII)

from that raw data: *Ward*, at para. 93; *Marakah*, at paras. 14-15; *Orlandis-Habsburgo*, at para. 75; and *Spencer*, at para. 26.

[39] The fact is that the Drug Usage Report, as captured in the excerpt shown earlier in these reasons, contained what can only be described as bland information, which included the dates on which fentanyl was "prescribed", the "prescription" number, and the strength and quantity of fentanyl dispensed. The inferences that could be drawn from that data include that the appellant's pharmacy was dispensing fentanyl patches, of varying strengths and sometimes in large numbers. That is all.

[40] Here, the subject matter of the search did not engage in any meaningful way with personal privacy. While the appellant tries to bolster the sensitivity of the subject matter of the search by injecting a hypothetical scenario involving more sensitive medications and a means by which to infer who was receiving those medications, that is not the scenario here. Indeed, determining the subject matter of a search should not take on hypothetical dimensions. It must remain rooted in reality: what is the subject matter of the search in this case? Focussing where we should, the fact is that the circumstances of this case involve a significantly edited Drug Usage Report, which is singularly focussed upon the distribution of fentanyl and contains no identifying information.

2023 ONCA 440 (CanLII)

[41] While it is true, as the appellant argues, that the police were able to infer from Mr. Imerovik's cell records that he was possibly using the appellant's pharmacy to obtain fentanyl patches, an inference drawn from the location of his phone on days fentanyl was dispensed from her pharmacy, this inference did not change the essential nature of the subject matter of the Drug Usage Report. That subject matter was the raw data reflected in the Drug Usage Report and the immediate inferences that could be drawn from that data.

[42] An example of the subject matter including these kinds of inferences can be found in Doherty J.A.'s decision in *Orlandis-Habsburgo*. There, the raw data revealed total energy consumed in a home over a lengthy period of time and hourly energy consumption over a two-month period. This data, particularly the hourly pattern of usage data, directly gave rise to a "strong inference" that a grow-op was being operated in the residence: at para. 75. Therefore, the subject matter of the search included both the raw data "and the inferences that [could] be drawn from that data about the activity in the residence": at para. 75.

[43] The appellant contends that in calibrating the subject matter of the search, one must look not only to the raw data and the inferences that arise from that data, but also to the inferences that can arise from comparing that data with other investigative information. In this case, the appellant says that such information includes Mr. Imerovik's cell phone data. When comparing the Drug Usage Report with that cell data, the police were able to draw more private inferences, including

2023 ONCA 440 (CanLII)

about Mr. Imerovik's whereabouts on days that fentanyl was being dispensed. This "indirect information", the appellant argues, must also be included in the subject matter of the search.

2023 ONCA 440 (CanLII)

[44] The appellant also relied on *Spencer* for support. Yet *Spencer* is of no assistance to her argument.

[45] In *Spencer*, the police identified an Internet Protocol ("IP") address corresponding to someone's use of a computer to access and store child pornography through an online file-sharing program. The question was, who had done so? The way to answer that question was to obtain the subscriber information directly associated with that IP address. In other words, to replace the IP address with a name, so as to unlock the anonymity of the person connected to this very specific and known online activity.

[46] There is a world of difference between *Spencer* and what the appellant proposes in this case.

[47] In *Spencer*, "the subject matter of the search [was] the identity of a subscriber whose Internet connection [was] linked to particular, monitored Internet activity": at para. 33. Here, the subject matter of the search was a Drug Usage Report. On its face, it largely showed when fentanyl was being dispensed from the pharmacy and in what quantity.

[48] The subject matter of a search cannot be, as the appellant suggests, retroactively characterized according to what the information reveals after it has been combined with other investigative facts. If that were the analytical approach to determining the subject matter of a search, it would not be a stretch to suggest that virtually all information obtained by the police would ultimately result in privacy claims.

[49] The whole nature of a police investigation is to thread together investigative facts that eventually provide a window into what is undoubtedly private. Indeed, such investigative techniques would not be necessary could the picture be obtained from the outset. The subject matter of the search cannot be characterized based on what the police conclude at the end of their completed investigation; it must be considered solely from the perspective of what the raw data reveals and what, if any, inferences can be taken directly from that data.

[50] Respectfully, were it otherwise, society's legitimate interest in privacy and being left alone, as balanced against society's legitimate interest in "[s]afety, security and the suppression of crime", would quickly become skewed: *Tessling*, at para. 17; *Hunter*, at pp. 159-60; and *Edwards*, at para. 30. Professor Steven Penney refers to this as the "privacy versus security" debate and calls it "a perpetually polarizing dialectic": Steven Penney, "The Digitization of Section 8 of the Charter: Reform or Revolution?" (2014) 67 S.C.L.R. (2d) 505, at p. 506.

2023 ONCA 440 (CanLII)

[51] The normative approach asks what a reasonable person would expect in a free and democratic society. That reasonable person undoubtedly has an interest in not only protecting privacy, but also in ensuring the effectiveness of law enforcement. If the subject matter of a search could be characterized by every inference that could be taken from the raw data, when placed against all other investigative facts, this would result in anything but effective and efficient investigations.

[52] This is not even to mention the fact that investigations evolve over time and the inferences that can be derived from raw data can morph with the evolution of further investigative facts. The police must be able to determine at the time they come into possession of information whether it is the subject of a reasonable expectation of privacy. If the subject matter of a search is constantly in flux and depends on the possibility that it may reveal important information after being combined with the results of other investigative steps – that may or may not be contemplated or even possible at the time of the original search – police cannot make informed decisions as to whether prior judicial authorization will be required. Such a procedure would be unworkable. Rather, the subject matter of the search must be fixed at the time of the search and the inferences that can be taken from the data must be ones that arise directly from that data.

2023 ONCA 440 (CanLII)

[53] As for the appellant's phone number, email address and home address, the trial judge said that while it was "clearly personal information", this was raw data that did not lend itself to further inferences.

[54] While the appellant argues that her phone number and email address could have provided a window into all kinds of private information about her, it is not at all clear how this would be so. Again, this is entirely unlike *Spencer*, where the police knew about a course of Internet activity associated to an IP address; they simply needed the subscriber data for that IP address in order to strip the Internet activity of its anonymity. In this case, on the other hand, it is not clear how the police would use the appellant's phone number, which was actually wrong by two digits, or her email address to strip her of any anonymity. Indeed, this did not happen. The appellant also concedes that the email address was not used for anything.

[55] As for the wrong phone number, the appellant suggests that the police could have used it to connect her phone to Mr. Imerovik's phone records. Leaving aside that it was a wrong number, the police did not do that. Rather, the police obtained the appellant's actual phone number through surveillance and Mr. Imerovik's phone data, for which the police had prior judicial authorization.

[56] As for the appellant's home address, it was equally benign. While the appellant says that a home address can reveal information about one's

2023 ONCA 440 (CanLII)

socioeconomic status, and perhaps at the edges that is true, her address did not unlock any further information. For instance, it said nothing about what was happening inside of the appellant's home. It really was just an address.

2023 ONCA 440 (CanLII)

[57] Therefore, at its highest, the subject matter of the search was a home address, an email address that was used for no investigative purpose, a wrong phone number and a heavily redacted Drug Usage Report.

(iii) Direct Interest in the Subject Matter

[58] The trial judge found that the appellant had a direct interest in the subject matter of the search. I agree. The appellant clearly had a personal and business interest in the information provided. Although the appellant did not have exclusive control over the information, to the extent that she had any privacy interest over the information it was not extinguished simply because it was given to the OCP: *Orlandis-Habsburgo*, at paras. 83-85.

(iv) Subjective Expectation of Privacy

[59] The trial judge did not deal with whether the appellant had a subjective expectation of privacy in the information provided by the OCP to the police. While not a prerequisite to or determinative of the existence of a reasonable expectation of privacy, it is not entirely clear why he skipped this step: *Orlandis-Habsburgo*, at para. 82. It seems the trial judge did so since the appellant "did not testify and

express her subjective perspective on the issue" and so he decided to move on to address "whether or not the expectation of privacy was objectively reasonable".

[60] Just because an accused does not testify, that does not mean that a subjective expectation of privacy does not exist or that this third stage of the inquiry need not be addressed. While it was not always the case, today it takes little to cross the subjective expectation of privacy threshold. In appropriate circumstances, it can be inferred: *Patrick*, at para. 37; *Marakah*, at para. 22; and *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, at para. 20.

[61] Despite his failure to address the issue, I read the trial judge's reasons as in essence inferring the existence of a subjective privacy interest. I say this because the trial judge moved along to consider, as he put it, whether the subjective privacy interest was objectively reasonable in the circumstances. I will now focus on that issue.

(v) Was the Appellant's Expectation of Privacy Objectively Reasonable in the Circumstances?

[62] This is where the bulk of the trial judge's reasoning lay. It is also where the bulk of the parties' submissions on appeal lay. And it is really where the normative lens takes focus.

[63] The appellant argues that the trial judge made two errors under the fourth prong of the test for determining the appellant's standing to assert s. 8.

2023 ONCA 440 (CanLII)

[64] First, the appellant says that the trial judge erred when he concluded that the regulatory framework within which the appellant worked diminished the objective reasonableness of her privacy interest. To the contrary, the appellant says that the regulatory framework actually enhanced her privacy interest. Second, the appellant says that the trial judge erred when he concluded that her personal information, provided by the OCP to the police, did not implicate her biographical core. I will deal with these alleged errors in this order.

2023 ONCA 440 (CanLII)

1. The Impact of the Regulatory Framework on the Appellant's Privacy Interest

[65] In my view, while not determinative of the privacy issue at work in this case, the regulatory framework within which the s. 8 issue operates diminishes the appellant's reasonable expectation of privacy. To understand why this is so, we have to first look to the statutory provisions at work.

a. Sections 36(1)(e), 36(1.2), 36(1.3) and 36(1.4) of the *RHPA*

[66] Section 36(1)(e) of the *RHPA* permitted, but did not require, the OCP to disclose the information about the appellant and her pharmacy in aid of the police investigation. The salient provisions follow:

> **Confidentiality**
>
> 36 (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* … shall keep confidential all information that comes to his or her knowledge in the course of his or

her duties and shall not communicate any information to any other person except,

…

(e) to a police officer to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

…

Definition

(1.2) In clause (1) (e),

> "law enforcement proceeding" means a proceeding in a court or tribunal that could result in a penalty or sanction being imposed. 1998, c. 18, Sched. G, s. 7 (2); 2007, c. 10, Sched. M, s. 7 (2).

Limitation

(1.3) No person or member described in subsection (1) shall disclose, under clause (1) (e), any information with respect to a person other than a member. 1998, c. 18, Sched. G, s. 7 (2); 2007, c. 10, Sched. M, s. 7 (3).

No requirement

(1.4) Nothing in clause (1) (e) shall require a person described in subsection (1) to disclose information to a police officer unless the information is required to be produced under a warrant. 1998, c. 18, Sched. G, s. 7 (2); 2007, c. 10, Sched. M, s. 7 (4). [Emphasis added.]

[67] The term "member" is defined in s. 1(1) of the *RHPA* as a "member of a College" and the term "College" refers to "the College of a health profession or group of health professions established or continued under a health profession Act". Each "health profession Act" is listed in Schedule 1 of the *RHPA*, including

2023 ONCA 440 (CanLII)

the *Pharmacy Act, 1991*, S.O. 1991, c. 36, which continues the OCP (s. 5). As a licenced pharmacist, the appellant was a "member" of the OCP.

2023 ONCA 440 (CanLII)

[68] Distilled, I see the statute as operating in the following way:

> (1) subject to some statutorily defined exceptions, the OCP must keep confidential "all information" that comes into its knowledge in the course of its duties (s. 36(1));
>
> (2) one such exception is where the information is given to the police in aid of an investigation with a view to, or which will likely lead to, a legal proceeding that could result in a penalty or sanction (ss. 36(1)(e), 36(1.2));
>
> (3) where that exception applies, the OCP may provide information about members but not about non-members (ss. 1(1), 36(1.3)); and
>
> (4) unless the information is required to be provided by "warrant", the provision of that information is at the discretion of the OCP (s. 36(1.4)).

b. The *RHPA* Reduces the Objective Reasonableness of the Privacy Interest at Work

[69] The appellant says that these sections enhance, not detract from, the appellant's reasonable expectation of privacy because they create a presumption of confidentiality.

[70] Before responding directly to this argument, it is important to clarify the role a legislative scheme, such as the *RHPA*, plays in determining whether there is a reasonable expectation of privacy. In *Gomboc*, at para. 33, Deschamps J. for the plurality noted that, in the contractual context, contracts of adhesion require a

cautious approach because a person may not know the terms governing their relationship with the holder of the information or that those terms could permit disclosure to the police. As Deschamps J. put it:

> In view of the multitudinous forms of information that are generated in customer relationships and given that consumer relationships are often governed by contracts of adhesion … there is every reason for proceeding with caution when deciding what independent constitutional effect disclosure clauses similar to those in the [operative terms] may have on determining a reasonable expectation of privacy.

[71] Accordingly, rather than concluding that the legislative scheme, which permitted disclosure, was sufficient to erode the expectation of privacy, the plurality in *Gomboc* viewed this as but one factor among many constituting the totality of circumstances informing whether there existed an objectively reasonable expectation of privacy. The two dissenting judges, McLachlin C.J. and Fish J., joined the plurality in this observation, making for a majority on the point. As the dissenting judges put it, at para. 115: “The legislation is only one factor that is to be considered when determining whether an expectation of privacy is objectively reasonable and it may be insufficient to negate an expectation of privacy that is otherwise particularly compelling.”

[72] Therefore, I start by recognizing that the operation of the *RHPA* in this case is not dispositive of the claimed privacy interest. The respondent correctly

2023 ONCA 440 (CanLII)

acknowledges this fact. At the same time, it is in my view a strong factor for consideration.

[73] This is not a case involving a contract of adhesion, the nuances of which may not be known by a consumer who has been drawn into said contract. While the appellant could not have negotiated her way out of the disclosure provisions in the *RHPA*, as a professional pharmacist, she is to be taken to have known the rules and regulations governing the profession that she willingly entered.

[74] In this case, the legislation clearly works against any objectively reasonable privacy interest. The appellant was operating in a highly regulated environment. She knew the rules by which she was governed, including those related to disclosure. She knew that the OCP would be highly engaged, indeed, concerned with narcotic distribution, would be watching such distribution closely, and would be in a position to share information with the police provided that it only related to her.

[75] The appellant maintains that, even if the *RHPA* worked to decrease her reasonable expectation of privacy, the OCP needed to engage with the disclosure provisions through the exercise of "independent and informed judgment". This language is borrowed from para. 107 of the *Orlandis-Habsburgo* decision. In that case, Doherty J.A. found that s. 32(g) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (the "*MFIPPA*"), which was then

2023 ONCA 440 (CanLII)

worded very similarly to the current s. 36(1)(e) of the *RHPA*, vested a discretion in the record holder to release information to the police. Section 32(g) of the *MFIPPA* at the time of Doherty J.A.'s decision read as follows:

> **Where disclosure permitted**
>
> 32 An institution shall not disclose personal information in its custody or under its control except,
>
> …
>
> (g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

[76] Doherty J.A. held that s. 32(g) of the *MFIPPA* did not contemplate an ongoing sharing of information, but rather, to meet s. 8 compliance, it required an "independent and informed judgment" on the part of the record holder.

[77] That is precisely what happened in this case.

[78] The police made specific requests for information. The OCP considered and responded to those requests. The OCP, and Mr. Hui, in particular, exercised independent judgment in deciding what information to provide. For example, when Det. Ibbott asked to see the Drug Usage Report, Mr. Hui decided to redact the information provided. Mr. Hui also denied the police request for further information, namely, the unredacted Drug Usage Report, because, in his independent judgment, providing that information would breach s. 36 of the *RHPA*.

2023 ONCA 440 (CanLII)

[79] While the appellant argues that there was an internal protocol in place at the OCP that required all police requests for information to be dealt with by a person who did not work at the investigative level, and Mr. Hui breached that protocol by responding to the request himself, the question is not whether internal protocols are breached, but whether independent and informed judgment is exercised. Regardless of whether an internal protocol was breached or not, and I should not be taken as suggesting it was, Mr. Hui's actions demonstrate the exercise of independent and informed judgment.

2. Did the Information Engage the Appellant's Biographical Core of Personal Information?

[80] As noted in *Plant*, at p. 293, the laudable values of individual dignity, integrity and autonomy require that s. 8 seek to protect a biographical core of personal information that "individuals in a free and democratic society would wish to maintain and control from dissemination to the state." This biographical core includes information that "tends to reveal intimate details of the lifestyle and personal choices of the individual": at p. 293. The appellant argues that this is precisely the type of information that was provided by the OCP to the police.

[81] I see no error in the trial judge's conclusion to the contrary.

[82] I start with the respondent's reference to this court's decision in *R. v. Shaheen*, 2022 ONCA 734, leave to appeal requested, [2022] S.C.C.A. No. 512,

2023 ONCA 440 (CanLII)

a decision that is said to definitively decide against describing the information at issue as falling within a biographical core of personal information. I do not see *Shaheen* as definitive on this point.

[83] Like the appellant, Mr. Shaheen was a pharmacist trafficking in fentanyl patches. And like the appellant, the OCP shared information with the police about Mr. Shaheen's pharmacy, namely, records detailing narcotics received and dispensed by the pharmacy. In this court's brief decision dismissing the conviction appeal, the court noted in a single sentence that the trial judge "did not err when he held that the disclosure by the [OCP] to the police was authorized by s. 36(1)(e) of the [*RHPA*] and therefore did not violate s. 8 of the *Charter*."

[84] This sentence from the *Shaheen* decision, however, does not resolve the question in the case at hand as to whether the information tended to reveal intimate details about the lifestyle and personal choices of the appellant. Rather, when the sentence from *Shaheen* is read contextually with the ruling under review, this court's reasons simply appear to acknowledge what is not in dispute in this case, namely, that s. 36(1)(e) of the *RHPA* permits the OCP to share information with the police. The question remains, in what situations can that occur in a constitutionally compliant fashion?

[85] In my view, the appellant's address does not reveal intimate details of the lifestyle and personal choices of the appellant. Even though the police were able

2023 ONCA 440 (CanLII)

to attend at her apartment building and confirm that she lived there by watching a surveillance video to which the landlord gave them access, there are simply no intimate details concerning one's life revealed from just a home address. To be sure, it reveals nothing about what is taking place within the home. In other words, in providing the appellant's address to the police, the OCP did not equip them with a better understanding of what was in her apartment or what she was doing in her apartment.

2023 ONCA 440 (CanLII)

[86] I agree with the trial judge that addresses are frequently kept on police, government and other databases. For instance, the police could have easily found the appellant's address had she been a driver registered in the Ministry of Transportation of Ontario database. As the appellant acknowledges, there would have been nothing wrong with the police obtaining the appellant's address from a witness or employee of the pharmacy, many of whom may have known where she lived. Moreover, the police could have simply followed the appellant from her pharmacy to that address. Quite simply, the appellant had no objectively reasonable privacy interest in her address: *R. v. Nguyen*, 2023 ONCA 367, at paras. 30-35; *R. v. Saciragic*, 2017 ONCA 91, at paras. 31-34, leave to appeal refused, [2017] S.C.C.A. No. 106; and *R. v. Yu*, 2019 ONCA 942, 151 O.R. (3d) 244, at para. 76, leave to appeal refused, [2020] S.C.C.A. No. 38.

[87] As for the cell phone number, the appellant argues that it could have provided intimate access to the appellant's social media accounts. That did not happen. Nor is it at all clear that it could happen, especially with a wrong number.

[88] In my view, standing on its own, a cellular phone number does not engage with the lifestyle and personal choices of the accused: *R. v. Lattif*, 2015 ONSC 1580, 331 C.R.R. (2d) 72, at paras. 6-10; *R. v. Browne*, 2017 ONSC 5046, at para. 71; *R. v. Khan*, 2014 ONSC 5664, at para. 27; and *R. v. Chaudhry*, 2021 ONSC 394, at para. 67. In my view, the simple fact of a phone number – and that is all it was in this case, only it was a wrong phone number – is a long distance from the biographical core information envisioned in *Plant*.

[89] In any event, the police obtained the appellant's correct telephone number from surveillance and under judicial authorization when they pursued Mr. Imerovik's cellular phone data, an exercise that included the subscriber data for the numbers that connected to Mr. Imerovik's phone.

[90] The appellant did not press the point on her email address, given that nothing of any investigative value came from it.

[91] As for the Drug Usage Report, it is difficult to ascertain how, if at all, it touched on the appellant's biographical core of personal information. While it showed how many fentanyl patches were dispensed from her pharmacy over a period of time, there was no personal information and certainly nothing that could

2023 ONCA 440 (CanLII)

rise to the level of something over which a person in her position would wish to maintain control. Indeed, as a pharmacist, she must have known she could not maintain control over it.

(vi) Conclusion

[92] In the totality of the circumstances, including the regulatory framework within which the appellant worked, I see no error in the trial judge's conclusion that she did not have a reasonable expectation of privacy in the information that was warrantlessly provided by the OCP to the police.

(c) *The Garofoli Issue*

[93] The appellant advances an alternative argument. Even if the police properly came into possession of the OCP information, and therefore nothing needs to be excised from the ITO, she claims that the trial judge erred by concluding that there was sufficient evidence upon which the search warrant could issue.

[94] Absent an error of law, a misapprehension of the evidence or a failure to consider relevant evidence, this court must defer to a reviewing justice's decision under *Garofoli*: *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.), at para. 18, leave to appeal refused, [2001] 1 S.C.R. xii. To be sure, reviewing judges work within a small orbit. They must not substitute their opinion for that of the issuing judge: *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 20, leave to appeal refused, [2010] 1 S.C.R. ix; *Garofoli*, at p. 1452.

2023 ONCA 440 (CanLII)

[95] The question is not whether the reviewing justice would have issued the warrant. The question is whether the issuing justice could have done so: *Garofoli*, at p. 1452; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 51-52; and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. Therefore, the focus of a *Garofoli* review is on whether there is reliable evidence that might reasonably be believed upon which an authorization could have issued: *Garofoli*, at p. 1452; *Araujo*, at para. 51.

[96] The "reasonable grounds to believe threshold" does not require proof beyond a reasonable doubt or even proof on a balance of probabilities. It requires that the well-known standard of "credibly-based probability" be applied: *Hunter*, at pp. 167-68; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at para. 81. The question for the issuing justice is whether the ITO sets out sufficient grounds to establish a reasonable belief that an offence has been committed and that there will be evidence of that offence located in the location to be searched. The answer in this case was yes.

[97] I have reviewed the ITO. It is full of information connecting the appellant to the alleged offences. Among other things, the ITO discloses numerous facts connecting Mr. Imerovik to the appellant. It also connects Mr. Imerovik to the appellant's home, including the fact that it discusses a video of his presence in the lobby of the appellant's condominium building where Mr. Imerovik met with the appellant's brother while holding a package in the shape of a stack of money.

2023 ONCA 440 (CanLII)

Against this fact, it was open to infer that Mr. Imerovik brought money to her home which was the proceeds of trafficking.

2023 ONCA 440 (CanLII)

[98] The appellant says that the trial judge erred in finding that there were sufficient grounds to justify searching the appellant's residence. I do not agree.

[99] Among other things, the ITO made clear that the appellant was believed to be involved in this trafficking scheme with others, including with Mr. Imerovik.

[100] The ITO made it equally clear that Mr. Imerovik was believed to be involved in fentanyl trafficking, including recounting occasions when he was seen meeting with Mr. Holmes, a known fentanyl trafficker. Clearly, the appellant would need to communicate with Mr. Imerovik and perhaps others. Indeed, by the time the police had applied for the search warrant, they had already connected the appellant's phones to Mr. Imerovik's phone and established, as reflected in the ITO, that the two communicated a great deal.

[101] In all of these circumstances, the issuing justice was entitled to infer that evidence of the trafficking offence would be found at the appellant's home. This was a matter of common sense. It was entirely reasonable to believe that the appellant, who was believed to be trafficking in fentanyl, would have the proceeds of this crime, her phones containing communications and even drug debt lists at her home.

[102] In the circumstances of this case, the trial judge was entitled to find that the ITO contained information that supported the inference that there would be evidence of drug trafficking at the appellant's home.

(d) *Section 24(2)*

[103] Given my conclusions on s. 8, there is no need to address s. 24(2). I would simply say that I see no error in the trial judge's approach.

C. SENTENCE APPEAL

[104] The appellant argues that the trial judge erred when he imposed a 13-year sentence for trafficking in fentanyl and a concurrent 10-year sentence for possession of fentanyl for the purpose of trafficking. If the conviction appeal is dismissed, she asks that we vary the sentence to a conditional sentence. While I would not grant a conditional sentence, I would grant the sentence appeal and vary the sentence to one of eight years.

[105] I want to make clear at the outset that I appreciate how extraordinary this sentence is for the extremely serious crime committed by the appellant. As such, these reasons should not be read as diluting the proper range of sentence for grave offences of this nature. The result turns exclusively upon the extreme and unique collateral circumstances at work in this case.

2023 ONCA 440 (CanLII)

(1) Reasons for Sentence

[106] The trial judge provided brief reasons for sentence. He reviewed the parties' positions, noting that the trial Crown sought a sentence of 11 to 14 years and that the defence advocated for a suspended sentence, with the alternative being a sentence of 3 to 4 years in custody. I pause here to note that, while the trial judge was right about what the trial Crown advanced as the correct range of sentence, his reasons do not reflect the fact that, in the end, the trial Crown only asked that a 12-year sentence be imposed.

[107] In his reasons, the trial judge acknowledged that the appellant suffers from Von Hippel Lindau Disease ("VHL") and that the disease affects various parts of the body, leading to both cancerous and non-cancerous tumours and lesions which can be recurrent, multiple and unpredictable. The trial judge did not make mention of the fact that the appellant's young daughter and many of her family members are also battling with this genetic and extremely rare disease.

[108] The trial judge found that while incarceration would be difficult for the appellant, he was satisfied that her medical condition could be "monitored in custody." He also found that, while the consequences of her incarceration on her children was "unfortunate," she "should have thought of these consequences before engaging in serious criminal activity."

2023 ONCA 440 (CanLII)

[109] The trial judge acknowledged that he could take “collateral consequences of this sort into account” but held that the sentence had to remain proportionate to the gravity of the offence and the degree of responsibility of the offender.

[110] At the time that this sentence was imposed, a conditional sentence was not available for this offence. Having acknowledged that fact, the trial judge reviewed the operative sentencing principles, and then considered the appropriate sentencing range.

[111] He cited *R. v. Shaheen*, 2018 ONCJ 150, the first instance sentencing decision of the case mentioned earlier in these reasons involving another pharmacist who trafficked in fentanyl patches. At first instance, Mr. Shaheen received a 14-year sentence. Notably, after the appellant was sentenced in this case, this court reduced Mr. Shaheen’s sentence to one of 12 years.

[112] The trial judge noted that this was the appellant’s first offence and that she had what he described as good rehabilitative potential. Even so, for the trial judge, the seriousness of the offence, including that it was motivated strictly by greed, required that a 13-year sentence be imposed.

2023 ONCA 440 (CanLII)

(2) The Appellant Raises Errors in Principle and a Failure to Take Into Consideration Relevant Facts

[113] Trial judges have a broad discretion in imposing a sentence: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 39. Deference is owed to those exercises of discretion.

[114] Unless a sentence is demonstrably unfit or the sentencing judge commits an error in principle that impacts the sentence, an appellate court should not vary the sentence on appeal: *Lacasse*, at paras. 39, 41 and 44; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46; and *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 25. In my view, as discussed below, the trial judge committed errors in principle and failed to take into account a relevant factor that impacted the sentence. Therefore, no deference is owed.

(a) *Conditional Sentence is Now Available*

[115] The appellant points to the fact that, unlike at the time of sentencing, a conditional sentence is now available for the offences with which she stands convicted: Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess., 44th Parl., 2022 (assented to 17 November 2022), S.C. 2022, c. 15; *Criminal Code*, R.S.C. 1985, c. C-46, s. 742.1. A conditional sentence now being available, and this case still being in the system, the appellant argues that this court should now consider substituting a conditional sentence.

2023 ONCA 440 (CanLII)

[116] For reasons that will become clear, although a conditional sentence is now available for the crimes with which the appellant stands convicted, it would not be appropriate to impose one in this case. Quite simply, the extreme gravity of what the appellant did cries out for a custodial sentence of some length.

[117] Accordingly, the change in the law has no practical impact on the sentencing here.

(b) *Lack of Parity with the Shaheen Case*

[118] The second alleged error is that the trial judge used the first instance sentencing decision in the *Shaheen* case, where a 14-year sentence was imposed, as a benchmark. That case is said to be much worse than this one and, in any event, the sentence imposed at trial was varied by this court to one of 12 years. The appellant argues that a problem with parity has now crystalized because she has received a longer sentence than Mr. Shaheen, who she says was a far worse offender.

[119] While I would not describe Mr. Shaheen as a far worse offender than the appellant, there is no question that his case carries some additional aggravating features. This is very possibly why the trial Crown in the case at hand invited the court to impose a 12-year sentence on the appellant, given that the *Shaheen* sentence, at that time, was one of 14 years.

2023 ONCA 440 (CanLII)

[120] As we know from earlier in these reasons, Mr. Shaheen was also a pharmacist trafficking in fentanyl patches. There are many similarities between this case and that one, including that the appellant is a first-time offender with no criminal record. On that point, this court, in part, reduced Mr. Shaheen's sentence to 12 years because of concerns over a failure to apply the principle of restraint to a first-time offender.

[121] Importantly, Mr. Shaheen was proven to have trafficked in almost double the amount of fentanyl patches as the appellant, namely, over 5,000 patches, over a longer period than the appellant. This is compared with the 2,780 patches that were proven to have been trafficked by the appellant over a much shorter period of time.

[122] Still, there is an additional aggravating factor in *Shaheen*. When he realized that the discrepancy in the fentanyl inventory had been discovered by a pharmacy assistant, he conspired with a confederate to stage a robbery of the pharmacy in an effort to hide the missing "mountains" of fentanyl he had trafficked. That staged robbery took place and then Mr. Shaheen reported it to the police, all done in an effort to deceive. To make matters even worse, he made an insurance claim after the staged robbery, claiming that he had lost over $37,000 in narcotics.

[123] In my view, the *Shaheen* case undoubtedly has worse facts than this one and yet, in the wake of this court's variation of the sentence in the *Shaheen* case,

2023 ONCA 440 (CanLII)

he is now serving a shorter sentence than that of the appellant. This creates an issue of parity.

2023 ONCA 440 (CanLII)

(c) *Failure to Properly Take into Account the Collateral Consequences*

[124] The real crux of this sentence appeal, though, does not lie in the above arguments. Rather, it lies in what is said to be the trial judge's erroneous approach to the operative collateral circumstances in this case, circumstances that arise from the appellant's and her daughter's common medical condition. The appellant has filed fresh evidence to bring this court an update on the progression of their disease. The respondent concedes its admissibility.

[125] Despite the admissibility of the fresh evidence, the respondent says that there is nothing new in the evidence that reaches beyond what the trial judge knew at the time that he sentenced the appellant. As the respondent points out, the trial judge was well-aware of the fact that VHL is an unpredictable disease and can be fatal. For the respondent, the fact remains that, though the appellant and her daughter suffer from this tragic disease, the crime the appellant committed was serious and involved such a grave breach of trust that she needed to be sentenced in accordance with that conduct, appropriately resulting in a 13-year sentence.

(i) Factual Backdrop for the Collateral Circumstances

[126] This is truly an extraordinary case, not only in the sense that the appellant is extremely ill, but also in the sense that her young child and, indeed, many other

family members are also extremely ill. Before discussing how this impacts on the sentence, I will attempt to summarize the medical landscape and the implications of that landscape.

2023 ONCA 440 (CanLII)

[127] Virtually all of the information that follows, except for the more recent updates, formed part of the record from the sentencing proceeding.

[128] The appellant's family has been impacted by VHL, a very rare genetic disorder. There is no cure for this disease. It is an autosomal dominant disorder, meaning that family members have at least a 50 percent chance of being struck by the disease. The appellant's family has been struck at a rate higher than 50 percent.

[129] The disease impacts the nervous system, kidneys, pancreas, eyes and other body sites. It results in tumours that impact the nervous system and can cause cancer in the kidneys and pre-cancerous lesions in other areas of the body. As explained by the appellant's uncle, who is a gastroenterologist and hepatologist, certified by the Royal College of Physicians and Surgeons of Canada, and who is an active doctor, researcher and lecturer in Toronto, lesions caused by this disease are recurrent, multiple and unpredictable. The single most important technique to manage the disease is timely and unyielding monitoring.

[130] The first person in the appellant's family who was diagnosed with the disease was another uncle, the brother of the uncle mentioned above and also a

doctor. This uncle has undergone over 15 surgeries to manage the disease since his original diagnosis. The appellant was diagnosed with the disease many years ago. She, herself, has gone through countless surgeries, has had recurrent kidney cancers and lives with tumours in her nervous system that are closely monitored. The appellant's mother also had the disease. She died from it in 2018, which was during the trial of this matter. The appellant also has an aunt who died from the disease at 56 years of age. She also has another uncle who died from the disease at 54 years of age.

[131] The appellant's sister also has the disease and was diagnosed in her late teens. Her sister has undergone multiple brain and spinal surgeries here in Toronto. Despite eye surgeries, she is now completely blind. The appellant's brother also has the disease, which has taken much the same course. In his case, however, the disease has forced him to lose both kidneys.

[132] The appellant herself is now blind in one eye because of the disease and has numerous tumours that are being closely monitored.

[133] This brings us to the appellant's young daughter who was also diagnosed with the disease a few years ago. I have decided not to chronicle in any detailed way the course of this child's disease and her journey to date in the medical system. Needless to say, it must be terrifying for the child and her loved ones. The only way to deal with this disease is through close, intensive monitoring and a

2023 ONCA 440 (CanLII)

failure to do so can lead to what is described in the record as “horrific complications” and death.

[134] All of this information was available at the time of sentencing. So, too, was the fact that the appellant is a single mother of her two children. Her other child has never been diagnosed with the disease.

[135] Their father lives in Egypt. He only visits the children for one week a year. The father provided a letter to the trial judge at sentencing that suggested that he could not take responsibility for the children in Egypt, should the appellant be incarcerated. He also said that, in any event, he would be unable to obtain the care required to address his daughter’s health condition should she go to live with him in Egypt. The child’s current health team is at the Hospital for Sick Children in Toronto.

[136] Although during oral submissions, at the time of sentencing, defence counsel suggested that the family would endeavour to work something out for the children should the appellant be incarcerated, it was not at all clear what the plan would be. What was certain at the time was that the appellant’s active physician uncle and his wife, who live in Toronto, would be unable to provide constant care for the children. Nor could the appellant’s sister provide that care, especially because she has been rendered blind by VHL and already has a child with VHL.

2023 ONCA 440 (CanLII)

[137] The fresh evidence provides a window into the progress of the disease since the time of sentencing. As for the appellant, she has undergone another surgery for tumour removal since that time. She now has small tumours developing in her neck and thoracic spine, as well as in her head, all of which need to be monitored very closely. She also has cancerous tumours in one of her kidneys that have increased in size. There is also a potential tumour in the only eye from which she can still see. The daughter's care continues to be provided on an ongoing basis. It has worsened and monitoring remains a priority. There is no dispute that the appellant, very familiar with the disease, is in the best position to provide that monitoring.

[138] The final update provided by way of the fresh evidence is that the father of the children is now prepared to take them to Egypt should the appellant be incarcerated. She has been on bail pending the appeal until now. Even so, because the daughter's medical condition cannot be properly monitored in Egypt, the plan is that the appellant's uncle and the child's father will travel with the child back to Toronto once or twice a year to obtain the medical attention she requires. The children are Canadian citizens.

(ii) What is the Fit Disposition?

[139] The trial judge noted that the appellant has VHL and provided a brief overview of what the disease involves. Near the end of his reasons on sentence,

2023 ONCA 440 (CanLII)

the trial judge briefly addressed the collateral circumstances, but was satisfied that the appellant's medical condition could be monitored in custody. While he found that the impact of the appellant's incarceration on the children would be "unfortunate," he does not appear to have taken the daughter's illness into account.

[140] It is not clear how the trial judge arrived at the conclusion that the appellant's condition could be effectively monitored in custody. The reasons and the record, however, suggest that this finding was, in part, based on the obligation on the part of the correctional authorities to provide any necessary care, and the absence of any evidentiary foundation to say that the appellant's condition could not be accommodated and monitored in custody.

[141] On appeal, the fresh evidence does not add much more on this point. The only relevant additional information is an excerpt from a doctor's report filed as fresh evidence, where the doctor mentions having contacted the "health unit of <u>Grand Valley Institution for Women</u> … to inquire about their ability to provide care for [the appellant]" (emphasis in original). The doctor received an email back suggesting that Grand Valley "could accommodate the high-level needs of a patient with VHL."

[142] While the trial judge seems to have acknowledged that he could take the collateral circumstances into account, it is unclear how he did so. I say this because he arrived at a sentence that was higher than what the trial Crown asked for and

2023 ONCA 440 (CanLII)

only one year shy of the sentence imposed by the trial judge in *Shaheen,* a case involving more serious aggravating factors.

[143] In my view, the reasons demonstrate that the trial judge failed to take into account that, in some circumstances, a sentence may be reduced where there is evidence suggesting that a term of imprisonment would be experienced by an offender in a disproportionate manner because of collateral circumstances. This is a relevant part of the proportionality analysis. As this court noted in *R. v. Shahnawaz* (2000), 51 O.R. (3d) 29 (C.A.), at para. 34, leave to appeal refused, [2001] 1 S.C.R. xvii:

> What we are left with as a relevant factor for consideration is the evidence, accepted by the trial judge, that imprisonment had and would probably continue to have an "extreme effect" on Mr. Shahnawaz. Given this fact, it becomes necessary to adjust the sentence imposed on this particular offender so as to ensure that it does not become disproportionate to his crime.

[144] Undoubtedly, a collateral consequence can arise from the commission of an offence, the conviction for an offence or the sentence imposed for an offence: *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 47. Sometimes adjusting a sentence downward is entirely necessary to ensure that a sentence does not become disproportionate to the crime, because the offender is not like other offenders in the sense that they will not experience incarceration in the same way. In other words, although only arising in rare and extreme circumstances, if an

2023 ONCA 440 (CanLII)

offender is going to experience custody in a more severe way, then a sentence can become disproportionate to the offender's offending behaviour.

[145] This also comes back to the principle of parity, in the sense that like offenders should be treated alike, but from time to time, collateral consequences will mean that "an offender is no longer 'like' the others," something that can render the sentence unfit: *Suter*, at para. 48.

[146] Of course, in most cases, there will be reason to conclude that an offender's medical condition can be properly treated in custody in accordance with the statutory obligations of correctional authorities, such that the offender will not experience the sentence in a disproportionate way: *R. v. Hanse*, 2022 ONCA 843, at para. 52; *R. v. R.C.*, 2015 ONCA 313, at para. 8; *R. v. H.S.*, 2014 ONCA 323, 308 C.C.C. (3d) 27, at paras. 37-38; and *R. v. R.L.*, 2013 ONCA 504, at paras. 38-40.

[147] However, in my view, the trial judge erred by failing to take these sentencing principles into account and overlooking the severe negative effect that this sentence would have on the appellant. The appellant's and her daughter's disease is extraordinary. The appellant's condition is very advanced. She has lost sight in one eye and has a tumour developing in the other. She has tumours throughout her body. She works with a medical team and time is critically of the essence.

2023 ONCA 440 (CanLII)

[148] She has always been the sole caregiver for her daughter (and son). She is the one who has managed her daughter's disease to date and reacts when action is needed. While the trial judge is right that she should have thought about that when she committed the offences, the fact remains that we are here now. Two Canadian citizens may well have to leave Canada to live with their father while their mother is incarcerated. In this case, it is not just about a child leaving the country, but a child being pulled away from the security of her medical team and from the possibility of receiving quick treatment, which she will require as issues inevitably arise. It also means that the appellant, the child's mother, will not only have to live with the anxiety of her own disease while incarcerated, but she will also have to live with the knowledge that her child, who is in so much need, has had her access to urgent medical care jeopardized. It also means, of course, that the appellant will see her children infrequently.

[149] These are indeed extraordinary collateral circumstances, the likes of which are extremely severe, if not unique. They simply were not dealt with in the sentencing reasons.

[150] There is little that can be said by way of mitigation here. I want nothing in these reasons to be read as suggesting that what the appellant did constitutes anything but a profound breach of trust. She entered a professional field that exists to do good, to improve health, to care for others. She betrayed those responsibilities. She abused her position as a pharmacist by trafficking in fentanyl

2023 ONCA 440 (CanLII)

from her pharmacy and, through those actions, visited untold harm on communities, families and, in fact, their beloved children.

[151] We have become all too familiar with the fact that consumption of even the smallest amount of fentanyl can kill. And it does, over and over and over again. She was a knowing purveyor of misery, all driven by nothing but greed. She failed in her duty as a pharmacist and failed in her duty as a human being.

(iii) Where Does this Leave Us with Collateral Circumstances?

[152] The appellant says that the sentence should be served in the community. The respondent says the 13 years already imposed is right. I am of the view that the correct answer is somewhere in between.

[153] I have no doubt that custody will be experienced by the appellant in a much more severe way than others. She is currently 44 years of age, still relatively young, but not according to the ages that some of her family members with this disease have died.

[154] I look to the sentence that the courier, Mr. Imerovik received. While he pled guilty, he received a six-year sentence. His work was critical to the trafficking operation. I also look to the sentence that Dr. George Otto received, the physician who wrote the fake prescriptions and also facilitated the entire scheme. He

2023 ONCA 440 (CanLII)

received a sentence of 12 years but absconded from Canada. He is yet to start serving his sentence.

2023 ONCA 440 (CanLII)

[155] I also look to the *Shaheen* sentence of 12 years, a case involving more aggravating factors than this one.

[156] Taking into account the extreme seriousness of the appellant's conduct, a conditional sentence or even a low penitentiary sentence is simply not available. Yet, there are strong collateral circumstances at work here, ones that I conclude should have an impact on sentence. I find that the appropriate sentence is one of eight years.

[157] To be clear, this sentence should not be taken as signalling any change in this court's approach to sentencing in cases such as these. The appellant needs to think very hard about how she will give back to the community from which she took so much when she emerges from what can only be described as a very light sentence.

D. CONCLUSION

[158] I would dismiss the conviction appeal. I would grant leave to appeal sentence, grant the sentence appeal and vary the sentence on the trafficking count to one of eight years and on the possession for the purpose of trafficking count to one of eight years concurrent. This sentence takes into account the minimal

amount of pre-sentence detention credit pursuant to *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575. All other orders remain undisturbed.

[159] It is obviously open to the appellant to seek early parole from the Parole Board of Canada, which has statutory authority pursuant to s. 121(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 to grant early parole if the inmate is suffering from exceptional circumstances. I trust these reasons will be of assistance to the Parole Board in the event that any such application is brought.

Released: June 20, 2023 JMF

"Fairburn A.C.J.O."
"I agree. A. Harvison Young J.A."
"I agree. L. Favreau J.A.

2023 ONCA 440 (CanLII)

Her Majesty the Queen v. Shahnawaz*

[Indexed as: R. v. Shahnawaz]

51 O.R. (3d) 29
[2000] O.J. No. 4151
Docket No. C33082

Court of Appeal for Ontario
Osborne A.C.J.O., Laskin and Charron JJ.A.
November 7, 2000

*Application for leave to appeal to the Supreme Court of Canada was dismissed without reasons April 19, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28265. S.C.C. Bulletin, 2001, p. 729.

Criminal law -- Sentencing -- Principles -- Psychological effect on accused -- Accused convicted of trafficking in heroin -- Accused having suffered years of torture and political imprisonment in Afghanistan -- Defence evidence demonstrating additional imprisonment would have very negative psychological effects on accused -- Trial judge finding usual range of sentence nine to 12 years' imprisonment but ordering conditional sentence in light of accused's psychological condition -- Trial judge erring in determining psychological condition key factor in sentencing in absence of evidence that psychological disabilities playing any role in crime -- Crown appeal allowed and sentence of six years' imprisonment imposed.

Criminal law -- Sentence -- Trafficking in heroin -- Accused convicted of trafficking in 650 grams of heroin -- Trial judge acknowledging that appropriate range of sentence for offences involving similar amounts of heroin being nine to 12 years' imprisonment -- Accused suffering from post-traumatic stress

2000 CanLII 16973 (ON CA)

disorder as result of political imprisonment and torture in Afghanistan -- Defence adducing psychiatric evidence that imprisonment would be particularly hard on accused -- Trial judge imposing conditional sentence of 17 months less a day followed by two years' probation -- Trial judge erring in considering treatment of accused's psychological condition as crucial factor in his rehabilitation in absence of any evidence that his psychological disabilities played any role in commission of offence -- Sentence varied on appeal to six years' imprisonment.

The accused was convicted of four counts of trafficking in a total of 650 grams of heroin with an estimated street value of $227,500. He spent seven months in pre-trial and post-conviction custody. The trial judge found that the accused's level of involvement in the trafficking scheme was very low. The accused had spent three years as a political prisoner in Afghanistan, during which time he was subjected to horrific torture. As a result, he suffered from post-traumatic stress disorder. His treating psychiatrist expressed the opinion that the accused's experience in pre-trial detention had reactivated and intensified the symptoms of his post-traumatic stress disorder and that his condition was not likely to improve as long as he was in detention. The trial judge concluded that incarceration was causing intense psychological suffering for the accused and that there were no prospects of rehabilitation as long as he remained in prison. She held that the appropriate range of sentence for offences involving similar amounts of heroin was nine to 12 years' imprisonment, but that this was an exceptional case requiring an exceptional sentence. She imposed a conditional sentence of 17 months less a day followed by two years' probation. The terms of the conditional sentence and the probation order included a requirement that the accused remain in his residence except for reporting or medical purposes and that he submit to electronic monitoring to enforce this restriction.

The Crown appealed. The Ministry of Correctional Services obtained leave to intervene on the appeal on the question of electronic monitoring. The Ministry argued that the trial judge erred in ordering that the accused submit to electronic

2000 CanLII 16973 (ON CA)

monitoring in the absence of evidence that the necessary resources were available in the community to provide for such surveillance. The Ministry took the position that electronic monitoring is not presently available to supervise conditional sentences in Ontario and sought leave to introduce fresh evidence to support its position.

Held, the appeal should be allowed.

Per Charron J.A. (Osborne A.C.J.O. concurring): The trial judge's conclusions about the accused's low level of involvement in the illicit drug trade were, for the most part, based on inferences drawn from an absence of evidence and were essentially speculative in nature. The evidence that was accepted by the trial judge did not reveal the accused's actual level of involvement in the illicit drug trade beyond showing that he knowingly and repeatedly trafficked in substantial amounts of heroin. It was not possible to determine on the record the actual level of his involvement in the drug trade with any degree of certainty.

The trial judge erred in considering the treatment of the accused's psychological condition as the crucial factor in his rehabilitation in the absence of any evidence that his psychological disabilities played any role in the commission of the offences. Rehabilitation as a goal of sentencing is not the restoration of an offender's physical and mental health but his reinstatement as a functioning and law-abiding member of the community. There was no connection in this case between the accused's post-traumatic stress disorder and his illegal drug activities. The conditional sentence should be set aside and a sentence of six years' imprisonment substituted.

In view of that conclusion, the issue raised by the Ministry on the appropriateness of imposing electronic monitoring as a term of the sentence was moot. The fresh evidence sought to be relied on by the Ministry could and should have been introduced at the sentencing hearing. The Ministry's motion to introduce fresh evidence was dismissed.

Per Laskin J.A. (dissenting): The sentence imposed by the

2000 CanLII 16973 (ON CA)

trial judge was not unreasonable and did not reflect an error in principle. It was entitled to deference.

The Crown's position on appeal supported a lenient sentence. The Crown recognized that compassion was called for because it sought incarceration only for the maximum reformatory term of two years less a day. Nothing justified increasing the length of the sentence asked for by the Crown, let alone tripling it.

The accused had already served over two-thirds of his conditional sentence. In light of the significant punishment he had already received, incarcerating him now would not be in the interests of justice.

Cases referred to

Leger v. R. (1979), 10 C.R. (3d) S-25 (Que. C.A.); R. v. C. (D.W.), [2000] O.J. No. 3759 (C.A.); R. v. Fireman, [1971] 3 O.R. 380, 4 C.C.C. (2d) 82 (C.A.); R. v. M. (C.A.), [1996] 1 S.C.R. 500, 194 N.R. 321, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269; R. v. McDonnell, [1997] 1 S.C.R. 948, 49 Alta. L.R. (3d) 111, 145 D.L.R. (4th) 577, 210 N.R. 241, 43 C.R.R. (2d) 189, 114 C.C.C. (3d) 436, 6 C.R. (5th) 231; R. v. McKnight (1999), 44 O.R. (3d) 263, 135 C.C.C. (3d) 41 (C.A.); R. v. Messervey (No. 2) (1991), 96 Nfld. & P.E.I.R. 314, 305 A.P.R. 314 (Nfld. Prov. Ct.); R. v. Moncini (1975), 23 C.C.C. (2d) 452, [1975] 4 W.W.R. 509 (B.C.C.A.); R. v. Proulx (2000), 142 Man. R. (2d) 161, 182 D.L.R. (4th) 1, 249 N.R. 201, 212 W.A.C. 161, [2000] 4 W.W.R. 21, 140 C.C.C. (3d) 449, 49 M.V.R. (3d) 163, 30 C.R. (5th) 1 (S.C.C.) (sub nom. R. v. P. (J.K.D.)); R. v. R. (A.) (1994), 92 Man. R. (2d) 183, 61 W.A.C. 183, 88 C.C (3d) 184 (C.A.); R. v. Shaw, [2000] O.J. No. 2646 (S.C.J.); R. v. Shropshire, [1995] 4 S.C.R. 227, 129 D.L.R. (4th) 657, 188 N.R. 284, 102 C.C.C. (3d) 193, 43 C.R. (4th) 269; R. v. Stone, [1999] 2 S.C.R. 290, 173 D.L.R. (4th) 66, 239 N.R. 201, 63 C.R.R. (2d) 43, 134 C.C.C. (3d) 353, 24 C.R. (5th) 1; R. v. W. (A.G.), [2000] O.J. No. 398 (C.A.); R. v. Wallace (1973), 11 C.C.C. (2d) 95 (Ont. C.A.); R. v. Wellington (1999), 43 O.R. (3d) 534, 132 C.C.C. (3d) 470, 23 C.R. (5th) 234 (C.A.)

2000 CanLII 16973 (ON CA)

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 676(1)(d), 687, 742.4

Authorities referred to

Martin, Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (Toronto: Queen's Printer, 1993), pp. 327-34

APPEAL by the Crown from sentence for trafficking in heroin.

Beverly Wilton, for appellant.
P. Andras Schreck, for respondent.
Brian Whitehead and Lisa C. Ofiara, for intervenor, Ministry of Correctional Services.

[1] CHARRON J.A. (OSBORNE A.C.J.O. concurring): -- This is a Crown appeal against sentence. Following his trial by judge and jury, the respondent Abdul Momen Shahnawaz was convicted of four counts of trafficking in heroin. The quantity of heroin sold by Shahnawaz was 650 grams (a pound and a half) with an estimated street value of $350 per gram for a total of $227,500. At trial, the judge agreed with Crown counsel that, based on case law involving similar amounts of heroin, the appropriate range of sentence in this case would be nine to 12 years' imprisonment. However, the trial judge found this to be an exceptional case requiring an exceptional sentence, and imposed a conditional sentence of 17 months less a day with two years' probation in addition to the seven months of pre-trial and post-conviction custody Mr. Shahnawaz had already served. The Crown seeks leave to appeal the sentence, arguing that the trial judge placed too much emphasis on Mr. Shahnawaz's personal circumstances an d imposed a sentence that is manifestly unfit.

2000 CanLII 16973 (ON CA)

[2] Counsel for Mr. Shahnawaz does not dispute the trial judge's finding that the appropriate range of sentence for like offences is nine to 12 years' imprisonment, but submits that it was within the trial judge's discretion to conclude that this case was deserving of an exceptional sentence. Counsel submits that the trial judge's conclusion was based on two critical factual findings which were amply supported by the evidence. First, the trial judge found that Mr. Shahnawaz's level of involvement in the trafficking scheme was very low. She found it unlikely that he owned the drugs or that he was paid for his involvement. Rather, she concluded that it was more likely that he had been the pawn of higher level and unscrupulous drug dealers. Second, the trial judge found that imprisonment would cause intense psychological suffering to Mr. Shahnawaz.

[3] The terms of the conditional sentence and of the probation order included a requirement that Mr. Shahnawaz remain in his residence except for reporting or medical purposes and that he submit to electronic monitoring to enforce this restriction. The Ministry of Correctional Services ("the Ministry") sought and obtained leave to intervene on this appeal on the question of electronic monitoring only. The Ministry argues that the trial judge erred in ordering that Mr. Shahnawaz submit to electronic monitoring in the absence of evidence that the necessary resources were available in the community to provide for such surveillance. The Ministry takes the position that electronic monitoring is not presently available to supervise conditional sentences in Ontario and seeks leave to introduce fresh evidence to support its position.

[4] Counsel for Mr. Shahnawaz submits that the Ministry should not be allowed to introduce fresh evidence on this appeal because it failed to bring an application before the sentencing judge under s. 742.4 of the Criminal Code, R.S.C. 1985, c. C-46, for a change of conditions. The respondent argues that this latter course of action was not only open to the Ministry, it was anticipated by the sentencing judge as evidenced by her reasons for sentence. The respondent argues further that, even if this court were to receive the proposed

2000 CanLII 16973 (ON CA)

fresh evidence, the Crown should not be permitted to rely on it in support of its appeal against the imposition of a conditional sentence because Crown counsel at trial could have introduced this kind of evidence on the sentence hearing but failed to do so. Counsel submits that it would be unfair for the Crown to rely on this evidence at this late stage of the proceedings.

[5] Crown counsel takes no position with respect to the Ministry's motion and does not rely on the proposed fresh evidence in support of the appeal.

[6] I would allow the appeal. It is my view that the sentence is manifestly unfit. The trial judge correctly stated that the appropriate range of sentence for offences involving similar amounts of heroin was nine to 12 years' imprisonment. While Mr. Shahnawaz's personal circumstances could properly be taken into account in reducing the sentence, the trial judge placed too much emphasis on this factor. In my view, there was no justification for the imposition of a sentence other than a penitentiary term. Consequently, a conditional sentence was not an available sentencing option.

[7] In view of this conclusion, the issue raised by the Ministry on the appropriateness of imposing electronic monitoring as a term of the sentence is moot. Although it would still be open to this court to consider the issue, I do not think that this is an appropriate case to do so. The trial court is the better forum to determine factual issues. The issue raised before this court for the first time on appeal could have been brought before the trial judge in either of two ways. The fresh evidence sought to be relied upon by the Ministry could and should have been introduced at the sentencing hearing. The trial judge specifically asked Crown counsel at trial whether electronic monitoring was a viable option but received no assistance on this inquiry. She therefore relied on the limited information available to defence counsel. Alternatively, if indeed the electronic monitoring was an unworkable condition due to a lack of resources, an application for a change of conditions could have been brought before the sentencing judge after the

2000 CanLII 16973 (ON CA)

sentencing under s. 742.4. As counsel for the respondent noted, this course of action was even anticipated by the trial judge. On such application, any request for a change of conditions could have been fully canvassed by the trial court and a proper determination made on the availability of community resources.

2000 CanLII 16973 (ON CA)

[8] I would therefore dismiss the Ministry's motion to introduce fresh evidence. I would grant leave to appeal, allow the appeal, set aside the sentence and, for the reasons that follow, substitute the sentence with a term of six years' imprisonment.

The Offences

[9] The facts of the offences are simple. They are succinctly set out by the trial judge as follows [at para. 7]:

> It is clear from the jury verdict that Mr. Shahnawaz trafficked in heroin on four separate occasions: February 13, February 20, March 9 and March 25, 1997. On the first date, the undercover agent received only a sample amount of heroin and no money was paid. On February 20, the police provided their agent with $7,000.00 and the agent obtained 100 grams of heroin from Mr. Shahnawaz. On March 9, the police provided $3,500 and the agent obtained 50 grams of heroin. March 25th was arranged ahead of time to be the "take down" date at which Mr. Shahnawaz was to be arrested. The agent, acting on instructions from the police, arranged to purchase 500 grams of heroin at a price of $70.00 per gram. Because an arrest was to be made on this date, the police did not provide any "buy money". On March 25th, Mr. Shahnawaz gave the agent a package containing 500 grams of heroin and was immediately arrested. The total amount of heroin involved was approximately 650 grams. At an estimated street value of $350.00 per gram, this is a substantial amount of heroin.

[10] It is also noteworthy that, on two occasions, Mr. Shahnawaz attended a pre-arranged drug transaction in the company of his young children. On February 13, Mr. Shahnawaz's

five-year-old son was in the back seat of the car in which he met with the police agent. On March 25, Mr. Shahnawaz placed the package with the 500 grams of heroin underneath his baby in the carriage and took both his children with him to meet with the police agent.

[11] Mr. Shahnawaz's defence at trial was that he acted under duress. Mr. Shahnawaz acknowledged that he supplied the drugs to the person who, unbeknownst to him, was the police agent, but that he did so because this person had made death threats against him, his wife and his children.

[12] In addition to his own testimony, Mr. Shahnawaz called Dr. Payne in support of his defence. Dr. Payne is a psychiatrist who treated Mr. Shahnawaz regularly from 1992 to the time of trial. Dr. Payne's main diagnosis was that Mr. Shahnawaz suffered from a condition, known as post-traumatic stress disorder, resulting from the torture inflicted on him when he was a political prisoner in Afghanistan some years earlier. Dr. Payne described the typical symptoms of post-traumatic stress disorder as a tendency to relive the traumatic experience with resulting anxiety, depression, fearfulness and irritability. The main thrust of his testimony, as it related to the defence of duress, was that Mr. Shahnawaz was a person of low average intelligence who had limited inner resources and difficulty coping with stress. It was Dr. Payne's opinion that Mr. Shahnawaz, if faced with a problem, would be more likely to give in to external pressure and opt for the quick solution rather than think through the various options open to him.

[13] It is not necessary for the purpose of this appeal to describe in any detail the testimony offered by Mr. Shahnawaz in his defence. It is obvious from the verdict that his explanation was rejected by the jury.

[14] The trial judge correctly noted that the extent of an accused's moral culpability is a relevant factor in sentencing. Of course, the precise findings of fact made by the jury which led to the rejection of the defence are not known. As the trial judge noted, the defence could have been

2000 CanLII 16973 (ON CA)

rejected because the jury did not believe that threats were made or, alternatively, they accepted that threats were made but rejected the defence because Mr. Shahnawaz had other avenues of escape. In the latter case, Mr. Shahnawaz's moral culpability would be less than if he engaged in the illicit drug trade voluntarily. In order to assess the degree of Mr. Shahnawaz's involvement, the trial judge made an extensive review of the evidence relating to duress and made her own findings of fact.

[15] The trial judge concluded that she did not believe Mr. Shahnawaz's explanation of the events. She noted that, in many respects, the explanation given by Mr. Shahnawaz simply defied logic. Further, his conduct at the time of the four drug transactions was inconsistent with his allegation of duress. The trial judge noted [at para. 14] that there was "a striking contrast between Mr. Shahnawaz's casual, easygoing appearance in the videotape of the February 20th drug deal and his nervous, agitated demeanour in the courtroom and his doctor's description of how he handled stress." The trial judge also found it surprising that Mr. Shahnawaz did not make any appointments with Dr. Payne for all of February and March 1997. Given the relationship of trust between Mr. Shahnawaz and Dr. Payne, one would reasonably expect that he would have sought his assistance if he had been under the stress that he described. Finally, the trial judge noted that she thought it was "inconceivable" that Mr. Shahnawaz, a devoted father would have brought his children on two of the drug transactions as he did if indeed, as he alleged, the police agent had threatened to kill the children. The trial judge concluded as follows [at para. 17]:

> Accordingly, I am satisfied beyond a reasonable doubt that Mr. Shahnawaz was not under any duress from Mr. Shah. I do not believe that Mr. Shah made any threats. Mr. Shahnawaz fabricated this evidence to avoid telling the truth about why he was dealing in heroin.

[16] The trial judge nonetheless concluded that it was unlikely that Mr. Shahnawaz was involved at a high level in the illicit drug trade. She stated as follows [at para. 18]:

2000 CanLII 16973 (ON CA)

The only thing that suggests he might be involved at a high level is the quantity of heroin involved. However, all of the rest of the evidence supports the proposition that Mr. Shahnawaz was likely no more than a dupe or a pawn in the hands of unscrupulous high-level dealers. Based on my own impressions of Mr. Shahnawaz at trial and the expert evidence before me, I doubt that Mr. Shahnawaz possesses the cognitive skills necessary to function as a high-level drug dealer. The police did a thorough search of his home at the time of his arrest and found no evidence of drug dealing. There were no drugs, no packaging materials and no drug paraphernalia. Mr. Shahnawaz does not have a pager or a cell phone and there was no evidence of any unusual activity on his personal telephone line. He has an extremely modest life style, in keeping with his welfare income. He has virtually no assets. Because of the story fabricated by Mr. Shahnawaz to explain his involvement in these drug deals, I am unable to determine the true facts of his involvement. However, based on the whole of the evidence, I cannot be satisfied that he was the owner of the drugs involved, that he received any compensation for his role in these offences, or that he was actively involved in the illicit drug trade other than at the lowest levels. On the contrary, I find that it is more likely than not that the reverse was true; i.e. that Mr. Shahnawaz was delivering the drugs at the behest of persons unknown, that he received no payment and that his involvement in the drug trade was simply as a delivery person. However, I am satisfied beyond a reasonable doubt that Mr. Shahnawaz knew that the substance he was delivering was an illegal drug. His own evidence confirms that he had that knowledge.

[17] The Crown does not dispute the trial judge's findings of fact on this appeal and an appellate court owes deference to those findings. However, it is my view that the trial judge's conclusions on Mr. Shahnawaz's low level of involvement in the illicit drug trade are, for the most part, based on inferences drawn from an absence of evidence and essentially speculative in nature. Her conclusions are also somewhat at odds with her finding that, given Mr. Shahnawaz's

2000 CanLII 16973 (ON CA)

fabricated testimony, she was "unable to determine the true facts of his involvement." In my view, the latter statement accords more with the evidence in this case. The evidence that was accepted by the trial judge does not reveal Mr. Shahnawaz's actual level of involvement in the illicit drug trade beyond showing that he knowingly and repeatedly trafficked in substantial amounts of heroin. It is not possible to determine on this record the actual level of his involvement in the drug trade with any degree of certainty. We also do not know precisely why he was involved in drug trafficking. There is no suggestion that he is an addict or even a user. The evidence only shows that he received money in exchange for the drugs from the purchaser.

[18] The Crown argued at trial that Mr. Shahnawaz's involvement of his children in two of the four transactions constituted an aggravating factor. The trial judge agreed that Mr. Shahnawaz put his children in harm's way and that in doing so he showed flagrant disregard for their well-being. She noted, however, Mr. Shahnawaz's extraordinary attachment to his children and found that the discrepancy between his love for his children and his conduct could only be explained by his poor cognitive skills and coping mechanisms as described by Dr. Payne. She therefore concluded that while this fact still gave her cause for concern in fashioning an appropriate sentence, she did "not consider it to be an aggravating factor that would increase the length of the appropriate sentence."

[19] The Crown argues that the trial judge erred in effectively dismissing this behaviour as mere carelessness on Mr. Shahnawaz's part and submits that his decision to involve his children in the commission of these offences is an important aggravating factor to be considered in sentencing.

[20] I disagree with the Crown's characterization of the trial judge's decision on this point. The trial judge did not view this conduct as mere carelessness. She described it as "a flagrant disregard for [the children's] well being." She also recognized that this factor was an aggravating circumstance but, in light of Mr. Shahnawaz's personal psychological profile, she concluded that this behaviour should not result

2000 CanLII 16973 (ON CA)

in an increase of what would otherwise be an appropriate sentence. I do not consider it necessary or useful to consider this factor in isolation. In my view, the trial judge's approach to this issue simply exemplifies the overemphasis that she placed on the offender's personal circumstances. I therefore turn to consider this evidence. The Offender

[21] The trial judge summarized the circumstances of the offender as follows [at paras. 4-6]:

> Abdul Momen Shahnawaz was 34 years old at the time of trial. He is married and the father of four young children. Mr. Shahnawaz was born and grew up in Afghanistan. When he was only 17 years old he was arrested by the Russian authorities for political reasons and held without trial. Apparently, the authorities believed that Mr. Shahnawaz had information as to the whereabouts of his older brother who was a rebel fighter with the Mujahadeen. Mr. Shahnawaz was imprisoned in Afghanistan for a period of three years during the course of which he was subjected to horrific and repeated torture. He was later transferred to an army barracks from which he managed to escape, making his way out of Afghanistan, through Pakistan and into India. He met and married his wife in India and the first two of their children were born there. The family immigrated to Canada in 1991 and was granted refugee status.
>
> Mr. Shahnawaz has been diagnosed as suffering from post-traumatic stress disorder and has been receiving psychiatric care since arriving in Canada. His treating psychiatrist, Dr. Donald Payne, testified at trial and also at the sentencing hearing. Dr. Payne has considerable experience treating patients who have been victims of torture. He testified that in addition to post-traumatic stress, Mr. Shahnawaz suffers from chronic depression and anxiety, has limited cognitive skills and has limited inner resources to deal with stressful things. He also has physical ailments such as a stomach disorder, muscle pain and headaches; although, Dr. Payne was of the view that some of these symptoms may be a manifestation of psychological tension. Dr. Payne testified at trial that of the

2000 CanLII 16973 (ON CA)

approximately 1400 torture victims he has treated, Mr. Shahnawaz would be in the lowest 2% in terms of his level of functioning. In Dr. Payne's opinion, Mr. Shahnawaz is completely unable to work as a result of his psychiatric disability. The sole income for the Shahnawaz family is from public assistance.

Mr. Shahnawaz has one prior conviction for theft that arose from a shoplifting incident in 1991. The goods stolen were not of significant value. Mr. Shahnawaz was given a conditional discharge. Because of the time that has passed, the nature and circumstances of the 1991 offence and its dissimilarity from the charges in this case, I consider it appropriate to treat Mr. Shahnawaz much the same as a first time offender.

[22] The record does not provide much detail on the mistreatment received by Mr. Shahnawaz at the hands of the Russian authorities in Afghanistan but both Mr. Shahnawaz in his testimony and Dr. Payne, in relating the information received from his patient, are consistent in saying that Mr. Shahnawaz was repeatedly beaten and tortured during the first five months of his detention before he was transferred to another jail in Afghanistan. It is the effect that this abuse has had on Mr. Shahnawaz coupled with the fact of imprisonment following his conviction which became of particular concern to the trial judge on sentencing.

[23] After the jury returned the guilty verdict, the trial judge revoked Mr. Shahnawaz's bail pending sentence. He therefore went into custody on June 2, 1999. There followed five brief court appearances on June 10, June 17, September 8, September 23 and September 30 before the sentencing ultimately proceeded on October 4, 1999. The trial judge noted in her reasons for sentence that she was "shocked by the deterioration in [Mr. Shahnawaz's] appearance over time." She stated [at para. 22]:

He appeared to me to be very fearful, submissive in the extreme (almost cowering), unable to make eye contact, withdrawn and visibly trembling.

2000 CanLII 16973 (ON CA)

[24] In addition to her own observations, the trial judge heard evidence from two psychiatrists called by the defence, Dr. Payne and Dr. Helen Meier. As indicated earlier, Dr. Payne, a psychiatrist, was Mr. Shahnawaz's regular physician. Dr. Meier was a psychiatrist with expertise in post-traumatic stress syndrome who saw Mr. Shahnawaz in jail on June 30 and on September 20, 1999. Both psychiatrists also prepared written reports which set out the essence of their testimony at the sentence hearing.

[25] Dr. Payne treated Mr. Shahnawaz for a number of years. He saw him a total of 33 times from 1992 to the time of trial. He then interviewed Mr. Shahnawaz in jail on September 18, 1999 for about 50 minutes for the purpose of updating earlier reports before the sentence hearing. Dr. Payne noted that, on examination, Mr. Shahnawaz appeared very tense and more emotionally distressed than he had been whenever he had seen him previously. He was very pleased in seeing Dr. Payne and being able to talk to him. He was very emotional in showing this. Mr. Shahnawaz reported that he had been much more emotionally distressed since his present incarceration. He reported recurrent nightmares of something bad happening to his children and of being back in jail in Afghanistan. He reported feeling emotionally distressed in the same way that he felt when in detention in Afghanistan. He related feelings of fearfulness, depression and shame that his children know that he is in detention. He reported increased physical symptoms of tension including severe headaches, shaking, increased smoking, poor appetite and recurrent severe chest pains for which he was presently being held on the medical unit. He stated that he kept to himself and that he was constantly thinking and brooding about his situation. He would talk to himself and found that his only way of receiving comfort was through prayer.

[26] Dr. Payne saw no evidence of any thought disorder (hallucinations or delusions), no evidence of any aggressive thinking or behaviour, and found him correctly orientated as to time and place. He expressed the opinion that Mr. Shahnawaz's experience in detention had reactivated and

2000 CanLII 16973 (ON CA)

intensified the symptoms of his post-traumatic stress disorder and that his condition would not likely improve as long as he was in detention. Dr. Payne concluded his report with the opinion that Mr. Shahnawaz represented no significant risk to himself or others if he were in the community. It was his view that his marked upset over his current detention would act as a very strong deterrent to any further illegal activity.

[27] Dr. Meier saw Mr. Shahnawaz in jail for the specific purpose of assessing the effect of incarceration on his psychiatric condition. She interviewed him twice, on June 24, 1999 and on September 18, 1999, with the benefit of Farsi interpretation. Dr. Meier obtained the historical information from Mr. Shahnawaz on his imprisonment in Afghanistan and his subsequent symptoms over the years. The information she received was consistent with Dr. Payne's testimony. Dr. Meier also received from Mr. Shahnawaz a description of his increased symptoms since his incarceration. In her first report, Dr. Meier concluded that Mr. Shahnawaz suffered from an exacerbation of the post-traumatic stress disorder and that continued incarceration without the appropriate treatment would probably lead to an increasing intensity of his condition. She concluded her updated report by stating [at para. 25]:

> Continued incarceration will probably lead to increased intensity of the Post-Traumatic Stress Disorder and severity of depression. Even with specific treatment, including counselling and medication, continued incarceration represents contemporary trauma and re-traumatization for Mr. Shahnawaz.

[28] The trial judge observed [at para. 26] that, based on the evidence before her, "it would seem more likely that after a lengthy penitentiary term Mr. Shahnawaz will be even more dysfunctional and unable to cope with the stresses of every day life, than he was before he went to prison." She also noted that there was no evidence of any treatment programs which might be available in the penitentiary system. She concluded as follows [at para. 27]:

2000 CanLII 16973 (ON CA)

Based on the evidence before me, I find that incarceration was causing intense psychological suffering for Mr. Shahnawaz. As long as Mr. Shahnawaz remained in prison, there were no prospects of rehabilitation. Further, prolonged incarceration would make eventual rehabilitation upon release more unlikely, and perhaps impossible.

[29] The trial judge went on to state [at para. 28] that "judicial clemency is frequently exercised in cases where an accused would be particularly affected by imprisonment because of physical or mental disabilities." She noted that "it is also recognized that in such cases, less weight need be given to the principle of general deterrence." She cited Leger v. R. (1979), 10 C.R. (3d) S-25 (Que. C.A.) and R. v. Messervey (No. 2) (1991), 96 Nfld. & P.E.I.R. 314, 305 A.P.R. 314 (Nfld. Prov. Ct.). She also quoted from R. v. Wallace (1973), 11 C.C.C. (2d) 95 (Ont. C.A.). The trial judge noted that Mr. Shahnawaz's case was different from the situation in Wallace because there was "no clear evidence" that Mr. Shahnawaz's disabilities played any role in the commission of the offences, but she nonetheless drew several parallels between the two cases with respect to the effect of imprisonment on the offender's condition.

[30] In my view, the trial judge erred in considering the treatment of Mr. Shahnawaz's psychological condition as the crucial factor in his rehabilitation in the absence of any evidence that his psychological disabilities played any role in the commission of the offences. Rehabilitation as a goal of sentencing is not the restoration of an offender's physical and mental health but his reinstatement as a functioning and law- abiding member of the community. It is in this sense that rehabilitation of the offender serves to protect society. Although the trial judge noted this distinction between Mr. Shahnawaz's case and Wallace, it is my view that she failed to appreciate its significance.

[31] In Wallace, there was clear evidence that the offender's psychiatric condition, paranoid schizophrenia, played a major role in the commission of the offences of robbery and assault. Hence Mr. Wallace's rehabilitation as a

2000 CanLII 16973 (ON CA)

functioning and law- abiding citizen was directly linked to the treatment of his condition. There was also evidence that prolonged detention prevented the necessary treatment. In these circumstances, the court concluded that the total sentence of 10 years should be reduced to four years. The court stated as follows [at p. 100]:

> If the primary object of the criminal law is the protection of society, how apt is this sentence? Perhaps such a sentence as this one offers immediate protection to society but clearly it does little to protect it for the future. The best future protection for society lies in imposing a sentence which will make the appellant's rehabilitation probable through the provision of medical treatment that can be made available to him. It seems then that if a moderate term of imprisonment had been imposed, the medical treatment which he needed would have been available during such term and the sentence must be altered so that we can accomplish his cure and protect the community.

[32] In this case, there is no connection between Mr. Shahnawaz's post-traumatic stress disorder and his illegal drug activities. The situation would be otherwise, of course, if, for example, Mr. Shahnawaz's involvement in the offence was due to an addiction to heroin. In such a case, the treatment of the addiction would have a direct bearing on his rehabilitation and its availability could indeed become the focal point of sentencing.

[33] The other two cases cited by the trial judge also present very different situations. In Leger, there was evidence that the dangerousness of the offender, who was convicted of arson, resulted from his illness. In Messervey, the accused was convicted of dangerous driving causing death. There was evidence that Mr. Messervey, who was mentally deficient, did not understand that his driving was dangerous. Hence, in both these cases, the offender's psychiatric or psychological condition had a direct bearing on the degree of his moral culpability. In this case, the only relationship between Mr. Shahnawaz's psychological condition and the commission of the offence was raised in relation to the

2000 CanLII 16973 (ON CA)

defence of duress. Given the trial judge's finding that this version of events was totally fabricated, Mr. Shahnawaz's post-traumatic stress disorder becomes irrelevant to the assessment of his moral culpability.

[34] What we are left with as a relevant factor for consideration is the evidence, accepted by the trial judge, that imprisonment had and would probably continue to have an "extreme effect" on Mr. Shahnawaz. Given this fact, it becomes necessary to adjust the sentence imposed on this particular offender so as to ensure that it does not become disproportionate to his crime. The court must not lose sight of the fact, however, that it is difficult to predict Mr. Shahnawaz's future condition and that the state of any prisoner's health while in custody is largely a matter for the correctional authorities. It is my view that, taking all the circumstances into account, including the seven months spent in custody awaiting sentence and the time served on the conditional sentence, a fit sentence would have been one of six years.

[35] I would therefore grant leave to appeal sentence, allow the appeal, set aside the conditional sentence order and the order for probation and substitute a term of six years' imprisonment. The appellant is ordered to surrender into custody forthwith, failing which a warrant for his arrest shall issue.

[36] LASKIN J.A. (dissenting): -- I have read the decision of my colleague Charron J.A. I agree with her reasons on the issue of electronic monitoring that was raised by the intervenor, the provincial Crown. But I do not agree with her on the federal Crown's sentence appeal. I would dismiss the appeal.

[37] Mr. Shahnawaz was imprisoned in Afghanistan for three years, though he committed no crime. While detained, he was repeatedly tortured and beaten, and he has suffered profoundly because of it. The psychiatric evidence shows that because of what he experienced, incarceration would be a far more severe punishment for Mr. Shahnawaz than for a normal person. The

2000 CanLII 16973 (ON CA)

trial judge, Molloy J., recognized that this was an exceptional case, a case that called for compassion and leniency and that warranted a significant reduction from the usual range for heroin trafficking. She therefore imposed a conditional sentence of two years less a day (minus credit for time served in custody). She attached strict conditions to this sentence, which included house arrest.

[38] I would not interfere with this sentence for three reasons:

(1) The sentence is entitled to deference. The sentence Molloy J. imposed is not unreasonable and does not reflect an error in principle. Therefore this court is not justified in interfering with it.

(2) The Crown's position on appeal supports a lenient sentence. The Crown, too, recognized that compassion was called for because it sought incarceration only for the maximum reformatory term, two years less a day. Nothing justifies this court increasing the length of the sentence asked for by the Crown, let alone tripling it as my colleague proposes.

(3) The sentence has been mostly served. Mr. Shahnawaz has already served over two-thirds of his conditional sentence. In the light of the significant punishment he has already received, incarcerating him now would not be in the interests of justice.

A. Background

[39] Unquestionably, Mr. Shahnawaz was convicted of very serious drug offences. After a trial before a judge and jury, he was found guilty of four counts of trafficking in heroin. The four incidents of trafficking, all to a police agent, took place between February 13 and March 25, 1997. The amount of heroin trafficked was about 11/2 lbs., with an estimated street value of $227,500.

[40] At the time of his trial, Mr. Shahnawaz was 33 years

2000 CanLII 16973 (ON CA)

old. He had previously been convicted of one minor criminal offence for which he received a conditional discharge, and the trial judge fairly treated him as a first offender.

[41] Molloy J. imposed a conditional sentence of two years less a day and properly gave Mr. Shahnawaz credit equivalent to seven months for time already spent in custody. Thus, he was required to serve a conditional sentence of 17 months less a day. And the trial judge imposed strict, indeed onerous, conditions, which included:

- house arrest: Mr. Shahnawaz must reside with his family and not leave the house save for reporting to his supervisor, obtaining psychiatric treatment or an emergency;

- electronic monitoring to enforce the house arrest;

- weekly reporting to his supervisor;

- attending at the Clarke Institute for a psychiatric assessment, and then obtaining regular psychiatric treatment; and

- the monitoring of the welfare of his children by the Children's Aid Society.

[42] After serving the conditional sentence, Mr. Shahnawaz must be on probation for two years on the same conditions, except that during the last year of probation he may leave the house for any purpose directed towards rehabilitation recommended by his psychiatrist.

[43] I turn now to my reasons for dismissing this appeal.

B. Discussion

1. The sentence imposed by the trial judge is entitled to deference

[44] Deference to the sentencing judge's discretion is now a

2000 CanLII 16973 (ON CA)

well-established principle of appellate review. An appellate court may justifiably interfere with the sentence imposed by a trial judge only if the sentence is unreasonable or reflects an error in principle.

[45] Several aspects of this principle of appellate deference are relevant to the discretion exercised by Molloy J. The first relevant aspect arises from one of the main rationales for deference: the highly subjective nature of sentencing and the trial judge's comparative advantage in determining a fit sentence. Iacobucci J. explained in R. v. Shropshire, [1995] 4 S.C.R. 227 at p. 249, 102 C.C.C. (3d) 193 at p. 210 that "the formulation of a sentencing order is a profoundly subjective process." Similarly, in R. v. M. (C.A.), [1996] 1 S.C.R. 500 at p. 567, 194 N.R. 321, Chief Justice Lamer observed that "[s]entencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction."

[46] In the search for an appropriate sentence, the sentencing judge has an important advantage over the Court of Appeal. In M. (C.A.), Lamer C.J.C. discussed the sentencing judge's comparative advantage at some length at pp. 565-66 S.C.R.:

> This deferential standard of review has profound functional justifications. As Iacobucci J. explained in Shropshire, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the

2000 CanLII 16973 (ON CA)

offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[47] The sentencing judge's comparative advantage is especially relevant in this case. Molloy J. had an opportunity to assess Mr. Shahnawaz over many days of trial and to observe how he had deteriorated after having been incarcerated. I will discuss this deterioration later in these reasons.

[48] The second relevant aspect of the principle of appellate deference relates to the sentencing judge's decision to depart from a customary range. Appellate courts serve the important role of minimizing the disparity among sentences for similar offenders and similar offences, and in doing so, give guidance to sentencing judges. Appellate courts perform this role by establishing ranges of sentences "customarily imposed for similar offenders committing similar offences." See M. (C.A.), at p. 567.

[49] However, cases will arise where the sentencing judge justifiably decides to depart from a customary range and that decision, too, is entitled to deference on appeal. Such deference finds support in two recent Supreme Court of Canada judgments: R. v. McDonnell, [1997] 1 S.C.R. 948, 114 C.C.C. (3d) 436 and R. v. Stone, [1999] 2 S.C.R. 290, 134 C.C.C. (3d) 353. In McDonnell, the Alberta Court of Appeal interfered with

2000 CanLII 16973 (ON CA)

the sentence imposed by the trial judge because it departed from the "starting point" that the appellate court had established for similar offences. In restoring the sentence imposed by the trial judge, Sopinka J. for a majority of the court wrote at p. 450 C.C.C. [pp. 969-70 S.C.R.]:

> . . . the sentencing judge took into account all relevant mitigating and aggravating circumstances and arrived at what she considered was an appropriate sentence. Accordingly, the sentence's departure from the Court of Appeal's view of the appropriate starting-point does not in itself imply that the sentence was demonstrably unfit.

Similarly, in Stone, Bastarache J., writing for the court on this point, held at p. 450 C.C.C. [p. 411 S.C.R.]:

> One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders . . . In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing . . .

[50] The third relevant aspect of the defence principle is that it applies not just to the sentencing judge's determination of a fit length of sentence but also to the judge's determination of where that sentence ought to be served, in jail or in the community. The sentencing judge's decision on both these matters is entitled to deference on appeal.

[51] I now consider Molloy J.'s reasons. Whatever one's view of the appropriate sentence in this case, her reasons are admirable for their thoroughness, their thoughtfulness and, in my view, their analysis. She took into account all the relevant sentencing principles. She recognized and accepted the Crown's submission that the customary range for the amount of heroin trafficked in this case was nine to 12 years. As I read her reasons, three considerations prompted her to impose

2000 CanLII 16973 (ON CA)

a conditional sentence: the impact of incarceration on Mr. Shahnawaz, his degree of moral culpability for the offences, and his prospects of rehabilitation were he to be incarcerated. In my view, these three considerations, taken together, reasonably supported a conditional sentence.

2000 CanLII 16973 (ON CA)

[52] On the first consideration, the trial judge found as facts [at para. 29] that "as a result of Mr. Shahnawaz's history and psychiatric disability, the experience of imprisonment was more painful for him than it would be for most people" and that his incarceration after his bail was revoked caused him "intense psychological suffering". The evidence overwhelmingly supports these findings. I will briefly review some of this evidence.

[53] Mr. Shahnawaz was born in Afghanistan and has a grade nine education. When he was a teenager, Soviet troops occupied Afghanistan. One of his brothers was killed by a bomb during the fighting. Another brother joined a resistance movement known as the Mujahadeen. Although Mr. Shahnawaz was not involved in politics, pro-Russian Afghani authorities arrested him in an attempt to find his brother. He was but 17 years old at the time.

[54] After his capture, Mr. Shahnawaz was subjected to treatment condemned by every free and democratic society in the world. He was blindfolded and taken to a detention centre known as the Khad, where he was held without trial. He was detained at the Khad for five months. Almost every day he was taken to a room where he was "interrogated". These "interrogations" lasted three to four hours, during which Mr. Shahnawaz was tortured. He was hit with a bayonet, causing him permanent scarring. He was strangled, causing him to lose sight in one of his eyes. He was beaten on the head and subjected to electric shocks. At times, he was suspended upside down. One time, he overheard two fellow prisoners in a nearby cell being shot to death. Their bodies were dragged past his cell. After five months in the Khad, Mr. Shahnawaz was transferred to another jail. There he was held for another 21/2 years. The beatings continued, though not as often.

[55] When he was finally released, Mr. Shahnawaz was sent to join the army, forced to live in a barracks and trained to use a rifle. He eventually escaped from the barracks and made his way home. He had not seen his family for three years.

[56] Mr. Shahnawaz then left Afghanistan and went to India, where he lived from 1983 to 1991. In India, he met and married his wife. In 1991, they moved to Canada. They now have four children.

[57] Mr. Shahnawaz was profoundly psychologically damaged by his experiences in Afghanistan. Since 1992, he has been seeing a psychiatrist, Dr. Payne, who has devoted much of his practice to treating victims of torture. Dr. Payne diagnosed Mr. Shahnawaz as suffering from post-traumatic stress disorder, chronic depression and a personality disorder that gives him difficulty with impulse control. In his evidence, Dr. Payne described post-traumatic stress disorder:

> Post-traumatic stress disorder is a disorder that came into the diagnostic nomenclature in the early 1980s after there were studies done on Vietnam war veterans that had characteristic problems after that.
>
> And it was noted that these problems occurred in other circumstances as well, usually where people are exposed to a very stressful psychological event which is outside the range of usual human experience and where they have a lot of fear associated with that, usually a fear that they could be killed and where they are in a situation where they sort of feel hopeless and helpless to do anything about it.
>
> . . . . .
>
> Typical symptoms that people have are the re-living of their experience. This can come at night, during bad dreams or nightmares, or during the day by some intrusive memories coming in. They don't really want to think about it, but they can't stop thinking about it.
>
> They usually feel more anxious and keyed up about things.

2000 CanLII 16973 (ON CA)

They feel depressed. You see, you know, a lot of withdrawal, crying, brooding about things.

[58] Because of what he has gone through, Mr. Shahnawaz is severely cognitively impaired. Of the over 1,400 torture victims Dr. Payne has treated, Mr. Shahnawaz functions at the lowest two per cent. He lives with constant stress. He cannot participate in many aspects of normal life. He and his family live on social assistance. He is likely incapable of work. At best, he could manage a simple repetitive job with no stress.

[59] After his conviction, Molloy J. revoked his bail and Mr. Shahnawaz spent several months in custody awaiting sentence. Incarceration dramatically worsened his condition. Dr. Payne visited him in the Toronto Jail and observed that imprisonment had aggravated Mr. Shahnawaz's post-traumatic stress disorder:

> [Mr. Shahnawaz] reported that he now feels very depressed in contrast to the contentment with his simple life prior to his current problems. He reported that he has never smiled since he has been detained. He cries every night when he tries to go to sleep. He feels like crying during the day, but feels ashamed to cry in front of other people. When he cries during the day, he holds his head down to try to prevent others from seeing his tears.
>
> . . . . .
>
> He reported that he has increased physical symptoms of tension. He has had more severe and more frequent headaches from the pressure in his head. He has a throbbing headache in his left eye, with the feeling that his head is going to break open and his left eye come out. He used to shake a little bit before his detention, but he reported that he now shakes a lot when he lies in bed trying to sleep. His smoking has increased. His appetite is often poor and he gives his food to other detainees. He had had increased stomach pain associated with a stomach ulcer. While in detention he has had recurrent severe pain in his left chest radiating down his left arm. He reported that because of this, he was taken to a hospital emergency department

2000 CanLII 16973 (ON CA)

because of concern that he might have a heart problem. He reported that he had another electrocardiogram done yesterday and was to have a chest X-ray today. He reported that he is presently being held on the medical unit.

He reported that in detention he sits by himself and does not talk to anyone. He reported that he is constantly thinking and brooding about his situation. He does not watch television as he is bothered by the noise. He does not read as he can only identify English letters and cannot read words. He had a very limited education in Afghanistan and has forgotten the little that he had learned to read in the Afghan language. When he tries to concentrate on something else, his mind quickly goes off to thinking about his difficulties. He often shakes his head to clear it and washes his face to try to calm down. He talks to himself and talks to God. His only way of receiving comfort is to desperately pray to God in the same way that he did while in detention in Afghanistan. He feels that the other detainees believe that he is crazy.

[60] Indeed, Dr. Payne testified that when persons suffering from post-traumatic stress disorder are reminded of their past traumatic suffering they often experience flashbacks. These flashbacks cause their condition to deteriorate. In the words of Dr. Payne:

His reports of his detention in Afghanistan before were associated with torture and a lot of fear for his life and insecurity about what was going to happen to him. In terms of his incarceration now, there is a reactivation of those symptoms again, with flashbacks of these experiences, flashbacks being different than memory. It's not that "I'm in jail now and this reminds me of being in jail before" and get the fear, but it brings back similar feelings as if it - what was going on then is going on at the present time. And, this is noted in my report, comes up a lot more at night time where there are less cues in terms of what's going on. So hearing a guard walking outside the cell here can bring back the same sort of fear and feeling that he could have had in Afghanistan about the guards walking outside and not

2000 CanLII 16973 (ON CA)

knowing when they might come in to beat him up.

[61] Dr. Payne's psychiatric evidence is supported by the trial judge's own observations. The trial judge saw for herself the impact of incarceration on Mr. Shahnawaz, incarceration that she had ordered. She described the impact of incarceration in these words [at para. 22]:

> As a result of these various remands, I saw the accused in the courtroom on June 10, June 17, September 8, September 23 and September 30. Although these appearances were brief and Mr. Shahnawaz did not speak, I was shocked by the deterioration in his appearance over time. The difference in Mr. Shahnawaz between June 17th and September 8th was particularly striking. Even during the trial Mr. Shahnawaz had shown a submissive, nervous demeanour, and was weepy at times. However, at his attendances in court in September and during the sentencing hearing in October, his condition was worse. He appeared to me to be very fearful, submissive in the extreme (almost cowering), unable to make eye contact, withdrawn and visibly trembling.

[62] It is hardly surprising then that she concluded [at para. 27]: "Incarceration was causing intense psychological suffering for Mr. Shahnawaz."

[63] Moreover, in Dr. Payne's opinion, incarcerating Mr. Shahnawaz again will only worsen his condition. As a torture victim, Mr. Shahnawaz will never be able to accept that life in a Canadian prison does not present the same dangers as life in an Afghanistan prison. Even if he were to receive psychiatric treatment while incarcerated, his condition would likely deteriorate.

[64] Dr. Helen Meier, a staff psychiatrist at Mount Sinai Hospital in Toronto, visited Mr. Shahnawaz twice while he was in jail. Dr. Meier concurred that imprisonment would aggravate his post-traumatic stress disorder. She offered this grim prognosis:

> Incarceration has already had an effect on Mr. Shahnawaz's

2000 CanLII 16973 (ON CA)

psychiatric condition. He suffers the exacerbation of the Post-Traumatic Stress Disorder, which has followed his imprisonment and torture in Afghanistan. Mr. Shahnawaz now suffers from major Depression. Continued incarceration without the appropriate treatment, which includes counselling in addition to medication, would probably lead to an increasing intensity of PTSD and severity of Depression. This may include suicidal risk, as there is the sense of shame and grief over the effective loss of his children. Increase in the pressure of thoughts may reach psychotic proportions where there may be dissociation from reality.

[65] The psychiatric evidence, supported by the trial judge's observations, unequivocally shows that incarceration would be a much more severe punishment for Mr. Shahnawaz than for an ordinary person. Many courts, including this court, have recognized that a reduction from the customary range of sentence is justified where a sentence within the range would be "much more severe punishment" for the accused than for most people. In R. v. Wallace (1973), 11 C.C.C. (2d) 95 at p. 100 (Ont. C.A.), a case relied on by Molloy J., this court reduced a 10-year sentence for robbery and assault causing bodily harm to four years because the accused was a paranoid schizophrenic. Brooke J.A. wrote:

> It is plain that a sentence the length of that imposed was very much more severe punishment for this man than for a normal person, because of the terror that he experiences, the danger of self-destruction and the loss of amenability to treatment as well as the fact it is unlikely he can achieve an early release because that treatment which he is in need of must be deferred because of the sentence he must serve.

Mr. Wallace's situation differed from that of Mr. Shahnawaz. Mr. Wallace's psychiatric condition contributed to the offences he committed. Mr. Shahnawaz's did not. Charron J.A. criticizes Molloy J.'s reliance on Wallace, stating that the trial judge did not appreciate the significance of this distinction. I disagree. Molloy J. expressly adverted to the

2000 CanLII 16973 (ON CA)

distinction and relied on Wallace only for the proposition, affirmed by many other courts, that the impact of incarceration on an accused may affect the fitness of the sentence and may warrant departing from the customary range. See R. v. Fireman, [1971] 3 O.R. 380, 4 C.C.C. (2d) 82 (C.A.); R. v. W. (A.G.), [2000] O.J. No. 398 (C.A.); R. v. R. (A.) (1994), 88 C.C.C. (3d) 184, 92 Man. R. (2d) 183 (C.A.); R. v. Moncini (1975), 23 C.C.C. (2d) 452, [1975] 4 W.W.R. 509 (B.C.C.A.); Leger v. R. (1979), 10 C.R. (3d) S-25 (Que. C.A.).

[66] Indeed, my colleague recognizes this proposition as well because she would reduce the sentence to six years, well below the customary range for the amount of heroin trafficked. We are then left with a question of degree, and of deference. Charron J.A. says that the trial judge overemphasized Mr. Shahnawaz's personal circumstances. I say that the trial judge's emphasis was within the realm of reasonableness. Unquestionably, the crime of heroin trafficking is among the most serious in our society. It is rightly condemned by our courts. But I doubt that any of us fortunate enough to live in a civilized society can ever fully comprehend the horrific treatment Mr. Shahnawaz must have suffered and its devastating effect on him. As Twaddle J.A. said in R. v. R. (A.), supra, at p. 192 C.C.C.: "Justice without clemency, in appropriate circumstances, is injustice." See also R. v. Shaw, [2000] O.J. No. 2646 (S.C.J. per Hill J.).

[67] The second consideration relied on by Molloy J. was Mr. Shahnawaz's moral culpability for his crimes. The trial judge found as facts [at para. 18] that Mr. Shahnawaz's involvement in drug trafficking was likely "at the lowest levels", that as a delivery man, he "was likely no more than a dupe or a pawn in the hands of unscrupulous high-level drug dealers" and that he was not paid for what he did.

[68] On appeal, the Crown accepted these findings of fact. Charron J.A., however, contends that they are speculative, based mostly on inferences from an absence of evidence. Respectfully, I disagree with her. It is simply unrealistic to believe that a person as cognitively impaired as Mr. Shahnawaz could be at anything other than the lowest levels of the

2000 CanLII 16973 (ON CA)

heroin trade. And, as the trial judge pointed out, a thorough search of Mr. Shahnawaz's house turned up no evidence of drug dealing, but instead revealed a family living an extremely modest lifestyle with virtually no assets. Therefore, I see no justification for doubting the trial judge's factual findings.

[69] The last consideration relied on by the trial judge was that Mr. Shahnawaz would likely not be rehabilitated if he were incarcerated. In her words [at para. 27]:

> Based on the evidence before me, I find that incarceration was causing intense psychological suffering for Mr. Shahnawaz. As long as Mr. Shahnawaz remained in prison, there were no prospects of rehabilitation. Further, prolonged incarceration would make eventual rehabilitation upon release more unlikely, and perhaps impossible.

[70] In substance, Molloy J. made a finding that this court made nearly three decades ago in R. v. Fireman, supra, at pp. 85-86 C.C.C. [p. 383 O.R.]: that incarceration "would greatly reduce the chance of this man assuming a normal tolerable role on returning to his society".

[71] Overall, Molloy J. concluded that the principles of sentencing could be met by a conditional sentence. She held [at para. 33] that, taken together, the effect of imprisonment on Mr. Shahnawaz, his level of moral blameworthiness and his prospects for rehabilitation justified a conditional sentence:

> I am satisfied that the principles of sentencing are met by a conditional sentence in this case. The principles of denunciation and general deterrence are not inconsistent with a conditional sentence: R. v. Wismayer (1997), 115 C.C.C. (3d) 18 (Ont. C.A.) at 36-40. This is particularly so where stringent conditions are imposed to reflect the gravity of the offence. Although some of the principles of sentencing might suggest a longer sentence and one which would be served in prison, those principles are outweighed, in my view, by the consideration of competing principles such as the personal circumstances of this offender, the prospects of rehabilitation, and compassion for the effect

2000 CanLII 16973 (ON CA)

upon him of imprisonment in a penal institution.

[72] The trial judge did not ignore the competing considerations that would have justified a higher sentence. Toward the end of her reasons, she summarized the relevant factors [at para. 31]:

> In this case, the factors supporting the imposition of a significant term of imprisonment are: the nature of the offence (including the fact that a large amount of heroin was involved); the presence of children at the scene of two of the offences; the avoidance of disparity of sentences for similar offences; and the principles of denunciation and general deterrence. The factors supporting a more reduced sentence are: the relatively low status of Mr. Shahnawaz in the drug world; the apparent lack of any profit to him from trafficking; the absence of any criminal record for this type of offence; the extreme effect of imprisonment on Mr. Shahnawaz because of his background and disability; and the impossibility of rehabilitation while he is in prison. In all of these circumstances, it cannot be said that imprisonment is the only reasonable sentencing option available. . . .

[73] In balancing these factors, Molloy J. chose to emphasize "the devastating consequences of imprisonment" for Mr. Shahnawaz, which she found to be out of proportion to his degree of culpability. She recognized [at para. 38] that by doing so the sentence she imposed was less severe than sentences given to other heroin traffickers:

> My role as a judge is to impose a sentence which reflects society's condemnation of the crimes committed by Mr. Shahnawaz, which protects the interests of the community and which at the same time is directed towards the rehabilitation of Mr. Shahnawaz. I have attempted to balance these competing interests. However, there is no perfect solution here. The sentence imposed on Mr. Shahnawaz is less severe than the sentence imposed on others who have committed similar crime and there will no doubt be some who will consider that it does not adequately denounce his

2000 CanLII 16973 (ON CA)

conduct. However, I have chosen to place more weight on the devastating consequences of imprisonment on this particular individual and to relieve his suffering which I consider to be out of proportion to his degree of culpability.

[74] An appellate court is not justified in interfering with a sentencing judge's discretion merely because it would have given different weight or emphasis to a relevant factor. The weighing of relevant factors, the balancing process, is what the exercise of discretion is all about. Only if the sentencing judge exercises that discretion unreasonably -- by, for example, overemphasizing one factor or not giving enough weight to another -- should an appellate court interfere. In this exceptional case, the trial judge did not exercise her discretion unreasonably. See R. v. McKnight (1999), 44 O.R. (3d) 263 at p. 273, 135 C.C.C. (3d) 41 at pp. 53-54 (C.A.).

2. The Crown's position on appeal supports a lenient sentence

[75] In this court, Crown counsel submitted that an appropriate sentence for Mr. Shahnawaz would be a maximum reformatory term of two years less a day in jail. This submission itself recognizes the profound impact of incarceration on Mr. Shahnawaz.

[76] This court, of course, is not bound by the Crown's proposed sentence. The court's sentencing jurisdiction under s. 687 of the Criminal Code gives it discretion to impose a sentence greater than that requested by the Crown. But this court cannot ignore the obvious, that this is an appeal by Crown counsel instructed by the Attorney General of Canada under s. 676(1)(d) of the Code. The Attorney General is responsible for enforcing and prosecuting our drug laws in the public interest. Through her counsel, she has determined that the public interest does not require Mr. Shahnawaz to serve a sentence longer than two years less a day. But for Crown counsel's appeal, this sentence would not even be before this court for review.

[77] Therefore, although this court has discretion to impose a greater sentence than the one Crown counsel asks for, we

2000 CanLII 16973 (ON CA)

should exercise that discretion very sparingly. Unless the Crown's proposed sentence would bring the administration of criminal justice into disrepute, or would otherwise be contrary to the public interest, I do not think that this court is justified in going beyond it, let alone tripling it, as my colleague proposes. In this case, the Crown's proposed sentence for this offender is not contrary to the public interest, and it would not bring the administration of justice into disrepute. In the light of the Crown's position on appeal, I see no justification for increasing the length of the sentence imposed by the trial judge. See G.A. Martin, Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (Toronto: Queen's Printer, 1993) at pp. 327-34.

2000 CanLII 16973 (ON CA)

[78] The trial judge's disposition and the Crown's position differ only on where the sentence should be served: in the community or in prison. In support of its argument for a jail sentence, the Crown submits that the trial judge erred by failing to find that the presence of Mr. Shahnawaz's children during two of the drug transactions was an aggravating factor. On one of the drug transactions, Mr. Shahnawaz took his young son with him; on another, he took two of his children, including one who was just a baby and he put the package of heroin under the baby in the carriage. Because of these incidents, the Crown contends that Mr. Shahnawaz used his children "as a tool to escape detection and to ensure the success of the transaction." The Crown made the same submission at trial and the trial judge rejected it. She said [at para. 20]:

> . . . I agree that Mr. Shahnawaz put his children in harm's way and that in doing so he showed flagrant disregard for their well being. However, I am not satisfied that Mr. Shahnawaz was deliberately using his children as "cover". I think it entirely possible that his cognitive skills and coping mechanisms are so poor that he lacked the judgment to appreciate the serious danger involved for his children. Dr. Payne was of the view, based on his expertise and his experience with Mr. Shahnawaz, that this was a likely explanation for his conduct. . . . Based on the evidence of

Mr. Shahnawaz, my observations of him in the courtroom, and the evidence of Dr. Payne and Mrs. Shahnawaz, I accept that Mr. Shahnawaz is a devoted father who is extraordinarily attached to his children. I recognize that his conduct with respect to the children on February 13 and March 25 would appear to be completely at odds with this conclusion. Nevertheless, I find it to be the case. In my opinion, the discrepancy between his love for h is children and his conduct is explainable only by his various psychiatric impairments. This still gives me cause for concern in fashioning an appropriate sentence, but I do not consider it to be an aggravating factor that would increase the length of the appropriate sentence.

[79] I see no basis to revisit these findings on appeal.

[80] Nonetheless, the Crown's submissions invite the question: should Mr. Shahnawaz be incarcerated, even for a reformatory term? In deciding where the sentence should be served, the Supreme Court of Canada's decision in R. v. Proulx (2000), 182 D.L.R. (4th) 1, 140 C.C.C. (3d) 449 is relevant. Proulx tells us that conditional sentences are available for any offence for which no mandatory minimum penitentiary sentence is prescribed, including trafficking in narcotics, even trafficking in heroin. See also this court's judgment in R. v. Wellington (1999), 43 O.R. (3d) 534, 132 C.C.C. (3d) 470 (C.A.). Proulx also tells us that a conditional sentence with strict conditions like the ones imposed on Mr. Shahnawaz is a punitive sanction that can achieve the objectives of denunciation and deterrence. Thus, I am not persuaded that Mr. Shahnawaz should be incarcerated, even for a reformatory term.

3. The sentence has been mostly served

[81] The trafficking incidents for which Mr. Shahnawaz was convicted took place over 31/2 years ago. He has now served one year of his 17-month conditional sentence. He has served that sentence under strict conditions, including house arrest. In the light of the significant punishment Mr. Shahnawaz has already received, incarcerating him now would not serve the interests of justice. See R. v. C. (D.W.), [2000] O.J. No.

2000 CanLII 16973 (ON CA)

3759 (C.A.). C. Electronic Monitoring

[82] Because I would dismiss the Crown's sentence appeal, the electronic monitoring condition imposed by the trial judge is not moot. However, I agree with Charron J.A.'s reasons on this aspect of the appeal. The important issues surrounding electronic monitoring raised by the intervenor should have been raised before the sentencing judge. Therefore, I too would dismiss the provincial Crown's motion to introduce fresh evidence.

D. Conclusion

[83] I would grant leave to appeal sentence but I would dismiss the Crown's sentence appeal. I would also dismiss the intervenor's motion to introduce fresh evidence.

Appeal allowed.

2000 CanLII 16973 (ON CA)

MARGARITA CASTILLO -and- XELA ENTERPRISE LTD. et al.
Applicant Respondents

Court File No. COA-22-CV-0206

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE RESPONDENT, THE RECEIVER
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