

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

**1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.**

Respondents

**BOOK OF AUTHORITIES OF THE MOVING PARTY,
GARY WAYNE BODIMEADE**

JUNE 12, 2017

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Court File No. CV-16-11369-00CL

**ONTARIO
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B E T W E E N :

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2	<i>3038081 Nova Scotia Ltd. v 3026255 Nova Scotia Ltd. (Receiver of)</i> [2003] OJ No 1087, 121 ACWS (3d) 675.
3	<i>Montréal (City) v Quebec (Commission des droits de la personne et des droits de la jeunesse)</i> , 2008 SCC 48, 2 SCR 698.
4	<i>R v Corser</i> , 2004 AQBQ 861, AJ No 1335.
5	<i>R v Khan</i> , 2016 ONCJ 282, OJ No 2566.
6	<i>Hamilton Wentworth Credit Union Ltd. (Liquidator of) v Courtcliffe Parks Ltd.</i> (1995), CarswellOnt 3559, 58 ACWS (3d) 925.
7	<i>Davies v Clarington (Municipality)</i> , 2009 ONCA 722, OJ No 4236.
8	<i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41 at para 53, 2 SCR 522.

TAB 1

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Bank of America Canada v. Willann Investments Ltd.* | 1993 CarswellOnt 249, 5 W.D.C.P. (2d) 26, [1993] O.J. No. 3039, 44 A.C.W.S. (3d) 437, 23 C.B.R. (3d) 98 | (Ont. Gen. Div., Dec 14, 1993)

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Third Generation Realty Ltd. v. Twigg Holdings Ltd.

1992 CarswellOnt 473, [1992] O.J. No. 1472, 34 A.C.W.S. (3d) 842, 9 C.P.C. (3d) 387

THIRD GENERATION REALTY LIMITED v. TWIGG HOLDINGS LIMITED, ESDA HOLDINGS LTD., ZAVER HOLDINGS LTD., CHESTERMERE INVESTMENTS LIMITED, BRIDLE PARK INVESTMENTS LIMITED, BEACONSFIELD BUILDING CORPORATION, ROYAL TRUST CORPORATION OF CANADA and WELPORT INVESTMENTS LIMITED

Farley J.

Judgment: June 25, 1992
Docket: Doc. Toronto B277/91

Counsel: *B. Casey*, for moving party Great West Life Assurance Company.
R. Van Banning and *W. Del Mul*, for receiver-manager Peat Marwick Thorne Inc.
F. Myers, for defendants Bridle Park Investments Ltd., Beaconsfield Building Corp., and Welport Investments Ltd.
P. Morrison, for plaintiff Third Generation Realty Ltd.
W.P. Sasso, for defendants Esda Holdings Ltd. and Zaver Holdings Ltd.
I. Marks, for defendant Chestermere Investments Ltd.

Subject: Civil Practice and Procedure; Property; Corporate and Commercial

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.7 Actions involving receiver

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Real property

V Landlord and tenant

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Headnote

Landlord and Tenant --- Forfeiture and re-entry — Landlord's option to forfeit

Receivers --- Actions by and against — Actions against receiver

Landlord and tenant — Forfeiture and re-entry — Landlord's option to forfeit — Receiver-manager appointed following default under mortgage — In determining whether forfeiture justified, court to consider whether forfeiture would be out of proportion to any financial damage suffered by landlord.

Receivers — Actions — Against receiver — Circumscribing right to sue to enforce rights under lease of lands.

The landlords, GW and NALI Co., moved for leave to take such action as they may be advised to take to enforce their rights under lease of land. A competing motion was brought by the receiver of the property to dismiss the motion especially as to any element of forfeiture or, in the alternative, to obtain advice or direction.

GW wished to know how much additional rent it might be entitled to under the lease but which had not been remitted to it. GW claimed its lack of knowledge was because it had not received the appropriate statements of verification.

The receiver claimed that it had just taken over the property and so it might be difficult to provide information with certainty. The receiver also claimed that there was some ambiguity in the operative clause as to what was required and included in the definition of "gross annual income received by the tenants from the building or building situate on the demised premises".

Held:

The landlord GW was granted leave to proceed to obtain verification; there was to be no declaration of forfeiture.

The test for a landlord to obtain leave to enforce its rights was that leave to commence proceedings against a receiver appointed by the court was to be granted, unless it was clear that there was no foundation for the claim or the action was frivolous or vexatious. However, the application for leave was not to be dealt with on a perfunctory basis. There should be careful examination of both the factual and legal issues. Furthermore, leave should not be given in a "carte blanche" manner. Therefore, because of the uncertainty of GW's future course of action and its past lack of action, the leave granted to GW was restricted to obtaining two verifications and conducting, if it so wished, an audit.

The courts would lean against declaring forfeiture except in the plainest of cases and would hold a strict hand over conditions for defeating leases. GW would be required to explain how there could be forfeiture in light of GW's continuing to accept rent payments.

In determining whether forfeiture was justified, the court should take into account whether or not the forfeiture would be out of all proportion to any financial damage suffered by the landlord, even if there were, in fact, breaches of the lease. However, in this instances there was no appreciation of the monetary magnitude and so the proportions were unknown.

Table of Authorities

Cases considered:

Clark v. Mihailescu (1974), 5 O.R. (2d) 201, 50 D.L.R. (3d) 111 (H.C.) — *applied*

Columbia Trust Co. v. American Home Assurance Co. (1990), 44 C.P.C. (2d) 226, 50 B.C.L.R. (2d) 379, 48 C.C.L.I. 95, 4 C.B.R. (3d) 198 (S.C.) — *applied*

Holy Spirit Credit Union Ltd. v. Golden Mile Toyota Ltd., [1980] 6 W.W.R. 547, 35 C.B.R. (N.S.) 264, 113 D.L.R. (3d) 285 (C.A.) — *applied*

Lipman v. Lee (Estate), (sub nom. *Lipman v. Lee Yick*) [1953] O.R. (2d) 514 (H.C.) — *applied*

Mount Citadel Ltd. v. Ibar Developments Ltd. (1976), 14 O.R. (2d) 318, 73 D.L.R. (3d) 584 (H.C.) — *considered*

New Alger Mines Ltd. v. Thorne Riddell Inc. (1986), 54 O.R. (2d) 562, 59 C.B.R. (N.S.) 113, 14 O.A.C. 25, (sub nom. *New Alger Mines Ltd., Re*) 26 D.L.R. (4th) 719 (C.A.) [leave to appeal refused (1986), 54 O.R. 562n, 68 N.R. 400 (note), 18 O.A.C. 80 (note) (S.C.C.)] — *followed*

Royal Inns Canada Ltd. v. Bolus-Revelas-Bolus Ltd. (1982), 37 O.R. (2d) 339 (C.A.) — *followed*

RoyNat v. Omni Drilling Rig Partnership No. 1 (Receiver of) (sub nom. *RoyNat Inc. v. Allan*) (1988), 69 C.B.R. (N.S.) 245, 61 Alta. L.R. (2d) 165, [1988] 6 W.W.R. 156, 90 A.R. 173 (Q.B.) — *applied*

Wrightmar Industries Ltd. v. Assiniboia Downs 81 Ltd. (1983), 47 C.B.R. (N.S.) 225, 21 Man. R. (2d) 278, 148 D.L.R. (3d) 760 (C.A.) — *applied*

116531 Canada Inc. v. 569562 Ontario Inc. (1988), 28 O.A.C. 144 (Div. Ct.) — *followed*

Motion by landlords for leave to take such action as deemed advisable to rights under lease of lands; Motion by receiver to dismiss landlords' motion or, alternatively, for advice and directions.

Farley J. (orally):

1 This motion was brought before me yesterday by Great West Life Assurance Company ("G.W.") for leave to take such

action as G.W. and North American Life Insurance Company (collectively the “landlords”) “maybe advised to take to enforce their rights under lease of lands, [being the property municipally known as, 21 King Street East, Toronto, Ontario] ... or for such further or other order as may seem just”. There was a competing motion by the receiver of the property to dismiss the G.W. motion especially as to any element of forfeiture or in the alternative to obtain advice or direction or for “such further other or other order as may seem just to the honourable court”.

2 One can only be dismayed by the apparent unwillingness for these two moving parties to engage in any meaningful discussion, prior to racing off to court. It was not a dialogue of the deaf but the intentional use of sign language, with the full knowledge that the other side is blind. It is perhaps amazing that they complain of legal expense of having to come to court when the obvious business approach could have been much more fruitful at a minimal cost. Where is commercial sanity? — lost in the Pavlovian litigation response?

3 How much more obvious could it be that these two sides wish to avoid meaningful communication than the acknowledgment by both to my question as to what was happening in the rent fixing for the next 30 years that both were ready, willing and able to start. Each thought the other was unwilling to commence. They agreed to commence yesterday afternoon and resume July 2. Would these motions have been necessary if these two sides had simply picked up the telephone and asked what is it that you really want to do; rather than each engaging in a war of attrition fuelled by the empty bombast of semi- (if at all) responsive correspondence.

4 The receiver wished to pre-empt the forfeiture move by G.W. It was not until court that G.W. indicated for the first time it was not taking any forfeiture step before giving the receiver (and other interested parties) such advance notice so the matter could be contested in court and further G.W. would not be advancing the position that the court would have no jurisdiction in that event. G.W.’s further advice was that it merely wanted to know how much additional rent it might be entitled to under the lease but which had not be remitted to it. It claimed it had a lack of knowledge since it had not received the appropriate statements of verification (a new agreed semi-annual one from an officer of the tenant and an annual one from the tenants’ accountants). However the request form indicated the G.W. motion was “motion for repossession by landlord”.

5 The receiver’s position is that: it had just taken over the property last October after Third Generation’s “abandonment”, it may be difficult for it to provide information with certainty relying on materials it had received from Third Generation, it suggested G.W. acquiesced from its course of conduct of not pursuing its sporadic and feeble requests for such information, and there is some ambiguity in the operative clause as to what is required and included in the definition of “gross annual income received by the tenants from the building or buildings situate on the demised premises”.

6 There was an amendment to the lease which set out the verification procedure. It reads as follows:

Paragraph 3(d)(iii).

For the purpose of determining the additional rental, if any, for which the tenant is liable computed as aforesaid, and for the purpose of computing the amount thereof, the tenant shall and hereby agrees that it will keep in its main offices in the City of Toronto an accurate record of all income derived by it from the building or buildings situate upon the demise premises; which records and all supporting records shall be open to the inspection and audit of the landlord and its agents upon reasonable request by the landlord, at all reasonable times during ordinary business hours. The certificate of the auditors from time to time of the Tenant provided they are Chartered Accountants and qualified and entitled to practice as such in the Province of Ontario, shall bind the parties as to all matters of account under this paragraph, on each of the days upon which the tenant is required to pay additional rental as in this paragraph 3 provided, the Tenant shall deliver to the landlord a statement signed by an officer of the Tenant verifying the gross income received by the Tenant during the preceding three (3) months. In addition, the Tenant covenants and agrees to supply to the landlord annually a statement prepared by its Accountants verifying the amounts paid to the landlord as the addition rental required to be paid pursuant to this paragraph 3, is the correct amount.

7 The loose language in this clause is but one of the examples of such that I was referred to in the lease. It seems that the illness was contagious with the loose drafting of the motion, including G.W. relying on a wrong section and relief that was not contemplated by the correct section.

8 I am of the following opinions;

9 1. Leave to commence proceedings against a receiver appointed by the court is to be granted, unless it is clear there is no foundation for the claim or the action is frivolous or vexatious. See *New Alger Mines Ltd. v. Thorne Riddell Inc.* (1986), 54 O.R. (2d) 562, 59 C.B.R. (N.S.) 113, 14 O.A.C. 25, (sub nom. *New Alger Mines Ltd., Re*) 26 D.L.R. (4th) 719 (C.A.) and *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (sub nom. *RoyNat Inc. v. Allan*) (1988), 69 C.B.R. (N.S.) 245, 61 Alta. L.R. (2d) 165, [1988] 6 W.W.R. 156, 90 A.R. 173 (Q.B.). The same test is to be applied and leave sought for a landlord to enforce its rights under the lease even where no further resort will be made to the court by the landlord. See *Holy Spirit Credit Union Ltd. v. Golden Mile Toyota Ltd.*, [1980] 6 W.W.R. 547, 35 C.B.R. (N.S.) 264, 113 D.L.R. (3d) 285 (C.A.) and *Wrightmar Industries Ltd. v. Assiniboia Downs 81 Ltd.* (1983), 47 C.B.R. (N.S.) 225, 21 Man. R. (2d) 278, 148 D.L.R. (3d) 760 (C.A.).

10 2. However the application for leave should not be dealt with on perfunctory basis rather there should be very careful examination of both the factual and legal issues. See *Columbia Trust Co. v. American Home Assurance Co.* (1990), 44 C.P.C. (2d) 226, 50 B.C.L.R. (2d) 379, 48 C.C.L.I. 95, 4 C.B.R. (3d) 198 (S.C.). In this case it is clear that neither the officer's verification nor the accountant's verification was given. The receiver suggested that G.W.'s course of conduct in not insisting on such certificates and not following up on such requests was aware of such requirements however it provided no law to back up this assertion based on the facts as it presented them.

11 3. Leave should not be given in a blanket or carte blanche manner. G.W.'s motion indicated that it did not know what its further course of action would be. On questioning, it suggested that it would not know how worthwhile the question of "deficient" additional rent would be, until it had an idea of what the scope of the deficiency might be. However I am puzzled by a diversion up that alley, since when one looks at para. 3(d)(iii), it might be said what is missing from the piece of paper it now receives is an officer's signature saying, "I verify the foregoing as the addition rent". However one might think this is in essence implicit in the transmittal. Clearly G.W. would be none the wiser as to what it may be missing in dollars if such verification stamp were added. True, the accountant's verification was also missing, however if G.W. was truly concerned (although it is strange that it would wait until this moment to become excited about this matter) then G.W. could satisfy its curiosity by doing its own audit. Based on the foregoing observations, G.W.'s leave is restricted to proceeding to obtain two verifications (back to June 30, 1986 being the date of the estoppel certificate) and conducting, if it so wishes, an audit.

12 4. It would only be after G.W. obtained such information that it may wish to take additional steps for which it will then require leave. See however my later observations.

13 5. It would seem to me the breach of the provision of verification would not in any event be of the nature in these circumstances to warrant a justified forfeiture "[t]he courts rightly lean against forfeiture except in the plainest of cases. ..." see *Clarke v. Mihailescu* (1974), 5 O.R. (2d) 201, 50 D.L.R. (3d) 111 (H.C.) [at p. 203 O.R.]. "One is stating old and modern law when one says that the Courts have leaned against forfeiture and held a strict hand over conditions for defeating leases", *Lipman v. Lee (Estate)*, (sub nom. *Lipman v. Lee Yick*) [1953] O.R. (2d) 514 (H.C.) [at p. 522]. If there is doubt in the meaning of a covenant; such is to be resolved in favour of the tenant. See *Mount Citadel Ltd. v. Ibar Developments Ltd.* (1976), 14 O.R. (2d) 318, 73 D.L.R. (3d) 584 (H.C.) [at pp. 324-325 O.R.] and *Clark, supra*, at p. 203 [O.R.]. G.W. in this case would also have to explain how there could be a forfeiture in light of it continuing to accept rent payments despite sporadic complaints about lack of verification: *Royal Inns Canada Ltd. v. Bolus-Revelas-Bolus Ltd.* (1982), 37 O.R. (2d) 339 (C.A.) [at p. 344]. There is also the point that "in determining whether or not a forfeiture should be avoided a court should take into account whether or not the forfeiture would be out of all proportion to any financial damage suffered by the landlord even if there were in fact breaches of" the lease: *116531 Canada Inc. v. 569562 Ontario Inc.* (1988), 28 O.A.C. 144 (Div. Ct.) [at p. 145]. Until we can get some monetary appreciation of the magnitude, it seems to me that no one would know what the proportions are.

14 The obvious business approach, however, seems to me to be as follows (and perhaps this is what can be considered the catch-all phrase, "such further or other order as may seem just"): The receiver (with the necessary cooperation of Third Generation in sorting through the records that it has provided the receiver) could provide G.W. with a break-out on an annual basis 1986-1991 and for the first half of 1992, of the rents and other categories of revenues received by the tenant/Third Generation/receiver including parking fees, steam plant revenues, escalation amounts on a gross and net basis, such would be

presented as accurate and subject to verification by audit by G.W. and its agent if it wishes, subject of course without prejudice, to tenants disputing that such categories were properly within the definition of gross annual income. I would think that it might well be sufficient for discussion purposes, that G.W. be provided with ballpark estimates said to be accurate within a tolerance of five per cent. If after receipt and discussion, G.W. feels that it must get a court determination of gross annual income and what it comprises, it could then apply for leave to do so. One must always be ever optimistic such a court appearance would not be necessary.

15 There was much thunder in these motions; sadly there was no lightning that might have given momentary illumination. The motion by G.W. is sadly overreaching and that by the receiver was technically premature. The receiver and each of the party groups represented by counsel at this hearing are to receive \$1,500 from G.W., such amount to be payable forthwith. It is unfortunate that where the two sides bumble along as they appear to have here, that there cannot be a more appropriate cost sanction.

16 I am to receive a report by noon July 15, 1992 as to whether there has been a resolution of the new rent or if not how the parties intend to reach a resolution in that regard.

17 Disposition of motions; G.W. is to receive leave to proceed to obtain verification as set out above. As to the receiver's motion, there is to be no forfeiture based on the failure to provide such verification in the past.

Order accordingly.

TAB

2

2003 CarswellOnt 1016
Ont. S.C.J. [Commercial List]

3038081 Nova Scotia Ltd. v. 3026255 Nova Scotia Ltd. (Receiver of)

2003 CarswellOnt 1016, [2003] O.J. No. 1087, [2003] O.T.C. 231, 121 A.C.W.S. (3d) 675

**In the Matter of Bank of Montreal and 757630 Ontario Inc., o/a Motor Home
Vacations (Canada), 1249555 Ontario Inc., 3026255 Nova Scotia Limited, John
Sammut and David Sammut**

3038081 Nova Scotia Limited (Applicant) and Deloitte & Touche Inc., in its capacity as Interim Receiver
(Respondent)

Lederman J.

Heard: March 10, 2003
Judgment: March 26, 2003
Docket: 01-CL-4333

Counsel: Stephen Thom for Applicant
Stephen Schwartz for Respondent

Subject: Contracts; Property; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Real property

III Sale of land

III.1 Agreement of purchase and sale

III.1.a Formation of contract

III.1.a.iii Requirements for validity

III.1.a.iii.A Offer and acceptance

Headnote

Sale of land --- Agreement of purchase and sale — Formation of contract — Requirements for validity — Offer and acceptance

Table of Authorities

Cases considered by *Lederman J.*:

Third Generation Realty Ltd. v. Twigg Holdings Ltd., 9 C.P.C. (3d) 387, 1992 CarswellOnt 473 (Ont. Gen. Div.) — considered

MOTION by buyer for order *nunc pro tunc* to grant leave to buyer to commence and continue action for specific performance of agreement of purchase and sale against seller.

Lederman J.:

Nature of Proceeding

1 3038081 Nova Scotia Limited ("303") has brought a motion for an order *nunc pro tunc* granting leave to it to commence and continue an action in the Province of Nova Scotia against Deloitte & Touche Inc., the court appointed receiver (the "Receiver") for 3026255 Nova Scotia Limited. That action was commenced without obtaining leave of the court as 303 did not have notice of the order of C. Campbell J. until after it commenced its action in Nova Scotia. 303 claims it has a valid subsisting agreement of purchase and sale with the Receiver and has brought an action in the Supreme Court of Nova Scotia for specific performance of that agreement.

2 On February 19, 2003, Gans J. held that leave to commence a suit against the Receiver in Nova Scotia depended upon whether there is a valid and outstanding contract between the Receiver and 303. Gans J. recognized that this is "the very issue that will ultimately have to be decided in Nova Scotia." He directed a trial of this issue which was conducted before me.

Facts

3 In October 2002, the Receiver engaged Tom Gerard ("Gerard") of Royal LePage Commercial Eastern in Halifax to market a commercial property located in Lower Sackville, Nova Scotia (the "Property").

4 On October 29, 2002, 303 signed on offer to purchase the Property for \$660,000 which was accepted by the Receiver on October 31, 2002. A deposit of \$25,000 accompanied the offer and was paid to the Receiver.

5 Although 303 was purchasing the Property on an "as is, where is" basis, the agreement contained as a schedule, Special Conditions, which read in part as follows:

(a) Within five (5) business days of acceptance of this offer, the Seller shall provide the Buyer with a copy of the most recent Phase 1 Environmental and or Certificate of Compliance Report completed on the property to be reviewed by the Buyer. The results of said environmental review shall be deemed to be satisfactory unless the Seller or Seller(s) Agent is notified to the contrary, on or before **November 8th, 2002**, or at such other extension date that may be granted by the Seller. If notice to the contrary is received, which the Seller is unable or unwilling to remedy, either party shall be at liberty to terminate this contract and the deposit is to be returned to Buyer without interest or penalty.

(b) This agreement is subject to the Buyer at his/her expense having the property inspected by inspector(s) of the Buyer's choice and that inspection meeting the Buyer's full satisfaction. The inspection shall be deemed to be satisfactory unless the Seller or Seller(s) Agent is notified to the contrary, on or before **November 8th, 2002**. If notice to the contrary is received, which the Seller is unable or unwilling to remedy, either party shall be at liberty to terminate this contract and the deposit is to be returned to the Buyer without interest or penalty.

6 By a written amendment to the agreement signed by both parties, the conditional date for the environmental due diligence and inspection was extended until November 22, 2002 and the closing date was extended until December 6, 2002.

7 303 conducted an inspection of the building on the property and found it to be in need of substantial repairs and upgrading. On November 21st, Jeffrey Potter ("Potter"), the President of 303, sent a copy of the engineer's report outlining alleged shortcomings in the Property to Gerard. Potter testified that Gerard told him that the Receiver would not be able to read the inspection report until Monday, November 25th.

8 On the last day of the conditional period, November 22, 2002, Potter faxed Gerard a letter indicating that it would waive the environmental and inspection conditions and close on December 6, 2002 if the vendor would complete one of the following: repair only the structural deficiencies of the block wall and foundation or adjust the purchase price down by \$100,000. It also stated: Please respond by Monday, November 25, 2002 5:00 p.m.

9 Both Gerard and Potter testified about the conversations that they had on November 22nd and thereafter, and not surprisingly, they have different versions.

10 Gerard testified that on the morning of November 22nd, he was informed by Potter in a telephone call that 303 would be seeking a downward price adjustment for the Property. Gerard stated that the purchase price of \$660,000 was the minimum price that the Receiver was prepared to accept. He testified that he informed Potter that the Receiver would not accept such an adjustment as the sale was to be on an "as is, where is" basis, but that any offer should be put in writing. Later that day, he received the aforesaid fax from Potter.

11 Gerard testified that after receiving this fax, he forwarded it to Robert Powell, the Vice President of Deloitte & Touche in Toronto, who was the person primarily responsible for the disposition of the assets in the receivership.

12 Gerard was instructed by Powell that the offer was not acceptable. Gerard testified that he subsequently phoned Potter at approximately 3:30 p.m. on November 22nd, and advised him that the Receiver was not willing to either repair the structural deficiencies of the block wall or adjust the price by the amount requested. He testified that he further told Potter that the Receiver was not prepared to accept a price reduction of any kind and that he was wasting time. He said that he also advised Potter that there were other interested parties who were willing to purchase the property.

13 Gerard testified that on that Friday, November 22nd, Potter told him that he might be able to interest his partners in a \$25,000 price reduction. Gerard testified that he told Potter that the Receiver would not reduce it by one dollar, but if he wanted to put it in writing he should do so.

14 Also, on Friday, November 22nd, Gerard contacted another potential purchaser, Dunford Investments Limited ("Dunford"), to advise it that the agreement with 303 had terminated and to enquire whether it was still interested in the property.

15 Gerard states that approximately a half hour later, he received a telephone call from Potter in which he informed Gerard that 303 would be willing to accept a price reduction of \$25,000. Gerard stated that he informed Potter that as far as he knew the Receiver would not accept any reduction in price, but that if he put his offer in writing he would communicate it to the Receiver. No such offer was sent by 303 on November 22nd. Gerard testified that, accordingly, it was his belief that 303 did not waive the condition set forth in Schedule B to the agreement, and that it was thereby terminated.

16 It is the position of the Receiver that 303 did not waive the condition within the relevant time period and that 303 would not close without an abatement and the agreement was terminated on its terms. Potter's letter of November 22nd did not say that 303 would not close, although the Receiver seems to have interpreted it that way. Rather, it said that 303 was prepared to waive the environmental and inspection conditions and close on December 6, 2002 if the vendor would either repair the structure or adjust the price downwards by \$100,000.

17 At no time, however, did the Receiver or Gerard ever expressly notify 303 that the agreement was, in fact, terminated. The word "terminate" was never spoken by Gerard or Potter on November 22nd. No fax or email between the two of them ever used the word either.

18 Gerard met with Potter at the Property on Saturday, November 23rd. Gerard testified that he went to the meeting for

the purpose of obtaining the key to the building back from Potter as it was the only key to the building and he needed it to take to other prospective buyers. Potter testified that Gerard met with him because Gerard wanted to better understand the nature of the structural deficiencies so that he could speak more knowledgeably about these issues to Powell on Monday.

19 On Monday, November 25th, Potter did not receive any consent to extend the conditional period, but he testified that he was told by Gerard that the Receiver would not reduce the purchase price by \$100,000. However, he said that Gerard told him the Receiver might look at some other price reduction.

20 On Monday, November 25th, Gerard and Powell had at least two conversations. Gerard testified that he told Powell that Potter had informed him that if 303 could get a price reduction of \$25,000 he thought he could get the deal done. Gerard told Powell that Potter was still interested in the Property. They talked about whether they should entertain a new offer for \$25,000 less, or entertain other offers from other parties. Gerard testified that Powell never told him to seek a price reduction of \$10,000.

21 On Tuesday, November 26th, Potter spoke with Gerard and enquired what the Receiver might respond positively to as a price reduction. Potter understood from Gerard that the Receiver might respond to a \$25,000 reduction but he felt sure he could get a \$10,000 reduction. Gerard denies that there was any discussion with Potter about the fact that the Receiver might be receptive to a \$10,000 reduction.

22 On Wednesday, November 27, 2002 Potter faxed a letter to Gerard indicating that 303 was prepared to waive the inspection condition if the price is reduced by \$25,000. He added that, "in a gesture of good faith if the owners wish they may hire their own inspector to investigate this matter, and if there is not a problem with the foundation, we will reimburse the \$25,000 reduction."

23 For his part, Gerard said that Potter sent this proposal of a \$25,000 abatement on his own accord. Gerard testified that he told Potter earlier that 303 was free to make new offers but that the Receiver would not reduce the price by any amount.

24 On Thursday, November 28th, without advising 303, the Receiver signed an offer in favour of Dunford at a purchase price of \$675,000 after Dunford had told Gerard earlier that it was prepared to purchase the property at that price. Dunford wanted the Receiver to commit to a price in writing by signing the offer first.

25 Gerard testified that on Friday, November 29th, Potter called him early in the morning between 8:00 and 10:00 a.m. and said that he would make one last attempt to present an offer of a \$10,000 abatement. Gerard testified that this was the first time the \$10,000 figure came up. Gerard stated that if Potter had any further offer he should put it in writing.

26 Both Powell and Gerard testified that they did not discuss the possibility of a \$10,000 reduction and, in fact, never mentioned that figure between them. Powell's note of the telephone conversation that took place between them on November 25th, however, states, "Either say no or reduce by \$10 M."

27 Dunford accepted the Receiver's offer and executed it and faxed a copy of the agreement to Gerard at approximately 3:33 p.m. on Friday, November 29th.

28 At 5:07 p.m. on November 29th, Potter faxed a letter to Gerard which stated,

"As per our telephone conversation in the interest of moving forward we would wave (*sic*) the building inspection, and for a reduction of \$10,000 resulting in an offer to purchase of \$650,000 with a closing date of on or before January 14/02."

29 Gerard testified that at approximately 5:45 p.m. on Friday, November 29th he received a phone call from Mr. Verege Armoyan, a principal of 303, expressing concern that an agreement had not yet been reached between the Receiver and 303 on the sale of the Property. Gerard stated that he informed Armoyan that the Property had been sold to a third party purchaser. Armoyan expressed disappointment and questioned why 303 had not been provided with an opportunity to submit a clean offer for the Property. Gerard stated that he told Armoyan that Potter had been given numerous opportunities to

submit a clean offer. Armoyan then suggested that the deal had not been terminated because the Receiver had not provided 303 with the termination in writing.

30 At approximately 6:46 p.m. on Friday, November 29th, Potter faxed a letter to Gerard stating:

"As per our telephone conversation in the interest of moving forward we would wave (*sic*) the building inspection and will close as per our agreement. Please advise us as to the solicitor of you (*sic*) client and we will be in contact with them on Monday."

31 At no time did the Receiver attempt to return the \$25,000 deposit paid by 303.

Was the Agreement of Purchase and Sale Between the Receiver and 303 Terminated?

32 The Receiver's position is that because 303 did not waive the inspection condition within the relevant time period, the agreement of purchase and sale was terminated on its terms. Mr. Schwartz, for the Receiver, contends that 303 indicated quite clearly on November 22nd, that it would not waive the condition unless it received a \$100,000 abatement on the purchase price and since the Receiver was not prepared to accede to this proposal, the agreement ended.

33 303's position is that the inspection condition clause in the circumstances of this case provided each party with the option to terminate the agreement in the event that the purchaser objected to the condition of the Property and the vendor was unwilling or unable to remedy it, but that no express termination by either side took place.

34 Mr. Thom, for 303, submits that the Receiver did not appreciate that the inspection condition clause involves a multi-step process as follows:

a) By reason of the inspection report obtained by 303 within the condition period, 303 advised the Receiver/seller that the building condition was not satisfactory and that constituted "notice to the contrary." The purchaser indicated, however, that it would close with an abatement or if the Receiver effected the repairs;

b) Powell decided that the Receiver was unwilling to do any remedial work or grant the abatement;

c) The clause states that thereafter "either party shall be at liberty to terminate this contract and the deposit is to be returned to the buyer without interest or penalty." This last step of the process never took place. Mr. Thom, therefore, submits that the agreement of purchase and sale was never, in fact, terminated and remains in force.

35 As the clause came from the real estate agent's form of conditions and was attached to the Receiver's form of offer, any ambiguity in the wording should be resolved in favour of the purchaser.

36 What is particularly interesting is that neither Gerard nor Powell ever examined this clause at the time that they received Potter's letter on November 22nd. Rather, they both assumed that the letter constituted a notice that the state of the building was unsatisfactory and that was tantamount to a termination since the Receiver was unwilling to do any remedial work or grant any form of abatement.

37 Powell and Gerard testified that they knew 303 was still interested in the Property after November 22nd, and that they invited 303 to submit new offers. There is, however, nothing in the correspondence suggesting that any new deal was to be predicated upon a brand new offer, rather than an amendment to the existing agreement of purchase and sale.

38 Although Powell and Gerard in their testimony profess never to have had a discussion about the specific number of \$10,000 as a possible abatement and that no such notion was ever presented to Potter, Powell's note of the conversation that he had with Gerard suggests otherwise. On the basis of that note, I believe that Powell, in fact, instructed Gerard to either say no to any abatement or "throw them a bone" (as indicated by Powell in his later note of November 27th) by reducing the

price by \$10,000. Powell's note is also consistent with Potter's evidence that Gerard told him that he, in fact, could get a \$10,000 reduction.

39 Although Powell first said that the note of \$10,000 reflects just what was going on in his head and not the subject of conversation, he did concede that it is possible that he may have discussed it with Gerard.

40 Even though Gerard said that the deal was effectively at an end on Friday, November 22nd, he did acknowledge that he went out to the site to meet with Potter to better understand the deficiencies outlined by the inspector in addition to picking up the key for the building. If the agreement was, in fact, terminated by reason of the fact that the Receiver would not grant any abatement whatsoever or do any remedial work, it does not make sense that Gerard would be wasting his time by trying to better appreciate the nature of the deficiencies complained about by 303.

41 With Dunford back on the scene and demonstrating interest in the Property, it would appear that Powell and Gerard, rather than sending notices of termination of the agreement to 303, wanted to generate another possible offer from Dunford and yet be able to keep the 303 agreement in reserve if need be. It seems that 303's offer was shopped to Dunford, but Dunford's offer was not shopped to 303 as 303 was completely unaware about Dunford until it was told of it as a *fait accompli*.

42 At no time did the Receiver return the deposit as was required upon a termination of the agreement according to the inspection clause. Mr. Schwartz submitted that because 303 was still interested in submitting a new offer and the \$25,000 deposit was in a bank account in Toronto, it made no sense for the Receiver to return it while discussions were still underway. However, no mention of handling the deposit in this way was ever communicated to 303 during the relevant time period.

43 At no time was the fact of termination ever communicated by either party. Paragraph 15 of the agreement provides that any notice to be given or document to be delivered to the parties pursuant to the agreement shall be sufficient if delivered personally or sent by facsimile to the specific addresses and fax numbers of the parties set out therein. Although there was a clear provision for communicating such notice of termination, the Receiver did not avail itself of it. In any event, even if the inspection clause did not explicitly require written notice of termination, I find that no oral notice of termination was given, nor was there any implied termination arising from the November 22nd letter from 303.

44 In fact, Powell and Gerard were trying to keep the 303 agreement alive while at the same time attempting to get a better deal from Dunford. I find that at no time did the Receiver specifically advise 303 that their agreement was at an end and that they should consider putting in a new offer. Powell and Gerard did not want to let go of the 303 agreement until they had to.

45 I, therefore, find that the agreement of purchase and sale with 303 was not, in fact, terminated by its letter of November 22nd.

46 Mr. Schwartz raised for the first time in argument that even if the agreement was not terminated on November 22nd, it was terminated on November 29th in the conversation between Gerard and Armoyan when Gerard informed Armoyan that there was another offer that the Receiver had accepted. That agreement was signed by Dunford earlier on the same day when Potter sent his letter waiving the building inspection and firming up the agreement.

47 It was only after that conversation between Gerard and Armoyan that 303 decided to waive the condition altogether and continue with the agreement.

48 The suggestion that the conversation with Armoyan constituted termination of the agreement does not make sense. Apart from this matter being raised in argument by Mr. Schwartz, there is nothing in the evidence of Powell or Gerard to suggest that the Receiver ever thought for a moment that this conversation with Armoyan constituted termination of the agreement with 303.

49 Accordingly, I find that the agreement was not terminated in accordance with the Inspection clause and there is a valid and outstanding contract between the Receiver and 303.

50 Leave to commence proceedings against a receiver appointed by the court is to be granted unless it is clear there is no foundation for the claim or the action is frivolous or vexatious: *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.). Having found that there is a basis for the claim by 303, leave is hereby given *nunc pro tunc* to 303 to commence and continue the action in Nova Scotia against the Receiver.

51 If the parties cannot agree upon costs of the trial of the issue and the motions before Gans J., they may make written submissions.

Motion granted.

TAB

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Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bilodeau | 2017 QCTDP 8, 2017 CarswellQue 3983, EYB 2017-279545 | (T.D.P.Q., May 5, 2017)

2008 SCC 48
Supreme Court of Canada

Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine)
Service de police

2008 CarswellQue 6947, 2008 CarswellQue 6948, 2008 SCC 48, [2008] 2 S.C.R. 698, [2008] S.C.J. No. 49, 168 A.C.W.S. (3d) 358, 176 C.R.R. (2d) 40, 2008 C.L.L.C. 230-032, 295 D.L.R. (4th) 577, 377 N.R. 316, 64 C.H.R.R. D/1, J.E. 2008-1536, D.T.E. 2008T-632

**City of Montréal (in right of the Communauté urbaine de Montréal), Appellant
and Commission des droits de la personne et des droits de la jeunesse and S. N,
Respondents and Attorney General of Quebec, École nationale de police du
Québec and Prisoners' Rights Committee, Interveners**

Abella J., Bastarache J., Binnie J., Charron J., Deschamps J., Fish J., LeBel J., McLachlin C.J.C., Rothstein J.

Heard: December 5, 2007
Judgment: August 1, 2008
Docket: 31551

Proceedings: affirmed *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine) Service de police* (2006), [2006] R.J.Q. 1307, 2006 CarswellQue 14105, 2006 QCCA 612, 2006 CarswellQue 3696 (Que. C.A.); affirmed *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Service de police de la Communauté urbaine)* (2001), 2001 CarswellQue 2785, [2002] R.J.D.T. 205, [2002] R.J.Q. 824 (T.D.P.Q.)

Counsel: Pierre Yves Boisvert, Jean-Nicolas Loiselle, Guy Régimbald, for Appellant
Pierre-Yves Bourdeau, Christian Baillargeon, for Respondents
Hugo Jean, for Intervener, Attorney General of Quebec
Louis Masson, Albina Mulaomerovic, Gérald Laprise, for Intervener, École nationale de police du Québec
Pier Bélisle, Jacky Éric Salvant, for Intervener, Prisoners' Rights Committee

Subject: Public; Torts; Criminal; Constitutional; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications

Criminal law

IX Sentencing

IX.8 Types of sentence

IX.8.b Absolute or conditional discharge

IX.8.b.iii Effect of discharge

Human rights

III What constitutes discrimination

III.10 Criminal record

Law enforcement agencies

I Police

I.1 Organization of police forces

I.1.a Appointment of officers

Law enforcement agencies

I Police

I.2 Duties, rights and liabilities of officers

I.2.a Status of officers

Statutes

II Interpretation

II.6 Particular words

II.6.a Technical words

Headnote

Law enforcement agencies --- Police — Organization of police forces — Appointment of officers

In 1995, applicant for employment as police officer was informed that her application had been rejected because she did not satisfy criterion of “good moral character” — Applicant had been caught shoplifting in 1990 but had been conditionally discharged — Applicant argued that she had been pardoned, but decision stood — Applicant complained to Commission des droits de la personne et des droits de la jeunesse (“commission”), asserting that s. 18.2 of Quebec Charter had been violated — Commission unsuccessfully proposed two measures of redress to police service — Commission submitted application to Human Rights Tribunal (“HRT”) against police service — HRT held that discharge is pardon within meaning of Charter and that rejection by police service of applicant’s application on basis that she had shoplifted was infringement of Charter — Court of Appeal confirmed HRT’s decision and police service appealed — Appeal dismissed — Police officer’s role is of course essential to any organized society, but this does not mean that they do not hold employment — Police officers are subject to their superiors, to executive power of State, and to general supervisory powers of their employer in exercise of their tasks — Thus, police officers hold employment.

Law enforcement agencies --- Police — Duties, rights and liabilities of officers — Status of officers

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Criminal law --- Sentencing — Types of sentence — Absolute or conditional discharge — Effect of discharge

In 1995, applicant for employment as police officer was informed that her application had been rejected because she did not satisfy criterion of “good moral character” — Applicant had been caught shoplifting in 1990 but had been conditionally discharged — Applicant argued that she had been pardoned, but decision stood — Applicant complained to Commission des droits de la personne et des droits de la jeunesse (“commission”), asserting that s. 18.2 of Quebec Charter had been violated — Commission unsuccessfully proposed two measures of redress to police service — Commission submitted application to Human Rights Tribunal (“HRT”) against police service — HRT held that discharge is pardon within meaning of Charter and that rejection by police service of applicant’s application on basis that she had shoplifted was infringement of Charter — Court of Appeal confirmed HRT’s decision and police service appealed — Appeal dismissed — Although definition of “pardon” in s. 2 of Criminal Record Act (“CRA”) does not refer to mechanism that applies when person is discharged, effect is same — Consequently, when time period provided for in CRA elapses or pardon is granted, opprobrium that results from prejudice and is attached solely to finding of guilt must be resisted, and finding of guilt should no longer reflect adversely on pardoned person’s character.

Statutes --- Interpretation — Particular words — Technical words

In 1995, applicant for employment as police officer was informed that her application had been rejected because she did not satisfy criterion of “good moral character” — Applicant had been caught shoplifting in 1990 but had been conditionally discharged — Applicant argued that she had been pardoned, but decision stood — Applicant complained to Commission des droits de la personne et des droits de la jeunesse (“commission”), asserting that s. 18.2 of Quebec Charter had been violated — Commission unsuccessfully proposed two measures of redress to police service — Commission submitted application to Human Rights Tribunal (“HRT”) against police service — HRT held that discharge is pardon within meaning of Charter and that rejection by police service of applicant’s application on basis that she had shoplifted was infringement of Charter — Court of Appeal confirmed HRT’s decision and police service appealed — Appeal dismissed — Although definition of “pardon” in s. 2 of Criminal Record Act (“CRA”) does not refer to mechanism that applies when person is discharged, effect is same — Consequently, when time period provided for in CRA elapses or pardon is granted, opprobrium that results from prejudice and is attached solely to finding of guilt must be resisted, and finding of guilt should no longer reflect adversely on pardoned person’s character.

Human rights --- What constitutes discrimination — Criminal record

In 1995, applicant for employment as police officer was informed that her application had been rejected because she did not satisfy criterion of “good moral character” — Applicant had been caught shoplifting in 1990 but had been conditionally discharged — Applicant argued that she had been pardoned, but decision stood — Applicant complained to Commission des droits de la personne et des droits de la jeunesse (“commission”), asserting that s. 18.2 of Quebec Charter had been violated — Commission unsuccessfully proposed two measures of redress to police service — Commission submitted application to Human Rights Tribunal (“HRT”) against police service — HRT held that discharge is pardon within meaning of Charter and that rejection by police service of applicant’s application on basis that she had shoplifted was infringement of Charter — Court of Appeal confirmed HRT’s decision and police service appealed — Appeal dismissed — There is no doubt that being of good moral character is qualification required to become or remain police officer — However, employer must also consider s. 18.2 of Charter so that conviction or, in case of discharge, finding of guilt “should” no longer reflect adversely on person’s character following pardon — To justify objection based on moral character, employer must show that decision was not based on mere fact of finding of guilt — There is no exception to this rule where police officers are concerned — In these circumstances, since applicant had been pardoned, lack of moral integrity associated with shoplifting could not be relied on to prove that she was not of “good moral character”.

Organismes chargés de l’application de la loi --- Police — Organisation des forces policières — Nomination des policiers

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu’elle ne satisfaisait pas au critère des « bonnes moeurs » — Candidate avait commis un vol à l’étalage en 1990 mais avait reçu une absolution conditionnelle — Candidate a fait valoir qu’elle a fait l’objet d’une réhabilitation mais la décision de rejeter sa demande a été maintenue — Candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l’art. 18.2 de la Charte québécoise — Commission a proposé au service de police deux mesures de redressement, mais en vain — Commission a saisi le Tribunal des droits de la personne (« TDP ») d’une plainte

contre le service de police — Selon le TDP, l'absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu'elle avait commis un vol à l'étalage constituait une contravention à la Charte — Cour d'appel a confirmé le jugement du TDP et le service de police a formé un pourvoi — Pourvoi rejeté — Bien que la fonction de policier soit essentielle dans toute société organisée, cela ne signifie nullement que cette fonction n'est pas exercée dans le cadre d'un emploi — Policiers sont soumis à leurs supérieurs, soumis au pouvoir exécutif de l'État et soumis, dans l'exercice de leurs tâches, au pouvoir d'encadrement général de leur employeur — Fonction de policier s'exerce donc dans le cadre d'un emploi.

Organismes chargés de l'application de la loi --- Police — Obligations, droits et responsabilités des policiers — Statut des policiers

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu'elle ne satisfaisait pas au critère des « bonnes moeurs » — Candidate avait commis un vol à l'étalage en 1990 mais avait reçu une absolution conditionnelle — Candidate a fait valoir qu'elle a fait l'objet d'une réhabilitation mais la décision de rejeter sa demande a été maintenue — Candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l'art. 18.2 de la Charte québécoise — Commission a proposé au service de police deux mesures de redressement, mais en vain — Commission a saisi le Tribunal des droits de la personne (« TDP ») d'une plainte contre le service de police — Selon le TDP, l'absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu'elle avait commis un vol à l'étalage constituait une contravention à la Charte — Cour d'appel a confirmé le jugement du TDP et le service de police a formé un pourvoi — Pourvoi rejeté — Bien que la fonction de policier soit essentielle dans toute société organisée, cela ne signifie nullement que cette fonction n'est pas exercée dans le cadre d'un emploi — Policiers sont soumis à leurs supérieurs, soumis au pouvoir exécutif de l'État et soumis, dans l'exercice de leurs tâches, au pouvoir d'encadrement général de leur employeur — Fonction de policier s'exerce donc dans le cadre d'un emploi.

Droit criminel --- Détermination de la peine — Types de peines — Absolution inconditionnelle ou sous conditions — Effet de l'absolution

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu'elle ne satisfaisait pas au critère des « bonnes moeurs » — Candidate avait commis un vol à l'étalage en 1990 mais avait reçu une absolution conditionnelle — Candidate a fait valoir qu'elle a fait l'objet d'une réhabilitation mais la décision de rejeter sa demande a été maintenue — Candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l'art. 18.2 de la Charte québécoise — Commission a proposé au service de police deux mesures de redressement, mais en vain — Commission a saisi le Tribunal des droits de la personne (« TDP ») d'une plainte contre le service de police — Selon le TDP, l'absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu'elle avait commis un vol à l'étalage constituait une contravention à la Charte — Cour d'appel a confirmé le jugement du TDP et le service de police a formé un pourvoi — Pourvoi rejeté — Bien que la définition de « réhabilitation » à l'art. 2 de la Loi sur le casier judiciaire (« LCJ ») ne fasse pas état du mécanisme applicable en cas d'absolution, l'effet est le même — Par conséquent, après l'expiration du délai prévu par la LCJ ou lors de la délivrance d'une réhabilitation, l'opprobre fondé sur les préjugés et se rattachant uniquement à la déclaration doit être combattu et celle-ci ne devrait plus ternir la réputation de la personne réhabilitée.

Lois --- Interprétation — Mots en particulier — Mots techniques

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu'elle ne satisfaisait pas au critère des « bonnes moeurs » — Candidate avait commis un vol à l'étalage en 1990 mais avait reçu une absolution conditionnelle — Candidate a fait valoir qu'elle a fait l'objet d'une réhabilitation mais la décision de rejeter sa demande a été maintenue — Candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l'art. 18.2 de la Charte québécoise — Commission a proposé au service de police deux mesures de redressement, mais en vain — Commission a saisi le Tribunal des droits de la personne (« TDP ») d'une plainte contre le service de police — Selon le TDP, l'absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu'elle avait commis un vol à l'étalage constituait une contravention à la Charte — Cour d'appel a confirmé le jugement du TDP et le service de police a formé un pourvoi — Pourvoi rejeté — Bien que la définition de « réhabilitation » à l'art. 2 de la Loi sur le casier judiciaire (« LCJ ») ne fasse pas

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Droits de la personne --- Ce qui constitue de la discrimination — Casier judiciaire

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu'elle ne satisfaisait pas au critère des « bonnes moeurs » — Candidate avait commis un vol à l'étalage en 1990 mais avait reçu une absolution conditionnelle — Candidate a fait valoir qu'elle a fait l'objet d'une réhabilitation mais la décision de rejeter sa demande a été maintenue — Candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l'art. 18.2 de la Charte québécoise — Commission a proposé au service de police deux mesures de redressement, mais en vain — Commission a saisi le Tribunal des droits de la personne (« TDP ») d'une plainte contre le service de police — Selon le TDP, l'absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu'elle avait commis un vol à l'étalage constituait une contravention à la Charte — Cour d'appel a confirmé le jugement du TDP et le service de police a formé un pourvoi — Pourvoi rejeté — Il ne fait aucun doute qu'être de bonnes moeurs constitue une qualité requise pour devenir ou demeurer policier — Toutefois, l'employeur doit aussi tenir compte de l'art. 18.2 de la Charte de sorte que la condamnation et, dans le cas d'une absolution, la déclaration de culpabilité ne « devraient » plus ternir la réputation de la personne après sa réhabilitation — Pour pouvoir soutenir une objection fondée sur les bonnes moeurs, l'employeur doit démontrer que la décision n'est pas fondée sur le seul fait de la déclaration de culpabilité — Cette règle ne souffre pas d'exception pour ce qui est des policiers — Dans les circonstances de la cause en l'espèce, comme la candidate avait été réhabilitée, le manque d'intégrité morale associé au vol à l'étalage ne pouvait être invoqué contre elle sous l'appellation « mauvaises moeurs ».

In 1995, an applicant for employment as a police officer was informed that her application had been rejected because she did not satisfy the criterion of “good moral character” imposed by the hiring standards. An inquiry had revealed that she had been caught shoplifting in 1990 but had been conditionally discharged. The applicant argued that she had been pardoned, but the decision stood.

The applicant complained to the Commission des droits de la personne et des droits de la jeunesse (“commission”), asserting that s. 18.2 of the Quebec Charter had been violated. Following an investigation, the commission proposed two measures of redress to the police service, namely that it pay the applicant \$5,000 in moral damages and that it cease to consider her criminal record in applying the “good moral character criterion”, but the police service refused to implement them. The commission submitted an application to the Human Rights Tribunal (“HRT”) against the police service.

According to the HRT, police officers hold employment within the meaning of s. 18.2 of the Charter and the police service excluded the applicant because of her criminal record. The HRT held that a discharge is a pardon within the meaning of the Charter and that the rejection by the police service of the applicant's application on the basis that she had shoplifted was an infringement of the Charter. The case was appealed to the Court of Appeal, which confirmed the HRT's decision. The police service appealed.

Held: The appeal was dismissed.

Deschamps J. (McLachlin C.J.C., LeBel, Fish, Abella, Rothstein JJ. concurring): Police officers do not enjoy the constitutional protection judges are granted to ensure that they are not subject to any bureaucratic higher authority. The police officer's role is of course essential to any organized society, since it ensures order and security. However, this does not mean that they do not hold employment. Furthermore, as the Court of Appeal noted, police officers are subject to their superiors, to the executive power of the State, and to the general supervisory powers of their employer in the exercise of their tasks. Thus, police officers hold employment.

The word “pardon” in s. 18.2 has a general meaning. The Quebec legislature has neither defined the scope of its reference to the federal law respecting pardons nor limited that reference in time. The incorporation of this concept in the Charter must be seen as concerning the pardon in the law as it stands at the time the reference is applied. As a result of the amendments to the Criminal Record Act (“CRA”), someone who is granted a discharge obtains a pardon solely through the passage of time. As a result of the amendments, if more than three years have elapsed since a conditional discharge or if more than one year has elapsed since an absolute discharge, no record of the discharge may be disclosed to any person, nor may the existence of the record be disclosed. Thus, the amendments to the CRA were not intended to deprive discharged persons of the benefit of that statute. Although the definition of “pardon” in s. 2 of the CRA does not refer to the mechanism that applies when a person is discharged, the effect is the same. Consequently, when the time period provided for in the CRA elapses or a pardon is granted, the opprobrium that results from prejudice and is attached solely to the finding of guilt must be resisted, and the finding of guilt should no longer reflect adversely on the pardoned person’s character.

There is no doubt that being of good moral character is a qualification required to become or remain a police officer. However, the employer must also consider s. 18.2 of the Charter so that a conviction or, in the case of a discharge, a finding of guilt “should” no longer reflect adversely on a person’s character following a pardon. The legislature has created a special rule for the stigma attached to findings of guilt. This rule could not be disregarded by applying the more general rule in s. 20 of the Charter. To justify an objection based on moral character, the employer must show that the decision was not based on the mere fact of the finding of guilt. There is no exception to this rule where police officers are concerned. In these circumstances, the police service’s submission that it had rejected the applicant’s application for a reason other than the fact that she had been found guilty of shoplifting cannot be accepted. Since the applicant had been pardoned, the lack of moral integrity associated with shoplifting could not be relied on to prove that she was not of “good moral character”.

Charron J. (Binnie J. concurring) (dissenting): The majority of the court correctly found that the position of police officer constitutes “employment” for the purposes of s. 18.2 of the Charter and that the sealing of the record of an absolute or conditional discharge is the functional equivalent of a “pardon” within the meaning of s. 18.2. However, there was no violation of the Charter in this case. Sections 18.2 and 20 can and should be read harmoniously in the context of the Charter as a whole. Thus, although the s. 18.2 protection did apply in this case, there was no reason why the general grounds for justification contained in s. 20 should be carved out of the Charter. Here, the requirement for good moral character for a police officer was an aptitude or qualification for employment within the meaning of s. 20. Because of the need of police officers to exercise their authority with integrity, the risk of recidivism may impose an undue burden on the police force. Therefore, the police service was justified in refusing to hire the applicant and thus its actions did not violate the Charter.

En 1995, une candidate à un poste de policière a été informée que sa demande était rejetée parce qu’elle ne satisfaisait pas au critère des « bonnes moeurs » prescrit par les normes d’embauche. En effet, une enquête a révélé qu’elle avait commis un vol à l’étalage en 1990 mais avait reçu une absolution conditionnelle. La candidate a fait valoir qu’elle a fait l’objet d’une réhabilitation mais la décision de rejeter sa demande a été maintenue.

La candidate a porté plainte à la Commission des droits de la personne et des droits de la jeunesse (« commission »), invoquant une violation de l’art. 18.2 de la Charte québécoise. Après enquête, la commission a proposé au service de police deux mesures de redressement, soit de verser 5 000,00 \$ en dommages-intérêts moraux et cesser de considérer les antécédents judiciaires pour l’application du critère des « bonnes moeurs », ce que le service de police a refusé de faire. La commission a saisi le Tribunal des droits de la personne (« TDP ») d’une plainte contre le service de police.

Selon le TDP, la fonction de policier est un emploi visé à l’art. 18.2 de la Charte et le service de police a exclu la candidate en raison de ses antécédents judiciaires. Selon le TDP, l’absolution constitue un pardon au sens de la Charte et le rejet par le service de police de la demande de la candidate fondé sur le simple fait qu’elle avait commis un vol à l’étalage constituait une contravention à la Charte. L’affaire a été portée en Cour d’appel, laquelle a confirmé le jugement du TDP. Le service de police a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (McLachlin, J.C.C., LeBel, Fish, Abella, Rothstein, JJ., souscrivant à son opinion) : Les policiers ne bénéficient pas de la protection constitutionnelle qui est accordée aux juges et qui exige que ceux-ci ne soient soumis à aucune autorité hiérarchiquement supérieure. Certes, la fonction de policier est essentielle dans toute société organisée, puisqu'elle assure l'ordre et la sécurité. Cependant, cela ne signifie nullement que cette fonction n'est pas exercée dans le cadre d'un emploi. Comme le signalait la Cour d'appel, les policiers sont soumis à leurs supérieurs, soumis au pouvoir exécutif de l'État et soumis, dans l'exercice de leurs tâches, au pouvoir d'encadrement général de leur employeur. La fonction de policier s'exerce donc dans le cadre d'un emploi.

Le mot « pardon » à l'art. 18.2 a une portée générale. Le législateur québécois n'a ni circonscrit ni limité dans le temps sa référence au droit fédéral sur le pardon. L'incorporation de ce concept dans la Charte devait être interprétée comme ayant pour objet le pardon selon l'état du droit au moment de l'utilisation du renvoi. Or, en raison des modifications apportées à la Loi sur le casier judiciaire (« LCJ »), la réhabilitation des personnes qui bénéficient d'une absolution intervient du seul fait de l'écoulement du temps. Les modifications font en sorte qu'à l'expiration d'une période de trois ans dans le cas d'une absolution conditionnelle et d'une période d'un an dans le cas d'une absolution inconditionnelle, nul ne peut communiquer un dossier ou relevé attestant une absolution ni en révéler l'existence. Les modifications apportées à la LCJ n'avaient donc pas pour objectif de priver les personnes absoutes du bénéfice de cette loi. Bien que la définition de « réhabilitation » à l'art. 2 de la LCJ ne fasse pas état du mécanisme applicable en cas d'absolution, l'effet est le même. Par conséquent, après l'expiration du délai prévu par la LCJ ou lors de la délivrance d'une réhabilitation, l'opprobre fondé sur les préjugés et se rattachant uniquement à la déclaration doit être combattu et celle-ci ne devrait plus ternir la réputation de la personne réhabilitée.

Il ne fait aucun doute qu'être de bonnes moeurs constitue une qualité requise pour devenir ou demeurer policier. Toutefois, l'employeur doit aussi tenir compte de l'art. 18.2 de la Charte de sorte que la condamnation et, dans le cas d'une absolution, la déclaration de culpabilité ne « devraient » plus ternir la réputation de la personne après sa réhabilitation. Le législateur a créé un régime particulier pour les stigmates associés aux déclarations de culpabilité. Il ne s'agit pas d'un régime qui pourrait être écarté par suite de l'application du régime plus général de l'art. 20 de la Charte. Pour pouvoir soutenir une objection fondée sur les bonnes moeurs, l'employeur doit démontrer que la décision n'est pas fondée sur le seul fait de la déclaration de culpabilité. Cette règle ne souffre pas d'exception pour ce qui est des policiers. Dans les circonstances de la cause en l'espèce, la prétention du service de police qu'il a exclu la candidate pour un motif autre que la déclaration de culpabilité pour vol à l'étalage ne pouvait être acceptée. Comme la candidate avait été réhabilitée, le manque d'intégrité morale associé au vol à l'étalage ne pouvait être invoqué contre elle sous l'appellation « mauvaises moeurs ».

Charron, J. (Binnie, J., souscrivant à son opinion) (dissident) : La majorité de la cour a eu raison de conclure que le poste de policier constituait un « emploi » pour l'application de l'art. 18.2 de la Charte et que la mise sous scellés du dossier attestant d'une absolution inconditionnelle ou sous conditions était l'équivalent fonctionnel d'un « pardon » au sens de l'art. 18.2. Toutefois, il n'y a pas eu violation de la Charte en l'espèce. Les art. 18.2 et 20 peuvent et doivent être interprétés de façon harmonieuse dans le contexte de la Charte prise dans son ensemble. Ainsi, bien que la protection de l'art. 18.2 s'appliquait effectivement en l'espèce, il n'y avait aucune raison d'exclure de l'application de la Charte les motifs généraux de justification contenus dans l'art. 20. L'exigence relative aux bonnes moeurs était, en l'espèce, une aptitude ou qualité requise par l'emploi au sens de l'art. 20. Comme les policiers doivent faire preuve d'intégrité dans l'exercice de leurs pouvoirs, le risque de récidive peut constituer un fardeau indu pour services de police. Par conséquent, le service de police était fondé à refuser d'embaucher la candidate et ses actions ne contrevenaient donc pas à la Charte.

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APPEAL by police service against judgment reported at *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine) Service de police* (2006), [2006] R.J.Q. 1307, 2006 CarswellQue 14105, 2006 QCCA 612, 2006 CarswellQue 3696 (Que. C.A.), confirming judgment reported at *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Service de police de la Communauté urbaine)* (2001), 2001 CarswellQue 2785, [2002] R.J.D.T. 205, [2002] R.J.Q. 824 (T.D.P.Q.), allowing applicant's complaint against police service following rejection of her application for employment as police officer on basis of shoplifting conviction.

POURVOI du service de police à l'encontre du jugement publié à *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine) Service de police* (2006), [2006] R.J.Q. 1307, 2006 CarswellQue 14105, 2006 QCCA 612, 2006 CarswellQue 3696 (Que. C.A.), ayant confirmé le jugement publié à *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Service de police de la Communauté urbaine)* (2001), 2001 CarswellQue 2785, [2002] R.J.D.T. 205, [2002] R.J.Q. 824 (T.D.P.Q.), ayant accueilli la plainte de la candidate à l'encontre du service de police à la suite du rejet de sa candidature à un poste de policier fondé sur une déclaration de culpabilité de vol à l'étalage.

Deschamps J.:

1 Is a person who has obtained a pardon protected by s. 18.2 of the *Charter of human rights and freedoms*, R.S.Q., c.

C-12 ("Charter"), on applying for employment as a police officer? The answer to this question is yes, but this does not deprive the employer of the defences available to it when its decision is not based on the stigma attached to the conviction in respect of which the pardon was granted.

1. Facts

2 In May 1995, S.N. applied for employment as a police officer with the Service de police de la Communauté urbaine de Montréal ("SPCUM"). In November 1995, she received a letter from the SPCUM informing her that her application had been rejected.

3 S.N. asked why it had been rejected. A personnel officer told her that she did not satisfy the criterion of "good moral character" imposed by the hiring standards, since an inquiry had revealed that she had been caught shoplifting in 1990, when she was 21 years old. She had pleaded guilty to a charge of theft in summary conviction proceedings (s. 334(b)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("Cr. C.)) and had been conditionally discharged. S.N. informed the officer that she had been pardoned, but the SPCUM stood by its decision.

4 S.N. complained to the Commission des droits de la personne et des droits de la jeunesse ("Commission"). She asserted that the SPCUM had, contrary to s. 18.2 of the *Charter*, refused to hire her owing to the mere fact that she had been found guilty of a criminal offence.

5 The Commission investigated the complaint and proposed two measures of redress to the SPCUM: that it pay S.N. \$5,000 in moral damages and that it cease to consider her criminal record in applying the good moral character criterion. The SPCUM refused to implement them. The Commission submitted an application to the Human Rights Tribunal ("HRT") against the SPCUM.

2. Issues and Decisions Below

6 The SPCUM argued that service as a police officer does not constitute employment and is therefore not subject to s. 18.2 of the *Charter*. It added that the rejection of S.N.'s application had been based not on her criminal record, which consisted of the one finding of guilt for shoplifting, but on the "good moral character" criterion provided for in the *By-law respecting standards of the Sûreté du Québec and municipal police forces for the hiring of constables and cadets*, R.R.Q. 1981, c. P-13, r. 14 ("By-law respecting standards for hiring"). The SPCUM further submitted that a pardon resulting solely from the passage of time is not a "pardon" within the meaning of s. 18.2 of the *Charter* and that, under s. 20 of the *Charter*, it could take account of the fact that S.N. did not meet the requirements of the job. The SPCUM maintained that it had committed no fault justifying an award of damages.

7 The HRT concluded that a police officer working for the SPCUM holds employment within the meaning of s. 18.2 of the *Charter* and that the SPCUM had automatically excluded S.N. from the hiring process because of her criminal record. The HRT held that a pardon that results solely from the passage of time following an order of discharge is a "pardon" within the meaning of s. 18.2 of the *Charter*. Accordingly, even though S.N.'s offence was connected with employment as a police officer, the SPCUM could not reject her application on the basis that the facts surrounding the incident in which she was caught shoplifting showed that she was not of good moral character. The HRT found that by rejecting it on that basis, the SPCUM had infringed s. 18.2 of the *Charter*. Since S.N. had given up on becoming a police officer, the HRT ordered the SPCUM, because her dignity had nevertheless been impaired, to pay her \$5,000 in moral damages. However, the HRT did not grant the Commission's request to order the SPCUM to cease considering S.N.'s criminal record in applying the good moral character criterion ((2001), [2002] R.J.Q. 824 (T.D.P.Q.)). The case was appealed to the Court of Appeal.

8 The Court of Appeal affirmed the HRT's decision ([2006] Q.J. No. 4125, 2006 QCCA 612 (Que. C.A.)), stating that police officers are in an employment relationship and that the SPCUM's hiring process must be consistent with s. 18.2 of the *Charter*, which was not the case here. Since S.N. had been pardoned, the SPCUM could not reject her application on the basis that she had been found guilty of a criminal offence or on the basis of the facts of the offence. According to the Court of Appeal, an employer that refuses to hire a candidate solely because of his or her criminal record cannot rely on s. 20 of the *Charter* as a defence. The Court of Appeal held that there was no reason to intervene on the issue of damages.

9 The same arguments were made in this Court.

3. Analysis

10 The issue here concerns the interpretation of s. 18.2 of the *Charter*, which reads as follows:

18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

This Court previously considered this provision in *Therrien c. Québec (Ministre de la justice)*, [2001] 2 S.C.R. 3, 2001 SCC 35 (S.C.C.), where it identified four conditions that must be met for s. 18.2 to apply (at para. 140). There must be:

- (1) a dismissal, a refusal to hire or any kind of penalty,
- (2) decided on in relation to the person's employment,
- (3) owing to the mere fact that the person was convicted of a penal or criminal offence, and
- (4) either the offence must be in no way connected with the employment or the person must have obtained a pardon for the offence.

11 The instant case concerns a refusal to hire, but this condition for the application of s. 18.2 is not in issue. The appellant's grounds of appeal relate to the other three conditions: Does a police officer in the SPCUM hold employment within the meaning of s. 18.2 of the *Charter*? Is a pardon that results solely from the passage of time a "pardon" within the meaning of s. 18.2? And did the SPCUM refuse to hire S.N. owing to the mere fact that she had a criminal record?

3.1 Does a police officer's relationship with the SPCUM constitute employment within the meaning of s. 18.2 of the *Charter*?

12 The appellant argues that service as a police officer must be likened to the office of a judge for the purposes of s. 18.2 of the *Charter*. It takes the Court's conclusions in *Therrien* and applies them to police officers. The appellant's argument is without merit. In *Therrien*, Gonthier J. explained his reasons for holding that judicial office is not *employment* within the meaning of s. 18.2 as follows (para. 141):

However, the Court of Appeal held that judicial office was not an employment within the meaning intended by s. 18.2, by reason of the history of the judiciary and the nature, characteristics and requirements of the office. These findings in fact reflect the constitutional reality of judicial office, which requires that judges not be subject to any bureaucratic higher authority, or be a party to any relationship of subordination such as is traditionally characteristic of the employer-employee relationship, other than in respect of certain administrative aspects of the office such as workload allocation and scheduling of court sittings and certain duties associated with the enforcement of judicial ethics, which are assigned to the chief judge: see s. 96 *C.J.A. and Ruffo* [[1995] 4 S.C.R. 267], at para. 59. In addition, although judges perform their functions for remuneration, their financial security is one of the three essential conditions of judicial independence for the purposes of s. 11(d) of the *Canadian Charter* and the preamble to the *Constitution Act, 1867*, which require that the right to salary and pension be established by law and that any salary reduction, increase or freeze be the subject of a specific process allowing avoidance of any possibility of real or perceived interference by the Executive: *Valente* [[1985] 2 S.C.R. 673], at p. 704, and *Reference re Remuneration of Judges of the Provincial Court* [[1997] 3 S.C.R. 3], at paras. 131 and 287. Finally, the hiring and firing process for judges is substantially different from the normal procedure used for most employments. As the case at bar illustrates, the appointment and removal of

members of the judiciary are governed by a series of constitutional requirements that are intended to protect their security of tenure: *Valente*, at p. 698.

13 Police officers do not enjoy the constitutional protection judges are granted to ensure that they are not subject to any bureaucratic higher authority. The police officer's role is of course essential to any organized society, since it ensures order and security. Police officers are an integral part of the judicial system established to punish delinquent behaviour and prevent wrongdoing. However, this does not mean that they do not hold employment. Furthermore, as the Court of Appeal noted (at para. 41) after reviewing the legislative provisions governing service as a police officer, [TRANSLATION] "police officers are subject to their superiors, to the executive power of the State, and to the general supervisory powers of their employer in the exercise of their tasks" (see the *Act respecting police organization*, R.S.Q., c. O-8.1; the *Police Act*, R.S.Q., c. P-13; and the *By-law respecting standards for hiring*). Although some of this legislation — which was in force at the relevant time — has since been replaced, the status of police officers remains the same. The relationship of subordination that characterizes the employment relationship of police officers clearly distinguishes them from judges. Thus, police officers hold employment and can benefit from the protection of s. 18.2 of the *Charter*.

3.2 Is a statutory pardon a "pardon" within the meaning of s. 18.2?

14 The appellant submits that the use of the word "pardon" in s. 18.2 of the *Charter* is a static interjurisdictional reference and that in enacting s. 18.2 in 1982, the legislature was concerned only with pardons as they existed at the time. According to this interpretation, the protection afforded someone who is granted a pardon under the *Criminal Records Act*, R.S.C. 1985, c. C-47 ("CRA"), has been virtually eliminated as a result of the amendments made by Parliament to the CRA in 1992. This argument cannot be accepted. A restrictive interpretation such as this is not necessary merely because the word "pardon" is used in the French version of s. 18.2 of the *Charter*. The use of the word "réhabilitation" in the French version of the CRA does not indicate a substantive change, since the single word "pardon" is used in the English versions of both statutes. Nor do the administrative changes alter the concept of a pardon. This word has a more general meaning. The Quebec legislature has neither defined the scope of its reference to the federal law respecting pardons nor limited that reference in time. Its incorporation of this concept in the *Charter* must be seen as concerning the pardon in the law as it stands at the time the reference is applied. As the law now stands, the administrative pardon is a form of pardon. The word encompasses both a pardon granted by royal prerogative (s. 748 *Cr. C.*) and a pardon under the CRA.

15 The 1992 amendments to the CRA specifically affect someone who is granted a discharge. As a result of these amendments, a pardon is obtained solely through the passage of time. The person in question receives no document attesting to his or her pardon. Parliament made this amendment in response to a report by an interdepartmental committee on the reform of the CRA: *Proposal for Reform of the Criminal Records Act* (July 20, 1991), Explanatory document by the Solicitor General of Canada, at p. 1. The report began by referring to the purpose of a pardon:

The primary aim of a pardon, granted under the *Criminal Records Act* (CRA) is the removal, as completely as possible, of the negative consequences of conviction once the offender has fulfilled the sentence and enough time has elapsed to establish, with some degree of certainty, law abiding behaviour.

16 In the case of discharged persons, the reform was dictated by a concern to "[address] the anomaly of requiring those persons receiving discharges (and therefore no conviction) to apply for a pardon" (p. 5). Under s. 730(3) *Cr. C.*, a person found guilty of an offence who is discharged is deemed not to have been convicted of the offence. The new process was therefore designed to further recognition of the distinction between a person who is found guilty and discharged and a person who is convicted and sentenced under the *Criminal Code*. As a result of the amendments, if more than three years have elapsed since a conditional discharge or if more than one year has elapsed since an absolute discharge, no record of the discharge may be disclosed to any person, nor may the existence of the record be disclosed. The interdepartmental committee considered this time period necessary to meet the requirements for proving previous convictions or discharges, appealing and pleading *autrefois convict* (ss. 667 and 607 *Cr. C.*). It also wanted to ensure that discharged persons would be provided the same protection as before the amendments (report, at p. 6). Thus, the amendments to the CRA were not intended to deprive discharged persons of the benefit of that statute.

17 The appellant's argument that a pardon under the CRA cannot be considered a "pardon" within the meaning of s. 18.2 is therefore based neither on the wording of the *Charter* nor on the history of the amendments made to the CRA in 1992.

18 Moreover, since the protection against the disclosure of information that the CRA affords a person granted a conditional discharge is effective only once three years have elapsed, there is no basis for concluding that a person who is discharged under s. 730(1) *Cr. C.* benefits from the effects of a pardon as soon as the order of discharge is made.

19 It remains to be asked what the effects of the pardon are. In its report, the interdepartmental committee stated that the purpose of a pardon is to remove, as completely as possible, the consequences of conviction. This purpose is pursued in the CRA by providing that a pardon has the following effects:

5. The pardon

(a) is evidence of the fact

(i) that, in the case of a pardon for an offence referred to in paragraph 4(a), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and

(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and

(b) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161, 259, 490.012 or 490.019 of the *Criminal Code* or subsection 147.1(1) of the *National Defence Act*, or of a regulation made under an Act of Parliament.

Although the definition of "pardon" in s. 2 of the CRA does not refer to the mechanism that applies when a person is discharged, the effect is the same. It can be concluded from a contextual interpretation in keeping with the spirit of the CRA that s. 5 applies to discharged persons as well as to convicted persons.

20 As Gonthier J. noted in *Therrien*, the use of the conditional in s. 5(a)(ii) is significant. A pardon does not have an absolute effect and does not erase the past. Neither a discharge nor a pardon allows a person to deny that he or she was found guilty of an offence (*Therrien*, at paras. 116 and 122). The facts surrounding the offence did occur, but the pardon helps obliterate the stigma attached to the finding of guilt. Consequently, when the time period provided for in the CRA elapses or a pardon is granted, the opprobrium that results from prejudice and is attached solely to the finding of guilt must be resisted, and the finding of guilt should no longer reflect adversely on the pardoned person's character. It must be presumed that the person has completely recovered his or her moral integrity.

21 If the pardoned person is presumed to have recovered his or her moral integrity, can an employer consider the facts that gave rise to the finding of guilt when deciding either to refuse to hire the person or to dismiss him or her? The respondent and the appellant advocate different approaches to this question. Regarding the application of s. 18.2, the answer to the question lies in the real reason for the refusal to hire or the dismissal.

3.3 Was the refusal to hire S.N. based on the mere fact of her criminal record?

22 The appellant makes three arguments concerning the reason for the refusal to hire. First, it argues that, under the *Police Act* and the *By-law respecting standards for hiring*, it has a legal obligation to verify the good moral character of every candidate. It submits that its review of the record of the investigation that resulted in the finding of guilt led it to conclude

that S.N. was not of good moral character. The appellant also argues that a person's integrity cannot be dissociated from the duties of a police officer. This standard should therefore be accepted as a required qualification under s. 20 of the *Charter*. Finally, the appellant argues that it cannot be held civilly liable, since all it did was meet the statutory and regulatory requirements applicable to it. In the circumstances of this case, these three arguments overlap.

23 The relevant provisions of the *Police Act* and the *By-law respecting standards for hiring* read as follows:

Police Act

3. To become a member of the Police Force, a municipal policeman or a special constable, a person must

.....

(2) be of good moral character;

(3) not have been found guilty following an information for an offence under the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) which, according to the information, was prosecuted by way of indictment;

.....

By-law respecting standards for hiring

2. To become a constable or a cadet of the Police Force or of a municipal police force, a person must:

.....

(b) be of good moral character according to the conclusions of an inquiry to be made by using the form prescribed for such purpose by the Commission particularly as regards his family, social, financial and judicial background;

(c) never have been found guilty or pleaded guilty of an offence under the Criminal Code (R.S.C., 1970, c. C-34) upon prosecution by way of indictment, or have pleaded guilty upon an information for an offence under the Criminal Code which, according to the information, should be prosecuted by way of indictment;

24 Being of good moral character and not having a criminal record are separate criteria and are treated as such in the *Police Act* and the *By-law respecting standards for hiring*. They are governed by separate paragraphs. If, as the appellant argues, the facts giving rise to a conviction can on their own be used to reject a candidate for not being of good moral character, this would mean that the provisions concerning a criminal record are redundant. On the other hand, to accept the respondent's argument that the facts giving rise to a conviction may not be considered in assessing whether a candidate is of good moral character would mean that a pardon would not only restore the convicted person's reputation but would also erase the past, which is not the case.

25 There is no doubt that being of good moral character is a qualification required to become or remain a police officer. As Bastarache J. said in *Lévis (Ville) c. Côté*, [2007] 1 S.C.R. 591, 2007 SCC 14 (S.C.C.), at para. 43:

... most, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties.

Not only is a police force, as an employer, entitled to rely on that factor on the basis of the *Police Act* and the *By-law respecting standards for hiring*, but it can also invoke s. 20 of the *Charter*, according to which a distinction based on an aptitude required for an employment is deemed non-discriminatory. In this context, the provisions — s. 3(2) of the *Police Act* and s. 2(6) of the *By-law respecting standards for hiring* — dealing with good moral character are merely applications of this general provision of the *Charter*, which reads as follows:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or

justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

26 An employer is therefore entitled to consider the facts that resulted in a finding of guilt in assessing whether a candidate has the qualifications required for a job. Those facts are inevitably part of the candidate's past. However, the employer must also consider the fact that the person has been pardoned.

27 Indeed, the fact that a candidate's good moral character, and thus his or her entire file, is considered does not justify a decision that is inconsistent with the fact that the candidate has been pardoned. A conviction or, in the case of a discharge, a finding of guilt "should" no longer reflect adversely on a person's character following a pardon. The positive effect of a pardon as it reflects on a person's character may, however, be countered by adducing evidence of delinquent behaviour or of facts indicating a lack of probity, although this evidence cannot be limited solely to the finding of guilt.

28 To justify an objection based on moral character, the employer's inquiry must uncover conduct or facts that, when considered in light of the circumstances in which the person committed the crime for which the pardon was obtained, support a conclusion that this person is unfit for the job. The employer must show that the decision was not based on the mere fact of the finding of guilt.

29 Thus, the facts giving rise to a finding of guilt can be helpful in showing that a person is unfit for service as a police officer. In this context, the facts considered at the time the finding of guilt was made may reveal deficiencies that are relevant to the decision the employer must make. The Commission's position — which, I should add, the Court of Appeal endorsed (paras. 58-59) — that the facts giving rise to a finding of guilt may not be considered in deciding whether a candidate meets the good moral character criterion provided for in the *By-law respecting standards for hiring* must therefore be rejected.

30 To assess the interaction between ss. 18.2 and 20 of the *Charter*, a correlation must be established between the protection against the stigma attached to a finding of guilt and the defence available to the employer to counter a complaint of discrimination on the basis of a qualification required for the employment.

31 A finding of guilt reflects first and foremost on a person's character. A person who has committed an act for which he or she has been reprimanded under criminal or penal law is believed to be less honest. This stigma may therefore affect the assessment of the person's ability to meet conditions of employment. Pursuant to s. 18.2, such a stigma is unjustified if the offence was not connected with the employment or if the person has been pardoned. This protection is more limited — it applies only to findings of guilt — than the general protection against discrimination (s. 10 of the *Charter*), and to avoid its application, the employer need only establish a connection between the offence and the employment. This represents a choice of the legislature. The defence provided for in s. 20 is broader. It encompasses occupational requirements that go beyond a person's integrity or character. However, an employer that imposes a requirement that is *prima facie* discriminatory must prove that it would suffer undue hardship if the requirement were not met. Section 18.2 does not require such proof. The legislature has therefore created a special rule for the stigma attached to findings of guilt. This rule cannot be disregarded by applying the more general rule in s. 20. A special rule prevails over a general rule.

32 Unlike my colleague Charron J., I am unable to accept the appellant's argument that the comments made in *Therrien* and in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maksteel Québec inc.*, [2003] 3 S.C.R. 228, 2003 SCC 68 (S.C.C.), namely that s. 20 cannot be applied to counter the protection regarding findings of guilt, do not reflect the law. A person who is pardoned is entitled to all the benefits flowing from the pardon. Section 18.2 does not distinguish the pardon of the *Criminal Code* from that of the CRA. The protection of a pardon obtains even if there is a connection with the employment. It cannot be denied solely because it would deprive the employer of the justification based on the connection with the employment: that is the very purpose of the exception. The only case where a pardon will be determinative for a complainant is one in which a connection with the employment can be established. Thus, to accept that s. 20 allows the employer to rely on past findings of guilt despite the pardon would involve a surprising interpretation according to which a justification that is not applicable under s. 18.2 could be raised under s. 20. I find it hard to imagine that this was the objective being pursued when s. 18.2 was enacted. In the other Canadian jurisdictions where discrimination based on prior convictions is prohibited, the protection is explicitly subject to a defence based on the aptitudes required for a job. In order to respect each legislature's choice, a court must consider such a defence in light of the provisions applicable to the case before it (*Maksteel*, at paras. 42 and 54, and reasons of Charron J., at para. 76).

33 These principles do not affect the criterion according to which exemplary probity is an essential qualification for employment as a police officer. Indeed, this is why it is difficult to imagine a crime that would not be connected with employment as a police officer. Moreover, the purpose of the protection provided for in s. 18.2 of the *Charter* is to require an employer to presume that a candidate who has been pardoned (or whose finding of guilt is not connected with the employment) is not of bad character or dubious integrity owing to the mere fact of having been found guilty of an offence. There is no exception to this rule where police officers are concerned. As I mentioned above, this does not mean that the good moral character criterion may not be relied on by an employer against whom a complaint under s. 18.2 is made. An employer can establish that a candidate was rejected or an employee dismissed for not being of "good moral character". However, such a defence requires proof of more than just a connection with the employment and may not be raised if the decision was based solely on the fact that the person has been found guilty of an offence. While it is normally the candidate or employee who must prove the elements of a complaint of discrimination, where the employer submits that there was a reason other than the one alleged in the complaint, it is then up to the employer to prove that its decision was not based solely on the stigma attached to the finding of guilt (*Maksteel*, at paras. 48 and 53). In other words, the employer must prove that it is outside the framework of s. 18.2, which prohibits discrimination based on the mere fact of the finding of guilt, and that it is justified in relying on s. 20.

34 In the case at bar, the SPCUM claims to have concluded that S.N. lacked integrity after a thorough review of the file. The HRT's findings of fact are clear, however. At the relevant time, the SPCUM was rejecting anyone found guilty of shoplifting, regardless of whether the person had been pardoned. In the specific case of S.N., the rejection of her application was based solely on a review of the file on which the finding of guilt was based. The SPCUM conducted no further inquiry or interviews that would have enabled it to conclude that there was sufficient evidence to counter the presumption that the pardon had restored her moral integrity. In these circumstances, the SPCUM's submission that it had rejected S.N.'s application for a reason other than the fact that she had been found guilty of shoplifting cannot be accepted. Since S.N. had been pardoned, the lack of moral integrity associated with shoplifting could not be relied on to prove that she was not of good moral character.

35 The appellant cites the example of a person found guilty of sexual assault who is pardoned. This example is an alarmist one. It disregards the provisions applicable in sexual assault cases and cannot be used by the SPCUM to sidestep its burden of proof. I would hope that an employer that received a job application from a person who had been found guilty of sexual assault would conduct an inquiry more satisfactory than the one conducted by the SPCUM in this case. It is also worth mentioning that stricter controls are likely to be imposed in respect of sex crimes than of other crimes (see, for example, ss. 161 and 753 Cr. G). In particular, special measures exist in respect of sex crimes in the field of education: *Education Act*, R.S.Q., c. I-13.3. Thus, the spectre raised by the appellant cannot make up for the lack of evidence supporting the rejection of S.N.'s application.

36 Finally, the appellant submits that it cannot be ordered to pay damages, because it complied with the *Police Act* and the *By-law respecting standards for hiring*. In addition to the other arguments that can be made against this submission, the above-quoted passages from the legislation in question show that the rejection of S.N.'s application was required by no provision in force at the time, since the offence was a summary conviction offence. The *Police Act* has since been replaced by the *Police Act*, R.S.Q., c. P-13.1. The principles that might be relied on under the new legislation need not be analysed, however, as it does not apply here.

4. Conclusion

37 The appellant cannot apply the good moral character criterion in this case because it has alleged no facts other than the ones that resulted in the finding of guilt in respect of which S.N. was pardoned. Those facts did not have to be disregarded in reviewing S.N.'s application, but they could not serve as the sole basis for rejecting it. The SPCUM made no real inquiry that would have enabled it to justify its decision. In the circumstances, the HRT's finding that S.N.'s application was rejected owing to the mere fact that she had been found guilty of a criminal offence must be upheld.

38 For these reasons, I would dismiss the appeal with costs.

Charron J.:

1. Overview

39 S.N. applied to become a police officer with the Service de police de la Communauté urbaine de Montréal ("SPCUM"). During the course of the selection process, the SPCUM discovered that, a few years earlier, S.N. had been found guilty of theft. After looking into the circumstances of the offence, the SPCUM rejected S.N.'s candidacy based on the fact that she was not, as required by s. 3 of the *Police Act*, R.S.Q., c. P-13, a person of "good moral character". The question on this appeal is whether the SPCUM violated S.N.'s rights under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("Charter").

40 The issue arises because S.N. was sentenced to a conditional discharge under s. 730 (736 at that time) of the *Criminal Code*, R.S.C. 1985, c. C-46, for the offence and, following the requisite passage of time, her criminal record was sealed pursuant to s. 6.1 of the *Criminal Records Act*, R.S.C. 1985, c. C-47. S.N. maintains that the sealing of her record is the equivalent of a pardon and that, consequently, the SPCUM's refusal to hire her because of her criminal past constituted discrimination under s. 18.2 of the *Charter*. Section 18.2 reads as follows:

18.2 No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

41 The SPCUM takes the position that s. 18.2 of the *Charter* does not apply for several reasons: (1) the position of police officer does not constitute "employment"; (2) the automatic sealing of S.N.'s criminal record under s. 6.1 of the *Criminal Records Act* is not a "pardon"; and (3) the rejection of her candidacy was not based on the "mere fact" that she was found guilty of a criminal offence but, rather, on the circumstances surrounding the commission of the offence. Alternatively, the SPCUM argues that s. 18.2 must be read in conjunction with s. 20 of the *Charter* which allows for the rejection of S.N.'s candidacy based on the fact that she did not have "the aptitudes or qualifications" to become a police officer. Section 20 reads as follows:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

42 I have had the benefit of reading the reasons of Deschamps J. I agree with my colleague that the position of police officer constitutes "employment" for the purposes of s. 18.2 of the *Charter*. I also agree that the sealing of the record of an absolute or conditional discharge, once the statutory time period set out in s. 6.1 of the *Criminal Records Act* has passed, is the functional equivalent of a "pardon" within the meaning of s. 18.2. However, I respectfully disagree that there was a violation of the *Charter* in this case. I take a different view on the proper analytical framework for dealing with alleged discrimination based on criminal record under the *Charter*.

43 In my view, ss. 18.2 and 20 can and should be read harmoniously in the context of the *Charter* as a whole. The *obiter* statements in two previous decisions of this Court to the effect that s. 18.2 is a "self-contained" or "independent" provision in respect of which s. 20 finds no application should be departed from. These statements were based on the fact that s. 18.2 has its own internal justification mechanism and that resort to the "aptitudes or qualifications" requirement for the employment contained in s. 20 would duplicate this mechanism: *Therrien c. Québec (Ministre de la justice)*, [2001] 2 S.C.R. 3, 2001 SCC 35 (S.C.C.), at para. 145; *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maksteel Québec inc.*, [2003] 3 S.C.R. 228, 2003 SCC 68 (S.C.C.), at paras. 21-22. I agree that where the employer can successfully except his action or decision from the scope of s. 18.2 by showing that there is a connection between the offence and the employment, resort to s. 20 is unnecessary. In such cases, the s. 18.2 protection against discrimination based on criminal record simply does not apply. However, where the s. 18.2 protection *does* apply, as in this case, I see no reason why the general grounds for justification contained in s. 20 should be carved out of the *Charter*. Indeed, the opposite conclusion is not only inconsistent

with the language, structure and intent of the *Charter*, it would result in many absurdities.

44 For the reasons that follow, I conclude that the SPCUM was justified in refusing to hire S.N. and thus its actions did not violate the *Charter*. I would therefore allow the appeal, set aside the judgment in the court below, and dismiss the action with costs throughout.

2. The Facts

45 In August 1990, S.N. was arrested for shoplifting approximately \$200 worth of clothes and accessories from a department store. She was 21 years old at the time. In May 1991, she plead guilty to the offence of theft and received a conditional discharge. Following the requisite passage of time, her criminal record was sealed pursuant to s. 6.1 of the *Criminal Records Act*.

46 In 1995, S.N. applied to become a police officer with the SPCUM. S.N. did not reveal that she had been in trouble with the law because she believed, based on her reading of a letter received from the RCMP, that the sealing of her record effectively erased the incident from her past. Further, the application form did not require disclosure of pardoned offences.

47 As part of the selection process, the SPCUM conducted an investigation to determine whether she met the criteria set out in s. 3 of the *Police Act*, and s. 2 of the By-law respecting standards of the Sûreté du Québec, and municipal police forces for the hiring of constables and cadets, R.S.Q., c. P-13, r. 14. Among other qualities, both the Act and the *By-law* require the candidate to be a person of “good moral character”. The investigation therefore included checking for any criminal activities in the candidate’s past.

48 Upon discovering that S.N. had been found guilty of theft, the SPCUM obtained a copy of the reports and statements made at the time of the arrest, as well as the court records. Based on its review of the circumstances of the offence, particularly the fact that S.N. was 21 years old at the time, the SPCUM concluded that S.N. did not meet the requisite criterion of “good moral character”. Her candidacy was therefore rejected on this basis.

49 S.N. lodged a complaint with the Commission des droits de la personne et des droits de la jeunesse, alleging that the SPCUM discriminated against her based on a criminal offence for which she had received a pardon, contrary to s. 18.2 of the *Charter*. The Commission brought a complaint against the SPCUM before the Tribunal des droits de la personne. The Tribunal found that the SPCUM violated s. 18.2 of the *Charter* and ordered it to pay \$5,000 in damages ((2001), [2002] R.J.Q. 824 (T.D.P.Q.)). The decision was upheld on appeal before the Quebec Court of Appeal ([2006] R.J.Q. 1307, 2006 QCCA 612 (Que. C.A.)). The SPCUM further appeals before this Court.

3. Analysis

50 In order to determine whether the SPCUM acted improperly in rejecting S.N.’s application, it is essential to understand what the *Charter* protects, and what it does not. Before turning to this question, I will comment briefly on an issue which, although not raised by the parties, should be addressed. The law in Quebec provides that the English and French versions of statutes are equally authoritative: *Charter of the French language*, R.S.Q., c. C-11, s. 7(3). An issue therefore arises from the difference between the English and French versions of s. 18.2. For convenience, I reproduce both versions here:

18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

18.2. Nul ne peut congédier, refuser d’embaucher ou autrement pénaliser dans le cadre de son emploi une personne du seul fait qu’elle a été déclarée coupable d’une infraction pénale ou criminelle, si cette infraction n’a aucun lien avec l’emploi ou si cette personne en a obtenu le pardon.

51 The French version of s. 18.2 refers to a person who has been “*déclarée coupable*” (found guilty) of a criminal or penal offence whereas the English text refers to a person being “convicted” (*condamnée*). All persons who are convicted are found guilty of the offence, however, the converse is not true. Persons who are found guilty are not all convicted. For example, — some are granted an absolute or conditional discharge under s. 730 of the *Criminal Code*. Or, in cases where the principle in *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729 (S.C.C.), applies, a stay will be entered to avoid multiple convictions for the same delict: *R. v. Hammerling*, [1982] 2 S.C.R. 905 (S.C.C.). This case falls in the former category. The relevant part of s. 730 reads as follows:

730. (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

730. (1) Le tribunal devant lequel comparaît l'accusé, autre qu'une organisation, qui plaide coupable ou est reconnu coupable d'une infraction pour laquelle la loi ne prescrit pas de peine minimale ou qui n'est pas punissable d'un emprisonnement de quatorze ans ou de l'emprisonnement à perpétuité peut, s'il considère qu'il y va de l'intérêt véritable de l'accusé sans nuire à l'intérêt public, au lieu de le condamner, prescrire par ordonnance qu'il soit absous inconditionnellement ou aux conditions prévues dans l'ordonnance rendue aux termes du paragraphe 731(2).

52 Hence, the English text implies that s. 18.2 does not apply to pardons that result from discharges whereas the French text would have the protection apply to all forms of pardons.

53 This Court has on a number of occasions elaborated on the appropriate method for interpreting bilingual legislative provisions: see e.g., *R. c. Bois*, [2004] 1 S.C.R. 217, 2004 SCC 6 (S.C.C.); *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62 (S.C.C.). These cases suggest a two-step approach. The first step is to look for a shared meaning between the two provisions, which often involves adopting the more narrow version. In this case, this “shared meaning” approach would lead us to adopt the more restricted scope of the protection under the English version of s. 18.2. However, if this approach would lead to a meaning that is contrary to the legislature’s intention, other principles of interpretation should apply. The second step therefore involves comparing the shared meaning to Parliament’s intent to determine whether it is consistent with that intent.

54 As explained by Deschamps J., the sealing of a criminal record of a person who has received a discharge under s. 6.1 of the *Criminal Records Act* is the functional equivalent of a pardon. Indeed, there is no mechanism under that Act for a person who has received a discharge to apply for a pardon — the criminal record is automatically sealed with the simple passage of time. While this automatic sealing of the criminal record is not technically defined as a pardon, it is apparent from reading the provision in context and having regard to the legislative intent in passing this provision that it is functionally equivalent to other forms of pardon. In turn, a large and liberal approach to the *Charter* would suggest that the legislature intended to extend the s. 18.2 protection to all persons who have received a pardon, including those whose criminal records have been sealed following a discharge.

55 I therefore conclude that the French version of s. 18.2 is more consistent with the intention of the legislature and that the protection extends to all persons who have been found guilty of a criminal or penal offence in respect of which they have received some form of pardon.

56 I now turn to a review of s. 18.2 in the context of other relevant *Charter* provisions.

57 In reviewing the relevant provisions of the *Charter*, it is important to bear in mind the common rule of interpretation that statutory provisions are to be read in their immediate context and in the context of the Act as a whole: *R. Sullivan, Sullivan and Dreidger on the Construction of Statutes* (4th ed. 2002), at p. 281. As I will explain, a holistic and purposive reading of the *Charter* leads me to the conclusion that ss. 18.2 and 20 of the *Charter* can and should be read in harmony.

58 The prohibited grounds of discrimination are largely set out in s. 10 of the *Charter*:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

59 It is noteworthy that the protection from discrimination based on the mere fact that a person has been found guilty of a criminal or penal offence (which I refer to throughout as “discrimination based on criminal record”) does not form part of the enumerated grounds under s. 10. Rather, the protection is provided for separately in s. 18.2. Most notably, in contrast to the s. 10 prohibited grounds of discrimination, the s. 18.2 protection does not apply universally — it is limited to the employment context. The scope of the protection is further circumscribed in two significant respects. It only applies if (1) the basis for the decision or action taken is “the *mere fact*” of conviction; and (2) “the offence was in no way connected with the employment or if the person has obtained a pardon for the offence”. I will return later to the scope of the s. 18.2 protection. For the moment, I will focus on the general structure of the *Charter*.

60 Certain provisions of the *Charter* make explicit reference to the grounds enumerated in s. 10 and further delineate the scope of the protection on those grounds, but make no reference to s. 18.2. Quite clearly, these provisions do not apply to the s. 18.2 protection. For example, s. 10.1 states that “no one may harass a person on the basis of any ground mentioned in section 10.” Another example which is more relevant to the question that occupies us is found in s. 18.1. It provides as follows:

18.1 No one may, in an employment application form or employment interview, require a person to give information regarding any ground mentioned in section 10 unless the information is useful for the application of section 20 or the implementation of an affirmative action program in existence at the time of the application.

The prohibition contained in s. 18.1 is specifically limited to s. 10 grounds. Therefore, as this Court held in *Therrien*, the *Charter* does not prevent an employer from asking a prospective employee whether she has had any trouble with the law, and this, even when the candidate has obtained a pardon in respect of the crime in question (paras. 136-38).

61 In contrast, s. 20 of the *Charter* does not refer to discrimination based solely on s. 10 grounds. Again for convenience, I repeat it here:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

As the language makes plain, s. 20 is a general clause that deems certain distinctions, exclusions or preferences non-discriminatory. Given the general nature of this section, and the fact that, like s. 18.2, it also deals with the employment context, it seems to me that s. 20 should be read in harmony with s. 18.2.

62 Thus, distinctions based on criminal record that otherwise fall within the scope of the s. 18.2 protection should be deemed non-discriminatory if they relate to aptitudes or qualifications required for an employment. In my view, this interpretation is consistent with the language and structure of the *Charter*. Put against this interpretation are *obiter* statements in two decisions of this Court that s. 20 has *no* application to s. 18.2: see *Therrien*, at para. 145, and *Maksteel*, at para. 21. It is my view that the reasoning in each of those cases does not support this conclusion and that it should be departed from. I will explain.

63 The Court in *Therrien* described s. 18.2 as a self-contained provision. Gonthier J. explained that, because aptitudes or qualifications required for an employment are subsumed within the notion of connection with the employment, there is no need to turn to s. 20 of the *Charter*. He therefore concluded that s. 20 did not apply to s. 18.2, stating as follows:

The second situation is one in which no exception to the application of that provision is possible. If a pardon has been granted and the other three conditions are also met, the probable finding will be that there was discrimination against the

person who received the pardon. It should be noted that s. 20, which provides that a distinction based on the aptitudes or qualifications required from an employment is deemed nondiscriminatory, has no application in respect of s. 18.2. Section 18.2 is a self-contained provision and has its own rules governing exceptions. This internal justification mechanism would otherwise duplicate the mechanism in s. 20.

[Emphasis added; para. 145.]

64 Building on this reasoning, the Court in *Maksteel* characterized s. 18.2 as an “independent provision” and found that, when the link to the employment is made out, there is no need to resort to the general justification found in s. 20 nor to its inherent duty to accommodate. While there was no question of pardon in *Maksteel*, Deschamps J. added the following:

If the person has obtained a pardon for the offence committed, whether or not the offence was connected with the employment, the protection is absolute. Moreover, if there is no connection between the criminal record and the employment, the protection is also complete.

[Emphasis added; para. 21.]

65 The notion that s. 20 is subsumed under s. 18.2 holds in so far as the “connection to employment” branch of s. 18.2 is concerned. The expression “*in no way* connected with the employment” is indeed very wide. It certainly encompasses the notion of “aptitudes or qualifications required for an employment”. But it is even broader than that. For example, employees who steal from their employer, commit crimes during work hours or using the employer’s property, assault clients or co-workers, all commit crimes that are connected to the employment. These crimes may or may not, however, impact the employee’s ability to do his or her job — the gardener who steals a hoe from his employer may still be an excellent gardener. The employer may nonetheless be justified in dismissing, penalizing, or refusing to hire these individuals based on ordinary employment law principles. The internal limitation contained in s. 18.2 protection signals that these rules are not displaced by the protection against *unjustified* treatment based on criminal record provided by the *Charter*. Because of this wide notion of connection to the employment that internally circumscribes the scope of the protection, whenever an employer successfully invokes this branch of s. 18.2 to except his decision or action from its application, there is no need to justify it under s. 20 because there is no *prima facie* discrimination. The logic is not that demonstrating a “connection to the employment” leaves nothing to be decided under s. 20, but rather the protection simply does not extend to the decision or action in question.

66 However, the inquiry is very different when the second branch of the s. 18.2 protection is invoked. If there is a pardon, the s. 18.2 protection is triggered. Does this mean that the protection is absolute or that it admits of no exception? Such a conclusion certainly cannot be based on the notion that any inquiry under s. 20 would be redundant. Nor in my view, as I explained earlier, can it be based on the language or structure of the relevant *Charter* provisions. If the protection is indeed absolute, this conclusion would have to flow from the nature and legal effect of the pardon itself.

67 In *Therrien*, Gonthier J. reviewed at length the various types of pardons, their meaning and effect (paras. 113-27). It is not necessary to repeat this analysis. It suffices here to repeat the conclusion of the Court:

I therefore find that while a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored, and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner, a situation which the Canadian and Quebec charters tend to protect against.

[Emphasis added; para. 127.]

Therefore, it is clear that a pardon does not erase the past. Would it nonetheless be “arbitrary or discriminatory” to consider the past events in the context of determining whether a candidate meets the aptitudes or requirements of the employment within the meaning of s. 20? Short of a free pardon under s. 748(2) and (3) of the *Criminal Code*, by virtue of which a “person shall be deemed thereafter never to have committed the offence”, it is my view that it would not. The pardon prevents unjustified or discriminatory treatment based on criminal record, but it does not create a legal fiction that forces employers to ignore the fact that the person has committed the acts in question. The application of s. 20 would merely ensure

that a dismissal, refusal to hire, or other penalty is justified by the *real* aptitudes or qualifications of the individual and not based on stereotypes.

68 Further, if a pardon were to provide an absolute protection as contended, it would result in the following absurdities. The protection under s. 18.2 of the *Charter* does not extend to reprehensible conduct that has not been the subject matter of a charge. Nor does it extend to the commission of criminal acts in respect of which a criminal proceeding has not resulted in a finding of guilt. An employer who requires its employees to be of high moral character could justifiably refuse to hire persons who have engaged in questionable activities that fall well short of criminal behaviour, or criminal activities that never formed the subject matter of a charge. However, the same employer would be prohibited from refusing to hire a person who has committed a criminal act that has been proven beyond a reasonable doubt, if that person has obtained a pardon. And this, even if the acts in question had an undeniable relation to the aptitudes or qualifications for the job. Further, because the standard of proof in a criminal case is higher than in a civil proceeding, an employer could justify the refusal to hire based on proof of reprehensible acts in respect of which the candidate has been charged but *acquitted*. However, in making its decision, the same employer could not consider criminal acts in respect of which the candidate was found guilty when they are the subject of a subsequent pardon.

69 My colleague accepts that a pardon does not erase the past and that the underlying facts can be considered by an employer, even within the four corners of s. 18.2. However, she would require that the employer show something more to support the refusal to hire. Hence, in dismissing as alarmist the SPCUM's argument that an employer may have to hire a pardoned pedophile in a day care, she states that one would hope that the employer who receives such an application would conduct a more thorough investigation than that conducted by the SPCUM here.

70 In my respectful view, the facts underlying the pardoned offence cannot be realistically contained and used simply as a building block to support further facts that would justify the employer's decision as my colleague's analysis would have it. For one matter, it will not always be possible to obtain further information from a more thorough investigation. Also, the criminal acts in question may provide *the most cogent* information about a person's inaptitude for the job. Undoubtedly, the SPCUM's stark example of a pedophile claiming a right to be hired in a day care facility was intended to capture the Court's attention. But it nonetheless underscores the potential absurdities that may result if we were to exclude s. 20's application to s. 18.2.

71 As I have stated earlier, I agree with Deschamps J. that the sealing of S.N.'s record should be regarded as the functional equivalent of a pardon within the meaning of s. 18.2 of the *Charter*. However, we cannot ignore the reality that, unlike the free pardon or other forms of pardon, an administrative pardon that is issued for an absolute or conditional discharge is granted automatically based on the simple passage of time, one year in the case of an absolute discharge and three years for a conditional discharge. Hence, it does not offer the same safeguards about the person's actual rehabilitation as other forms of pardon may offer. Further, as the evidence demonstrates, pardons are far from uncommon (Tribunal's decision, at para. 63). All this to say, it cannot have been the legislature's intention that the protection granted under the second branch of s. 18.2 be absolute as contended. The purpose of the *Charter* is to protect against *stereotypes* and *unjustified* exclusions based on criminal records. It is not intended to erase the past and shield an individual from *all* civil consequences of their own behaviour.

72 It is important to note that this interpretation does not negate the protection afforded by the second branch of s. 18.2. Section 20 requires that an employer rebut a *prima facie* claim of discrimination by demonstrating that the distinction relates to an aptitude or qualification required for the employment, also referred to as a *bona fide* occupational requirement, governed by the three-part test set out in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) (the "*Meiorin*" test).

73 Hence, in order to prove that a standard is a *bona fide* occupational requirement, the employer must demonstrate:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that the employer could not accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (*Meiorin*, at para. 54; *Syndicat des employé-e-s de techniques professionnelles & de bureau d'Hydro-Québec, section 2000 (SCFP-FTQ) c. Corbeil*, 2008 SCC 43 (S.C.C.), at paras 11-12

74 The fact that a person has received a pardon should factor into the *bona fide* occupational requirement analysis. As noted earlier, there are various types of pardons. A “free pardon”, under s. 748(2) and (3) of the *Criminal Code*, deems that the person never committed the offence. Thus it would be virtually impossible to find that the finding of guilt is related to a *bona fide* occupational requirement if such a pardon were granted. Other pardons are obtained after a certain amount of time passes without the person committing any subsequent offences. In the case of administrative pardons issued for absolute and conditional discharges, they are granted automatically and without investigation into the person’s actual rehabilitation. The passage of time makes it less likely that the criminal activity will be relevant to a *bona fide* occupational requirement, depending on the severity of the offence and the nature of the employment. However, there are some jobs where any degree of risk of recidivism is too great to be tolerated. Likewise, if the position requires a public perception of integrity, then a criminal record may not be something that can be accommodated, regardless of how much time has passed.

75 The *bona fide* occupational requirement exception set out by the legislature in s. 20 applies to all other grounds of discrimination under the *Charter*. There is no reason why it should not apply to the protection afforded under s. 18.2. It ensures that the *Charter* serves its purpose of preventing a criminal record from being an unnecessary and unjust barrier to employment while, at the same time, not overshooting the scope of the protection.

76 Finally, this approach is consistent with the legislation in other Canadian jurisdictions. Every Canadian jurisdiction that provides protection from discrimination based on criminal record allows the employer to consider the criminal conviction if it is a *bona fide* occupational requirement. See e.g., *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Human Rights Code*, R.S.B.C. 1996, c. 210; *Human Rights Code*, R.S.O. 1990, C.H.19; *Human Rights Act*, R.S.P.E.I. 1998, c. H-12; *Human Rights Act*, R.S.Y. 2002, c. 116; *Human Rights Act*, S.N.W.T. 2002, c. 18; *Human Rights Act*, S.Nu. 2003, c. 12. This is true even where the legislation contains an “internal limitation” similar to the “connection to the employment” language of s. 18.2 of the *Charter*: see e.g., British Columbia, Prince Edward Island, and the Yukon. It is also true of jurisdictions that provide protection from discrimination where a pardon has been obtained: Federal, Ontario, Northwest Territories, and Nunavut. I see no reason why the language or the logic of the Quebec *Charter* would lead to a different result.

4. Application of the Charter to S.N.’s Candidacy

77 The issue in this case is whether the SPCUM violated s. 18.2 of the *Charter* when it refused to hire S.N. As stated in *Therrien*, “[w]hether this section applies will depend on whether four essential conditions are met: (1) a dismissal, a refusal to hire or any kind of penalty; (2) in the person’s employment; (3) owing to the mere fact that the person was convicted of a penal or criminal offence; (4) if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence” (para. 140).

78 Conditions (1), (2) and (4) are clearly met. The only question is whether the SPCUM refused to hire S.N. based on the “mere fact” that she was found guilty of a criminal offence.

79 The SPCUM argues firstly that it did not refuse to hire S.N. based on the “mere fact” that she had a criminal record but, rather, based on its review of the circumstances of the offence. I would not accede to this argument. If that position were accepted, an employer could always circumvent the application of s. 18.2 by simply stating that reliance was placed on the facts of the offence as opposed to the mere fact that the person was found guilty. In my view, the two are inseparable.

80 The fact that the SPCUM did consider the circumstances of the offence, however, has a bearing on the more germane question whether the refusal to hire was based on an aptitude or qualification required for an employment within the meaning of s. 20. In order to answer this question, it may be useful to briefly recall the facts related to the investigation.

81 The SPCUM discovered that S.N. had a criminal record by conducting a verification through the computerized police

information system. Because S.N. had been pardoned, the system did not contain the details of the offence. The SPCUM continued its investigation. It obtained the police reports and statements made at the time of the infraction, as well as the court record for S.N. The SPCUM conducted an analysis of the *modus operandi* of the crime and considered her age at the time of the infraction. Because the crime was deliberate and S.N. was an adult at the time (A.R., at p. 1345), the SPCUM determined that this incident demonstrated that S.N. was not, as required by the *Police Act* and the *By-law respecting hiring of constables and cadets*, a “person of good moral character”.

82 The SPCUM takes the position that the requirement for good moral character for a police officer is an aptitude or qualification for employment within the meaning of s. 20. I agree.

83 This Court has recently affirmed that participation in most, if not all, criminal activities will undermine a police officer’s ability to do his or her job. In *Lévis (Ville) c. Côté*, [2007] 1 S.C.R. 591, 2007 SCC 14 (S.C.C.), Bastarache J. noted that:

A criminal conviction, whether it occurs on-duty or off-duty, brings into question the moral authority and integrity required by a police officer to discharge his or her responsibility to uphold the law and to protect the public. It undermines the confidence and trust of the public in the ability of a police officer to carry out his or her duties faithfully: *Deux-Montagnes; Ville de Lévis*. [para. 70]

84 Police have considerable power and discretion over matters that can affect the fundamental rights of the members of the public whom they encounter. Police work requires individuals not only to exercise a significant degree of judgment and integrity, it is also a position that requires the utmost public trust.

85 Clearly the standard of “good moral character” set out in s. 3 of the *Police Act* meets the first two steps of the *Meiorin* test, as it is rationally connected to the job and is imposed in good faith. The question is whether the employer can accommodate persons who have a criminal record and have received a pardon for the offence without imposing undue hardship on the employer.

86 In the case of police officers, the hardship is two-fold: the risk of recidivism and the public perception of the integrity of the police force. Because of the need of police officers to exercise their authority with integrity, the risk of recidivism may impose an undue burden on the police force. Even if the person presents a very low risk of re-offending, the fact that they have committed an offence is likely to affect the public’s confidence in the integrity of the police force. There may be some exceptions such as persons who receive free pardons, persons who committed very minor infractions as minors, or persons whose record stems from non-violent political activity, but these exceptions will be rare. The nature of the employment requires the highest standard of moral character.

87 I therefore conclude that the SPCUM was justified in refusing to hire S.N. and thus its actions did not violate the *Charter*.

88 For these reasons, I would allow the appeal, set aside the judgment below, and dismiss the action with costs throughout.

*Appeal dismissed.
Pourvoi rejeté.*

TAB
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2004 ABQB 861
Alberta Court of Queen's Bench

R. v. Corser

2004 CarswellAlta 1579, 2004 ABQB 861, [2004] A.J. No. 1335, [2005] A.W.L.D. 564

Her Majesty the Queen (Respondent) and Don Richard Corser (Appellant)

Veit J.

Heard: September 13, 2004
Judgment: September 17, 2004
Docket: Edmonton 031009608P101001

Proceedings: affirmed *R. v. Corser* ((October 28, 2003)), Doc. Evansburg 031009608P101001 ((Alta. Prov. Ct.))

Counsel: Laurie I. Wood, for Appellant
John P. Higgerty, for Respondent

Subject: Criminal

Related Abridgment Classifications

Criminal law

VI Offences

VI.145 Threatening communications or uttering threats to cause bodily harm

VI.145.a Elements

VI.145.a.ii Miscellaneous

Headnote

Criminal law --- Offences — Threatening communications or uttering threats to cause bodily harm — Elements — General

Accused had history of bad relationship with brother — Accused came to residence of individual whose sister-in-law was married to accused's brother — Accused allegedly told individual that he planned to shoot brother and that brother's wife "needed to go too" — Accused was charged with uttering threats to cause bodily harm contrary to s. 264.1(1)(a) of Criminal Code, R.S.C. 1985, c. C-46 — At trial individual to whom accused uttered alleged threats testified that accused appeared to be on drugs at time — Accused was convicted — Accused brought appeal from conviction on basis that Crown failed to prove all elements of crime — Appeal dismissed — Trial judge was correct in law in determining that offence was made out as accused uttered words of menace with intent for menace to be taken seriously — Accused spoke clearly menacing words to relative of persons threatened in circumstances where accused had no expectation of confidentiality — Fact that accused had long-standing acrimonious relationship with brother, no relationship of trust with individual to whom threat was expressed and knew individual was relative of targets of threat supported conclusion that accused put threat into circulation.

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R. v. Small (2001), 2001 BCCA 91, 2001 CarswellBC 441, 152 C.C.C. (3d) 412, 149 B.C.A.C. 36, 244 W.A.C. 36 (B.C. C.A.) — referred to

R. v. Styles (2000), 2000 CarswellNfld 102, 189 Nfld. & P.E.I.R. 116, 571 A.P.R. 116 (Nfld. T.D.) — referred to

R. v. Tan (1974), 22 C.C.C. (2d) 184, [1975] 2 W.W.R. 747, 1974 CarswellBC 302 (B.C. C.A.) — referred to

R. v. Thompson (1981), 59 C.C.C. (2d) 514, 22 C.R. (3d) 389, 1981 CarswellOnt 65 (Ont. C.A.) — considered

R. v. Tibando (1994), 69 O.A.C. 225, 88 C.C.C. (3d) 229, 1994 CarswellOnt 888 (Ont. C.A.) — considered

R. c. Tremblay (1991), [1991] R.J.Q. 2766, 41 Q.A.C. 241, 68 C.C.C. (3d) 439, 1991 CarswellQue 198 (Que. C.A.) — referred to

R. c. Tremblay (1993), 23 C.R. (4th) 98, 156 N.R. 30, 106 D.L.R. (4th) 413, 57 Q.A.C. 161, [1993] 2 S.C.R. 932, 84 C.C.C. (3d) 97, 1993 CarswellQue 15, 1993 CarswellQue 161 (S.C.C.) — referred to

R. v. Whittaker (1989), 95 A.R. 229, 1989 CarswellAlta 478 (Alta. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 264.1(1) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 38] — referred to

s. 264.1(1)(a) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 38] — pursuant to

s. 590(1)(b) — referred to

Criminal Records Act, R.S.C. 1985, c. C-47

Generally — referred to

s. 6.1 [en. 1992, c. 22, s. 6] — considered

s. 6.1(2) [en. 1992, c. 22, s. 6] — considered

APPEAL by accused from conviction on charge of uttering threat.

Veit J.:

Summary

1 Mr. Corser was convicted of uttering threats on evidence that he told Betty Jones that his sister-in-law Kelly Corser “needs to go too” and that Mr. Corser “was going to shoot out his (brother Craig Corser’s) kneecaps”.

2 Mr. Corser appeals his conviction on the specific charge that he “did by through [sic] a third person (Betty Jones) knowingly utter or convey a threat to Craig and Kelly Corser to cause bodily harm or death to Craig or Kelly Corser, contrary to section 264.1(1)(a) of the Criminal Code”. (After the Crown had closed its case, it was allowed to amend the wording of the charge; however, on appeal, the Crown concedes that the amendment should not have been granted, but maintains that Mr. Corser was properly convicted of the offence originally charged.) Mr. Corser argues that he made no threat, and that, in any event, he did not have the necessary *mens rea* for that crime. He also argues that the Crown did not prove all of the elements of the offence as charged, including that the threats were uttered “through” Betty Jones.

3 The appeal is denied.

4 The trial judge's determination about the nature of a threat was correct in law: as Mr. Corser himself acknowledges, an accused's intention to carry out the threat is not an element of this offence. Moreover, it is not even an element of the offence that the person threatened ever became aware of the fact of being threatened. The offence is made out if words of menace are uttered by an accused with the intent that the menace be taken seriously.

5 The trial judge's finding of mixed fact and law that Mr. Corser made a threat was based on trial evidence; the trial judge did not commit any palpable and over-riding error. Words, which on their face were menaces, were spoken, not in jest, to a relative of one of the persons threatened, in circumstances where the accused could not have had an expectation of confidentiality. Although the trial judge obviously accepted that the accused was "stoned" when he uttered the words of menace, the evidence of impairment did not raise a reasonable doubt about the accused's intent to be taken seriously when he uttered the words.

6 In order to be the subject of criminal proceedings, a threat must be put into circulation, must be published. The Crown is not required to particularize the "means" by which the threat was conveyed: *Rémy-Mercier*. However, in this case, given the fact that the accused has a long-standing acrimonious relationship with his brother Craig Corser, if the Crown had not volunteered particulars, such particulars would presumably have been ordered. In this case, therefore, having given required particulars, the Crown was required to prove the particulars pleaded. On the facts of this case, given that the accused had no relationship of trust or confidence with the person to whom the threat was expressed and that the accused knew that the person in whose presence the threat was expressed was a relative of one of the "targets" of the threat, the Crown has proved beyond a reasonable doubt that Mr. Corser conveyed his threats to Craig and Kelly Corser through Betty Jones.

7 If the offence as originally charged were multifarious, that defect is not objectionable.

8 Although it is not relevant to this appeal, the court notes that the trial judge received a criminal record for the accused that included reference to an absolute discharge. Discharges should not be included in criminal records: s. 6.1(2) of the *Criminal Records Act*. The court requests the cooperation of Crown prosecutors in removing any such references that are included in criminal records. It is only in exceptional circumstances that reference should be made in a criminal proceeding to a discharge.

Cases and authority cited

9 By Mr. Corser: *R. v. J. Ralla Homes Ltd.*, [1994] B.C.J. No. 816 (B.C. Prov. Ct.); *R. c. Tremblay* (1993), 84 C.C.C. (3d) 97 (S.C.C.) Reversing (1991), 68 C.C.C. (3d) 439 (Que. C.A.); *R. v. Dupont* (1958), 123 C.C.C. 386 (Que. Q.B.); Section 264.1(1) of the *Criminal Code of Canada*; *R. v. LeBlanc* (1989), 70 C.R. (3d) 94, 50 C.C.C. (3d) 192 (S.C.C.) Reversing (1988), 66 C.R. (3d) 134, 44 C.C.C. (3d) 18 (N.B. C.A.); *R. v. Clemente* (1994), 31 C.R. (4th) 28, 91 C.C.C. (3d) 1 (S.C.C.) Affirming (1993), 27 C.R. (4th) 281, 86 C.C.C. (3d) 398 (Man. C.A.); *R. v. N. (L.)* (1993), 87 C.C.C. (3d) 190 (Alta. C.A.) Leave to appeal refused [*R. v. N. (L.C.)*] (1994), 87 C.C.C. (3d) vi (note) (S.C.C.); *R. v. Shaw* (1992), 135 A.R. 161 (Alta. C.A.); *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.); *R. v. Bone*, [1993] M.J. No. 222 (Man. C.A.); *R. v. George* (2002), 162 C.C.C. (3d) 337 (Y.T. C.A.).

10 By the court: On the standard of review: *R. v. Nicholson*, [2002] A.J. No. 31 (Alta. Q.B.) [hereinafter Housen]

11 On conveying a threat: *R. v. Tibando* (1994), 88 C.C.C. (3d) 229 (Ont. C.A.); *R. v. Hiscox*, 2002 BCCA 312 (B.C. C.A.); *R. c. Rémy-Mercier* (1993), 82 C.C.C. (3d) 176 (Que. C.A.); *Henry v. R.* (1981), 24 C.R. (3d) 261 (Ont. C.A.); *R. v. Petravic*, [2001] O.J. No. 2766 (Ont. S.C.J.); *R. v. Styles*, [2000] N.J. No. 109 (Nfld. T.D.); *R. v. Cenciarini*, [2000] B.C.J. No. 1728 (B.C. S.C.);

12 On the meaning of "utter": *Webster's Third New International Dictionary* 1976, G.& C. Merriam Co.

13 On the need for the Crown to prove particulars: *R. c. Bois*, [2004] S.C.J. No. 7 (S.C.C.) [hereinafter Daoust]; *R. v. Saunders*, [1990] S.C.J. No. 22 (S.C.C.); *R. v. Whittaker* (1989), 95 A.R. 229 (Alta. C.A.)

14 On the exclusion of discharges from criminal records: *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 6.1; [*R. v. Tan*

(1974), 22 C.C.C. (2d) 184 (B.C. C.A.); *R. v. Small*, 2001 BCCA 91 (B.C. C.A.) at para. 11; *R. v. Ramirez*, [1994] A.J. No. 1082 (Alta. Prov. Ct.); *R. v. Brown*, 2003 ABPC 192 (Alta. Prov. Ct.).

1. — Background

a) — *Evidentiary background*

15 Betty Jones was the only Crown witness, and provided the only evidence at trial. She testified that on the date in question, Mr. Corser — who is in his early 40s — had come to Ms. Jones' residence to see her husband, Ted Gardner, who is a brother of the complainant Kelly Gardner Corser. Prior to that visit, Ms. Jones had not spoken with the accused for 20 years. Ms. Jones testified that the accused appeared "stoned", that he was "agitated and talkative and just telling me about — just telling me things that didn't make sense, like buying a railroad". (Although there was no evidence about railroads, in subsequent submissions to the court defence counsel indicated that Mr. Corser and a partner were acquiring a railroad bed from which they had plans to excavate the gravel.)

16 Ms. Jones knew that the accused and his brother Craig did not get along. She also acknowledged that, because Craig Corser was married to her husband's sister, her assessment of the accused was probably influenced by Craig Corser's negative view of the accused. Ms. Jones' evidence includes the following:

Q. Okay. With respect to Craig, what did he say specifically about him?

A. That he would like to — or that he was going to shoot his kneecaps. . . . And that everyone knew that he had a gun.

.....

Q. Did you do anything as a result of hearing that out of his mouth?

A. . . . I just continued to talk to him hoping that Ted would get home right away, my husband.

Q. Okay. What did he say with respect to Kelly? You said he made some remarks with respect to her?

A. He said he should do her in and maybe he would that afternoon.

.....

Q. Okay. As a result of hearing this did you do anything as a result of being alarmed by these comments?

A. I just resolved that as soon as Ted got there, I would phone Kelly.

Q. And did you do that?

A. I did that, I phoned. As soon as Ted got there. He was surprised to see Don. I went in the living room and used the phone and I got Craig on the phone instead of Kelly and I told him I just wanted to warn him that . . . I just wanted to get a hold of her and make sure she was okay and tell her of the circumstances.

Q. And give her a warning?

A. Yes, warn her, yes.

Q. Because you were alarmed?

A. Yes.

17 In cross-examination, Ms. Jones gave the following evidence:

Q. Okay. So again your best recollection of what he said was, he should do her in?

A. Well, he gave me a time. He said probably by 4 or something to that effect, so it wasn't a maybe or he'd like to or he was thinking about it. Sounded like a plan to me.

.....

Q. So he either said he should do her in or finish her off?

A. Finish her off I believe is exactly what he said.

18 Ms. Jones later agreed that the statement she gave to the police the day after the events probably represented her best evidence about the exact words uttered by the accused and those words were:

He also told me that Kelly used to be his friend, but now he knows she is one of them and she needs to go too.

19 In re-examination, Ms. Jones testified as follows:

Q. When he uttered words of that nature, was he smiling, was he grinning?

A. No, he's upset.

Q. Was — it wasn't a joke?

A. No.

Q. He was serious, in your mind?

A. In my mind the thing that sticks out the most is I think he felt, at that time, terribly betrayed by Kelly.

20 It is clear from the trial evidence that the accused would have known that Ms. Jones was related, by marriage, to Kelly Corser.

21 Mr. Corser's sentence on this conviction was suspended for a period of one year during which a period of probation was imposed. Mr. Corser does not appeal his sentence. I note, in passing, that the information about Mr. Corser's prior criminal record, showing no related convictions for threats or for violence, as provided to the trial judge included an absolute discharge; since a discharge does not result in the entry of a conviction, information about the discharge should not have been included in Mr. Corser's criminal record: s. 6.1 of the *Criminal Records*, as amended by 1995, c.-22, Sch III, in force September 3, 1996, which reads as follows:

Discharges

6.1 (1) No record of a discharge under section 730 of the Criminal Code that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if

- (a) more than one year has elapsed since the offender was discharged absolutely; or
- (b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

Purging C.P.I.C.

(2) The Commissioner shall remove all references to a discharge under section 730 of the Criminal Code from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1).

22 There are some cases that refer to discharges: *Tan*, *Small*, *Ramirez*, *Brown*. However, it is clear that *Tan* preceded the statutory change to the *Criminal Records Act*, and I am not certain whether reference to the change in legislation was made to the *Ramirez* and *Brown* courts.

b) — Legislative background

23 The current provision of the Code relating to the utterance of threats reads as follows:

Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

- a) to cause death or bodily harm to any person;

.....

2. — Standard of review

24 Although the issue of the standard of review in this appellate court was not specifically addressed by counsel, it is clear that on matters of law alone, the decision appealed from must be correct, and that on matters of mixed fact and law the standard is “palpable and overriding error”. In other words, on a mixed question of fact and law, this court owes deference to the trial judge and cannot set that judge’s decision aside unless the trial judge has not only committed some error, but an error which is plainly seen: *Housen*.

3. — Did the trial judge make an error in defining the elements of the offence charged and in concluding that the Crown had proved each element beyond a reasonable doubt?

25 Mr. Corser has raised some contention around each of the elements of the offence of uttering threats. Therefore, the court proposes to review each element of the offence.

a) — How to go about assessing the meaning of words in this context

26 In *Clemente*, the Supreme Court of Canada gave trial judges direction on how to assess the difference between words that were, in essence, a threat and words that were on their face a threat, but in essence did not constitute a menace and were not intended to be taken seriously:

To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them objectively; and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.

Obviously, words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat.

(Emphasis added)

b) — Were the words used words of threat or menace?

27 The trial judge's finding that the words "she has to go too" and "shoot out his kneecaps" were spoken by the accused is amply supported by the evidence.

28 In the context in which they were spoken, the trial judge was entitled to find that the words "she has to go too" referred to killing or causing bodily harm to Kelly Corser. Similarly, the trial judge was entitled to find that, on their face, the words "shoot out his kneecaps" referred to causing bodily harm to Craig Corser.

c) — Is it an element of the offence that the Crown must prove that the accused intended to carry out the threats?

29 The appellant relies on the fact that, in speaking of the threats, the trial judge said: "I do not know whether or not he had any intention of carrying them out". However, that is of no assistance to the appellant: as Mr. Corser himself acknowledges, it is not an element of the offence of uttering threats that the accused meant to carry out the threat. Rather, the intent that must be proven is that the accused meant the uttered threat to be taken seriously, whether or not there was an intention to carry out the threat: *Clemente*.

d) — Is there anything in the evidence about the general circumstances in which the words were spoken that affects the interpretation of the words, that raises a doubt about whether the words were, in their essence, threats?

30 The evidence before the trial judge was that the accused came to the residence of Betty Jones without invitation or arrangement, and without his brother Craig Corser being any point of reference. Betty Jones reported that during the conversation, the accused spoke the words of menace, and that he was not speaking in jest. Indeed, the evidence before the trial judge was that Betty Jones took the words uttered so seriously that, while the accused was still at her residence, she telephoned Craig Corser to warn him of the accused's threats.

31 The threats may well have been made as a result of, and as retaliation for, some previous unpleasant episode between the accused and his brother Craig. It was clearly not part of the trial judge's mandate to determine whether the threats made by Don Corser in front of Betty Jones were provoked by some previous contact between Craig Corser and Don Corser.

32 Nor was the trial judge prevented from making determinations based on the evidence of only one witness. He was entitled to make his determinations based on the evidence that was presented to him.

e) — Is there anything in the identity of the person to whom the words were spoken that affects the interpretation of the words, that raises a doubt about whether the words were, in their essence, threats?

33 Naturally, all of the circumstances in which words were uttered in order to determine if the words were actually a

threat. In the circumstances here, the trial judge did explicitly take into consideration, as he was entitled and bound to do, that the words were spoken to a woman with whom the accused had not had a conversation in 20 years, and with respect to whom he would have no expectation of privacy or confidentiality.

34 As the trial judge put it:

I would say to you that were this just someone coming after an argument with his brother just to a confidante and venting, I would view it somewhat differently.

35 The trial judge was obviously very alert to all of the circumstances in which the words of menace were spoken.

f) — Was there proof that the accused intended the words to be taken seriously, i.e. of the required mens rea?

36 In determining whether the mental element of the crime has been proved, the court must take into account any evidence of drunkenness that would affect the accused's ability to develop the required state of mind.

37 Although the trial judge concluded that Mr. Corser was "stoned" when he made the threats, the trial judge was clearly of the view that the accused had sufficient capacity to intend that the threats be taken seriously. Indeed, the trial judge went further and concluded that the emotional condition of the accused at the time of making the threats was such that the accused might even act upon them.

g) — Were the words "uttered"?

38 As late as 1976, the Webster International Dictionary gave as the first definition of "utter", "to place on the market: offer for sale or barter". In second place, we find, as meaning a, "to send forth as a sound", and as meaning c, "to give public expression to". In fourth place, we find "to put into circulation".

39 I deduce from this that Parliament only intended to characterize as criminal those sounds that were knowingly made to at least one other person. In other words, a person who is speaking interior thoughts out loud at a time when that person is unaware that anyone can hear is not "uttering" comments within the meaning of this section.

h) — Has the Crown failed to prove the charge as originally laid because the threats spoken were to kill, not to cause bodily injury to, Kelly Corser, and to cause bodily harm, not death, to Craig Corser?

40 After the Crown had closed its case, the court allowed a short adjournment during which there were discussions between the prosecutor and defence counsel. When the parties returned to the courtroom, a discussion concerning the amendment of the information ensued. That discussion included the following phrases:

Prosecutor: My friend just pointed something out to me that I had seen before, but did not address my mind to fully until he just brought it up a couple of minutes ago . . .

Now it may be confusing to my friend looking at that charge as to what charge the accused was actually facing, however you now have the evidence before you as to what exactly Ms. Jones heard and thought.

.....

Defence counsel: What should have been done and I think the court will appreciate it's not my job to tell the Crown how to prosecute my clients, but this should have been a two count Information alleging one thing against one

complainant and another thing against another. My friend's now in the unfortunate position of having to prove everything that's in the Information.

41 The fact that the prosecutor at trial did not think that he could prove the charge as it originally stood is not binding on this court.

42 If the offence as originally charged were multifarious, that defect is not objectionable: s. 590(1)(b) of the Criminal Code.

i) — Did the Crown prove all of the elements of the offence as charged, including that the threats were uttered through Betty Jones?

43 Assuming that it was not initially necessary for the Crown to particularize the means by which Mr. Corser conveyed the threat to Kelly and Craig Corser, once the Crown had done so, it was obliged to prove the particulars beyond a reasonable doubt. As the Supreme Court of Canada re-iterated recently in *Daoust*:

They rely on the decision in *R. v. Saunders*, [1990] 1 S.C.R. 1020, in which McLachlin J. (as she then was) wrote, at p. 1023:

It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.

[para22] It is a well-established legal principle that an accused need only answer the charges as they appear in the indictment and that the Crown has the burden of proving them unless it requests an amendment, [page229] which in this case was not done in time. Pursuant to s. 601(3) Cr. C., a court may amend a count in an indictment at any stage of the proceedings provided it is a particular of the offence that is amended: *Morozuk v. The Queen*, [1986] 1 S.C.R. 31 (per Lamer J., as he then was); *Elliott v. The Queen*, [1978] 2 S.C.R. 393, at p. 427 (per Ritchie J.). However, an amendment to the indictment we are concerned with would not constitute a change in the particulars of the offence. Rather, it would amount to laying a different charge from the one originally brought. At any rate, this Court is certainly not prepared to amend the indictment at this stage of the proceedings.

44 Because of the long-standing animosity between Mr. Corser and his brother Craig, this is presumably a situation in which particulars would have been ordered had the Crown not provided particulars in the original indictment. Particulars were required in this case so that Mr. Corser would be entitled, if the animosity continued with his brother, to plead *autrefois convict*.

45 This is not a case like *Whittaker*, where the date was found to be surplusage.

46 The Crown contends that, in a situation such as this one, where the accused knew, but had not spoken to, the Crown witness for 20 years, the accused could not have been "venting" to a person with whom he was not close. Moreover, because he knew the relationship between Ms. Jones and the complainants, he should have expected her to pass along to them the threats to them that he made in their presence.

47 The issue of threats to one person made to another person has cropped up from time to time. For a long time in Canada, it was not a crime to make face-to-face threats. Then, threats made by certain means only were criminalized. Therefore, in that line of cases, it was important to consider as elements of the offence of uttering the exact provisions of the Criminal Code. Much of the contemporary case law has reminded us that, at this time, Parliament has decreed that a person who, "by any means", utters, conveys, or causes a person to receive a threat commits a crime.

48 The Supreme Court of Canada dealt with the matter in *Clemente*. However, it is important to remember the context in which those comments were made. As the headnote fairly summarizes it, the situation there was the following:

The appellant made threats to his social worker against her colleague (his former social worker) to whom his file was to be transferred. He stated on one occasion that he would blow up her office and strangle her, on another that a dead body would be found in her office on transfer of his file, and on yet another, that he would kill her. The appellant was convicted of intending to convey to his former social worker that he intended to kill or cause serious bodily harm to her, contrary to s. 264.1(1)(a) of the Criminal Code. The trial judge went on to find that the appellant intended that his present social worker should convey the message to the intended victim. The conviction was upheld on appeal. At issue here was the mens rea that is required by s 264.1(1)(a). The appellant argued that it must be established that the words were uttered with the intent to intimidate or instill fear. The respondent contended that it is sufficient if it is shown that the threat was uttered with the intent that it be taken seriously.

.....

The amendment to the section and the decision of this Court in *R. v. McCraw*, supra, make it apparent that it is not a necessary element of the offence that the intended victim be aware of the threat.

(Emphasis added)

49 The narrow point that the Supreme Court of Canada was dealing with in that case was whether, in order to be characterized as a "threat", words needed to instill fear or only needed to be taken seriously. It opted for the latter.

50 The issue of whether the Crown must prove that a threat is made to a person or to a messenger who could pass the threat along to a person has been the subject of comment that has varied as Parliament has changed the essence of the crime of making threats. Recently, the Ontario Court of Appeal made the following comments in *Tibando*:

The decision of this court in *R. v. Henry* (1981), 24 C.R. (3d) 261 (Ont. C.A.), appears to have caused some confusion. The trial judge was of the opinion that we held in the Henry case that there had to be an intention on the part of the accused that the threat be conveyed to the person who was being threatened. If this were so, it would, of course, conflict with the earlier decision of this court in *R. v. Thompson* (1981), 59 C.C.C. (2d) 514, 22 C.R. (3d) 389 (Ont. C.A.), in which it was held that such an intention was unnecessary. In our opinion, there is no such conflict and the interpretation of the trial judge of the Henry case is, with respect, in error.

.....

The means by which the threat is conveyed is no longer a crucial element of the offence. As was said by Mr. Justice Delisle in *R. v. Remy* (1993), 82 C.C.C. (3d) 176 at p. 188, [1993] R.J.Q. 1383, 21 W.C.B. (2d) 228 (Q.C.A.):

In his final ground, the appellant submits that the indictment is insufficient in that it should have specified the means by which the threat was conveyed and the appellant's intent to use this means.

The appellant referred to an extract from the reasons of Houlden J.A. in *R. v. Henry*, supra, where the justice pointed to the absence of evidence to the effect that the accused had intended to use the persons mentioned in the

indictment as the means of conveying the threat.

The examination of the different previous versions of Cr. Code, s. 264.1 revealed the importance of the means of conveying the threat. In the past, only a few means of conveying threats were prohibited by Parliament. The limited number of intermediaries prohibited therefore required that the indictment specifically mention the means used to convey the threat and the accused's intent to use that means.

Section 264.1, however, no longer requires such proof. Since 1985, threats may be conveyed "in any manner". Mention of the means used to convey the threat is no longer an essential element of the offence (Cr. Code, s. 583(f)).

(An extract from the original version of *Rémy-Mercier* is set out below.)

51 In order to interpret those comments from the Ontario Court of Appeal, it is useful to examine their comments in the earlier *R. v. Thompson* [1981 CarswellOnt 65 (Ont. C.A.)] decision:

[para7] In our opinion the words in s. 331(1)(a) are clear and unambiguous, and with respect they do not require that the intended victim must be the direct recipient of the threat in order for the offence to be made out. If that had been Parliament's intention, it would no doubt have expressed its intention by using the kind of language that is used in subsections (2) and (3) of s. 330, which is the section immediately preceding the section here in question. In those particular subsections, both of which are concerned with telephone calls, the recipients of the calls are clearly identified as being the very persons sought to be made the victims. By contrast there is no such identification of recipient and intended victim in s. 331(1)(a).

[para8] The proposition that under the latter section the threat must be communicated either directly or through an intermediary to the person who is the intended victim can readily be tested by asking the question, what would follow if a telephone call were made by someone to the mother of a six-months' old child, threatening the life of the child? On the trial judge's reasoning, there would presumably be no offence because the threatening phone call was not made directly to the child. Such an interpretation appears to us to be clearly contrary to the obvious intention of the legislation. In our view the trial judge erred in law in holding that there was no offence committed in this case.

52 Again to improve the context, it is useful to go back to the comments in *Henry*, where the same court had said:

[para6] Even if, as suggested in the above passage from Nabis, a threat may be made by means of a messenger or intermediary and even if the individuals named in the information could be regarded as messengers or intermediaries, there was no evidence in this case that the appellant intended that those persons should act as messengers or intermediaries to express or convey the threats. The threats do not therefore come within s. 331(1)(a).

[para7] In the circumstances it is unnecessary for us to express any opinion on Mr. Gold's second ground of appeal that a threat "to kill an unnamed police officer in the Province of Ontario" is not a "threat to cause death or injury to any person". Mr. Gold's submission being, if we understood it correctly, that s. 331(1)(a) requires a threat to a member of a readily identifiable or ascertainable group and that a threat to kill an unnamed police officer in the Province of Ontario is too vague to permit a conviction under s. 331(1)(a).

[para8] The appeal is therefore allowed, the convictions quashed, and verdicts of acquittal entered. Since the evidence in this case raises a question as to the mental health of the appellant, it may be appropriate for the authorities to consider whether the provisions of the Mental Health Act, R.S.O. 1980, c. 262, may be invoked.

53 One can deduce from these various comments that while it may not be necessary for the Crown to specify the means by which a threat is conveyed, the fact that the threat be conveyed is an element of the offence. There is unfortunately no comment in the *Tibando* decision about the circumstances in which the threat was uttered by the accused. One can only

surmise that the evidence was such that the conveyance aspect of the charge was so clearly made out that it was not necessary to refer to it.

54 As noted by Boyle J. in *Cenciarini*, the words of the Ontario Court of Appeal should not be taken alone and out of context:

[para21] *R. v. Tibando* (1994), 88 C.C.C. (3d) 229 at 231 (Ont. C.A.) decided: “There is no requirement under the section that the accused intend the recipient of the threat to convey it to the intended victim ...” but, even if that is so — and I accept it is for these purposes although it does not make perfect sense — whether or not conveyance was intended is a factor to be considered in deciding whether or not the intention to utter a threat has been proven. That is, there could be little doubt of intent where an accused has added to words of threat (for instance): “be sure to tell her I said so.”

55 In *Rémy-Mercier*, Delisle J.A. made the following comments:

3) — Insuffisance de l’acte d’accusation

Par ce dernier argument, l’appelant prétend que l’acte d’accusation est insuffisant en ce qu’il aurait dû préciser le moyen de transmission de la menace et l’intention de l’appelant d’utiliser ce moyen.

L’appelant cite un extrait de l’opinion du juge Houlden dans *Henry c. R.*, précité, dans lequel le juge souligne l’absence de preuve à l’effet que l’accusé avait l’intention d’utiliser les personnes mentionnées dans l’acte d’accusation comme moyen de transmission de la menace.

L’examen des différentes versions antérieures de l’article 264.1 C.cr. a permis de révéler l’importance du mode de transmission des menaces. Dans le passé, seuls quelques moyens étaient retenus par le législateur pour véhiculer les menaces. Ce choix limité d’intermédiaire exigeait donc que l’acte d’accusation contienne la mention du moyen de transmission de la menace et l’intention de l’accusé d’utiliser un tel moyen.

L’article 264.1 C.cr. n’exige cependant plus une telle preuve. Depuis 1985, la transmission des menaces peut se faire de “quelque façon” (“in any manner”). La mention de l’agent de transmission n’est plus un élément essentiel de l’infraction. (art. 583f) C.cr.)

Par ailleurs, l’appelant a lui-même sollicité une entrevue du Journal de Montréal. Il a choisi ce “moyen” pour “transmettre son message”. Il peut alors difficilement prétendre qu’il n’avait pas l’intention d’utiliser cet intermédiaire.

Ce troisième moyen d’appel est écarté.

It will be seen from this extract that the Quebec Court of Appeal was dealing with a situation in which the accused had himself requested an interview with a newspaper and had chosen that “manner” to transmit his threats. Therefore, while reference to the manner in which the threats are made is not an essential element to every charge of uttering threats, in a particular circumstance, reference to the manner of uttering the threats is a required particular.

4. — Conclusion

56 For the reasons set out above, the appeal is denied. The trial judge made no error of law, and no palpable and overriding error of mixed fact and law, in holding that the Crown had proved beyond a reasonable doubt that the accused had uttered threats to kill or cause bodily harm to Kelly Corser and Craig Corser and that he had made those threats through Betty Jones.

Appeal dismissed

R. v. Corser, 2004 ABQB 861, 2004 CarswellAlta 1579

2004 ABQB 861, 2004 CarswellAlta 1579, [2004] A.J. No. 1335, [2005] A.W.L.D. 564

TAB

5

2016 ONCJ 282
Ontario Court of Justice

R. v. Khan

2016 CarswellOnt 7843, 2016 ONCJ 282, [2016] O.J. No. 2566, 130 W.C.B. (2d) 456

Her Majesty the Queen and Zamin Khan

P.A. Schreck J.

Heard: April 1, 2016
Judgment: May 18, 2016
Docket: Brampton 14-8009

Counsel: T. Powell, for Crown
D. Berg, for Defendant, Zamin Khan

Subject: Criminal

Related Abridgment Classifications

Criminal law

VI Offences

VI.133 Sexual assault

VI.133.b General offence

VI.133.b.vi Sentencing

VI.133.b.vi.A Adult offenders

VI.133.b.vi.A.6 Accused health care professional

Headnote

Criminal law --- Offences — Sexual assault — General offence — Sentencing — Adult offenders — Accused health care professional

Female complainant went to massage clinic to receive massage from registered massage therapist — Complainant received massage from accused who was not registered massage therapist — During massage accused sexually assaulted complainant by touching breasts and vaginal area — Accused was convicted of sexual assault — Accused sentenced to 6 months' imprisonment and upon release from custody, to 12 months' probation — Accused was first offender and was not remorseful — Accused had history of gainful employment — Denunciation and deterrence were primary sentencing objectives — Denunciation was particularly important since accused committed breach of trust — Since accused needed to be made aware of consequences of behaviour to ensure it was not repeated, conditional sentence was not available as it would not be consistent with fundamental purpose and principles of sentencing.

Table of Authorities

Cases considered by *P.A. Schreck J.*:

R. v. Aguas (2015), 2015 ONSC 5732, 2015 CarswellOnt 13917 (Ont. S.C.J.) — considered

R. v. Alasti (2011), 2011 BCSC 824, 2011 CarswellBC 1624 (B.C. S.C.) — considered

R. v. Collins (2007), 2007 NBQB 169, 2007 CarswellNB 218, 319 N.B.R. (2d) 196, 823 A.P.R. 196 (N.B. Q.B.) — considered

R. v. Corser (2004), 2004 ABQB 861, 2004 CarswellAlta 1579 (Alta. Q.B.) — referred to

R. v. Gibson (2013), 2013 ONSC 589, 2013 CarswellOnt 1102 (Ont. S.C.J.) — referred to

R. v. H. (J.) (1999), 1999 CarswellOnt 1048, 118 O.A.C. 354, 135 C.C.C. (3d) 338 (Ont. C.A.) — considered

R. v. Hall (2010), 2010 ABCA 165, 2010 CarswellAlta 979, 487 A.R. 182, 495 W.A.C. 182 (Alta. C.A.) — considered

R. v. Im (2009), 2009 ONCA 101, 2009 CarswellOnt 444, 64 C.R. (6th) 157, 242 C.C.C. (3d) 77 (Ont. C.A.) — referred to

R. v. Manel (2012), 2012 QCCS 2273, 2012 CarswellQue 5035 (C.S. Que.) — referred to

R. v. Mermer (2015), 2015 ONSC 2715, 2015 CarswellOnt 8302 (Ont. S.C.J.) — referred to

R. v. Proulx (2000), 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, [2000] 4 W.W.R. 21, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

R. v. Solowan (2008), 2008 SCC 62, 2008 CarswellBC 2396, 2008 CarswellBC 2397, 70 M.V.R. (5th) 1, 381 N.R. 191, (sub nom. *R. v. S. (K.S.T.)*) 237 C.C.C. (3d) 129, 61 C.R. (6th) 268, 299 D.L.R. (4th) 577, 261 B.C.A.C. 27, 440 W.A.C. 27, [2008] 3 S.C.R. 309 (S.C.C.) — referred to

R. v. Valentini (1999), 1999 CarswellOnt 271, 132 C.C.C. (3d) 262, 118 O.A.C. 1, 43 O.R. (3d) 178 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 487.051(2) [en. 1998, c. 37, s. 17] — considered

s. 490.012(1) [en. 2004, c. 10, s. 20] — considered

s. 490.013(1) [en. 2004, c. 10, s. 20] — considered

s. 718 — considered

s. 718.2 [en. 1995, c. 22, s. 6] — considered

s. 742.1 [en. 1992, c. 11, s. 16] — considered

s. 742.1(b)-742.1(f) — referred to

ss. 718-718.2 — referred to

Criminal Records Act, R.S.C. 1985, c. C-47

s. 6.1 [en. 1992, c. 22, s. 6] — considered

Sex Offender Information Registration Act, S.C. 2004, c. 10

Generally — referred to

SENTENCING of accused convicted of sexual assault.

P.A. Schreck J.:

1 M.N. went to a massage clinic to receive a massage from a registered massage therapist. She instead received a massage from Zamin Khan, who was not a registered massage therapist. During the massage, he sexually assaulted her by touching her breasts and vaginal area. Mr. Khan was charged with sexual assault. The Crown elected to proceed summarily and he was found guilty following a trial. The Crown takes the position that the appropriate sentence for this conduct is imprisonment for 15 months. Counsel for Mr. Khan seeks a nine-month conditional sentence.

I. The Offence

2 On June 27, 2014, M.N. and her spousal partner went to the Evergreen Wellness Centre in Mississauga for massages. M.N. was a frequent consumer of massage therapy services, the cost of which was covered by her employment benefits plan. The plan only covered massages done by a registered massage therapist ("RMT"). However, M.N. had viewed the Evergreen website, which stated that all massages were done by RMTs.

3 Upon arriving at the Evergreen Wellness Centre, M.N. and her partner were greeted by the defendant, Mr. Khan, who identified himself as the person who would conduct their massages. M.N.'s partner went into the massage room first. Her massage was uneventful. It was then M.N.'s turn.

4 Upon entering the massage room, M.N. disrobed fully, lay face down on the massage table and covered herself with a thin sheet that had been provided for that purpose. Mr. Khan then began to massage M.N.'s legs and then moved to her back

and shoulders. At one point, he pulled down the sheet that was covering her such that one of her buttocks was exposed. During the massage, Mr. Khan talked a lot about personal matters. At one point, he told M.N. that she was a tall, attractive woman and that her shoulders were very broad. After a while, Mr. Khan told M.N. to roll over onto her back, which she did. He asked her if she wished to have her stomach massaged. She found this to be odd and declined. At this point, Mr. Khan put his hands under the sheet, cupped both of her breasts with his two hands and began to squeeze them repeatedly with a “pumping” motion. M.N. told him that she did not need a massage there. Mr. Khan then moved one of his hands down under the sheet and began to massage her inner thigh, very close to her vagina. At this point, M.N. said “no”. Mr. Khan then moved his hand up again and as he did so his fingers brushed against her clitoris.

5 Mr. Khan asked M.N. out for dinner. She declined and asked him if the massage was over. He replied that it was and then left the room. M.N. got dressed, left the room, and paid for the massage. At that point, she learned that Mr. Khan was not an RMT. Later that day, M.N. contacted the police and reported that she had been sexually assaulted.

6 M.N. prepared a victim impact statement, which she read in court. She reports that the sexual assault caused her to be embarrassed and ashamed, resulting in her withdrawing from her friends and family. She is now less trusting with strangers than she had been and has difficulty fostering new relationships. She reports that “[t]his incident has changed me in a way that is not for the better”.

II. The Offender

7 A Pre-Sentence Report (“PSR”) was prepared. Mr. Khan is 44 years old and was born and grew up in India. He has been married since 1997 and has no children, although he and his wife plan to adopt. A letter written by his wife was submitted at the sentencing hearing. She describes her relationship with Mr. Khan in positive terms.

8 Mr. Khan obtained a Bachelor of Arts degree in India. He is currently employed in a warehouse and this job will continue to be available to him after he has served whatever sentence is imposed.

9 Mr. Khan told the author of the PSR that he began working at the Evergreen Wellness Clinic with plans of becoming an RMT. He claimed that after a year and a half of training, he was to attend the “schooling portion” of this training, which he was forced to discontinue after being charged with this offence. I am somewhat sceptical of this claim. First, it would be somewhat surprising if the proper training to become an RMT was to first work as one for several years and then attend school. With most professions, practical training follows at least some schooling. Second, the owner of the Evergreen Wellness Clinic testified at Mr. Khan’s trial. He was not a credible witness, and I find that he was actively attempting to defraud his customers by falsely claiming that all massages were conducted by RMTs. Whether Mr. Khan was involved in this fraudulent activity and to what extent is unknown and I have not considered his involvement in determining the appropriate sentence.

10 Mr. Khan has not expressed any remorse for his actions. He told the author of the PSR that in his view, the victim must have something “wrong with her psychologically”. He apparently suggested that she falsely accused him because she “likes” women and “doesn’t like” men. M.N. is a gay woman.

11 The PSR mentions that Mr. Khan was granted a conditional discharge after being found guilty of assault in 2010. The author of the PSR goes on to describe this as “a Sexual Assault for which he plead [*sic*] guilty to the lesser offence of Assault” and then relates the allegations found in the “police report”. None of this information should have been included in the PSR. Section 6.1 of the *Criminal Records Act*, R.S.C. 1985, c. C-47 clearly prohibits the disclosure of a record of a conditional discharge more than three years after the end of the term of probation: *R. v. Manel*, [2012] Q.J. No. 4788 (C.S. Que.) at para. 69; *R. v. Corser*, [2004] A.J. No. 1335 (Alta. Q.B.) at para. 8. Furthermore, regardless of what Mr. Khan had been charged with, the only offence he was found guilty of was assault. Even if the record was disclosable, the only relevant facts would have been those that he admitted to. Unproven allegations in the “police report”, which was likely a synopsis, were irrelevant and potentially prejudicial. It is well known that a police synopsis is prepared at the very early stages of the prosecution and often includes allegations which are ultimately never proven: *R. v. Gibson*, [2013] O.J. No. 490 (Ont. S.C.J.) at para. 32. I am directing that a copy of these reasons be provided to the author of the PSR.

12 I have disabused my mind of the information respecting the prior finding of guilt and it has played no part in my

determination of the appropriate sentence. Mr. Khan is entitled to be treated as a first offender.

III. Analysis

A. Aggravating and Mitigating Factors

13 This case has a number of aggravating features. Foremost among them is that the offence involved a breach of trust. M.N. trusted Mr. Khan to provide her with massage therapy services because she believed him to be an RMT. He abused that trust. The fact that the trust relationship was created through deceit is, in my view, a further aggravating factor.

14 A second aggravating feature, although somewhat related to the first, is that the victim was in a vulnerable position at the time of the offence. She was in a small room, alone with Mr. Khan and in a completely disrobed state.

15 Third, the assault was more than momentary. After M.N. made it clear to Mr. Khan that she did not want him to massage her breasts, he proceeded to touch her upper thigh, brushing his hand against her vaginal area.

16 Finally, the offence has had a significant impact on the victim, as described in her victim impact statement.

17 There are, however, mitigating factors as well. Most importantly, Mr. Khan has no prior convictions and is being sentenced as a first offender. I note as well that he has a history of gainful employment, although the mitigating effect of this is somewhat attenuated by the fact that some of that employment consisted of falsely holding himself out as an RMT. Mr. Khan appears to enjoy support in the community and from his family. It appears that the offence is somewhat out of character for him.

18 A mitigating factor that is wholly absent is an expression of remorse or acceptance of responsibility. This is, however, the absence of a mitigating factor. It is not an aggravating factor: *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.) at paras. 81-84.

B. The Availability of a Conditional Sentence

19 The parties differ substantially with respect to their views as to the appropriate penalty. The Crown seeks a sentence of 15 months imprisonment. The defence seeks a nine-month conditional sentence.

20 As defence counsel correctly points out, the appropriate duration of a conditional sentence will often differ from the appropriate duration of a sentence served in a custodial facility: *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at para. 52. While the determination of where the sentence is to be served cannot be divorced from the issue of its duration, in the circumstances of this case it is my view that the best approach is to first determine whether a conditional sentence is appropriate in this case and then determine the appropriate duration.

21 The availability of a conditional sentence is dictated by s. 742.1 of the *Criminal Code*. The sentence must be less than two years in duration and is unavailable in a number of enumerated circumstances. In this case, the Crown elected to proceed summarily, so the maximum penalty is imprisonment for 18 months and there is no minimum penalty. As result, the offence is not one of those excluded in subsections (b) to (f) of s. 742.1. The real issue is whether the requirements of subsection (a) are met, that is, that a conditional sentence would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Code*.

16 I am satisfied that a conditional sentence would not endanger the safety of the community. Mr. Khan has been on bail for a significant period of time and I have heard no suggestion that he has not abided by his bail conditions or has committed any further offences.

17 More difficult is the question of whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2. The approach to be taken to making this determination was explained in *R. v. Proulx*, *supra* at paras. 113-115:

In sum, in determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, sentencing judges should consider which sentencing objectives figure most prominently in the factual circumstances of the particular case before them. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the *Code*). This list is not exhaustive.

Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.

22 In this case, restorative objectives can play but a limited role because Mr. Khan has refused to accept responsibility for the offence. As noted earlier, this is not an aggravating factor. However, the reality is that absent an acceptance of responsibility, there is little that can be done to promote Mr. Khan's rehabilitation or reparations to the victim and the community. No treatment program will be effective as he does not admit to having any problems that led to his offending behaviour. He has shown no interest in making reparations. To the contrary, he blames the victim for causing him problems, which he seems to attribute to the fact that she is a lesbian.

23 In my view, in this case denunciation and deterrence are the primary sentencing objectives. Denunciation is of particular importance given the breach of trust. While the effectiveness of imprisonment as a general deterrent is somewhat uncertain (see *R. v. Proulx*, *supra* at para. 107), specific deterrence is of some importance in this case. Mr. Khan is free to refuse to accept responsibility. However, he must be made aware of the consequences of this type of behaviour to ensure that he does not engage in it again. For these reasons, I am not satisfied that a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

C. The Appropriate Length of Sentence

24 The issue that now needs to be determined is the appropriate length of the term of imprisonment that must be imposed. The Crown seeks a sentence of 15 months, and in doing so relies on a number of authorities. I note that in some of those cases, the Crown proceeded by indictment. I recognize that the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment: *R. v. Solowan*, [2008] 3 S.C.R. 309 (S.C.C.) at para. 15. However, when the Crown elects to proceed summarily, the range of sentence is circumscribed the statutory maximum. Insofar as other authorities are situating a sentencing within a range that has an upper limit greater than 18 months, they are of limited value in this case: *R. v. Mermer*, [2015] O.J. No. 2857 (Ont. S.C.J.) at para. 20.

25 Having reviewed the Crown's authorities, I am not persuaded that they support the sentence being sought here. Some are easily distinguishable from the case at bar. In *R. v. Aguas*, [2015] O.J. No. 4739 (Ont. S.C.J.), the accused, a nurse, was convicted of both voyeurism and sexual assault in relation to two different victims. Both victims were extremely vulnerable, one having just attempted suicide and the other having recently been in a serious car accident. The fact that there were multiple victims and their extreme vulnerability both played a significant part in the sentencing judge's decision to impose a 14-month sentence. *R. v. Hall*, [2010] A.J. No. 586 (Alta. C.A.) bears very little factual similarity to this case except that both involved a fondling of the victim's breasts. In any event, the Court in that case held that a six-month sentence was appropriate. *R. v. Im*, [2009] O.J. No. 373 (Ont. C.A.) involved a physician who rubbed his genitals against a patient while examining her. He received a six-month conditional sentence. The Court of Appeal's judgment sets out its reasons for refusing leave to appeal a Summary Conviction Appeal Court decision dismissing a conviction appeal. There is no discussion with respect to how the sentence was arrived at.

26 The Crown relied on two cases which are factually similar to this one. In *R. v. Collins*, [2007] N.B.J. No. 167 (N.B. Q.B.), a massage therapist improperly massaged the victim's breasts. Like Mr. Khan, the accused was a first offender but did not accept responsibility. Unlike in this case, however, the offence occurred repeatedly over the course of six visits by the victim. Even then, the Court imposed a one-year sentence, significantly less than the Crown is seeking in this case. In *R. v. Alasti*, [2011] B.C.J. No. 1177 (B.C. S.C.), the accused was convicted of two counts of sexual assault. Like Mr. Khan, he was an unlicensed massage therapist. As in this case, the Crown proceeded summarily. The first sexual assault consisted of the accused touching and then digitally penetrating the vagina of a woman he was massaging. The assault resulted in pain and bleeding for which she required medical attention. The second sexual assault consisted of the accused touching the breasts and nipples of a woman he was massaging. He was sentenced to 12 months imprisonment for the first offence and six months consecutive for the second. The sentences were upheld on appeal.

27 Obviously, no two cases are exactly the same. In my view, the second sexual assault in *R. v. Alasti*, *supra* bears the greatest resemblance to the case at bar. As in this case, it involved an unlicensed massage therapist and the Crown proceeded summarily. This case involved the added touching of the upper thigh and a brushing of the vaginal area, but the assaults are otherwise similar.

28 Mr. Khan is a first offender. It is well established that "a first sentence of imprisonment especially for a first offender should be as short as possible and tailored to the individual circumstances of the accused": *R. v. H. (J.)* (1999), 135 C.C.C. (3d) 338 (Ont. C.A.) at para. 22. Having considered the authorities reviewed above, in my view a six-month sentence will appropriately denounce Mr. Khan's conduct and drive home to him and others that his behaviour was unacceptable.

D. Probation

29 Upon his release from custody, Mr. Khan is to be placed on probation for a period of 12 months. In addition to the statutory terms, he is to abide by the following terms:

1. Report in person to a probation officer within two working days of your release from custody and after that, at all times and places as directed by the probation officer or any person authorized by a probation officer to assist in your supervision.
2. Do not contact or communicate in any way, either directly or indirectly, by any physical, electronic or other means, with M.N. or S.M.
3. Do not be within 500 metres of any place where you know any of the persons named above to live, work, go to school, frequent or any place you know them to be.
3. Do not possess any weapons as defined by the *Criminal Code*.
4. Attend and actively participate in all assessment, counselling or rehabilitative programs as directed by the probation officer and complete them to the satisfaction of your probation officer.
5. Do not engage in employment as a massage therapist unless fully licenced by the Ontario College of Massage Therapists.

E. Ancillary Orders

30 As required by ss. 490.012(1) and 490.013(1) of the *Criminal Code*, Mr. Khan is ordered to comply with the *Sex Offender Information Registration Act* ("SOIRA") for a period of 10 years.

31 In accordance with s. 487.051(2) of the *Criminal Code*, Mr. Khan is ordered to provide such samples of bodily substances as may be required for forensic DNA analysis and inclusion in the national databank.

32 I am indebted to both counsel for their assistance.

Order accordingly.

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TAB

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1995 CarswellOnt 3559
Ontario Court of Justice (General Division) [Commercial List]

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.

1995 CarswellOnt 3559, 58 A.C.W.S. (3d) 925

**Hamilton Wentworth Credit Union Limited, In Liquidation, Plaintiff and
Courtcliffe Parks Limited and Courtland L. Weaver, Sr., Defendants**

Courtcliffe Parks Limited and Courtland L. Weaver, Sr., Plaintiffs by Counterclaim and Hamilton Wentworth Credit Union Limited in liquidation, Donald Babb, John Calderwood, John Edmonds, Arnold Georgian, Garfield Woods, Roy J. Parkin and Michael Green, Defendants by Counterclaim

Blair J.

Judgment: November 9, 1995
Docket: B117/92, 92-CQ-20023

Proceedings: Additional reasons 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. [Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.](#)) 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List])

Counsel: *Rob B. Thibodeau*, for Receiver, Deloitte & Touche Inc.
Lee A. Pinelli, for Corporation of the Town of Flamborough.

Subject: Corporate and Commercial; Public; Civil Practice and Procedure; Tax — Miscellaneous; Municipal

Related Abridgment Classifications

Civil practice and procedure

[XXIV](#) Costs

[XXIV.8](#) Scale and quantum of costs

[XXIV.8.a](#) General principles

Debtors and creditors

[VII](#) Receivers

[VII.7](#) Actions involving receiver

[VII.7.e](#) Practice and procedure

[VII.7.e.iii](#) Costs

Municipal law

[XXI](#) Tax collection and enforcement

[XXI.7](#) Remedies available to municipality

[XXI.7.e](#) Priorities

[XXI.7.e.iii](#) Miscellaneous

Municipal law

XXII Tax sales

XXII.1 Nature and scope of legislation

Headnote

Municipal law --- Tax sales — Practice and procedure — Costs

Receivers --- Actions by and against receiver — Practice and procedure — Costs

R.A. Blair J.:

1 These are supplementary Reasons fixing costs with respect to a Motion and Cross-Motion determined earlier. The essential issues in those proceedings were:

(1) whether the Town of Flamborough could proceed to exercise its statutory tax sales remedies, and if so, on what terms; and,

(2) whether the Receiver could assert priority for its fees and disbursements over the outstanding realty taxes.

2 In written Reasons released on May 30, 1995, I ruled in favour of the Town on both matters and awarded the Town costs, to be fixed if counsel could not agree. I have since received written submissions from counsel, who could not agree.

3 The rationale for the award of costs was set out in the foregoing Reasons as follows:

Although the Town was unsuccessful with respect to its argument concerning the need for the granting of leave for it to proceed, the substantial issues on these Motions related to the terms upon which it would be able to proceed with its tax sale rights and remedies and to the question of whether the Receiver was entitled to priority with respect to its fees and disbursements. The Town has been successful on these issues and, accordingly, is entitled to its costs of the Motions. I will fix the costs if counsel are unable to agree upon them.

4 The Town is entitled to its costs on a party and party scale. The questions for determination here are (a) in what amount? and, (b) out of whose pocket?

The Principles

5 By virtue of s. 141(1) of *the Courts of Justice Act*, costs are in the discretion of the court. That section provides as follows:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

6 Rule 57.01(1) outlines the factors that the court may consider in carrying out this exercise, and in sub-paragraph(3) states that:

(3) In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment, and where the costs are not fixed, they may be assessed under Rule 58.

7 A judge, in *fixing* costs is not *assessing* costs in the way in which a Master or Assessment Officer does when costs are referred to be assessed, but instead is making a “determination of what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his [or her] own experience and (in party and party situations) with some regard to what could be taxed on the party and party scale”: see *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.*, (1991) 4 O.R. (3d) 321, at p. 326, per Henry J.

8 In relation to these motions the following provisions of Rule 57.01(1) are pertinent:

In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

(a) the amount claimed and the amount recovered in the proceeding;

(c) the complexity of the proceeding;

(d) the importance of the issues; and

(i) any other matter relevant to the question of costs.

Quantum

9 Mr. Pinelli has submitted a bill of costs seeking an amount of \$19,745.00 for time spent plus disbursements of \$289.18 and GST of \$1,402.39, for a total of \$21,436.57. I think this is too much, having regard to the nature of the motions in question measured against the foregoing criteria. Nonetheless, the Town is entitled to recover a significant amount for its party and party costs.

10 There were two appearances to speak to these matters before they were argued, and they were argued during the day of February 21, 1995. Written submissions followed, at my request, in relation to a jurisdictional issue raised by the Court. These submissions by both counsel were thorough and very helpful. While the issues raised were not exceedingly complex, they were of moderate complexity and they were difficult because they covered new ground regarding which there were no earlier authorities on point. They thus involved a considerable amount of “spade work” by both counsel. The issues were also of importance both to the Town and to the Receiver.

11 The time spent by Mr. Pinelli and by his associate, Ms. Smith, encompassed the drafting of motion materials, correspondence, preparation for and attendance upon cross-examinations, legal research, preparation of factums and briefs of authorities, receipt and review of the Receiver’s motion materials, preparation for argument of the motions, written submissions, and attendances. Mr. Pinelli arrives at the fee portion of the claim for costs primarily by multiplying his 69.4 hours by an hourly rate of \$150.00 and Ms. Smith’s 92 hours by \$100.00.

12 Mr. Pinelli was called to the Bar in 1974 and he is certified as a specialist in Civil Litigation by the Law Society of

Upper Canada. Ms. Smith was called in 1991. Like O'Brien J. in *Minuteman Press of Canada Co. v. Touche Ross & Co.* (1994) 27 C.P.C. (3d) 70, a case involving counsel of similar experience, I do not find the hourly rates claimed to be out of line for a party and party award of costs. However, I do not think that determining such costs is simply a function of multiplying hours spent by an appropriate hourly rate. One must take into account all of the appropriate factors involved, as outlined above, and arrive at a figure, as Mr. Justice Henry noted, in *Apotex, supra*, of

...what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his [or her] own experience and with some regard to what could be taxed on the party and party scale.... [The exercise] is essentially pragmatic, made on an overall appreciation of the factors in rule 57.01 without reviewing a catalogue of itemized charges.

13 Mr. Thibodeau argued that the Receiver should be entitled to costs of a motion argued on November 21, 1994 on which he was successful in compelling the re-attendance of a representative of the Town for cross-examination. I have reviewed my endorsement at that time. No order was made as to costs, nor were they reserved to the hearing of the substantive motions. I note that a similar disposition was made with respect to a second motion on the same date, brought by the Town to compel the Receiver to provide it with materials served in relation to the receivership proceedings. Neither party is entitled to costs with respect to such motions.

14 Making some allowance for the inclusion of time relating to the November 21st motions, and based upon all of the foregoing factors, I am satisfied that an appropriate award of party and party costs for these motions is \$11,000.00 plus disbursements as claimed and GST.

Source of Payment

15 This brings me to the questions of whether the Receiver is entitled to look to the assets of the receivership for the payment of such costs; whether, if it is, it must do so on a unsecured basis; or whether it is obliged to absorb and pay the costs award itself.

16 Costs are only awarded personally against a receiver in the rarest of cases, and then, ordinarily, only if notice has been given to the receiver that such an order is being sought: see, *Re Brydon* (1923), 25 O.W.N. 289 (H.C.); Frank Bennett, *Receiverships*, Toronto, the Carswell Company Limited, 1985 at pp. 131-132.

17 In the circumstances of this case, in my view, the appropriate disposition is to require the Receiver to pay the Town the costs awarded, forthwith, but to allow the Receiver to rank as an unsecured creditor against the assets to recover those amounts in the event that there is a surplus available for unsecured creditors. To do otherwise would be to undermine the substantive order made denying the Receiver priority for its fees and disbursements over the tax claim of the Town.

18 For similar reasons I reject Mr. Thibodeau's submissions that the costs should be recoverable by the Town as "legal fees and disbursements" comprising part of the "cancellation price" provided for under s. 1(1) of the *Municipal Tax Sales Act*, R.S.O. 1990, c. M.60. While the Town may well be entitled to recover its legal fees and disbursements incurred in connection with the proceedings through such a means, it does not follow that costs obliged to be paid to it by another party must be treated in the same fashion. In the circumstances of this case, as Mr. Pinelli has pointed out, such a result would frustrate the main order because the Town would never collect its costs, the value of the receivership assets being insufficient to cover even the outstanding taxes.

19 The only equitable solution is to shift the "security" risk to the Receiver should that turn out not to be the case. For the reasons outlined on the substantive motions, it is the Receiver who should justly bear that risk here. If there should ultimately be equity in the assets -- a very unlikely event -- the Receiver may recover as an unsecured creditor. In the meantime, it must pay the costs as awarded to the Town.

Conclusion

20 Accordingly, an order will go fixing the Town's costs at the sum of \$11,000.00 plus disbursements of \$289.39 plus applicable GST. The Receiver is to pay such costs to the Town forthwith, and will rank as an unsecured creditor against the assets of the Receivership for recovery of such costs.

TAB 7

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Thambapillai v. Labrash Security Services Ltd.](#) | 2017 ONSC 3299, 2017 CarswellOnt 8253 | (Ont. S.C.J., May 29, 2017)

2009 ONCA 722
Ontario Court of Appeal

Davies v. Clarington (Municipality)

2009 CarswellOnt 6185, 2009 ONCA 722, [2009] O.J. No. 4236, 100 O.R. (3d) 66, 182 A.C.W.S. (3d) 291, 254 O.A.C. 356, 312 D.L.R. (4th) 278, 77 C.P.C. (6th) 1

Bonnie Davies (Plaintiff) and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc. (Defendants / Appellants) and Blue Circle Canada Inc. (Defendant / Respondent) and Hydro One Networks Inc. (Defendant / Appellant)

S.T. Goudge, Robert Sharpe, Gloria Epstein J.J.A.

Heard: June 18, 2009
Judgment: October 16, 2009
Docket: CA C49139

Proceedings: varying *Davies v. Clarington (Municipality)* (2007), 2007 CarswellOnt 7413 (Ont. S.C.J.); additional reasons to *Davies v. Clarington (Municipality)* (2006), 2006 CarswellOnt 2020, 266 D.L.R. (4th) 375 (Ont. S.C.J.)

Counsel: James M. Regan for Appellants
Brian J.E. Brock, Q.C., Roseanna R. Ansell-Vaughan for Respondent

Subject: Torts; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

XXIV Costs

XXIV.4 Offers to settle or payment into court

XXIV.4.a Offers to settle

XXIV.4.a.ii Discretion of court

Civil practice and procedure

XXIV Costs

XXIV.8 Scale and quantum of costs

XXIV.8.a General principles

Civil practice and procedure

XXIV Costs

XXIV.9 Particular items of costs

XXIV.9.d Disbursements

XXIV.9.d.ii Photocopies

Civil practice and procedure

XXIV Costs

XXIV.9 Particular items of costs

XXIV.9.d Disbursements

XXIV.9.d.iv Surveillance and investigation

Civil practice and procedure

XXIV Costs

XXIV.9 Particular items of costs

XXIV.9.d Disbursements

XXIV.9.d.vi Telephone charges

Civil practice and procedure

XXIV Costs

XXIV.9 Particular items of costs

XXIV.9.d Disbursements

XXIV.9.d.vii Travelling expenses

Civil practice and procedure

XXIV Costs

XXIV.9 Particular items of costs

XXIV.9.d Disbursements

XXIV.9.d.ix Miscellaneous

Civil practice and procedure

XXIV Costs

XXIV.12 Costs where crossclaim made

Headnote

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Discretion of court

Predecessor of B Inc. acquired property adjacent to railway corridor as well as right of way over crossing — B Inc. did not use crossing for access to its property, though its tenant used crossing for farm purposes — Tractor trailer driver got lost on way to B Inc., got stuck while trying to execute three-point turn on crossing, and did not warn anybody — Tractor-trailer was struck by freight train and passenger train, causing both trains to derail — All parties affected by collision except B Inc. reached settlement — B Inc. served two offers to consent to dismissal of claims and cross-claims against it on without costs basis, second of which stayed open for acceptance until time of trial — Action by railways and passengers against B Inc. for damages for negligence was dismissed — Cross-claim by other defendants against B Inc. was dismissed — B Inc. sought costs against settling defendants — B Inc. was entitled to partial indemnity costs in amount of \$53,867.10 and substantial indemnity costs from date of its second offer to settle forward in amount of \$455,585.08 — Rule 49(10) of Rules of Civil

Procedure did not apply — Court had discretion under R. 57.01 of Rules to consider offer to settle in awarding costs of crossclaim — Defendants appealed — Appeal allowed; costs to B Inc. were varied to \$300,000 — Trial judge appeared to have intended to order Blue Circle its costs on substantial indemnity basis but actually awarded them on full indemnity scale — Trial judge erred in awarding such high costs — Fixing costs is discretionary exercise and attracts high level of deference but it must be done on principled basis — Judicial discretion under R. 49.13 and 57.01 is not so broad as to permit fundamental changes to law governing awards of elevated level of costs — Elevated costs awards require clear findings of reprehensible conduct on part of party against which costs are awarded — Defendants did not engage in such conduct so award was not warranted — There was no basis upon which to justify anything more than partial indemnity costs award — Award was not fair and reasonable — Reasonableness is overriding principle in costs awards — Trial judge did identify importance reasonableness assessment but her reasons did not show she actually conducted one given how high her costs award was — On fair and reasonableness analysis it was apparent that appellate intervention was warranted.

Civil practice and procedure --- Costs — Scale and quantum of costs — General principles

Predecessor of B Inc. acquired property adjacent to corridor as well as right of way over crossing — B Inc. did not use crossing for access to its property, though its tenant used crossing for farm purposes — Tractor trailer driver got lost on way to B Inc., got stuck while trying to execute three-point turn on crossing, and did not warn anybody — Tractor-trailer was struck by freight train and passenger train, causing both trains to derail — All parties affected by collision except B Inc. reached settlement — Action by railways and passengers against B Inc. for damages for negligence was dismissed — Cross-claim by other defendants against B Inc. was dismissed — B Inc. sought costs against settling defendants — B Inc. was entitled to partial indemnity costs in amount of \$53,867.10 and substantial indemnity costs from date of its second offer to settle forward in amount of \$455,585.08 — Although much of action was heard prior to abolition of costs grid, current costs rule applied as there was no prejudice — Lawyers were all senior experienced members of bar and their hours and rates charged were reasonable — Amount of costs B Inc. sought would have reasonably been expected by parties — Case was complex — B Inc. often played mediating role — Defendants appealed — Appeal allowed; costs to B Inc. were varied to \$300,000 — Trial judge appeared to have intended to order Blue Circle its costs on substantial indemnity basis but actually awarded them on full indemnity scale — Trial judge erred in awarding such high costs — Fixing costs is discretionary exercise and attracts high level of deference but it must be done on principled basis — Judicial discretion under R. 49.13 and 57.01 is not so broad as to permit fundamental changes to law governing awards of elevated level of costs — Elevated costs awards require clear findings of reprehensible conduct on part of party against which costs are awarded — Defendants did not engage in such conduct so award was not warranted — There was no basis upon which to justify anything more than partial indemnity costs award — Award was not fair and reasonable — Reasonableness is overriding principle in costs awards — Trial judge did identify importance reasonableness assessment but her reasons did not show she actually conducted one given how high her costs award was — On fair and reasonableness analysis it was apparent that appellate intervention was warranted.

Civil practice and procedure --- Costs — Costs where crossclaim made

Predecessor of B Inc. acquired property adjacent to corridor as well as right of way over crossing — B Inc. did not use crossing for access to its property, though its tenant used crossing for farm purposes — Tractor trailer driver got lost on way to B Inc., got stuck while trying to execute three-point turn on crossing, and did not warn anybody — Tractor-trailer was struck by freight train and passenger train, causing both trains to derail — All parties affected by collision except B Inc. reached settlement — B Inc. served two offers to consent to dismissal of claims and cross-claims against it on without costs basis, second of which stayed open for acceptance until time of trial — Action by railways and passengers against B Inc. for damages for negligence was dismissed — Cross-claim by other defendants against B Inc. was dismissed — B Inc. sought costs against settling defendants — B Inc. was entitled to partial indemnity costs in amount of \$53,867.10 and substantial indemnity costs from date of its second offer to settle forward in amount of \$455,585.08 — Rule 49(10) of Rules of Civil Procedure did not apply — Court had discretion under R. 57.01 of Rules to consider offers to settle in awarding costs of crossclaim — Defendants appealed — Appeal allowed; costs to B Inc. were varied to \$300,000 — Trial judge appeared to have intended to order Blue Circle its costs on substantial indemnity basis but actually awarded them on full indemnity scale — Trial judge erred in awarding such high costs — Fixing costs is discretionary exercise and attracts high level of deference but it must be done on principled basis — Judicial discretion under R. 49.13 and 57.01 is not so broad as to permit fundamental changes to law governing awards of elevated level of costs — Elevated costs awards require clear findings of reprehensible conduct on part of party against which costs are awarded — Defendants did not engage in such conduct so

award was not warranted — There was no basis upon which to justify anything more than partial indemnity costs award — Award was not fair and reasonable — Reasonableness is overriding principle in costs awards — Trial judge did identify importance reasonableness assessment but her reasons did not show she actually conducted one given how high her costs award was — On fair and reasonableness analysis it was apparent that appellate intervention was warranted.

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Photocopies

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Telephone charges

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Travelling expenses

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Surveillance and investigation

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Miscellaneous disbursements

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Apotex Inc. v. Egis Pharmaceuticals (1990), 2 O.R. (3d) 126, 1990 CarswellOnt 2702, 32 C.P.R. (3d) 559 at 568 (Ont. Gen. Div.) — considered

Apotex Inc. v. Egis Pharmaceuticals (1991), 1991 CarswellOnt 3149, 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Ont. S.C.J.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario*) 71 O.R. (3d) 291 (Ont. C.A.) — considered

Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC (2005), 2005 CarswellOnt 189, 5 C.P.C. (6th) 258, 75 O.R. (3d) 638 (Ont. C.A.) — referred to

Dyer v. Mekinda Snyder Partnership Inc. (1998), 1998 CarswellOnt 2283, 40 O.R. (3d) 180, 61 O.T.C. 390 (Ont. Gen. Div.) — referred to

Foulis v. Robinson (1978), 1978 CarswellOnt 466, 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (Ont. C.A.) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — considered

McBride Metal Fabricating Corp. v. H & W Sales Co. (2002), 19 C.P.R. (4th) 440, 158 O.A.C. 214, 59 O.R. (3d) 97, 2002 CarswellOnt 1200 (Ont. C.A.) — considered

Moon v. Sher (2004), 2004 CarswellOnt 4702, 192 O.A.C. 222, 246 D.L.R. (4th) 440 (Ont. C.A.) — referred to

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S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1990 CarswellOnt 435, 49 C.P.C. (2d) 234, 1 O.R. (3d) 243, 45 O.A.C. 394 (Ont. C.A.) — considered

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Walker v. Ritchie (2005), 2005 CarswellOnt 1574, 197 O.A.C. 81, 31 C.C.L.T. (3d) 205, 25 C.C.L.I. (4th) 60, 12 C.P.C. (6th) 51 (Ont. C.A.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

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Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — considered

Rules considered:

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R. 1.03(1) “substantial indemnity costs” — considered
R. 1.04 — referred to
R. 49 — considered
R. 49.02(1) — considered
R. 49.10 — considered
R. 49.10(1) — considered
R. 49.10(2) — considered
R. 49.13 — considered
R. 57.01 — considered
R. 57.01(1) — considered
R. 57.01(1)(0.a) [en. O. Reg. 42/05] — considered
R. 57.01(1)(0.b) [en. O. Reg. 42/05] — considered
R. 57.01(1)(c) — considered
R. 57.01(1)(e) — considered
R. 57.01(4) — considered
R. 57.01(4)(c) — considered
R. 57.01(4)(d) — considered

Tariffs considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Tariff A, Pt. I — referred to

APPEAL of judgment reported at *Davies v. Clarington (Municipality)* (2007), 2007 CarswellOnt 7413 (Ont. S.C.J.).

Gloria Epstein J.A.:

1 The primary issue in this appeal involves the limits of the court's discretion to award costs on either a substantial indemnity or full indemnity scale. This court is asked to consider a costs award in the amount of \$509,452.18, payable by a number of defendants in this action to a defendant against which the action was dismissed. The award is notable not only for its considerable quantum, but also for the trial judge's decision to fix a large portion of the costs on a full indemnity basis absent a finding of sanction-worthy conduct on the part of the party against which the cost order was made. Specifically, full indemnity costs were ordered for the period following the delivery of an offer to settle the claims of the plaintiff and other defendants on a without-costs basis.

2 For the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the costs award below, and substitute an award in the amount of \$300,000 plus disbursements and Goods and Services Tax.

I. Background Facts

3 This action, commenced on September 5, 2000, arose out of a train derailment that took place in Bowmanville on November 23, 1999.

4 On April 10, 2002, Blue Circle Canada Inc., one of the defendants and the respondent in this appeal, delivered a non-severable offer to settle consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. This offer remained open for acceptance for 30 days. On February 1, 2005, Blue Circle delivered a second offer on the same terms (the "February 2005 offer"). This offer was never revoked and was open for acceptance at the time of trial.

5 The trial, on the issue of liability only, began in April 2005 and continued for almost 11 weeks. In this complex action, eight parties advanced claims, counterclaims, and cross-claims in contract and in tort. Prior to closing arguments, settlement discussions took place, at the end of which the defendants/appellants in this appeal, the Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, The BLM Group Inc., Timothy Garnham, Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Hydro One Networks Inc. (collectively, the "settling defendants"), settled with the plaintiff.

6 In the course of the settlement discussions, Blue Circle offered to accept \$250,000 from the settling defendants in relation to costs it incurred in defending their cross-claims. It subsequently reduced this amount to \$200,000. This offer was not accepted and consequently Blue Circle did not participate in the settlement.

7 As a result, the trial judge had to determine Blue Circle's liability, if any, for damages arising from the derailment. On April 5, 2006, after hearing final arguments, the trial judge dismissed the action against Blue Circle.

8 Blue Circle then sought costs against the settling defendants on a partial indemnity scale from the commencement of the litigation to the February 2005 offer and on a substantial indemnity basis thereafter.

9 On November 19, 2007, upon considering written argument, the trial judge ordered the settling defendants to pay Blue Circle's costs in the amount of \$509,452.18 plus disbursements of \$26,276.77.

II. The Applicable Rules

10 The award of costs is governed by section 131 of the *Courts of Justice Act* R.S.O. 1990, c.43 and by rules 49 and 57.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194.

11 The general source of judicial discretion to award costs is found under s.131 of the *Courts of Justice Act*, as expanded by rule 57.01.

12 Section 131 of the *Courts of Justice Act* says:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

13 Rule 57.01 reads as follows:

In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding *and any offer to settle or to contribute made in writing*,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

.....

(c) the complexity of the proceeding;

.....

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding. (Emphasis added.)

14 Rule 57.01(4) allows for elevated levels of costs:

57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,

.....

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity.

15 "Substantial indemnity costs" is defined in rule 1.03 as "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A". This part of Tariff A was once the prescribed grid for "partial indemnity costs", but is no longer in effect. "Full indemnity costs" is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation: see M. Orkin, *The Law of Costs*, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 1993) at para. 219.05.

16 Rule 49 deals with a specific aspect of costs: it is a self-contained scheme that addresses the manner in which offers to settle are brought into play. Its objective is to promote an offer of compromise and visit a cost consequence upon an offeree

who rejects an offer that turns out to be as favourable as or more favourable than the judgment awarded to a plaintiff at trial. The parts of rule 49 relevant to this analysis are:

49.02(1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle

.....

Costs Consequences of Failure to Accept

Plaintiff's Offer

49.10(1) Where an offer to settle,

- (a) is made by a plaintiff at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the defendant, and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

- (a) is made by a defendant at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the plaintiff, and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

.....

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

III. Reasons of the Trial Judge Regarding Blue Circle's Costs

17 In her endorsement relating to Blue Circle's costs, the trial judge briefly set out the nature and history of the proceedings.

18 After completing her assessment of Blue Circle's disbursements that were in issue, the trial judge turned to Blue Circle's submissions concerning fees. She noted Blue Circle's two offers to consent to a dismissal of the claims and cross-claims on a without-costs basis and its offers made to the settling defendants during the course of the settlement discussions.

19 The trial judge identified the principles and authorities upon which Blue Circle relied in support of its claim for partial indemnity costs to the date of the February 2005 offer and substantial indemnity costs thereafter. Blue Circle relied upon the

wide discretionary power in s. 131 of the *Courts of Justice Act* and rules 49.13 and 57.01(1) and (4) of the *Rules of Civil Procedure* as well as this court's decisions in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (Ont. C.A.), and the Ontario Court (General Division) decision in *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Ont. Gen. Div.).

20 In her analysis, the trial judge identified the principles established in the two well-known cases of *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), and *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ont. C.A.). The principles are that the fixing of costs is not merely a mechanical exercise; that the result of applying the costs grid must be considered, in particular whether in all the circumstances the result is fair and reasonable¹; and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor.

21 At para. 22 of her reasons, the trial judge analyzed the factors set out in rule 57.01(1) that she considered relevant to her determination as to costs:

I am now going to look at the 57.01(1) factors applicable to this case:

(0.a) The lawyers were all senior experienced members of the bar - no doubt the best in this area of law. The rates charged and the hours expended are reasonable. There is no reason why there should not be full indemnity following the service of the offer and partial indemnity of the earlier fees.

(0.b) The amount of costs being sought by Blue Circle would have been reasonably expected by the parties.

.....

(c) The case was very complex. Even the sole issue which had to be determined in the end was very complex.

.....

(e) The conduct of Blue Circle - I agree that counsel for Blue Circle often played a mediating role. Difficult issues erupted at the trial and usually Mr. Brock, who was not involved in the "erupting" issue, offered some practical and helpful thoughts. I was not present in the settlement discussions but have no doubt that he was an integral part in arriving at the settlement.

22 Then, in paras. 23 and 24, the trial judge fixed Blue Circle's costs as follows:

1. "Partial indemnity costs" from the commencement of the action to February 1, 2005, in the amount of \$53,867.10; and

2. "Substantial indemnity costs" from February 1, 2005 to the date of the costs decision, in the amount of \$455,585.08.

23 In her reasons the trial judge used the terms "substantial" and "full" interchangeably with respect to the scale of costs. However, the \$455,585.08 awarded is the aggregate of all of the invoices Blue Circle paid its counsel for fees incurred after February 2005. Thus, while the trial judge appears to have intended to order Blue Circle its costs on a substantial indemnity basis, the amount awarded was on a full indemnity scale. Although this amounts to an error, it has no bearing on my analysis or the outcome of this appeal. For simplicity, throughout the rest of my reasons I will refer to both full and substantial indemnity costs generically as "elevated costs".

IV. The Issues

24 The settling defendants appeal on a narrow basis. They take the position that Blue Circle is entitled to its costs throughout, on a partial indemnity basis, and to the disbursements awarded by the trial judge. Their complaint lies in the trial judge's having awarded Blue Circle elevated costs from the February 2005 offer to the date of judgment as well as in the overall amount of the award.

25 The settling defendants submit that the trial judge erred in the exercise of her discretion in awarding elevated costs for this period, in two respects:

(a) in effectively treating Blue Circle's February 2005 offer to settle as though it were a rule 49.10 offer; and,

(b) in relying on *Strasser* in support of her conclusion that Blue Circle was entitled to elevated costs from the February 2005 offer forward.

26 The settling defendants further argue that the trial judge erred in ordering costs in an amount that is not "fair and reasonable" according to the principles set out in *Boucher*.

V. Analysis

27 The parties take no issue with the general principles applicable to appellate review of costs decisions. The Supreme Court has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: see *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(1) *The Costs Award on an Elevated Scale*

The Jurisprudential Framework

28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

29 In *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at p. 134, McLachlin J., described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

30 The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (Ont. C.A.), at p. 23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to Orkin at para. 219.

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form

of chastisement.²

31 The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H & W Sales Co.* (2002), 59 O.R. (3d) 97 (Ont. C.A.) where, at para. 39, she said:

Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

See also: *Walker v. Ritchie* (2005), 197 O.A.C. 81 (Ont. C.A.) at para. 105, reversed on other grounds, [2006] 2 S.C.R. 428 (S.C.C.).

32 At para. 14 of the reasons, the trial judge acknowledges the parties' agreement that rule 49 was not applicable to Blue Circle's February offer.

33 This leaves egregious conduct, specifically the question whether in the circumstances of this case the settling defendants engaged in conduct worthy of sanction.

Strasser

34 This takes me to *Strasser*, the case upon which the trial judge relied in awarding an elevated scale of costs following the February 2005 offer to settle and upon which Blue Circle heavily relies in this appeal.

35 In *Strasser*, the plaintiff had originally claimed \$1,000,000. After discovery, the defendant offered to pay \$30,000. The plaintiff then reduced the claim to \$70,000. The action was ultimately dismissed. In those circumstances, the trial judge awarded the defendant solicitor-and-client costs, throughout.

36 In the plaintiff's appeal of the costs award, Carthy J.A., for the court, noted that although the defendant's offer was not a rule 49.10 offer, the language of rules 49.13 and 57.01 gives the trial judge discretion with respect to costs, and rule 49.13 specifically invites the judge exercising discretion to take into account any offer to settle made in writing. Carthy J.A. went on, however, to hold that the offer in *Strasser* could not, standing on its own, justify an award of solicitor-and-client costs. While the trial judge did not identify any evidence of reprehensible conduct, Carthy J.A., in upholding the award, was careful to note that during the costs submissions the trial judge did say "I think this case, in these circumstances, screams for solicitor-and-client costs:" p. 246.

37 This court sought to clarify *Strasser* in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 737 (Ont. C.A.), a case in which the defendant had served an offer to settle on the basis that the action be dismissed without costs and the trial judge subsequently dismissed the plaintiff's claim. Purportedly following *Strasser*, the trial judge awarded party-and-party costs to the date of the offer and solicitor-and-client costs thereafter.

38 On appeal, this court started its analysis of the defendant's appeal of the costs award by observing, once again, that as the plaintiff's claim had failed, rule 49.10 had no application. Then, at p. 750, turning to *Strasser*, Austin J.A. had this to say:

[T]he principle upon which solicitor and client costs were awarded in *Strasser* is a very narrow one. The plaintiff had made a claim for \$1 million, the defendant made an offer after discovery of \$30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in *Strasser* who said "I think this case, in these circumstances, screams for solicitor and client costs."

39 Thus interpreting *Strasser* as a case where egregious conduct was implicitly found, this court allowed the appeal as to

costs, set aside the original costs award and substituted an award of costs on a party-and-party basis. For other cases in which comments have been made on the limited application of *Strasser*, see *St. Louis-Lalonde v. Carleton Condominium Corp. No. 12* [2005 CarswellOnt 2731 (Ont. S.C.J.)], 142 A.C.W.S. (3d) 934 aff'd 155 A.C.W.S. (3d) 479 (C.A.), at para. 15, *Dyer v. Mekinda Snyder Partnership Inc.* (1998), 40 O.R. (3d) 180 (Ont. Gen. Div.).

40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

Application to the Facts

41 Here, the circumstances are similar to those found in *Scapillati*. There was no rule 49.10 offer and no finding by the trial judge that the settling defendants conducted themselves in a reprehensible or egregious fashion.

42 Blue Circle submits that notwithstanding the trial judge's failure to make such a finding in her reasons as to costs, her reasons dismissing the claim against it demonstrate that the settling defendants' conduct in relentlessly pursuing their claims against Blue Circle, in the face of the apparent weakness of their position, is conduct that justifiably attracted an elevated scale of costs.

43 I have considerable difficulty with this argument.

44 Blue Circle's submission in this respect is contrary to the principle Dubin J.A. expressed in *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.) at p. 776 that "Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action."

45 Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counterproductive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.), substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.

46 Here, there is no finding or evidence in the record of "harassment...by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court. In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

47 *Apotex* (1990) does not assist Blue Circle in trying to make out a case for misconduct on the part of the settling defendants. That case involved meritless claims of fraud, deceit, and dishonesty based on pure speculation. First, the trial judge did not make such a link between this case and *Apotex* (1990) on this basis. Second, unsubstantiated allegations of the nature advanced in *Apotex* (1990) represent a form of egregious conduct commonly accepted as a basis for attracting a higher costs award: see *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Gen. Div.); *Réno-Dépôt Inc. v. Wonderland Commercial Centre Inc.* (2008), 2008 ONCA 786 (Ont. C.A.) (award of costs on a substantial indemnity basis warranted only from the point in time when allegations of fraud and dishonesty were made). This is not the nature of the allegations made against the settling defendants.

48 Before turning to the settling defendants' second argument, I make one final comment. In cases such as *Beresford-Last (Litigation Guardian of) v. Dworak* (2000), 101 A.C.W.S. (3d) 696 (Ont. Sup. Ct.), and *Marcella v. Integrated Management and Investments Inc.* (2007), 157 A.C.W.S. (3d) 51 (Ont. Sup. Ct.), trial judges have expressed the view that denying elevated costs to defendants who submit an offer to settle, which is later revealed to be more favourable than the result at trial, acts as a disincentive to defendants to make reasonable offers to settle. This view, while understandable, is contrary to

the wording, spirit and intent of rule 49. Rules cannot be incrementally changed through jurisprudence. Any change in the rules to take into account the position of defendants who legitimately try to curtail what turns out to be unnecessary litigation is a matter for the Rules Committee.

49 In my view, there is no basis to justify anything other than a partial indemnity costs award in favour of Blue Circle.

(2) Whether the costs award is “fair and reasonable”

50 While this conclusion is sufficient to set aside the costs award, I would add that, in my view, the award was otherwise not fair and reasonable.

51 In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.), the Divisional Court set out several principles that must be considered when awarding costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon, and Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (Ont. C.A.).
2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
4. The court should seek to avoid inconsistency with comparable awards in other cases. “Like cases, [if they can be found], should conclude with like substantive results”: *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at p. 249.
5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

52 As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said “[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice.”

53 Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of \$509,452.18 her reasons do not indicate that she conducted an assessment or at least a sufficient one, in accordance the requirements set out in *Boucher*. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have claimed costs of this magnitude, she was, according to *Boucher* at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs award.

54 It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle’s limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle’s own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would

treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions.³ Further, in considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.

55 The results of this “fair and reasonable” analysis demonstrate that appellate intervention is warranted.

56 Turning to quantum, taking into consideration the circumstances of this case and applying to them the relevant factors set out in rule 57.01, and the fair and reasonable test expressed in Boucher, in my view the amount of \$300,000 would be appropriate.

VI. Disposition

57 I would therefore allow the appeal and set aside the trial judge’s cost award in relation to fees only and in its place substitute the amount of \$300,000.

58 Upon the agreement of the parties, the settling defendants are entitled to their costs of this appeal and the motion for leave to appeal, fixed in the amount of \$10,000 including disbursements and Goods and Services Tax.

S.T. Goudge J.A.:

I agree.

Robert Sharpe J.A.:

I agree.

Appeal allowed; costs order varied.

Footnotes

¹ The costs grid has since been removed from the rules, but the general point is clear; the result of a costs award formula must be scrutinized for fairness and reasonableness.

² Note the discrepancy in language between the former terminology, “solicitor and client costs” and the newer terminology of “substantial indemnity.” The two terms indicate the same costs scale. Rule 1.04 identifies the two terms as follows: “If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs.”

³ While the assistance of counsel for Blue Circle in the discussions that led to the settlement among all but Blue Circle is commendable, it is not, in my view, a basis upon which to make the settling defendants pay Blue Circle’s costs on an elevated basis.

TAB

8

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Canada (Procureur général) c. Contrevenant No. 10* | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

**Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada,
Respondent and The Minister of Finance of Canada, the Minister of Foreign
Affairs of Canada, the Minister of International Trade of Canada and the Attorney
General of Canada, Respondents**

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada

Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure

XII Discovery

XII.2 Discovery of documents

XII.2.h Privileged document

XII.2.h.xiii Miscellaneous

Civil practice and procedure

XII Discovery

XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous

Evidence

VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — [Loi canadienne sur l'évaluation environnementale](#), L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — [Loi canadienne sur l'évaluation environnementale](#), L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a \$1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurier les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société

d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pourrait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emporteraient sur ses effets préjudiciables.

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s. 8 — referred to

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s. 54(2)(b) — referred to

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R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by Iacobucci J.:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the “Confidential Documents”). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL’s experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang’s evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the “EIRs”), a Preliminary Safety Analysis Report (the “PSAR”), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent’s position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with

the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) *Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns “trade secrets,” this information will not be disclosed during a trial if to do so would destroy the owner’s proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is “necessary” to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules*, 1998?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

- (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the

discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

- (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
- (b) the judge must consider whether the order is limited as much as possible; and
- (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the

parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the “necessity” branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase “proper administration of justice” must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflect . . . the substance of the *Oakes* test”, *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL’s confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer’s property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant’s commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant’s capacity to make full answer and defence or, expressed more generally, the appellant’s right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L’Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as “the very soul of justice,” guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase “important commercial interest” is in need of some clarification. In order to qualify as an “important commercial interest,” the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields “where the *public* interest in confidentiality outweighs the public interest in openness” (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an “important commercial interest.” It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” (para. 14) as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant’s commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL’s competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal’s assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant’s case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club’s position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would

not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), per Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra*, per Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the

nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of

protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.
Pourvoi accueilli.

CANADIAN IMPERIAL
BANK OF COMMERCE

and

1299746 ONTARIO INC.
o/a COMPUQUEST2000 et al.

Court File No.: CV-16-11369-00CL

Applicant

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

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