EB-2010-0221

**IN THE MATTER OF** the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

**AND IN THE MATTER OF** a Notice of Intention to Make an Order for Compliance, Suspension and an Administrative Penalty against Summitt Energy Management Inc. dated June 17th, 2010

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# BOOK OF AUTHORITIES OF COMPLIANCE COUNSEL ON THE MOTION OF SUMMITT ENERGY MANAGEMENT, INC.

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August 18, 2010

**Stockwoods LLP Barristers**
Royal Trust Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

**M. Philip Tunley** LSUC #26402J
Tel: 416-593-3495
Fax: 416-593-9345
Email: *PhilT@stockwoods.ca*

**ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

**Maureen Helt**
Tel: (416) 440-7672
Email: *Maureen.Helt@oeb.gov.on.caS*

Compliance Counsel

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

**Attention: Kirsten Walli,**
Board Secretary
Tel: 888.632.6273
Fax:416-440-7656
E Mail: *Boardsec@ oeb..qov.on.ca*

AND TO: **Cassels Brock & Blackwell LLP**
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2

**Stephen I. Selznick** LSUC#: 18593C
Tel: 416.860.6883
Fax: 416.642.7147
Email: *sselznick@ casselsbrock.com*

**Jason Beitchman** LSUC#: 564770
Tel: 416.860.2988
Fax: 647.259.7993
Email: *jbeitchman @ casselsbrock.com*

Lawyers for: Summitt Energy Management Inc.

**TAB AUTHORITY**

**1.** *Toronto Hydro Electric Systems Ltd.*, EB-2009-0308 Decision and Order on Motion for Disclosure, October 14, 2009

**2.** *May v. Ferndale Institution,* [2005] 3 S.C.R. 809, 2005 SCC 82

**3.** *CIBA-Geigy Canada Ltd. v. Patent Medicine Prices Review Board* [1994] 3 F.C. 425 (McKeown J.)

**4.** *CIBA-Geigy Canada Ltd.* [1994] 83 FTR 2nFed. C.A.)

**5.** *Fischer v. Milo* (2007), 44 R.F.L. (6th) 134, [2007] O.J. No. 3692, 2007 CarswellOnt 6144 (Ont. S.C.J. - D.M. Brown J.)

**6.** *F.(J.) v. C.(V.),* 2000 CanLII 21095 (ON S.C.)

**7.** *F.H. v. McDougall,* [2008] 3 S.C.R. 41

**8.** *Ontario Energy Board Act, 1998,* Ontario Regulation 200/02

**9.** *Electricity Retailer Code of Conduct,* Ontario Energy Board, 2004

**10.** *Code of Conduct for Gas Marketers,* Ontario Energy Board, 2004

**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2009-0308**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

**BEFORE:** Gordon Kaiser
Vice-Chair and Presiding Member

Cynthia Chaplin
Member

## DECISION AND ORDER

[1] This Decision addresses a motion brought by Toronto Hydro-Electric System Limited ("Toronto") for the production and disclosure of certain documents from: the Board; certain complainants, Metrogate Inc. ("Metrogate"), Residences of Avonshire Inc. ("Avonshire"), Deltera Inc. ("Deltera") and Enbridge Electric Connections Inc. ("Enbridge"); and the members of the Smart Sub-Metering Working Group (the "Working Group") [1].

[2] This is a compliance proceeding in which Compliance Counsel is seeking an Order under section 112.3 of the OEB Act. That section states:

[1] The Smart Sub-metering Working Group is made up of the following members:

Carma Industries Inc.
Enbridge Electric Connections Inc.
Hydro Connection Inc.
Intellimeter Canada Inc.
Provident Energy Management Inc.
Stratacon Inc.
Wyse Meter Solutions

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

[3] In the Notice of Intention to Make an Order For Compliance dated August 4, 2009, the Board identified the enforceable provisions as: section 28 of the *Electricity Act, 1998* (the *"Electricity Act"*); section 53.17 of the Electricity Act; section 2.4.6 of the Distribution System Code (the "DSC"); section 3.1.1 of the DSC; and section 5.1.9 of the DSC.

[4] The foregoing provisions create a scheme under which condominium developers or corporations may opt to: (i) have a distributor smart-meter individual condominium units, in which case each unit owner becomes a customer of the distributor; or (ii) have a Board-licensed smart sub-meter provider smart sub-meter individual units, in which case the condominium corporation (through a bulk meter) continues to be the customer of the distributor and the smart sub-metering provider allocates the bulk bill to the individual unit owners.

[5] At issue in this proceeding is Toronto's practice of refusing to connect new condominium projects within its service area unless all units in the condominium are individually smart-metered by Toronto. This practice, it is alleged, effectively precludes condominium corporations or developers from the option of using services of licensed smart sub-meter providers.

[6] In this proceeding, the Board alleges that Toronto's practice violates the above-noted provisions of the *Electricity Act* and the DSC. The particulars of non-compliance are set out in the Compliance Notice:

1. Toronto's Conditions of Service, specifically section 2.3.7.1.1, states that Toronto "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, Toronto informed Metrogate Inc. ("Metrogate") and Avonshire Inc.

("Avonshire") that despite Metrogate and Avonshire's request that Toronto prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, Toronto would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.

2. Toronto's refusal to connect on that basis is contrary to the requirement of a distributor to connect to a building, to its distribution system as per section 28 of the Electricity Act and is contrary to section 3.1.1 of the DSC.

3. Toronto's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters when requested to do so by the board of directors of a condominium corporation or by the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the *Condominium Act, 1998*.

4. Toronto's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07 – *Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.

5. Toronto's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.

[7] On August 21, 2009 Toronto wrote to Compliance Counsel requesting "disclosure and production of all information that may relate to suite metering or smart metering practices of THESL or third parties".

[8] On September 1, 2009 Compliance Counsel responded and provided counsel for Toronto with a package of documents[2] containing:

(a) Stakeholder complaints made to the Board;
(b) Compliance office communications with Toronto; and
(c) Extracts from Toronto's Conditions of Service, the Distribution System Code, and the Smart Sub-Metering Code.

[2] Affidavit of Patrick G. Duffy sworn September 22, 2009. Exhibit KM1.1.

[9] On August 28, 2009 Toronto wrote to the Working Group and requested disclosure of "all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto" from each member of the Working Group.

[10] On August 31, 2009, the Working Group informed Toronto by letter that it would not be providing the materials requested.

[11] In this motion, Toronto is seeking the production of:

(a) all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units (referred to by Toronto as "Compliance Information");

(b) all communications among the "Complainants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominiums developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto (referred to by Toronto as "Complainant Information"); and

(c) materials from the members of the Working Group, specifically all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto (the "Working Group Materials").

**Disclosure By Compliance Counsel**

[12] Toronto is seeking extensive disclosure and production of documents based upon the Supreme Court decision in *Stinchcombe*[3]. The *Stinchcombe* standard was summarized by Supreme Court of Canada in *Taillefer*[4].

> "The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly

[3] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[4] *R. v. Tailleter*, [2003] 3 S.C.R. 307.

> irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from person who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses…
>
> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will exempt from the duty that is imposed on the prosecution to disclose evidence.
>
> The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence."

[13] The *Stinchcombe* standard was established in the context of an indictable criminal offense and the disclosure requirements of a prosecutor. Mr. Justice Sopinka, the author of that opinion questioned at the time whether it would even extend to summary conviction offenses. *Stinchcombe* has however been applied to civil proceedings by administrative tribunals but that extension has largely been restricted to cases where an individual's livelihood is at stake.

[14] In *Re Berry*[5] the Ontario Securities Commission (the "Commission") decided that *Stinchcombe* required that documents reflecting settlement agreements between other parties should be produced. In *Re Biovail*[6] the Commission also recognized that the staff must provide disclosure similar to this *Stinchcombe* standard following the Supreme Court of Canada in *Deloitte and Touche LLP*[7]. Toronto also relies on the *Markandey*[8]decision, a disciplinary proceeding against an ophthalmologist. At paragraph 43 the Court stated

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[5] (2008), 31 O.S.C.B. 5441.

[6] (2008), 31 O.S.C.B. 7161.

[7] *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713.

[8] *Markandey v. Ontario (Board of Ophthalmic Dispensers)* [1994] O.J. No. 484. See also *Re Suman* 32 O.S.C.B. 592 at para 38.

> "The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (See Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary."

[15] Compliance Counsel responds that the *Stinchcombe* level of disclosure is limited to criminal or disciplinary proceedings where the accused faces a severe sanction. He relies on the recent Supreme Court of Canada decision in *May v. Ferndale*[9] at paragraph 91:

> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context."

[16] Compliance Counsel also relies on the Federal Court decision in *CIBA-Geigy*[10] which concerned the disclosure standards to be used by the Patented Medicine Prices Review Board. CIBA-Geigy was accused of excessive pricing and the company faced substantial fines relating to any excess profits. CIBA-Geigy requested all documents relating to all matters at issue that were or had been in the possession or control of the Board. The request was for all relevant documents whether favorable or prejudicial to the Respondent's position whether or not Board staff plan to rely upon those documents

[9] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809.

[10] *CIBA-Geigy Canada Ltd*., (1994) 83 F.T.R. 2.

as part of its case. In that sense the claim by CIBA-Geigy for disclosure was similar to the claim by Toronto before this Board.

[17] In the trial decision Mr. Justice McKeown refused the requested disclosure stating at paragraph 32:

> "In summary, when the statutory scheme of this Board is looked at, the Board is a regulatory Board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on."

[18] The Federal Court of Appeal upheld the trial decision[11] stating at paragraph 8:

> "This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings."

[19] To require a Board to disclose all possibly relevant information gathered in the course of its regulatory activities could easily impede its work from an administrative standpoint. As Macaulay and Sprague note "there must be a reason the functions have been mandated to an administrative agency and not to a court "[12]. There is also a significant difference between disciplinary proceedings where an individual may lose his livelihood and a situation where a corporation faces a sanction by way of fine or administrative penalty. An economic regulator, such as this Board, has little ability to affect human rights in the manner of a criminal or disciplinary proceeding. No individual is at risk in this case. Counsel for Toronto suggested that there may be an analogy in that Toronto could lose its license and ability to operate. Compliance Counsel responded that he is not seeking such a remedy.

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[11] *CIBA-Geigy Canada Ltd*., (1994) 3 F.C. 425 (CA).

[12] *Macaulay and Sprague*, Hearings Before Administrative Tribunals (Carswell 2009) at 9-1 to 9-2.

[20] Toronto argued that the Board often requires extensive disclosure from utilities it regulates and it would be wrong if the Board were to impose a broad disclosure requirement on a utility as an Applicant and not provide similar rights when the utility is a Respondent facing charges that it failed to comply with the Act or its licence. In *West Coast Energy*[13] the Board set out the standard of disclosure required of a utility and sanctioned the utility with a cost penalty for failure to comply:

> "A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis…
>
> Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.
>
> A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In doing so, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here."

[21] There is no question that the Board takes a broad view of disclosure for regulated utilities but that obligation flows from the unique status of a public utility with a monopoly franchise. As indicated in *West Coast Energy* that responsibility flows from the "regulatory compact" long recognized by the courts. That is not the situation here. The law respecting disclosure is well developed. The question before us is whether Stinchcombe extends to this type of regulatory proceeding where no individual rights are at issue. We take the view that it does not.

[22] Compliance Counsel responds that he is only required to produce documents he intends to rely on. Toronto claims that it should have access to all documents

[13] *Re West Coast Energy Inc. and Union Gas Limited* EB-2008-0304, November 19, 2008 at p.11.

necessary to meet those charges and frame its defence. In this regard Toronto sets out a very specific defence. Toronto intends to argue that it has a statutory defence which allows them to refuse to connect if there is a violation of law. Toronto argues that it is illegal for unlicensed distributors to profit from distribution activities.

[23] Accordingly, Toronto seeks information on the financial arrangements between condominium developers and sub-meterers to determine whether either or both of these are seeking to profit from distribution activities. Toronto argues that this information is relevant to its defense under section 3.1.1 of the Distribution System Code[14]. That section authorizes a refusal to connect where the customer contravenes the laws of Ontario.

[24] Fairness is always a matter of balancing different interests. As indicated, we do not accept that *Stinchcombe* applies to the disclosure requirements in this case. On the other hand, we believe Toronto is entitled to frame its defence as it sees fit and to obtain documents necessary to argue that defence. Whether they will be successful in that legal argument remains to be seen. But as a matter of fairness they are entitled to have documents required to advance a defence particularly where, as here, they have identified a specific arguable defence. Accordingly, we will order Compliance Counsel to produce all documents relating to smart metering activities at Metrogate and Avonshire.

[25] This is narrower disclosure than Toronto seeks. Toronto is seeking "all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units".

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[14] DSC section 3.1.1 states that: In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

(a) contravention of the laws of Canada or the Province of Ontario including the Ontario Electrical Safety Code;
(b) violation of conditions in a distributor's licence;
(c) materially adverse effect on the reliability or safety of the distribution system;
(d) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the distribution system;
(e) a material decrease in the efficiency of the distributor's distribution system;
(f) a materially adverse effect on the quality of distribution services received by an existing connection; and
(g) if the person requesting the connection owes the distributor money for distribution services, or for non-payment of a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20.

[26] The Notice of Intention to Make an Order issued by the Board on August 4 limits the questionable conduct to actions of Toronto with respect to Metrogate and Avonshire. No allegations are made with respect to other condominiums. Accordingly, any production of documents should be limited to documents in the possession of Compliance Counsel that relate to Metrogate and Avonshire.

[27] These documents should be produced within ten days unless there is a claim of privilege. There is no question that this Board is required to recognize claims of privilege where appropriate[15], but any claim of privilege must reference specific documents. We are not prepared to accept blanket claims of privilege.

**Disclosure of Third-Party Documents**

[28] Toronto is also seeking broad disclosure from third parties. Specifically they request "all communications among the "Complianants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominium developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto". They also request that all members of the Working Group produce *all* proposals and *all* contracts made with condominium developers relating to the installation and operation of sub-meters for condominiums in the City of Toronto. Seven companies form the Working Group.

[29] There is no question that the Board has jurisdiction to order third parties to produce documents[16] but this is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure. We do not believe that Toronto has met the burden in this case.

[30] As the Ontario Municipal Board cautioned in *Hammersmith Canada*[17] the Board "must be mindful of the possible abuse of the discovery process. We should be vigilant against any attempt to transform the right to discovery into a license to procure information from the world at large". Toronto has not identified specific documents. Rather, they request *all* seven members of the Working Group and each of the

[15] *Blood Tribe Department of Health v. Canada (Privacy Commission)*, [2008] 2 S.C.R. 574.

[16] See s. 21(1) of the *Ontario Energy Board Act, 1998*, and ss. 5.4 and 12 of the *Statutory Powers Procedure Act*.

[17] *Hammerson Canada Inc. v. Guelph (City)*, [1999] O.M.B.D. No. 1174 at para. 7.

"complainants" to produce *all* proposals and *all* contracts with *all* condominium developers in the City of Toronto.

[31] Concern with a fishing expedition is particularly relevant here where the members of the Working Group all compete with Toronto in the supply of smart meters to condominium units. Moreover, this is not a Stinchcombe case and Toronto's conduct is being questioned regarding only two condominium units, Metrogate and Avonshire, not *all* condominium units in Toronto.

[32] We also noted that the Board has appointed an independent lawyer to act as Compliance Counsel in this case largely in response to Toronto's concerns that the Board should not be acting as both an investigator and prosecutor. Toronto originally sought an order from the board concerning the separation of those activities. That matter has been resolved by the Board appointing independent counsel and the agreement by counsel to certain joint undertakings set out in Appendix A to this decision.

[33] It is important in considering this aspect of the motion to note that paragraph 37 of the factum filed by Compliance Counsel states that "the complainant information and Working Group materials [requested by Toronto directly from the third parties] have not been shared with Board compliance staff and will not be relied upon by compliance counsel in this proceeding". We would also note that of the production ordered with respect to Metrogate and Avonshire goes beyond the bare minimum that Compliance Counsel offered, namely that he produce only those documents that he intended to rely upon.

[34] In the circumstances we believe that the production ordered with respect to Metrogate and Avonshire materials held by Compliance Counsel meets any fairness concerns. Accordingly, no production will be ordered against third parties.

**Role of Prosecution Staff**

[35] In addition to orders for the production of various documents, Toronto also sought certain orders from the Board relating to procedural matters. The purpose of these requests was to ensure that sufficient separation was maintained between the members of Board staff (along with their external counsel) that were and had been working on the file from a compliance perspective to bring the case against Toronto

("Compliance Staff") and the members of Board staff that were and had been assisting the Board panel in this matter ("Board Staff").

[36] Prior to the commencement of the oral hearing on the motion, the parties reached an agreement on an appropriate procedural protocol, which was approved by the Board. A copy of this protocol, which has been signed by the counsel which are bound by it, is attached as Appendix A to this decision.

**IT IS THEREFORE ORDERED THAT:**

1. Compliance Counsel will within ten days produce all information that may relate to suite metering or smart metering practices of Toronto or Metrogate or Avonshire, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units.

**DATED** at Toronto, October 14, 2009.

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli
Board Secretary

## Appendix A

## Procedural Protocol

By Notice of Motion dated September 4, 2009, the Defendant Toronto Hydro Electric System Limited ("THESL") requested an order from the Board establishing a process for this proceeding, and in particular, governing how the Board will ensure that the Board Staff Team (consisting of individuals listed below) and the Panel hearing this proceeding (the "Panel") will govern their interactions with the Compliance Team (consisting of individuals listed below).

The Board Staff Team consists of persons who are assisting the Panel in this matter, specifically Michael Millar, Lenore Dougan and Adrian Pye.

The Compliance Team consists of persons who have been engaged in the investigation, compliance or prosecution of this application, specifically: Maureen Helt, MaryAnne Aldred, Joanna Rosset, Martine Band, Mark Garner, Brian Hewson, Jill Bada, (no longer an employee of the OEB) Fiona O'Connell, Lee Harmer, and Paul Gasparatto.

The Board Staff Team agrees to support the following protocol for the Panel's endorsement:

1. Members from each Team will have no contact with each other about matters relevant to this proceeding, except through the public hearing process or through correspondence copied to all other parties. Members of the Compliance team will have no contact with Board members on matters relevant to this proceeding, except through the public hearing process.

2. No member of either Team will place any files relevant to this proceeding that are not on the public record (computer or otherwise) in a place that can be accessed by the other team or anyone not on their Team.

3. The Team lists will be circulated to everyone at the Board, with instructions that no person at the Board that is not on one of the Teams may communicate with any member of either Team about this case except as specifically authorized in writing from the Board. If it is discovered that a person at the Board has either assisted the panel in this matter or engaged in the investigation and prosecution

of this matter throughout the course of this proceeding, or if, during the course of this proceeding, any additional persons either assist the panel in this matter or engage in the investigation and prosecution of this matter, then the Board Staff Team will immediately inform THESL and such person will be added to the appropriate list of persons.

4. The Board Staff Team will only provide advice to the Panel on questions of facts, law, policy or some combination thereof on the public record so that all other parties can respond. This restriction applies to substantive procedural matters. However, it does not apply to administrative procedural issues, such as advice on where items are addressed in the Board's Rules of Practice and Procedure or other matters that are similarly not contestable.

5. Point 4 (above) applies to advice on questions of facts, law policy or some combination thereof in communications between the Board Staff Team and the Panel after the hearing has concluded (including in discussing or reviewing a draft decision) so that the Board Staff Team will not provide any such advice unless the hearing is re-opened and all parties have an opportunity to hear staff's submissions and make their own submissions.

I undertake to abide by the protocol described above, to the extent that it applies:

*Original signed by*
Michael Millar

*Original signed by*
Maureen Helt

*Original signed by*
Glenn Zacher

*Original signed by*
Patrick Duffy

**SUPREME COURT OF CANADA**

**CITATION:** May *v.* Ferndale Institution, [2005] 3 S.C.R. 809, 2005 SCC 82

**DATE:** 20051222
**DOCKET:** 30083

**BETWEEN:**

**Terry Lee May**
Appellant
and
**Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada**
Respondents

**AND BETWEEN:**

**David Edward Owen**
Appellant
and
**Warden of Ferndale Institution, Warden of Matsqui Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada**
Respondents

**AND BETWEEN:**

**Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner**
Appellants
and
**Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada**
Respondents
and
**Canadian Association of Elizabeth Fry Societies, John Howard Society of Canada and British Columbia Civil Liberties Association**
Interveners

**CORAM:** McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

| | |
|---|---|
| **REASONS FOR JUDGMENT:** (paras. 1 to 121) | LeBel and Fish JJ. (McLachlin C.J. and Binnie, Deschamps and Abella JJ. concurring) |
| **DISSENTING REASONS:** | Charron J. (Major and Bastarache JJ. concurring) |

(paras. 122 to 140)

May *v.* Ferndale Institution, [2005] 3 S.C.R. 809, 2005 SCC 82

**Terry Lee May** *Appellant*

*v.*

**Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada** *Respondents*

- and -

**David Edward Owen** *Appellant*

*v.*

**Warden of Ferndale Institution, Warden of Matsqui Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada** *Respondents*

- and -

**Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner** *Appellants*

*v.*

**Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada** *Respondents*

- and -

**Canadian Association of Elizabeth Fry Societies,**
**John Howard Society of Canada and**
**British Columbia Civil Liberties Association** *Interveners*

**Indexed as: May *v.* Ferndale Institution**

**Neutral citation: 2005 SCC 82.**

File No.: 30083.

2005: May 17; 2005: December 22.

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

on appeal from the court of appeal for british columbia

*Courts — Jurisdiction — Habeas corpus — Transfer of federal inmates from minimum- to medium-security institution — Whether provincial superior court had jurisdiction to review inmates' transfer on application for habeas corpus with certiorari in aid — If so, whether it should have declined habeas corpus jurisdiction in favour of Federal Court jurisdiction on judicial review.*

*Prisons — Transfer of inmates — Deprivation of residual liberty — Habeas corpus — Transfer of federal inmates from minimum- to medium-security*

*institution — Whether inmates unlawfully deprived of their residual liberty — Whether inmates' habeas corpus applications should be granted.*

*Evidence — New evidence — Motion to submit new evidence filed before Supreme Court of Canada — Whether new evidence should be admitted.*

*Administrative law — Arbitrary decisions — Correctional Service of Canada — Transfer of inmates to higher security institution — Whether transfer decisions initiated by change in policy arbitrary — Whether inmates unlawfully deprived of their liberty.*

*Administrative law — Procedural fairness — Duty to disclose — Correctional Service of Canada — Transfer of inmates to higher security institution — Correctional Service not making full disclosure of information relied upon in its reclassification of inmates — Whether inmates unlawfully deprived of their liberty — Whether Stinchcombe principles applicable to administrative context — Whether Correctional Service complied with its statutory duty to disclose — Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 27(1).*

The appellant inmates are prisoners serving life sentences. Based on a computerized reclassification scale which yielded a medium-security rating, they were each involuntarily transferred from a minimum- to a medium-security institution. There were no allegations of fault or misconduct on the part of these inmates. The transfers were the result of a direction from the Correctional Service of Canada ("CSC") to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender

programming. CSC used a computer application to assist the classification review process. This application, the Security Reclassification Scale ("SRS"), was developed to help caseworkers determine the most appropriate level of security at key points throughout an offender's sentence. It provides a security rating based on data entered with respect to various factors related to the assessment of risk.

The inmates applied to the provincial superior court for *habeas corpus* with *certiorari* in aid directing correction officials to transfer them back to the minimum-security facility. From the outset, they requested the scoring matrix for the SRS, but were told it was not available. The chambers judge found that a provincial superior court had jurisdiction to review a federal inmate's involuntary transfer on an application for *habeas corpus* with *certiorari* in aid, but that the applications should be dismissed because the inmates' transfers had not been arbitrary and had not been made in the absence of jurisdiction. The Court of Appeal dismissed the inmates' appeal, holding that the chambers judge ought to have declined to exercise *habeas corpus* jurisdiction because no reasonable explanation was given for the inmates' failure to pursue judicial review in Federal Court. Before the hearing in this Court, the inmates filed a motion to submit the cover page of a scored copy of an assessment and a current version of the scoring matrix as new evidence.

*Held* (Major, Bastarache and Charron JJ. dissenting): The appeal should be allowed. The applications for *habeas corpus* and the motion to adduce new evidence should be granted. The transfer decisions are declared null and void for want of jurisdiction.

*Per* McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ.: Inmates may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because an alternative remedy exists and seems more convenient to the court. Provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute, such as the *Criminal Code*, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision, such as the scheme created by Parliament for immigration matters. [44-50]

Here, the Court of Appeal erred in barring access to *habeas corpus* as neither of the two recognized exceptions are applicable. First, these cases involve administrative decisions in the prison context, not criminal convictions. Second, Parliament has not enacted a complete, comprehensive and expert procedure for review of a decision affecting inmates' confinements. The language of the *Corrections and Conditional Release Act* ("*CCRA*") and its regulations make it clear that Parliament did not intend to bar federal inmates' access to *habeas corpus*. The scheme of review and appeal which militates against the exercise of *habeas corpus* jurisdiction in the immigration context is substantially different from the grievance procedure provided in the *CCRA*. Moreover, when the *habeas corpus* jurisdiction of provincial superior courts is assessed purposively, the relevant factors favour the concurrent jurisdiction approach. This approach properly recognizes the importance of affording inmates a meaningful and significant access to justice in order to protect their liberty

rights. Timely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of inmates, and to ensure that the rule of law applies within penitentiary walls. [51-72]

*Habeas corpus* should not be granted in these cases on the basis of arbitrariness. A transfer decision initiated by a mere change in policy is not, in and of itself, arbitrary. The new policy applied here strikes a proper balance between the interests of inmates deprived of their residual liberty and the state's interest in the protection of the public. It also required that inmates be transferred to higher security institutions only after individual assessment. In each case, there was a concern that the inmate had failed to complete a violent offender program, thereby ensuring that the inmates' liberty interest was limited only to the extent necessary to protect the public. [83-86]

However, *habeas corpus* should be granted because CSC's failure to disclose the scoring matrix for the computerized security classification rating tool unlawfully deprived the inmates of their residual liberty. While the *Stinchcombe* disclosure standard is inapplicable to an administrative context, in that context procedural fairness generally requires that the decision-maker disclose the information relied upon. The individual must know the case he has to meet. If the decision-maker fails to provide sufficient information, his decision is void for lack of jurisdiction. In order to assure the fairness of decisions concerning inmates, s. 27(1) of the *CCRA* requires that CSC give the inmate, at a reasonable period before the decision is to be taken, "all the information to be considered in the taking of the decision or a summary of that information". Here, CSC's failure to disclose the scoring matrix which was

available at the relevant time, despite several requests by the inmates, was a clear breach of procedural fairness and of its statutory duty of disclosure. This information was not a duplication of information already disclosed. Without the scoring matrix which provides information on the numerical values to be assigned to each factor and to the manner in which a final score is generated by the computerized tool, the inmates were deprived of information essential to understanding the computerized system which generated their scores and were prevented from formulating a meaningful response to the reclassification decisions. The inmates knew what the factors were, but did not know how values were assigned to them or how those values factored into the generation of the final score. Since CSC concealed crucial information and violated in doing so its statutory duty of disclosure, the transfer decisions were made improperly. They are, therefore, null and void for want of jurisdiction. The inmates' motion to adduce the "scoring matrix" as new evidence should be granted because the evidence satisfies all the requirements of the *Palmer* test. [91-120]

*Per* Major, Bastarache and Charron JJ. (dissenting): The provincial superior court properly exercised its *habeas corpus* jurisdiction, and its dismissal of the *habeas corpus* applications must be upheld because the inmates were not unlawfully deprived of their liberty. First, the transfer decisions were not arbitrary. Each decision was based on an individualized assessment of the merits of each case. Second, although the inmates should have been provided with the scoring matrix, which they had specifically requested so that they could check the accuracy of the total SRS score, not every instance of non-disclosure results in a breach of procedural fairness and deprives the decision-maker of jurisdiction. In these cases, the statutory requirement to provide a "summary of the information" in s. 27(1) of the *CCRA* was met. Further, procedural fairness was achieved, because each inmate was provided

with sufficient information to know the case he had to meet. The inmates were advised that the SRS formed part of the basis for the transfer recommendation, and they were provided with a list of the relevant factors considered in computing the score, the personal information relied upon in assessing each factor, and the reclassification score assigned to them. [122-125] [138]

The fresh evidence fails to satisfy the requirements of the *Palmer* test. Although it is clear that instructions on how to compute the SRS existed at the time of the reclassification, the scoring matrix would not have shown that the reclassification was arbitrary or that the total score was inaccurate. Moreover, the SRS score only partially prompted the review of the inmates' classifications; the actual transfer decisions were based on the individual assessments of their respective situations. There was no basis for granting the *habeas corpus* applications with or without this additional information. [133-139]

**Cases Cited**

By LeBel and Fish JJ.

**Applied:** *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; **disapproved:** *Spindler v. Millhaven Institution* (2003), 15 C.R. (6th) 183; *Hickey v. Kent Institution (Director)* (2003), 176 B.C.A.C. 272, 2003 BCCA 23; **distinguished:** *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253, leave to appeal denied, [1989] 2 S.C.R. x; *R. v. Stinchcombe*, [1991]

3 S.C.R. 326; **referred to:** *Jones v. Cunningham*, 371 U.S. 236 (1962); *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Re Trepanier* (1885), 12 S.C.R. 111; *Re Sproule* (1886), 12 S.C.R. 140; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547; *Korponay v. Kulik*, [1980] 2 S.C.R. 265; *R. v. Gamble*, [1988] 2 S.C.R. 595; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Bernard v. Kent Institution*, [2003] B.C.J. No. 62 (QL), 2003 BCCA 24; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Re Hay and National Parole Board* (1985), 21 C.C.C. (3d) 408; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2.

By Charron J. (dissenting)

*R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 9, 10(*c*).

*Constitution Act, 1867*, s. 96.

*Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 4(*d*), (*g*), 27(1), (3), 28, 30(1), (2), 90, 91, 96(*u*), 97, 98.

*Corrections and Conditional Release Regulations*, SOR/92-620, ss. 13, 17, 18, 74 to 82, 74(1), (3), (5), 75, 77(3), 79(3), 80, 81.

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

*Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, r. 4.

*Federal Court Act*, R.S.C. 1985, c. F-7 [formerly R.S.C. 1970, c. 10 (2nd Supp.)], ss. 2, 18, 18.1(2), (4).

*Federal Court Rules, 1998*, SOR/98-106, rr. 301 to 314.

*Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2.

*Immigration Act, 1976*, S.C. 1976-77, c. 52 [later *Immigration Act*, R.S.C. 1985, c. I-2], ss. 63 [ad. 1988, c. 35, s. 18], 64 [*idem*], 71.4 to 78 [*idem*], 83.1 to 85.2 [*idem*, s. 19].

*Magna Carta* (1215).

**Authors Cited**

Canada. Correctional Service. *Commissioner's Directive 081*, "Offender Complaints and Grievances", 2002.

Canada. Correctional Service. *Security Classification of Offenders: Standard Operating Practices*, 700-14, 2001.

Canada. Correctional Service. *Transfer of Offenders: Standard Operating Practices*, 700-15, 1999.

Duker, William F. *A Constitutional History of Habeas Corpus*. Westport, Conn.: Greenwood Press, 1980.

Jackson, Michael. *Justice Behind the Walls: Human Rights in Canadian Prisons*. Vancouver: Douglas & McIntyre, 2002.

Jackson, Michael. *Prisoners of Isolation: Solitary Confinement in Canada.* Toronto: University of Toronto Press, 1983.

Mullan, David J. *Administrative Law.* Toronto: Irwin Law, 2001.

Sharpe, Robert J. *The Law of Habeas Corpus*, 2nd ed. Oxford: Clarendon Press, 1989.

APPEAL from a judgment of the British Columbia Court of Appeal (Ryan, Mackenzie and Saunders JJ.A.) (2003), 188 B.C.A.C. 23, 308 W.A.C. 23, [2003] B.C.J. No. 2294 (QL), 2003 BCCA 536, affirming a decision of Bauman J., [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335. Appeal allowed, Major, Bastarache and Charron JJ. dissenting.

*Ann H. Pollak*, for the appellants Terry Lee May and David Edward Owen.

*Donna M. Turko*, for the appellants Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner.

*Roslyn J. Levine, Q.C.*, and *Donald A. MacIntosh*, for the respondents.

*Elizabeth Thomas* and *Allan Manson*, for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada.

*Michael Jackson, Q.C.*, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LEBEL AND FISH JJ. —

## I. Introduction

1 These cases involve the overlap and potential conflict of jurisdiction between provincial superior courts and the Federal Court. At stake is the right of federal prisoners to challenge the legality of their detention by way of *habeas corpus* in provincial superior courts. The question to be resolved in these cases is whether the Supreme Court of British Columbia should have declined *habeas corpus* jurisdiction in favour of Federal Court jurisdiction on judicial review. If the court properly exercised its jurisdiction, we will also have to assess whether the appellants have been unlawfully deprived of their liberty.

2 In our view, the Supreme Court of British Columbia has properly exercised its *habeas corpus* jurisdiction. This is not one of the limited circumstances pursuant to which a superior court should decline to exercise its jurisdiction: first, these cases do not involve a statute that confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be; and second, Parliament has not put in place a complete, comprehensive and expert procedure for review of an administrative decision.

3 Moreover, we believe that the appellants have been unlawfully deprived of their liberty. The respondents did not comply with their statutory duty to provide all the information or a summary of the information considered in making the transfer decisions. The appeal should therefore be allowed.

II. Facts and Judicial History

4 Each of the appellants are prisoners serving life sentences for murder and/or manslaughter. Terry Lee May was convicted of first-degree murder for killing one adolescent boy so that he could sexually assault another without interference. David Edward Owen was convicted of second-degree murder for beating his ex-wife to death. Maurice Yvon Roy was convicted of second-degree murder for killing his common law wife. Gareth Wayne Robinson was convicted on two counts of manslaughter after he stabbed his girlfriend and then, three years later, struck his wife on the head with a hammer. Segen Uther Speer-Senner was convicted of second-degree murder in circumstances unspecified in the record before us. After varying periods of incarceration, the appellants became residents of Ferndale Institution, a minimum security federal penitentiary located in British Columbia.

5 Between November 2000 and February 2001, all five appellants were involuntarily transferred from Ferndale Institution to medium-security institutions. Mr. May, Mr. Roy, Mr. Robinson and Mr. Speer-Senner were transferred to Mission Institution and Mr. Owen, to Matsqui Institution. It is not in issue that a transfer from a minimum- to a medium-security institution involves a significant deprivation of liberty for inmates. Consequently, the appellants filed grievances and also applied for *habeas corpus* relief with *certiorari* in aid directing the responsible correction officials to transfer them back to Ferndale Institution. Their applications were not joined, but the arguments before the British Columbia Court of Appeal were adopted by all five appellants.

6 The transfers were the result of a direction from the Correctional Service of Canada ("CSC") to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender programming in the aftermath of a sensational crime committed by a former inmate in another province. CSC used computer applications to assist the classification review process. Mr. Roy, Mr. Robinson, Mr. Speer-Senner and Mr. Owen were advised that their transfers were based on a computerized reclassification scale which yielded a medium-security rating. Mr. May was told that his security rating had been adjusted because the security classification tool could not rate him as minimum-security because he had not completed violent offender programming. There were no allegations of fault or misconduct.

7 The appellants attacked the decision-making process leading to their transfers. They submitted that a change in general policy, embodied in a direction to review the security classification of offenders serving a life sentence at Ferndale Institution using certain classification tools, was the sole factor prompting their transfers. They said that the transfers were arbitrary, made without any "fresh" misconduct on their parts, and made without considering the merits of each case. The appellants also claimed that their right to procedural fairness was breached by the failure to disclose the scoring matrix for one of the classification tools, leaving them unable to challenge the usefulness of that tool in the decision-making process.

8 The Supreme Court of British Columbia dismissed the *habeas corpus* application: [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335. Bauman J. first considered whether a provincial superior court had jurisdiction to review a federal prisoner's involuntary transfer on an application for *habeas corpus* (with *certiorari* in

aid) and, in the affirmative, whether it should decline to exercise it. The issue arose because the Federal Court is granted *exclusive* jurisdiction in respect of *certiorari* proceedings involving the decisions of federal tribunals by its constituent statute.

9 Bauman J. found that he had jurisdiction to hear the application. He relied on *R. v. Miller*, [1985] 2 S.C.R. 613, which held that provincial superior courts have retained concurrent jurisdiction with the Federal Court to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (formerly R.S.C. 1970, c. 10 (2nd Supp.)) ("*FCA*").

10 Bauman J. then dealt with the substantive issues, which he agreed to examine under his *habeas corpus* jurisdiction. He found against the appellants. He held that they had not made out their allegations of failure to disclose relevant information, the computer matrix not being available, and that the transfers had not been arbitrary. In his opinion, although the transfers had been prompted by a general instruction issued to CSC, the decisions had been made after an individualized assessment of all relevant factors. He concluded that they had not been made in the absence or in excess of jurisdiction. The applications for *habeas corpus* and *certiorari* in aid were then dismissed.

11 The British Columbia Court of Appeal dismissed the appeal: (2003), 188 B.C.A.C. 23, 2003 BCCA 536. On the jurisdiction issue, the Court of Appeal had asked for and received written submissions from counsel on the issue raised in *Spindler v. Millhaven Institution* (2003), 15 C.R. (6th) 183 (Ont. C.A.).

12 In *Spindler*, prisoners had been placed in a maximum-security prison as a result of a new policy applicable to convicted murderers. They raised arguments which were similar to the submissions of the appellants in the present appeals. The Ontario Court of Appeal had held that, where a remedy is available in the Federal Court on the exercise of a statutory power granted under a federal statute to a federally appointed individual or tribunal, the provincial superior court should decline to hear an application for *habeas corpus* if no reasonable explanation for the failure to pursue judicial review in the Federal Court was offered by the petitioner. In doing so, the Ontario Court of Appeal agreed with the British Columbia Court of Appeal's decision in *Hickey v. Kent Institution (Director)* (2003), 176 B.C.A.C. 272, 2003 BCCA 23.

13 Ryan J.A. felt that those comments were particularly apt in the case at bar. Although the issues raised in these cases were not identical to those raised in *Spindler*, they all involved policies and procedures adopted by the Commissioner of Corrections in determining the security classifications of the appellants. In her view, these cases should have been heard by the "specialized" Federal Court. The appellants had offered no reasonable explanation for failing to pursue judicial review in the Federal Court, so Ryan J.A. was of the opinion that Bauman J. ought to have declined to hear the applications in these cases, though it is implicit from her reasons that he had jurisdiction to do so. Nevertheless, Ryan J.A. decided to examine the substantive issue, but she found no error in Bauman J.'s conclusion that there were no procedural flaws which would entitle the appellants to an order for *habeas corpus*.

14 Since the Supreme Court of British Columbia heard the application, the record indicates that the situation of most of the appellants has changed. On June 30, 2002, Mr. May was transferred from medium- to minimum-security

confinement at Ferndale Institution. On February 6, 2003, Mr. Speer-Senner was also transferred back to Ferndale Institution. On January 30, 2005, Mr. Owen was released on full parole. The record is silent with respect to the updated situation of Mr. Roy, however, at the hearing, Ms. Pollack, one of the counsel for the appellants, informed us that only Mr. Robinson is still incarcerated in a medium-security institution.

## III. Issues and Position of the Parties

15 These cases revolve around two core issues. First, whether the Supreme Court of British Columbia should have declined *habeas corpus* jurisdiction and, second, whether the appellants have been unlawfully deprived of their liberty.

16 The appellants argue that the jurisdiction of provincial superior courts to grant *habeas corpus* is not affected by the fact that the unlawful detention results from a breach of relevant statutory and regulatory rules and of principles of natural justice by a federal authority. The applicant is entitled to choose the forum in which to challenge unlawful restrictions of liberty in the prison context. In addition, the appellants contend that the decisions to transfer them from a minimum-security institution to medium-security institutions were arbitrary and unfair.

17 On the other hand, the respondents submit that the Court of Appeal did not err in holding that the lower court should have declined *habeas corpus* jurisdiction in the instant case. *Habeas corpus* jurisdiction should be assessed purposively, in view of the comprehensive statutory schemes that provide effective comparable remedies. In any event, the respondents contend that the transfer decisions were lawfully made.

## IV. Analysis

### A. *Did the Superior Court of British Columbia Properly Exercise Its Habeas Corpus Jurisdiction?*

18 Should the Supreme Court of British Columbia have declined *habeas corpus* jurisdiction in favour of Federal Court jurisdiction on judicial review? This issue is particularly important in the context of recent jurisprudential and legal developments and to ensure that the rule of law applies inside Canadian prisons. The continuing relevance of *habeas corpus* is also at stake in a changing social and legal environment. In the case of prisons, access to relief in the nature of *habeas corpus* is critical in order to ensure that prisoners' rights are respected. Accordingly, we will review and discuss five subjects: (1) the nature of *habeas corpus*; (2) the *Miller*, *Cardinal* and *Morin* trilogy (*R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662) and the concurrent jurisdiction of the superior courts and of the Federal Court; (3) the rise of a limited discretion of superior courts to decline to exercise their *habeas corpus* jurisdiction; (4) the expansion of the limited discretion to decline *habeas corpus* jurisdiction in the prison context by provincial courts of appeal; and (5) the need for and protection of federal prisoners' access to *habeas corpus*.

#### (1) The Nature of *Habeas Corpus*

19 The writ of *habeas corpus* is also known as the "Great Writ of Liberty". As early as 1215, the *Magna Carta* entrenched the principle that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law

of the land." In the 14th century, the writ of *habeas corpus* was used to compel the production of a prisoner and the cause of his or her detention: W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 25.

20 From the 17th to the 20th century, the writ was codified in various *habeas corpus* acts in order to bring clarity and uniformity to its principles and application. The first codification is found in the *Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2. Essentially, the Act ensured that prisoners entitled to relief "would not be thwarted by procedural inadequacy": R. J. Sharpe, *The Law of Habeas Corpus* (2nd ed. 1989), at p. 19.

21 According to Black J. of the United States Supreme Court, *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty": *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243. In his book, Sharpe, at p. 23, describes the traditional form of review available on *habeas corpus* as follows:

> The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given by the party who is exercising restraint over the applicant. [Emphasis added.]

22 *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the

principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). Accordingly, the *Charter* guarantees the right to *habeas corpus*:

> **10.** Everyone has the right on arrest or detention
>
> . . .
>
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

23 However, the right to seek relief in the nature of *habeas corpus* has not always been given to prisoners challenging internal disciplinary decisions. At common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision-making process of prison officials: M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002), at pp. 47-50. By the end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights: M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 82.

24 It was this view that provided the original rationale for Canadian courts' refusal to review the internal decisions of prison officials. The "effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions": Jackson, *Prisoners of Isolation*, at p. 82.

25 Shortly after certain serious incidents in federal penitentiaries occurred in the 1970s and reviews of their management took place, this Court abandoned the "hands-off" doctrine and extended judicial review to the decision-making process of prison officials by which prisoners were deprived of their residual liberty. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:

> In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls. [Emphasis added; p. 622.]

26 Dickson J. made it clear that "*certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interest, property, privileges, or liberties of any person", including prisoners (pp. 622-23 (emphasis added)). However, he did not specifically examine whether provincial superior courts have jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention imposed by *federal authority*. The question would certainly arise in the present case because s. 18 of the *FCA* confers on the Federal Court exclusive jurisdiction to issue *certiorari* against any "federal board, commission or other tribunal". A few years later, a trilogy of cases dealt with this important issue.

(2) The *Miller*, *Cardinal* and *Morin* Trilogy and the Concurrent Jurisdiction of the Superior Courts and the Federal Court

27 In 1985, in the trilogy of *Miller*, *Cardinal*, and *Morin*, the Court expanded the scope of *habeas corpus* by making the writ available to free inmates from restrictive forms of custody within an institution, without releasing the inmate. *Habeas corpus* could thus free inmates from a "prison within a prison". Each case involved challenges by prisoners of their confinement in administrative segregation and their transfer to a special handling unit. This unit was reserved for particularly dangerous inmates and was characterized by more restrictive confinement.

28 In *Miller*, Le Dain J., writing for the Court, recognized that confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population because it involves a significant reduction in the residual liberty of the inmate. In his view, *habeas corpus* should lie "to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution" (p. 641).

29 The issue remained, however, whether the remedy should be sought in a provincial superior court or the Federal Court. Le Dain J. pointed out that Parliament had made a conscious decision not to include *habeas corpus* in the list of prerogative remedies over which the Federal Court has exclusive jurisdiction. *Habeas corpus* jurisdiction, as an essential safeguard of the liberty interest, could only be affected by express words, which were not present in s. 18(1) of the *FCA* (pp. 624-25). Therefore, *habeas corpus* remained within the long standing inherent jurisdiction conferred to provincial superior court judges appointed under s. 96 of the *Constitution Act, 1867*. To remove that jurisdiction from the provincial superior courts would require clear and

direct statutory language such as that used in s. 18(2) of the *FCA* referring to members of the Canadian Forces stationed overseas.

30 Le Dain J. specifically addressed the issue, which arises in these cases, of whether jurisdiction for judicial review of federal boards by the Federal Court under s. 18 of the *FCA* trumped the provincial superior courts' *habeas corpus* jurisdiction. He concluded, without any ambiguity, "that a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the *Federal Court Act*" (p. 626 (emphasis added)).

31 Throughout his analysis, Le Dain J. carefully examined which forum was the most appropriate to review the legality of federal prisoners' detention, with reference to s. 18 of the *FCA*, the importance of local accessibility of the *habeas corpus* remedy, and the problems arising out of concurrent jurisdiction. Dealing with the issue of concurrent jurisdiction, he stated:

> After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. [Emphasis added; pp. 640-41.]

32 The same reasoning was also applied by this Court in *Cardinal* and *Morin*, the companion cases to *Miller*. In our view, the trilogy supports two distinct

propositions. First and foremost, provincial superior courts have jurisdiction to issue *certiorari* in aid of *habeas corpus* in respect of detention in federal penitentiaries in order to protect residual liberty interests. This principle is crucial in these cases. In the prison context, the applicant is thus entitled to choose the forum in which to challenge an allegedly unlawful restriction of liberty. Under *Miller*, if the applicant chooses *habeas corpus*, his or her claim should be dealt with on its merits, without regard to other potential remedies in the Federal Court. The second proposition, which does not arise in these cases, is that *habeas corpus* will lie to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found unlawful, to order his or her release into the general inmate population of the institution.

(3) The Emergence of a Limited Discretion to Decline Jurisdiction

33 As we have seen, the starting point is that a prisoner is free to choose whether to challenge an unlawful restriction of liberty by way of *habeas corpus* in a provincial superior court or by way of judicial review in the Federal Court. Historically, the writ of *habeas corpus* has never been a discretionary remedy. It is issued as of right, where the applicant successfully challenges the legality of the detention:

> In principle, habeas corpus is not a discretionary remedy: it issues *ex debito justitiae* on proper grounds being shown. It is, however, a writ of right rather than a writ of course, and there is a long-established practice of having a preliminary proceeding to determine whether there is sufficient merit in the application to warrant bringing in the other parties.
>
> This means, simply, that it is not a writ which can be had for the asking upon payment of a court fee, but one which will only be issued where it is made to appear that there are proper grounds. While the court has no discretion to refuse relief, it is still for the court to decide whether

> proper grounds have been made out to support the application. The rule that the writ issues *ex debito justitiae* means simply that the court may only properly refuse relief on the grounds that there is no legal basis for the application and that habeas corpus should never be refused on discretionary grounds such as inconvenience. [Emphasis added.]
>
> (Sharpe, at p. 58)

34 Thus, as a matter of general principle, *habeas corpus* jurisdiction should not be declined merely because of the existence of an alternative remedy. Whether the other remedy is still available or whether the applicant has foregone the right to use it, its existence should not preclude or affect the right to apply for *habeas corpus* to the Superior Court of the province: Sharpe, at p. 59.

35 However, given that alternative remedies to *habeas corpus* are often available and in consideration of the development of various forms of judicial review and of rights of appeal in the law of civil and criminal procedure, questions have arisen as to the proper scope of the traditional writ of *habeas corpus* and about the existence of a discretion of superior courts to decline jurisdiction. Courts have sometimes refused to grant relief in the form of *habeas corpus* because an appeal or another statutory route to a court was thought to be more appropriate. The obvious policy reason behind this exception is the need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty: Sharpe, at pp. 59-60. So far, these situations have primarily arisen in two different contexts.

36 Strictly speaking, in the criminal context, *habeas corpus* cannot be used to challenge the legality of a conviction. The remedy of *habeas corpus* is not a substitute for the exercise by prisoners of their right of appeal: see *Re Trepanier* (1885), 12 S.C.R. 111; *Re Sproule* (1886), 12 S.C.R. 140, at p. 204; *Goldhar v. The*

*Queen*, [1960] S.C.R. 431, at p. 439; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547, at p. 551; *Korponay v. Kulik*, [1980] 2 S.C.R. 265.

37 Our Court reaffirmed this in *R. v. Gamble*, [1988] 2 S.C.R. 595. In *Gamble*, the Court considered *inter alia* whether a superior court judge should have declined to exercise his *habeas corpus* jurisdiction. The appellant had been denied parole eligibility because of a pre-*Charter* law, the continued application of which was alleged to violate the *Charter*.

38 Wilson J., writing for the majority, found that while superior courts do have the discretion not to exercise their *habeas corpus* jurisdiction, this discretion should "be exercised with due regard to the constitutionally mandated need to provide prompt and effective enforcement of *Charter* rights" (p. 634). Considering the argument that *habeas corpus* jurisdiction should not be asserted because a parallel mechanism already exists in the Federal Court, she held that the assertion of *Charter* rights by way of *habeas corpus* does not create a parallel system and that those who argued that jurisdiction should be declined on this basis did "no credit to that existing system by attempting to place procedural roadblocks in the way of someone like the appellant who is seeking to vindicate one of the citizens' most fundamental rights in the traditional and appropriate forum" (p. 635). However, referring to the criminal process, she ultimately confirmed that:

> Under section 24(1) of the *Charter* courts should not allow *habeas corpus* applications to be used to circumvent the appropriate appeal process, but neither should they bind themselves by overly rigid rules about the availability of *habeas corpus* which may have the effect of denying applicants access to courts to obtain *Charter* relief. [Emphasis added; p. 642.]

39 A second limitation to the scope of *habeas corpus* has gradually developed in the field of immigration law. It is now well established that courts have a limited discretion to refuse to entertain applications for prerogative relief in immigration matters: *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.) (leave to appeal denied, [1989] 2 S.C.R. x). In the words of Catzman J.A. in *Peiroo*:

> Parliament has established in the [*Immigration Act*], particularly in the recent amendments which specifically address the disposition of claims of persons in the position of the appellant, a comprehensive scheme to regulate the determination of such claims and to provide for review and appeal in the Federal Court of Canada of decisions and orders made under the Act, the ambit of which review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus* with *certiorari* in aid. In the absence of any showing that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeas corpus* jurisdiction of the Supreme Court of Ontario, it is my view that this court should, in the exercise of its discretion, decline to grant relief upon the application for habeas corpus in the present case, which clearly falls within the purview of that statutory review and appeal process. [Emphasis added; pp. 261-62.]

40 In *Reza v. Canada*, [1994] 2 S.C.R. 394, the trial judge refused to hear a constitutional challenge to the *Immigration Act* brought in provincial superior court. The Court confirmed once again that the trial judge "properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum" (p. 405 (emphasis added)). Thus, it can be seen from these cases that, in matters of immigration law, because Parliament has put in place a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded.

41 From the two recognized exceptions to the availability of *habeas corpus* — criminal appeals and the "*Peiroo* exception", adopted in *Reza* — we turn now to the decision of this Court in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385. *Steele* has on occasion been thought, mistakenly in our view, to have established a rule of general application barring access to *habeas corpus* whenever an alternative remedy is available. In light of the unusual circumstances of that case, we think it important to consider more closely its true significance.

42 The issue here is not whether the result in *Steele* was justified in the circumstances — we believe that it was — but whether *Steele* created a fresh and independent exception to the availability of *habeas corpus*. In our view, it did not. *Steele* was the product of a convergent set of unusual facts and can only be understood in that light. Without any discussion of the principles governing access to *habeas corpus*, the Court in *Steele* granted that remedy while questioning its availability. No judicial barrier to the venerable right to *habeas corpus*, now constitutionalized in Canada, can be made to rest on so fragile a jurisprudential foundation.

43 Nor should this Court's decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, be thought to have decided otherwise: the Court did not in that case elevate the result in *Steele* into a principled rule barring access to *habeas corpus* in matters not caught by the two recognized exceptions set out above. The decisive issue in *Idziak* was whether Parliament had created with respect to extradition a comprehensive statutory scheme similar to the scheme created by Parliament for immigration matters. The Court held that it had not. Accordingly, there was no reason for provincial superior courts to decline to exercise their *habeas corpus* jurisdiction where the impugned detention resulted from proceedings in extradition.

44 To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (i.e. *Pringle* and *Peiroo*).

### (4) The Expansion of the Limited Discretion to Decline *Habeas Corpus* Jurisdiction in the Prison Context by Provincial Courts of Appeal

45 The British Columbia Court of Appeal, in these cases and in *Hickey*, and the Ontario Court of Appeal in *Spindler*, each discussed earlier, have recently restricted access to relief in the form of *habeas corpus* in the provincial superior courts. The respondents rely heavily on this line of decisions to support the position that superior courts should generally decline jurisdiction in favour of statutory judicial review when it is available. If such an approach were to be accepted by our Court, the *habeas corpus* jurisdiction of superior courts might be significantly curtailed. It might evolve into a discretionary residual jurisdiction, available only when everything else

has failed. Such a result would be inconsistent with this Court's jurisprudence. Given their importance in the courts below, we will now review and comment on *Hickey* and *Spindler*.

46 In *Hickey*, an inmate who was serving a life sentence was ordered to be transferred to a special handling unit. The inmate opposed the transfer by way of *habeas corpus* instead of using the internal grievance procedures or applying by way of judicial review to the Federal Court. Ryan J.A., for the British Columbia Court of Appeal, ultimately held that the trial judge had jurisdiction. However, referring to *Steele*, she further stated:

> It is trite that the court has a discretion to refuse to entertain an application for habeas corpus if there exists a viable alternative to the writ. In the context of prison law the fact that there is in place a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement is a factor which militates against hearing a petition for habeas corpus. But there will be exceptions.
>
> . . .
>
> In the case at bar the appellant provided the Supreme Court with no explanation as to why he had not pursued either the grievance procedures or judicial review to the Federal Court. Without any information setting out why these procedures were inadequate to deal with Mr. Hickey's situation, the Chambers judge ought not to have heard the application for habeas corpus. [Emphasis added; paras. 50 and 53.]
>
> (See also the companion case to *Hickey*, *Bernard v. Kent Institution*, [2003] B.C.J. No. 62 (QL), 2003 BCCA 24, at paras. 6-7.)

47 In *Spindler*, the inmates were serving life sentences for murder and were incarcerated in a maximum-security penitentiary. They applied for *habeas corpus* claiming that their detention was illegal and seeking an order directing that they be moved to "a penitentiary of a lower security level". The motions judge stated that he had jurisdiction to consider the *habeas corpus* application but declined to do so

holding that the Federal Court was the more appropriate forum. Doherty J.A. dismissed the appeal. Relying on *Steele* and agreeing with *Hickey*, he said:

> As I read *Steele*, *supra*, except in exceptional circumstances, a provincial superior court should decline to exercise its *habeas corpus* jurisdiction where the application is in essence, a challenge to the exercise of a statutory power granted under a federal statute to a federally appointed individual or tribunal. Those challenges are specifically assigned to the Federal Court under the *Federal Court Act* R.S.C. 1985 c. F-7 s. 18, s. 28. By directing such challenges to the Federal Court, Parliament has recognized that individuals or tribunals exercising statutory powers under federal authority must exercise those powers across the country. It is important that judicial interpretations as to the nature and scope of those powers be as uniform and consistent as possible. By giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time, facilitating the development of an expertise over these matters in the Federal Court. [Emphasis added; para. 19.]

48 Finally, in the case at bar, Ryan J.A., for the British Columbia Court of appeal, relied on *Hickey* and *Spindler* to support her conclusion that the chambers judge ought to have refused to hear the application for *habeas corpus*. She further explained:

> In my view the observations of Doherty, J.A., with regard to the importance of pursuing remedies in the Federal Court are particularly apt in the case at bar. While the issues raised in the cases at bar may not be identical to those raised in *Spindler*, supra, all, like *Spindler*, involve policy and procedure adopted by the Commissioner in determining the security classifications of the appellants. In my view these cases ought to have been heard by that specialized court.
>
> The appellants have offered no reasonable explanation for failing to pursue judicial review in the Federal Court. In my view, the Chambers judge in this case ought to have refused to hear the applications in this case. [Emphasis added; paras. 21-22.]

49 The position adopted by the British Columbia Court of Appeal and the Ontario Court of Appeal can be summarized as follows. First, the court has a discretion to refuse to entertain an application for *habeas corpus* if there exists a viable alternative to the writ. Second, in the context of prison law, the existence of a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement is a factor which militates against hearing a petition for *habeas corpus*. Third, by giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time facilitating the development of an expertise over these matters in the Federal Court. Fourth, except in exceptional circumstances, a provincial superior court should decline to exercise its *habeas corpus* jurisdiction where the application is, in essence, a challenge to the exercise of a statutory power granted under a federal statute to a federally appointed tribunal. And fifth, the applicant has to provide a reasonable explanation as to why he or she has not pursued either the grievance procedures or judicial review to the Federal Court.

50 Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. In our view, the propositions articulated by the Court of Appeal in these cases, as in *Hickey* and *Spindler*, unduly limit the scope and availability of *habeas corpus* review and are incompatible with this Court's jurisprudence. With respect, we are unable to reconcile this narrow view of superior court jurisdiction with the broad approach adopted by the *Miller* trilogy and confirmed in subsequent cases. In principle, the

governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.

### (5) Confirming Federal Prisoners' Access to *Habeas Corpus*

51 The British Columbia Court of Appeal erred in barring access to *habeas corpus* in these cases. Neither of the two recognized exceptions to the general rule that the superior courts should exercise *habeas corpus* jurisdiction are applicable here. The first exception has no application in these cases because they do not involve a criminal conviction, but rather administrative decisions in the prison context. The second exception does not apply since, for the reasons explained below, Parliament has not enacted a complete, comprehensive and expert procedure for review of a decision affecting the confinement of prisoners. Moreover, as will be shown below, a purposive approach to the issues that arise here also clearly favours a concurrency of jurisdiction.

52 The respondents argue that the same reasoning that applies to immigration cases should apply to prison law. In their view, Parliament has created a comprehensive statutory scheme, in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), and its regulations, for the resolution of inmate grievances, including those relating to decisions to transfer, segregate or otherwise restrict liberty.

53 The respondents contend that the scheme dovetails with Parliament's intention that review of such matters generally occurs in the Federal Court. The scheme is specifically tailored to individuals who are incarcerated and provides internal grievances or appeals for decisions that have an impact upon the liberty of inmates. Many of the decisions made by correction officers require the application of policy developed in the specialized circumstances of the federal prison system. According to the respondents, the Federal Court has acquired considerable expertise in reviewing the decisions of grievance boards.

54 We must therefore examine the legal and regulatory framework of inmate classification in the federal penitentiary system in order to determine whether Parliament has put in place a complete statutory code for the administration and review of inmates' grievances. The starting point is the administrative decision by which inmates are classified for security purposes. By virtue of s. 30(1) of the *CCRA*, CSC "shall assign a security classification of maximum, medium or minimum to each inmate". Security classifications are made pursuant to the statutory factors provided for in ss. 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*Regulations*").

55 As a matter of principle, CSC must use the "least restrictive measures consistent with the protection of the public, staff members and offenders": s. 4(*d*) of the *CCRA*. Where a person is to be confined in a penitentiary, CSC must provide the "least restrictive environment for that person" taking into account specific criteria: s. 28 of the *CCRA*. Section 30(2) of the *CCRA* further provides that CSC "shall give each inmate reasons, in writing, for assigning a particular security classification or for

changing that classification". Of course, correctional decisions, including security classifications, must "be made in a forthright and fair manner, with access by the offender to an effective grievance procedure": s. 4(*g*) of the *CCRA*.

56 Inmates who are dissatisfied with transfer decisions can grieve the decisions through the correction system. Sections 90 and 91 of the *CCRA* establish the general framework for the inmate grievance procedure. The *CCRA* requires that inmates have access to a fair and expeditious grievance procedure, to be prescribed by regulation and Commissioner's Directives: ss. 96(*u*), 97 and 98. The nuts and bolts of the procedure are found in ss. 74 to 82 of the *Regulations*. The process allows inmates to pursue any complaint up the successive administrative rungs of CSC so that supervisors are reviewing the actions of their subordinates. Pursuant to s. 74(1) of the *Regulations*, when an inmate is unhappy with an action or a decision of a staff member, the inmate may submit a complaint to the staff member's supervisor. Written complaints by offenders are to be resolved informally if at all possible. If complaints are not resolved to the satisfaction of the inmate, he or she has access to the grievance procedure.

57 The grievance procedure has essentially three levels. At the first level, if the inmate is dissatisfied with the resolution of a complaint by the staff member's supervisor, the inmate can grieve to the Warden of the institution: s. 75(*a*) of the *Regulations*. At the second level, if the inmate is dissatisfied with the Warden's decision, or if the Warden is the origin of the complaint, the inmate may bring a grievance to the Regional Head: ss. 75(*b*) and 80(1) of the *Regulations*. At the third level, if the inmate is dissatisfied with the Regional Head's response, the inmate may grieve directly to the Commissioner of Corrections: s. 80(2) of the *Regulations*. The

Commissioner has delegated his or her authority as the final decision-maker with respect to grievances to the Assistant Commissioner: ss. 18 and 19 of the *Commissioner's Directive 081*, "Offender Complaints and Grievances", March 4, 2002 ("*CD 081*"). Ultimately, by virtue of ss. 2 and 18 of the *FCA*, the inmate may challenge the fairness and *Charter* compliance of the decision at the third level by way of judicial review before the Federal Court.

58 As mentioned earlier, the law requires that inmates have access to an effective, fair and expeditious grievance procedure. As a result, the inmate is entitled to written reasons at all levels of the grievance procedure: ss. 74(3), 74(5), 77(3), 79(3) and 80(3) of the *Regulations*. Naturally, the inmate is required to participate in the resolution process and *CD 081* requires that confidentiality of complaints and grievances be preserved "to the greatest possible extent" (ss. 6(c) and 6(e)). The *Regulations* also prescribe that decisions on complaints and grievances must be issued "as soon as practicable": ss. 74(3), 74(5), 77(3), 79(3) and 80(3); see also ss. 6(d), 7 and 8 of *CD 081* for a more precise timetable. Finally, the institution must show that corrective action is taken when a grievance is upheld: s. 10 of *CD 081*.

59 The question before us is whether the grievance procedure is a complete, comprehensive and expert procedure for review of an inmate's security classification. In *Pringle*, Laskin J. (as he then was), writing for the Court, held:

> I am satisfied that in the context of the overall scheme for the administration of immigration policy the words in s. 22 ("sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction") are adequate not only to endow the Board with the stated authority but to exclude any other court or tribunal from entertaining any type of proceedings, be they by way of *certiorari* or otherwise, in relation to the matters so confided exclusively to the Board. [Emphasis added; p. 826.]

60 The decisive issue for Laskin J. therefore was the intention of the legislature to grant exclusive jurisdiction to the Board. However, there is no such language in the *CCRA* or in the *Regulations*. In fact, it is clear that it was not the intention of the Governor-in-Council, the regulator, to grant paramountcy to the grievance procedure over the superior courts' *habeas corpus* jurisdiction. Section 81(1) of the *Regulations* provides:

> 81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

61 Section 81(1) makes it clear that the regulator contemplated the possibility that an inmate may choose to pursue a legal remedy, such as an application for *habeas corpus*, in addition to filing an administrative grievance under the *Regulations*. The legal remedy supersedes the grievance procedure. The regulator did not intend to bar federal prisoners' access to *habeas corpus*. But there is more.

62 In our view, the grievance procedure can and should be distinguished from the immigration context for several other reasons. The scheme of review which militated against the exercise of *habeas corpus* jurisdiction in *Pringle* and *Peiroo* is substantially different than the grievance procedure provided in the *CCRA*. The *Immigration Act* in force at the time of *Peiroo* provided for an appeal from decisions of immigration authorities to an independent administrative tribunal, the Immigration Appeal Division, vested with all the powers of a superior court of record including jurisdiction to issue summons, administer oaths and enforce its orders: S.C. 1976-77, c. 52 (am. S.C. 1988, c. 35), s. 71.4(2). It was a process wherein the impartiality of

the adjudicator was statutorily assured, the grounds for review were articulated, and the process for review was clearly laid out: ss. 63, 64 and 71.4 to 78. A detailed procedure was also provided for the manner in which applications and appeals were to be brought before the Federal Court: ss. 83.1 to 85.2.

63 In contrast, the internal grievance process set out in the *CCRA* prescribes the review of decisions made by *prison authorities by other prison authorities*. Thus, in a case where the legality of a Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue. It is also noteworthy that there are no remedies set out in the *CCRA* and its regulations and no articulated grounds upon which grievances may be reviewed. Lastly, the decisions with respect to grievances are not legally enforceable. In *Peiroo*, the Ontario Court of Appeal emphasized that Parliament had put in place a complete, comprehensive and expert statutory scheme that provided for a review at least as broad as *habeas corpus* and no less advantageous. That is clearly not the case in this appeal.

64 Therefore, in view of the structural weaknesses of the grievance procedure, there is no justification for importing the line of reasoning adopted in the immigration law context. In the prison context, Parliament has not yet enacted a comprehensive scheme of review and appeal similar to the immigration scheme. The same conclusion was previously reached in *Idziak* with regard to extradition (pp. 652-53).

65 As we have seen, these cases do not fall within the recognized exceptions where a provincial superior court should decline to exercise its *habeas corpus* jurisdiction. The respondents submit that this Court should assess the *habeas corpus*

jurisdiction of the superior courts purposively by acknowledging that the statutory scheme provides for effective and comparable remedies. A purposive approach, however, also requires that we look at the entire context. In our view, the following five factors militate in favour of concurrent jurisdiction and provide additional support for the position that a provincial superior court should hear *habeas corpus* applications from federal prisoners: (1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.

66 First, in the prison context, the applicant may choose either to seek relief in the provincial superior courts or in the Federal Court. In *Idziak*, this Court noted that the applicants in the *Miller, Cardinal* and *Morin* trilogy each had a choice of whether to seek a remedy in the provincial superior courts or in Federal Court. The applicants' decision to resort to the provincial superior courts for their remedy was accepted (pp. 651-52).

67 Furthermore and as noted previously, this Court recognized in *Miller* that the availability of *habeas corpus* "must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction" (p. 641).

68 Second, the greater expertise of the Federal Court in correctional matters is not conclusively established. The Federal Court has considerable familiarity in

federal administrative law and procedure and deservedly enjoys a strong reputation in these parts of the law as in other federal matters. On the other hand, prison law revolves around the application of *Charter* principles in respect of which provincial superior courts are equally well versed. Moreover, prison law and life in the penal institution remain closely connected with the administration of criminal justice, in which the superior courts play a critical role on a daily basis. In this context, we find no strong grounds for the adoption of a policy of deference in favour of judicial review in the Federal Court.

69 Third, a hearing on a *habeas corpus* application in the Supreme Court of British Columbia can be obtained more rapidly than a hearing on a judicial review application in the Federal Court. Rule 4 of the *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, provides for a hearing of a *habeas corpus* application on six days notice. In contrast, the request for hearing a judicial review application in the Federal Court is filed at day 160 following the impugned decision, if all time limits have run completely: s. 18.1(2) of the *FCA* and Rules 301 to 314 of the *Federal Court Rules, 1998*, SOR/98-106. This is a matter of great significance for prisoners unlawfully deprived of their liberty. It is also relevant if counsel is acting *pro bono* or on limited legal aid funding or if the prisoner is representing himself. The importance of the interests at stake militates in favour of a quick resolution of the issues.

70 Fourth, relief in the form of *habeas corpus* is locally accessible to prisoners in provincial superior courts. Access to justice is closely linked to timeliness of relief. Moreover, it would be unfair if federal prisoners did not have the same access to *habeas corpus* as do provincial prisoners. Section 10(*c*) of the *Charter* does not

support such a distinction. In *Gamble*, Wilson J. recognized the importance of access by federal prisoners to the superior courts of the province where they are incarcerated:

> This Court has previously recognized "the importance of the local accessibility of this remedy" of *habeas corpus* because of the traditional role of the court as "a safeguard of the liberty of the subject": *R. v. Miller*, [1985] 2 S.C.R. 613, at pp. 624-25. Relief in the form of *habeas corpus* should not be withheld for reasons of mere convenience. [Emphasis added; p. 635.]

71 Finally, a writ of *habeas corpus* is issued as of right where the applicant shows that there is cause to doubt the legality of his detention: Sharpe, at p. 58. In contrast, on judicial review, the Federal Court can deny relief on discretionary grounds: D. J. Mullan, *Administrative Law* (2001), at p. 481. Also, on *habeas corpus*, so long as the prisoner has raised a legitimate ground upon which to question the legality of the deprivation of liberty, the onus is on the respondent to justify the lawfulness of the detention: Sharpe, at pp. 86-88. However, on judicial review, the onus is on the applicant to demonstrate that the "federal board, commission or other tribunal" has made an error: s. 18.1(4) of the *FCA*.

72 Our review of the relevant factors favours the concurrent jurisdiction approach. This approach properly recognizes the importance of affording prisoners a meaningful and significant access to justice in order to protect their liberty rights, a *Charter* value. Timely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners, and to ensure that the rule of law applies within penitentiary walls.

B. *Have the Appellants Been Unlawfully Deprived of Their Liberty?*

73 Having concluded that the British Columbia Court of Appeal erred in finding that the chambers judge should have declined to exercise his *habeas corpus* jurisdiction, we must now consider whether the chambers judge erred in denying the appellants' *habeas corpus* application on its merit.

74 A successful application for *habeas corpus* requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.

75 With respect to the first element of *habeas corpus*, the appellants claim that transfer to a more restrictive institutional setting deprives them of their residual liberty. With respect to the second element of *habeas corpus*, the appellants contend that the deprivation of their residual liberty was unlawful because it was arbitrary and violated CSC's statutory duty to disclose entrenched in s. 27(1) of the *CCRA*.

(1) Deprivation of Liberty

76 The decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her residual liberty: *Miller*, at p. 637; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464. As a result, there is no question that the appellants have discharged their burden of making out a deprivation of liberty. We must therefore go on to consider whether that deprivation was lawful.

(2) Lawfulness of the Deprivation of Liberty

77 A deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, administrative decisions must be made in accordance with the *Charter*. Administrative decisions that violate the *Charter* are null and void for lack of jurisdiction: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the *Charter* provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.

78 The appellants raise two arguments with respect to the lawfulness of the deprivation in these cases. First, they argue that the transfer decisions were arbitrary because they were solely based on a change in policy, in the absence of any "fresh" misconduct on their part. Second, they submit that the respondents did not comply with their duty of disclosure by withholding a relevant scoring matrix. We will consider each argument in turn.

(a) *Whether Deprivation of Liberty Due to a Change in Policy Was Lawful*

79 The appellants claim that their security classification was changed as a result of a new policy from CSC requiring that prisoners serving life sentences must complete a violent offender program in order to be classified as a minimum-security risk. A transfer decision made solely pursuant to a change in policy, they say, is arbitrary and, as a consequence, offends the principles of fundamental justice.

80 The appellants rely on *Re Hay and National Parole Board* (1985), 21 C.C.C. (3d) 408 (F.C.T.D.). In that case, Muldoon J. held that a transfer decision made in the absence of any fault or misconduct on the part of the inmate is arbitrary and unfair, whether or not it was made in good faith (p. 415).

81 The respondents, however, stress that while the change in policy may have prompted the review of the appellants' security classifications, an individualized assessment was conducted of each inmate. The decisions were not arbitrary, they argue, since they were clearly effected in consideration of each inmate's personal circumstances and characteristics.

82 We agree with the respondents. In *Cunningham v. Canada*, [1993] 2 S.C.R. 143, this Court held that correctional authorities may change how a sentence is served, including transferring an inmate to a higher security institution, without necessarily violating the principles of fundamental justice. McLachlin J. (as she then was) noted that "[a] change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice" (p. 152). In order to support her position, she relied mainly on the need for punctual reforms in correctional law:

> [O]ur system of justice has always permitted correctional authorities to make appropriate changes in how a sentence is served, whether the changes relate to place, conditions, training facilities, or treatment. Many changes in the conditions under which sentences are served occur on an administrative basis in response to the prisoner's immediate needs or behaviour. Other changes are more general. From time to time, for example, new approaches in correctional law are introduced by legislation or regulation. These initiatives change the manner in which some of the prisoners in the system serve their sentences. [pp. 152-53]

83 Consequently, CSC had the authority to transfer the appellants because of a change in policy as long as the transfer decisions were not arbitrary. A transfer decision initiated by a mere change in policy is not, in and of itself, arbitrary. The acceptance of the appellants' argument would undermine CSC's ability to properly administer the *CCRA*. A fair balance must be reached between the interest of inmates deprived of their residual liberty and the interest of the state in the protection of the public (pp. 151-52).

84 In our view, the new policy strikes the proper balance between these two interests. Its purpose is to protect society. Public safety is an important factor CSC must consider in the course of inmate placement and transfer decisions: s. 28 of the *CCRA*. It is also worthy of note that the policy requires that inmates be transferred to higher security institutions only after an individual assessment of their file has been conducted.

85 In these cases, the reviewing officers determined that each of the appellants posed a risk to public safety and, as a result, should not be incarcerated in a minimum-security institution. In every case, there was a concern that the inmate had failed to complete a violent offender program and this led to the conclusion that the risk presented by the inmate could not be managed at Ferndale Institution. Thus, the prisoner's liberty interest was limited pursuant to the policy only to the extent that it was shown to be necessary for the protection of the public.

86 For the foregoing reasons, *habeas corpus* should not be granted on the basis of arbitrariness. There is no evidence of any blanket application of the policy that would render the process arbitrary.

(b) *Whether Deprivation of Liberty Absent Disclosure of the Scoring Matrix Was Lawful*

87 The appellants submit that CSC did not make full disclosure of the information relied upon in their reclassification. A computerized tool was used in the reclassification process. CSC did not disclose the so-called "scoring matrix" for this computerized tool. This failure to disclose, they suggest, ran afoul of the disclosure requirements imposed by the *Charter* and the *CCRA* itself. As a result, they say, the decision was unlawful.

88 The appellants' claim raises the issue of procedural fairness. We will begin by examining whether the disclosure requirements imposed by the *Charter* in the criminal context, as recognized in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, apply in the instant case. We will then consider whether the duty of procedural fairness recognized at common law, which is acknowledged and fleshed out in the disclosure requirements of the *CCRA*, mandates the disclosure of the scoring matrix.

(i) Whether the *Stinchcombe* Rules of Disclosure Apply

89 The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decisions involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with involuntary transfers is administrative law and not criminal law. The *Stinchcombe* disclosure standard is fair and justified when innocence is at stake but not in situations like this one.

90 We share the respondents' view. The requirements of procedural fairness must be assessed contextually in every circumstance: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 39; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 82.

91 It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.

92 In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in *Ruby*, at para. 40:

> As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position . . . .

93 Therefore, the fact that *Stinchcombe* does not apply does not mean that the respondents have met their disclosure obligations. As we have seen, in the

administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents.

(ii) The Applicable Statutory Duty of Disclosure

94 A duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges or interests of an individual: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal*; *Baker*, at para. 20. These privileges are reflected in and bolstered by the disclosure requirements imposed by the *CCRA*.

95 In order to assure the fairness of decisions concerning prison inmates, s. 27(1) of the *CCRA* imposes an onerous disclosure obligation on CSC. It requires that CSC give the offender, at a reasonable period before the decision is to be taken, "all the information to be considered in the taking of the decision or a summary of that information".

96 The extensive scope of disclosure which is required under s. 27(1) is confirmed by the fact that Parliament has specifically identified the circumstances in which CSC can refuse to disclose information:

> **27.** . . .
>
> (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
>
> (*a*) the safety of any person,
>
> (*b*) the security of a penitentiary, or

(*c*) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*), (*b*) or (*c*).

97 The *Regulations* adopted pursuant to the *CCRA* shed additional light on the duties imposed upon prison authorities. Section 13 of the *Regulations*, which applies to involuntary transfers on an emergency basis, provides a right of information to inmates after their transfer to a new facility. The Institutional Head of the penitentiary to which an inmate is being transferred must meet with the inmate within two days in order to explain the reasons for the transfer. An opportunity to make representations must also be given to the inmate. Finally, written notice of the final transfer decision must be provided.

98 Other specific provisions in the Standard Operating Practices ("SOP") directives further clarify the duty to disclose. The Security Classification of Offenders directive, SOP 700-14, sets out the security classification procedures for inmates. In all cases where a security classification is assigned or revised, a notice must be provided to the offender. The notice must contain reasons as well as the information considered in making the decision (para. 26).

99 The Transfer of Offenders directive, SOP 700-15, sets out the criteria for the transfer of prisoners and indicates the extent to which disclosure should be made. An Assessment for Decision must be completed at the earliest possible time within two days following an offender's emergency transfer. The offender shall be provided with written notification of a recommendation for a transfer. The directive is very specific in this regard:

> The Notice of Involuntary Transfer Recommendation . . . must contain enough information to allow the offender to know the case against him or her. The offender must be in a position to be able to respond to the recommendation for an involuntary transfer. To meet this standard, the details of the incident(s) which prompted the transfer recommendation must be provided to the greatest extent possible. This may include providing the offender with the following information regarding the incident(s): where it occurred, when it occurred, against whom it occurred, the extent of injury or damage which resulted, the evidence or proof of its occurrence, and any further relevant information which may elaborate on the incident(s). In cases where sensitive information exists which cannot fully be shared, the offender shall be provided with a gist.

100 Having determined that the applicable statutory duty of disclosure in respect of the transfer decisions is substantial and extensive, we must now go on to consider whether it was respected in these cases. If it was not, the transfer decisions will have been unlawful.

(iii) Whether the Applicable Duties of Disclosure Were Respected

101 The appellants submit that the respondents' refusal to disclose the scoring matrix for a computerized security classification rating tool is a breach of s. 27(1) of the *CCRA*. We agree. Considering the legislative scheme, the nature of the undisclosed information and the importance of the decision for the appellants, there was a clear breach of the statutory duty to disclose "all the information to be considered in the taking of the decision or a summary of that information".

102 The Security Reclassification Scale ("SRS") is a computer application that provides a security rating based on data entered with respect to various factors related to the assessment of risk: (1) the seriousness of the offence committed by the offender; (2) the existence of outstanding charges against the offender; (3) the offender's

performance and behaviour while under sentence; (4) the offender's social, criminal and, if applicable, young-offender history; (5) any physical or mental illness or disorder suffered; (6) the offender's potential for violent behaviour; and (7) the offender's continued involvement in criminal activities. The SRS scale has been developed to assist caseworkers to determine the most appropriate level of security at key points throughout the offender's sentence: SOP 700-14, at paras. 18-19.

103 The SRS is completed by assigning scores to several factors assessing the offender's security risk and custody performance. The SRS provides numerical "cut-off levels" which determine a security rating. If the officer completing the review does not agree with the results provided by the SRS, he or she may override the results and give a different security classification. The override provisions are incorporated in the SRS as a means to address factors that may compel the transfer of an offender to a security level that is different from the one obtained through the computer application: SOP 700-14, at para. 20.

104 The appellants acted diligently in requesting more information on the SRS including its scoring matrix. The matrix contains the information that would allow them to understand how the numerical results were arrived at. This tool is necessary in order to determine if there had been an error in assigning scores to the various factors and to evaluate the accuracy of the final computerized score that was generated.

105 In the courts below, the respondents claimed that the scoring matrix was not available. The chambers judge accepted this claim. In addition, the respondents insisted that SRS was simply a preliminary assessment tool, the results of which were not entirely determinative of the security rating since reviewing officers may override

the results. The transfer decisions provided the appellants with the questions and answers used in the SRS along with the computerized score and classification. After the SRS assessment was completed, CSC would undergo a case-by-case review to ensure that the reclassification was justified. The transfer decisions, they say, could stand on their own apart from the SRS. Hence, the appellants were given all the available information used in making the transfer decisions.

106 Before the hearing, the appellants filed a motion to submit new evidence. The evidence sought to be admitted consists of two documents. The first is the cover page of a scored copy of an SRS assessment. The second is the *Security Reclassification Scale: Functional Specification*, Version 4.0.3 ("SRSFS"), produced by CSC and updated as of June 2001. It explains the grading of each factor and how the factors should be applied in computing the SRS score. Strictly speaking, the SRSFS is the "scoring matrix" requested by the appellants.

107 When deciding whether the new evidence should be admitted in an appeal, discretion must be exercised on the basis of the criteria of due diligence, relevance, credibility and decisiveness: *Palmer v. The Queen*, [1980] 1 S.C.R. 759. This test applies in non-criminal matters such as the instant case: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 44; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2.

108 After consideration of the parties' submissions, we believe that the motion to adduce new evidence should be granted. In our view, the evidence satisfies all the requirements of the *Palmer* test. The fact that the appellants have repeatedly requested the information and that it was discovered only after the Court of Appeal rendered its

decision shows that they acted with due diligence. In addition, the new evidence goes to the heart of a fundamental issue in these cases: procedural fairness. The respondents do not contest the credibility of the information. In addition, they were less than forthcoming in the courts below and even in our Court in their explanations and information about the existence and function of the scoring matrix. Finally, the information would likely have affected the result of the chambers judge's decision because it clearly demonstrates that the scoring matrix was available.

109 The transfer decisions were made between November 2000 and February 2001. However, the cover sheet of the scoring matrix ("SRSFS") filed by the appellants as new evidence indicates that it is version 4.0.3 updated "As of June, 2001" including "Version 4 enhancements". Therefore, while the transfer decisions predate version 4.0.3 of the SRSFS, this evidence also suggests that earlier versions of the document as well as the requested information existed at the time of the transfer decisions. Its content is not in issue. Our only concern is whether the scoring matrix was available at the relevant time.

110 In our view, the information provided by the respondents to the courts below as to the nature and role of the matrix was misleading. At the hearing before this Court, counsel for the respondents indicated that, at the time of the reclassifications, the scoring matrix was not available because *it was the practice not to produce it.* Counsel explained that it was thought to be a duplication of information already disclosed.

111 The new evidence clearly provides information on the numerical values to be assigned to each factor and to the manner in which a final score is generated by the

computerized tool. Given that the appellants had repeatedly requested this information — and not solely the factors used to establish their security classification — it is disingenuous to suggest that the information was believed to be duplicative. This behaviour is highly objectionable. The chambers judge was falsely led to believe that the scoring matrix was not available when, in fact, it was.

112 The new evidence confirmed that the scoring matrix existed. The duty to disclose information used in making transfer decisions is substantial. Therefore, if the scores generated by the computerized tool played a role in the transfer decisions, its scoring matrix should have been disclosed. In fact, it does appear that the scores generated by the computerized tool played an important role. As a result, the transfer decisions were unlawful.

113 An analysis of SOP directives reveals that inmates were presumptively reclassified through the use of the SRS. SOP 700-14 states that security reclassification shall be determined primarily by using the SRS (paras. 1-18). The SRS classification is only subject to variation in limited situations. Discretion is provided when the score is within 5 percent of the sanctioned cut-off values: SRSFS, at pp. 9-10. In other cases, no discretion is allowed. The SRS classification may not be modified unless an override security classification is relied upon.

114 The procedure applicable to the override classification confirms the presumptive nature of the SRS rather than invalidating it. SOP 700-14 makes it clear that the override is not normally relied upon and requires a detailed justification for bypassing the SRS score:

> Normally there will be no overrides above or below the rating produced by the Custody Rating Scale or the Security Reclassification Scale. Where the caseworker believes that it is necessary to override or underride the results of the Custody Rating Scale or the Security Reclassification Scale, he/she shall include a detailed justification in the *Assessment for Decision* in conformity with section 18 of the *Corrections and Conditional Release Regulations*, by setting out the analysis under the three headings of institutional adjustment, escape risk and risk to public safety. [para. 23]

115 The override must also be approved by a supervisor or, in some cases, by the Assistant Commissioner, Correctional Operations and Programs (para. 25). It is noteworthy that the override function was not used in the instant cases. This suggests that the computer application ultimately fixed the security classification of each appellant.

116 Based on the evidence, we cannot accept the respondents' argument that the SRS was only a preliminary assessment tool. Although it is true that an individual assessment of each inmate's security classification is made subsequently to the SRS assessment, in our view, the SRS presumptively classifies inmates and constitutes an important aspect of the classification process.

117 Considering the nature of the scoring matrix and its role in the SRS, its non-disclosure constituted a major breach of the duty to disclose inherent in the requirement of procedural fairness. The appellants were deprived of information essential to understanding the computerized system which generated their scores. The appellants were not given the formula used to weigh the factors or the documents used for scoring questions and answers. The appellants knew what the factors were, but did not know how values were assigned to them or how those values factored into the generation of the final score.

118 How can there be a meaningful response to a reclassification decision without information explaining how the security rating is determined? As a matter of logic and common sense, the scoring tabulation and methodology associated with the SRS classification score should have been made available. The importance of making that information available stems from the fact that inmates may want to rebut the evidence relied upon for the calculation of the SRS score and security classification. This information may be critical in circumstances where a security classification depends on the weight attributed to one specific factor.

119 Hence, given the importance of the information contained in the scoring matrix, the presumptive validity of the score and its potential effect on the determination of security classification, it should have been disclosed. The respondents had a duty to do so under s. 27(1) of the *CCRA*.

120 In conclusion, the respondents failed to disclose all the relevant information or a summary of the information used in making the transfer decisions despite several requests by the appellants. The respondents concealed crucial information. In doing so, they violated their statutory duty. The transfer decisions were made improperly and, therefore, they are null and void for want of jurisdiction. It follows that the appellants were unlawfully deprived of their liberty.

## V. Conclusion

121 For the foregoing reasons, the appeal should be allowed. The applications for *habeas corpus* and the motion to adduce new evidence are granted. The transfer decisions are declared null and void for want of jurisdiction. The appellant still

incarcerated in a medium-security institution pursuant to the impugned decision is thus to be returned to minimum-security institutions.

The reasons of Major, Bastarache and Charron JJ. were delivered by

CHARRON J. (dissenting) —

I. Introduction

122 I have considered the reasons of LeBel and Fish JJ. and agree that the Supreme Court of British Columbia has properly exercised its *habeas corpus* jurisdiction in this matter. I also agree with their analysis on the limited circumstances in which a superior court should decline to exercise its jurisdiction in *habeas corpus* matters. However, I do not agree with their conclusion that the appellants have been unlawfully deprived of their liberty and therefore I would not interfere with the chambers judge's dismissal of their applications for *habeas corpus*.

123 The appellants raise two grounds in support of their contention that the deprivation of their residual liberty was unlawful. First, they argue that the transfer decisions were arbitrary. Second, they contend that the respondents breached their duty of procedural fairness by failing to disclose the "scoring matrix" that explained how the Security Reclassification Scale ("SRS") score used in each of their cases was computed.

124 For the reasons of LeBel and Fish JJ., I agree that the first ground fails. It is clear on the evidence that the transfer decisions were not the result of an arbitrary

"blanket" application of a change in policy. Rather, each decision was based on an individualized assessment of the merits of each case.

125 On the procedural fairness issue, my colleagues aptly reject the appellants' contention that *Stinchcombe* disclosure requirements apply (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326). They describe the applicable statutory duty of disclosure in this administrative context. I agree with this analysis. I also agree in the circumstances of these cases that the "scoring matrix", utilized to compute the SRS score, should have been disclosed to the appellants. However, I respectfully disagree with my colleagues' conclusion that the failure to provide this information constituted a breach of statutory duty rendering the transfer decisions null and void for want of jurisdiction. It is not every instance of non-disclosure that deprives the decision-maker of its jurisdiction. As I will explain, in these cases, each appellant was provided with sufficient information to know the case he had to meet. Hence, procedural fairness was achieved. On the motion to introduce the scoring matrix as fresh evidence, I conclude that the evidence would have had no impact on the dismissal of the *habeas corpus* applications. Hence, I would dismiss the motion and the appeal.

## II. Disclosure Requirements

126 As described by LeBel and Fish JJ., the applicable duty of disclosure is that set out in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*Regulations*"), and the Standard Operating Practices directives ("SOPs"). Pursuant to s. 27(1) of the *CCRA*, Correctional Service of Canada has the duty to provide the prisoner with "all the information to be considered in the taking of the decision or a

summary of that information". My colleagues describe the relevant regulations and SOPs in detail and there is no need to repeat their review here. None of the provisions deals specifically with the scoring matrix in issue and the adequacy of disclosure falls to be determined according to general principles of procedural fairness. The decision-maker is required to disclose the information he or she relied upon so as to enable the inmate to know the case he or she has to meet. The failure to provide sufficient information to meet that purpose will result in a breach of the rules of procedural fairness. As I will explain, it is my view that the appellants were provided with sufficient information to know the case they each had to meet.

III. The Contents of the Disclosure

127 Each appellant received a Notice of Involuntary Transfer Recommendation advising him that his case was going to be studied for involuntary transfer to a medium-security institution and informing him of the basis for the recommendation. In Mr. May's case, the notice identified the need for completion of a particular treatment program. In the case of each other appellant, the notice stated that the recommendation was based on the results of two classification tools:

(1) the Security Reclassification Scale, which yielded a medium-security rating; and

(2) the Offender Security Classification, which was also consistent with a medium-security offender.

128 Each appellant also received an Assessment for Decision which described in considerable detail the basis for the recommendation. In respect of the SRS, the Assessment for Decision in each case (including Mr. May's) disclosed the information particular to the inmate relied upon to evaluate each of the factors set out on the SRS (the factors are mandated by s. 17 of the *Regulations*) and gave the total score and resulting classification. The Assessment for Decision next provided detailed information, specific to each individual, identifying the particular areas of concern — such as Institutional Adjustment, Escape Risk and Public Safety — that led to the medium Offender Security Classification. There is no suggestion that any of the latter category of information was insufficient. The appellants' complaints relate solely to the disclosure provided in respect of the SRS score.

129 As the disclosure in respect of the SRS lies at the heart of this appeal, I reproduce here, by way of example, the information provided to Mr. Roy with respect to the computation of the SRS score:

> FPS Number: 572727A
> Name: ROY, MAURICE YVON
> Date of SR calculation: 2000-11-15
> Completed By: FORTIER, DANIELLE
> Completing Office: FERNDALE INSTITUTION
> OMS Decision Number: 22
>
> Question # 1 Serious Disciplinary Offences
> Answer: None
>
> Question # 2 Minor Disciplinary Offences
> Answer: None
>
> Question # 3 Recorded Incidents
> Answer: No Record
>
> Question # 4 Pay Grade
> Answer: Level A

Question # 5 Segregation Period
Answer: None

Question # 6 Detention Referral
Answer: Life or Indeterminate Sentence

Question # 7 Correctional Plan Progress
Answer: Has partially addressed factors

Question # 8 Correctional Plan Motivation
Answer: Partially motivated, active in programs to address contributing & other factors in the C.P.

Question # 9 Drug and Alcohol Rating
Answer: Identified as a contributing factor, but has no evidence of substance abuse during the review period.

Question # 10 Successful ETA Releases
Answer: Three or more ETAs

Question # 11 Successful UTA/Work Releases
Answer: None

Question # 12 Age at Review
Answer: 36 or Older

Question # 13 Psychological Concerns
Answer: Psychological Concerns Noted

Question # 14 CRS Escape History
Answer: Score of 0

Question # 15 CRS Incident History
Answer: Score of 0

Computed SR Score: 17.5
Computed Security Classification: MEDIUM

130 Mr. Roy, as did each other appellant, took the position that this disclosure was insufficient. The appellants submit that, without additional information explaining the numerical rating system — what appears the appellants are referring to as the "scoring matrix" —, they were unable to challenge the case against them in two respects. First, they were not in a position to check the accuracy of the total score.

Second, without knowing the distribution of points per factor, they were unable to evaluate the fairness or arbitrariness of the new classification process.

131 The appellants requested the scoring matrix from the prison authorities and were advised that it was "not available". Again by way of example, Diane Knopf, Deputy-Warden at Ferndale Institution, in a letter to Mr. May's counsel dated December 21, 2000, stated as follows:

> I have made inquiries at both CSC Regional Headquarters in Abbotsford, B.C. and through Ms. Anne Kelly at CSC National Headquarters in Ottawa. I have been advised that the CJIL is a computerized tool and that a scoring matrix is not available.

In a further letter dated February 9, 2001, she explained the respondents' position as follows:

> Your second questions (*sic*) in regards to how the SR scores are calculated. It should be noted that the Security Rating Scale is an evolving instrument and its application is only a tool. This tool was never intended to be a substitute for the professional judgement of staff who are involved with the offender's case and the decision making process. The tool is only meant to serve as a guideline using an offender's personal information as it relates to risk. A "score" is automatically computed by the program with an associated analysis of what that relates to with regards to a security classification. The decision on the actual security classification assigned to an offender is made by the institutional head or delegate.

132 The appellants contested their transfer to a medium-security institution without the scoring matrix and they were unsuccessful. They again raised the issue of non-disclosure before the chambers judge on their *habeas corpus* applications. Counsel for the respondents advised the judge that the scoring matrix was "not available". The chambers judge accepted this representation and held that "there has

not been a non-disclosure of available information which might assist the applicants in their submissions": [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335, at para. 17 (emphasis added). As I will explain, I see no reason to interfere with this conclusion.

## IV. The Motion to Introduce Fresh Evidence

133 The appellants bring a motion to introduce fresh evidence before this Court and invite the Court to infer on the basis of that evidence that the scoring matrix did exist and that the respondents simply refused to produce it. The appellants argue further that this non-disclosure resulted in a breach of procedural fairness. LeBel and Fish JJ. are of the view that the fresh evidence satisfies all the requirements of the *Palmer* test (*Palmer v. The Queen*, [1980] 1 S.C.R. 759) and, on the basis of its admission, they accept the appellants' argument and conclude that there has been a breach of procedural fairness. I respectfully disagree.

134 As indicated earlier, it remains unclear what the appellants call the "scoring matrix". In their motion material they refer to two computer printouts as the scoring matrices. However, these documents are not explained, they do not in any way refer to the SRS, and do not appear to contain any information of value. Although not identified as such, as my colleagues conclude at para. 106, it would appear rather that the "scoring matrix" in question is a second document called the *Security Reclassification Scale: Functional Specification* which explains the grading of each factor and how the factors should be applied in computing the SRS score. I will therefore refer to the set of instructions on how to compute the SRS score as the "scoring matrix".

135 I have no difficulty drawing the inference that a scoring matrix, in one form or another, did exist at the time of the reclassification. In my view, regardless of the fresh evidence, this inference can be drawn from the disclosure material itself. It is plain to see on the basis of the summary provided in the Assessment for Decision that the SRS numerical score was based on an assessment of the listed factors. As the appellants insisted all along, I come to the inescapable conclusion that the classification officer had to have some set of instructions to know how to compute the score. Whatever label was used to describe this material, I understand that it was this set of instructions that the appellants were asking for in their request for further disclosure. I am also prepared to draw the inference that the scoring matrix used for the appellants' reclassification was an earlier version of the *Security Reclassification Scale* presented on the fresh evidence motion. It lists the same factors set out in the Assessment for Decision, identifies the numerical score attached to each possible value attributed to each factor, and gives some guidance on how to choose the appropriate value. To illustrate, I reproduce here the instructions for the first two factors:

SERIOUS DISCIPLINARY OFFENCES

| Possible Value | Score |
|---|---|
| None | 0.5 |
| One | 1.0 |
| Two | 1.5 |
| Three or more | 2.0 |

- During the review period only count the institutional disciplinary offences that resulted in a conviction for a serious offence as defined by the court.

- Count all the "Institutional charges" (Institutional_Charges) where the "offence date" (inst_charge_offence_date) is within the review period and the "court finding" (court_finding_code) is convicted (i.e. 0001) and the "offence category" (charge_category_code) is serious (i.e. 0001).

- This field is automatically calculated by the application and cannot be modified by the user.

MINOR DISCIPLINARY OFFENCES

| Possible Value | Score |
|---|---|
| None | 0.5 |
| One | 0.5 |
| Two | 0.5 |
| Three or more | 1.0 |

- During the review period only count the institutional disciplinary offences that resulted in a conviction for a minor offence as defined by the court.
- Count all the "Institutional charges" (Institutional_Charges) where the "offence date" (inst_charge_offence_date) is within the review period and the "court finding" (court_finding_code) is convicted (i.e. 0001) and the "offence category" (charge_category_code) is minor (i.e. 0002).
- This field is automatically calculated by the application and cannot be modified by the user.

136 As it turns out, the numerical values shown on the *Security Reclassification Scale* add up to the total scores indicated on each appellant's Assessment for Decision. Hence, the inference that this document, albeit perhaps in an earlier form, was the scoring matrix used in computing their SRS score can readily be made. I therefore join LeBel and Fish JJ. in drawing the inference that a scoring matrix was available. It is on that basis that my colleagues conclude that the fresh evidence is decisive. They state: "Finally, the information would likely have affected the result of the chambers judge's decision because it clearly demonstrates that the scoring matrix was available" (para. 108). With respect, the inquiry cannot end there. The relevant question is whether the chambers judge, knowing that the scoring matrix was available, would have come to a different conclusion on the *habeas corpus* applications. In my view, he would not.

137 As noted earlier, the appellants raised two grounds in support of their *habeas corpus* applications, arbitrariness and breach of procedural fairness. On the first ground, the appellants wanted the scoring matrix so they could use the distribution of points per factor to support their argument that the new classification process was arbitrary. In my view, the scoring matrix was of no consequence on the issue of arbitrariness. Regardless of the distribution of points per factor, as my colleagues correctly note: "[The Correctional Service of Canada] had the authority to transfer the appellants because of a change in policy as long as the transfer decisions were not arbitrary" (para. 83). And, as every court below has held, my colleagues conclude that "[t]here is no evidence of any blanket application of the policy that would render the process arbitrary" (para. 86). I agree with this conclusion. In each case, it is clear that the transfers were effected in consideration of each appellants' personal circumstances and characteristics, not on the basis of any particular distribution of points on the SRS score.

138 On the second ground, the relevant question is whether the non-disclosure of the scoring matrix deprived the appellants of their right to know the case they had to meet. Only if it did can we conclude that there has been a breach of the rules of procedural fairness. In my view, it did not. The appellants were advised that the SRS score formed part of the basis for the transfer recommendation. In the Assessment for Decision, they were provided with the list of relevant factors considered in computing the score. They were provided with the personal information that was relied upon in assessing each factor and it was open to them to dispute the accuracy of that information. They were provided with the reclassification score assigned to them. It is true, as contended, that without the scoring matrix, they could not check the

accuracy of the total score. It is on that basis that I conclude that the scoring matrix should have been provided. Although the disclosure met the requirement under s. 27(1) of the *CCRA* that the prisoner be provided with "all the information to be considered in the taking of the decision or a summary of that information", detailed information beyond the summary was specifically requested in these cases and the respondents have not advanced any reason why it should not have been disclosed. However, I would not conclude that its non-disclosure resulted in a breach of procedural fairness in the context of these cases. The appellants had sufficient information to know the case they had to meet.

## V. Conclusion

139 Hence, I conclude that the fresh evidence would not have affected the result on the *habeas corpus* applications and should not be admitted. As stated earlier, this additional information would not have assisted the appellants on the main issue in respect of which they wanted it, to show arbitrariness. Further, it is readily apparent from the proposed fresh evidence that the scoring matrix would not have assisted the appellants in challenging the accuracy of the total score, which was the other reason why they wanted the information. In any event, even if there had been some error in calculation, the SRS score was only part of the basis for prompting the review of the appellants' classification. The actual transfer decisions were based on the individual assessments of their respective situations.

140 For these reasons, I would dismiss the motion to introduce fresh evidence and the appeal.

*Appeal allowed*, MAJOR, BASTARACHE *and* CHARRON JJ. *dissenting.*

*Solicitor for the appellants Terry Lee May and David Edward Owen: Ann H. Pollak, Vancouver.*

*Solicitor for the appellants Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner: Donna M. Turko, Vancouver.*

*Solicitor for the respondents: Justice Canada, Toronto.*

*Solicitor for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada: Elizabeth Thomas, Kingston.*

*Solicitor for the intervener the British Columbia Civil Liberties Association: Michael Jackson, Vancouver.*

# CIBA-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board), [1994] 3 F.C. 425


Date: 1994-05-03

Docket: T-375-94

Parallel citations: 1994 CanLII 3489 (F.C.) • 55 C.P.R. (3d) 482 • 26 Admin. L.R. (2d) 253 • 77 F.T.R. 197

URL: http://www.canlii.org/en/ca/fct/doc/1994/1994canlii3489/1994canlii3489.html




## Legislation cited (available on CanLII)

- Canadian Charter of Rights and Freedoms, Constitution
- Constitution Act, 1982, Constitution
- Human Rights Code, R.S.O., 1990, c. H.19
- Patent Act, R.S.C., 1985, c. P-4 — 39 • 39.18

## Decisions cited

- Boucher v. The Queen, 1954 CanLII 3 (S.C.C.) — [1955] S.C.R. 16
- Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc. (C.A.), reflex — [1991] 3 F.C. 626 • 81 D.L.R. (4th) 376 • 4 Admin. L.R. (2d) 61 • 36 C.P.R. (3d) 455
- Human Rights Commission (Ont.) v. House, reflex — 67 O.A.C. 72
- Manitoba Society of Seniors Inc. v. Canada (Attorney-General), reflex — 77 D.L.R. (4th) 485 • 35 C.P.R. (3d) 66 • 70 Man. R. (2d) 141
- R. v. Stinchcombe, 1991 CanLII 45 (S.C.C.) — [1991] 3 S.C.R. 326 • [1992] 1 W.W.R. 97 • 68 C.C.C. (3d) 1 • 8 C.R. (4th) 277 • 18 C.R.R. (2d) 210 • 83 Alta. L.R. (2d) 193

[sv 1,425] [sv 75,3] [sv 19,1994]

ciba-geigy canada ltd. *v.* canada

T-375-94

**CIBA-Geigy Canada Ltd.** (*Applicant*)

v.

**Patented Medicine Prices Review Board** (*Respondent*)

Indexed as: CIBA-Geigy Canada Ltd. v. Canada ***(*Patented Medicine Prices Review Board*) (*T.D.*)***

Trial Division, McKeown J."Toronto, April 18; Ottawa, May 3, 1994.

Judicial review " Patented Medicine Prices Review Board " Order denying request for disclosure of fruits of investigation " Applicant relying on S.C.C. decision in criminal case " Statutory scheme creating Board examined " Ontario Divisional Court decision involving human rights legislation distinguished " Board's primary mandate economic regulation " Tribunals regulating economic activity not subject to same high standards as those dealing with individual rights " Disclosure denial given curial deference unless fairness, natural justice requiring otherwise " Board to proceed efficiently, protect public interest " Hearing not to be unduly prolonged " Applicant entitled to know case against it but not all evidence in Board's possession " Board having properly balanced duty to applicant with duty to public " Useless for legislature to create tribunal if treated as criminal court " Law and policy requiring leeway given administrative tribunal having economic regulatory functions if must receive confidential information " Proceedings before these tribunals less adversarial than those in court " Full disclosure requirement unduly impeding Board in fulfilling regulatory obligations " Fairness requires balancing diverse interests " No adverse effect, prejudice in applicant not receiving all documents in Board's possession.

Patents " Practice " Application for judicial review of Patented Medicine Prices Review Board's order dismissing applicant's request for disclosure, production of all documents relating to matters in issue in hearing to determine whether "Habitrol" sold at excessive price " Board undertaking to provide applicant with comprehensive disclosure of factual allegations, opinion evidence, documents used to cross-examine applicant's witnesses " Providing detailed particulars of its understanding of allegations " Proposed rules requiring Board to file affidavits of all expert witnesses on whose evidence will rely; parties to pre-file outline of evidence of non-expert witnesses intending to call; Board to pre-file copies of all documents to be relied upon " Application dismissed " Board's mandate economic regulation " Information supplied pursuant to statutory authority for purposes of economic regulation prima facie confidential " Patent Act, s. 97 requiring hearing not be unduly prolonged " Applicant entitled to know case against it, but not to obtain all evidence in Board's possession.

This was an application for judicial review of the Patented Medicine Prices Review Board's order dismissing the applicant's request for disclosure and production of all documents relating to matters in issue in an upcoming hearing to determine whether the drug "Habitrol," marketed in Canada by CIBA, was being sold at an excessive price.

The Board has undertaken to provide CIBA with comprehensive prior disclosure of the factual allegations and opinion evidence it will have to meet. It also undertook to provide all documents which will be used to cross-examine witnesses for the applicant. In refusing the request for exhaustive disclosure, the Board held that it had to balance its duty to give every opportunity to a respondent to be heard against its responsibility to ensure that its orders did not have the effect of limiting its ability to discharge its responsibilities. Under the *Patent Act*, the Board is responsible for obtaining information with respect to the prices being charged in Canada for patented medicines and ensuring that such prices are not excessive. The Board's staff monitors the price of patented medicines, relying upon information filed by the patentee and the recommendation of

the Human Drug Advisory Panel (HDAP), an independent panel of scientific experts which recommends the category in which each medicine should be included for price comparison purposes. It also communicates with other experts in the field to obtain their opinions on the patented drug in issue and to obtain other relevant information. This information is provided on a confidential basis and may eventually be discarded by Board staff. The confidential relationships which Board staff maintain with third parties are very important to the Board's discharge of its statutory responsibilities. Upon completing an investigation, Board staff prepares a confidential report for review by the Chairperson who decides whether or not there is sufficient evidence to issue a notice of hearing. Subsection 83(6) requires the Board to provide the patentee with a reasonable opportunity to respond to the notice of hearing before making an order under subsection 83(2).

After submissions and discussions as to how Habitrol should be categorized, which medicines should be used as comparators to determine an appropriate price range for Habitrol, why the pricing of Habitrol was not excessive, whether Habitrol was a patent pertaining to medicine and thus within the Board's jurisdiction, Board staff prepared a confidential analysis with respect to the price of Habitrol. The Chairperson considered the report and decided to issue the notice of hearing setting out the material facts in support of the issuance and stating that Habitrol was too expensive. It also indicated the proposed orders: a price reduction and penalty payable to the Crown. Board staff gave CIBA detailed particulars of its understanding of the allegations, and set out its position on all the substantive issues that will be raised at the hearing. Pursuant to the proposed rules respecting practice before the Board, Board staff must file affidavits of all of the expert witnesses on whose evidence it will rely. The parties will also pre-file an outline of the evidence of each non-expert witness they intend to call. Board staff will also pre-file copies of all documents that they will rely upon at the hearing. Board staff also suggested that a process of written interrogatories should be initiated to clarify each party's evidence through requests for further information prior to the commencement of the hearing.

In support of the assertion that it was entitled to all the fruits of the investigation, the applicant relied upon *R. v. Stinchcombe*, wherein it was held that all relevant information must be disclosed to the defence, subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence, but also that which it does not.

The issues were whether CIBA was only entitled to the documents upon which the Board intended to rely at the hearing, or whether it was entitled to all of "the fruits of the investigation" of Board staff. If not entitled to the fruits of the investigation, was CIBA entitled to all of the documents in the possession of the Chairperson or Board members?

*Held*, the application should be dismissed.

The *Stinchcombe* case was distinguished as it involved indictable offences. The Patented Medicine Prices Review Board is a regulatory board or tribunal. There is no point in the legislature creating a regulatory tribunal if it is to be treated as a criminal court. Law and policy require that some leeway be given an administrative tribunal with economic regulatory functions, if, in pursuing its mandate, the tribunal is required by necessity to receive confidential information. It is not intended that proceedings before these tribunals be as adversarial as those before a court. To require the Board to disclose all possibly relevant information gathered while

fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint.

The applicant was entitled to know the case against it, but not to obtain all the fruits of the investigation. That the Board's primary mandate was economic regulation was supported by a review of the historical development of patent legislation. The Board and its staff receive a constant supply of information on prices of medicines. Information supplied pursuant to statutory authority for purposes of economic regulation is *prima facie* confidential. *Patent Act*, subsection 97(1) provides that all proceedings before the Board shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. In other words, the Board is supposed to proceed efficiently and to protect the interest of the public. This requires, *inter alia*, that a hearing shall not be unduly prolonged. The Board's decision refusing disclosure of the documents requested should be given curial deference unless fairness or natural justice requires otherwise. Fairness is a matter of balancing diverse interests. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on. CIBA has been provided with much more than the minimum disclosure required to enable it to meet the case.

As to whether the applicant was entitled to all documents placed before the Chairperson or other members of the Board, the test was whether the Board acted on evidence which was prejudicial or had an adverse effect on the applicant. The Board's report was prepared for the Chairperson and was only used to decide if a notice of hearing should issue. It was no different than any other document put before the Board. The documents become relevant only if the Board is going to use them. There was no prejudice or adverse effect to the applicant if it did not receive all the documents in the Board's possession.

statutes and regulations judicially considered

*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

*Human Rights Code*, R.S.O. 1990, c. H.19.

*Patent Act*, R.S.C., 1985, c. P-4 , ss. 39.18 (as enacted by R.S.C., 1985 (3rd Supp.), c. 33, s. 15), 79 (as enacted by S.C. 1993, c. 2, s. 7), 80 (as enacted *idem*), 81 (as enacted *idem*), 82 (as enacted *idem*), 83 (as enacted *idem*), 84 (as enacted *idem*), 85 (as enacted *idem*), 86 (as enacted *idem*), 87 (as enacted *idem*), 88 (as enacted *idem*), 89 (as enacted *idem*), 90 (as enacted *idem*), 91 (as enacted *idem*), 92 (as enacted *idem*), 93 (as enacted *idem*), 94 (as enacted *idem*), 95 (as enacted *idem*), 96 (as enacted *idem*), 97 (as enacted *idem*), 98 (as enacted *idem*), 99 (as enacted *idem*), 100 (as enacted *idem*), 101 (as enacted *idem*), 102 (as enacted *idem*).

cases judicially considered

applied:

*Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, reflex, [1991] 3 F.C. 626; (1991), 81 D.L.R. (4th) 376; 4 Admin. L.R. (2d) 61; 36 C.P.R. (3d) 455; 129

N.R. 296 (C.A.); *Manitoba Society of Seniors Inc. v. Canada (Attorney-General)* reflex, (1991), 77 D.L.R. (4th) 485; 70 Man. R. (2d) 141; 35 C.P.R. (3d) 66 (Q.B.).

distinguished:

*R. v. Stinchcombe*, 1991 CanLII 45 (S.C.C.), [1991] 3 S.C.R. 326; (1991), 120 A.R. 161; [1992] 1 W.W.R. 97; 83 Alta. L.R. (2d) 93; 68 C.C.C. (3d) 1; 8 C.R. (4th) 277; 130 N.R. 277; 8 W.A.C. 161; *Human Rights Commission (Ont.) v. House et al.* reflex, (1993), 67 O.A.C. 72 (Div. Ct.).

APPLICATION for judicial review of the Patented Medicine Prices Review Board's order dismissing the applicant's request for disclosure and production of all documents relating to matters in issue in an upcoming hearing to determine whether the drug "Habitrol" was being sold at an excessive price. Application dismissed.

counsel:

*Daniel V. Macdonald* and *David W. Kent* for applicant.

*Guy J. Pratte* and *P. Andrée Wylie* for respondent.

solicitors:

*McMillan, Binch*, Toronto, for applicant.

*Scott & Aylen*, Ottawa, and *Blake, Cassels & Graydon*, Ottawa, for respondent.

*The following are the reasons for order rendered in English by*

McKeown J.: CIBA-Geigy Canada Limited (CIBA) is seeking judicial review of the order of the Patented Medicine Prices Review Board (the Board) dated February 1, 1994, dismissing CIBA's request for disclosure and production of all documents relating to the matters in issue in an upcoming hearing to be held by the Board. The upcoming hearing is to determine whether the drug Habitrol, marketed in Canada by CIBA, is being sold at an excessive price. The applicant is seeking an order:

1. setting aside the decision of the Board dated February 1, 1994 and identified as PMPRB-94-1/HABITROL.PHC in file No. PMPRB-94-D1/HABITROL; and

2. requiring the Board and Board staff to disclose and produce all documents in their power, possession or control which relate to matters at issue in the proceeding commenced by the Board against CIBA by notice of hearing dated November 24, 1993.

Both parties agree that the doctrines of fairness and natural justice apply here. The question is whether, in the circumstances of this case, CIBA is only entitled to the documents which the Board intends to rely on at the hearing, or whether CIBA is entitled to all "the fruits of the investigation" of Board staff, as provided in *R. v. Stinchcombe*, 1991 CanLII 45 (S.C.C.), [1991] 3 S.C.R. 326 (*Stinchcombe*). If CIBA is not entitled to the "fruits of the investigation," the issue then becomes whether CIBA is entitled to all of the documents in the possession of the

Chairperson or members of the Board. Pursuant to the notice of hearing issued on November 24, 1993, and the Board's pre-hearing decision at issue here, the respondent has undertaken to provide the applicant with comprehensive prior disclosure of the factual allegations and opinion evidence it will have to meet. In addition, the respondent has undertaken to provide CIBA with all documents which will be used to cross-examine witnesses for the applicant.

The Board refused CIBA's request for exhaustive disclosure *inter alia* on the following grounds:

In the Board's view, in a hearing before it, the party to whom the hearing relates must be provided with a level of disclosure and production which ensures that the party is fully informed of the case to be made against it. Further, the procedure followed must provide the party to whom the hearing relates a reasonable opportunity to meet that case by bringing forward its own position and by correcting or contradicting any statement or evidence related to the case which is prejudicial to its position.

It is the Board's view that, in matters of the disclosure and production of information and documents in the context of a public hearing, the Board must balance its duty to give every opportunity to a Respondent to be heard against its responsibility to ensure that its orders do not have the effect of limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. In order to discharge such responsibilities, the Board must be confident that it is getting candid, complete and objective advice from its staff. This is particularly the case in respect of the preliminary views it receives as to whether there is sufficient evidence to justify calling a hearing into a matter. This balancing need not in any way affect the Board's duty in law to make its decisions on the basis of the evidence placed and tested before it during a hearing.

The Patented Medicine Prices Review Board

The Board was created in 1987 pursuant to R.S.C., 1985 (3rd Supp.), c. 33, s. 15, which amended the *Patent Act*, R.S.C., 1985 c. P-4 , s. 39 (the Act). Under the Act the Board is responsible, *inter alia*, for obtaining information with respect to the price being charged in Canada for patented medicines and ensuring that such prices are not, in the opinion of the Board, excessive. In order to carry out its statutory mandate the Board has access to Board staff whose role is to monitor the price of patented medicines. This monitoring function by Board staff begins when a patented medicine is first sold. It is based in part upon information filed with the Board by the patentee. The information filed includes background information and the identity of the medicine as well as the price and dosage of the medicine when it is first sold and at six-month intervals thereafter. Board staff report directly to the Chairperson of the Board who is the Board's chief executive officer pursuant to subsection 93(2) [as enacted by S.C. 1993, c. 2, s. 7] of the Act. He has the ultimate responsibility for supervising and directing the work of Board staff. Accordingly, under the Act, the Chairperson is responsible for the investigation as well as the adjudication of the question of whether a patented medicine is being sold at an excessive price.

Subsection 85(1) [as enacted *idem*] of the Act provides that in determining whether a medicine is being or has been sold at an excessive price, the Board must consider:

**85.** (1) . . . .

(*a*) the prices at which the medicine has been sold in the relevant market;

(*b*) the prices at which other medicines in the same therapeutic class have been sold in the relevant market;

(*c*) the prices at which the medicine and other medicines in the same therapeutic class have been sold in countries other than Canada;

(*d*) changes in the Consumer Price Index. . . .

The Board has also adopted certain guidelines in order to encourage and facilitate compliance by patentees. These guidelines, *inter alia*, establish three categories of medicines. Each new patented medicine is slotted into one of these categories, according to the recommendation of a group of independent scientific experts called the Human Drug Advisory Panel (HDAP). The category the medicine is assigned to determines which other medicines are used in the price comparison tests performed by Board staff. The extent of the Board's work can be gauged by the fact that as of December 31, 1992, the Board monitored the prices of 738 different patented drugs on the market in Canada, with total sales of $2.1 billion.

In carrying out its investigations, Board staff relies in large measure upon the recommendation of HDAP and the information provided by the patentee. In addition, however, Board staff will communicate with other experts in the field to obtain their opinions on the patented drug in issue and to obtain other relevant information which may be of assistance in the investigation. Typically, this information is provided on a confidential basis and may eventually be discarded by Board staff. The confidential relationships which Board staff entertain with third parties are very important to their ability to discharge their statutory responsibilities. The Board staff will communicate to the patentee the substance of the evidence upon which any excessive pricing determination is made. If the investigation suggests that the price exceeds the guidelines, the patentee is provided with the basis for the Board staff's conclusion and is requested to enter into a voluntary compliance undertaking (VCU) to adjust its price. Regardless of the patentee's response to Board staff's request, upon completing its investigation, Board staff prepares a confidential report which is forwarded to the Chairperson of the Board. It is upon review of this report that the Chairperson decides whether or not there is sufficient evidence to issue a notice of hearing. The notice of hearing sets out the grounds upon which the Chairperson believes a remedial order may be issued; i.e. that a *prima facie* case exists, and the material facts which led the Chairperson to this conclusion.

Subsection 83(6) [as enacted *idem*] of the Act requires the Board to provide the patentee with a reasonable opportunity to respond to the notice of hearing. If, after this, the Board concludes that the medicine has been sold at an excessive price, the Board may make an order under subsection 83(2) [as enacted *idem*]:

a) directing the patentee to reduce the price at which it sells the medicine or some other patented medicine in Canada to a level which would off-set the excess revenues estimated to have been derived by the patentee from the sale of the medicine at an excessive price;

b) directing the patentee to pay to Her Majesty an amount in the order; or

c) in circumstances where the Board finds that the patentee has engaged in a policy of selling the medicine at an excessive price, directing the patentee to do one or more of the things referred to in paragraphs a) and b) above, so as to off-set, by not more than twice the amount, the excess revenues estimated by the Board to have been derived by the patentee from the sale of the medicine at an excessive price.

The Facts

CIBA sells numerous medicinal products in Canada, approximately 19 of which fell within the jurisdiction of the Board as of December 31, 1992. CIBA has been continually filing with the Board the requisite information concerning these products. Board staff continues to have regular, frequent contact with CIBA personnel concerning the statutory requirements relating to the CIBA patented medicines. On July 8, 1992, CIBA advised Board staff that it intended to market Habitrol, a nicotine patch used in smoking cessation therapy, and filed information with the Board in order to justify the price being charged for the new product. There have been numerous and extensive discussions and documentary exchanges between Board staff and CIBA throughout the Habitrol investigation. Board staff has also had discussions with and received advice from HDAP and obtained and considered important information from third party sources. CIBA takes the position that notwithstanding its filing of information pursuant to the Act, the Board does not have jurisdiction over the pricing of Habitrol as CIBA, with respect to Habitrol, is not a patentee within the meaning of the Act.

The issue of how Habitrol would be categorized by the Board was first raised by CIBA in a letter dated November 13, 1992. CIBA made additional submissions which were provided to HDAP, and was given a summary of the discussion held by HDAP regarding the categorization of Habitrol. Finally, the recommendation of HDAP, that Habitrol be considered a category III new medicine, and the reasons therefor, were the focus of a meeting held on January 11, 1993 between Board staff and CIBA. This meeting lasted over two hours.

The issue of which medicines, if any, and in which dosages, should be used as comparators for the purpose of determining an appropriate price range for Habitrol, was also the subject of extensive discussions between Board staff and CIBA. Meetings were held to deal with this issue on November 30, 1992 and January 11, 1993. Following both these meetings, CIBA sent to Board staff, letters, dated December 18, 1992 and January 12, 1993, containing information the company deemed relevant to the concerns raised by Board staff at the meetings. In response, by letter dated June 17, 1993, Board staff provided CIBA with the reasons why CIBA's contentions were not accepted and the basis for the calculations which led Board staff to believe that Habitrol was excessively priced. Board staff advised that if CIBA did not elect to provide a VCU for consideration by the Chairperson of the Board, Board staff would report the matter to the Chairperson, who might issue a notice of hearing. On June 24, 1993, CIBA advised Board staff that it would not provide a VCU of the kind requested by Board staff and set forth once again its submissions as to why the pricing of Habitrol was not excessive.

The issue of whether Habitrol was a patent pertaining to medicine and thus within the jurisdiction of the Board was first raised by Board staff on July 8, 1992 (before Habitrol was even on the market), and was also discussed in face-to-face meetings between Board staff and CIBA on November 30, 1992, January 22, 1993, May 20, 1993 and September 20, 1993. In

addition, clarification of the status of the patent was requested by Board staff in a letter to CIBA dated January 26, 1993, to which CIBA responded on February 3, 1993.

The Board staff analysis with respect to the price of Habitrol was forwarded to the Chairperson in a confidential report. The Chairperson, after considering the confidential report, decided to issue the notice of hearing on November 23, 1993, wherein the material facts relied on by the Chairperson in support of the issuance of the notice of hearing were clearly set out. The notice of hearing states that the price of Habitrol exceeded the Board's guidelines and proposed orders, *inter alia*, reducing the price at which CIBA sells Habitrol and directing CIBA to pay Her Majesty in right of Canada a specified amount of money. CIBA's counsel requested further particulars concerning the allegations contained in the notice of hearing. On December 2, 1993, Board staff provided CIBA with detailed particulars of its understanding of the allegations. This was done in order to enable CIBA to respond to the notice by December 13, 1993, as was required under the Board's rules of practice. CIBA also advised the Board and Board staff that it intends to challenge the constitutionality of the Act as it relates to the Board's power to regulate prices.

In a memorandum dated January 10, 1994, Board staff set out its position on all the substantive issues that will be raised in the forthcoming hearing. Pursuant to the proposed rules respecting practice before the Board, Board staff will have to file the affidavits of all of the expert witnesses on whose evidence it will rely by May 13, 1994. Moreover, at the suggestion of Board staff, on the same date, the parties will also pre-file an outline of the evidence of each non-expert witness they intend to call. Board staff will also pre-file copies of all documents that they will rely upon at the hearing.

In its January 10, 1994 memorandum, Board staff also suggested that, after delivery of the expert evidence and the outlines of the non-expert witnesses' evidence, a process of written interrogatories should be initiated. The object of this process would be to clarify each party's evidence through requests for further information, prior to the commencement of the hearing. Counsel for CIBA objected to this suggestion.

At the pre-hearing conference held on January 18, 1994, CIBA requested that the Board issue an order requiring both the Board and Board staff to produce copies of all documents relating to any matter at issue in the proceedings that were or had been in the power, possession or control of the Board or Board staff. This request was for all relevant documents, whether favourable or prejudicial to CIBA's position and whether or not Board staff planned to rely on the relevant document as part of its case. There is no evidence to indicate whether Board staff has any documents which are not in the possession of the Board. The chairperson of the Board indicated that the Board did not have any documentation which was not in the possession of Board staff.

Analysis

The central issue in this case is whether, in light of the statutory mandate of the Board, fairness entitles the applicant to more disclosure than that which it has and will have been afforded prior to the commencement of the hearing scheduled for May 24, 1994. If I decide that CIBA is not entitled to the fruits of the investigation, i.e. documents that are favourable to it as well as unfavourable to it, the issue is whether the applicant is entitled to any documents which have

been provided to the chairperson or any members of the Board who will be sitting at the hearing. In this case all five members of the Board, including the chairman, will be sitting at the hearing.

The first issue arises out of the *Stinchcombe* decision, *supra*. In that case, the accused was charged with breach of trust, theft and fraud. During the investigation by the RCMP, a witness was interviewed by a police officer and a written statement was taken. Defence counsel was informed of the existence, but not of the content, of the statement. His request for disclosure was refused. The Crown decided not to call the witness. Defence counsel sought an order that the witness be called or that the Crown disclose the contents of the statement. The trial judge dismissed the application. The trial proceeded and the accused was convicted of a breach of trust and fraud. The Court of Appeal affirmed the convictions without giving reasons, but the Supreme Court of Canada allowed the appeal and ordered a new trial. The Supreme Court found that the Crown had a legal duty to disclose all relevant information to the defence. Sopinka J. delivered the unanimous judgment of the Court. He states at page 332 of the decision:

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.

He then reviews the arguments for and against disclosure of the fruits of an investigation, at page 333, stating:

It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, 1954 CanLII 3 (S.C.C.), [1955] S.C.R. 16, Rand J. states, at pp. 23-24:

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

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist

the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

In my view, in the case at bar, I must examine the statutory scheme pursuant to which the Patented Medicine Prices Review Board was created, and construe it as a whole to determine the degree to which Parliament intended the principle of fairness to apply. Before reviewing the relevant provisions of the Act further, I will continue with Justice Sopinka's comments in *Stinchcombe* which are relevant to the issues before me. Justice Sopinka deals with the suggestion that the disclosure may put at risk persons who provide the prosecution with information. At page 335, he states:

No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto . . . .

In the case before me I must deal with the common law in respect of the provision of confidential information. Justice Sopinka goes on to say at pages 335-336:

It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

He then states at page 339:

As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant.

He then summarizes the general principles with respect to disclosure when he states at page 343:

. . . the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.

He then applies that principle to the case before him and states at page 345:

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor.

However, Justice Sopinka notes that this same general principle of disclosure may not apply in all criminal cases. He states at page 342:

The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings.

There is no discussion of disclosure principles and matters before administrative tribunals in the *Stinchcombe* case. However, in *Human Rights Commission (Ont.) v. House et al.* reflex, (1993), 67 O.A.C. 72 (Div. Ct.), leave to appeal denied January 31, 1994 (Ont. C.A.) (*House*), the Divisional Court did apply *Stinchcombe*. In the *House* case, the Board of Inquiry under the Ontario *Human Rights Code* [R.S.O. 1990, c. H.19] had ordered production of witness statements and other documents related to the investigation of certain complaints made pursuant to the provisions of the Ontario *Human Rights Code*. This is unlike the case at bar where the Board has refused the wide ranging production of documents demanded by CIBA. I must also keep in mind that curial deference is a key principle in judicial reviews.

Furthermore, in the *House* case, the Board states at page 13 of its reasons, that one of its considerations, when determining the degree of disclosure required in that instance, was that:

. . . it appears to me that the allegations are very serious indeed, with the potential, if made out, to ruin reputations, and cast a pall over the future career prospects of anyone found to have so discriminated.

CIBA alleges that if the Board finds it has charged an excessive price for Habitrol, it could cost CIBA approximately $20 million. It is also alleged that the possibility of finding that CIBA engaged in a policy of excessive pricing would impact on the public and commercial reputation of CIBA and the personal reputations and careers of its officers, directors and employees. However, this is always a potential result of economic regulation. In my view, the finding that CIBA engaged in a policy of excessive pricing would not impact any more negatively on the public and commercial reputation of CIBA or the personal reputations and careers of its officers, directors and employees, than a finding of excessive pricing.

As stated earlier I must look at how the statutory scheme operates as a whole. In the *House* case, the Court states at page 75 that:

In rejecting the claim of privilege, the Board of Inquiry separated the investigation stage from the subsequent conciliation stage and the third "prosecution" stage.

The Court in *House* applied the reasoning in *Stinchcombe* to the proceedings under the Ontario *Human Rights Code*, but drew a distinction between privilege at the investigation stage and privilege at the litigation stage. The relevant part of the *Patent Act*, i.e. the part dealing with patented medicines, sections 79 to 102 [as enacted *idem*], concerns economic regulation. The Board monitors the prices of all medicine produced under patent. The Chairperson of the Board has administrative and adjudicative functions as a regulator. The applicant concedes that the legislation provides for institutional bias and this cannot be attacked under the case law.

There is a further difference between the legislation in issue here and the Human Rights legislation, in that there are not two parties involved. The Board staff is not a party in the same sense as the investigative staff under the Human Rights legislation. The investigators under the Human Rights legislation are clearly separated from the adjudicators. Also, there are search and seizure provisions under section 33 of the Ontario *Human Rights Code*, which make the powers of the investigators more akin to those exercised during a police investigation. Finally, the nature of the rights the Ontario *Human Rights Code* is designed to protect are very personal individual characteristics. Tribunals charged with regulating economic activity have not had placed on them the same high standards as tribunals dealing with personal individual rights.

After quoting Sopinka J. in respect of justice being better served when the element of surprise was eliminated from the trial, the Divisional Court concluded that [at page 77]:

. . . in the appropriate case, justice will be better served in proceedings under the **Human Rights Code** when there is complete information available to the respondents.

It is interesting to note that the Divisional Court recognized that only in the appropriate case the complete information should be made available. Disclosure must always be decided upon in the context of the matter involved.

The Divisional Court also was of the opinion that the role of Commission counsel is analogous to that of the Crown in criminal proceedings. The role of the Board in the statutory scheme is to monitor prices and where necessary regulate to avoid excess prices.

At page 78 of the *House* decision, the Divisional Court reiterated the well-known principle that:

In any particular case the requirements of "natural justice" will depend upon the particular circumstances of the case.

My view that the Board's primary mandate is economic regulation is supported by a review of the historical development of the patent legislation. Dureault J. undertook such a review in *Manitoba Society of Seniors Inc. v. Canada (Attorney-General)* reflex, (1991), 77 D.L.R. (4th) 485 (Man. Q.B.), a constitutional challenge to price control in the pharmaceutical industry. He states at pages 487-489:

The *Patent Act*, S.C. 1923, c. 23, s. 17, allowed for compulsory licences to be granted for the manufacture, use, and sale of patented processes. Up until 1969, when the 1923 Act was amended (S.C. 1968-69, c. 49) to permit compulsory licences to import patented pharmaceutical products, few applications for compulsory licences were made. Subsequent to the 1969 amendment, however, 559 licences to import and sell have been applied for; of these, 306 have been granted, 15 have been refused or terminated, 96 have been abandoned or withdrawn, and 142 were still pending as of January 31, 1985. . . .

The 1969 amendment resulted in the licensing of brand name patented products by generic firms which then produced and marketed their own brand or copy of the patented medicine. Compulsory licensing to import medicines resulted in increased competition by generic firms against patent-holding firms. This competition was further encouraged by the provincial policy of generic substitution under their respective pharmacare plans. The result has been the growth of large and profitable Canadian-owned generic pharmaceutical firms, which in turn led to lower prices. Needless to say, this aspect of compulsory licensing permitting a competitor (generic firm) to import and produce a copy of the patent holder's product (brand name) has been the object of intense political lobbying by the patent-holding firms. There was no such thing as patent exclusivity for an invention of medicine. Indeed an applicant could apply for a compulsory licence immediately upon the grant of the patent.

Restoration of patent exclusivity and revocation of compulsory licensing for patented medicine had for some time been the elusive goal of the patent-holding firms. Reacting to the pharmaceutical lobby, the government appointed Dr. H.C. Eastman as commissioner to inquire into and report upon the then current situation in the pharmaceutical industry in Canada. The commissioner's report was submitted on February 28, 1985.

The government's response to the Eastman report was the introduction in Parliament of Bill C-22, entitled "An Act to amend the Patent Act and to provide for certain matters in relation thereto", 33rd Parl., 2nd Sess. (1986). It was given first reading on November 7, 1986. The Bill, following its usual legislative route including several references to both the House of Commons Legislative Committee and the Special Committee of the Senate, was eventually passed by Parliament and received Royal Assent on November 19, 1987 (See S.C. 1987, c. 41, also R.S.C. 1985, c. 33 (3rd Suppl.)).

It is widely acknowledged that s. 14 of Bill C-22 created a new regime of patent exclusivity applicable to medicines. The amending provisions were designed to give back some measure of patent exclusivity to the brand name firms. While compulsory licensing was retained, it carried with it a prohibition from exercising any rights obtained under the compulsory licence for periods varying generally from seven to ten years.

Patents in respect of medicine, as for any other patent, are issued for 17- or 20-year terms. What is exceptional about these patents, however, is the provision for their immediate compulsory licensing. The new regime does not change this unique provision. It merely prohibits a licensee from exercising the rights given under the licence for a particular period of time. In other words, a monopoly is created for the patent holder for the period during which the licensee is prohibited from working the patent.

Under this limited monopoly, it was recognized that the price of new medicines would be introduced and maintained at higher levels than otherwise would be the case with competition under compulsory licensing. The increased financial return to the brand name firm was expected to encourage pharmaceutical research and development in Canada. From the government's standpoint, growth of this industry with enhanced employment opportunities was considered to be a desirable objective. On the other hand, legitimate concerns arose that, from the consumer's standpoint, prices might escalate to unacceptable levels during the exclusivity period. To counteract this mischief, the impugned amending provisions were also linked to a regulatory scheme to be administered by the Board referred to earlier.

The scheme in this part of the *Patent Act* is similar to other statutory schemes to regulate monopolies such as the Canadian Radio-television and Telecommunications Commission and the National Energy Board. The Board and its staff are receiving a constant supply of information on prices of medicines. In my view, information supplied pursuant to statutory authority for purposes of economic regulation is, *prima facie*, confidential.

In this case there has been very extensive disclosure to CIBA as outlined briefly earlier in the facts. In sworn material submitted to this Court the manager of compliance and enforcement testified that:

If the investigation suggests that the price exceeds the Guidelines, the patentee is notified, provided with the basis of Board staff's conclusion, and the patentee is provided an opportunity to submit a VCU to adjust its price. Whether the patentee submits a VCU, or refuses to do so, the matter is referred to the Chairperson of the Board, who may either accept the VCU or may issue a Notice of Hearing. In this regard, Board staff prepare a confidential report which is forwarded to the Chairperson.

The manager was not cross-examined on the need for confidentiality.

Section 96 of the Act empowers the Board, with the approval of the Governor in Council, to make general rules for regulating its practice and procedure. The Board uses proposed rules at the present time. Subsection 97(1) provides that:

**97.** (1) All proceedings before the Board shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

The Board has made a decision refusing disclosure of the documents requested and I should give such a decision curial deference unless fairness or natural justice requires otherwise. Disclosure cannot be decided in the abstract. The Board is supposed to proceed efficiently and to protect the interest of the public. This requires, *inter alia*, that a hearing shall not be unduly prolonged. Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. The Board's function is not to obtain information solely for investigative purposes; its primary role is to monitor prices. In its decision, the Board recognized the need to balance its duty to the applicant against limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. The Board has exercised its duty properly in the case at bar.

In deciding whether the Board's decision to refuse disclosure in this matter is correct I must also examine the question in light of the disclosure by the Board to date. I have already outlined the extensive amount of disclosure provided by the Board in numerous meetings and otherwise. I also note the future disclosures that the Board has agreed to provide.

In summary, when the statutory scheme of this Board is looked at, the Board is a regulatory board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on. CIBA has been provided with much more than the minimum disclosure required to enable it to meet the case. Law and policy require that some leeway be given an administrative tribunal with economic regulatory functions, if, in pursuing its mandate, the tribunal is required by necessity to receive confidential information. It is not intended that proceedings before these tribunals be as adversarial as proceedings before a court. To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter.

Since I have determined that the applicant is not entitled to the fruits of the investigation, I must determine whether the applicant is entitled to all documents placed before the chairperson or other members of the Board. Again I must examine this problem in light of the statutory scheme of this Board.

In my view, the reasoning in *Canadian Cable Television Assn. v. American College Sports Collective of Canada Inc.*, reflex, [1991] 3 F.C. 626 (C.A.) is still valid even though it was decided prior to *Stinchcombe*. In that case, the Copyright Board had both an investigative and an adjudicative function, such as the Board here has. The applicant made the same argument in that case as was made before me. The applicant submitted that he was:

. . . prejudiced in all the circumstances, not by any reason of any adverse effect, but rather by being denied the opportunity to exploit in its favour the evidence received.

In his reasons, the dissenting member of the Board referred to information not placed before the Board at the hearing. The majority did not refer to this information. The Court rejected the applicant's argument, saying at page 650, that there was

not a shred of evidence that any of the information received [by the dissenting member] had any influence whatsoever, on the Board's decision, that is to say, on the decision of the Board majority.

The test is whether the Board acted on evidence which was prejudicial or had an adverse effect on the applicant. MacGuigan J.A. elaborated on this at page 650:

In my opinion, this review of the case law indicates the fallacy of the applicant's argument. Contrary to its contention that a court will not inquire into the question of prejudice, all of the authorities which focus on the matter show that the question of the possibility of prejudice is the

fundamental issue: *Kane, Consolidated-Bathurst, Cardinal Insurance, Civic Employees' Union,* and *Hecla Mining*.

. . . The authorities, moreover, have taken "prejudicial" in the sense of "adverse effect".

Many of the questions resolved above are also relevant with respect to the second issue; that is: whether the applicant is entitled to all of the documents placed before the chairperson or other members of the Board. I will not review them a second time. This is not a case where individual rights are an issue, it is a case of economic regulation, which is not in form or substance criminal, nor does it involve the procedural safeguards constitutionalized in section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]].

CIBA sought in particular to have the Board's report disclosed. This report was prepared for the chairperson and was only used to decide if a notice of hearing should issue. It is no different than any other document put before the Board. The documents only become relevant if the Board is going to rely on them.

The Chairperson has stated that the Board's duty in law is:

. . . to make its decision on the basis of the evidence placed and tested before it during the hearing.

Accordingly there is no prejudice and no adverse effect to the applicant when it does not receive all the documents in the Board's possession. If the Board should rely on evidence not before it, then it would be open to the applicant to bring a further application at that time.

The application is dismissed.

*Indexed as:*

# Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board) (F.C.A.)

**Between**
**Ciba-Geigy Canada Ltd., Appellant, and**
**Patented Medicine Prices Review Board, Respondent**

**[1994] F.C.J. No. 884**

**[1994] A.C.F. no 884**

**83 F.T.R. 2** n

**170 N.R. 360**

**56 C.P.R. (3d) 377**

**48 A.C.W.S. (3d) 1304**

**1994 CarswellNat 1796**

Appeal No. A-209-94

Federal Court of Appeal
Ottawa, Ontario

**Marceau, MacGuigan and Décary JJ.A.**

Heard: June 7, 1994
Oral judgment: June 7, 1994

(6 pp.)

*Patents of invention -- Practice -- Disclosure -- Crown -- Administrative law.*

Appeal concerning the extent of disclosure required of documents in the hands of the Patented Medicine Prices Review Board. The Board had scheduled a hearing which could result in a finding the appellant was selling a drug for an excessive price. The appellant sought disclosure of all facets

of the staff investigation and all documents in the hands of the Board or its chairman. A judicial review from the Board's refusal of this request had been dismissed.

HELD: Appeal dismissed. The administrative tribunal here had economic regulatory functions and no power to affect human rights in a way akin to criminal proceedings. A trustful relationship with its investigative staff and proceeding as fairly and expeditiously as the circumstances of fairness permit were valid Board objectives. Law and policy required that some leeway be given an administrative tribunal with economic regulatory objectives in pursuing its mandate.

**STATUTES, REGULATIONS AND RULES CITED:**

Patent Act, R.S.C. 1985 c. P-4, s. 83.

QL Update: 940928
d/sdd

Daniel V. MacDonald, for the Appellant.
Guy Pratte, for the Respondent.
P. Andrée Wylie, for the Board.

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The judgment of the Court was delivered by

**1** **MacGUIGAN J.A.** (orally):-- This appeal has to do with the extent of the disclosure required to the appellant of documents in the hands of the Patented Medicine Prices Review Board ("the Board").

**2** Utilizing its powers under the Patent Act ("the Act"), the Board scheduled a hearing to determine whether the drug Habitrol marketed in Canada by the appellant is being sold at an excessive price. The consequences of such a finding under s. 83 of the Act could be an order for a price reduction in the selling price, a payment to Her Majesty in the Right of Canada of an offset amount from estimated excess corporate revenue, and, on a finding of a policy of selling the medicine at an excessive price, an offset of up to twice the amount of the estimated excess revenues. This last kind of remedial order is not in play in the instant case in its current state.

**3** In deciding to hold a formal hearing, once a patentee has refused to make a voluntary compliance order the Chairman of the Board considers a report from the Board staff to the effect that the market price charged for the drug in Canada exceeds the Board's guidelines. The appellant seeks the disclosure to it of all documents in the Board's possession which relate to the matters in issue in the s. 83 hearing, particularly the report on which the Chairman acted in ordering the hearing. In its view such disclosure should extend to all the facets of the staff investigation and to all documents in the hands of the Board or its Chairman.

**4** The Board refused the appellant's request for such exhaustive disclosure for the following reasons (Appeal Board, I, 3):

> In the Board's view, in a hearing before it, the party to whom the hearing relates must be provided with a level of disclosure and production which ensures that the party is fully informed of the case to be made against it. Further, the procedure followed must provide the party to whom the hearing relates a reasonable opportunity to meet that case by bringing forward its own position and by correcting or contradicting any statement or evidence related to the case which is prejudicial to its position.
>
> It is the Board's view that, in matters of the disclosure and production of information and documents in the context of a public hearing, the Board must balance its duty to give every opportunity to a Respondent to be heard against its responsibility to ensure that its orders do not have the effect of limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. In order to discharge such responsibilities, the Board must be confident that it is getting candid, complete and objective advice from its staff. This is particularly the case in respect of the preliminary views it receives as to whether there is sufficient evidence to justify calling a hearing into a matter. This balancing need not in any way affect the Board's duty in law to make its decisions on the basis of the evidence placed and tested before it during a hearing.

**5** On a judicial review proceeding McKeown J. upheld the Board's decision as follows (Appeal Book, I, 17):

> The Board has made a decision refusing disclosure of the documents requested and I should give such a decision curial deference unless fairness or natural justice requires otherwise. Disclosure cannot be decided in the abstract. The Board is supposed to proceed efficiently and to protect the interest of the public. This requires, inter alia, that a hearing shall not be unduly prolonged. Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. The Board's function is not to obtain information solely for investigative purposes; its primary role is to monitor prices. In its decision, the Board recognized the need to balance its duty to the applicant against limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. The Board has exercised its duty properly in the case at bar.... [W]hen the statutory scheme of this Board is looked at, the Board is a regulatory board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on. CIBA has been provided with much more than the minimum disclosure required to enable it to meet the case. Law

> and policy require that some leeway be given an administrative tribunal with economic regulatory functions, if, in pursuing its mandate, the tribunal is required by necessity to receive confidential information. It is not intended that proceedings before these tribunals be as adversarial as proceedings before a court. To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter.

We are all agreed that the Motions Judge has correctly stated and applied the law.

**6** Indeed, in emphasizing that its case is one of audi alteram partem and not of bias, counsel for the appellant expressly agreed with the law as stated by the respondent that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case" (Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653, 682 (per L'Heureux-Dubé J.) and the context to be thus taken into account consists of the nature and seriousness of the matters in issue, the circumstances, and of course the governing statute. This was precisely the approach of the Motions Judge.

**7** The only real issue between the parties is as to the effect to be given in this non-criminal case to the powerful reasons for decision of Sopinka J. in R. v. Stinchcombe, [1991] 3 S.C.R. 326 that in a criminal case the Crown has a legal duty to make total disclosure to the defence. Stinchcombe was applied by a Divisional Court in Ontario to the requirements of natural justice under an Ontario Human Rights Code Board of Inquiry in Ontario Human Rights Commission v. House, decided 8 November 1993 (No. 520/93). The Court in House analogized the proceedings in question to criminal proceedings and the role of Commission counsel to that of the Crown in criminal proceedings. It concluded that (p. 12):

> There is no dispute in these proceedings that the allegations made by the complainants are indeed extremely serious. Any racial discrimination strikes at the very heart of a democratic pluralistic society. It is, of course, of the utmost seriousness if any such racial discrimination exists or has existed in an important public institution such as a major hospital. The consequences attendant on a negative finding by a Board of Inquiry would be most severe for the Respondents as any such finding could and should seriously damage the reputation of any such individual.

**8** This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.

**9** A trustful relationship with its investigative staff and proceeding "as informally and expeditiously as the circumstances of fairness permits" are valid Board objectives.

**10** We are all agreed with McKeown J. that "law and policy require that some leeway be given an administrative tribunal with economic regulatory functions . . . in pursuing its mandate."

**11** The appeal must therefore be dismissed with costs.

MacGUIGAN J.A.

** Traduction **

*Intitulé de la cause :*

**Ciba-Geigy Canada Ltée c. Canada (Conseil d'examen du prix des médicaments brevetés)**

**Entre**
**Ciba-Geigy Canada Ltée, appelante, et**
**Le Conseil d'examen du prix des médicaments brevetés,**
**intimé**

**[1994] A.C.F. no 884**

**[1994] F.C.J. No. 884**

**83 F.T.R. 2** n

**170 N.R. 360**

**56 C.P.R. (3d) 377**

**48 A.C.W.S. (3d) 1304**

**1994 CarswellNat 1796**

No du greffe A-209-94

Cour d'appel fédérale
Ottawa (Ontario)

**Les juges Marceau, MacGuigan et Décary**

Entendu : le 7 juin 1994.
Jugement oral : le 7 juin 1994.

(11 paras)

Pourvoi à l'encontre d'une ordonnance de la section de première instance en date du 29 avril 1994, no du greffe de la section de première instance : T-375-94.

**Avocats :**

Daniel V. MacDonald, pour l'appelante.
Guy Pratte, pour l'intimé.
P. Andrée Wylie, pour le Conseil.

---

Le jugement de la Cour a été rendu par

**1** **LE JUGE MacGUIGAN** (oralement) :-- Le présent appel concerne la portée de la divulgation réclamée par l'appelante concernant les documents qui sont en possession du Conseil d'examen du prix des médicaments brevetés (le "Conseil").

**2** En vertu des pouvoirs que lui confère la Loi sur les brevets (la "Loi"), le Conseil a convoqué une audience pour déterminer si le médicament Habitrol, mis sur le marché au Canada par l'appelante, est vendu à un prix excessif. Si tel est le cas, le Conseil peut, aux termes d'une ordonnance prévue à l'article 83 de la Loi, enjoindre à l'appelante de baisser le prix de vente du médicament, de payer à Sa Majesté du chef du Canada un montant pour compenser l'excédent qu'aurait pu procurer au breveté la vente du médicament au prix excessif et, si le conseil estime que le breveté s'est livré à une politique de vente du médicament à un prix excessif, il peut lui enjoindre de payer un montant visant à compenser au plus le double de l'excédent procuré par la vente au prix excessif. Ce dernier type d'ordonnance n'entre pas en ligne de compte en l'espèce.

**3** Pour décider s'il y a lieu de tenir une audience formelle, une fois qu'un breveté a refusé de prendre volontairement un engagement de conformité à la loi, le président du Conseil examine le rapport, établi par son personnel, qui indique que le prix de vente du médicament sur le marché canadien outrepasse les normes du Conseil. L'appelante demande que tous les documents qui sont en possession du Conseil et qui ont trait aux questions qui seront abordées au cours de l'audience convoquée aux termes de l'article 83 lui soient divulguée, plus particulièrement le rapport sur lequel le président s'est fondé pour convoquer l'audience. À son avis, la divulgation devrait s'étendre à tous les aspects de l'enquête menée par le personnel et à tous les documents qui sont en possession du Conseil ou de son président.

**4** Le Conseil a refusé la demande de divulgation d'une aussi grande portée présentée par l'appelante pour les raisons suivantes (Dossier d'appel, I, 3) :

> [traduction]
>
> "De l'avis du Conseil, lorsqu'il convoque une partie à une audience, il doit lui divulguer et lui remettre les renseignements et documents suffisants pour qu'elle

soit pleinement informée des arguments qui seront présentés contre elle. En outre, la procédure suivie doit accorder à la partie convoquée à l'audience une possibilité raisonnable de réfuter les allégations portées contre elle en lui permettant de présenter sa position et de corriger ou de contredire les déclarations ou les éléments de preuve qui portent préjudice à sa position.

Chaque fois qu'il est question de divulgation et de production de renseignements et de documents pour la tenue d'une audience publique, le Conseil est d'avis qu'il doit trouver le juste milieu entre son obligation d'accorder à un requérant toutes les possibilités de se faire entendre et la responsabilité qui lui incombe de s'assurer que ses ordonnances n'ont pas pour effet de limiter se capacité de s'acquitter de son mandat dans le respect constant de l'intérêt public. Pour ce faire, le Conseil doit avoir la certitude que son personnel lui communique des renseignements exacts, complets et objectifs. Cette certitude s'applique particulièrement aux opinions préliminaires communiquées au Conseil en vue de décider s'il y à assez d'éléments de preuve pour justifier la tenue d'une audience. Ce jeu d'équilibre ne doit d'aucune façon porter atteinte à l'obligation légale qui est faite au Conseil de fonder ses décisions sur la preuve présentée et analysée devant lui au cours d'une audience."

**5** Au cours de la procédure de contrôle judiciaire intentée à l'encontre de cette décision, le juge McKeown a maintenu la décision du Conseil dans les termes suivants (Dossier d'appel, I, 17) :

"Le Conseil à décidé de refuser la divulgation des documents demandés et je dois, en vertu du principe de la déférence judiciaire, respecter cette décision à moins que l'équité ou la justice naturelle s'y oppose. Une décision quant à la divulgation ne peut être prise de façon abstraite. Le Conseil est censé agir efficacement et protéger les intérêts du public. Il faut donc, entre autres, éviter de prolonger indûment les audiences. Celui qui fait l'objet d'une audience en matière de prix excessif à certainement le droit de connaître les arguments présentés contre lui; cependant, il ne devrait pas être autorisé à obtenir toute la preuve que le Conseil a obtenue dans l'exercice de ses fonctions de réglementation, dans l'intérêt du public, du seul fait qu'elle pourrait avoir un rapport avec la question en litige. Le Conseil n'a pas pour fonction d'obtenir des renseignements uniquement à des fins d'enquête; son rôle principal est de surveiller les prix. Dans sa décision, le Conseil a reconnu la nécessité de trouver le juste milieu entre son obligation envers la requérante et le fait de limiter sa capacité de s'acquitter en permanence de ses responsabilités dans l'intérêt du public. Le Conseil à correctement exercé se fonction en l'espèce [...] Lorsque l'on examine le régime légal dans lequel ce Conseil agit, on constate qu'il s'agit d'un office de réglementation. Il serait inutile que le législateur crée un tel office si celui-ci devait être traité comme une cour criminelle. Les obligations de divulgation imposées par le principe de l'équité et de la justice naturelle sont remplies si le sujet de l'enquête est informé des arguments qu'il doit réfuter et si on lui fournit tous les documents sur lesquels on s'appuiera. CIBA a eu beaucoup plus que le minimum de renseignements qui doit lui être divulgué pour lui permettre de réfuter les arguments avancés contre elle. Le droit et des questions de principe exigent qu'une certaine

> latitude soit accordée à un tribunal administratif exerçant des fonctions de réglementation économique si, dans l'exercice de son mandat, le tribunal est obligé de recevoir des renseignements confidentiels. La procédure devant ces tribunaux n'est pas censée revêtir un caractère aussi contradictoire que la procédure suivie devant un tribunal judiciaire. Le fait d'exiger du Conseil qu'il divulgue tous les renseignements susceptibles d'être pertinents, parmi ceux qu'il recueille dans l'exercice de ses fonctions de réglementation, entraverait indûment son travail d'un point de vue administratif. L'équité est toujours une question d'équilibre entre divers intérêts. Je conclus que l'équité n'exige pas la divulgation des fruits de l'enquête en l'espèce."

Nous sommes tous d'avis que le juge des requêtes a correctement énoncé et appliqué le droit.

**6** En fait, en soulignant que sa demande porte sur l'application de la règle audi alteram partem et non sur une allégation de partialité, l'avocat de l'appelante reconnaît expressément la justesse du droit énoncé par l'intimé selon lequel "la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas" (Knight c. Indian Head School Division No 19 of Saskatchewan, [1990] 1 R.C.S. 653, à la page 682 (le juge L'Heureux-Dubé)); en l'espèce, le contexte dont il faut tenir compte comprend la nature et la gravité des questions en litige, les circonstances et, bien entendu, la loi pertinente. C'est précisément l'approche adoptée par le juge des requêtes.

**7** Le seul véritable point de mésentente entre les parties concerne l'application, dans une affaire non criminelle comme celle en l'espèce, du raisonnement puissant du juge Sopinka dans l'arrêt R. c. Stinchcombe, [1991] 3 R.C.S. 326, selon lequel, en matière criminelle, le ministère public est tenu en droit de divulguer à la défense tous les renseignements pertinents. L'arrêt Stinchcombe a été appliqué par une Cour divisionnaire de l'Ontario au respect des règles de justice naturelle par une Commission d'enquête établie en vertu du Code des droits de la personne de l'Ontario dans l'arrêt Commission des droits de la personne de l'Ontario c. House, prononcé le 8 novembre 1993 (No du greffe 520/93). Dans l'arrêt House, la cour établit une analogie entre la procédure suivie et la procédure applicable aux matières criminelles, ainsi qu'entre le rôle de l'avocat de la Commission et celui de l'avocat du ministère public en matières criminelles. Elle a conclu de la façon suivante à la page 12 :

> [traduction]
>
> "Il n'est pas contesté en l'espèce que les allégations portées contre les plaignants sont en fait extraordinairement graves. Toute discrimination raciale porte atteinte aux fondements même d'une société pluraliste et démocratique. Il est en effet d'une extrême gravité que cette forme de discrimination existe ou ait existé dans une institution publique importante comme un grand hôpital. Une conclusion négative rendue par une commission d'enquête pourrait avoir des conséquences extrêmement graves pour les intimés du fait qu'elle peut entacher sérieusement leur réputation."

**8** C'est ici que doit s'arrêter toute analogie entre le droit criminel et la procédure en l'espèce. Il ne fait aucun doute qu'il y a des conséquences économiques très importantes pour un breveté qui n'obtient pas gain de cause à l'audience tenue aux termes de l'article 83, et peut-être même une at-

teinte à l'image publique d'une société. Mais, comme en a conclu le juge McKeown, le tribunal administratif en l'espèce exerce des fonctions de réglementation économique et ne peut, dans l'exercice de son mandat, porter atteinte aux droite de la personne à un degré comparable à ce qui risque de se produire en matière criminelle.

**9** L'établissement d'une relation de confiance avec ses enquêteurs et le souci de procéder "sans formalisme et avec célérité dans la mesure où les circonstances et l'équité le permettent" sont des objectifs valablement établis par le Conseil.

**10** Nous souscrivons tous à l'opinion du juge McKeown selon laquelle "le droit et des questions de principe exigent qu'une certaine latitude soit accordée à un tribunal administratif exerçant des fonctions de réglementation économique dans l'exercice de son mandat".

**11** Le pourvoi est donc rejeté avec dépens.

Traduction certifiée conforme: C. Comtois

qp/s/qlmcd

---- End of Request ----
Print Request: All Documents: 1-2
Time Of Request: Tuesday, August 17, 2010  17:29:06

**COURT FILE NO.:** 04-FP-293882FIS
**DATE:** 20070926



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Daniel Fischer v. Nira Milo

**BEFORE:** Justice D. M. Brown

**COUNSEL:** A. Volikis, for the Applicant/Moving Party

L. Mostyn, for the Respondent/Responding Party

**DATE HEARD:** September 18, 2007

# E N D O R S E M E N T

## I. Introduction

[1] Both parties have agreed to adjourn, to December 13, 2007 for a full-day hearing with *viva voce* evidence, this motion brought by Mr. Fischer against Ms. Milo for an order that she is in contempt of the order of Perell J. dated December 21, 2006 and for the imposition of penalties, including incarceration. The dispute revolves around the duration of a vacation taken this past summer by Ms. Milo with their son. One issue regarding the adjournment remains for determination:

> Although *viva voce* evidence will be adduced at the December hearing, and Ms. Milo will have the right at that time to cross-examine Mr. Fischer, is Ms. Milo entitled to cross-examine Mr. Fischer on his affidavit in support of the motion in advance of the hearing in order (i) to secure pre-hearing discovery, and (ii) to obtain evidence that could be used to impeach Mr. Fischer's credibility at the hearing?

[2] I conclude Ms. Milo is not.

## II. The Motion

[3] Mr. Fischer and Ms. Milo were married, and then separated. One of their children is Ethan, who is 11 years old. After jointly retaining a consultant to conduct a custody and access assessment, both parties incorporated the consultant's recommendations into a final order made by Perell J. on December 21, 2006. The consent order includes a lengthy Parenting Plan, one section of which specifies how Ethan will spend the summer with each parent.

[4] In his affidavit in support of the motion, Mr. Fischer sets out a week-by-week narration of events that transpired over the course of the summer of 2007. Mr. Fischer alleges that Ms. Milo did not comply with her obligations under the Parenting Plan this past summer, resulting in Mr. Fischer spending less time with Ethan than agreed upon. He deposed:

> While there is little I can do to reclaim the lost time, my primary concern in bringing this Motion is to send a message to [Ms. Milo] that Court Orders need to be respected and there are consequences to willful breaches of Orders. The last thing Ethan needs is more conflict. I am asking that the Court make an order finding [Ms. Milo] in contempt and imposing such penalty as the Court deems just, including a monetary penalty…

Mr. Fischer's notice of motion also asks the court to consider making an order incarcerating Ms. Milo for a period of time.

[5] Ms. Milo has filed a responding affidavit in which she places the blame for any access scheduling issues that arose during this past summer on Mr. Fischer. In her affidavit she recounted her own chronology of what transpired over the summer and responded to the allegations asserted by Mr. Fischer.

[6] Ethan's voice has not been heard in this on-going dispute between his parents.

## III. Analysis

### A. Basic Principles governing contempt motions

[7] Rule 31 of the *Family Law Rules* governing motions for contempt does not detail the process for conducting a contempt hearing. Such procedural matters fall, in large part, to be decided under the common law regarding contempt, which invests in courts a discretion to determine how to proceed with a summary contempt matter.[1]

[8] In the present motion, Mr. Fischer seeks a range of remedies against Ms. Milo, including her incarceration. As a result, the liberty interest of Ms. Milo is at stake. In *R. v. B.E.S.T. Plating Shoppe Ltd. and Sapias*[2] the Court of Appeal stated:

> Section 7 of the Canadian Charter of Rights and Freedoms provides that a person shall not be deprived of his liberty except in accordance with the principles of fundamental justice. It is settled law that resort may be had to summary proceedings in contempt proceedings. But it is also settled law that in the conduct of those proceedings it is incumbent on the court to ensure that the offender has a fair trial in accordance with the principles of fundamental justice. Those principles include, amongst other rights, the right to be presumed innocent until proven guilty beyond a reasonable doubt and to have a reasonable time to prepare a defence and to call witnesses. In so far as the right to have

[1] *Some Guidelines on the Use of Contempt Powers*, Canadian Judicial Council, May, 2001, at page 18.
[2] (1987), 59 O.R. (2d) 145 (C.A.).

> a reasonable time to prepare a defence is concerned it may be somewhat circumscribed in exceptional cases where there is a compelling or urgent need for immediate action.[3]

[9] Contempt motions for breach of a civil order possess a quasi-criminal aspect, entitling the respondent to service of a notice of motion particularizing the allegations of contempt, a hearing, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the right to make full answer and defence, including the right to counsel, the right to cross-examine witnesses against him, and the right to call evidence.[4]

**B. The forms of contempt proceedings**

[10] The case law makes it clear that a contempt motion may proceed in a summary fashion employing one of two hearing methods: (i) a hearing on a written record, or (ii) an oral hearing with *viva voce* evidence. Which form of hearing may be appropriate depends upon whether material facts are in dispute on the motion. A hearing on a written record is only available where facts material to the issue of contempt are not in issue. As put by the Court of Appeal in *R. v. Jetco Manufacturing Ltd. and Alexander*:

> When there are controverted facts relating to matters essential to a decision as to whether a party is in contempt of court, those facts cannot be found by an assessment of the credibility of deponents who have not been seen or heard by the trier of fact, as was done in this case.[5]

The Court of Appeal reiterated this position in its later decision in *R. v. B.E.S.T. Plating* where it stated:

> Where affidavits filed by the parties to contempt proceedings contain contradictory statements with respect to material facts or issues in the case, an alleged contemnor is entitled to have the trial of an issue with the calling of witnesses to give viva voce evidence if he so requests. A refusal to order a trial of an issue in those circumstances would amount to a violation of the provisions of s. 7 of the Charter and the principles set forth by this court in the *Jetco* and *Cohn* cases.[6]

[11] In the present case the parties properly concluded that in view of the controverted facts on essential matters set forth in their respective affidavits, the motion should be heard by way of a summary hearing at which *viva voce* evidence could be adduced.

[12] Whether at the hearing the parties' respective affidavits will serve as their evidence in chief was not a matter raised before me. Absent agreement by the parties, that will be a matter for the hearing judge to determine.

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[3] *Ibid*., at page 150. See also: *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721 (C.A.), at para. 127; *Toronto Transit Commission v. Ryan* (1998), 37 O.R. (3d) 266 (Gen. Div.).
[4] *Dickie v. Dickie* (2006), 78 O.R. (3d) 1 (C.A.), per Laskin J.A., dissenting, at para. 119; rev'd on other grounds (2007), 279 D.L.R. (4th) 625 (S.C.C.).
[5] (1987), 57 O.R. (2d) 776 (C.A.), at page 781.
[6] *R. v. B.E.S.T. Plating, supra*., at pages 152-3.

## C. Ability to cross-examine on affidavits prior to a hearing

[13] Where the evidence does not disclose controverted facts, and the motions judge intends to determine the matter on a written record, a respondent certainly is entitled, in advance of the hearing, to cross-examine the moving party on the affidavits and documentary evidence it puts forward in support of the motion.[7] Although on a motion for contempt a responding party cannot be compelled to be a witness against himself,[8] where he files a responding affidavit and a hearing on a written record will be held, as a general rule the moving party may cross-examine him in advance of the hearing. In both circumstances, the cross-examinations stand in the place of those that would have occurred had the motion been heard in a summary way with *viva voce* evidence.

[14] Where, as in the present case, *viva voce* evidence will be given at the hearing, in my view a pre-hearing cross-examination by Ms. Milo of Mr. Fischer on his affidavit, or any other evidence that Mr. Fischer may adduce by way of affidavit, is not necessary in order to protect Ms. Milo's undoubted right to cross-examine those who give evidence against her. The right will be satisfied by her opportunity to cross-examine such witnesses at the hearing.

[15] Our common law permits contempt motions to proceed in a summary fashion. While a respondent is entitled to notice of the case that he or she has to meet – and the rules regarding notices of motion address that issue – I have not been able to find any suggestion in the case law that pre-hearing discovery should form part of the summary procedure. Indeed, resorting to pre-hearing examinations for discovery or cross-examinations when an oral hearing will be held would be inconsistent with the summary nature of contempt proceedings, converting them into ones more akin to a full civil trial.

[16] Further, I do not accept the submission by Ms. Milo's counsel that a pre-hearing cross-examination is necessary in order that he can deal properly with issues of credibility. He can cross-examine Mr. Fischer fully as to credibility in front of the hearings judge. On issues of credibility, a pre-hearing examination reduced to a transcript usually is a poor substitute for a *viva voce* cross-examination in front of the trier of fact.

[17] Turning from the general principles governing contempt motions, to the specific provisions of the *Family Law Rules*, it is important to note that under those rules a party does not have an automatic right to cross-examine another on an affidavit filed in support of a motion. While Rule 14(17) contemplates the possibility of using as evidence on a motion the transcript of the cross-examination, or questioning, of a witness on his affidavit in support of the motion, the rule makes it clear that such questioning must be permissible under Rule 20. Rule 20(7) of the *Family Law Rules* provides that the court "may, on motion, make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit…" Rule 20(5) provides:

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[7] *Ibid*., at pages 150-1.
[8] *Canada Copier Corp. v. Sharp Electronics of Canada Ltd*., [1985] O.J. No. 1673 (M.C.);

> (5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:
>
> 1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.
>
> 2. The information is not easily available by any other method.
>
> 3. The questioning or disclosure will not cause unacceptable delay or undue expense.



[18] In my view, these provisions of the *Family Law Rules* must be applied in a manner consistent with the broader common law and constitutional principles governing contempt motions. Where the contempt motion will be heard using *viva voce* evidence, with the respondent enjoying the right at the hearing to make full cross-examination of any witnesses called against her, I see no unfairness to the respondent by not permitting her to engage in pre-hearing questioning. At the hearing she will be able to cross-examine Mr. Fischer to elicit admissions against his interest or impeach his credibility. Second, in this case Ms. Milo has already filed an affidavit containing her version of events. The information she requires to explain her actions over the summer is fully within her control – i.e. available by another method than a pre-hearing questioning of Mr. Fischer. Finally, in my opinion a pre-hearing questioning of Mr. Fischer would cause undue expense given that Ms. Milo will have an opportunity to attempt to achieve her cross-examination objectives at the hearing.

[19] For these reasons, I conclude that Ms. Milo is not entitled to conduct pre-hearing questioning of Mr. Fischer on his affidavit in support of his motion to find her in contempt.

[20] Ms. Milo is entitled, however, to know the particulars of the accusation against her.[9] Counsel did not ask me to review the adequacy of the particulars contained in Mr. Fischer's affidavit. If Ms. Milo requires further particulars of Mr. Fischer's allegations of contempt, she may serve and file a written demand for particulars on or before October 15, 2007, and Mr. Fischer shall serve and file a written response to such a demand on or before November 2, 2007.

[21] The costs, if any, of this adjournment request are reserved to the judge hearing the motion on December 13, 2007.

D. M. Brown J.

[9] *Selection Testing Consultations International Ltd. v. Humanex International Inc.*, [1987] 2 F.C. 405 (T.D.), at page 410.

**DATE:** September 26, 2007

Hamilton Registry F-001842/98
DATE: 2000·V·12
CITATION: *F.(J.) v. C.(V.)*

# SUPERIOR COURT OF JUSTICE
# FAMILY COURT



**B E T W E E N :**

**J.F.,**
***Applicant,***

**— AND —**

**V.C.,**
***Respondent.***

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Before Senior Justice David M. Steinberg
Heard on 12 May 2000
Oral Reasons for Judgment delivered on 12 May 2000
Written Reasons for Judgment released on 14 June 2000

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**CIVIL PROCEDURE — Conduct of trial — Adjournment — Grounds — Time to perfect evidence — Preparation of transcript of audio tapes — Father in custody dispute wanted to impeach one of his own expert witnesses at outset on basis of audio recordings that he had secretly made of therapeutic sessions that he had attended — After having refused to provide his own witness with copy of tapes, he now asked court for extra time to prepare transcript of recorded material — Court found that father's refusal to provide that witness with copy of taped material was sufficient reason to deny him any extension of time.**

**EVIDENCE — Documentary evidence — Audio or video recording — Clandestine recording — Father in custody dispute had secretly made audio recordings of therapeutic sessions, despite fact that clinic had specifically told him that sessions were not to be recorded — Aside from classic concerns for accuracy of recording and provision of transcript, court also had to weigh potential negative impact on helping professions who might be discouraged from helping parties involved in family law cases arising from problems for which they sought therapeutic help — Such negative impact would not advance administration of justice — Audio recordings were inadmissible.**

In the course of a custody dispute, the mother suspected that her son had been abused by the father and had the boy referred to a team of child abuse experts at a local hospital.

The father had not in any way objected to the team's study and he participated in several sessions but he erroneously concluded that these sessions with him were being recorded and he began in secret to make tape recordings of his own. The hospital team's report was not prepared as a result of a court-ordered assessment but was made part of the court record.

The father now asked the court to admit his recordings as part of his strategy to expose various weaknesses in the team's conclusions and to lay the foundation for eventually having one of his own expert witnesses declared hostile. That witness had anticipated the father's intentions several months earlier and asked him to provide her with the unedited copies of his tapes and any other supporting material, but the father refused. Now, at the eleventh hour, with his witness soon to be called, the father asked for the court's help to perfect his position by getting permission to use these tapes to impeach his own witness before even calling her. He asked the court to give him time to prepare a transcript of what was said in the interviews and to establish that the recording was accurate.

*Held:*— Father's request to extend the time for perfecting his care refused. Tapes ruled inadmissible.

If tapes or a transcripts were usable for questioning or otherwise admissible into evidence, the father's earlier refusal to provide his own witness, whom he wanted to impeach at the outset, with a copy of the materials was a good reason not to extend him time to get his evidence in order.

According to the textbooks on evidence, the tapes would be generally be admissible, provided that their accuracy could be established and the court were provided with a transcript. More recent cases, however, have injected a further consideration — namely, the danger that secretly made recordings of therapeutic sessions would discourage members of the helping professions from providing assistance to parties who might be involved in family law proceedings arising from the problems for which they sought medical, psychological or social work help. That would not advance the administration of justice.

**STATUTES AND REGULATIONS CITED**

*Evidence Act*, R.S.O. 1990, c. E-23 [as amended], section 23.

**CASES CITED**

*Fattali v. Fattali* (1996), 22 R.F.L. (4th) 159, 1996 CanLII 7272, [1996] O.J. No. 1207, 1996 CarswellOnt 1284 (Ont. Fam. Ct.).

*Reddick v. Reddick* (1997), 14 C.P.C. (4th) 175, [1997] O.J. No. 2497, 1997 CarswellOnt 3477 (Ont. Gen. Div.).

**AUTHORS AND WORKS CITED**

*Halsbury's Laws of England* (2d), vol.13 (London: Butterworths, 1934).

Sopinka, John and Sidney N. Lederman: *Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974).

**J.F. ..... on his own behalf**

**L. Charles Flaherty ..... for the respondent mother**

**[1]** SENIOR JUSTICE D.M. STEINBERG:— The applicant, Mr. J.F., has sought a ruling on the admissibility of certain tape recordings he made during part of his sessions with the CAAP ("Child Advocacy and Assessment Program") team at the McMaster University Medical Centre. The problems of A.F., relating to a possible child abuse by the father based on several allegations by the mother, had been referred to the team by the family doctor. The ensuing CAAP report, which is part of the court record, was not prepared as a result of a court-ordered assessment. There is no evidence or any submissions by the father that he in any way objected to the team's undertaking this duty. It is conceded by him that, of the five sessions he had with various members of the team, he recorded about 3½ of them.

**[2]** The applicant, who is the executive director of an organization known as "Kids Need Both Parents", obviously had some concerns about the CAAP team as he, without advising the team, began taping the sessions. He indicated that he believed that the team was taping the sessions, but he apparently made no inquiries in that regard. CAAP was not, in fact, recording the sessions. It appears that Mr. J.F. was prepared for any objection to his taping the sessions as he, in his evidence, indicated that, when he was asked to turn off his tape machine, unknown to the CAAP team, he had a second back-up going. This second machine, he now says, didn't work; he states that he only found this out in the last day or so. But the fact that he had this undetected back-up indicates to me that he knew that the CAAP team did not want him to tape. After this incident, he still continued to tape, against the wishes of the team, although it is not clear that this was known by the CAAP team.

**[3]** Mr. J.F. has taken the position that the CAAP team is guilty of blatant gender bias and that it is his wish to expose it. He wishes to use the tapes for the purpose of the cross-examination of the CAAP witnesses to demonstrate the following:

(a) The CAAP team failed to take into consideration material he produced to it about the mother's ex-husband's acquittal on appeal in Québec of a criminal charge relating to sexual abuse of her children.

(b) It wrongly concluded that the mother had not fabricated certain allegations of child abuse against him, notwithstanding that it could not conclude that any sexual abuse had occurred.

(c) The CAAP team declined to instruct her in the report not to make further reports of sexual abuse against him, as this would be harmful to the child.

(d) The team made no comment that having the access exchange at the police station would constitute child abuse.

(e) It did not comment or consider certain police reports which were detrimental to the mother's case.

(f) The team only asked the mother about how the access visits were going, and not him.

(g) Only his sessions with the CAAP team were monitored by a one-way mirror, and not the mother's.

(h) There was never any delineation in the report on how he was contributing to the parental discord, as was alleged in the document.

(i) The only two words in the report that were underlined or emphasized were words

detrimental to him.

(j) No reference was made in the report of inconsistent statements made by the mother to the Catholic children's aid society, the police and in her affidavit material.

(k) There was no reference in the report to a letter that Mr. J.F. wrote to the Catholic children's aid society stating that the mother should desist from making abuse allegations against him.

(l) No reference was made in the report that the respondent mother had allegedly timed the abuse allegations to coincide with upcoming court proceedings.

**[4]** Mr. J.F. requested a ruling on the admissibility of tapes, as Dr. Waddell of the CAAP team is shortly to be called as his witness; if the tapes are to be excluded as evidence, he indicates that it would preclude him from having to undergo the expense of having a transcript of the tape recording.

**[5]** Since Dr. Waddell is his witness, I speculate that he does not want to put the tapes in as part of his case, but rather use them in order to cross-examine the witness. I presume that the tapes are necessary to assist the court to declare that Dr. Waddell is a hostile or adverse witness.

**[6]** Section 23 of the Ontario *Evidence Act*, R.S.O. 1990, c. E-23, as amended, provides:

> **23. How far a party may discredit his or her own witness.**— A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding, proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given, the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement.

The second edition of *Halsbury's Laws of England*, vol. 13, page 760, states:

> By an "adverse" witness is meant, not one whose testimony turns out to be unfavourable, but one who shows a mind hostile to the party calling him and who, by his manner of giving evidence, shows that he is not desirous of telling the court the truth. Whether he shows himself so hostile as to justify his cross-examination by the party calling him, is a matter for the discretion of the judge and this is so even where a party calls a witness who must of necessity be adverse to him, as, for example, his opponent in the case.

If Dr. Waddell is not found to be adverse or hostile, he cannot be cross-examined by the applicant.

**[7]** On 22 March 2000, counsel for Dr. Waddell and Dr. MacMillan wrote to Mr. J.F. the following letter:

> Your letter of March 20, 200 was forwarded to me for reply.
>
> Enclosed are copies of both Dr. MacMillan and Dr. Waddell's Curriculum

Vitaes.

> You have stated to members of CAAP and confirmed in Court that you have tape recordings of all your interviews with CAAP members and that you wanted to use them in Court. Please provide me with the unedited copies of all of the tapes that you have.
>
> This is to further confirm that you advised Madam Justice McLaren that you intend to move before the trial Judge to have Dr. Macmillan and Dr. Waddell declared as hostile witnesses. Please provide me with your motion and supporting material as soon as possible.

On 31 March 2000, this was followed up by a further letter:

> Further to our letter of March 28, 2000, please advise us immediately with your position on providing our office with copies of the unedited tapes.

Mr. J.F. declined to provide any disclosure.

**[8]** The issue of the admissibility of tape recordings has been addressed in Sopinka and Lederman in the *Law of Evidence in Civil Cases* at pages 29 and 30:

> A tape recording of a conversation, which would otherwise be admissible if heard by a witness and related in the witness-box, is admissible notwithstanding that it may have been obtained contrary to provincial law.
>
> While the cases stress that the admissibility of a tape recording will depend entirely upon the circumstances of each case, the circumstances referred to are the adequacy of proof of the accuracy of the recording. It is therefore necessary to prove, (1) that the voice is that of the person or persons alleged to be taking part in the conversation. (2) that the recording accurately records what was said, and (3) how the record was brought into existence.
>
> In practice, it is desirable to have a transcript prepared of the recording. The court can then be satisfied as to the accuracy of the transcript by either hearing the recording and comparing it with the transcript, or, where this would necessitate the playing over and over again of the recording, by calling the person who prepared the transcript as a witness.
>
> If it is intended to introduce the tape recording in cross-examination, proof may be facilitated by reading the transcript to the witness. If the witness admits having the conversation and what was said, no further proof is required. If, however, the conversation or its accuracy is denied, then the recording must be proved in the manner described above.

**[9]** The applicant wants to use these tapes to impeach his own witness before even calling her. The witness anticipated this as early as 22 March and wished copies of the supporting material on the applicant's anticipated motion to have her declared hostile. I am not entirely certain of the applicant's reason for denying the witness the information she sought. Now, at the eleventh hour, with his witness soon to be called, the applicant seeks the aid of the court to assist him to perfect his position; that is to say:

(a) give him time to prepare a transcript of what was said in the interviews; and

(b) establish that the recording is accurate.

**[10]** In the present circumstances, having refused to provide his own witness, whom he

seeks to impeach at the outset, with a copy of the tape or a transcript, there is, in my view, a good reason not to extend him time to get his evidence in order, if it were usable for questioning or otherwise admissible into evidence.

**[11]** The applicant's professional witnesses, who have been summoned, will therefore appear as required in their summons to witness, subject to further submissions by Mr. Jaskot on whether or not I should quash the summons to witnesses.

**[12]** On the admissibility of the tapes, if the applicant can satisfy the procedural requirements as set out in Sopinka and Lederman, are the tapes otherwise admissible into evidence? Since the publication of the above passage from Sopinka and Lederman, there have been two reported cases dealing with the surreptitious taping of witnesses or parties in family law cases.

**[13]** In *Reddick v. Reddick* (1997), 14 C.P.C. (4th) 175, [1997] O.J. No. 2497, 1997 CarswellOnt 3477 (Ont. Gen. Div.), the court allowed four tapes of conversations between a mother and her two children to be introduced as evidence. These were illegally obtained by a wire tap arranged by the father. Justice Judith M. Bell allowed them into evidence on the basis of relevancy. However, Mrs. Reddick was aware that many of the telephone calls were being intercepted, and had even commented on that from time to time.

**[14]** In *Fattali v. Fattali* (1996), 22 R.F.L. (4th) 159, 1996 CanLII 7272, [1996] O.J. No. 1207, 1996 CarswellOnt 1284 (Ont. Fam. Ct.), Justice Henry Vogelsang refused to allow into evidence conversations between a family pædiatrician and a father that had been secretly recorded by the latter in which the doctor discussed the mother's administration of a drug to the child. The court stated at page 161:

> **[5]** . . . In my view, such forays into the gathering of potential evidence are to be discouraged in the strongest terms. Proceedings involving the best interests of children should not be decided on evidence the product of calculated subterfuge. It does not help the father's position to be plotting tricks or deceit to advance his cause. The tape recording of the statements of Dr. Carson and his nurse are not admissible.

**[15]** I agree with that conclusion which ought to be applied to the facts of this case. In addition to Justice Vogelsang's reasons, permitting such misconduct by the applicant would discourage members of the helping professions from providing assistance to parties who might be involved in family law proceedings arising from the problems for which they sought medical, psychological or social work help. That would not advance the administration of justice.

**[16]** I conclude that the secretly-made tapes of Mr. J.F. cannot be admitted into evidence, nor used for the purpose of cross-examination of the members of the CAAP team, nor to have them declared as hostile witnesses.

**SUPREME COURT OF CANADA**

**CITATION:** F.H. *v.* McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53

**DATE:** 20081002
**DOCKET:** 32085

**BETWEEN:**

**F.H.**
Appellant
and
**Ian Hugh McDougall**
Respondent

**AND BETWEEN:**

**F.H.**
Appellant
and
**The Order of the Oblates of Mary Immaculate in the Province of British Columbia**
Respondent

**AND BETWEEN:**

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

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

**REASONS FOR JUDGMENT:** (paras. 1 to 102) Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

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F.H. *v.* McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53

**F.H.** *Appellant*

*v.*

**Ian Hugh McDougall** *Respondent*

- and -

**F.H.** *Appellant*

*v.*

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

- and -

**F.H.** *Appellant*

*v.*

**Her Majesty The Queen in Right of Canada as represented**

**by the Minister of Indian Affairs and Northern Development** *Respondent*

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

**Neutral citation: 2008 SCC 53.**

File No.: 32085.

2008: May 15; 2008: October 2.

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

on appeal from the court of appeal for british columbia

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

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

*Appeals — Standard of review — Applicable standard of appellate review on questions*

*of fact and credibility.*

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

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

There is only one standard of proof in a civil case and that is proof on a balance of

probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [30] [40] [44-46] [49] [53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding

circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that H was nevertheless a credible witness. Where a trial judge demonstrates that he or she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal identified no such error. [52] [58-59] [70] [72-73] [75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case

above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [77] [80-81] [86] [96]

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

**Cases Cited**

**Applied:** *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51; **referred to:** *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.A.C. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

**Statutes and Regulations Cited**

*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125.

*Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1).

*Criminal Code*, R.S.C. 1985, c. C-46, s. 274.

*Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l).

**Authors Cited**

Rothstein, Linda R., Robert A. Centa and Eric Adams. "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 455.

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

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Rowles and Ryan JJ.) (2007), 68 B.C.L.R. (4th) 203 (*sub nom. C. (R.) v. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, allowing the appeal against Gill J.'s decision in the case of sexual assault but dismissing the appeal from her finding of physical assault, [2005] B.C.J. No. 2358 (QL) (*sub nom. R.C. v. McDougall*), 2005 CarswellBC 2578, 2005 BCSC 1518. Appeal allowed.

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

*Bronson Toy*, for the respondent Ian Hugh McDougall.

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

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

The judgment of the Court was delivered by

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

I. Facts

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

[3] The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was

accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

[4] F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately 10 years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

> As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.
>
> F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.
>
> The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.
>
> The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.

> The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took him upstairs to the supervisors' washroom. Another rape occurred.
>
> ([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

[6] F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

## II. Judgments Below

### A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact:

(1) Was either plaintiff physically or sexually abused while he attended the school?

(2) If the plaintiff was abused

(a) by whom was he abused?

(b) when did the abuse occur? and

(c) what are the particulars of the abuse?

[8] The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

[9] The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

[10] In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defence that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defence's position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while

acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defence counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

[11] The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults being four incidents of anal intercourse committed during the 1968-69 school year.

[12] In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

[13] With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

[15] Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

[16] Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did not scrutinize the evidence in the manner required and thereby erred in law.

[17] In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

[18] In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

[19] Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other . . . requires . . . an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

[20] In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

[21] While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

[22] Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

[23] In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

[24] Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

[25] Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

## III. Analysis

### A. *The Standard of Proof*

#### (1) Canadian Jurisprudence

[26] Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 455, at p. 456:

> These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.

[27] Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard

of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated:

> It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [p. 459]

[28] In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

> The court is justified in imposing a higher degree of probability which is "commensurate with the occasion": . . . .

[29] In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

[30] However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. . . .
>
> . . . There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[31] In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

[32] In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply.

In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> . . . I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

[33] Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

> . . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

[34] Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

[35] Lord Hoffmann addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

[36] The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffmann states:

> I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffmann did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

> I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[37] Lord Hoffmann went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

> I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

[38] *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section I of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child

seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[41] Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused

> committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[42] By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:

> Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

[43] An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

[44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and

defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

> Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

[48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

> Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[50] I turn now to the issues particular to this case.

B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

[51] The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

[52] In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had

failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "scrutinize the evidence in the manner required and thereby erred in law" (para. 79).

[53] As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

[54] Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out. (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was))

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

[55] An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

[56] Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality

of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[59] It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

[60] The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77 that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to the respondent's recollection of events. In fact, the defence evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

[61] However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

[62] In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

[63] The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall, he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

[64] It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

[65] However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

[66] As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

[67] Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

[68] The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt,

it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

[69] As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

[70] The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

[71] All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be

assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

[72] With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

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

[73] As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. *Palpable and Overriding Error*

[74] Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

[75] I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole. She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

[76] In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over 30 years earlier when F.H. was approximately 10 years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

[77] The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

[78] In her concurring reasons at para. 106, Southin J.A. stated:

> To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

[79] The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

[81] Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), as well as the

current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility Is in Issue?*

[82] At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).
>
> . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on a balance of probabilities.

[83] *W. (D.)* was a decision by this Court in which Cory J., at p. 758, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[84] These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

> Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.
>
> . . .
>
> . . . In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[85] The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

[87] In an argument related to *W. (D.)*, the Attorney General of Canada says, at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

[88] The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> . . . a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[89] Thus, the Attorney General contends, at para. 47 of its factum, that:

> In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

[90] I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

[91] The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H. She also dealt with the defence arguments with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

[92] In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behaviour such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

[93] She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

[94] And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

[95] At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

[96] I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did

not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. *Were the Reasons of the Trial Judge Adequate?*

[97] The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that led to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this Court that the reasons are nonetheless inadequate.

[98] The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

(1) To justify and explain the result;

(2) To tell the losing party why he or she lost;

(3) To provide for informed consideration of the grounds of appeal; and

(4) To satisfy the public that justice has been done.

[99] However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. . . . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

[100] An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to

> verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[101] Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

## IV. Conclusion

[102] I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

*Appeal allowed with costs.*

*Solicitors for the appellant: Donovan & Company, Vancouver.*

*Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.*

*Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.*

*Solicitor for the respondent Her Majesty the Queen in Right of Canada: Attorney General of Canada, Toronto.*

# Ontario Energy Board Act, 1998
# Loi de 1998 sur la Commission de l'énergie de l'Ontario

## ONTARIO REGULATION 200/02
## CONSUMER PROTECTION

**Consolidation Period:** From July 30, 2005 to the e-Laws currency date.

Last amendment: O.Reg. 25/05.

***This Regulation is made in English only.***

**Definition of consumer**

**1.** The amount of electricity referred to in clause (a) of the definition of "consumer" in section 88.1 of the Act is 150,000 kilowatt hours. O. Reg. 200/02, s. 1.

**Unfair practices**

**2.** (1) The following acts or omissions of a retailer of electricity or gas marketer are unfair practices for the purposes of Part V.1 of the Act:

1. Making any false, misleading or deceptive statement to the public or to any consumer, including but not limited to a false, misleading or deceptive statement relating to the following:
   i. The terms and conditions of any contract.
   ii. The quality or other characteristics of any electricity or gas provided by any retailer of electricity or gas marketer.
   iii. The status of any retailer of electricity or gas marketer or the business relationship, affiliation or connection between any retailer of electricity or gas marketer and any other person.
   iv. Benefits to the consumer arising from the status of any retailer of electricity or gas marketer or the business relationship, affiliation or connection between any retailer of electricity or gas marketer and any other person.
   v. The rate for the distribution of electricity or gas or the total price of electricity or gas.
   vi. The difference between any price charged for the provision of electricity or gas by any retailer of electricity or gas marketer, including a distributor, and any price charged by any other retailer of electricity or gas marketer, including a distributor.
   vii. The amount of money to be saved by a consumer, expressed in any manner, if a consumer chooses one retailer of electricity or gas marketer, including a distributor, over any other entity selling electricity or gas.
   viii. The period of time during which a consumer may enter into a contract for the provision of electricity or gas at a specified price.
   ix. The consequences if the consumer does not enter into or reaffirm a contract with the retailer of electricity or gas marketer.
2. Failing to disclose information about the products, services, or business of a retailer of electricity or a gas marketer, if,
   i. the failure has the effect of deceiving or misleading a consumer, or
   ii. the retailer of electricity or gas marketer knows or ought to know that the failure has the capacity or tendency to deceive or mislead a consumer.

2.1 Failing, before entering into, renewing or extending a contract for the provision of electricity, to give the consumer a written notice, in not less than 12 point bold type, that states,
   i. the price that would be payable by the consumer for the provision of electricity if the consumer enters into, renews or extends the contract, expressed per kilowatt hour of electricity, and
   ii. the price that would be payable by the consumer if the consumer does not enter into, renew or extend the contract but purchases electricity directly from the consumer's local electricity distributor, expressed per kilowatt hour of electricity.

2.2 Structuring the billing arrangements in a contract that is renewed or extended for a period of one year or less in a fashion that misleads or deceives the consumer in respect of the monthly costs of the renewed or extended contract during the period when the consumer may cancel the renewed or extended contract.

3. Asking a distributor to provide electricity or gas under a contract between a consumer and the retailer of electricity or gas marketer, if the contract is not signed by the consumer or is otherwise not valid.
4. Failing to comply with the Fair Marketing Practices set out in the Electricity Retailer Code of Conduct or the Code of Conduct for Gas Marketers approved by the Board.
5. If a person acting on behalf of the retailer of electricity or gas marketer negotiates or concludes a contract in person with another person at a direct sales location,
    i. failing, at the time of negotiating or concluding the contract, to give the other person a written copy of any document that is presented to the other person and is signed by the other person,
    ii. failing, at the time of negotiating or concluding the contract, to give the other person a written copy of any document that is presented to the other person but is not signed by the other person, if the other person requests a copy, or
    iii. on or after August 1, 2002, failing, at the time of negotiating or concluding the contract, to give the other person a business card that,
        A. identifies the person acting on behalf of the retailer of electricity or gas marketer,
        B. identifies the retailer of electricity or gas marketer,
        C. includes the number of the electricity retailer's licence or gas marketer's licence issued under the Act to the retailer of electricity or gas marketer, and
        D. includes the telephone number of the retailer of electricity or gas marketer.
6. Despite the terms of any contract and subject to the rules for an extension or renewal of a contract for a period of one year or less provided in subsection 6 (2.1), amending any term of a contract for the provision of electricity or gas to a consumer without the express written consent of the consumer given not more than one month before the amendment is made.
7. Any act or omission that is an unfair practice under Part III of the *Consumer Protection Act, 2002*. O. Reg. 200/02, s. 2 (1); O. Reg. 340/02, s. 1; O. Reg. 194/03, s. 1; O. Reg. 25/05, s. 1.

(2) In paragraph 5 of subsection (1),

"direct sales location" means any place other than,

(a) the place of business of the retailer of electricity or gas marketer,

(b) a market place,

(c) an auction,

(d) a trade fair,

(e) an agricultural fair, or

(f) an exhibition. O. Reg. 200/02, s. 2 (2).

**Written copy of contract**

**3.** For the purpose of section 88.9 of the Act, the written copy of the contract shall be delivered to the consumer within 40 days after the consumer signs the contract. O. Reg. 200/02, s. 3.

**Reaffirming or not reaffirming contracts**

**4.** (1) Subject to subsection (3), for the purpose of section 88.9 of the Act, a consumer may reaffirm a contract or give notice to not reaffirm a contract by giving written notice to the retailer of electricity or gas marketer by any means that indicates an intention of the consumer to reaffirm the contract or to not reaffirm the contract, as the case may be. O. Reg. 200/02, s. 4 (1).

(2) Where notice is given under subsection (1) other than by personal service, it shall be deemed to have been given when sent. O. Reg. 200/02, s. 4 (2).

(3) Despite the *Electronic Commerce Act, 2000*, notice under subsection (1) may not be given by telephone unless a voice recording of the telephone notice is made and, on request, is given to the consumer. O. Reg. 200/02, s. 4 (3).

**Date for contract to cease to have effect**

**5.** (1) If clause 88.9 (10) (a) of the Act applies to a contract, the 41st day after the consumer signs the contract is prescribed,

(a) for the purpose of subsection 88.9 (10) of the Act, as the day the contract ceases to have effect; and

(b) for the purpose of subsection 88.9 (13) of the Act, as the day the consumer has no further obligations. O. Reg. 200/02, s. 5 (1).

(2) If clause 88.9 (10) (b) or (c) of the Act applies to a contract, the 61st day following the day on which the written copy of the contract was delivered to the consumer is prescribed,

(a) for the purpose of subsection 88.9 (10) of the Act, as the day the contract ceases to have effect; and

(b) for the purpose of subsection 88.9 (13) of the Act, as the day the consumer has no further obligations. O. Reg. 200/02, s. 5 (2); O. Reg. 330/03, s. 1.

**Renewals and extensions of contracts**

**6.** (1) For the purpose of subsection 88.9 (8) of the Act, a contract may be renewed or extended only if,

(0.a) the contract,

(i) contains a provision that allows for its renewal or extension, and

(ii) no matter how many times it is renewed or extended and subject to subsections (2) and (2.1), the contract is renewed or extended in total for a period no longer than the renewal or extension period contemplated in the provision in the contract;

(a) the contract contains the same information that subsection 88.10 (1) of the Act would require in a contract that is entered into on the day the retailer of electricity or gas marketer complies with paragraph 1 of subsection (2);

(b) the contract is renewed or extended without any changes, other than changes to the term of the contract and the price for the provision of electricity or gas; and

(c) the contract is renewed or extended,

(i) in accordance with subsection (2), in the case of a contract that is renewed or extended for a period of more than one year, or

(ii) in accordance with subsection (2.1), in the case of a contract that is renewed or extended for a period of one year or less. O. Reg. 200/02, s. 6 (1); O. Reg. 194/03, s. 2 (1, 2).

(2) The following rules apply to the renewal or extension of a contract for a period of more than one year:

1. The retailer of electricity or gas marketer must give the consumer written notice of the changes to the contract, a copy of the original contract and a renewal or extension form.

2. The renewal or extension form must clearly indicate, in not less than 12 point type,

i. that the purpose of the form is to renew or extend the contract,

ii. that the retailer of electricity or gas marketer is offering to renew or extend the contract without any changes, other than changes described on the form, in not less than 12 point type, to the term of the contract and the price for the provision of electricity or gas,

ii.1 in the case of a contract for the provision of electricity,

A. the price that would be payable by the consumer for the provision of electricity if the consumer renews or extends the contract, expressed per kilowatt hour of electricity, and

B. the price that would be payable by the consumer if the consumer does not renew or extend the contract but purchases electricity directly from the consumer's local electricity distributor, expressed per kilowatt hour of electricity,

iii. that the contract will only be renewed or extended if the consumer accepts the renewal or extension by giving written notice to the retailer of electricity or gas marketer,

iv. even if the consumer accepts the renewal or extension, the contract will not be renewed or extended if, not later than 14 days after giving the notice of acceptance, the consumer retracts the acceptance by giving written notice of the retraction to the retailer of electricity or gas marketer, and

v. in the case of a contract for the provision of electricity, that the contract will only be renewed or extended if the consumer specifically acknowledges in writing that the consumer has read the information referred to in subparagraph ii.1.

3. If the current term of the contract expires less than 60 days after this section comes into force, the material referred to in paragraph 1 must be given to the consumer not more than 120 days before the current term of the contract expires.

4. If the current term of the contract expires 60 days or more after this section comes into force, the material referred to in paragraph 1 must be given to the consumer not less than 60 and not more than 120 days before the current term of the contract expires.

5. The consumer may accept the renewal or extension of the contract with the changes described on the renewal or extension form only by giving written notice to the retailer of electricity or gas marketer that indicates an intention of the consumer to accept the renewal or extension.

5.1 In the case of a contract for the provision of electricity, an acceptance under paragraph 5 is void unless the consumer specifically acknowledges in writing that the consumer has read the information referred to in subparagraph 2 ii.1.

6. Not later than 14 days after giving notice under paragraph 5, the consumer may retract the acceptance by giving written notice to the retailer of electricity or gas marketer that indicates an intention of the consumer to retract the acceptance.

7. The renewal or extension only takes effect if the consumer accepts the renewal or extension under paragraph 5 and, on the 15th day after giving notice under paragraph 5, the consumer has not retracted the acceptance under paragraph 6. O. Reg. 200/02, s. 6 (2); O. Reg. 340/02, s. 2 (1-4); O. Reg. 194/03, s. 2 (3).

(2.1) The following rules apply to the renewal or extension of a contract for a period of one year or less:

1. Not less than 60 days before and more than 120 days before the renewal or extension date of the contract, the retailer of electricity or gas marketer must give the consumer written notice, in not less than 12 point type in each case except for the copy of the original contract, that includes,

   i. the changes to the contract,

   ii. a copy of the original contract,

   iii. a statement of all the information required under subsection 88.10 (1) of the Act,

   iv. in the case of a contract for the provision of electricity,

      A. the price that would be payable by the consumer for the provision of electricity if the contract is not cancelled, expressed per kilowatt hour of electricity, and

      B. the price that would be payable by the consumer if the contract is cancelled and the consumer purchases electricity directly from the consumer's local electricity distributor, expressed per kilowatt hour of electricity,

   v. a cancellation form,

   vi. the renewal or extension date of the contract and the options that are available to the consumer as of that date, of which one option must be that the consumer may cancel the contract,

   vii. the fact that the contract will be renewed or extended unless the consumer gives written notice of their intention to cancel the contract within 30 days after the consumer receives notice under this paragraph,

   viii. the fact that the consumer may also cancel the contract within 35 days after the first bill under the renewed or extended contract is sent, and

   ix. in the case of a contract for the provision of electricity, a statement that the contract will only be renewed or extended if the consumer specifically acknowledges in writing that the consumer has read the information referred to in subparagraph iv.

2. The cancellation form must clearly indicate, in not less than 12 point type,

   i. that the consumer may use the form to cancel the contract or may cancel the contract in writing in any way, as long as it indicates the consumer's intention to cancel the contract,

   ii. that the consumer may give notice of the cancellation at the postal address or the electronic mail address that must be included in the form,

   iii. that the consumer may reach the retailer of electricity or gas marketer by telephone at the toll-free telephone number that must be included in the form,

   iv. that, in the absence of its cancellation by the consumer, the retailer of electricity or gas marketer will renew or extend the contract without any changes, other than the changes described, in not less than 12 point type, on the form, to the terms of the contract and the price for the provision of electricity or gas.

3. The contract is renewed or extended for a period of no more than one year if the retailer of electricity or gas marketer complies with paragraphs 1 and 2 and the consumer does not give written notice of cancellation of the contract under subparagraph 1 vii.

4. Despite the renewal or extension of the contract under paragraph 3, a consumer may give written notice of cancellation of the contract within 35 days after the day on which the first bill under the renewed or extended contract is sent.

5. In the case of a contract for the provision of electricity, a renewal or extension of the contract is void unless the consumer specifically acknowledges in writing that the consumer has read the information referred to in subparagraph 1 iv. O. Reg. 194/03, s. 2 (4); O. Reg. 261/03, s. 1 (1, 2); O. Reg. 330/03, s. 2.

(2.2) Where notice is given under subsection (2.1) other than by personal service, it shall be deemed to have been given when sent. O. Reg. 194/03, s. 2 (4).

(3) Subject to subsection (5), notice under paragraph 5 or 6 of subsection (2) may be given by any means. O. Reg. 200/02, s. 6 (3).

(4) Where notice is given under paragraph 5 or 6 of subsection (2) other than by personal service, it shall be deemed to have been given when sent. O. Reg. 200/02, s. 6 (4).

(5) Despite the *Electronic Commerce Act, 2000*, notice under paragraph 5 or 6 of subsection (2) may not be given by telephone unless a voice recording of the telephone notice is made and, on request, is given to the consumer. O. Reg. 200/02, s. 6 (5).

(5.1) Subject to subsection (5.3), an acknowledgement under paragraph 5.1 of subsection (2) may be given by any means. O. Reg. 340/02, s. 2 (5).

(5.2) Where an acknowledgement is given under paragraph 5.1 of subsection (2) other than by personal service, it shall be deemed to have been given when sent. O. Reg. 340/02, s. 2 (5).

(5.3) Despite the *Electronic Commerce Act, 2000*, an acknowledgement under paragraph 5.1 of subsection (2) and paragraph 5 of subsection (2.1) may not be given by telephone unless a voice recording of the telephone acknowledgment is made and, on request, is given to the consumer. O. Reg. 261/03, s. 1 (3).

(6) Nothing in this section prevents a new contract from being entered into in accordance with the Act. O. Reg. 200/02, s. 6 (6).

**Information to be included in contracts**

**7.** (1) For the purpose of clause 88.10 (1) (a) of the Act, a contract must contain the following information:

1. The consumer's name and address.
2. The name, business address, telephone number and, if any, fax number, website address, e-mail address and toll-free telephone number of the retailer of electricity or gas marketer.
3. The number of the electricity retailer's licence or gas marketer's licence issued under the Act to the retailer of electricity or gas marketer.
4. The name of the person who signed the contract on behalf of the retailer of electricity or gas marketer.
5. The date on which the parties to the contract entered into it.
6. The date that the provision of electricity or gas is intended to start under the contract and a description of any circumstances that may prevent electricity or gas from being provided on that date.
7. A statement, in not less than 12 point bold type, that the contract ceases to have effect unless the retailer of electricity or gas marketer delivers a written copy of the contract to the consumer within 40 days after the consumer signs the contract.
8. A statement, in not less than 12 point bold type, that the contract ceases to have effect unless it is reaffirmed by the consumer in accordance with section 88.9 of the *Ontario Energy Board Act, 1998* before the 61st day following the day on which the written copy of the contract is delivered to the consumer, unless subsections 88.9 (3) to (6) and clauses 88.9 (10) (b) and (c) of the Act do not apply to the contract pursuant to subsection 88.9 (16) of the Act.
9. A statement, in not less than 12 point bold type, that the consumer has the right set out in subsection 88.10 (2) of the *Ontario Energy Board Act, 1998* to cancel the contract within one year of entering into the contract if the contract does not meet the requirements referred to in subsection 88.10 (1) of the Act.
10. The heading "Consumer's Rights" in not less than 12 point bold underlined type preceding the statements described in paragraphs 7, 8 and 9.
11. A statement that the consumer is contracting with a retailer of electricity or gas marketer, not the consumer's local electricity distributor or local gas distributor.
12. In the case of a contract for the provision of gas, a statement of the price to be paid under the contract for the provision of gas, expressed per cubic metre of gas.

12.1 In the case of a contract for the provision of electricity,

i. a statement, in not less than 12 point bold type, of,

   A. the price to be paid under the contract for the provision of electricity, expressed per kilowatt hour of electricity, and

   B. the price that would be payable by the consumer if the consumer does not enter into the contract but purchases electricity directly from the consumer's local electricity distributor, expressed per kilowatt hour of electricity, and

ii. a statement, immediately adjacent to the information referred to in subparagraph i, that is signed by the consumer and indicates that the consumer acknowledges having read the information referred to in subparagraph i.

13. The terms of payment that the contract requires, including the terms relating to any deposit, any late payment charges and any other charges or penalties payable under the contract.

14. A statement that the price for the provision of electricity or gas set out in the contract is the price for electricity or gas only and does not include regulated transmission, distribution and other charges that will be charged by the consumer's local electricity distributor or local gas distributor.

15. The circumstances in which the contract may be terminated by the consumer or by the retailer of electricity or gas marketer, and the address or fax number to which a consumer may send a notice of termination.

16. Whether or not the contract may be assigned by the retailer of electricity or gas marketer, and any terms or conditions relating to such an assignment.

17. Whether or not the contract applies only to specified premises and any terms or conditions relating to making the contract applicable to other premises.

18. If a contract for the provision of electricity contains a term assigning a rebate to which the consumer is entitled to another person, a statement in not less than 12 point bold type informing the consumer that the consumer will not receive the rebate.

19. A description of how to make a complaint to or ask a question of the retailer of electricity or gas marketer.

20. A description of how to contact the Ontario Energy Board's Customer Service Centre.

21. The signatures of the parties to the contract. O. Reg. 200/02, s. 7 (1); O. Reg. 340/02, s. 3; O. Reg. 330/03, s. 3.

(2) The information required by subsection (1) shall be contained in the contract in not less than 10 point type, unless subsection (1) provides otherwise. O. Reg. 200/02, s. 7 (2).

(3) In the event of a conflict, this section prevails over any code governing the conduct of a retailer of electricity made by the Board or any rules that apply to gas marketing made by the Board under clause 44 (1) (c) of the Act. O. Reg. 200/02, s. 7 (3).

(4) This section does not apply to contracts entered into before this section comes into force. O. Reg. 200/02, s. 7 (4).

**Date for cancellation of contract**

**8.** (1) For the purpose of subsection 88.11 (4) of the Act, the cancellation of a contract takes effect on the first day of the first month that begins more than 30 days after the notice of cancellation is given under subsection 88.11 (2) of the Act. O. Reg. 200/02, s. 8 (1).

(2) For the purpose of subsection 88.11 (7) of the Act, the cancellation of a contract takes effect on the day of the first reading of the consumer's electricity meter that is more than 30 days after the notice of cancellation is given under subsection 88.11 (2) of the Act. O. Reg. 200/02, s. 8 (2).

**Reading electricity meter**

**9.** (1) For the purpose of subsection 88.11 (5) of the Act, the distributor shall read the consumer's electricity meter not less than 31 days and not more than 45 days after the notice of cancellation was given by the consumer. O. Reg. 200/02, s. 9 (1).

(2) Despite subsection (1), the Board may authorize the distributor to read the consumer's electricity meter within a period specified by the Board that ends more than 45 days after the notice of cancellation was given if the Board is satisfied that it is not reasonably possible for the distributor to read the meter within the time period set out in subsection (1). O. Reg. 330/03, s. 4.

**10.** REVOKED: O. Reg. 330/03, s. 5.

**11.** OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 200/02, s. 11.

Back to top

# ELECTRICITY RETAILER CODE OF CONDUCT

**Ontario Energy Board**
December 20, 2004

**TABLE OF CONTENTS**

# 1 GENERAL

## 1.1 Interpretation

Unless otherwise defined in this Code, words and phrases shall have the meaning ascribed to them in the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended and the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, as amended. Nothing in this Code shall be interpreted to alter or affect the conditions of the licence of an electricity retailer, or relieve a retailer from compliance with the licence. Headings are for convenience only and shall not affect the interpretation of this Code. Words importing the singular include the plural and vice versa.

## 1.2 Definitions

For the purposes of this Code,

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"consumer" means a person who uses, for the person's own consumption, electricity that the person did not generate;

"consumer information" means information relating to a specific consumer obtained by a retailer or its salesperson, and includes information obtained without the consent of the consumer;

"customer" means a consumer with whom a retailer has a contract for the supply of electricity;

"Electricity Act" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"low volume consumer" means a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than 150,000 kilowatt hours of electricity.

"notice of acceptance" means the written notice to the retailer that indicates an intention of the consumer to accept the renewal or extension of a contract, as set out in section 6(2)5 of Ontario Regulation 200/02;

"notice of reaffirmation" means the written notice to the retailer that indicates an intention of the consumer to reaffirm the contract or not reaffirm the contract, as set out in section 4 of Ontario Regulation 200/02;

"retailing," for the purpose of this Code, includes door-to-door selling, telemarketing, direct mail selling activities, and any other means by which a retailer or a salesperson of a retailer interacts directly with a consumer;

"salesperson" has the meaning ascribed to it in section 88.4(4) of the Act.

### 1.3 Purpose of the Code

This Code sets the minimum standards under which a licensed electricity retailer may retail electricity. Specific requirements may apply for retailing to low volume consumers. The Board may exempt a retailer from compliance with this Code, in whole or in part, subject to such conditions or restrictions as the Board may determine. From time to time, amendments may be made to this Code by the Board in accordance with the Act.

### 1.4 Obligation to comply with the law

A retailer shall comply with the Act, the Electricity Act and regulations made under those Acts, including Part V.1 of the Act and O. Reg. 200/02. Nothing in this Code affects the obligation of a retailer and its salespersons to comply with provincial and federal law.

### 1.5 Obligation to ensure salespersons comply

A retailer shall ensure that its salespersons adhere to the same standards required of the retailer as set out in this Code.

### 1.6 Coming into force

This revised Code is in effect as of March 21, 2005, and replaces the Electricity Retailer Code of Conduct issued August 18, 1999.

## 2 FAIR MARKETING PRACTICES

2.1 A retailer or salesperson of a retailer, when retailing to a consumer, shall:

(a) immediately and truthfully give the name of the salesperson and the retailer to the consumer, and state that the retailer offering a contract for the supply of electricity is not the consumer's distributor;

(b) state the price to be paid under the contract for the supply of electricity, expressed per kilowatt hour of electricity for low volume consumers, and state the term of the contract;

(c) not exert undue pressure on a consumer;

(d) allow the consumer sufficient opportunity to read all documents provided;

(e) not make any offer or provide any promotional material to a consumer that is inconsistent with the contract being offered to or entered into with the consumer;

(f) not make any representation or statement or give any answer or take any measure that is false or is likely to mislead a consumer; and

(g) if retailing to a low volume consumer at a place other than the retailer's place of business, display a photograph of the salesperson, with the salesperson's name and the name of the retailer.

2.2 Where a retailer has a contract with a low volume customer that has a remaining term greater than 120 days, and the retailer has offered that customer a new contract that will amend, revoke or replace the existing contract, the retailer, as part of the process of reaffirmation of the new contract, must clearly inform the customer of the existing contract, its price, remaining term, and the fact that it will be amended, revoked or replaced if the customer reaffirms the new contract.

**Transfer requests**

2.3 A retailer shall not:

(a) submit a request to a distributor for a change of electricity supply for a consumer to that retailer unless the retailer has the permission of the consumer in writing to do so; or

(b) supply electricity to a consumer unless the retailer has the permission of the consumer in writing to do so, and has received the notice of reaffirmation from the consumer, where reaffirmation is required.

2.4 If a retailer discovers that it has submitted a transfer request to a distributor supported by a contract that does not comply with the Act, the Regulations, the Retailer's Licence or this Code, or does not contain the signature of the consumer, the retailer shall contact the affected consumer, clearly explain the non-compliance, and offer that consumer a compliant contract; and

(a) if the consumer accepts the compliant contract, provide a copy of the compliant contract to the consumer within 14 days of acceptance by that consumer; or

(b) if the consumer does not accept the compliant contract, immediately reverse the transfer request.

**Contracts with low volume consumers**

2.5 In addition to any requirements imposed by law, a contract between a retailer and a low volume consumer shall clearly state:

(a) the time period for which the contract is in effect;

(b) the type and frequency of bills the consumer will receive; and

(c) any terms and conditions for renewal.

2.6 A retailer shall not enter into any contract with a low volume consumer that has a term of more than five years.

**Renewal of low volume consumer contracts**

2.7 If, within the last year of a contract, a customer notifies a retailer in writing that the customer does not wish to renew or extend the contract, the retailer shall not renew or extend the contract unless the retailer reminds the customer of the notice and obtains positive acceptance of the renewed contract from the customer.

## 3 CONSUMER COMPLAINTS

3.1 A retailer shall provide to its low volume customers and prospective customers in all written offers, contracts and renewal forms, the telephone number of the retailer's customer service centre and the telephone number of the Ontario Energy Board Customer Service Centre.

3.2 If any low volume consumer makes a complaint to a retailer regarding retailing by the retailer or its salespersons, the conduct of the retailer's salespersons, the contract the consumer has with the retailer, or any other matter related to the retailer, the retailer shall expeditiously investigate the complaint and take all appropriate and necessary steps to resolve the complaint. If the complaint is not resolved to the satisfaction of the consumer, the retailer shall provide to the consumer the telephone number of the Ontario Energy Board Customer Service Centre.

3.3 In cases where a consumer complaint has been referred to the retailer from the Ontario Energy Board and resolution of that complaint is reached, the retailer shall implement the resolution immediately and shall confirm this, in writing, with the Ontario Energy Board.

## 4 SERVICES TO BE MAINTAINED BY AN ELECTRICITY RETAILER

4.1 A retailer shall have a current mailing address in Ontario and a current telephone number listed in Ontario, and shall provide them to every customer. If the retailer retails electricity to low volume consumers, the retailer shall have a telephone number which may be reached by the general public without charge, and shall provide the telephone number to every low volume customer.

## 5 CONFIDENTIALITY OF CONSUMER INFORMATION

5.1 A retailer shall not disclose consumer information as defined in this Code to any person other than the consumer or the Board without the consent of the consumer in writing, except when the information has been sufficiently aggregated such that an individual consumer's information cannot be identified, or where consumer information is required to be disclosed:

(a) for billing or market operation purposes;

(b) for law enforcement purposes;

(c) to comply with a statute or an order of a court or tribunal;

(d) when past due accounts of the consumer have been passed to a debt collection agency; or

(e) for the purpose of complying with the Market Rules.

5.2 A retailer shall inform consumers regarding the conditions described in paragraph 5.1 under which consumer information may be released to a third party without the consumer's consent.

5.3 A retailer shall not use consumer information obtained for one purpose from a consumer for any other purpose without the consent of the consumer in writing.

## 6 TRANSFER AND ASSIGNMENT OF CONTRACTS

6.1 A retailer shall not sell, transfer or assign the administration of a contract with a customer to another person who is not a licensed electricity retailer.

6.2 A retailer must notify the Board of any sale, transfer or assignment of contracts within 10 days of the sale, transfer or assignment.

6.3 Within 60 days of any sale, transfer or assignment of a contract to another retailer, the new retailer must notify the affected customers of the new retailer's address for service and telephone number.

## 7 BREACH OF THIS CODE

7.1 In addition to other penalties provided for under the Act, the licence of a retailer can be suspended or revoked if the licence holder does not comply with this Code.

7.2 A breach of this Code may occur in the course of retailing even if no contract is entered into.

# CODE OF CONDUCT
# for GAS MARKETERS

**Ontario Energy Board**
December 20, 2004

**TABLE OF CONTENTS**

# 1 GENERAL

## 1.1 Interpretation

Unless otherwise defined in this Code, words and phrases shall have the meaning ascribed to them in the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended. Nothing in this Code shall be interpreted to alter or affect the conditions of the licence of an gas marketer, or relieve a gas marketer from compliance with the licence. Headings are for convenience only and shall not affect the interpretation of this Code. Words importing the singular include the plural and vice versa.

## 1.2 Definitions

For the purposes of this Code,

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"consumer" means a person who annually uses less than 50,000 cubic metres of gas;

"consumer information" means information relating to a specific consumer obtained by a gas marketer or its salesperson, and includes information obtained without the consent of the consumer;

"customer" means a consumer with whom a gas marketer has a contract for the supply of gas;

"marketing" for the purpose of this Code, includes door-to-door selling, telemarketing, direct mail selling activities, and any other means by which a gas marketer or a salesperson of a gas marketer interacts directly with a consumer;

"notice of acceptance" means the written notice to the gas marketer that indicates an intention of the consumer to accept the renewal or extension of a contract, as set out in section 6(2)5 of Ontario Regulation 200/02;

"notice of reaffirmation" means the written notice to the gas marketer that indicates an intention of the consumer to reaffirm the contract or not reaffirm the contract, as set out in section 4 of Ontario Regulation 200/02;

"salesperson" has the meaning ascribed to it in section 88.4(4) of the Act.

### 1.3 Purpose of the Code

This Code sets the minimum standards under which a licensed gas marketer may market gas. The Board may exempt a gas marketer from compliance with this Code, in whole or in part, subject to such conditions or restrictions as the Board may determine. From time to time, amendments may be made to this Code by the Board in accordance with the Act.

### 1.4 Obligation to comply with the law

A gas marketer shall comply with the Act and regulations made under the Act, including Part V.1 of the Act and O. Reg. 200/02. Nothing in this Code affects the obligation of a gas marketer and its salespersons to comply with provincial and federal law.

### 1.5 Obligation to ensure salespersons comply

A gas marketer shall ensure that its salespersons adhere to the same standards required of the gas marketer as set out in this Code.

## 1.6 Coming into force

This revised Code is in effect as of March 21, 2005, and replaces the Gas Marketer Code of Conduct issued March 2, 1999.

## 2 FAIR MARKETING PRACTICES

2.1 A gas marketer or salesperson of a gas marketer, when marketing to a consumer, shall:

(a) immediately and truthfully give the name of the salesperson and the gas marketer to the consumer, and state that the gas marketer offering a contract for the supply of gas is not the consumer's local gas distributor;

(b) state the price to be paid under the contract for the supply of gas, expressed per cubic metre of gas, and state the term of the contract;

(c) not exert undue pressure on a consumer;

(d) allow the consumer sufficient opportunity to read all documents provided;

(e) not make any offer or provide any promotional material to a consumer that is inconsistent with the contract being offered to or entered into with the consumer;

(f) not make any representation or statement or give any answer or take any measure that is false or is likely to mislead a consumer; and

(g) if marketing at a place other than the gas marketer's place of business, display a photograph of the salesperson, with the salesperson's name and the name of the gas marketer.

2.2 Where a gas marketer has a contract with a customer that has a remaining term greater than 120 days, and the gas marketer has offered that customer a new contract that will amend, revoke or replace the existing contract, the gas marketer, as part of the process of reaffirmation of the new contract, must clearly inform the customer of the existing contract, its price, remaining term, and the fact that it will be amended, revoked or replaced if the customer reaffirms the new contract.

**Transfer requests**

2.3 A gas marketer shall not:

(a) submit a request to a gas distributor for a change of gas supply for a consumer to that gas marketer unless the gas marketer has the permission of the consumer in writing to do so; or

(b) supply gas to a consumer unless the gas marketer has the permission of the consumer in writing to do so, and has received the notice of reaffirmation from the consumer, where reaffirmation is required.

2.4 If a gas marketer discovers that it has submitted a transfer request to a gas distributor supported by a contract that does not comply with the Act, the Regulations, the Gas Marketer's Licence or this Code, or does not contain the signature of the consumer, the gas marketer shall contact the affected consumer, clearly explain the non-compliance, and offer that consumer a compliant contract; and

(a) if the consumer accepts the compliant contract, provide a copy of the compliant contract to the consumer within 14 days of acceptance by that consumer; or

(b) if the consumer does not accept the compliant contract, immediately reverse the transfer request.

**Contracts**

2.5 In addition to any requirements imposed by law, a contract between a gas marketer and a consumer shall clearly state:

(a) the time period for which the contract is in effect;

(b) the type and frequency of bills the consumer will receive; and

(c) any terms and conditions for renewal.

2.6 A gas marketer shall not enter into any contract with a consumer that has a term of more than five years.

**Renewal**

2.7 If, within the last year of a contract, a customer notifies a gas marketer in writing that the customer does not wish to renew or extend the contract, the gas marketer shall not renew or extend the contract unless the gas marketer reminds the customer of the notice and obtains positive acceptance of the renewed contract from the customer.

## 3 CONSUMER COMPLAINTS

3.1 A gas marketer shall provide to its customers and prospective customers in all written offers, contracts and renewal forms, the telephone number of the gas marketer's customer service centre and the telephone number of the Ontario Energy Board Customer Service Centre.

3.2 If any consumer makes a complaint to a gas marketer regarding marketing by the gas marketer or its salespersons, the conduct of the gas marketer's salespersons, the contract the consumer has with the gas marketer, or any other matter related to the gas marketer, the gas marketer shall expeditiously investigate the complaint and take all appropriate and necessary steps to resolve the complaint. If the complaint is not resolved to the satisfaction of the consumer, the gas marketer shall provide to the consumer the telephone number of the Ontario Energy Board Customer Service Centre.

3.3 In cases where a consumer complaint has been referred to the gas marketer from the Ontario Energy Board and resolution of that complaint is reached, the gas marketer shall implement the resolution immediately and shall confirm this, in writing, with the Ontario Energy Board.

## 4 SERVICES AND INFORMATION TO BE MAINTAINED BY A GAS MARKETER

4.1 A gas marketer shall have a current mailing address in Ontario and a current telephone number listed in Ontario which may be reached by the general public without charge, and shall provide them to every customer.

4.2 A gas marketer shall maintain on file, and provide to the Board on request:

(a) a current list of salespersons who act for that gas marketer; and

(b) for as long as contracts with customers or any renewal of them are in effect:

(i) a list of the gas marketer's customers;

(ii) permission from each customer, signed by the customer, to submit a request for a change of gas supply;

(iii) the contract with each customer, with the customer's signature, to purchase gas from the gas marketer or for the gas marketer to purchase gas as agent for the customer;

(iv) where reaffirmation of a contract is required, the notice of reaffirmation of the contract by the customer; and

(v) where notice of acceptance of contract renewal or extension is required, the notice of acceptance of the renewal or extension from the customer.

## 5 CONFIDENTIALITY OF CONSUMER INFORMATION

5.1 A gas marketer shall not disclose consumer information as defined in this Code to any person other than the consumer or the Board without the consent of the consumer in writing, except when the information has been sufficiently aggregated such that an individual's consumer information cannot be identified, or where consumer information is required to be disclosed:

(a) for billing or market operation purposes;

(b) for law enforcement purposes;

(c) to comply with a statute or an order of a court or tribunal; or

(d) when past due accounts of the consumer have been passed to a debt collection agency.

5.2 A gas marketer shall inform consumers regarding the conditions described in paragraph 5.1 under which consumer information may be released to a third party without the consumer's consent.

5.3 A gas marketer shall not use consumer information obtained for one purpose from a consumer for any other purpose without the consent of the consumer in writing.

## 6 TRANSFER AND ASSIGNMENT OF CONTRACTS

6.1 A gas marketer shall not sell, transfer or assign the administration of a contract with a customer to another person who is not a licensed gas marketer.

6.2 A gas marketer must notify the Board of any sale, transfer or assignment of contracts within 10 days of the sale, transfer or assignment.

6.3 Within 60 days of any sale, transfer or assignment of a contract to another gas marketer, the new gas marketer must notify the affected customers of the new gas marketer's address for service and telephone number.

## 7 BREACH OF THIS CODE

7.1 In addition to other penalties provided for under the Act, the licence of a gas marketer can be suspended or revoked if the licence holder does not comply with this Code.

7.2 A breach of this Code may occur in the course of gas marketing even if no contract is entered into.