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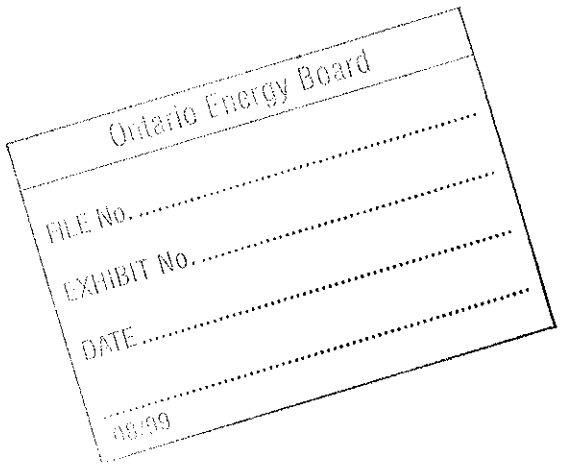
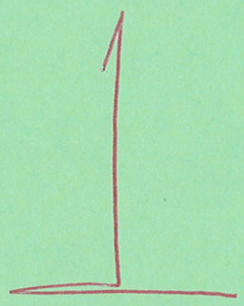
EB-2011-0144

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

BOARD STAFF

COMPENDIUM OF DOCUMENTS





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Ontario

BY E-MAIL AND WEB POSTING

April 20, 2010

To: All Licensed Electricity Distributors
All Other Interested Parties

Re: Early Rebasing Applications

This letter addresses the issue of electricity distributors filing rate applications to have their rates set through a cost of service proceeding earlier than scheduled.

Background

In 2006, the Board established a multi-year rate setting plan for electricity distributors. The plan calls for electricity distributors to have their rates set on a cost of service basis only once over a period of several years, with rates being set using an incentive regulation mechanism ("IRM") in the intervening years. As determined in March, 2009, 16 distributors were scheduled to have their rates rebased in 2011. Two distributors, originally scheduled to file for rebasing in 2010, have since requested that the rebasing of their rates be deferred to 2011, and the Board accepted those requests. On that basis, 18 distributors were scheduled by the Board to have their rates rebased in 2011, as shown in Appendix A. The Board has now received letters from four distributors indicating that they intend to file cost of service applications to have their rates rebased in 2011 rather than in 2012 as scheduled.

The Board has consulted distributors and other interested parties in relation to the development of the IRM (2nd and 3rd generations) as well as in relation to the list of distributors whose rates are to be rebased in any given year.

The Board's rate-setting policies are such that distributors are expected to be able to adequately manage their resources and financial needs during the term of their IRM plan. The Board's multi-year rate setting approach does contemplate that some distributors may legitimately need to have their rates rebased earlier than originally

scheduled, by making provision for an "off-ramp". The conditions under which the "off-ramp" applies reflect the Board's view of the circumstances that justify a departure from the plan schedule that would otherwise be applicable.

Early Rebasing Applications

A distributor, including the four distributors referred to above, that seeks to have its rates rebased in advance of its next regularly scheduled cost of service proceeding must justify, in its cost of service application, why an early rebasing is required notwithstanding that the "off ramp" conditions have not been met. Specifically, the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan period. Distributors are advised that the panel of the Board hearing the application may consider it appropriate to determine, as a preliminary issue, whether the application for rebasing is justified or whether the application as framed should be dismissed.

Distributors are also advised that the Board may, where an application for early rebasing does not appear to have been justified, disallow some or all of the regulatory costs associated with the preparation and hearing of that application, including the Board's costs and intervenor costs. In other words, the Board may order that some or all of those costs be borne by the shareholder.

Any distributor that proposes to file a cost of service application for 2011 rates, and that is not on the list attached as Appendix A to this letter, must so notify the Board in writing as soon as possible, and in any event no later than May 31, 2010, if it has not done so already.

Any questions relating to the above should be directed to the Market Operations Hotline at market.operations@oeb.gov.on.ca or 416-440-7604.

Yours truly,

Original signed by

John Pickernell
Assistant Board Secretary

Attachment: Appendix A -Selection of Electricity Distributors for Rate Rebasing in 2011

Selection of Electricity Distributors for Rate Rebasing in 2011

APPENDIX A

1	Attawapiskat Power Corporation
2	E.L.K. Energy Inc.
3	Fort Albany Power Corporation
4	Grimsby Power Incorporated
5	Hydro One Brampton Networks Inc.
6	Kashechewan Power Corporation
7	Kenora Hydro Electric Corporation Ltd
8	Kingston Electricity Distribution Limited
9	Milton Hydro Distribution Inc.
10	Niagara Peninsula Energy Inc.
11	Parry Sound Power Corporation
12	St. Thomas Energy Inc.
13	Toronto Hydro-Electric Systems
14	Wasaga Distribution Inc.
15	Waterloo North Hydro Inc.
16	Woodstock Hydro Services Inc.
17	Brant County Power Inc.
18	Fort Frances Power Corporation

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Ontario

BY E-MAIL

March 1, 2011

To: All Licensed Electricity Distributors
All Other Interested Parties

Re: Electricity Distributors Scheduled to Apply for Rebasing for 2012 Rates

This letter identifies the list of distributors that are expected to file a cost of service application in respect of their 2012 rates.

Background

The Board has followed a multi-year electricity distribution rate-setting plan for a number of years based on an approach whereby the rates of all electricity distributors would be rebased over the three-year period covering 2008, 2009 and 2010. In 2009, the Board extended the plan to cover the 2011 rate year.

The *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors*, issued on July 14, 2008, established a three year plan term for 3rd generation incentive regulation ("IR") (i.e., rebasing plus three years). The rates of a distributor were not expected to be subject to rebasing before the end of the plan term other than through an eligible off ramp.

In accordance with the multi-year rate-setting plan, the rates of each distributor would be rebased in only one of the years 2008, 2009, 2010 or 2011. Leading up to the year of rebasing, a distributor would be on the 2nd generation IR plan. Following the year of rebasing, a distributor would be subject to 3rd generation IR for a fixed term of three years.

In its October 27, 2010 letter regarding the development of a Renewed Regulatory Framework for Electricity ("RRF"), the Board announced that it was extending the 3rd generation IR plan until such time as three RRF policy initiatives have been substantially completed. As such, the four-year rate-setting cycle (i.e. rebasing plus three years of 3rd generation IR) remains in place for the time being.

Distributors Expected to Rebase for 2012

The Board expects that distributors whose rates were last rebased in 2008 will file their 2012 rate applications on a cost of service basis. In addition, seven distributors whose rates have not been rebased under the 3rd generation IR plan are also expected to file for a cost of service rate adjustment for 2012 rates. The list of distributors attached as Appendix A to this letter includes distributors that fall into these two categories.

A distributor that is on the list attached as Appendix A to this letter and that believes that its next cost of service application should be deferred beyond the 2012 rate year must notify the Board in writing as soon as possible, and in any event no later than **April 29, 2011**, including the reasons for which deferral of rebasing is being sought. The Board may, if appropriate having regard to the distributor's financial circumstances and other relevant factors, nonetheless require that the distributor's 2012 rates be set on a cost of service basis.

A distributor that proposes to file a cost of service application for 2012 rates, and that is not on the list attached as Appendix A to this letter, must so notify the Board in writing as soon as possible, and in any event no later than **April 29, 2011**, if it has not done so already. In keeping with the Board's approach as set out in its April 20, 2010 letter, a distributor that seeks to have its rates rebased earlier than scheduled must justify, in its cost of service application, why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remainder of the 3rd generation IR plan term.

As was the case in the three early rebasing applications heard in 2011, the panel of the Board hearing an early rebasing application may consider it appropriate to determine, as a preliminary issue, whether or not to proceed with the application as framed. Distributors are also reminded that, where an application for early rebasing does not appear to have been justified, the Board may disallow some or all of the regulatory

costs associated with the preparation and hearing of that application, including the Board's costs and intervenor costs.

Filing Timelines

The Board expects to issue further refinements to the cost of service filing guidelines in Chapter 2 of the *Filing Requirements for Transmission and Distribution Applications* by June 2011. Applicants are encouraged to file cost of service applications for 2012 rates as soon as possible, and no later than **August 26, 2011** for rates to become effective May 1, 2012. Applicants that wish to request cost of service rates effective January 1, 2012, are encouraged to file their applications sooner, and no later than **April 29, 2011**. It is the Board's expectation that distributors filing applications in advance of any revisions to the *Filing Requirements* will update their applications in due course to address any material changes that may be reflected in the revised *Filing Requirements*.

Yours truly,

Original Signed By

Kirsten Walli
Board Secretary

Electricity Distributors Scheduled to Apply for Rebasing for 2012 Rates

APPENDIX A

1	Atikokan Hydro Inc.
2	Attawapiskat Power Corporation
3	Brantford Power Inc.
4	Chapleau Public Utilities Corporation
5	E.L.K Energy Inc.
6	Enersource Hydro Mississauga Inc.
7	Erie Thames Powerlines Corporation
8	Espanola Regional Hydro Distribution Corporation
9	Fort Albany Power Corporation
10	Fort Frances Power Corporation
11	Grimsby Power Inc.
12	Guelph Hydro Electric Systems Inc.
13	Halton Hills Hydro Inc.
14	Hydro Ottawa Limited
15	Hydro 2000 Inc.
16	Kashechewan Power Corporation
17	Lakefront Utilities Inc.
18	Norfolk Power Distribution Inc.
19	Oshawa PUC Networks Inc.
20	PUC Distribution Inc.
21	Rideau St. Lawrence Distribution Inc.
22	Sioux Lookout Hydro Inc.
23	Wasaga Distribution Inc.
24	Wellington North Power Inc.

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Pankaj Sardana
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toronto hydro electric system

March 25, 2011

via RESS e-filing – original to follow by courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge St, 27th Floor
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

RE: Toronto Hydro-Electric System Limited (THESL)
Notice of Filing Intentions for 2012 Distribution Rates

Introduction

By way of letter dated March 1, 2011 the Board notified distributors of its expectations concerning the filing of cost-of-service (COS) rate applications for rebasing within the context of incentive regulation (IRM). In that letter, the Board set out a list of distributors from which the Board expected such an application, and furthermore advised distributors not appearing on that list that they should notify the Board as soon as possible, but in no event later than April 29, 2011, of any intention they may have to file a COS application for 2012 distribution rates.

By way of this letter, THESL advises the Board and other stakeholders of its intention to file a non-IRM COS application for 2012 rates. Reasons supporting the need for this approach are set out in detail below.

The Board and intervenors in THESL's current application for 2011 rates are of course aware that the question of the manner of regulation that will apply to the determination of THESL's 2012 rates is a Board-approved, unsettled issue that will go to hearing in the EB-2010-0142

proceeding[1]. THESL does not wish to disturb or depart from the process the Board has already established for determination of that issue, and consequently has filed a copy of this letter in that proceeding so that it will form part of the record in EB-2010-0142.

Prejudice to THESL Arising from the Use of IRM

The imposition of IRM upon THESL for 2012 would effectively freeze THESL's revenue requirement for that year and prejudge evidence that THESL is yet to file pertaining to its continuing need to make significant capital expenditures exceeding depreciation (CEEDs). (The 2011 price cap adjustment for a utility with a median stretch factor was set at 0.18%.) It would also effectively deny recovery by THESL of the revenue requirement related to $120.0 million in capital spending, that is, 50% of CEEDs incurred in 2011, due to the operation of the 'half-year rule'. Such an approach in these circumstances is unjustified and punitive.

In rate applications over the past several years, THESL has consistently presented extensive, detailed evidence concerning the ongoing need for major capital expenditures on its aging distribution system, substantially in excess of annual depreciation cost, for the purpose of infrastructure renewal and the maintenance and improvement of reliability. In its successive decisions the Board has in turn allowed capital expenditures at levels somewhat reduced from those initially requested by THESL, but nevertheless still significantly in excess of depreciation. In the current application, THESL and intervenors have proposed a settlement which provides for capital expenditures of $378.8 million, depreciation of $138.8 million, and CEEDs of some $240.0 million.

Ratebase is the determinant of the capitalization-related components of revenue requirement (i.e., return, PILs, depreciation and interest expense). Ratebase itself can be viewed as a reservoir of investment in the distribution system, with capital expenditures being the primary inflow and depreciation being the primary outflow.

IRM can be well suited to circumstances where depreciation is balanced by capital expenditures so that ratebase remains stable, or grows only slowly. However, in THESL's circumstances there continues to be a demonstrated need for overall capital expenditures to substantially exceed depreciation, now and for a period of many years into the future. As a result of significant CEEDs, ratebase must grow, and consequently so must revenue requirement. IRM is not designed to, and cannot, accommodate significant growth in ratebase and the consequential significant growth in capitalization-related revenue requirement.

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[1] Procedural Order No. 2 includes Issue 1.5 which states: "When would it be appropriate for Toronto Hydro to commence filing rate applications under incentive regulation? Is this application an appropriate base case for a future IRM application? If not, why not?"

In contrast to other utilities whose load and customer base is growing and driving capital expenditure needs, most of THESL's capital expenditures are directed to non-revenue producing investments. Since 2005 THESL's load has been declining, on average by more than 1% annually, and customer growth has averaged less than 1% annually. On balance, billing determinants (customers and load) are essentially static for THESL. Stated differently, THESL's capital expenditures do not produce new revenues sufficient to fund those expenditures.

In addition, the Board clearly indicated in EB-2008-0187 Decision (Hydro One Distribution rates, pages 7 through 9) that the Incremental Capital Module was not intended by the Board to be applied to situations of long-term, predictable capital expenditures in excess of depreciation. As a result the existing Incremental Capital Module is inapplicable to THESL's circumstances and does not address the issue of accommodating programmatic CEEDs.

The operation of the half-year rule would also be punitive for THESL if IRM were imposed in 2012, since the 2011 revenue requirement only funds 50% of approved CEEDs in 2011. By 2011 year end, THESL expects to have incurred 100% of approved capital expenditures for that year. Since 2012 revenue requirement would be essentially frozen relative to that for 2011, approximately 50% of 2011 CEEDs or $120.0 million, representing a revenue requirement of approximately $13 million[2], would be unfunded in the 2012 revenue requirement.

It is furthermore the case that not all of the expenditures related to infrastructure renewal can be capitalized. THESL has documented the need for workforce renewal as a result of cresting retirements within its labour force, and new accounting rules reduce the proportion of total project expenditures that can be capitalized. As a result, THESL's operating expenditures are driven significantly by factors other than inflation and this real growth cannot be fully offset or accommodated through productivity growth.

In essence, IRM and cost-of-service both serve as means of setting utility revenue requirements, directly or indirectly. In circumstances where material factors other than inflation and productivity are absent, IRM presents advantages of simplicity and predictability. However, it is unreasonable to expect IRM to accommodate factors that it is not designed to account for, and it is prejudicial to effectively deny the existence of those factors (e.g., significant infrastructure and workforce renewal) by imposing IRM in circumstances where those factors do exist, and which, in THESL's case, are likely to persist for the foreseeable future.

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[2] Assuming a capitalization-related cost rate of 11%

Prejudice to Customers Arising from the Use of IRM

In order to carry on with the necessary renewal of its infrastructure and workforce, THESL requires resources. The only resources THESL can draw on are ultimately those obtained through revenue requirement, since all forms of capital used by THESL must be compensated and THESL has no other material source of earnings.

If IRM is imposed on THESL then it will have no ability to support expenditures in excess of its frozen revenue requirement. In direct consequence of that, THESL would have to reduce 2012 capital expenditures to a level equal to the depreciation component of that revenue requirement. In concrete terms, this would involve a dramatic reduction of capital expenditures from a proposed 2011 level of approximately $380 million to a 2012 level of approximately $150 million. Furthermore, THESL would have to substantially arrest its workforce renewal efforts despite the ongoing aging of that workforce and the inexorable erosion of its human capital.

Such developments would clearly injure customer interests in continuing reliability and service levels provided by the electricity distribution system, both in the near and long terms.

Furthermore the effect of abruptly and artificially curtailing investment in the system would be (among other things) to create even larger costs and hurdles to overcome in the future. Arresting remedial investment in the distribution system (both physical and human capital) does not arrest the ongoing degradation of those physical assets or the erosion of human capital. In fact to do so would set the stage for exactly the kind of 'lumpy', catch-up expenditures that the Board has criticized THESL for in the past (for example, at pages 12-13 of the EB-2007-0680 Decision). Any action which would have the effect of further postponing much needed investment simply exacerbates ongoing reliability concerns and exposes customers to increased reliability and service risks. These outcomes are clearly untoward for all parties concerned.

Even in the event that THESL could continue investing in its system at levels constituting significant CEEDs under IRM, the resulting erosion of THESL's return on equity would lead in short order to an earnings offramp, thereby predictably defeating the purpose of a prolonged period of mechanistic adjustments.

It is instead clearly preferable to meet those requirements in a steady, planned manner rather than by reacting to one emergency after another. Providing a stable, predictable stream of resources to the electricity distribution system is the best way to minimize long run costs and avoid abrupt rate shocks. In circumstances where CEEDs are required and strong pressures for real growth in operating expenditures exist, IRM does not provide a stable flow of resources but instead induces a stair-step pattern of deferred operating and capital expenditures

followed by abrupt and possibly severe rate shocks, together with unmanageable peaks in project workload. Neither of these outcomes protects customer interests. Until CEEDs are no longer significant, regular cost-of-service proceedings, or their functional equivalent, provide the greatest degree of rate smoothing in the circumstances that THESL faces.

Regulatory Efficiency

The Board and intervenors achieve substantial efficiencies in the regulation of THESL viewed from a per customer perspective. Considering the list of 24 utilities from which the Board expects a 2012 cost-of-service rebasing application, and using the latest available (2009) Yearbook of Electricity Distributors information, THESL's one cost-of-service proceeding covers 89% of the *combined total* of customers from all 24 of those distributors. If the two major urban utilities on the list are removed, THESL's one cost-of-service proceeding covers 237% of the *combined total* of customers from the remaining 22 distributors. Considering all the distributors listed in the 2009 Yearbook, THESL's 2009 customer base of 689,138 is more than eleven times as large as the average (including THESL) of 60,661. In terms of customer coverage, therefore, one THESL proceeding is more than eleven times more productive than the average proceeding, a fact which should carry significant weight when set against the fact that the costs in dollars and regulatory resources of carrying out any proceeding are largely independent of utility size.

This is further accentuated by the fact that THESL and intervenors have been highly successful in the last two proceedings in reaching settlement on the majority of issues in those proceedings, thereby considerably reducing the most expensive aspect of any proceeding, which is oral hearing time.

Furthermore, on more than one occasion and specifically in THESL's current rate proceeding, the Board has used a THESL application as a 'test case' in setting policy for the entire sector. In the current proceeding for example, the Board has required THESL to produce evidence including two cost allocation studies pertaining to the question of suite metering and the possible establishment of a separate class for multi unit residential buildings. Regardless of the merits of that question, THESL cost-of-service applications have been used by the Board as the venue for consideration of such policy questions and thereby have enabled the Board and intervenors to gain even more policy-setting leverage from THESL's single application.

Even in cases where the issues could be argued to affect only THESL directly, the Board has directed THESL to provide further evidence which could only be dealt with in subsequent cost-of-service applications; for example, with respect to distributed generation in Toronto and the ratemaking consequences of the transfer of streetlighting assets.

Alternatives to the Imposition of IRM

In response to Board Staff interrogatory #9 in the EB-2010-0142 proceeding, THESL outlined how alternatives to both IRM and COS might emerge in the context of the Board's Renewed Regulatory Framework for Electricity initiative. The two approaches outlined there were essentially the multi-year cost of service approach and the 'augmented IRM' approach under which an expanded set of cost drivers would be recognized and applied to revenue requirement directly rather than to rates directly.

Having given further consideration to these questions in the interim THESL is now of the view that a well-defined alternative may emerge in time to be applied to 2013 rates and revenue requirement, and as a result THESL does not at this stage wish to commit to the 3 year cost of service framework that was mentioned in the interrogatory response noted above. Pending further developments in this area THESL anticipates that its 2012 rate application will be for a one year period.

Summary

The imposition of IRM on THESL for the purpose of setting rates in 2012 and the foreseeable future would be unwarranted, unfair, and prejudicial to the interests of customers and THESL, and is not required from the perspective of regulatory efficiency.

Instead, THESL believes that it can work with the Board and intervenors to develop alternative regulatory approaches which can fairly and successfully address the circumstances of both THESL and its customers, while meeting the needs of the Board and intervenors. While annual cost-of-service reviews are demanding on all parties, the Board should encourage development of constructive alternatives to that approach rather than adopting an existing alternative in the form of IRM which is clearly inappropriate for THESL and its customers.

Yours truly,

[Original signed by]

Pankaj Sardana

Vice-President, Treasurer and Regulatory Affairs
regulatoryaffairs@torontohydro.com

cc: Registered Intervenors in EB-2010-0142
J. Mark Rodger, Counsel to THESL

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INTRODUCTION

SCOPE OF APPLICATION

With this Application, Toronto Hydro-Electric System Limited ("THESL") seeks approval from the Ontario Energy Board ("OEB" or "Board") for revenue requirements, corresponding rates, and other specified items of relief for three separate but consecutive rate years commencing May 1, 2012 and ending April 30, 2015.

THE NEED FOR A COST-OF-SERVICE APPLICATION

THESL submits that a cost of service Application for these three rate years is the only approach that will accommodate THESL's extensive capital replacement and other requirements. THESL's position on this issue is explained at Exhibit A1, Tab 1, Schedule 2.

COMPLIANCE WITH FILING REQUIREMENTS

THESL has prepared this Application in accordance with the revised Filing Requirements for Transmission and Distribution Applications ("Filing Requirements") issued by the OEB on June 22, 2011, and believes that it has met these requirements in all relevant respects.

BOARD DIRECTIVES FROM OTHER PROCEEDINGS

In its EB-2010-0142 Decision, the Board directed THESL to implement a separate rate class for suite metered customers beginning May 1, 2012. While the development of that rate class is ongoing in Phase 2 of that proceeding, THESL understands that the methodology approved by the Board to develop the suite meter rate class will be applied to the revenue requirements resulting from this application. In the interim, THESL has provided proposed rates and bill impacts based on the currently existing rate classes. THESL will provide an update reflecting the outcome of EB-2010-0142, Phase 2 when

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THE MANNER OF REGULATION FOR THESL

INTRODUCTION AND SUMMARY

A critical issue for the Board, THESL, ratepayers, and other stakeholders concerns the manner in which THESL is to be regulated by the Board. While other frameworks for distribution utility regulation may emerge in the future, THESL believes that at present, there are essentially two alternative forms of regulation: the Third Generation Incentive Regulation Mechanism ("IRM") and Cost of Service Regulation ("COS").

Very significant differences exist between these modes of regulation, both in terms of process and outcomes. The evidence set out below details how, in the circumstances that are faced by THESL, predictable outcomes arise when IRM is applied as the manner of regulation. If it is accepted, based on all the evidence in this proceeding, that THESL must undertake certain expenditures in order to meet its duties as a distributor, and these expenditures entail a revenue requirement greater than that produced under the IRM framework, these outcomes either deprive THESL of the resources necessary to responsibly carry out its duties, or place the utility in an untenable financial position, in which it is prevented from earning its authorized return.

The evidence in this section addresses:

i. The manner of regulation which has applied to THESL, and THESL's current regulatory status as a result of the EB-2010-0142 Decision in THESL's last rate case;
ii. The components and mechanics of utility revenue requirements;
iii. The Fair Return Standard;
iv. The potentially destabilizing outcomes which arise when IRM is applied to THESL in the circumstances which THESL faces; and

v. The ineffectiveness of the Incremental Capital Module ("ICM") as a tool with which to remedy the deficiencies inherent in the application of IRM to THESL.

This evidence demonstrates that allowed revenue requirement for THESL must follow from the expenditures and investments that are approved by the Board on the basis of the evidence in a distribution rates proceeding. If proposed expenditures and investments are found by the Board to be necessary and prudently incurred on the basis of the evidence, and are therefore approved by the Board, the revenue requirement necessary to enable those expenditures and investments must also be approved. Otherwise, THESL would be demonstrably prevented from having the opportunity to earn its Board-approved return, which would violate the fair return standard.

DISPOSITION OF THE PRELIMINARY ISSUE

THESL's view is that the manner of regulation to be applied to THESL is a question of fundamental importance, which the Board should decide based on the evidence on the record in this proceeding and the submissions of parties. THESL specifically and respectfully requests that the Board:

(i) exempt this issue from any settlement process it may convene;

(ii) determine, as a preliminary issue after receiving evidence and submissions from parties to the proceeding, that there is a *prima facie* indication that the use of the IRM price cap index ("PCI") mechanism to determine revenue requirement and rates for THESL in 2012 and succeeding years would not result in a revenue requirement adequate to recover THESL's reasonable and prudently incurred costs in those years;

(iii) determine, as a result of the above finding, that there is a *prima facie* indication that THESL would be unable to adequately manage its resources

and financial needs due to the deficiency in revenue requirement determined through the price cap index mechanism; and

(iv) therefore determine THESL's revenue requirements and establish its distribution rates for the years 2012 through 2014 using a cost of service approach, based on the evidence led in this proceeding.

The preliminary issue in this proceeding could be stated as: "Given THESL's required levels of expenditures and investments, would THESL be unable to manage its resources and financial needs through the remainder of the IRM term under a series of annual revenue requirements determined by the mechanistic price cap index methodology?" However, the Board's proper determination of those expenditure and investment requirements cannot be made without a full hearing of the evidence in this proceeding, and therefore cannot be undertaken as a 'preliminary' matter.

Nevertheless, this does not present a real dilemma – merely an apparent one. THESL asserts that the reason it would be unable to manage its resources and financial needs under the IRM-PCI framework is that the expenditures and investments it must make to responsibly discharge its duties as a distributor create a revenue requirement that is substantially greater than that which would result from the application of IRM-PCI. THESL believes that it is not necessary, for the purpose of determining the preliminary issue, that the Board make a final and exact determination of THESL's revenue requirements during the test period. The preliminary issue can be properly determined by the Board if it finds that given the general magnitude of THESL's expenditure and investment requirements, the consequential revenue requirements should not be determined mechanistically but should rather be determined with specific reference to the expenditures that the Board determines are necessary and prudently incurred, based on the evidence in this proceeding.

In the alternative, after a full examination of the evidence in the proceeding, were the Board to find that as a matter of fact, THESL's revenue requirements for the test period would not exceed those determined under the PCI mechanism, it would have effectively found that THESL has no continuing requirement to renew its distribution infrastructure or its workforce, contrary to its findings in THESL's previous cost of service rate cases.

THESL is of course aware of the comments made by the Board in the EB-2010-0142 Decision on 2011 rates for THESL, and of the Board's stipulation that the onus would be on THESL to demonstrate in its 2012 rates application that rates for that year should be set on a basis other than by the application of the IRM mechanistic adjustment. THESL believes that the approach to determining the preliminary issue set out above is entirely consistent with the requirements the Board has placed on THESL, and that it will provide for a transparent examination of all of the relevant issues and a fair determination of the question based on the evidence in the proceeding.

THESL'S REGULATORY HISTORY AND PRESENT STATUS

In 2007 THESL applied on a COS basis for rates for the three-year test period covering 2008, 2009 and 2010. In its Decision in the EB-2007-0680 proceeding, the Board (Messrs. Sommerville, Vlahos, Balsillie) made findings on what it characterized as the Threshold Issue, which in essence was whether to grant the COS relief sought over a three-year test period. The Board granted a two-year test period on a COS basis. In that Decision, the Board made observations around the relative merits of the IRM approach versus the COS approach, the need for evidence on productivity growth, the 'regulatory burden' arising from both approaches, forecast risk, and the need for sustained regulatory oversight during periods of rapid growth in capital and operating expenditures.[1] The Board also stated at page 7:

[1] EB-2007-0680 Decision, pages 3 - 7

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Vol. 3

A P P E A R A N C E S

KRISTI SEBALJ	Board Counsel
TED ANTONOPOULOS MARTIN DAVIES	Board Staff
MARK RODGER	Toronto Hydro Electric System Limited (THESL)
JAY SHEPHERD MARK RUBENSTEIN	School Energy Coalition
IAN BLUE	City of Toronto

I N D E X O F P R O C E E D I N G S

E X H I B I T S

U N D E R T A K I N G S

Description	Page No.

NO UNDERTAKINGS WERE FILED IN THIS PROCEEDING

Monday, November 11, 2011

--- On commencing at 9:31 a.m.

MS. CHAPLIN: Good morning. Please be seated.

Good morning, everyone. We're here today to hear the argument-in-chief from Toronto Hydro on the preliminary issue.

Before Mr. Rodger goes ahead, are there any preliminary matters? Are we still on track to receive the undertaking answers soon?

MR. RODGER: Tomorrow.

MS. CHAPLIN: Tomorrow. Okay.

MR. RODGER: Yes, Madam Chair.

MS. CHAPLIN: If some are ready today, then that would be great to receive them today, as well. Okay. So you can go ahead whenever.

FINAL ARGUMENT ON THE PRELIMINARY ISSUE BY MR. RODGER

MR. RODGER: Good morning, Madam Chair. Thank you.

Perhaps before I start, I did hand over to my friend a copy of a compendium of documents that I may be referring to this morning. It's 10 pages plus a cover page, simply entitled "Toronto Hydro-Electric System Limited Argument-in-Chief."

And perhaps I could make this an exhibit, please.

MS. SEBALJ: It will be Exhibit K3.1.

EXHIBIT NO. K3.1: COMPENDIUM ENTITLED "TORONTO HYDRO-ELECTRIC SYSTEM LIMITED ARGUMENT-IN-CHIEF."

MR. RODGER: Thank you very much.

So Panel, if I could start with the issue before the

Board this morning and the relief that Toronto Hydro seeks, in Procedural Order No. 1, an excerpt of which I have attached at page 3 of this compendium, the Board describes the issue to be decided as follows: Whether the application filed by THESL is acceptable or whether it should be dismissed. And this is what we've been referring to as the "preliminary issue."

And also on page 5 of Procedural Order No. 1, which I've also included as page 2 of the compendium, is specifically the Board has asked for evidence as to why early basing is required and why and how THESL cannot adequately manage its resources and financial needs.

Now, last Friday, this Board heard directly from THESL's senior management regarding just how concerned the utility is about its ability to adequately manage its system resources and needs on the one hand, and its financial needs on the other, if Toronto Hydro's rates were established under IRM.

And we believe that Friday's proceeding was very important in providing the Board and parties with a candid and detailed review about Toronto Hydro's significant concerns.

Now, there will no doubt be a difference of opinions amongst the parties as to how the Board should proceed on the preliminary issue, but to frame the discussion this morning, it is important to note that Toronto Hydro believes that we are all working together towards achieving the same common goals. And the three in particular are,

firstly, to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electrical service; two, to promote economic efficiency and cost-effectiveness in the distribution of electricity; and thirdly, to facilitate the maintenance of a financially viable electricity industry.

I'm going to return to these goals at the end of my submissions.

We submit that the Board should decide that THESL's application is acceptable and to proceed on to an oral hearing process to consider this cost-of-service application in establishing distribution rates for Toronto Hydro for the years 2012, 2013 and 2014.

So what's the basis for the relief we seek this morning? And there will be two broad grounds that I'm going to speak to during my argument.

The first is that the evidence that is before you is sufficient for Toronto Hydro to clearly discharge the onus on it that Toronto Hydro cannot manage under the circumstances Toronto Hydro faces, and given the mechanics of how IRM functions.

Accordingly, the Board should find that it is not in the public interest to regulate Toronto Hydro under IRM at this time.

Instead, and again, based on the evidence before you, there are clear, legitimate and convincing reasons why a cost-of-service approach is warranted at this time.

These reasons from the evidence include material

adverse consequences and unacceptable outcomes for the operation and revitalization of the utility, as well as the potential inability of Toronto Hydro to earn a reasonable return under IRM, which would be contrary to the fair return standard.

Secondly, the standard to discharge the onus is one that the Board knows well, the test of reasonableness. However, it is a different application of the standard in this case than what the Board typically applies after a full and complete cost-of-service proceeding has been concluded.

And it would be inappropriate for the Board to require more than a narrower application of the reasonableness test, since not all of THESL's evidence has been subject to the Board's typical hearing process.

Now, to turn specifically to the issue to be determined, to assist Toronto Hydro and intervenors in considering those circumstances wherein IRM should not apply, the Board has presented the preliminary issue to be determined as follows; and this comes from page 5 of Procedural Order No. 1, which is at page 2 of the compendium.

And the PO states:

> "Should THESL file a cost-of-service application for 2012 rates, the expectations of the Board are clear. As set out in the April 20th, 2010 and March 1st, 2011 letters, a distributor that seeks to have its rates rebased earlier than scheduled

must justify in its cost-of-service application why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remainder of the third-generation IRM plan term."

So the Board has asked Toronto Hydro to show the following: It has to justify in its cost-of-service application why early rebasing is required, and why and how Toronto Hydro cannot adequately manage its resources and financial needs under IRM.

Now, I spoke to the standard of proof that the Board should apply when I appeared before you on November 1st on the interrogatory proceeding day. And Toronto Hydro adopts those submissions as part of our argument today, but I want to briefly expand on this discussion further.

Now, Toronto Hydro understands that the Board's rate-setting policies are such that distributors are expected to be able to adequately manage the resources and financial needs during IRM. And you can understand that this presumption is very concerning to Toronto Hydro. On Friday, you heard directly from senior management just how concerned Toronto Hydro is about its ability to adequately manage under IRM.

But with the preliminary issue the way you have described it, the Board has rightly, I believe, made this a rebuttable presumption. And we acknowledge that it's up to Toronto Hydro to discharge the burden of proof in this matter.

So the Board saying, in essence: Show me why and how IRM does not work for Toronto Hydro at this time. But what the Board has not specifically identified is the "how much," how much do we have to show you? What is the standard of proof that must be met?

Now, in this case, we filed over five volumes of evidence, which, taken in its totality, is intended to show the Board exactly what the system needs and requirements are and the utility's prudent plans to manage those needs and requirements.

Now, it's not entirely clear to Toronto Hydro exactly what evidence you are going to look to and rely upon to make the decision on the preliminary issue. We understand from the procedural orders issued to date and the limited process that the Board has prescribed that the Board does not expect our submissions this morning to reflect the entire body of evidence comprising the entire five volumes that we filed in August. We would only do this after a cost-of-service hearing has been concluded. Of course this hasn't happened yet.

So we believe this is why you limited the scope of IRs on the preliminary issue in the first procedural order.

So there clearly must be a difference between the standard to be discharged in the main cost-of-service case, after all the evidence has been heard and tested and the hearing completed, and the preliminary issue to be decided in this restricted process we're in now.

So our submission is that the standard to discharge

the onus on the preliminary issue is one the Board is familiar with, the test of reasonableness, and the "how much" question. It's a different application of the standard since we're at the beginning, the very beginning of the process at this time.

I don't think any party would want the Board to make binding decisions on the specifics of the applications without those specifics being fully presented and tested, and that hasn't happened yet.

So the preliminary issue before the Board, what the Board is doing is making a preliminary assessment. And the standard in making that preliminary assessment, in our view, is whether Toronto Hydro has provided sufficient evidence within a band of reasonableness to permit the Board to conclude that a cost-of-service hearing should be held because IRM does not appear to permit THESL to adequately manage its resources and financial needs.

So in this case we filed five volumes of evidence, we filed three witness statements, and we've answered numerous interrogatories from the Board Staff and parties, but because we haven't had an opportunity to make our full case or test that whole body of evidence at this time, the Board will be making its decision without that entire application first, or hearing that first.

So in conclusion on this standard, application of the standard, our submission is it will be enough if you are persuaded that Toronto Hydro has put forward credible evidence - again, within this band of reasonableness - as

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RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

INTERROGATORY 2:

Reference(s): A1/T1/S2/p. 21

It is stated that:

"THESL believes that, as matter of fact, different distributors across the province face varied circumstances in terms of conditions of plant, the need for capital expenditures, and load and customer growth. In turn, these different circumstances produce different outcomes when the IRM regulatory framework is applied, both for customers of those utilities and for the utilities themselves."

a) Please discuss the extent to which THESL regards its circumstances as unique relative to other distributors in the province.

b) Please provide a quantitative assessment that demonstrates the uniqueness of THESL's circumstances particularly with respect to THESL's capital program growth, need for increases in OM&A, load growth and any other elements THESL considers relevant.

RESPONSE:

a) THESL does not regard its circumstances as being unique among the distributors of the province. However, THESL believes that its circumstances are reasonably representative of those of a category of distributors who share characteristics that distinguish them from other categories of distributors.

Table 1 below lists some of the specific characteristics with respect to which utilities can differ, with significant consequences for the appropriateness of the COS versus IRM-PCI regulatory frameworks.

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

Table 1: Dimensions of Differences Between Distributors

Characteristic	Value Favouring IRM	Value Favouring COS
Customer Growth	High	Low
Load Growth	High	Low
Vintage of Plant	New	Old
Proportion of Non-Revenue Producing CAPEX	Low	High
Proportion of CAPEX covered by Capital Contributions	High	Low

These characteristics are discussed in turn below. It is important to note for these purposes that (growth in) revenue requirement must be distinguished from (growth in) rates. If growth in total revenue requirement is driven largely by growth in customer numbers and load, the impact on rates will be muted or even entirely offset.

Customer Growth: It is typical for utilities to go through different phases and rates of growth as their service area changes. While utilities serving small rural or remote areas may remain relatively static for many years, if or when the area begins to develop as a population centre there will be a phase of relatively rapid growth until the area reaches saturation, or a condition of being more or less fully 'built out'. At that point a phase of redevelopment begins which may be marked by increasing customer and load densities depending on land values in the area.

This pattern is particularly noticeable in major urban centres in Ontario. Typically the urban core area develops first and if it is served by a separate utility, that utility reaches maturity earlier than surrounding areas, which are then developed to provide more residential, commercial, and industrial facilities. That development occurs at

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

varying rates through time but typically it takes decades for a municipal service area to become fully built out.

As a result of this pattern of development it can occur that neighbouring utilities exhibit markedly different rates of customer growth. The central utility in the area may be mature when the surrounding utilities are just beginning or are in the middle of a phase of high growth.

High customer growth places high demands on CAPEX to expand the system and connect customers, but it also produces new revenue and serves to expand the base of customers over which fixed costs can be spread, so economies of scale may be realized. In addition, it is typical for a significant portion of the total costs of expansion projects to be covered through capital contributions. As a result it may be possible to sustain distribution rates at relatively stable levels while total revenue requirement grows substantially.

Because IRM acts directly on rates rather than revenue requirement, and because under conditions of high customer growth upward pressure on rates is low or even negligible, IRM is well suited for utilities experiencing high rates of customer growth.

As customer growth rates decline due to the service area becoming mature, the character of utility expenditures begins to shift away from expansion and customer growth to maintenance and eventually to replacement of end-of-life equipment. A diminishing proportion of capital expenditures are revenue producing and opportunities for scale economies through customer growth decline directly as

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

customer growth does. The proportion of total project expenditures covered by capital contributions also decreases. As these characteristics become more pronounced for a given utility, IRM becomes less appropriate and sustainable.

Load Growth: Much of the same analysis as set out above with respect to customer growth applies with respect to load growth. Utility costs to supply incremental load once customers are connected are negligible apart from losses, but under existing rate design, fixed and quasi-fixed costs that do not vary with load are in fact recovered through consumption based rates. As a result, although there is little or no effect on distribution revenue requirement from variations in load, load growth has the effect of dampening upward pressure on rates while declining load increases upward pressure on rates.

Vintage of Plant: The age of utility plant has a significant effect on the capital expenditures of the utility, and on whether those capital expenditures are revenue producing. Apart from the effects noted above, two significant factors place considerable upward pressure on revenue requirement and rates as a utility begins to have to replace equipment at end-of-life.

The first is the historical cost basis of revenue requirement and ratemaking. Since ratebase, depreciation, and revenue requirement are based on historical costs of equipment that has been purchased and installed long ago in the case of a utility replacing equipment at end-of-life, the effect of inflation over the life of the equipment being replaced is not recognized in those quantities (ratebase, depreciation, and revenue requirement). Physically, however, the equipment to be replaced has and

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

does provide the necessary distribution function until it has to be replaced. This means that equipment that has been providing the distribution function at a very low revenue requirement cost eventually must be replaced, even on a like-for-like basis, with equipment that creates a very much higher cost in revenue requirement, both in terms of return to capital and depreciation. In effect, 40 or more years of inflation becomes embodied in the cost of the replacement asset. However, the replacement asset does not often or necessarily attract any increased load or customers – it merely replaces equipment that serves an already established area.

Compounding the effects of unrecognized inflation is the second factor, which is that in many instances capital or other private contributions covered a significant portion of the total cost of an original expansion project. Developers would either install the required assets and then turn them over to the utility to own and operate, or else make a financial contribution directly. In neither case would the contributed costs count as ratebase or the predecessor concepts to ratebase. At the time, this acted to minimize the rate impact to existing customers of system expansions, for example to serve new suburbs.

Nevertheless, those assets were used to provide utility service and were owned and operated by the utility, though no capital-related costs in terms of return or depreciation were attracted by those assets. However, at the end of life, those assets must be replaced at current replacement costs, again without necessarily attracting any new customers or loads. As a result, the impact on ratebase, revenue requirement, and rates is even more pronounced than in the case of other assets reaching end-of-life.

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

Proportion of Non-Revenue-Producing CAPEX: In many situations utilities have a range of equipment vintages and may provide service to both long established areas and newly developing areas within their overall service territory. Most utilities are adding new customers, though at varying rates. Nevertheless, some utilities exhibit a high proportion of CAPEX which is non-revenue-producing due to the need to replace end-of-life assets, while other utilities at a different stage of development in their service area exhibit a low proportion of non-revenue-producing CAPEX.

Replacement of failing end of life assets is not optional for utilities: As explained above, utilities which experience relatively high needs for non-revenue-producing CAPEX will experience corresponding upward pressure on revenue requirement and rates. This upward pressure on revenue requirement is not recognized or accommodated under the IRM regime.

Proportion of CAPEX Covered by Capital Contributions: As noted above under Customer Growth, utilities experiencing high rates of customer growth typically receive significant funding of CAPEX through capital contributions. Although replacement of those contributed assets at end-of-life may create significant upward pressure on rates at the time, current distribution revenue requirement understates the services being provided by the utility assets and is lower than it would be without the capital contributions.

In contrast, utilities faced with replacing contributed assets must undertake the entire cost of doing so without benefit of any offsetting capital contributions. It is not possible to obtain a capital contribution from customers who are already connected to

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

(for example) a feeder that needs to be replaced at end of life. Furthermore it is likely that the assets being replaced will be substantially or fully depreciated by the time of their replacement, meaning that an asset that was providing service at low or zero capital-related cost must be replaced, even on a like-for-like basis, with an asset that imposes the revenue requirement of the full, current replacement cost.

While it is the obligation of the utility to replace the end-of-life asset with a new asset in an efficient and cost effective manner, it is impossible in these circumstances to maintain existing service levels without a significant increase in revenue requirement and rates. These circumstances are not accounted for in the current IRM framework.

b) THESL does not accept the premise of the question, which is that THESL is unique among distributors. Furthermore, it is not necessary for THESL to demonstrate that it is unique in order to show that the application of IRM to THESL is not appropriate.

It is not possible within the timeframe given for interrogatory responses for THESL to prepare an exhaustive comparison of itself with other distributors in Ontario, or to use data other than that provided in the OEB Electricity Yearbooks. Also, the Yearbooks do not provide data on vintage of plant, percentage of CAPEX that is non-revenue-producing, or percentage of CAPEX covered by capital contributions. However, Table 1 below provides a comparison of Compound Annual Growth Rates ("CAGR") over the period 2005 to 2010 (the data range of the Yearbooks) of customer numbers, total kWh delivered, and average kW between THESL and a geographically adjacent distributor, PowerStream. The load data are non-normalized, and to reflect the impact of scale economies, are shown both with and without

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

adjustments to the 2005 data to reflect utility acquisitions made by PowerStream during that period.

Table 2 shows the significant, and in some instances dramatic differences in these characteristics alone. PowerStream customer numbers CAGR for the 2005 combined utility is 2.65%, or more than 3.8 times that for THESL. For the 2005 single utility, it is 9.83%, or more than 14 times that of THESL. For both measures of load, THESL's growth rate is negative, while that for PowerStream is slightly or significantly positive, depending on the basis of comparison (combined or single utility in 2005).

RESPONSES TO ONTARIO ENERGY BOARD STAFF INTERROGATORIES ON PRELIMINARY ISSUE

Table 2: Comparison of Customer and Load Compound Annual Growth Rates			
	2005	2010	**CAGR**
THESL			
Customers	676,678	700,386	**0.69%**
kWh Delivered	26,395,212,274	24,746,000,033	**-1.28%**
Average kW	4,174,409	4,039,475	**-0.66%**
PowerStream	2005 Including Acquisitions		
Customers	285,600	325,540	**2.65%**
kWh Delivered	8,326,846,710	8,334,777,460	**0.02%**
Average kW	1,422,472	1,447,917	**0.36%**
PowerStream	2005 Excluding Acquisitions		
Customers	203,749	325,540	**9.83%**
kWh Delivered	6,405,015,772	8,334,777,460	**5.41%**
Average kW	1,081,724	1,447,917	**6.00%**

to be an accurate representation of the threshold in general terms?

Sorry, are you trying to find the -- it's Energy Probe 13.

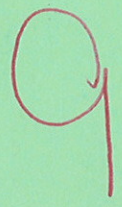
MR. McLORG: We have the exhibit. And although I didn't do this calculation personally, I have full confidence that the calculation was done correctly, according to the formula that is provided by the Board and using the input assumptions that have been provided by Energy Probe.

MS. SEBALJ: And so given that Toronto Hydro is seeking approval of a total cap-ex of 590 million in 2012, would this not mean that roughly 400 million of your capital program could meet the ICM threshold in 2012 and subsequent years?

MR. McLORG: I don't consider that to be the case, for the reasons outlined in various places, but I would direct you principally to Exhibit A1, tab 1, schedule 2.

And just to briefly summarize the reasons why the majority of our capital wouldn't fall into the category of being ICM-eligible, it's certainly our view that a case cannot be made to characterize the bulk of Toronto Hydro's spending as being in any sense extraordinary.

The capital spending that we're talking about has an established year-over-year history. It has to do with fundamental distribution plant that is already in existence; it's not even the addition of new plant, but it's the replacement of plant that's already in existence.



UNDERTAKING RESPONSES ON PRELIMINARY ISSUE

UNDERTAKING NO. J2.1:

Reference(s): **none provided**

To provide full list of projects that would be eligible for the incremental capital module, and their dollar values.

RESPONSE:

In Hydro One's EB-2008-0187 Decision (pp. 8-9), the Board stated, "In fact what the Board requires in considering an application under the incremental capital module is a demonstration that the distributor is facing extraordinary and unanticipated capital spending requirements; i.e. something other than the normal course of business".

The Board's IRM decision for Guelph Hydro in EB-2010-0130 and Oakville Hydro in EB-2010-0104, seemed to soften the interpretation of the word "unanticipated" to some extent by allowing municipal transformer stations to be approved for recovery through the ICM mechanism.

Based on these Decisions, and the Board's July 14, 2008 "Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors", THESL concludes that the only capital that may be considered eligible by the Board for ICM treatment in THESL's case, would be Bremner station and potentially contributions to HONI for Leaside-Birch transmission reinforcement. The amounts are presented below.

UNDERTAKING RESPONSES ON PRELIMINARY ISSUE

	2012	2013	2014
Bremner Station [1]	66.8	31.9	6.0
HONI Contributions [2]	19.8	17.5	-
Total	86.6	49.4	6.0

Notes: [1] See Exhibit D1, Tab 10, Schedule 4

[2] See Exhibit D1, Tab 10, Schedule 7 comprising the Leaside-Birch and Bremner Station project contributions

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Re

Bernstein and College of Physicians and Surgeons of Ontario

15 O.R. (2d) 447

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

O'LEARY, STEELE AND GARRETT, JJ.

11TH FEBRUARY 1977.

Physicians and surgeons -- Discipline -- Professional misconduct -- Standard of proof -- Physician charged with having improper sexual relationship with patient -- Charge denied by physician -- Patient having history of psychiatric treatment including sexual fantasies -- Patient's evidence not corroborated -- Whether charge proved -- Counsel for discipline committee preparing reasons for finding of professional misconduct -- Whether proper.

The appellant physician carried on a busy general practice and was well qualified and highly thought of by his former teachers. The complainant, a woman of 27, was his patient from 1970 to 1973 for a variety of gynaecological complaints for which she was properly treated by the physician. The complainant had a history of psychiatric treatment. Her home life had been difficult with a domineering mother and alcoholic father. She alleged incestuous relationships with her father and brothers. She later entered a convent for a period of time and subsequent hospital records showed that she had other sexual fantasies with respect to the nuns. Prior to becoming the appellant's patient she received further treatment from several psychiatrists who diagnosed her as having an hysterical, manipulative personality with depressive features, including suicidal tendencies, and further that she over-sexualized her relationships with men and became infatuated with her physicians. In 1973, the complainant attempted to commit suicide, was again admitted to hospital and a similar diagnosis was made. She testified that the appellant had sexual relations with her during most of the time she was his patient. This was denied categorically by the appellant and there was no corroborative evidence even though the affair was allegedly carried on at the complainant's apartment which she shared during most of this time with others. Early in 1973, the appellant had a discussion with a businessman with a view to a joint venture in a weight-reducing clinic in which the appellant's duties would be to give each client a prior physical examination. After consultation with the College of Physicians and Surgeons who informed him that such an association would be unethical, the appellant severed his ties with the venture and was then told by the businessman who had expended considerable funds on it that he would "get even". The businessman engaged the services of private investigators to observe the appellant's conduct. Two of its operatives observed the appellant refusing to see the complainant one evening after office hours. They gave her a ride and she swore an affidavit for them stating that she had had an affair with the appellant since 1970. The facts were published in a local newspaper. The day following publication the complainant went to the appellant's office and was met by his solicitor and she then made another affidavit which completely repudiated the earlier one. The complainant also made several statements that were complete fabrications, viz., that the appellant had performed two abortions on her sister and that her apartment had

been broken into and her diary in which she related the alleged affair with the appellant had been stolen. The diary had never existed.

On the hearing of the complaint before the Discipline Committee of the College of Physicians and Surgeons, the Committee was invited by counsel to disregard the affidavits and it did so. Moreover, it failed to consider the psychiatric history of the complainant. The Committee found the appellant guilty of professional misconduct and suspended him for 12 months. The reasons for its decision were subsequently prepared by its counsel. On appeal from the decision, held, the appeal should be allowed.

While the standard of proof is the civil standard, which is variously described as proof by a preponderance of evidence or on the balance of probabilities, the standard has never been precisely formulated. Nevertheless, before a tribunal can find a fact proved it must be reasonably satisfied that it occurred and a mere mechanical comparison of probabilities independent of the belief in the reality of the factual occurrence of the alleged event is not sufficient. Moreover, the proof must be clear and convincing and based on cogent evidence. Of particular relevance to this determination is the gravity of the consequences of any finding by the tribunal.

Since the consequences of a finding of professional misconduct in the circumstances are extremely serious, the Committee should have acted with great care and caution in assessing all the evidence and should not have proceeded upon fragile or suspect testimony. It failed to do so in that it did not consider the psychiatric history of the complainant and the several false statements and the two totally disparate affidavits that she made. Moreover, the Committee accepted the testimony of the complainant over that of the appellant even though the former's evidence was totally uncorroborated and even though counsel for the Committee acknowledged that the appellant's demeanour was far superior to that of the complainant. Having regard to the fact that the onus of proof was on the College, the Committee improperly accepted the evidence of the complainant in the circumstances.

Semble, it is improper for counsel for a tribunal to prepare the reasons for its decisions, even though they are based on a brief drafted by the chairman of the tribunal. Moreover, the reasons should set out the standard of proof employed by the tribunal.

[Re Glassman and Council of the College of Physicians and Surgeons, [1966] 2 O.R. 81, 55 D.L.R. (2d) 674; Smith v. Smith and Smedman, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449, folld; Re Miller and Saskatchewan College of Physicians and Surgeons (1966), 59 D.L.R. (2d) 736, distd; Re Golomb and College of Physicians and Surgeons of Ontario (1976), 12 O.R. (2d) 73, 68 D.L.R. (3d) 25, discd; Re "D" and Council of the College of Physicians and Surgeons of British Columbia (1970), 11 D.L.R. (3d) 570, 73 W.W.R. 627 sub nom. Re Dr. "D", refd to]

APPEAL from and APPLICATION for judicial review of a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario, finding the appellant guilty of professional misconduct and suspending him from practice.

M. Robb, Q.C., for appellant.

J. R. Hunter, Q.C., for respondent.

O'LEARY, J.:-- This matter comes before us both by way of an appeal by Dr. Stanley Karl Bernstein from the decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario made on December 14, 1973, and by way of an application for judicial review by the said Dr.

Bernstein of that same decision.

I shall deal firstly with the appeal. By notice of hearing dated September 27, 1973, Dr. Stanley Karl Bernstein was notified that a meeting of the Discipline Committee of the Council of the College of Physicians and Surgeons of Ontario would be held for the purpose of inquiring into an allegation that alleged Dr. Bernstein

> ... to be guilty of professional misconduct in that in the period from the month of January 1970 to the month of August 1973, or a part thereof, you became involved in an improper association with one Jo-Anne Johnston, a person with whom you stood in a professional relationship at all material times.

On December 14, 1973, at the conclusion of the hearing of evidence tendered at the said meeting, the Discipline Committee, by a written decision given at that time, stated:

1. We Find Dr. Bernstein guilty of the charge contained in the Notice of Hearing herein and therefore guilty of professional misconduct.
2. We Direct that Dr. Bernstein be suspended from the Register of the College of Physicians and Surgeons of Ontario for a period of 12 months.
3. We Further Direct that Dr. Bernstein do pay the costs of this hearing including the cost of reporting the evidence forthwith after taxation thereof provided that the College may accept the sum of $4,500 in full satisfaction of all costs if paid to the College on or before the 15th day of January, 1974.

Some time later the Discipline Committee gave written reasons for its decision.

Dr. Bernstein was aware that the "improper association" referred to in the notice of hearing was a sexual one and it was such a relationship that the Discipline Committee found to have existed.

The appellant alleges that the Discipline Committee on the evidence before it should not have found him guilty of having had a sexual relationship with Jo-Anne Johnston. It is necessary then to examine the evidence that was tendered before the Discipline Committee.

It should be noted at the outset that the only evidence that Dr. Bernstein had a sexual relationship with his patient Jo-Anne Johnston, was the evidence to that effect given by Jo-Anne Johnston. It was conceded by counsel for the Discipline Committee that there was no corroboration whatever of her testimony in that regard. Dr. Bernstein testified at the hearing that he had not had any sexual relationship with Jo-Anne Johnston, or any relationship of any kind with her, except that of doctor and patient.

So far as Jo-Anne Johnston is concerned the evidence indicates the following: She was born and grew up in Sudbury, Ontario. Her father was an alcoholic, her mother was strict and revengeful. She had difficulty in keeping abreast of her class in school and was advised not to continue schooling after failing her grade 10 year.

Her schooling to the completion of grade 8 had taken place in the Sudbury area. She took her studies for grades 9 and 10 in a convent boarding-school in North Bay. Prior to going to boarding-school her life had been an unhappy one. At the convent she was touched by the kindness of the nuns. After her grade 10 year at the convent she decided to enter the convent as a novice with a view to becoming a nun. To use the expression which later appears in the hospital records from a Sudbury hospital:

> Her life to that point was an unhappy one and she took refuge from it by entering a convent in North Bay where she remained for 3 years, leaving before taking her final vows.

On December 5, 1967, when she was 21 years of age she was admitted to hospital in Sudbury, ostensibly because of dysfunctional uterine bleeding. She had several complaints in addition to the uterine bleeding. In particular, she gave a history of complaints suggestive of arthritic problems. Dr. J. Stalker examined her and assessed her arthritic complaints. His notes read in part as follows:

> She is in good health and has no significant joint or other disease. I find she is suggestable and immature. I have reassured her about her health. I think that her symptoms apart from the menstrual symptoms are largely functional.

In an attempt to relieve her uterine bleeding Dr. Farrell performed a dilation and curettage procedure on her. His diagnosis of her condition was:

> It is felt that a good deal of this patient's complaints are functional in nature and that she is under a good deal of emotional strain.

While in the hospital in Sudbury she recognized her need for psychiatric assistance and accepted it. Her mental condition was diagnosed as "mixed psychoneurosis" (depressional hysteria). She spent 25 days on the psychiatric ward where treatment included four electroconvulsive therapy treatments and psychotherapy treatments and when discharged she was to continue as an outpatient. She was discharged from the hospital in Sudbury on January 2, 1968. There is no indication she continued on as an outpatient.

In addition to notes already quoted from the Sudbury hospital records, the following doctors' comments in those records are worthy of note:

> She left the convent in April because she felt her health was failing.
>
> . . . . .
>
> She is suffering from a rather severe reactive depression.
>
> . . . . .
>
> Initially depressed, confused, ambivalent about treatment, wanting direction, vocational guidance, withdrawn, in bed for days at the time, changed to hysterical behaviour during E.C.T. treatment, later settling down to better mood.
>
> Difficulties with alcoholic father, strict and revengeful mother also with twin sister -- resulted in a running away from life which for her meant going into the convent -- bringing along a scarred personality she continued there to be haunted by her past and after 2 years of doubts and crisis she eventually decided to leave.
>
> The experience repeats itself again in the outside world -- as she is not capable to make meaningful personal contacts or to derive satisfaction from job where she comes in contact with many people, etc., etc. -- the future looks confused and threatening to her and from time to time is tempted again to return into the convent.
>
> She will be assisted as an outpatient.

After leaving the convent in April, 1967, at age 21, she had worked for a couple of months as a cook in a hospital in Haileybury. She had then returned to Sudbury where she worked as a clerk in a Canadian

Tire store. She was so employed when she entered hospital in December, 1967. After leaving hospital she returned to her work at Canadian Tire and late in 1968 she went to Toronto and took a three-week I.B.M. course in keypunching and then returned to Sudbury until she could find employment. After a couple of months she did find employment in Toronto as a keypunch operator and moved to Toronto. Within a few months she changed employment to teletype work at Dominion Securities and worked there for about four years. From there she went to Canadian Pacific Shipping where she was employed as a telex operator at the time of the hearing of the charge against Dr. Bernstein. At the time of the hearing in December, 1973, she was 27 years of age.

While the evidence in that regard is not precise it appears that she found work in, and moved to, Toronto in the early part of 1969. Long before the year was out she was receiving psychiatric assistance at St. Michael's Hospital in Toronto.

The reports of Dr. J.C. Binney in the records of St. Michael's Hospital read in part as follows:

Loc. & Date

Nov. 18/69

. . . . .

Chief Complaints:

Included feelings of depression and despondency, a feeling that she had no friends and that she has an inability in making friends. She states that she became depressed in 1967, following a D. and C.

Past Psychiatric History:

Reveals hospitalization in a hospital in Sudbury in 1968 where she received E.C.T.

. . . . .

Family History:

Reveals mother aged 50, father aged 60. Mother described as being a very restrictive type of woman. Father described as being alcoholic and has been treated on several occasions in hospital. ...

The patient hinted that certain incestuous relationships had been established within the family and that she had slept with her father until the age of 13, when advances had been made towards her, particularly when he was drinking. She also stated that there was an attempted rape by one of her brothers and the patient commented that the mother was never able to set controls. She also stated that there have been some homosexual relationships with her sister and other women.

The present conflict is centred around the area of forming close interpersonal relationships with men. She, on the one hand is a very attractive young girl, who sexualizes most relationships, denies this and projects these feelings onto her external objects by saying that all men are interested in sex. On the one hand she abhors sex, but on the other hand she has the impulse to go out and give herself to anyone.

Diagnostic Impression:

Hysterical personality with depressive features.

Recommendations:

The patient will be taken on in individual psychotherapy on a weekly basis.

Date: January 7, 1970

The patient was first seen on November 18, 1969 and has subsequently been seen on December 3, 10 and today, January 7, 1970.

The last session Miss Johnston felt that she did not want psychotherapy, she felt that in a sense that just talking about things would not be sufficient. She gave me a phone call two or three days ago and wished to be seen again.

Miss Johnston has difficulty forming close interpersonal relationships. She tends to over-sexualize in her object relationships and uses some projection.

She becomes extremely frightened and panicky when she thinks that men are after her for purely physical reasons, but at the same time she considers using counterphobic mechanisms, i.e. going out and physically giving herself to men, which she denies ever doing.

In the interviews she sits very quietly, speaks very quietly but hesitates and lingers over certain issues in a rather teasing fashion. We must not overlook, however, the difficulty that she is experiencing regarding her psycho-sexual identity and development.

At present she is moderately depressed and at times despondent, but she still appears to have certain reserves as manifested by her ability to both rationalize and compensate for her depressive feelings.

(The emphases added, both above and later in these reasons, in quoting from hospital records and from the evidence are mine.)

On July 22, 1970, she was admitted to the psychiatric department of St. Michael's Hospital.

The report of Dr. M. N. Vijayalaksmi, resident in psychiatry, made on that date reads in part as follows:

Admitted: July 22, 1970

This twenty-four year old single Catholic girl who is a teletype operator was admitted to the floor with a history of depression and difficulty in coping with life. She has been seeing Dr. Binney as an out patient at this hospital. ... She has been depressed following a D and C in 1967. She has difficulty in making friends and has very few friends.

. . . . .

Patient has had incestuous relationships with her father and brother. She has had

relationships with a number of men and she tends to sexualize relationships with men which she denies. Patient has also had a homosexual relationship with her sister and other women.

. . . . .

She is very manipulative and provoked the examiner by her stubborn silence.

PROVISIONAL DIAGNOSIS:

1. Neurotic depression in a hysterical personality.
2. Psychotic depression.

Elsewhere, the records of St. Michael's Hospital contain the following history taken on admission:

Personal Hy

... for the past 2 months she has shared an apartment with 2 other girls. The patient claims to get along quite well with her room-mates and her other acquaintances but claims to have no close friend, either male or female.

She has been seeing Dr. Binney at weekly intervals since January. Her depression has increased although she has been dating quite often and been "out every night" to try to forget her problems.

. . . . .

After failing Gr IX in Sudbury she went to a boarding school (St. Jospeh's) in North Bay for 2 yrs (IX & X) largely to escape from her family situation. She was 16 yrs old at this time and the schooling was financed evenly by her priest and her own earnings from a part time job.

She then decided to enter a convent in North Bay which she did with no parental urgings. She remained there for 3 years and describes these years as well as those in the boarding school as "very happy". However, she was indecisive about taking her final vows and although she found the decision very difficult she left the convent to "find herself" before taking such an irrevocable step.

Mental Status

. . . . .

She is depressed and despondent but doesn't want to stay in hospital. In effect, she is saying "help me!" but making it very difficult for anyone to do so.

. . . . .

Imp.

. . . . .

(2) neurotic depression
(3) hysterical, manipulative personality

The report of Dr. C. V. Murray, M.B., staff psychiatrist, dated July 27, 1970, reads in part as follows:

> This patient has been noticed to be behaving in a rather theatrical manner, posturing, and wearing revealing clothes, although at the same time complaining angrily about men's sexual interest in women.

The report of Dr. Vijayalaksmi of July 29, 1970, reads in part as follows:

> At the time of admission patient was ... very provocative and manipulative in her behaviour.
>
> . . . . .
>
> She was constantly threatening to sign out and at one point she was told she would have to be certified. Following this patient became quite verbal and started saying that she had no such intent, that she felt that she was not wanted by anybody and felt rejected by Dr. Binney, since he admitted her to the floor and she wanted to sign herself out.
>
> . . . . .
>
> She signed herself out on Wednesday, July 29th and said she would be making arrangements to contact Dr. Binney to get an appointment with him.
>
> . . . . .

FINAL DIAGNOSIS:

Neurotic depression in a hysterical personality.

On signing herself out of St. Michael's Hospital on July 29, 1970, she signed a form which reads in part:

ST. MICHAEL'S HOSPITAL Toronto

July 29, 1970

> THIS IS TO CERTIFY I am leaving St. Michael's Hospital of my own free will and request, and against the urgent advice of Dr. Murray who is in charge of my case.
>
> . . . . .
>
> Signed Jo-Anne Johnston

The nurses' notes in the St. Michael's Hospital records read in part:

> Said she has been seeing Dr. Binney because of sexual problems. Feels guys are only after girls' bodies and regardless of whether or not you give in to them they will reject you.
>
> . . . . .
>
> Whenever she has confided in anyone they have hurt her. Feels Dr. Binney has now rejected her also.

. . . . .

Seems to be posing when in S.R., wearing mini dressing gown, very provocative. ... Behaviour and attire remains seductive.

. . . . .

Talking willingly about former relationships with men. Complaining that she has always been hurt but admitting that she always chooses married or older men to become involved with. ... Talked at great length about her feelings toward Dr. Binney -- feels he has rejected her.

. . . . .

Spoke readily with nurse about her sensitivity and ambivalence over the topic of sex. Spoke quite loudly in the S.R. in front of other patients. Said she is unable to discuss it at work where her co-workers joke about it. ... Almost denied that it is her sexual difficulties that cause her problems; says she'll "just have to meet the right person" to accept her and her ideas.

In admission group became quite pale and complained of nausea and jitteryness -- after the taper of medication change was initiated. Left group and went to room until sought out by other patient. Returned and it appeared as if she had applied some pale or white lipstick to appear more ill.

Tuesday's Report, July 28

Extremely interested in her physical appearance tonight. Still wearing her seductive P.J.'s -- sitting provocatively in front of John Campbell even though she knew of his sexually aggressive behaviour.

After reading the hospital records and in particular the portions I have referred to one wonders how much reliance can be put on her evidence where it relates to sexual activity. She related to Dr. Vijayalaksmi that she had a incestuous relationship with her father and brother. It is clear from other evidence that if any such relationship occurred it was prior to her hospitalization in the Sudbury hospital in December, 1967. Yet the records of the Sudbury hospital state "examination revealed a virginal introitus which appeared normal". It seems likely that the sexual relationships she said existed between herself and her father and brother were either greatly exaggerated or were the product of her imagination.

At the hearing before the Discipline Committee Jo-Anne Johnston testified that she became a patient of Dr. Bernstein in January, 1970. Dr. Bernstein, from his records on her as a patient, confirmed that she first was examined by him on January 28, 1970. According to Dr. Bernstein one of her complaints at that time was that she was experiencing pain during sexual intercourse with her boy-friend and this pain prevented her from enjoying sexual intercourse. Dr. Bernstein found she had a vaginal discharge and put her on some vaginal cream to help clear up the discharge.

The evidence of Dr. Bernstein in this regard is confirmed by the evidence of Jo-Anne Johnston herself. I quote from pp. 134-5 of the transcript from the cross-examination of Miss Johnston:

Q..And am I also fair in putting it that quite apart from Mrs. McDade, that you told the

doctor on your earliest visit to the office that you were having pain in having sexual intercourse

A..I did not tell her that. I stated that clearly to the doctor.

Q..You stated that clearly to the doctor

A..Yes.

Q..Now you said that you told Mrs. Bernstein at the house, on the night that you went up there -- which was on October 25th, last -- that you had never had intercourse with any man until her husband

A..I didn't. I attempted it, but I never did.

Q..I suggest that you said to Mrs. Bernstein that you had never had intercourse with any man except your husband

A..Well, I didn't. There is a big difference between "attempting" and "having".

Q..You didn't explain that in detail to her

A..I explained the first one, that I had had intercourse with her husband.

Q..But you did not introduce the word "attempt" or suggest that you had any "fruitless" attempts You were trying to suggest to her that you were completely pure until you met her husband, isn't that it

A..Well, he was the first man who ever touched me.

Miss Johnston saw Dr. Bernstein several times between January, 1970, and her admission to St. Michael's Hospital in July, 1970. Finally, Dr. Bernstein referred her to a gynaecologist who decided to do another dilation and curettage procedure on her. For this purpose she was admitted to the new Mount Sinai Hospital on July 31, 1970, and the procedure was carried out on August 1, 1970.

The transcript shows that at the hearing Jo-Anne Johnston testified in part as follows:

Jo-Anne Johnston in-chief

EXAMINED BY MR. HUNTER:

. . . . .

Q..Now in addition, the evidence presented thus far, Miss Johnson, would indicate you were in St. Michael's Hospital in the month of July, 1970: Did your confinement in that hospital have anything to do with Dr. Bernstein

A..Partially.

Q..In what respect

A..I was very confused about our relationship. I didn't know how long it was going to go, what was going to happen. I just couldn't end it.

Q..Did the doctor visit you while you were in St. Michael's Hospital

A..He didn't know I was there.

This evidence is completely contradictory to other evidence given by her at the hearing. (Note: The witness was referring to a conversation with Dr. Bernstein after her release from Mount Sinai Hospital in August, 1970.)

Johnston in-chief

EXAMINED BY MR. HUNTER:

Q..You had made up your mind

A..Yes.

Q..About what

A..As to whether I was going to get involved or not.

Q..With whom

A..This guy that I was going out with.

Q..And what decision had you come to

A..I had come to the decision that I was going to. He asked me on the phone and I said I didn't want to say. He said why And I said well, I just don't want to say. Then he asked me when my appointment was due, and I told him; and he said we will discuss it when you come down to the office.

Q..And did you discuss it at the office

A..Yes, we did.

Q..And can you recall the discussion that took place

A..Well, I was still very confused, and told him, I didn't want to be used and I didn't want anybody using me, either. I told him the men who were making advances at me, I didn't want this; and he said to me a lot of married men have affairs, but they don't think anything of it. He said I needed somebody that was experienced and knew what they were doing.

I can't remember how we came along to -- he asked the question, "is it me" And I said, "yes". And he asked me, when he could see me I said it didn't matter. And he said, I will see you today And I said yes.

Q..And did he see you that day

A..Yes.

Q..Where

A..At my apartment.

Q..What time did he arrive at the apartment

A..Well, he drove me home after the appointment. It would be about 2:00 o'clock, he asked me to come up then. I said the apartment was a mess and I had to clean it. I said to come back later. So he arrived about 5:00 o'clock.

Q..And where were you living at that time

A..I believe I was living at 280 Wellesley Street, East, St. James Town.

Q..What kind of accommodation did you have there

A..I was sharing a two-bedroom, with two other girls.

Q..When the doctor arrived, were the other girls there

A..No, they weren't.

Q..Do you know where they were

A..One of them always went home on weekends.

Q..Was that a weekend

A..Yes, it was.

Q..What day of the weekend was it

A..If I can recall correctly, it was the Saturday.

Q..Yes

A..I don't remember where the other girl was, but I know she wasn't there.

Q..And what, if anything, happened when he arrived at the apartment

A..Well, he arrived and I invited him in and just talked for a while; then went to bed.

Q..How long did you talk before you went to bed

A..About an hour or so.

Q..And when you went to bed, what happened

A..We made love.

Q..Did you have sexual intercourse

A..Yes.

Q..How long was he there on that occasion

A..To about 11:00 o'clock.

Q..How long were you in bed together

A..We were in bed all the time.

Q..Can you recall what date that was

A..It was August the 15th.

Q..How do you happen to recall that date

A..When I left the Convent, I left around Easter, and I was due to make "First vows" on August 15th. That day, I recall, because I still wasn't sure if I wanted to go back or not and I knew if I was going to go back, this was the day I was going to make first vows. All this stuck in my mind.

Q..Can you tell me on this date, when he visited you at the apartment, who made the first advance.

A..Well, he did.

Q..How.

A..He just kissed me.

Q..He just kissed you

A..Yes.

Q..Had he ever kissed you before

A..No.

Q..Had you ever had sexual intercourse with the doctor before

A..No.

Q..Had you ever had sexual intercourse with anyone else before

A..No.

Q..Have you had sexual intercourse with the doctor since August 15th, 1970

A..Yes.

Q..Can you tell us on what occasions Or, can you tell us in chronological order, if there was more than one occasion

A..Well, the relationship first started from that day I saw him almost every weekend, usually on a Saturday. As it advanced, I would see him sometime on Monday night or Wednesday night, for about three years after.

Q..For how many years

A..Three years.

Q..When was the last time you had sexual relations with Dr. Bernstein

A..It was in March, early March of 1973.

Q..Where did you have sexual relations with him then

A..Well, that time I moved to 240 Wellesley, still in St. James Town. I was sharing a two-bedroom with another girl. That is where I let it go.

It is clear even by her own testimony any sexual relationship between herself and Dr. Bernstein, or any relationship other than that of doctor and patient, did not begin until after her release from St. Michael's Hospital and, indeed, after the surgical procedure at the Mount Sinai Hospital on August 1, 1970.

If Jo-Anne Johnston was confused about her relationship with Dr. Bernstein and that confusion had something to do with her confinement in St. Michael's Hospital, it was obviously a one-sided relationship she was confused about, one that she imagined to exist; an imaginary relationship "that she could not end", to use her own words.

Miss Johnston testified that she could see towards the end of 1972 that her relationship with Dr. Bernstein was fading, and that at Christmas-time, 1972, he told her their relationship was over and that he did not want to see her anymore, but that he promised to call her when she returned to Toronto after a trip home for Christmas. She said that when he did not call her on her return to Toronto she became very upset and in early January, 1973, attempted suicide by taking an overdose of aspirin.

She was treated for this overdose and her psychiatric problem at the Wellesley Hospital. It appears she was admitted to the Wellesley Hospital on January 5, 1973, and was treated there chiefly by Dr. David Heilbrunn who was taking a post-graduate course in psychiatry at the University of Toronto at the time. She was kept in hospital about a week and then Dr. Heilbrunn saw her as an outpatient on fairly regular intervals until he left Wellesley Hospital in June, 1973.

I quote portions of the testimony of Dr. Heilbrunn given under cross-examination by Mr. Robb, counsel for Dr. Bernstein:

Q..Am I correct, from what I think I heard you say, that you did get in touch with Dr. Binney

A..Yes.

Q..And the reason that you got in touch with Dr. Binney was that you knew that girl had been treated by him at some stage

A..Yes, sir.

Q..And Dr. Binney was a psychiatrist

A..That is right.

. . . . .

Q..Am I correct that Dr. Binney indicated to you that the girl was prone to having a fascination or infatuation for the doctor

A..I am.

Q..And that was based on his experience

A..Yes.

Q..And that in connection with her having this fascination or infatuation for the doctors she could be quite manipulative

A..Yes.

Q..And you, too, found that she could be quite manipulative

A..I did.

Q..Did you conclude that it was possibly quite true when Dr. Binney told you that she developed a fascination or infatuation for him

A..I supposed it was quite possible, yes.

. . . . .

Q.."She tends to over-sexualize in her object relationships and uses some projection." [Mr. Robb reading from a report of Dr. Binney.]

Are those terms recognized as psychiatric terms

A..Yes, sir.

. . . . .

A..Well, I think he was trying to convey that Miss Johnston, in her relationship with her therapeutist, tends to or tended to sexualize the therapeutic situation. That is my impression.

. . . . .

A..That instead of regarding her relationship with Dr. Binney as purely a therapeutic one, that he felt that she tended to have sexual fantasies surrounding this relationship.

Q..Well, put it in layman's language: Would she tend to believe that he, the doctor, was sexually interested in her

A..Well, I don't know if you could say that. You could turn it the other way around, that he thought she, the patient was sexually interested in him.

Q..Yes And is this an unusual thing amongst patients, with the background of this one

A..I don't think so, no.

Q..It is quite usual, isn't it

A..Yes.

Q..The patient takes the relationship with the doctor and in her mind transforms it to a sexual relationship

. . . . .

Q..There is no doubt about it that in 1970, based on your own judgment of what you saw in 1973 -- early 1973 -- that this girl would be experiencing a difficulty regarding her psycho-sexual identity and development

A..Yes.

Q..No doubt about that at all

A..No.

Q..And that she would be prone to becoming infatuated with her doctor, whoever he was

A..Yes.

Q..And she would be prone to fantasize as to what their relationships were

A..Yes.

Under examination by members of the Discipline Committee we find testimony by Dr. Heilbrunn as follows:

CHAIRMAN: But your discussion with Dr. Binney over the telephone, did you have the impression that it was his diagnosis as well

WITNESS: I think he uses the term "hysterical personality".

. . . . .

CHAIRMAN: Then I would assume that Dr. Wilson and Dr. Mandryk and Dr. Binney

did, in fact, agree with your diagnosis of psycho-neurosis

WITNESS: Well, at least Dr. Mandryk did.

CHAIRMAN: You had said that Dr. Binney had made the diagnosis of hysterical personality

WITNESS: I seem to recall. I couldn't tell you for sure.

CHAIRMAN: Would you feel that this falls into the category of psycho-neurosis or psychosis

WITNESS: Well, as I indicated with the word "border-line", there is some features, particularly the vivid fantasy life, which would be almost psychotic in nature; because there is no actual evidence of psychotic illness of any kind.

In his reports Dr. Heilbrunn wrote in part as follows:

Psychiatric Clinic -- 1 Feb. 1973

. . . . .

Sexual impulses on weekend -- almost daily. Values sex highly, especially 69. Wants many different males. Wants to change them like H.H.

. . . . .

"They can get sex wherever they want but not what I can give them."

"If I am used I might as well be paid for it."

Gets "the hots" when J. and boyfriend are in bedroom (most of the time).

Brought up S.W. (because I said I was only getting half a picture). I am not a doctor to her -- got warm feelings -- wishes she hadn't met me in hospital (insinuation here) I suggested terminating patient. Asked to leave decision in abeyance.

In his final note on her hospital stay Dr. Heilbrunn reported in part, as follows, on January 24, 1973:

The patient has never received any affection from either parent and the male and female models they provided were, to say the least, inadequate. Her period at the convent was an attempt to find an alternate source of love and affection. It was a difficult time for her, fraught with sexual fantasies concerning the nuns. Since that time she has sought gratification through sexual relationships, mostly with married men, with a naturally appalling outcome. Various therapists have tried to employ interpretive techniques with her and all have failed as the transference neurosis very rapidly becomes an interference in the therapy.

While Dr. Heilbrunn was of the view that Jo-Anne Johnston would be able to distinguish between a sexual fantasy and an overt physical act of sexual intercourse, a certified psychiatrist was not so certain. Dr. Eugene Mandryk, a certified psychiatrist and a staff psychiatrist at the Wellesley Hospital, had Jo-Anne Johnston under his care at that hospital. His testimony is in part as follows:

Mandryk in-chief

. . . . .

Q..In your opinion, doctor, was this patient given to fantasy

A..Yes, most certainly. These were discussed in her psychotherapy. She had sexual fantasies concerning the nuns.

. . . . .

Certainly the patient's fantasy life was quite straight.

. . . . .

Mandryk re-exam

. . . . .

CHAIRMAN: Now when you had Miss Johnston in the Wellesley Hospital, what was the discharge diagnosis

WITNESS: The discharge diagnosis: Psycho-neurotic depressive reaction and borderline personality disorder.

CHAIRMAN: Now you don't in that diagnosis make any comments about psychosis

WITNESS: No. The term "borderline" is a vague term. What it means is, what it is defined as, is that there are times when the individual, the patient's reality testing is questionable. It may border on psychosis. I think it is important for me to emphasize that. The distinction or the conundrum between neurotic disorders, through personality disorders, through to psychotic disorders is continual and is not -- only in the most overt instances -- that the greatest instances where the boundaries are very, very sharp -- what I am saying, the boundaries, oftentimes are not sharp and are not easily defined.

CHAIRMAN: From your knowledge of Miss Johnston, would you assume that she would know the difference between an overt physical act and a fantasy of hers

WITNESS: Yes, for the most part. In the main, I would say that this person would be able to distinguish fantasy from an overt act. She would be able to make that distinction for the most part. I can't say for certain.

According to the evidence of Dr. Bernstein, on June 27, 1973 (during the day-time), Jo-Anne Johnston visited at his office complaining of a vaginal discharge. She had told him previously she was seeing a policeman and she said that she was still seeing him. Dr. Bernstein did a gonorrhoea smear. She complained of many family problems related to her sister, father and mother. Jo-Anne Johnston did not deny that such visit took place nor suggest Dr. Bernstein's version of it was incorrect.

It appears to be common ground that Miss Johnston knew that Dr. Bernstein was planning to go to Las Vegas on June 28, 1973. In spite of the fact she had seen him earlier in the day on June 27th she telephoned him at his office in the evening. He told her he was too busy to talk to her and refused to do

so. She told him she was taking a taxi-cab to his office and he told her not to. She took the cab anyway to his office. He would not allow her into the office, indicating he did not have time to talk to her as he was going away. It appears Dr. Bernstein told her she was making such a nuisance of herself that he had no interest in speaking with her again or treating her as a patient anymore. Miss Johnston left the office door. It was then about 10:00 p.m.

Two private investigators in a car across the street, one a man, the other a woman, witnessed the argument or dispute between Dr. Bernstein and Miss Johnston. They saw Miss Johnston attempt unsuccessfully to get a taxi, and then pulled alongside and offered her a ride, which she accepted.

The female investigator, Wendy Morrisey, told Miss Johnston that she was an ex-patient of Dr. Bernstein and had been having an affair with him, but now was getting the "runaround". I refer to the evidence of Miss Johnston, as follows:

> Q..I suggest to you that she was introduced as ex-patient of Dr. Bernstein's, and that Dr. Bernstein was giving her the run-around, that she had had an affair with him: Isn't that right
>
> A..They introduced themselves as investigators, before she told me that.
>
> Q..But she told you that
>
> A..That is right.
>
> Q..And she told you, that is, Miss Morrisey, is it
>
> A..Yes.

Later in her testimony Miss Johnston denied that Miss Morrisey said she had an affair with Dr. Bernstein but simply that he had "approached" her, like he had "approached" Miss Johnston.

In fact, Wendy Morrisey was never a patient of Dr. Bernstein, nor had anything to do with him. Counsel for the Discipline Committee did not call her to testify, and so the Committee did not have the opportunity of hearing from her, her version of the lies she told Miss Johnston, prior to Miss Johnston giving the statement which is ex. 6. The result of the encounter between the investigators and Miss Johnston was that Miss Johnston gave them a sworn statement which was filed as ex. 6 at the hearing. It reads as follows:

> Statement of
> June 27th, 1973.
>
> I, Jo Anne Johnston 27 yrs. Apt. 1009 Winnipeg Bldg St. James Town
>
> Make Oath and state as follows that I have been a patient of Dr. Stanley Bernstein of Gerrard St. for about three years.
>
> During this period of time I have had sexual intercourse on a fairly regular basis up to about March of 1973.
>
> As a result of our Doctor and patient relationship and sexual involvement my nerves became very bad and on or about January 3rd/73 I attempted suicide and was hospitalized at Wellesley and further was required to attend with a psychiatrist Dr. Hielbrunn.

I have had no intimate relationship with Dr. Bernstein since March 1973.

I further state that I make this declaration under oath and the contents are true.

Sworn before me in the Judicial District of York June 27th
1973.
"Jo-Anne Johnston"
Phone # 366-7411 - Loc. 486

[Signature -- Illegible]

A Commissioner etc.
Witness: "Wendy Morrisey"

On July 25, 1973, Miss Johnston wrote in her own hand and swore to the truth of a second statement in which she denied any relationship with Dr. Bernstein, except that of doctor and patient. That statement is ex. 7 and is as follows:

I Jo-Anne Johnston the undersigned make oath and say as follows,

(1) I first met and consulted with Dr. S. K. Bernstein as my physician in January of 1970.
(2) He has been my doctor since this time and I have consulted him concerning both my physical and mental health.
(3) I have always found him to be helpful and compassionate and he has always taken sufficient time for me to explain all of my problems to him.
(4) I have been under the care of another Doctor as well since January 1973 concerning my mental health and have been having difficulties adjusting to my life in view of the many emotional problems I have faced with my family.
(5) Near the end of June 1973, I was accosted by two people, a man and a woman, who identified themselves to me as private investigators working for Allied Detective Agency. This happened outside of Dr. Bernstein's office one night when I was in a particularly depressed state of mind and most upset, after I tried to force my way into Dr. Bernstein's office after closing time. They told me very horrible stories concerning the doctor and goaded me into such anger that I signed a paper in order them to harm Dr. Bernstein. I felt that what they had told me was true. I could no longer rely on him and that he should not be allowed to practice medicine.
(6) Anything contained in the document I signed cannot be relied upon as being true because I was not fully aware of what I was signing and was confused by the constant badgering of the two people. The woman had told me that Dr. Bernstein had made a pass at her when she went to be examined by him. This was before she had identified herself as a private investigator.
(7) At no time have I had any relationship with Dr. Bernstein other than as his patient and have the highest regard for him as a doctor. "Jo-Anne Johnston"

Sworn before me in the Judicial District of York this 25th day of July, 1973.

"Paul J Schrieder"

Notary Public

In addition to what she said to the investigators as contained in ex. 6 on the evening of June 27, 1973, she also told the investigators that Dr. Bernstein had performed an abortion on her sister. Dr. Bernstein never performed an abortion on Miss Johnston's sister and her remarks in that regard were lies told with the obvious intention of harming Dr. Bernstein.

The two private investigators, Wendy Morrisey who did not testify and Bernie Floyd who did testify, were watching the office of Dr. Bernstein on the evening of June 27, 1973, because they had been directed to do so by their employer, Allied Investigation and Security Limited, which had undertaken an investigation of Dr. Bernstein on the instructions of one Barry Kasman who was an acquaintance of Dr. Bernstein. The investigators had been watching Dr. Bernstein's office each evening, Monday to Thursday, 6:00 p.m. to 10:30 p.m., from about the middle of May, 1973, to June 27, 1973.

Prior to May 15, 1973, Dr. Bernstein had made some tentative plans with Barry Kasman to invest with him in a weight-reducing salon. It was contemplated that Dr. Bernstein would give all prospective clientele of the salon a physical examination before a weight-reducing scheme was worked out for a particular customer.

Dr. Bernstein checked with the College of Physicians and Surgeons to see if it was proper for him to get involved in the scheme and because of the advertising that would accompany the venture he was advised not to. He informed Mr. Kasman he could not join in the venture or act as the doctor for it. Mr. Kasman had apparently invested several thousands of dollars in the scheme expecting it would proceed and was very angry with Dr. Bernstein for backing out of it.

Dr. Bernstein explained what happened in that regard and no one attempted to contradict his testimony. Dr. Bernstein's evidence in that regard is found at pp. 759-60 of the transcript and is as follows:

> Q..Can you tell us the substance of what Kasman told you
>
> A..On the 16th -- I am sorry, on the 14th of May, after I told them I was no longer interested, Mr. Kasman tried to persuade me to change my mind. I refused to do so. On the 16th of May, he called me at the office and after I told him I would not change my mind, he said he would not take this lying down and he would "get me for costing him money" --
>
> Q..He would what
>
> A..He would get me for costing him a lot of money.
>
> Q..Yes
>
> A..On July the 5th, I telephoned him; and he told me that he was going to put me out of practice. He told me he had accumulated some information against me and that he would use it against me to put me out of practice. He then suggested -- or I suggested possibly trying to find out what he was doing and why he was doing it. I met with him on the 6th; and on the 6th he told me he wanted me to give him three or four thousand dollars; and possibly go into re-open this business with him. I did not know which alternative he wanted. He either wanted me to give him three or four thousand dollars and call it quits; or give him three or four thousand dollars and go into business with him.
>
> He had other financial problems. He told me he had other financial problems and he

didn't know whether he wanted to go back in the business or not; but he said that he would let me know.

On July the 8th, which was a Sunday, he phoned me at home and told him I didn't want to hear from him again; I didn't want to have any further dealings with him.

Q..Did you ever hear from him again

A..No, I haven't.

On July 9, 1973, Dr. Bernstein wrote the College of Physicians and Surgeons as follows:

College of Physicians & Surgeons, 64 Prince Arthur St. Toronto, Ont.

Dear Dr. Dawson:

I am writing this letter to inform the College of Physicians and Surgeons that I have just been made aware of what appears to be an attempt or plot to try to create situations or acts of purported unethical behaviour by me. I believe that this action is being taken by people with whom I have refused to enter into business and who are apparently blaming me for their financial losses. They may possibly even be attempting to conspire with another physician; in any event, they have been harrassing a number of my patients, so causing them mental anxiety.

I have already contacted a lawyer and also R. Marsh, Esquire, an inspector with the Metropolitan Toronto Police, for their respective advice in dealing with this troublesome matter. I may later, if necessary, even lay charges of defamation of character or of attempted extortion against these people, if the evidence so warrants.

Presently, since the police are involved in the investigation on my behalf, we hope to prevent any continuance of this illegal behaviour and to prevent any false charges being made against me of alleged or unprofessional or illegal conduct.

These people to whom I have made reference, may present their false accusations to the College of Physicians and Surgeons when I refuse to meet their unwarranted demands. If such does occur, please contact me or Inspector Marsh of the Metropolitan Toronto Police Department.

Thank you for your courtesies in the matter.

Eventually, of course, a charge of professional misconduct was layed against Dr. Bernstein. Prior to that event occurring Miss Johnston falsely informed the police that her apartment was broken into and that a personal diary which recorded the times she and Dr. Bernstein had met for sexual relations had been stolen. Miss Johnston later admitted the story as to the break-in was false and no such diary ever existed.

Dr. Stanley Bernstein graduated in medicine from the University of Toronto in 1966, interned at the Mount Sinai Hospital in 1967, and had an extremely busy general practice in a working-class district at 1330 Gerrard St. East in Toronto. Dr. Bernstein's office facility consisted of a waiting-room, three examination-rooms and his private office. He employed a nurse and a receptionist who made all his appointments. His office hours were until 9:00 p.m. on Mondays and Wednesdays and up until 1972 he

worked Saturday mornings until 12:30 p.m. In addition to his office hours he made house calls and was always on call for his obstetrical patients. It was Dr. Bernstein's practice to visit any of his patients who were in the hospital. He was at the new Mount Sinai Hospital on a daily basis. Dr. Bernstein did a great deal of pre-natal and pregnancy work. Many of his patients were young mothers with several children. He saw a great number of ethnic patients and welfare recipients. Dr. Bernstein's waiting-room was generally full with standing-room only. He always saw any patient who came to his office with or without an appointment. He would frequently stay on until 10:00 p.m. after his staff had left to see that all his patients were given attention.

From September, 1970, to August 7, 1973, Miss Johnston made persistent and continuous attempts to see Dr. Bernstein. She would often arrive at his office at 8:30 or 9:00 a.m. before office hours and demand to see him. When making appointments she admitted that she always tried to get the last appointment of the day. She telephoned Dr. Bernstein's office and the answering service continually, often as many as six or seven times a day. When Dr. Bernstein finally refused to take her calls she employed various ruses to get through. She pretended to be calling from the delivery-room or emergency department of the Mount Sinai Hospital. On one occasion she pretended to be a long-distance operator. Miss Johnston accused Dr. Bernstein's office staff of blocking her calls because they thought that she was infatuated with the doctor.

As indicated earlier, Dr. Bernstein testified at the hearing that he had no sexual relationship with Jo-Anne Johnston or, indeed, any relationship with her except that of doctor and patient.

A doctor who held a teaching position while Dr. Bernstein was an intern thought so highly of his character and ability that he told Dr. Bernstein if he chose to make gynaecology a specialty he would be happy to have Dr. Bernstein associate with him. That same doctor expressed the opinion that Dr. Bernstein was a first-class doctor who had much concern for his patients and saw them in the hospital regularly.

So far as Dr. Bernstein's demeanour as a witness is concerned, even counsel for the College of Physicians and Surgeons in his submissions to that Committee characterized it as being clear, straightforward, and beyond criticism.

Counsel for the College in his submissions to the Committee correctly reminded them that they were dealing with a matter of great seriousness and that the onus rests upon the complainant, in this case the College of Physicians and Surgeons of Ontario, to prove the charge.

He then submitted that the burden of proof cast upon the College was, as in civil cases, to establish the guilt by a fair and reasonable preponderance of credible testimony, they being entitled to act upon the balance of probabilities.

On the other hand, Mr. Robb submitted to the Committee that a mere preponderance of probability was not sufficient for a finding of guilty and the Committee had to keep uppermost in its mind that the matter was of the gravest nature, and that the proof must be weighty, cogent and reliable before there could be a finding of guilt.

It is necessary to examine some decisions on this point to decide the nature and degree of proof that should exist in a matter of this kind before there can be a finding of guilt.

In Re Glassman and Council of the College of Physicians and Surgeons, [1966] 2 O.R. 81 at pp. 92-3, 55 D.L.R. (2d) 674 at pp. 685-6, Schroeder, J.A., stated:

> To fortify his argument on that point appellant's counsel contended that because of the

seriousness of the charge and its attendant implications, the College was required to prove its case against his client beyond a reasonable doubt; that the application of a lower standard of proof than that which governs in a criminal case would work a grave injustice to the practitioner. In advancing that argument counsel overlooked the provisions of s. 38 of the Medical Act which are most pertinent to the point which he raises. That section provides as follows:

"38(1) Any person who would be a competent and compellable witness at the trial of a civil action in Ontario is a competent and compellable witness at a hearing of the discipline committee, and the evidence adduced thereat shall be governed by The Evidence Act and the rules of evidence in civil proceedings in Ontario, except that ... "

The section just quoted introduces into the proceedings sanctioned by the Act the rules of evidence that govern in civil cases, and the burden of proof cast upon the College is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities. To say that the College must prove its case does not imply that it must demonstrate its case. What was said by Earl Loreburn, L.C., in Richard Evans & Co. v. Astley, [1911] A.C. 674 at p. 678, is in the highest degree apposite to the point under discussion. That eminent jurist there stated:

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

In my view it would be wrong to isolate the words of Schroeder, J.A., and use them as the criteria or standard of proof in cases such as these, without regard to the views and explanations expressed by other jurists on this point.

The words of Laskin, J.A., as he then was, at pp. 105-6 O.R., pp. 698-9 D.L.R. of the same decision, are worthy of note:

Accepting that it is enough to establish guilt on a balance of probabilities, it is, none the less, a proper rule of caution to have regard to what Masten, J.A., said in Re Hynes and Swartz, [1938] O.R. 77 at p. 79, [1938] 1 D.L.R. 509 at p. 512 sub nom. Swartz v. Registration Board, Ontario Ass'n of Architects, a discipline case involving an architect, namely, that "considering the penal nature of the proceeding ... the appellant is entitled to the benefit of any doubt which may arise upon the evidence".

A further comment is in order on this last point in view of the provisions of s. 38 of the Medical Act prescribing, inter alia, that "the evidence adduced [at a hearing of the discipline committee] shall be governed by The Evidence Act [R.S.O. 1960, c. 125] and the rules of evidence in civil proceedings in Ontario". Both the discipline committee and the Council in its appellate character need to be left with more than the generalization that a charge of misconduct may be established on a mere balance of probabilities. What Cartwright, J., said in Smith v. Smith and Smedman, [1952] 2 S.C.R. 312 at p. 331, [1952] 3 D.L.R. 449 at p. 463, is highly important because, as Rand, J., said in the same case, there is not in civil

> cases as there is in criminal prosecutions a precise formula of the standard of proof. Cartwright, J., said this: "... in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and ... whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding."
>
> A man's professional reputation, threatened by allegations of misconduct against which he pledges his credit as a witness, should be upheld unless there be very strong evidence shattering his defence of that reputation: See R. v. Chapman (1958), 121 C.C.C. 353 at p. 362, 29 C.R. 168 at p. 177, 26 W.W.R. 385; Re Robb and Council of Dental Surgeons of B.C. (1964), 46 D.L.R. (2d) 202.

In Re "D" and Council of the College of Physicians and Surgeons of British Columbia (1970), 11 D.L.R. (3d) 570, 73 W.W.R. 627 sub nom. Re Dr. "D", Macfarlane, J., at p. 576, referred with approval to the words of Davey, J.A., in Re Medical Act and Dr. "A", March 14, 1966 (unreported), as follows: "... the question for the appellate tribunal is 'whether the evidence is sufficiently cogent to make it safe to uphold the findings' ".

In Smith v. Smith and Smedman, [1952] 2 S.C.R. 312 at p. 331, [1952] 3 D.L.R. 449 at p. 462, Rand, J., stated:

> I agree with the reasoning and conclusion of my brother Locke that in an action for divorce on the ground of adultery the standard of proof is that required in a civil proceeding and I have only one observation to add. There is not, in civil cases, as in criminal prosecutions, a precise formula of such a standard; proof "beyond a reasonable doubt", itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia, in part quoted by my brother Cartwright, is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. No formula of direction is here involved; instructions to juries are left exactly where they were; but it is at all times desirable to have these elusive processes progressively made more explicit.

and Cartwright, J., stated, at pp. 331-3 S.C.R., pp. 462-4 D.L.R.:

> I agree with the conclusion of my brother Locke that in divorce proceedings in British Columbia the standard of proof in determining the issue whether adultery has been committed is the standard required in civil actions only.
>
> It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.
>
> I would like to adopt the following passage from the judgment of Dixon, J., in Briginshaw v. Briginshaw ((1938) 60 C.L.R. 336):--

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."
>
> and the following from the judgment of Roach J.A. in George v. George and Logie ([1951] 1 D.L.R. 278):--
>
> "The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal--be it judge or jury--acting with care and caution to the fair and reasonable conclusion that the act was committed."
>
> There is, I think, no difference between the law of British Columbia and that of Ontario in this matter.
>
> In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the words "the gravity of the consequences flowing from a particular finding" assumes great importance in such a case.

One cannot, from reading the reasons for judgment of the Discipline Committee, determine what criteria was used by it as to the degree of proof that should have existed before it found Dr. Bernstein guilty. The Committee after reviewing the evidence simply said:

> With respect to that issue where the evidence of Miss Johnston and Dr. Bernstein is in conflict as to whether sexual intercourse took place, we accept the evidence of Miss Johnston in preference to that of Dr. Bernstein.

In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities". By referring to the decisions of several

distinguished jurists I hope I have made it easier for them to understand the kind of proof required before a conviction can be entered in a particular case.

The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

The grave charge against Dr. Bernstein could not be established to the reasonable satisfaction of the Committee by fragile or suspect testimony. The evidence to establish the charge had to be of such quality and quantity as to lead the Committee acting with care and caution to the fair and reasonable conclusion that he was guilty of the charge. In this case where Dr. Bernstein, a man of good reputation swore that no impropriety occurred between himself and Jo-Anne Johnston it would take very strong evidence to destroy his defence of his reputation.

In my view the evidence in support of the charge was not sufficiently cogent to permit the Discipline Committee to make the finding it did and that finding must be set aside.

Having already referred to the evidence at considerable length I do not intend to point out all the weaknesses in the evidence against Dr. Bernstein that in total made it too fragile on which to rely. I will, however, enumerate some of these weaknesses.

1. Approximately one month after swearing that she and Dr. Bernstein had had a sexual relationship, she swore a new affidavit to the effect that there had been no such relationship. 2. She testified that her relationship with Dr. Bernstein was responsible for her hospitalization in St. Michael's Hospital in July, 1970, but elsewhere testified that her relationship with him did not begin until approximately two weeks after she left St. Michael's Hospital. 3. She told the police her apartment had been broken into when it had not been, and that a diary which never existed had been stolen. 4. She told the investigators that Dr. Bernstein had performed two abortions on her sister when he had performed none. 5. She was described by Dr. Mandryk, a psychiatrist, as a border-line psychotic and he could not state with certainty that Jo-Anne Johnston could distinguish between fantasy and overt acts. 6. Except for the evidence of Jo-Anne Johnston, there was no evidence whatever that she and Dr. Bernstein had ever been even seen together outside of his office. Surely, if this sexual relationship continued for well over two years on a regular basis, two or three times a week at her apartment, somebody would have seen the doctor coming or going from that apartment at some time. Over much of the period Miss Johnston was living with other girls. Could it be that they would never have encountered the doctor if he was there at those times

Very simply, there was insufficient credible evidence before the Discipline Committee for it to reach the conclusion it did and I base my decision on that fact.

In any event, and apart from the insufficiency of credible evidence, the Committee made a fatal error in the reasoning which lead to its conclusion. For some inexplicable reason the Committee chose to ignore completely the fact that a month after she first related having a sexual relationship with the doctor, that she swore another statement saying she had not had such a relationship. Surely, it was of great significance to the issue of her credibility that she renounced her first statement a month later. Yet, we have the Committee saying in its reasons:

> We do not place any weight on any one of the affidavits and in making the findings which we do herein, we ignore the affidavits completely.

Having reached the conclusion the appeal must be allowed, it is not necessary for me to deal with the application for judicial review. For the future guidance of the Committee I will, however, make comment on some matters brought to our attention when the application for judicial review was argued before us.

The hearing of the charge against Dr. Bernstein was scheduled to begin on October 25, 1973. On October 24, 1973, Ronald G. Thomas, solicitor, in the absence of Malcolm Robb, Q.C., counsel for Dr. Bernstein, the applicant, appeared before the Discipline Committee composed of Dr. D. J. Grant, Dr. R. M. Mitchell and Dr. J. R. Barber, upon the first appearance to request an adjournment by reason of Malcolm Robb, Q.C., being engaged in another Court. At this juncture the Committee refused the adjournment, Dr. R. M. Mitchell stating:

> Could I ask a question first The doctor, himself, has been aware of the possible charge for three years.
>
> MR. THOMAS: No! No!
>
> MR. HUNTER: No, since September 14th.
>
> DR. MITCHELL: If his "affair" has been going on for three years, he knows what the penalty is.
>
> MR. THOMAS: That would pre-judge the situation, sir, with respect. This is a mere allegation at this stage and nothing more.
>
> MR. HUNTER: The really crucial date, the Notice of Hearing goes out, September 27th.
>
> DR. MITCHELL: I was only mentioning the September 14th date because the doctor knew that the matter was being considered by the Complaints Committee and wanted to know the outcome of the Discipline Committee in the matter; and he was told on that very day that it referred it to your committee; that he was going to discipline for professional misconduct.

The remarks of Dr. Mitchell could be interpreted to mean that he had prejudged the doctor's guilt and it would have been improper for him to sit on the Committee hearing the charge. Yet, when the hearing actually commenced, it appears it was by chance only that it was differently constituted and Dr. Mitchell was absent. On December 10, 1973, before evidence was called, counsel for the College stated:

> MR. HUNTER: Mr. Chairman, my friend made three points: No. 1, taking them in reverse order -- your comment re Dr. Mitchell: Dr. Mitchell is a member of the Discipline Committee, but he was not able to be with us for this hearing and therefore, he will not be present at any time during the current presentation of the evidence.
>
> I could also indicate to my friend that Dr. Barber, the other member, is not able to be here, either. Normally, you would have a five-man committee, but three constitutes a quorum. So we are proceeding with only three.

As mentioned earlier the Discipline Committee announced its verdict at the end of the hearing and

delivered reasons for its verdict later. How these reasons came into being is set out in a letter from Mr. Hunter to Mr. Robb dated April 7, 1976, which reads, in part, as follows:

Mr. Malcolm Robb, Q.C.

. . . . .

Dear Mr. Robb:

. . . . .

> As previously indicated, it has been the practice of the Discipline Committee in some cases after reaching its verdict, for the Chairman to prepare a rough outline of the Committee's reasons for judgment, after which I am directed by the Chairman to prepare a formal draft thereof for approval by him and the members of the Committee, and when such approval is obtained then the reasons are signed by the Chairman.

. . . . .

Yours very truly,
"J.R. Hunter"

In this particular case Mr. Hunter, though asked by the Court for the same, was unable to locate the rough outline of the reasons for judgment sometimes prepared by the chairman. In my view it is an unusual and improper practice for counsel to write the reasons for the Discipline Committee even if the chairman or some member of the Committee has drafted rough reasons to guide him. One who has stood trial before a disciplinary body is entitled to have that body's reasons for its decision and not the reasons the prosecutor composes for the decision. If the Committee has made an error in arriving at its conclusion the one who has stood trial, in fairness, should learn of it.

As indicated previously, I would allow the appeal with costs and set aside both the conviction and penalty imposed by the Discipline Committee, and I would direct that the respondent pay the appellant's costs of the hearing before the Discipline Committee on a party-and-party basis, on the Supreme Court scale.

STEELE, J., concurs with O'LEARY, J.

GARRETT, J.:-- This is an appeal by Dr. Stanley Karl Bernstein from a decision and finding of the Discipline Committee of the College of Physicians and Surgeons dated December 14, 1973, wherein it was found that in the period August 15, 1970, to the fall of 1972, an improper association did exist between the said Dr. Stanley Karl Bernstein and the patient Jo-Anne Johnston. The doctor was found to be guilty of professional misconduct and suspended from the register of the College of Physicians and Surgeons for a period of 12 months and directed to pay the costs of the hearing.

There is also an application for judicial review made in a separate application, but I propose to deal only with the appeal itself in these reasons.

Dr. Stanley Karl Bernstein (hereinafter referred to as "the doctor") was 31 years of age when this hearing was conducted on December 14, 1973. He had graduated from the University of Toronto as a doctor in 1966, and thereafter interned in the Mount Sinai Hospital in 1967. Following the completion of his internship he associated himself with two other doctors in general practice for a period of some eight or nine months and then he opened his own office in a working-class district of Toronto at 1330 Gerrard

St. East. Dr. Bernstein's offices consisted of a waiting-room, three examination-rooms and a private office. He employed a nurse and a receptionist who made all his appointments. His office hours were until 9:00 p.m. on Mondays and Wednesdays and until the year 1972 he worked Saturday mornings until 12:30 p.m. He had a very large number of obstetrical patients and he made a number of house calls. He did most of his obstetrical work at Mount Sinai Hospital and it would appear that most of Dr. Bernstein's practice consisted of pre-natal work and pregnancy work. He saw a large number of patients each day and the uncontrolled evidence is that he was an extremely busy doctor with a full waiting-room at all times and it is also uncontradicted that he would see patients who did not have an appointment and that he often stayed in his office and worked well after 9:00 p.m. and until 10:00 or 10:30 p.m. At all relevant times Dr. Bernstein was married and had two young children, one of whom was not in very good health. Dr. Bernstein is Jewish but he only had one or two Jewish families as patients apparently because of the fact that no Jewish people lived in the area where he maintained his offices. There was not one word said in this case against Dr. Bernstein's qualifications and there was absolutely no evidence which indicated that the doctor was incompetent or anything other than a busy general practitioner. Dr. Abraham Bernstein, a specialist in obstetrics and gynaecology, spoke very highly of the doctor's professional abilities and he had at one time indicated to the doctor that he should work under him and become a specialist in those fields. Dr. Abraham Bernstein is not in any way related to the doctor and it is quite obvious that he genuinely felt that the doctor's abilities and qualifications were excellent. The doctor apparently felt it was necessary to get away from the work and tensions of his office every once in a while and in 1973 he had made two trips to Las Vegas, one trip being with his wife and the other with a male friend of his. There is no evidence of any impropriety having been committed by the doctor in respect of these trips to Las Vegas and I would think that it could only be held that they constituted a form of recreation for him.

The doctor acknowledged that Miss Jo-Anne Johnston had been a patient of his for some time from January, 1970, down to August, 1973. Over that period of time she had consulted him for a variety of gynaecological complaints and it appeared that for most of that time she was suffering from a vaginal discharge. It also appeared that during the period of time in question Miss Johnston became infected with venereal warts and she also had developed cancer of the cervix and she was operated on for the cancer condition by Dr. Abraham Bernstein. Nothing at all had been suggested to the effect that the doctor did not treat Miss Jo-Anne Johnston in a capable and efficient way in so far as her medical complaints were concerned.

Miss Jo-Anne Johnston, who shall be hereinafter referred to as "the complainant", was 27 years of age, unmarried and a telex operator at the date of the hearing before the Discipline Committee. She had been born in the Sudbury area and had lived most of her life in and around Sudbury and North Bay until she entered a convent in North Bay where she remained for about three and one-half years without taking any final vow. She moved to Toronto in the year 1968 and by November, 1969, we find her under the care of Dr. J. C. Binney, a staff psychiatrist at St. Michael's Hospital, Toronto, who is treating her for certain problems that she is having which will be set out later with a bit more particularity. It should be noted that before coming to Toronto and in particular in January, 1968, the complainant had been a psychiatric patient in Sudbury General Hospital where she had received electroshock therapy. The hospital records of the Sudbury General Hospital are very voluminous concerning the complainant and they do show that she had some extremely serious mental problems. She was described as being depressed, confused and withdrawn and incapable of forming meaningful personal relationships. She suggested that an incestuous relationship had taken place between her and her father and perhaps with her brother. She had certain other sexual fantasies with respect to the nuns in the convent in North Bay. The complainant continued to see Dr. Binney on an outpatient basis and the effect of Dr. Binney's findings may be summed up when he stated that she over-sexualized her relationships with men. She developed an infatuation for Dr. Binney and was extremely manipulative in her behaviour. Dr. Binney diagnosed her as an hysterical personality with depressive features. She was admitted to St. Michael's

Hospital as an in-patient in July, 1970, where she was seen by several psychiatrists. The conclusions of the psychiatrists apart from Dr. Binney might be summarized by saying that she was found to be an hysterical, manipulative personality with potential suicidal developments. She still apparently was greatly concerned about Dr. Binney and she felt rejected by Dr. Binney and when first admitted into hospital in July, 1970, she refused to talk to any other doctor. While in hospital she wore revealing clothing and behaved in a provocative manner while complaining about men's sexual interest in her. It might be convenient to quote verbatim a short note of Dr. C. V. Murray, who was on the staff of St. Michael's Hospital as a psychiatrist. He stated under date of July 27, 1970:

> This patient has been noticed to be behaving in a rather theatrical manner, posturing, and wearing revealing clothes, although at the same time complaining angrily about men's sexual interest in women. She has impressed the staff as being hostile and critical but there is some indecision about the degree of depression and about the suicidal risk. It was felt that the risk of suicide has not yet been fully assessed and that if she attempts to sign herself out it will be necessary to commit her.

All of the foregoing psychiatric problems and assessments were made and observed in the complainant before August, 1970. In January, 1973, the complainant attempted to commit suicide and she was taken to Wellesley Hospital and there certified for psychiatric treatment by Dr. D. L. Heilbrunn, a resident in psychiatry. She was apparently greatly depressed because her father appeared to be dying and also because of the fight which she had had with the doctor at Christmas-time. Dr. Heilbrunn found Miss Johnston to be highly manipulative with tendencies to have sexual fantasies referable to her relations with men, particularly doctors. Dr. Heilbrunn found that she was becoming infatuated with him in the same manner as she had become infatuated with Dr. Binney. Dr. Heilbrunn diagnosed her as suffering from a psychoneurotic depressive reaction with border-line personality disorder characterized by a vivid fantasy life.

It is to be particularly noted that the complainant had a great deal of psychiatric attention and had had a lot of psychiatric problems prior to August, 1970. The complainant stated that on August 15, 1970, the doctor had driven her home from his office at about 2:00 p.m. and had asked if he could come up to her apartment to visit her. She stated she had to clean her apartment and therefore refused the doctor admittance. About 5:00 p.m. that night the doctor visited her apartment and stayed until 11:00 p.m. and she had sexual intercourse with the doctor and thereafter sexual intercourse occurred at her apartment regularly down to about the first week in March, 1973. The complainant did not say anything at all about any acts of sexual improprieties on the part of the doctor until June 27, 1973, when she was accosted by two private investigators under circumstances that will be hereinafter mentioned.

The doctor absolutely denied ever having had sexual relations with the complainant and his evidence in this regard was not really shaken at all on cross-examination at the hearing.

It must be mentioned that early in 1973 the doctor had had certain discussions with Barry Kasman and Kenneth deGaspar about opening a weight-control clinic in Toronto. At one point the doctor accompanied Kasman to San Diego where a similar clinic was in operation and it appears that Kasman did spend a fairly considerable amount of money in organizing a company, taking out a lease on Avenue Rd. property and in travelling expense. After having seen the operation in San Diego the doctor communicated with the College of Physicians and Surgeons to find out if it would be ethical for him to participate in the project and he was advised that it would not be ethical for him to do so. He communicated his decision not to participate in the weight-control clinic to Kasman and Kasman was extremely displeased and told the doctor that he would get revenge on him. In point of fact it was Kasman who hired Allied Investigation Services Limited to observe the conduct of the doctor and while we do not know the exact date on which the observation commenced in April or early May, 1973, two

detectives, Bernie Floyd and Wendy Morrissey, were working on the assignment to follow Dr. Bernstein on the night of June 27th. On this night at about 10:00 p.m. they observed the complainant being turned away by the doctor from his front office door. It appears that the doctor would not permit the complainant to enter his office although she endeavoured to do so and did try to push her way in but the doctor put her out. In any event, Floyd and Wendy Morrissey picked up the complainant and after some considerable period of time and after some considerable probing and questioning, the complainant made a short affidavit in which she stated that she had been having sexual intercourse with the doctor since August, 1970, and had had an affair with him. The one investigator, Bernie Floyd, stated that prior to June 27, 1973, he personally had followed the doctor on about 25 occasions and that on those 25 occasions he had not witnessed anything wrong or improper which the doctor had done. We do not know exactly how the private detectives obtained the statement which was sworn by Bernie Floyd, who is apparently a commissioner for taking affidavits, but it is obvious that there was a good deal of discussion before the affidavit was signed and it may be that the female detective told certain lies to the complainant in an effort to induce her to make a statement. In any event, Floyd wrote out a statement for the complainant's signature and the complainant did sign it and then Floyd purported to swear it. The evidence as to the order in which this statement was signed is diametrically opposed in that the complainant states that Floyd and Wendy Morrissey had affixed their signatures to the document before she signed it.

What I think is significant really about the evidence of these private investigators is Floyd's evidence to the effect that even though he had followed the doctor on a large number of occasions he had not witnessed anything improper. He also confirmed that subsequent to June 27, 1973, he had learned that the investigation he was doing was for the private benefit of Kasman who was endeavouring to get something on the doctor in order that he could get revenge for the abortive business deal. Apparently shortly after June 27, 1973, the affidavit which Floyd had obtained was forwarded along with other material, which was not before the Court, to Dr. Morton Shulman, a columnist for The Sun newspaper, and it was Dr. Shulman who apparently lodged the complaint with the College of Physicians and Surgeons.

On July 25th, the complainant attended the doctor's office where she met the doctor's lawyer, Mr. Paul Schrieder. It appears that the publication in the Toronto Sun took place on July 24th and the next day we have the complainant going to the doctor's office. Mr. Schrieder is a practising lawyer and he states that the complainant without any urging or improper suggestion on his part wrote out in her own handwriting a statement which he subsequently swore as a notary public. This affidavit completely denies the contents of the affidavit taken by Floyd on June 27, 1973, and is in fact in the complainant's own handwriting.

With respect to these two affidavits which are completely contradictory, the Discipline Committee indicated in its reasons for judgment that it was ignoring them and the Committee had been invited by its counsel to "set them aside".

It should also be mentioned that during the course of the proceedings and really shortly before the proceedings started, the complainant had lied on a number of occasions. Many of these lies, such as calling the doctor's office and posing as a long-distance telephone operator, or posing as the nurse in the delivery-room at the hospital, are not of any particular significance. However, the complainant's sworn testimony at the hearing that she had entered St. Michael's Hospital in July, 1970, before the alleged affair with the doctor commenced because of the affair with the doctor is of significance and she, of course, changed this evidence. Also, it is highly significant that the complainant alleged that her apartment had been broken int in August, 1973, and that a diary which she described in great detail had been stolen and that her apartment had been carefully searched. She told this story to a number of people but she also told it to the police and we therefore do have at least one good example of the complainant's

statements being false and untrustworthy. I am not so concerned about the fact that she is alleged to have said to the investigators that the doctor had done two abortions on her sister, thereby implying that he had been guilty of criminal acts. In point of fact these statements were also false because the doctor had not performed any abortions on the complainant's sister. He had arranged for a therapeutic abortion to be done in Toronto East General Hospital and this operation was performed by a doctor other than the doctor here charged and after the procedure had met with the approval of the committee at the hospital. The complainant's sister returned to the doctor again for a further abortion and he refused to have anything to do with her at all and suggested that she go to Buffalo if she wanted to have another abortion, and this is apparently what was done.

It seems to me that the medical history of this unfortunate complainant ought to have been carefully considered by the Discipline Committee and the affidavits which she swore, one of which had to be false, ought also to have been considered along with her admitted untruthfulness to the police in alleging a breaking and entering into her apartment and the theft of a diary, which diary never existed at all.

There are two matters about the hearing itself which should be mentioned. On October 24, 1973, Mr. Ronald G. Thomas appeared before the Discipline Committee and asked for an adjournment of the hearing because Mr. Malcolm Robb, Q.C., was engaged in another Court. Dr. R. M. Mitchell who was on October 24, 1973, a member of the Discipline Committee, plainly indicated that he had formed the conclusion that the doctor was guilty and this before any evidence at all was heard. Dr. Mitchell stated:

> I was only mentioning the September 14th date because the doctor knew that the matter was being considered by the complaints committee and wanted to know the outcome of the discipline committee in the matter; and he was told on that very day that it referred it to your committee; that he was going to discipline for professional misconduct.

Dr. Mitchell also stated immediately after the request for the adjournment was made, "Could I ask a question first The doctor himself, has been aware of the possible charge for three years." While it is true that Dr. Mitchell did not sit on the Committee which finally heard this case between December 10, 1973, and December 14, 1973, there was at least one member of the Committee as it was composed on October 24, 1973, who did sit at the hearing and this was Dr. D. J. Grant. In no way did Dr. D. J. Grant ever disassociate himself from the remarks of Dr. Mitchell hereinbefore set out. Then at the hearing Dr. C. L. Bates made the following remarks to Mrs. McDade who was the receptionist for the doctor:

> DR. BATES: It seems to me, but it didn't seem to bother you, the doctor of the Jewish faith, working on Saturdays all day
>
> WITNESS: No.
>
> DR. BATES: That is all I wanted.

This question by Dr. Bates, coupled with the lengthy cross-examination of the doctor's brother regarding his changing his name from Bernstein to Berns, introduces into this case overtones which I do not like at all and which in my opinion have no part to play in a case of this kind. So far as I am concerned there could be no possible reason for the cross-examination of the doctor's brother about changing his name other than to create, if not prejudice an atmosphere of prejudice against the doctor and his witness. I should have mentioned that Dr. Grant who was present on October 24, 1973, as well as for the full duration of the hearing, acted as the chairman of the Discipline Committee at the hearing.

The important legal question to be determined in this case is the appropriate standard or degree of proof required to be adopted by the tribunal in discipline cases such as this. The leading case on the subject is I think Smith v. Smith and Smedman, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449. This was a

divorce action and the problem was to determine the standard of proof required. At pp. 331-2 S.C.R., p. 463 D.L.R., Cartwright, J., stated:

> It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

Mr. Justice Cartwright then quotes with approval [at p. 332 S.C.R., pp. 463-4 D.L.R.] a passage from the judgment of Dixon, J., in Briginshaw v. Briginshaw (1938), 60 C.L.R. 336 at pp. 361-2:

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."

Mr. Justice Cartwright then concludes his judgment as follows:

> In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the words "the gravity of the consequences flowing from a particular finding" assumes great importance in such a case.

It is to be particularly noted that in cases of this kind Mr. Justice Cartwright has held " 'the gravity of the consequences flowing from a particular finding' assumes great importance in such a case".

The standard or degree of proof required to be employed by the Discipline Committee of the College of Physicians and Surgeons was considered in Re Glassman and Council of the College of Physicians and Surgeons, [1966] 2 O.R. 81, 55 D.L.R. (2d) 674. In this case Dr. Max Glassman was charged with professional misconduct because of certain advertising he had purportedly done. He was found guilty of the charge by the Discipline Committee and was reprimanded and ordered to pay certain costs.

Glassman appealed on grounds not relevant to this case and his appeal was allowed and the case remitted to the College to be disposed of on the merits. During the course of the case Schroeder, J.A., dealt with the question of the degree of proof required in cases of this kind. After first noting that s. 38 of the Medical Act provided that proceedings before the Discipline Committee were to be governed by the Evidence Act and the rules of the evidence in civil proceedings in Ontario, Mr. Justice Schroeder stated at pp. 92-3 O.R., pp. 685-6 D.L.R., as follows:

> ... the burden of proof cast upon the College is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities. To say that the College must prove its case does not imply that it must demonstrate its case. What was said by Earl Loreburn, L.C., in Richard Evans & Co. v. Astley, [1911] A.C. 674 at p. 678, is in the highest degree apposite to the point under discussion. That eminent jurist there stated:
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> "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

It is to be particularly noted that the matter which Mr. Justice Schroeder held could be proven by a fair and reasonable preponderance of credible testimony was the question as to whether or not Dr. Glassman had mailed or had authorized the mailing of the offensive advertising.

In Re "D" and Council of the College of Physicians and Surgeons of British Columbia (1970), 11 D.L.R. (3d) 570, 73 W.W.R. 627 sub nom. Re Dr. "D", the inquiry committee had found a doctor guilty of indecently assaulting a 15-year-old girl. The evidence against the doctor was extensive and there was apparently independent evidence. At pp. 572-3, Mr. Justice Macfarlane states as follows:

> It is true that the inquiry committee, after a careful examination of all the evidence before it, concluded that Miss X was telling the truth and that Dr. D's testimony should not be accepted. This is not to say that they did not consider his defence. His defence was a denial that he had kissed this girl and had committed any indecent act. His explanation was one which had medical overtones, which the committee with their special training were well equipped to consider. It is clear from reading the report of the inquiry committee that although they finally decided that they could not accept the explanation given by Dr. D., they proceeded upon the basis that a professional man "ought not to be disbarred from practice so long as a reasonable probability remains that his side of the story may be true" and that "the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions": Brethour v. Law Society of British Columbia, [1951] 2 D.L.R. 138 at p. 142, 1 W.W.R. (N.S.) 34 at p. 38; R. v. Chapman (1958), 121 C.C.C. 353, 29 C.R. 168, 26 W.W.R. 385; Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171; Re Robb and Council of Dental Surgeons of British Columbia (1964), 46 D.L.R. (2d) 202.
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> Upon a careful review of all the evidence given in this case, I am satisfied that this test has been satisfied. In addition I am satisfied that the inquiry committee did give full consideration to the defences raised by Dr. D. They did not, as it is suggested, merely

> believe Miss X and stop there. They appear to have examined the evidence of Dr. D in some considerable detail to ensure that their initial finding on credibility was not in error. Their report indicates that they did not reject the defences of Dr. D out of hand but did so after due deliberation and because the explanations of Dr. D were inconsistent in themselves or unworthy of belief. For instance, independent witnesses testified that Miss X was a "healthy, happy, normal child". Dr. D characterized her as a "desperate, depressed, unhappy girl" with "hang-ups". The tribunal accepted the evidence of the independent witnesses which coincided with their impression of the girl as she gave evidence.

Then after setting out certain further findings of the inquiry committee which were very damaging to the doctor, Macfarlane, J., stated, at pp. 573-4:

> This latter passage has some bearing, I think, upon the contention of the appellant that the tribunal failed to keep in mind the danger of finding guilt in a sexual matter where there has been no evidence corroborative of the complainant's story.
>
> The inquiry committee here gives emphasis to their concern to find evidence to support the complainant's story by saying, in the passage I have just quoted, that "what happened on the 13th of April should be underlined".

Later, at p. 575, Macfarlane, J., stated:

> It seems to me that the conduct of Dr. D, on his own evidence, was such as to be capable of corroboration.
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> Although the inquiry committee did not label this evidence as corroboration it seems to me that they "underlined" this evidence for the purpose of finding whether the girl's evidence was trustworthy or not. In other words, they treated it as being corroboration in that it made it appear more probable that the story of the girl was true and substantially removed the danger of acting upon her evidence.

It is to be particularly noted that in this case the inquiry committee obviously took a long time to carefully consider the evidence placed before it. It is also to be observed that Macfarlane, J., speaks approvingly of corroboration in that certain of the evidence adduced made it more probable that the girl's story was true and substantially removed the danger of acting upon her evidence alone.

In Re Miller and Saskatchewan College of Physicians and Surgeons (1966), 59 D.L.R. (2d) 736, the headnote is as follows:

> Although the rules of evidence applicable in disciplinary proceedings against a physician are, by virtue of the provisions of s. 43(5) of the Medical Profession Act, R.S.S. 1965, c. 303, the same as in civil cases in the Court of Queen's Bench, the proof of guilt on a charge of improper and unprofessional conduct in making indecent advances to a female patient in the course of a physical examination must, because of the gravity of the charge, be clear and convincing. But where a Discipline Committee's recommendation of suspension of a physician charged with such an offence is adopted by the Council of the College of Physicians and Surgeons after a hearing at which the physician neither testified himself nor led any evidence, and at which there was corroboration of the evidence of the patient, which evidence was accepted by the Committee, the findings of the Committee and the suspension by the Council will not be interfered with on appeal notwithstanding that the patient and her husband have extorted money from the physician as the price of their agreement not to

expose the physician's conduct.

It is interesting to note that in this case Mr. Justice MacPherson, after considering the Glassman case, supra, and the degree of proof which that case imposed, stated at p. 742, "the woman is corroborated and the doctor silent". At p. 741, MacPherson, J., stated, "the proof of guilt of the doctor must be clear and convincing".

In Re Golomb and College of Physicians and Surgeons of Ontario (1976), 12 O.R. (2d) 73, 68 D.L.R. (3d) 25, this Court had occasion to hear an appeal from a decision of the Discipline Committee of the College of Physicians and Surgeons finding professional misconduct on the part of the doctor because of a series of OHIP billings which were said to be duplicates of other billings and which resulted in a substantial overpayment to the doctor. There were many issues in that case including a serious allegation of bias and bias was found to have existed. Mr. Justice Galligan deals with the degree of proof required and he held that the finding of the Discipline Committee which virtually amounted to a finding of fraud must be set aside. He proceeded further to review the evidence and to find that there was evidence from which the Discipline Committee could properly have found that the doctor had rendered some bills which were duplicates of bills for pregnancy situations, which bills were properly submitted, and he also proceeded to find that such services ought not to have been charged for separately. In the result he rejected the serious allegation of fraud and found that there was proper evidence to support the less serious allegation, and, in view of the wide powers of the Court on an appeal of this kind, a finding of guilty on the lesser charge and imposed a penalty of one month's suspension as opposed to the original penalty of six months' suspension. It should be pointed out that before doing this Mr. Justice Galligan determined that what the doctor had done did amount to professional misconduct.

In his "Judicial Review of Administrative Action", The Honourable J. C. McRuer, a former Chief Justice of the High Court of Ontario, considers the problem of the standard of proof properly applicable to a disciplinary proceeding of the kind we are dealing with here. He states as follows:

> We think it unwise to attempt to define by statute the standard of proof on which a disciplinary body may act. The provisions of section 38 of the Medical Act appear to have created some confusion with respect to the standard of proof applicable in disciplinary matters in the medical profession, as distinct from other self-governing bodies.
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> In Glassman and Council of the College of Physicians and Surgeons, Schroeder J.A. held that by virtue of this section, "... the burden of proof cast upon the college is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities. To say that the college must prove its case does not imply that it must demonstrate its case."
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> In Hynes v. Swartz, [1938] O.R. 77, 79, Masten J.A., in dealing with a case under the Architects Act, said: "Considering the penal nature of the proceeding, I am of the opinion that the appellant is entitled to the benefit of any doubt which may arise upon the evidence." The learned Judge then went on to apply this principle and held that there was not sufficient proof of an intentional delinquency, but held the member to be negligent and reduced the penalty from suspension to a reprimand.
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> The risk of attempting to define standards of proof in statutory language is demonstrated by reference to certain judgments. In Rex v. Summers, [1952] 1 All E.R. 1059, 1060, Lord Goddard, in referring to the expression "beyond a reasonable doubt" as applied to a criminal case, said:

"I have never yet heard any court give a real definition of what is a "reasonable doubt", and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity ... The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one."

In Regina v. Hepworth and Fearnley, [1955] 2 Q.B. 600, Lord Goddard explained the above passage and pointed out again the difficulty of laying down a formula to define the term "reasonable doubt".

In Smith v. Smith, [1952] 2 S.C.R. 312, the matter of standards of proof in civil actions was discussed at some length. The discussion was provoked by the conflict in judicial decisions concerning the standard of proof required in a divorce case. Locke, J. rejected the argument that the standard should be proof "beyond a reasonable doubt", and concluded: "The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not 'satisfied' in any civil action of the plaintiff's right to recover, the action should fail". This statement was subject to the comment that no question affecting the legitimacy of offspring arose.

Two things are to be noted: the language used by the learned judge is very close to the standard as defined by Lord Goddard for criminal cases. The standard "satisfied" is used in each case. Words are often poor vehicles for the communication of ideas. In addition, the learned judge quite clearly indicates that there is a higher standard of proof required where the legitimacy of off-spring is in question.

Rand, J. and Cartwright, J. clearly stated principles that should apply to the cases with which we are concerned. Rand, J. said:

"There is not, in civil cases, as in criminal prosecutions, a precise formula for such standard; proof 'beyond a reasonable doubt' itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation."

Cartwright, J. quoted a passage from an illuminating judgment of Sir Owen Dixon, Chief Justice of Australia, in which he said in part:

"Except upon criminal issues to be proved by prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved ... "

On a disciplinary charge there may be a wide variation in the standard of proof that may be required, dependent on the elements of the case, the nature of the charge and the results that may flow from a finding of guilt. This is recognized throughout the civil law. The standard of proof to establish negligence or to justify an apportionment of negligence, is very different from the standard required to establish illegitimacy.

In disciplinary cases it is sufficient to say that where a finding of guilt warrants disqualification from the practice of a profession, the standard of proof should be very high

> and convincing, while a standard to be applied where there is a finding of incompetence in one of the self-governing occupations is quite a different matter. No definite rule should be laid down. The question always should be: Is the proof sufficient to satisfy reasonable men, exercising prudence and caution in the particular circumstances of each case, that the decision to exercise disciplinary powers is a just decision

There is a large number of cases dealing with the standard of proof required before disciplinary tribunals and many of these cases are collected in the headnote of the Glassman case and the Golomb case, supra. I should point out that in the Golomb case the Committee appears to have at least considered its decision for some two hours immediately after the hearing before giving its judgment and its reasons therefor. The report also notes that subsequent reasons were delivered.

I hold that the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based upon cogent evidence which is accepted by the tribunal. I agree with Mr. Justice Schroeder that the burden of proof is to establish the guilt of the doctor charged by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon the balance of probabilities. I think, however, that the seriousness of the charge is to be considered by the tribunal in its approach to the care it must take in deciding a case which might in fact amount to a sentence of professional death against a doctor. I am not prepared to hold that even though this is a sexual case that corroboration was required although I do think that the complete absence of any evidence at all confirming the complainant's evidence is a serious factor for the tribunal to consider and I would think that it would be only in the rarest cases that a finding of guilt would be made in these circumstances.

In this case there is just no evidence connecting the doctor with the complainant in any improper way other than the evidence of the complainant. There is no independent evidence that the doctor was ever seen with the complainant outside of his office although I think that we can be certain that Kasman through Allied Investigation and no doubt the College itself conducted a very searching inquiry into the doctor's conduct and I would think particularly his conduct outside of his office relating to the complainant. In my opinion it is entirely insufficient for the Discipline Committee to say that it believes the complainant wherever her evidence conflicts with the doctor. Why is her evidence to be believed in view of the burden of proof upon the College It could only be because of the demeanour of the two witnesses and in this case we have counsel for the Discipline Committee plainly stating in his argument to the Committee that the manner in which the doctor gave his evidence and his demeanour was greatly superior to the complainant's demeanour. I quote from p. 19 of the argument:

> The demeanour of the witnesses in the trial, judge and to the jury is of some importance. You have the demeanour of Miss Johnston; she gave her evidence; at times, concerned that what she was trying to say perhaps wasn't being believed; and that would be a natural reaction on the part of the girl.
>
> On the other hand, you have Dr. Bernstein's evidence, his demeanour and clear, straight-forward. One couldn't criticize, as I see it.

While it may be that in rare cases of this kind a judgment based on demeanour of a witness and the acceptance of his or her testimony against the testimony of a doctor might be proper, this in my opinion is not one of those rare cases. I cannot leave the argument of counsel for the Discipline Committee without commenting on two matters which such counsel put to the Committee as being important and capable of proving guilt. At p. 11 he outlines the doctor's apparent affluence, comments on his two trips to Las Vegas in 1973, and then at p. 12 he argues:

> All of that, when it is put all together, gentlemen, I suggest is a picture of someone that is moving in rather fast company. It is sort of a "jet-set style" -- and I am suggesting to you that this could well be the kind of person who might well have an affair with a patient.
>
> The probability! this is what you must look at and weigh and it could certainly lead in that direction.

And following this he stated:

> Fifthly: Opportunity! Certainly the opportunity was there. She, a young, attractive, available girl, not married; sharing an apartment in which her room-mate conveniently is not there on weekends ...

And then counsel suggested, sixthly, that medical opportunity was present. These arguments may very well have had a substantial effect upon the Committee and a devastating one. Whether they should have been made at all is open to serious question but when one considers that such arguments were not followed by any caution from a presiding Judge and when it is further considered that counsel for the Committee who advanced the arguments wrote the formal reasons for the decision of the Committee, then the great impropriety of this particular matter becomes clear.

The Committee deliberated for one-half hour following the argument and then found the doctor guilty. It proceeded at that time through its chairman to make a very brief statement which I would term the first reasons for judgment. Nothing in these first reasons gives any clue at all as to the standard of proof employed. The formal or second reasons for judgment were prepared later on by counsel for the Committee and these reasons again do not contain any indication at all as to the standard of proof employed by the Committee. The affidavits introduced in evidence were ignored completely and, quoting from the second reasons for judgment:

> We do not place any weight on any one of the affidavits and in making the findings which we do herein, we ignore the affidavits completely.

The only indication at all of the standard of proof employed is contained in the words:

> With respect to that issue [i.e., sexual intercourse between patient and doctor], where the evidence of Miss Johnston and Dr. Bernstein is in conflict as to whether sexual intercourse took place, we accept the evidence of Miss Johnston in preference to that of Dr. Bernstein.

When asked what standard of proof the Committee employed, counsel for the College at the hearing of the appeal advised that it was the standard of proof applicable in civil cases, i.e., the balance of probabilities. Counsel for the College frankly conceded at the outset of the hearing of the appeal that there was no corroborating evidence at all. He seemed to equate this case to a motor vehicle accident where proof of negligence is required or to some other simple action in tort or contract where credibility is the main issue. He invited the Committee in argument to set aside the affidavits and indeed the second reasons for decision which he prepared specifically state that these affidavits were ignored. The Committee should have been at least invited to consider the two conflicting affidavits from the standpoint of whether or not a truthful person would swear such contradictory affidavits about such an important matter in such a short space of time.

There are many seriously unsatisfactory matters concerning the way that this hearing was conducted and I am thinking of such matters as counsel for the Committee preparing the reasons for the Committee's decision, the argument of counsel for the Committee with respect to the doctor's life-style, the submissions to the Committee that it should set aside the affidavits of the complainant together with

the fact that the Committee did not consider the signing of these affidavits at all, the questioning of Dr. Bates during the course of the hearing and the initial statements of Dr. Mitchell made when an adjournment was being sought. Above all perhaps the most glaring deficiency in the Committee's approach to the case was its apparent failure to consider the background of the complainant and the fact that she had on occasion seen fit to lie about matters concerning this case. Her psychiatric background ought to have been considered. These matters relating to the complainant were clearly not considered by the Committee and I mention these things regarding the complainant not because I base my decision on these deficiencies but because it seems to me that it would be impossible for any fair tribunal to properly conduct its deliberations without considering these matters. Moreover, I do not see how any fair discipline committee could make appropriate deliberations on a case as important and as complex as this in the one-half hour period which the record indicates was taken by the Committee to reach its decision.

Notwithstanding the foregoing serious errors, I base my judgment herein principally on the basis that the proper standard of proof was not employed by the Discipline Committee in this case. It was not enough here to say we believe the complainant wherever her evidence conflicts with that of the doctor. The Discipline Committee should have found that upon a consideration of all the evidence, the clear and convincing proof which is required to establish guilt just did not exist and the complaint ought to have been dismissed.

I would accordingly allow the appeal, quash the decision of the respondent which directs that the doctor should be suspended from practice for one year and requires him to pay costs, and direct that a verdict of not guilty be entered. The doctor should have his costs both of this appeal and of the proceedings before the Discipline Committee, such costs to be taxed on a party-and-party basis.

Appeal allowed.

Indexed as:
F.H. v. McDougall

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.

[2008] 3 S.C.R. 41

[2008] S.C.J. No. 54

2008 SCC 53

File No.: 32085.

Supreme Court of Canada

Heard: May 15, 2008;
Judgment: October 2, 2008.

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

(102 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

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.

[page42]

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.

Summary:

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 [page43] 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. [para. 30] [para. 40] [paras. 44-46] [para. 49] [paras. 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 [page44] identified no such error. [para. 52] [paras. 58-59] [para. 70] [paras. 72-73] [paras. 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. [para. 77] [paras. 80-81] [para. 86] [para. 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. [paras. 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; [page45] *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.

History and Disposition:

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.

[page46]

Counsel:

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.

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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 [page48] 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 [page49] 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 [page50] 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 [page51] 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).

[page52]

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 [page53] 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.

[page54]

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 [page55] 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 [page56] 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 [page57] 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;

[page58]

(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 [page59] 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 [page60] 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 [page61] 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 [page62] 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))

[page63]

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 [page64] 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:

[page65]

> 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, [page66] 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.

[page67]

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 [page68] 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 [page69] 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. [page70] 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 [page71] 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), [page72] 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 [page73] 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 [page74] 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 [page75] 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:

[page76]

> 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:

[page77]

(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 [page78] 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.

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Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

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