EB-2015-0334

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Jim Babirad under section 38(3) of the *Ontario Energy Board Act, 1998* for an Order of the Board determining the quantum of compensation that Jim Babirad is entitled to receive from Enbridge Gas Distribution Inc.

AND IN THE MATTER OF Rule 42 of the Rules of *Practice and Procedure of the Ontario Energy Board*.

BOOK OF AUTHORITIES OF JIM BABIRAD

February 18, 2016

Jay Shepherd P.C.
2300 Yonge Street, Suite 806
Toronto, Ontario M4P 1E4

Mark Rubenstein
Tel: 416-483-3300
Fax: 416-483-3305

Counsel to Jim Babiard

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PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

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Ontario Energy Board Act, 1998, SO 1998, c 15, Sch B

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply. 1998, c. 15, Sched. B, s. 38 (4); 2003, c. 3, s. 31.

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Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Decision; interest

Decision

17. (1) A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party. R.S.O. 1990, c. S.22, s. 17; 1993, c. 27, Sched.

B

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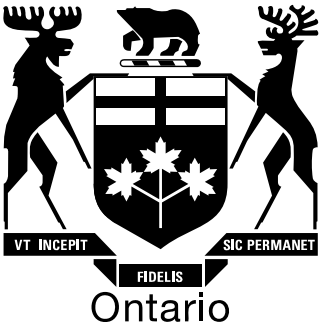
Ontario Energy Board

Commission de l'Énergie de l'Ontario



EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedur*e.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, …

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms…"

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference…"

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,…, make orders for (a) the exchange of documents, …"

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out … any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;…" While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1

> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words “may include” in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board’s rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word “shall”.

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be “special”. Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

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Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2014-0155

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

AND IN THE MATTER OF an application by Kitchener Wilmot Hydro Inc. for an order approving or fixing just and reasonable distribution rates effective January 1, 2014;

AND IN THE MATTER OF a Motion to Review and Vary by School Energy Coalition pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2013-0147.

BEFORE: Christine Long
Presiding Member

Ken Quenelle
Vice Chair

Allison Duff
Board Member

DECISION AND ORDER
ON NOTICE OF MOTION TO REVIEW AND VARY

July 31, 2014

On April 3, 2014, the School Energy Coalition ("SEC") filed a Motion for a Request to Review and Vary (the "Motion") the Board's Decision and Order dated March 20, 2014 in EB-2013-0147 (the "Decision") in respect of Kitchener-Wilmot Hydro Inc.'s ("KWHI's") cost of service application for rates to be effective January 1, 2014 (the "Application"). The Board has assigned the Motion file number EB-2014-0155.

In the Motion SEC asks the Board to make an Order:

a) to make revised findings on the appropriate test year Working Capital Allowance ("WCA") percentage by relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments; or

b) remitting the issue of the appropriate test year WCA percentage back to the Board panel in EB-2013-0147, so that they may make revised findings on the issue, relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments.

SEC is also asking the Board to find that its Motion satisfies the "threshold test" in Rule 45.01 of the OEB's *Rules of Practice and Procedure* (the "Rules").[1]

The Board, as set out in its Notice of Motion and Procedural Order No. 1, determined that the most expeditious way of dealing with the Motion is to consider concurrently the threshold question of whether the matter should be reviewed, as contemplated in the Board's *Rules of Practice and Procedure*, and the merits of the Motion.

BACKGROUND

The Motion seeks a review and variance of the Decision in KWHI's cost of service proceeding in which the Board determined that "in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application."

In the Application, KWHI proposed a WCA percentage of 13%, relying on the Board's letter of April 12, 2012 ("Board Letter").[2] The Board Letter provided the Board's rationale for changes to the 2013 Filing Guidelines for electricity and transmission distribution applications. The Board Letter stated that a distributor had two approaches available to calculating its WCA: filing a lead-lag study, or using a 13% default value. The 13% default WCA percentage was incorporated into section 2.5.1.3 of the *Filing Requirements for Electricity Distributors* (the "Filing Requirements"). A distributor who had been directed by the Board to carry out a lead-lag study, or had voluntarily carried out a lead-lag study, was not allowed to use the default percentage.

[1] SEC's Motion was filed on April 3, 2014 and references Rules 44 and 45 of the *Rules of Practice and Procedure*, updated on January 17, 2013. The Board issued updated *Rules of Practice and Procedure* on April 24, 2014. Rules 43 and 45 have been renumbered as, respectively, Rules 42 and 43 but are otherwise unchanged. In this *Decision on Notice of Motion to Review and Vary*, references are to the Rules as documented in the January 17, 2013 version of the *Rules of Practice and Procedure*.

[2] Letter of Ontario Energy Board, *Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications – Allowance for Working Capital,* dated April 12. 2012

The intervenors disputed whether KWHI had responded appropriately to previous Board directions, alleging that the Board Letter did not amount to a "Board led process". Thus, their argument was that KWHI was required to file a lead-lag study to support its WCA. They also argued that regardless of the previous Board decision, the KWHI WCA should be less than 13%, to account for KWHI's intention to move its remaining (i.e., Residential and General Service < 50 kW) customers from bi-monthly to monthly billing.[3]

Intervenors provided detailed submissions and calculations on the WCA percentage for KWHI, including why the 13% default factor set out in the Board's Letter and Filing Requirements is not appropriate for a distributor on or moving to monthly billing for all customers.[4]

Energy Probe's submission was that the default 13% WCA set out in the Board's Letter and Filing Requirements was based on lead-lag studies done by distributors who billed bi-monthly. Energy Probe explained in detail why it was not appropriate for a distributor like KWHI who was moving to monthly billing to rely on the WCA percentage of 13%. SEC and VECC made similar submissions.[5]

In this Motion, SEC submitted that the Board's reliance on the 13% default WCA, combined with the Board's apparent failure to consider the evidence put forward by the intervenors with respect to an alternative WCA, leaves a question for this reviewing Panel as to whether or not the Board, in reaching its Decision, felt bound to apply the 13% default value. In reaching a determination on this matter, this reviewing Panel has considered the submissions of the parties (intervenors and KWHI) as well as those of Board staff.

ISSUES

There are two issues in this Motion:

1. Has the threshold test been met?
2. If the answer to the above is yes, did the Board fetter its discretion in the Decision with respect to determining the WCA thereby making an error in law?

[3] Written Submissions of School Energy Coalition, para. 12
[4] *Ibid.*, para. 13
[5] *Ibid.*, paras. 13 and 14

THRESHOLD TEST

Section 44.01 of the Rules provides that:

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> I. error in fact;
>
> II. change in circumstances;
>
> III. new facts that have arisen;
>
> IV. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time[.]

Under section 45.01 of the Rules, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. Section 45.01 of the Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The Board has considered previous decisions of the Board in which the principles underlying the "threshold question" were discussed, namely in the Board's *Decision on a Motion to Review Natural Gas Electricity Interface Review Decision* (the "NGEIR Review Decision").[6] In the NGEIR Review Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

SEC, VECC and Energy Probe all argued that the Board fettered its discretion in its decision making thereby committing an error of law which would raise a question as to

[6] *Motion to Review Natural Gas Electricity Interface Review Decision (EB-2006-322/0338/0340) , Decision with Reasons*

the correctness of the Decision. Board staff agrees with SEC that the grounds for review listed in Rule 42.01 (a) are not exhaustive, and that an error of law is a proper ground for review. However, Board staff disagreed with SEC in the latter's allegation that the Board had fettered its discretion in its decision making and thereby had committed an error of law.

The Board agrees with the submission of SEC that an error in law raises a material question as to the correctness of the Board's Decision. Such an error, could result in the varying of the Decision. As a result, the Board finds that the threshold test has been met in this case given the potential for an error in law. The Board will proceed to consider the merits of the motion.

MERITS OF THE MOTION

Submissions of the Parties

In its submission, KWHI set out some of the background with respect to its decision to apply a 13% WCA. Section 2.5.1.4 of the Filing Requirements issued June 28, 2012 (Allowance for Working Capital) – corresponding to section 2.5.1.3 of the July 17, 2013 version of the Filing Requirements – states, in part:

> In a letter dated April 12, 2012, the Board provided an update to electricity distributors and transmitters on the options established in the June 22, 2011 cost of service filing requirements for the calculation of the allowance for working capital for the 2013 rate year. The applicant may take one of two approaches for the calculation of its allowance for working capital: (1) the 13% allowance approach; or (2) the filing of a lead/lag study.

The only exception to the above requirement is if the applicant has been previously directed by the Board to undertake a lead/lag study on which its current working capital allowance is based. Since KWHI was not directed to do a lead/lag study, KWHI had the choice of option (1) or option (2), and chose option (1); KWHI chose to rely on the 13% WCA approach.

While the Board may consider the Filing Requirements in determining the appropriate WCA percentage for setting rates in the test year, SEC argued that the Board erred in failing to consider the specific facts presented and arguments made in the proceeding by all parties.

SEC submitted that the Board committed an error of law by fettering its discretion in stating that it did "not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application".

SEC argued that the Board erred by relying solely on section 2.5.1.3 of the Filing Requirements as binding its ability to determine an appropriate WCA percentage of any number but 13% in absence of a lead/lag study, which the Board found that KWHI was not required to perform. SEC noted that the Board's Filing Requirements are akin to Board policies or guidelines. While the Board has the authority to issue non-statutory instruments such as the Filing Requirements, they cannot be applied as if they were mandatory.

Energy Probe submitted that it may have been acceptable for KWHI to rely on the Filing Requirements for the purpose of the WCA applied for in its Application. However, once intervenors, including Energy Probe, raised specific issues with the percentage during the proceeding, the Board was required to consider those arguments in determining the appropriate WCA percentage. Energy Probe made a number of arguments, citing the record and evidence in the proceeding, concluding that the Board's default 13% WCA percentage is not appropriate for a distributor such as KWHI that bills its customers on a monthly basis.

VECC adopted SEC's argument with respect to an error of law providing the basis for the motion to review and establishing the threshold test alleging that the Board chose automatically to adopt the 13% default value for the WCA.

Board staff submitted that the Board did not fetter its discretion. Board staff further submitted that guidelines may validly influence a decision maker's conduct. The use of guidelines to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.[7]

Board staff submitted that the statement by the Board in the Decision that it "does not find it necessary to consider whether any WCA other that the default 13% used by KWHI is more appropriate" is very different from SEC's submission that the Board

[7] *See, for example: Maple Lodge Farms v. Canada, [1982] 2 S.C.R. 2 and Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue -- M.N.R.), [2005] F.C.J. No. 394, 295 F.T.R. 314 (F.C.T.D.)*

fettered its discretion by noting that it "does not need to consider any WCA percentage beside the 13% set out in the Filing Requirements." Board staff submitted that this is not what the Board stated. Further, Board staff submitted that SEC has failed to put forward any evidence that suggests the Board failed to keep an open mind when hearing arguments, as provided in the submissions of KWHI, registered intervenors and Board staff, as filed in EB-2013-0147, that the 13% default should not be applied in this case. Nowhere in the Decision did the Board state that it was bound by the 13% set out in the Filing Requirements.

BOARD FINDINGS

The Board has considered all of the submissions and agrees with the parties on the principal point that it can establish guidelines, policies and other non-binding instruments and that it can utilize those instruments to inform its decision-making. However, those instruments cannot be treated as binding.

As the Federal Court of Appeal stated in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*:

> Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered[.][8]

While it is clear from the record that the intervenors made significant arguments about alternative appropriate WCA values during the original proceeding, it is not clear from the Decision that the original panel took these arguments into consideration in rendering the Decision. It is also not clear whether the original panel felt bound to apply the 13% set out in the Filing Requirements. The Board acknowledges and accepts Board staff's statement that nowhere in the Decision does the original panel explicitly state that it was bound by the Filing Requirements. However, it is also not clear whether the Board considered the detailed submissions regarding alternative WCA values in coming to the Decision.

[8] Federal Court of Appeal Decision in *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 20007 FCA 198 at para 66, quoted in SEC Submission, May 12, 2014, page 7

The submissions put forward by the intervenors in respect of an alternative WCA must be considered by the Board, and it must be clear that the Board has done so. Having heard the evidence in question, the original Panel is in the best position to make a finding in concordance with the findings in this Decision. As such, the Board will remit this matter back to the original panel. The Board will issue a Decision as to the appropriate value for KWHI's WCA.

COSTS

In its Motion, and subsequent filings, SEC sought approval for recovery of eligible costs. Energy Probe and VECC also claimed eligibility for cost recovery in their submissions. KWHI requested an opportunity to make submissions on claimed costs once the amounts were known.

The Board finds that the intervenors are entitiled to their reasonable costs incurred for participation in the hearing of the Motion. Claims for costs and submissions on cost claims should be filed as ordered below. A decision regarding the amount of the cost awards approved will be issued subsequently. KWHI shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

THE BOARD THEREFORE ORDERS THAT:

1. The proceeding will be remitted back to the original panel.

COST AWARDS

1. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. their respective cost claims by **August 14, 2014**.

2. Kitchener-Wilmot Hydro Inc. shall file with the Board and forward to intervenors any objections to the claimed costs by **August 28, 2014**.

3. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. any responses to any objections for cost claims within by **September 4, 2014**.

4. Kitchener-Wilmot Hydro Inc. shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2014-0155, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

ISSUED at Toronto, July 31, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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Case Name:

Clifford v. Ontario Municipal Employees Retirement System

Between
Sylvia Clifford, Applicant (Respondent), and
The Attorney General of Ontario, The Ontario Municipal Employees Retirement System and Bernadette Campbell, Respondents (Appellants)

[2009] O.J. No. 3900

2009 ONCA 670

76 C.C.P.B. 184

312 D.L.R. (4th) 70

256 O.A.C. 354

98 O.R. (3d) 210

2009 CarswellOnt 5595

93 Admin. L.R. (4th) 131

188 L.A.C. (4th) 97

181 A.C.W.S. (3d) 201

Docket: C49624

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and R.P. Armstrong JJ.A.

Heard: April 20, 2009.
Judgment: September 23, 2009.

(46 paras.)

Pensions and benefits law -- Public pension plans -- Appeals and judicial review -- Natural justice -- Standard of review -- Correctness -- Appeal boards and review tribunals -- Appeal by Crown from decision setting aside decision of OMERS tribunal -- Tribunal decided that Campbell was entitled to pension death benefits of Clifford's late ex-husband -- Divisional Court held that tribunal failed to provide meaningful reasons supporting its decision -- Standard of review of whether tribunal complied with obligation to provide reasons was correctness -- Tribunal did what was required of it to meet its legal obligation to provide reasons for its decision, and decision was reasonable.

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness -- Appeal by Crown from decision setting aside decision of OMERS tribunal -- Tribunal decided that Campbell was entitled to pension death benefits of Clifford's late ex-husband -- Divisional Court held that tribunal failed to provide meaningful reasons supporting its decision -- Standard of review of whether tribunal complied with obligation to provide reasons was correctness -- Tribunal did what was required of it to meet its legal obligation to provide reasons for its decision, and decision was reasonable.

Appeal by the Crown from an order setting aside a decision of the Appeal Sub-committee (the tribunal) of the Ontario Municipal Employees Retirement System (OMERS.) OMERS was a pension benefit system that was primarily for employees of Ontario municipalities. Determinations of entitlement to a pension benefit were made in the first instance by the president of OMERS. Appeals were heard by the tribunal. Clifford was a Toronto firefighter and a member of OMERS. He was married and had two children. He and his wife separated in 1996 and were divorced in January 2004. Clifford died without a will in February 2005. His wife was the named beneficiary under his OMERS pension plan. In 1999, Clifford moved into Campbell's residence. Campbell claimed that they lived together as common law partners until his death. If this were so, Campbell, rather than Clifford's wife, was entitled to the surviving spousal benefit from Clifford's OMERS pension. After Clifford's death, Campbell applied to OMERS for this benefit. Clifford's wife contested the application, claiming that Campbell and Clifford were not common law spouses at the time of his death, and claiming the benefit for herself. The president of OMERS concluded that Campbell and Clifford were living in a common law relationship at the time of his death, and Campbell was therefore entitled to the surviving spousal benefit under his OMERS plan. Clifford's wife appealed to the tribunal. The tribunal was not persuaded that the conjugal relationship between Campbell and Clifford had terminated at the time of his death, and dismissed the appeal. Clifford applied for judicial review of the tribunal's decision. The majority of the Divisional Court concluded that the tribunal was required to give reasons but had failed to adequately do so, and the decision was therefore unreasonable and not in accordance with principles of natural justice and procedural fairness.

HELD: Appeal allowed and application for judicial review dismissed. Procedural fairness imposed a legal obligation on the tribunal to give reasons for its decision. The standard of review of whether the tribunal had complied with this legal obligation was correctness. In the context of administrative law, reasons had to be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests were affected know why the decision was made and to permit effective judicial review. This was accomplished if the reasons, read in context, showed why the tribunal decided as it did. The basis of the decision had to be explained and this explanation had to be logically linked to the decision made. This did not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. The "path" taken by the tribunal to reach its decision had to be clear from the reasons read in the context of the proceeding, but it was not necessary that the tribunal describe every landmark along the way. The reasons were clearly sufficient to meet the tribunal's legal obligation. They demonstrated that the tribunal grappled with the two live issues before it. From a functional perspective, the reasons explained why the tribunal gave the answers it did to those issues. The reasons also allowed for effective judicial review of the decision itself. The tribunal did what was required of it to meet its legal obligation to provide reasons for its decision, and the decision was reasonable.

Statutes, Regulations and Rules Cited:

Ontario Municipal Employees Retirement System Act, 2006, S.O. 2006, c. 2

Pension Benefits Act, R.S.O. 1990, c. P.8

Appeal from:

On appeal from the judgment of the Divisional Court (Justice Anne M. Molloy, Justice John C. Murray, with Justice Romain W.M. Pitt dissenting) dated May 29, 2008, with reasons reported at (2008), 90 O.R. (3d) 742.

Counsel:

Terrence J. O'Sullivan and M. Paul Michell, for the appellant OMERS.

Sheila Holmes, for the appellant Bernadette Campbell.

John Legge, for the respondent Sylvia Clifford.

The judgment of the Court was deliverd by

S.T. GOUDGE J.A.:--

A. OVERVIEW

1 Where an administrative tribunal has a legal obligation to give reasons for its decision, on judicial review, what standard of review should the court apply in deciding whether it has done so? And then how does the court assess whether the reasons the tribunal provides are adequate to meet that legal obligation? Those are the principal questions raised by this appeal.

2 In this case, the Divisional Court, by majority, assessed the reasons of the administrative tribunal against both a standard of reasonableness and the principles of natural justice and procedural fairness. It found the reasons inadequate to meet the tribunal's legal obligation. It therefore granted the application for judicial review and quashed the decision.

3 For the reasons that follow, I would allow the appeal. In my view, the majority of the Divisional Court erred in applying the standard of reasonableness and in finding the reasons inadequate to meet the tribunal's legal obligation. I would apply the standard of correctness and conclude that the reasons given by the tribunal are adequate to meet its legal obligation.

4 The Ontario Municipal Employees Retirement System (OMERS) is a pension benefit system that is primarily for employees of Ontario municipalities. The administrative tribunal under scrutiny here is its Appeal Sub-committee (the Tribunal). Both OMERS and the Tribunal are governed by the *Ontario Municipal Employees Retirement System Act, 2006*, S.O. 2006, c. 2 and the *Pension Benefits Act*, R.S.O. 1990, c. P.8. Determinations of entitlement to a pension benefit are made in the first instance by the president of OMERS. Appeals from the president are heard by the Tribunal, a sub-committee of the OMERS Board, whose members typically consist either primarily or exclusively of non lawyers. In this case, the Tribunal was comprised entirely of non-lawyers.

5 The facts giving rise to the dispute in this case are not complicated. Tony Clifford was a Toronto firefighter and a member of OMERS. Sylvia Clifford and Tony Clifford were married in 1980. They had two children. They separated in 1996 and were legally divorced in January 2004. Mr. Clifford died without a will on February 20, 2005. Ms. Clifford is the named beneficiary under his OMERS pension plan.

6 In 1999, Mr. Clifford moved into Bernadette Campbell's residence. Ms. Campbell asserts that they lived together as common law partners until his death. It is undisputed that if this was so, Ms. Campbell, rather than Ms. Clifford, is entitled to the surviving spousal benefit from Mr. Clifford's OMERS pension.

7 After Mr. Clifford's death, Ms. Campbell applied to OMERS for this benefit. Ms. Clifford contested the application, saying that Ms. Campbell and Mr. Clifford were not common law spouses at the time of his death, and claiming the benefit for herself.

8 At first instance, the president of OMERS concluded that Ms. Campbell and Mr. Clifford were living in a common law relationship at the time of his death, and Ms. Campbell was therefore entitled to the surviving spousal benefit under his OMERS plan.

9 Ms. Clifford appealed to the Tribunal. It conducted a hearing *de novo* into the matter. Twelve witnesses were heard over two days of evidence. Argument was received from counsel, and a full transcript of the hearing was produced.

10 The Tribunal reserved its decision for several weeks and issued a decision dismissing Ms. Clifford's appeal. It set out the two questions it had to decide under the OMERS plan and governing legislation: whether Ms. Campbell and Mr. Clifford were in a common law relationship for at least three years prior to his death; and whether this relationship was still in place at the time of his death.

11 On the first question, it noted the uncontested evidence that Mr. Clifford moved into Ms. Campbell's residence in 1999. It then recited evidence supportive of Ms. Campbell's claim that they lived together as common law partners, including evidence of many activities they engaged in together, and evidence of Ms. Campbell's involvement in his funeral arrangements, being named in the notice in the newspaper and receiving a share of his ashes, and finally evidence from neighbours of their own observations of the couple. On this basis, the Tribunal concluded that the necessary common law relationship was established.

12 The Tribunal then considered the second question. Mr. Clifford died in a motel while on a drinking binge. There was evidence that he had battled a serious drinking problem for some time and would, on occasion, move to a motel when on a binge, always returning to take up residence with Ms. Campbell. The Tribunal also referred to evidence from Mr. Clifford's union representative that shortly before his death, Ms. Campbell told the representative that the relationship had essentially ended and Mr. Clifford no longer resided with her. It also referred to Ms. Campbell's denial of this and recited other evidence tending to support her, such as the continued presence of many of his personal belongings and important papers in the home. The Tribunal concluded its decision this way:

> [W]e are not persuaded that the conjugal relationship between Ms. Campbell and Mr. Clifford had terminated at the time of his death, and accordingly we dismiss the appeal of Ms. Clifford.

13 Ms. Clifford applied for judicial review of the Tribunal's decision. Molloy J. for the majority of the Divisional Court concluded that the Tribunal was required to give reasons but had failed to adequately do so.

14 The majority found that the Tribunal may have improperly reversed the onus of proof when it stated it was not persuaded that the conjugal relationship between Mr. Clifford and Ms. Campbell had terminated at the time of his death, but in the absence of any reasons beyond this single sentence, it was impossible to say. The majority also found that, despite hearing conflicting evidence on many points, the Tribunal made no findings of credibility or reliability and offered no reasons as to how its ultimate decision was reached. Finally, the majority listed a number of pieces of evidence that it felt would have been relevant for the Tribunal to consider in deciding if a common law relationship existed and whether it had ended, but which the Tribunal did not refer to in its reasons.

15 In addressing the appropriate standard of review the majority noted that the Supreme Court of Canada had fundamentally changed the law in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Molloy J. concluded at para. 31 of her reasons:

> In *Dunsmuir*, the Supreme Court of Canada noted that "reasonableness" is not merely a function of outcome, but also refers to "the process of articulating the reasons". The Court also held that the concept of reasonableness requires "justification, transparency and intelligibility within the decision-making process". In the absence of reasons setting out what the Tribunal's decision-making process was, the Tribunal's decision cannot be said to be "justified" or "transparent" or "intelligible". It is incumbent on the Tribunal, particularly in a case of this nature, to articulate its reasons so that the parties will know the basis upon which the case was decided and the reviewing court can determine whether the decision is a "reasonable" one. The reasons in this case do not enable that process to be carried out. Accordingly, the decision is not a "reasonable one" and is also not in accordance with principles of natural justice and procedural fairness.

16 Having found the reasons wanting, Molloy J. allowed the application and quashed the Tribunal's decision.

B. ANALYSIS

First Issue: The legal obligation to give reasons

17 It is surely desirable that public decision makers empowered by law to make decisions affecting the rights, privileges or interests of individuals should, so far as possible, explain their decisions. This helps build public confidence in those decisions and is an important mechanism by which the decision makers can be held accountable. However, that reality does not impose on all public decision makers a legal obligation to give reasons for every decision. That is a much more nuanced issue.

18 In this case, however, all parties conceded that the Tribunal had such a legal obligation. I agree.

19 In *Dunsmuir* at para. 79, the Supreme Court of Canada repeated that procedural fairness is a cornerstone of modern Canadian administrative law that requires public decision makers to act fairly in coming to decisions that affect the rights, privileges or interests of an individual and that what this requires is to be decided in the specific context of each case. A decade earlier, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 established that in certain circumstances the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision.

20 All of the circumstances in a particular case must be considered in order to determine the content of the duty of procedural fairness, including whether it includes the obligation to give reasons. While acknowledging there may be other factors, *Baker* suggests five factors of relevance to determine the content of the duty of fairness: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme being administered; the importance of the decision to the affected individual; the legitimate expectations of the person challenging the decision; and respect for the choice of procedures made by the administrative agency itself.

21 In this case, several of these considerations make it particularly important that the Tribunal give reasons as part of its duty of procedural fairness. The decision determines significant legal rights as between Ms. Campbell and Ms. Clifford, and the process used involved hearing evidence and argument by counsel, much like a court process. This points to greater procedural protections closer to those provided by courts. The fact that the decision is the final step in the process also supports the need for greater procedural protections. The importance of determining entitlement to surviving spousal benefits to Ms. Campbell and Ms. Clifford is clear. In summary, to paraphrase *Baker* at para. 43, it would be unfair for persons subject to a decision such as this one not to be told why the result was reached. In these circumstances, it is clear that procedural fairness imposes a legal obligation on the Tribunal to give reasons for its decision.

The Second Issue: The standard of review of the legal obligation to give reasons

22 Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

23 In my view, this remains unchanged by *Dunsmuir*. In his concurring reasons in that case, Binnie J. makes clear that the courts cannot defer to the administrative decision maker's choice of process where that decision maker is legally obliged to provide procedural fairness. He says this at para. 129:

> [A] fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. [Emphasis added.]

24 With respect, I disagree with the suggestion that *Dunsmuir* now requires the reviewing court apply the standard of reasonableness to assess whether the administrative tribunal has complied with its duty of procedural fairness. There is no doubt that the reconsideration of the standards of judicial review in *Dunsmuir* and its conclusion that there should be only two standards (correctness and reasonableness) is an important jurisprudential development, most particularly where the application for judicial review challenges the substantive outcome of an administrative action. In such a context, the discussion in *Dunsmuir* of the choice of standard of review is vital in assessing that outcome. However, where, as here, the question is whether the administrative tribunal has complied with its duty of procedural fairness, the court must decide the question. As Binnie J. said, the court must have the final say.

Third Issue: Assessing compliance with the legal obligation to give reasons

25 Where an applicant for judicial review argues that an administrative tribunal with a legal obligation to give reasons for its decision has failed to do so, how is the court to determine if this obligation has been complied with?

26 In the rare case where nothing is offered by the tribunal to support its decision, the question is readily answered in the negative. Where something is offered, the task is to determine whether, in the context of the particular case, this constitutes reasons sufficient to meet the tribunal's legal obligation.

27 In *Baker*, where the Supreme Court of Canada first explained that in certain circumstances the duty of procedural fairness requires reasons to be given, it also cautioned that, although it has the final say, the reviewing court must use flexibility in determining what constitutes reasons sufficient to meet this obligation. As *Baker* stated at para. 44, this approach recognizes the varied day-to-day realities of administrative agencies and the many ways that procedural fairness can be achieved.

28 Important guidance is also provided by *R. v. R.E.M.*, [2008] 3 S.C.R. 3, particularly paras. 15 to 35. Although a criminal case, the Supreme Court of Canada addresses the precise question of what in the context of a particular case constitutes reasons sufficient to meet the legal obligation to provide a written explanation for a decision. This is directly relevant to the case at bar.

29 *R.E.M.* emphasizes that where reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review. As *R.E.M.* held at para. 17, this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or

conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in *R.E.M.* at para. 24, the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

30 *R.E.M.* also emphasizes that the assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter: see *R.E.M.* at para. 43.

31 In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.

32 This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a substantive perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense.

Fourth Issue: The sufficiency of the reasons in this case

33 The Tribunal here was under a legal obligation to given reasons for its decision. It purported to do so. The question is whether those reasons are adequate to meet its legal obligation.

34 It is uncontested that the Tribunal was presented with two live issues to decide: whether Ms. Campbell and Mr. Clifford had been in a common law relationship for at least three years prior to his death; and whether this relationship was still in place at the time of his death. The Tribunal identified both questions, grappled with them one after the other and provided its answers to both.

35 In explaining its answer to the first issue, the Tribunal recited evidence of the activities of Ms. Campbell and Mr. Clifford after 1999, and of Ms. Campbell after his death, that pointed to a common law relationship for more than three years prior to Mr. Clifford's death. It also recited evidence to the same effect from their neighbours about the nature of their relationship. The Tribunal clearly accepted this evidence and found it a sufficient basis upon which to conclude that Ms. Campbell and Mr. Clifford had been in a common law relationship for the necessary length of time before he died.

36 The Tribunal addressed the second issue by first reciting Mr. Clifford's past pattern, absenting himself from Ms. Campbell's house while on a drinking binge but always returning. It then turned to whether anything was different about the drinking binge during which he died in February 2005. It referred to evidence that on that occasion Ms. Campbell said to Mr. Clifford's union representative that the relationship had ended and her denial of this. It recited other evidence that tended to show that the relationship had indeed not terminated. It concluded by answering this question in Ms. Campbell's favour. It is clear that the Tribunal accepted this evidence of a continuing relationship at the time of Mr. Clifford's death and based its conclusion on that.

37 The majority of the Divisional Court offered a number of reasons for finding that the tribunal breached its legal obligation to provide reasons for its decision.

38 First, it said that no reasons were provided as to how that decision was reached. With respect I disagree. The Tribunal gave reasons, as I have described.

39 Second, the majority expressed concern that the Tribunal might have made significant errors on matters not

addressed in its reasons. For example, it might have misapprehended evidence that it did not refer to. In my view, that is the wrong focus. The task is to determine whether what was said is sufficient, not what problems might have been with what was not said.

40 Third, the majority faulted the Tribunal for not referring to evidence that could have led it to decide differently. Again, I disagree. As I have described, reasons need not refer to every piece of evidence to be sufficient, but must simply provide an adequate explanation of the basis upon which the decision was reached.

41 Fourth, the Tribunal is criticized for making no findings of credibility or reliability. In my view, this is to misread the Tribunal's reasons. It set out the evidence in support of the conclusions reached on both issues. Clearly, the Tribunal found that evidence to be credible and reliable. This was open to the Tribunal to do.

42 Finally, the majority said that the Tribunal might have improperly reversed the onus of proof by concluding that it was not persuaded that the common law relationship had terminated at the time of Mr. Clifford's death and that this uncertainty rendered the reasons insufficient.

43 I do not agree. As *Baker* indicated, recognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.

44 In my view, these reasons are clearly sufficient to meet the Tribunal's legal obligation. Read in the context of the particular case, they demonstrate that the Tribunal grappled with the two live issues before it. From a functional perspective, they explain why the Tribunal gave the answers it did to those issues. Neither Ms. Clifford nor Ms. Campbell can be left in any doubt about that. Moreover, they allow for effective judicial review of the decision itself. The Tribunal did what was required of it to meet its legal obligation to provide reasons for its decision.

45 As to the decision itself, all parties took the position before the Divisional Court that on judicial review such a challenge would require deference from the reviewing court. The question is whether the decision was reasonable. Here both the decision itself and the reasoning in support of it meet the standard of reasonableness. There was clearly ample evidence to support the Tribunal's answers to the two live issues before it. The Tribunal clearly accepted that evidence. It is not up to the court to second guess the Tribunal's findings. Having made these findings, the Tribunal's decision in favour of Ms. Campbell is fully justified. The decision meets the standard of reasonableness.

46 For these reasons, I would allow the appeal and dismiss the application for judicial review. The appellant does not seek costs here or below. Ms. Campbell played a minor role supporting the appellant in both courts and is entitled only to a modest costs order payable by Ms. Clifford which I would fix at $1,000 in each court.

S.T. GOUDGE J.A.
R.J. SHARPE J.A.:-- I agree.
R.P. ARMSTRONG J.A.:-- I agree.

7

Case Name:

Aurora 2C West Landowners Group v. Aurora (Town)

Aurora 2C West Landowners Group has appealed to the Ontario Municipal Board under subsection 22(7) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the Town of Aurora with respect to lands located within Part of Lots 21 to 26, Concession 2, east of Yonge Street, known as the Bayview Northeast Area 2C West lands for the purpose of amending the policies of the Town of Aurora Official Plan to bring the subject lands into conformity with the Regional Official Plan Amendment that designates the lands "Urban Area" by bringing the subject lands into the Town of Aurora Official Plan "Future Urban Expansion Area" and deleting the subject lands from the area subject to "Site Specific Policy (3.6.2d) and to establish a Secondary Plan for the subject lands known as Bayview Northeast Area 2C West Elhara Investments Limited and Aurora-Leslie Developments Limited (collectively known as "Aurora-Leslie Developments Inc.") have appealed to the Ontario Municipal Board under subsection 22(7) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the Town of Aurora, as it specifically pertains to an approximately 76 hectare (188 acres) parcel of

land composed of Part of Lots 23 and 24, Concession 3, E.Y.S., located between Leslie Street and Highway 404, north of Wellington Street and south of St. John's Sideroad in the Bayview Northeast Planning 2C Area (which are presently designated "Urban Area" by the Regional Municipality of York Official Plan Amendment No. 53), from "Rural" on Schedule "A" and subject to Site Specific Policy Area 3.6.2 d) for the purpose of establishing a comprehensive secondary plan to facilitate the development of a new community Elhara Investments Limited and Aurora-Leslie Developments Limited (collectively known as "Aurora-Leslie Developments Inc.") has applied to the Ontario Municipal Board under Section 43 of the Ontario Municipal Board Act, R.S.O. 1990, c. O. 28, for a review of the Board's Decision and Order issued on September 1, 2011 as it applies to their private official plan amendment appeal (OMB File No. PL100186) and its appeal of Proposed Official Plan Amendment No. 73 (OPA 73) of the Town of Aurora IN THE MATTER OF subsection 17(36) of the Planning Act, R.S.O. 1990, c. P.13, as amended Appellant: Aurora 2C Landowners Group Inc. Appellant: Elhara Investments Limited & Aurora-Leslie Developments Limited (collectively known as "Aurora-Leslie Developments Inc.") Appellant: Robert G. Sikura Appellant: Wildrush Homeowners Group Subject: Proposed Official Plan Amendment No. 73 (OPA 73) of the Town of Aurora Municipality: Town of Aurora

72 O.M.B.R. 86

98 M.P.L.R. (4th) 158

2012 CarswellOnt 5304

Town of Aurora File No.: D09-05-08, O.M.B.

Case No.: PL090606, O.M.B. File

No.: PL090606, Town of Aurora File No.

D09-01-09, O.M.B. File No. PL100186,

OMB File Nos. PL100186, PL110191

Ontario Municipal Board

Panel: S.W. Lee Executive, Vice-Chair, N. Jackson, Vice-Chair

Decision: April 26, 2012.

(33 paras.)

Appearances:

Town of Aurora: Ian Lord.

Elhara Investments Limited and Aurara - Leslie Developments Inc. known as "Aurora-Leslie Developments Inc.": Ira Kagan, Paul DeMelo.

Regional Municipality of York: Pitman Patterson, Barbara Montgomery.

DECISION OF THE BOARD ON A SECTION 43 MOTION DELIVERED BY S.W. LEE AND N. JACKSON

1 This two--day hearing deals with an application pursuant to section 43 of the *Ontario Municipal Board Act* (OMB Act) made by Aurora-Leslie Development Inc. (Aurora-Leslie). The task before this panel is the determination of whether a rehearing should be granted.

2 The impugned decision was issued on September 1, 2011, after a six-week long hearing. The decision relates to the 2C planning area in the Town of Aurora, the last track of Greenfield developable lands in the Town of Aurora (Town). The lands in question consist of 66.1 hectares of developable lands owned by the applicants within the larger secondary plan area. This decision deals with the appeals of the two land owners, Aurora-Leslie and R. Sikura.

The main focus of the section 43 application

3 The focus of the application for the section 43 review relates only to the decision on the lands of Aurora-Leslie, and not on the Sikura lands. In essence, the decision reflects the learned member's determination of the proposed land use designations countenanced at the hearing. The issue is whether the subject lands should be in its entirety designated as "employment" or whether it should be designated partially "employment" and "residential". It is also important to note that there are two instruments consolidated and presented before the learned panel: the private appeal launched by the applicant for refusal or non-action by the Town and the appeal of OPA 73, the 2C secondary plan adopted by the Town and approved by the Regional Municipality of York (Region).

4 The backdrop of this hearing is the Region's growth plan (Growth Plan) and the ongoing process of appeals of the Growth Plan conformity exercise pursuant to the *Places to Grow Act* which hover ominously or benignly over this impugned hearing, depending on one's perspective.

5 At the hearing, parties attach differential importance to the different population and employment forecasts applicable to the Town. On one hand, counsel for the applicant insists that the applicable forecast currently in place should apply, i.e. 75,000 people and 33,000 jobs. It is his thesis that the Clergy Principle should apply and the proposed development should be evaluated against such criteria. On the other hand, counsel for the Region and the Town both insist that the revised 70,200 people and 34,200 jobs as decreed by the Region's newly adopted official plan should govern. In their view, nothing should be done to jeopardise these forecasts. The last mentioned instrument is under appeal before the Board, albeit the Town is fully in agreement with these figures.

6 It is against this larger canvas that the impugned hearing had played out.

7 The decision issued by the learned member favoured the position adopted by the Town and the Region. On the whole, he did not pivot his final decision on a singular device. He did not discount that the proposed residential and employment designations in the proposed configuration using the First Commercial Drive as a dividing line can be made to work. In fact, the learned member is pithy, bordering on a studied silence, on the questions of land topography of the western portion of the subject lands, even though there had been a fair amount of evidence presented on these matters. On p. 9 of the decision, the learned member states:

> Counsel for Aurora-Leslie, Mr. Kagan, submitted that this matter is not about "what is possible, but instead about what is recommended." The Board accepts this submission as persuasive. It is not simply that residential uses can work; it is whether residential uses should be permitted, in concert with employment uses, on the Appellant's lands east of Leslie Street.

A rare and extraordinary remedy

8 The Board has in the past erected a very high bar for a remedy arising from section 43 of the OMB Act. One of the panellists of this hearing has enunciated the following in *Canada Mortgage & Housing Corp. v. Vaughan(1994 OMBD No. 1941, 31 OMBR ,471, at par.9,* which had been cited with approval at the Court of Appeal in *Shanahan v. Russell, (2000) O.J. No. 4762,138 OAC 246,at p.11 :*

> The Jurisprudence of this board in this regard has been most clear. The past decisions indicate that we are reluctant to grant an s. 43 review unless there is a jurisdictional defect or whether there has been a change of circumstances or new evidence available, or whether there is a manifest error of decisions or if there is an apprehension of bias or undue influence. While the list may not be exhaustive, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or insubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effect on public and propriety interests, our decisions should be well considered and must have some measure of finality. ...It never has been nor would ever be our wont to constitute

ourselves as an appellant body, routinely reviewing or rehearing our own decisions.

9 The *Canada Mortgage and Housing Corporation* and *the Russell v. Shanahan* cases were both decided before the present Rules of Practice and Procedure came to birth. Nonetheless, these cases both codify the prior jurisprudence of the Board and adumbrate the present rules.

10 Pursuant to Rule 115.01, the exercise of discretion to order a hearing is confined strictly to the "convincing and compelling" case. In the area where the error of law or fact is alleged, there is the concomitant requirement that the error is such that the Board would have likely reached a different decision. In short, the bar for review remains very high.

The blemishes and the blooms: the topography

11 The attacks on the decision are based on allegations of different levels of errors of laws and denial of natural justice.

12 Amongst others, counsel for the application for the section 43 review enumerates a lack of findings on issues such as topography and land form conservation in contrast with the Sikura appeal which focuses on the geographic merits. He alleges also that the Board member did not deal with or apply the Clergy Principle. In fact, his complaint is that the word "clergy" is missing in the lexicon of the member's decision. Underlying it all, there is an almost implicit allegation that the member had not done justice to the huge body of evidence that had been presented as the impugned decision has not reflected any of the requisite weighing or analysis that is worthy of such a complicated hearing enterprise.

13 It is a truism that a board's decision must have the requisite transparency, intelligibility, justification and sufficiency of reasons so that the parties can follow the trail of how the decision is reached (see *Clifford v. Ontario Municipal Employees retirement System, 2009 ONCA 670, par.29 and 30)*. The degree of details required, however, varies. Often, it is governed by how pivotal the issues are and the extent they may shape the decision-making, and the relation to the legislative framework. In some cases, a pithy finding may suffice; in others, it may be woefully inadequate. Prolixity may not be called for in every hearing that is lengthy and the issues seemingly complex. However, for some short hearing events, fastidious attentiveness to details may be urgently needed. In short, context matters a great deal.

14 This panel is fully cognizant that there are blemishes and blooms in the impugned decision. Some of the "blemishes" relates to the lack of details. By and large, they belong to the "micro" spheres: areas that are not determinative. The essence of the structure and the trail of the reasoning of the impugned decision have not been altered by these blemishes. Within and surrounding all the "macro" spheres, the decision may not be easily challenged.

15 We come to this conclusion set out in the previous paragraph with a sense of certitude and based on the following. In the written factum materials and in the *viva voce* arguments, counsel from both sides gave an excellent delineation of the highlights of the issues canvassed at the impugned hearing. With the aid of the affidavits of witnesses that had testified and the final written arguments filed at the impugned hearing, all of which have been included and presented, this panel was able to gain a high degree of appreciation and a virtual sense of verisimilitude of the issues in play.

16 What is clear from the totality of the text of the impugned decision is that the geographic characteristics of Aurora-Leslie did not serve as a determinative basis in the choice of the proposed designated land use. In contrast to the Sikura's appeal, the analysis of the environmental feature in this case pales in comparison. In fact, as observed earlier, the learned member did not make a finding against, or in favour of, Aurora-Leslie in this respect. What swayed the learned member was more than topography and land form conservation, it was the general thrust of the Town's policies, the general disposition of protection of employment lands, and ultimately, the public interest concerns that a wiser course of action is to land on the positions of the Town and the Region.

17 It is to the last mentioned subject area that our decision will turn next.

What the impugned decision had done and what this section 43 review would not do?

18 This panel will next examine the concerns arising from the Clergy Principle and the larger context as to judge the cogency of the impugned decision. What appears to be submitted at the hearing consists of three positions in relation to forecasts.

19 At the impugned hearing and here, Aurora-Leslie takes a purist position; i.e. that it is entitled to be tested only against the in-force 1994 official plan forecast to the year of 2026, as opposed to the 2009 forecast to the year of 2031 which is still under appeal. The Town takes a hard line and equally polarized approach. It alleges that the Growth Plan would trump the Clergy Principle. Under S.5.4.1, subsection 9 of the Growth Plan, counsel for the Town insists that the Town is compelled to apply the allocation of population, housing demand and intensification targets set by the Region, notwithstanding the final approval of the Regional Growth Plan has not been achieved. He also cites subsection, .3(5)(a) of the *Planning Act* to buttress the importance of conformity at the date of the decision-making.

20 The Region does not go to the same extreme as the Town. It takes a more nuanced and pragmatic approach, both at the impugned hearing and at this hearing. Its counsel cited the dicta of the Divisional Court at the *Beechridge Farms v. Ajax, (2008) O.J. No.447, 233 O.A.C. 368(Div. Ct.) at par.19*. where the Court decrees that Clergy "is not a strict unvarying principle." He invited the learned member at the impugned hearing to take an expansive approach in the appreciation of the Growth Plan conformity exercise, how Official Plan Amendment 73 (OPA 73) would better implement the Growth Plan and that Aurora-Leslie's mixed-use proposals may not step up to the concept of a "complete community".

21 This is neither the forum nor the occasion for this panel to use the opportunity to make any ruling, *obita dicta* or not, on the validity of the Clergy Principle, its components and how it should be applied or whether it should be determinative or overridden by the Growth Plan. Each of these represents an area worthy of a great deal of planning and jurisprudential analysis. Nor would this panel delve into the procedures, structure and the relative merits of the residential land needs of the Town, the impact on the Region if Table 1 of the Region's official plan was not adhered to. This panel will punctiliously stay away from these leitmotifs that haunt every growth plan hearing on the horizon.

22 The task before this panel is simple: it is to determine whether the learned member had performed the Clergy Principle exercise in the decision; and if so, can his decision withstand the challenges mounted? It is not for this panel to gainsay what it would have done given the same evidence and submissions. It is for us to determine whether an error had been committed; if indeed an error were to be uncovered, should a re-hearing be allowed.

23 Although the term "clergy" had not been deployed, it is our finding that the learned member had been alive and responsive to the various positions to which the differential applications of the principle would have led him. It is plain that the impugned decision does not reveal any of the palpable tensions or the titanic struggles one would associate with the application of Clergy Principle. Nonetheless, the differential approach of the principle had been applied and the implications explored.

24 The learned member's conclusions seem to come about seamlessly and effortlessly. He sees the OPA 73 which is built upon a lower residential number as decreed by the Region and accepted by the Town should be accepted by the board, as a matter of course. In his view, it would better enable the public authority to embark on the planning journey. He is responsive to the comprehensive, consultative, calibrated process as being a better foundation to address the land needs. In doing what he did, not only did he attach a great deal of importance to the Growth Plan, he in fact heightened the significance of the conformity exercise at the Regional level. He had anchored his regard to the decision of the municipality, the Region and what had encumbered their decisions. Last, but not the least, he did not discount the possibilities that this applicant's aspirations should be reviewed afresh in the next opportunity of review.

25 Some other panels of the Board may have approached these questions more circuitously, delving into greater minutiae or engaging in deeper analysis. In his decision making, the learned member did not manoeuvre as if he was in

a war of attrition by painstakingly gaining territorial grounds and steadfastly garnering footholds. Instead, he undertook a blitzkrieg. There is no doubt that the decision might have been written differently for the same result. For instance, if the member were to weigh in the conflicting evidence of Mr. Matthews and Mr. Butler on one side and Ms. Gillezeau, Mr. Smith and Mr. Grimes on the other, the decision would have been different in tone and substance. One could speculate that a lot of ink could have been spilled on the implications of injecting 1,021 units and 2,430 people into the 2C area before landing on the alternative choices. One could also note that within the 2 C area, there is no shortage of residential land supply.

26 There had been evidence proffered at the impugned hearing on the larger questions pertaining to the reality or unreality of a 75,000 residents forecast, the land needs and the efficiency of the timing and use of infrastructure. The learned member could have pondered on the consequence of upsetting of the apple cart of Table 1 which had allocated the numbers to all the willing constituent municipalities. Indeed, the member could have attempted to secure the Holy Gail by tackling the question of whether Schedule 3 in the Growth Plan was to be interpreted as a hard-cap, or simply part of the plethora of application of the Growth Plan policies. All these and more are fertile territories upon which one's analysis may expand or shrink. In fact, the permutations would be endless.

27 Mr. Lord invites this panel to leapfrog into the posture that the Board is not required to decide the case solely on evidence. He relies on the leading case of the Court of Appeal in *Re Cloverdale shopping centre Ltd. et. al and the Town of Etobicoke (1966) 2.O.R. 439* and concludes that the decision of the Board is administrative in nature in that it can overrule the evidence and be guided by its view of public policy only.

28 This panel is of the view that the planning regime countenanced by the Board is no longer the idyll of the 1960s, and that the policy-driven system today and the current legislative framework would not lend themselves to such elegiac solution. Neither the learned member nor this panel is allowed to "make or enunciate policies", if only for the simple reason that this belongs to the domain of the province. Once these policies are enshrined in a provincial plan or the Provincial Policy Statement, they would bind all decision-makers, including the Board and the Ministers of the Crown. In addition, these high-level policies can give rise to conflicting or varying interpretations. No decision-maker can escape the evaluation of evidence to divine the meaning of the oracles.

29 Whether one agrees with the final outcome, it is important to observe the impugned decision does not fall outside the range of possibility advanced by the evidence proffered by one of the contenders. Yes, the impugned decision had avoided all the hard grind and drudgery of evidentiary and legal crunching. One may be critical of this swift delivery of outcome. This panel is not promoting this feature as a trend to come. However, the results align very fittingly with the middle Regional position. It has been noted judicially that the requirement of the sufficiency of reasons does not require the decision-maker to show every milestone in the path of reasoning. This panel is keenly aware that the lack of expansiveness by itself does not render the decision inadequate or impeachable (see *Aurora (Town) v. Robert G. Sikura* [2011] ONSC 7642 (Div. Ct.)., para 17, 18, 19 and 22).

The consolidation of the two appeals

30 Another important thrust of attack is that the decision gave primacy to OPA 73, and treated the private appeal almost like an ancillary afterthought. In effect, the allegation is that the Board has treated the Aurora-Leslie lands as already designated employment and put the appellant to a burden unjustifiable in planning.

31 It is important to remember that the issue of alternative land use designations was necessitated by the order of consolidation that had been directed by the Board upon consent of the parties. On one hand, there is the private appeal launched by Aurora-Leslie. On the other, there is the OPA 73 comprehensive secondary plan for the 2C area. The consolidation not only enabled the choice, but in fact compelled the choice to be made.

32 Once that was in play, the parties had to contend with the probability of either of these competing visions to succeed. In short, the hearing has been transformed into the stark alternative of yes or no, black or white, Antigone or

Creon. In planning terms, the consolidated hearing would have invited a range of issues associated with the larger questions pertaining to the constraints arising from a regional limitation. It invited the gaze beyond the obvious and had foreclosed the possibility of this case as a traditional choice of land uses. As we have noted in the previous section, this consolidation had heighted the importance of the conformity exercise at the Regional level.

Conclusion

33 Based on the above, it is therefore our conclusion that the impugned decision should not be altered. The application for the section 43 review is ordered dismissed. No rehearing will be ordered.

S.W. LEE
EXECUTIVE VICE-CHAIR

N. JACKSON
VICE-CHAIR

qp/e/qlspi/qlced/qljac

8

Her Majesty The Queen *Appellant*

v.

R.E.M. *Respondent*

and

Attorney General of Ontario and Attorney General of Alberta *Interveners*

Indexed as: R. *v.* **R.E.M.**

Neutral citation: 2008 SCC 51.

File No.: 32038.

2008: May 16; 2008: October 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Trial — Judgments — Reasons for judgment — Accused convicted of three offences relating to sexual assault — Whether judge's reasons on credibility of witnesses in criminal trial sufficient.

The complainant testified to 11 incidents of sexual assault by the accused over a period of years when she was between the ages of 9 and 17. The accused testified. He admitted to having sexual intercourse with the complainant, but claimed that the relationship only became sexual after she was 15 and that the intercourse was consensual. The age for minor consent at the time was 14.

The trial judge found the complainant to be a credible witness and accepted most of her evidence, while rejecting some portions that had been contradicted by other evidence. He discussed the reasons for these conclusions in some detail, noting that the complainant was a child at the time of most of the incidents, and that they had occurred a long time before. Some errors in her evidence were understandable, he concluded. The trial judge largely disbelieved the accused's evidence, although he found that on some points, it was not challenged. Again he gave reasons, although less extensive than he had in the case of the complainant's evidence. In the end, the trial judge convicted the accused on three counts.

Sa Majesté la Reine *Appelante*

c.

R.E.M. *Intimé*

et

Procureur général de l'Ontario et procureur général de l'Alberta *Intervenants*

Répertorié : R. *c.* **R.E.M.**

Référence neutre : 2008 CSC 51.

N^{o} du greffe : 32038.

2008 : 16 mai; 2008 : 2 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Procès — Jugements — Motifs — Accusé déclaré coupable de trois infractions d'ordre sexuel — Les motifs du juge sur la crédibilité des témoins dans le procès criminel étaient-ils suffisants?

La plaignante a témoigné relativement à 11 incidents répartis sur de nombreuses années, où l'accusé l'aurait agressée sexuellement alors qu'elle avait entre 9 et 17 ans. L'accusé a témoigné. Il a reconnu avoir eu des rapports sexuels avec la plaignante, mais il a soutenu qu'elle avait 15 ans lorsque leur relation a pris une tournure sexuelle et qu'il s'agissait de rapports consensuels. L'âge du consentement était alors fixé à 14 ans.

Le juge du procès a estimé que la plaignante était un témoin crédible et il a retenu la plupart de son témoignage, en rejetant néanmoins certaines parties contredites par d'autres éléments de preuve. Il a exposé de façon assez détaillée les motifs de ces conclusions, faisant observer que la plaignante était encore une enfant au moment de la plupart des incidents, survenus longtemps auparavant. Il était compréhensible, a-t-il conclu, que des erreurs se soient glissées dans son témoignage. Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu, à certains égards, qu'il n'était pas mis en doute. Encore une fois, il a exprimé des motifs, bien que moins détaillés que ses motifs concernant le témoignage de la plaignante. Le juge du procès a finalement déclaré l'accusé coupable de trois chefs d'accusation.

The Court of Appeal set aside the convictions on two of the three counts. It found the trial judge's reasons to be deficient on the grounds that the trial judge: (i) did not clearly explain which of the offences were proved by which of the 11 incidents; (ii) failed to mention some of the accused's evidence; (iii) failed to make general comments about the accused's evidence; (iv) failed to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence; and (v) failed to explain why he rejected the accused's plausible denial of the charges.

Held: The appeal should be allowed and the verdicts of guilty restored.

A trial judge's reasons serve three main functions: to explain the decision to the parties, to provide public accountability and to permit effective appellate review. Proceeding with deference, the appellate court is to ensure that, read in the context of the record as a whole, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court. [11] [55]

The three offences of which the accused was convicted found support in the evidence as to a number of the incidents. This gives rise to a reasonable inference that the trial judge accepted some or all of this evidence and grounded the convictions on that evidence. While reasons drawing a precise link between each count on which the accused was found guilty and the particular evidence that the trial judge accepted in support of that count might have been desirable, this omission did not render the reasons deficient. [63]

Nor did the trial judge's failure to mention some of the accused's evidence render the reasons for judgment deficient. A trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the fact that the trial judge failed to make general comments about the accused's evidence. As helpful as it might be in a given case, a trial judge is not required to summarize specific findings on credibility by issuing a general statement as to "overall" credibility. It is enough that the trial judge has demonstrated a recognition, where applicable, that the witness's credibility was a live issue. [64]

La Cour d'appel a annulé la déclaration de culpabilité à l'égard de deux des trois chefs d'accusation, concluant que les motifs du juge du procès étaient déficients parce que celui-ci (i) n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions; (ii) n'a pas mentionné une partie de la preuve offerte par l'accusé; (iii) n'a pas fait de commentaires généraux sur le témoignage de l'accusé; (iv) n'a pas concilié ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de son témoignage; (v) n'a pas expliqué pourquoi il a écarté la dénégation plausible des accusations par l'accusé.

Arrêt : Le pourvoi est accueilli et les verdicts de culpabilité sont rétablis.

Les motifs du juge du procès remplissent trois fonctions principales : expliquer la décision aux parties, rendre compte devant le public et permettre un véritable examen en appel. La cour d'appel doit, en faisant preuve de retenue, s'assurer que les motifs du juge du procès, considérés dans le contexte de l'ensemble du dossier, démontrent qu'il avait conscience des questions fondamentales en litige et qu'il les a résolues. [11] [55]

Les trois infractions dont l'accusé a été déclaré coupable s'appuyaient sur la preuve relative à plusieurs incidents, d'où l'inférence raisonnable que le juge du procès a retenu cette preuve en totalité ou en partie et s'est appuyé sur elle pour prononcer les déclarations de culpabilité. Bien qu'il eût été souhaitable que les motifs établissent un lien précis entre chacun des chefs d'accusation dont l'accusé a été déclaré coupable et la preuve que le juge du procès a retenue à l'appui de ce chef, cette omission ne rendait pas les motifs déficients. [63]

L'omission du juge du procès de mentionner une partie de la preuve offerte par l'accusé ne rendait pas non plus ses motifs de jugement déficients. Le juge du procès n'est pas tenu de traiter de tous les éléments de preuve sur un point donné, pourvu qu'il ressorte des motifs qu'il a saisi l'essentiel des questions en litige au procès. Il se dégage clairement des motifs que le juge du procès a examiné soigneusement la preuve de l'accusé, et qu'il l'a d'ailleurs acceptée sur certains points. Dans ces circonstances, l'omission de mentionner certains aspects de cette preuve ne constitue pas une erreur. Il en va de même du fait que le juge du procès n'a pas fait de commentaires généraux sur la preuve offerte par l'accusé. Aussi utile que cela puisse être dans certains cas, le juge du procès n'a pas à résumer ses conclusions relatives à la crédibilité en faisant une déclaration globale sur la crédibilité « en général ». Il suffit qu'il démontre qu'il comprenait, le cas échéant, que la crédibilité du témoin était une question en litige. [64]

The trial judge's alleged failure to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence did not render the reasons deficient. It is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness. The trial judge explained that the fact that many of the incidents testified to happened many years before and the fact that the complainant was a child at the time might well explain certain inconsistencies. In fact, he did explain why he rejected some of her evidence. [65]

Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged". It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt. [66]

It may have been desirable for the trial judge to explain certain matters more fully. However, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident. [67]

Instead of looking for this basis, the Court of Appeal focussed on omitted details and proceeded from a sceptical perspective. Having concluded that the accused's denial was plausible, it proceeded to examine the case

L'omission alléguée du juge du procès de concilier ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de celui-ci ne rendait pas ses motifs déficients. Le juge des faits peut accepter une partie de la déposition d'un témoin tout en en écartant d'autres parties. Le juge du procès a indiqué que le fait que plusieurs incidents dont la plaignante avait témoigné s'étaient produits de nombreuses années auparavant, quand elle n'était qu'une enfant, pouvait expliquer certaines incohérences. En fait, il a bel et bien indiqué pourquoi il a écarté une partie de son témoignage. [65]

Enfin, l'omission du juge du procès d'expliquer pourquoi il a écarté la dénégation plausible des accusations par l'accusé ne permet pas de conclure à la déficience des motifs. Il ressort clairement des motifs du juge du procès que, de façon générale, lorsque les témoignages de la plaignante et de l'accusé se contredisaient, il a retenu celui de la plaignante. Cela explique pourquoi il a écarté la dénégation de l'accusé. Il a exposé les raisons pour lesquelles il a retenu le témoignage de la plaignante, ayant jugé qu'elle était généralement sincère et « un témoin fort crédible », et il a conclu que son témoignage sur des événements précis n'était « pas sérieusement mis en doute ». Il s'ensuit, nécessairement, qu'il a écarté le témoignage de l'accusé lorsqu'il contredisait le témoignage de la plaignante qu'il avait retenu. Aucun autre motif n'était nécessaire pour justifier le rejet des explications de l'accusé. Dans ce contexte, les condamnations elles-mêmes permettent d'inférer raisonnablement que l'accusé n'a pas réussi à soulever un doute raisonnable en niant les accusations. [66]

Il eût peut-être été souhaitable que le juge du procès explique davantage certains points. Cependant, il s'agit de savoir si les motifs, considérés dans le contexte du dossier et des questions en litige au procès, faisaient ou non ressortir entre la preuve et le verdict un lien logique suffisant pour permettre un véritable appel. La principale question en litige au procès était la crédibilité. Il est manifeste que le juge du procès a retenu la totalité ou une partie suffisante du témoignage étoffé de la plaignante concernant les incidents et que ni l'ensemble de la preuve ni le témoignage contradictoire de l'accusé n'ont laissé subsister de doute raisonnable dans son esprit. Il en a conclu que la culpabilité de l'accusé avait été établie hors de tout doute raisonnable. Lorsqu'on considère le dossier globalement, le fondement du verdict est évident. [67]

Plutôt que de s'efforcer de découvrir ce fondement, la Cour d'appel s'est intéressée principalement aux détails omis et a fait preuve de scepticisme. Après avoir conclu que la dénégation de l'accusé était plausible, elle

from that perspective, asking whether the reasons disclosed that the trial judge had properly applied the reasonable doubt standard. In doing so, it ignored the trial judge's unique position to see and hear witnesses, and instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised. [68]

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APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Donald and

a examiné l'affaire de ce point de vue, se demandant s'il ressortait des motifs que le juge du procès avait appliqué correctement la norme du doute raisonnable. Ce faisant, elle n'a pas tenu compte de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins, et elle a substitué sa propre appréciation de la crédibilité à celle du juge du procès en critiquant les motifs du jugement parce qu'ils n'expliquaient pas pourquoi aucun doute raisonnable n'avait été soulevé. [68]

Jurisprudence

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Rowles, Donald

Saunders JJ.A.) (2007), 238 B.C.A.C. 176, 393 W.A.C. 176, 218 C.C.C. (3d) 446, [2007] B.C.J. No. 518 (QL), 2007 CarswellBC 547, 2007 BCCA 154, reversing in part a decision of Romilly J., [2004] B.C.J. No. 2896 (QL), 2004 CarswellBC 3313, 2004 BCSC 1679. Appeal allowed.

Alexander Budlovsky, *Q.C.*, for the appellant.

J. M. Brian Coleman, *Q.C.*, and *Lisa Jean Helps*, for the respondent.

M. David Lepofsky and *Amanda Rubaszek*, for the intervener the Attorney General of Ontario.

David C. Marriott, for the intervener the Attorney General of Alberta.

The judgment of the Court was delivered by

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

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

I. Factual and Judicial History

[3] The accused, R.E.M., was charged with various sexual offences involving the complainant, who is the accused's stepdaughter, and K.A.P., who is the

et Saunders) (2007), 238 B.C.A.C. 176, 393 W.A.C. 176, 218 C.C.C. (3d) 446, [2007] B.C.J. No. 518 (QL), 2007 CarswellBC 547, 2007 BCCA 154, qui a infirmé en partie une décision du juge Romilly, [2004] B.C.J. No. 2896 (QL), 2004 CarswellBC 3313, 2004 BCSC 1679. Pourvoi accueilli.

Alexander Budlovsky, *c.r.*, pour l'appelante.

J. M. Brian Coleman, *c.r.*, et *Lisa Jean Helps*, pour l'intimé.

M. David Lepofsky et *Amanda Rubaszek*, pour l'intervenant le procureur général de l'Ontario.

David C. Marriott, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement de la Cour rendu par

[1] La Juge en chef — Dans le présent pourvoi, la Cour est appelée à déterminer si un juge de première instance a donné des motifs suffisants relativement à la crédibilité des témoins dans un procès criminel. La Cour d'appel a reproché au juge du procès de ne pas avoir expliqué pourquoi les éléments de preuve contradictoires ne soulevaient pas un doute raisonnable quant à la culpabilité de l'accusé et elle a ordonné la tenue d'un nouveau procès en raison de l'insuffisance de ses motifs. Le ministère public se pourvoit devant notre Cour, faisant valoir que, sous le couvert de reproches au sujet de l'insuffisance des motifs, la Cour d'appel a en fait substitué sa propre appréciation des faits à celle du juge du procès sans avoir établi que celui-ci avait commis une erreur.

[2] Je conclus qu'il y a lieu d'accueillir le pourvoi. Les motifs du juge du procès n'étaient peut-être pas parfaits, mais ils étaient suffisants pour expliquer pourquoi il a prononcé les verdicts de culpabilité et pour fournir matière à examen en appel.

I. Faits et historique des procédures judiciaires

[3] L'accusé, R.E.M., a été inculpé de diverses infractions d'ordre sexuel concernant la plaignante, sa belle-fille, et K.A.P., la fille d'un ami de

daughter of a family friend. The offences involving the complainant were alleged to have been committed when the complainant was between 9 and 17 years old. When the complainant was 16 years old, she gave birth to a baby who had been conceived with the accused.

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

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

[6] The evidence dealt with 11 incidents relating to 4 counts respecting the complainant. At trial, the accused admitted the essential elements of one offence and denied the three other charges, and was ultimately acquitted of one of those. The trial judge found the complainant to be a very credible witness, that much of her testimony was not seriously challenged, and that she was not prone to embellishment or vindictiveness. The trial judge largely disbelieved the accused's evidence, although at some points found that it was not seriously challenged. The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led ([2004] B.C.J. No. 2896 (QL), 2004 BCSC 1679).

[7] The British Columbia Court of Appeal (*per* Saunders J.A.) allowed the appeal with respect to the two unadmitted counts, based on its view that the reasons for judgment did not sufficiently show that the trial judge properly applied the principle of reasonable doubt ((2007), 238 B.C.A.C. 176, 2007 BCCA 154). In particular, the court found that the trial judge failed to mention some of the accused's evidence, failed to make general comments about the accused's evidence, and failed to reconcile his generally positive findings on the complainant's

la famille. Les infractions concernant la plaignante auraient été commises lorsqu'elle avait entre 9 et 17 ans. À 16 ans, la plaignante a donné naissance à un bébé conçu avec l'accusé.

[4] L'accusé a reconnu avoir eu des rapports sexuels avec sa belle-fille, mais a soutenu que leur relation n'avait pris une tournure sexuelle qu'au moment où elle avait atteint l'âge de 15 ans et qu'il s'agissait de rapports consensuels. (L'âge du consentement était alors fixé à 14 ans.) Il a nié toutes les autres allégations formulées contre lui.

[5] Les accusations concernant K.A.P. ont été rejetées. Le procès a porté principalement sur celles concernant la belle-fille de l'accusé.

[6] La preuve portait sur 11 incidents ayant trait à 4 chefs d'accusation concernant la plaignante. Au procès, l'accusé a admis avoir commis les éléments essentiels d'une infraction et a nié les trois autres accusations; il a finalement été acquitté de l'une d'elles. Le juge du procès a estimé que la plaignante était un témoin fort crédible, qu'une grande partie de son témoignage n'était pas sérieusement mis en doute et qu'elle n'était pas encline à enjoliver son récit ni à se venger. Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu que, sur certains points, il n'était pas sérieusement mis en doute. Le juge du procès n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions ([2004] B.C.J. No. 2896 (QL), 2004 BCSC 1679).

[7] La Cour d'appel de la Colombie-Britannique, sous la plume de la juge Saunders, a accueilli l'appel relativement aux deux infractions non avouées, parce que, à son avis, il ne ressortait pas suffisamment des motifs du jugement que le juge du procès avait appliqué correctement le principe du doute raisonnable ((2007), 238 B.C.A.C. 176, 2007 BCCA 154). La cour a conclu notamment que le juge du procès avait omis de mentionner une partie de la preuve offerte par l'accusé, de faire des commentaires généraux sur le témoignage de l'accusé

credibility with the rejection of some of her evidence. The court found that the trial judge's failure to explain why he rejected the accused's plausible denial of the charges placed the reasons for judgment beyond the reach of meaningful appellate review. Finding that conviction was not inevitable and that the accused was entitled to the benefit of any reasonable doubt raised by his evidence, the court concluded that the minimal standard for sufficiency of reasons was not met and ordered a new trial.

et de concilier ses conclusions généralement positives sur la crédibilité de la plaignante avec le rejet d'une partie de son témoignage. Elle a estimé que l'omission du juge du procès d'expliquer pourquoi il avait écarté la dénégation plausible des accusations par l'accusé empêchait un véritable examen en appel. Étant d'avis que la déclaration de culpabilité n'était pas inévitable et que l'accusé avait droit au bénéfice du moindre doute raisonnable soulevé par son témoignage, la cour a conclu que les motifs ne répondaient pas à la norme minimale en ce qui a trait à leur suffisance et il a ordonné la tenue d'un nouveau procès.

II. Analysis

A. *When Are Reasons Required?*

[8] The common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence has been believed and what disbelieved: see e.g. *R. v. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne v. David Syme & Co.*, [1909] V.L.R. 550 (S.C.), aff'd on other grounds, [1910] V.L.R. 539 (H.C. Aust.); *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. In the words of a former Chief Justice of this Court, Laskin C.J.:

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

[9] Judicial reasons of the 19th and early 20th century, when given, tended to be cryptic. One searches in vain for early jurisprudence on the duty to give reasons, for the simple reason, one suspects, that such reasons were not viewed as required unless a statute so provided. This absence of such a duty is undoubtedly related to the long-standing common law principle that an appeal is based on

II. Analyse

A. *Dans quelles circonstances une décision doit-elle être motivée?*

[8] La common law ne reconnaissait autrefois aucune obligation légale pour un tribunal de dévoiler les motifs d'une décision ou de préciser quelle preuve il avait crue ou non : voir, p. ex., *R. c. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne c. David Syme & Co.*, [1909] V.L.R. 550 (C.S.), confirmé pour d'autres motifs, [1910] V.L.R. 539 (H.C. Austr.); *Macdonald c. La Reine*, [1977] 2 R.C.S. 665. Pour reprendre les termes utilisés par un ancien juge en chef de notre Cour, le juge chef Laskin :

> [TRADUCTION] La question de savoir si des motifs doivent être fournis revient souvent dans les procès sans jury et en appel. Il n'existe aucune obligation légale de ce genre, et c'est pour ainsi dire inutile dans de très nombreuses affaires tranchées lors d'un procès devant un juge seul, ainsi que dans bon nombre d'affaires où la Cour d'appel confirme la décision du juge du procès.
>
> (B. Laskin, « A Judge and His Constituencies » (1976), 7 *Man. L.J.* 1, p. 3-4)

[9] Les motifs exprimés par les tribunaux, le cas échéant, aux 19e et 20e siècles tendaient à être obscurs. On cherchera en vain des décisions anciennes sur l'obligation de fournir des motifs pour la simple raison, croit-on, que de tels motifs n'étaient pas jugés nécessaires à moins qu'une loi ne le prévoie. Cette absence d'obligation est sans doute reliée au principe de common law, établi de longue date,

the judgment of the court, not on the reasons the court provides to explain or justify that judgment: see e.g. *Glennie v. McD. & C. Holdings Ltd.*, [1935] S.C.R. 257, at p. 268.

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

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

1. Reasons tell the parties affected by the decision why the decision was made. As Lord Denning remarked, on the desirability of giving reasons, "by so doing, [the judge] gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account": *The Road to Justice* (1955), at p. 29. In this way, they attend to the dignity interest of the accused, an interest at the heart of post-World War II jurisprudence: M. Liston, "'Alert, alive and sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law", in D. Dyzenhaus, ed., *The Unity of Public Law* (2004), 113, at p. 121. No less important is the function of explaining to the Crown and to the victims of crime why a conviction was or was not entered.

2. Reasons provide public accountability of the judicial decision; justice is not only done, but

voulant qu'un appel soit fondé sur le jugement du tribunal, et non sur les motifs que le tribunal donne pour expliquer ou justifier ce jugement : voir, p. ex., *Glennie c. McD. & C. Holdings Ltd.*, [1935] R.C.S. 257, p. 268.

[10] Le droit a cependant évolué. Aucune règle absolue n'exige qu'une décision soit motivée en toutes circonstances. En revanche, dans certains contextes juridictionnels, des motifs sont souhaitables et, dans de rares cas, obligatoires. Comme notre Cour l'a affirmé dans *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26, par. 18, citant le par. 43 de l'arrêt *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration*, [1999] 2 R.C.S. 817 (dans un contexte de droit administratif), « il est maintenant approprié de reconnaître que, dans certaines circonstances, l'obligation d'équité procédurale requerra une explication écrite de la décision ». Un procès criminel, où l'innocence de l'accusé est en jeu, figure parmi ces circonstances.

[11] La doctrine et la jurisprudence établissent que les motifs du jugement dans un procès criminel remplissent trois fonctions principales :

1. Les motifs révèlent aux parties touchées par la décision pourquoi cette décision a été rendue. Comme lord Denning l'a fait remarquer au sujet de l'opportunité de fournir des motifs, [TRADUCTION] « ce faisant, [le juge] prouve qu'il a entendu et examiné la preuve et les arguments qui lui ont été présentés de chaque côté : et aussi qu'il n'a pas tenu compte de facteurs extrinsèques » : *The Road to Justice* (1955), p. 29. Les motifs servent ainsi le droit à la dignité de l'accusé, un droit qui est au cœur de la jurisprudence postérieure à la Seconde Guerre mondiale : M. Liston, « "Alert, alive and sensitive" : *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law », dans D. Dyzenhaus, dir., *The Unity of Public Law* (2004), 113, p. 121. Ils ont aussi pour fonction, tout aussi importante, d'expliquer au ministère public et aux victimes d'infractions criminelles pourquoi une déclaration de culpabilité a été ou non prononcée.

2. Les motifs constituent un moyen de rendre compte devant le public de l'exercice du pouvoir

is seen to be done. Thus, it has been said that the main object of a judgment "is not only to do but to seem to do justice": Lord Macmillan, "The Writing of Judgments" (1948), 26 *Can. Bar Rev.* 491, at p. 491.

3. Reasons permit effective appellate review. A clear articulation of the factual findings facilitates the correction of errors and enables appeal courts to discern the inferences drawn, while at the same time inhibiting appeal courts from making factual determinations "from the lifeless transcript of evidence, with the increased risk of factual error": M. Taggart, "Should Canadian judges be legally required to give reasoned decisions in civil cases" (1983), 33 *U.T.L.J.* 1, at p. 7. Likewise, appellate review for an error of law will be greatly aided where the trial judge has articulated her understanding of the legal principles governing the outcome of the case. Moreover, parties and lawyers rely on reasons in order to decide whether an appeal is warranted and, if so, on what grounds.

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

judiciaire; non seulement justice est rendue, mais il est manifeste qu'elle est rendue. C'est pourquoi on a affirmé que l'objet principal d'un jugement [TRADUCTION] « est non seulement de rendre justice mais de montrer que justice a été rendue » : Lord Macmillan, « The Writing of Judgments » (1948), 26 *R. du B. can.* 491, p. 491.

3. Les motifs permettent un examen efficace en appel. Un énoncé clair des conclusions de fait facilite la correction des erreurs et permet aux tribunaux d'appel de discerner les inférences tirées, tout en les empêchant de tirer des conclusions de fait [TRADUCTION] « fondées sur une terne transcription de la preuve, avec le risque accru d'erreurs de fait que cela comporte » : M. Taggart, « Should Canadian Judges be legally required to give reasoned decisions in civil cases » (1983), 33 *U.T.L.J.* 1, p. 7. De même, la révision en appel d'une erreur de droit sera grandement facilitée si le juge du procès a exposé son interprétation des principes de droit sur lesquels repose l'issue de la cause. En outre, les parties et leurs avocats se fondent sur les motifs pour décider s'il y a lieu d'interjeter appel et, dans l'affirmative, quels moyens invoquer.

[12] De plus, les motifs favorisent le prononcé de décisions équitables et exactes; la tâche d'énoncer les motifs attire l'attention du juge sur les points saillants et diminue le risque qu'il laisse de côté des questions de fait ou de droit importantes ou ne leur accorde pas l'importance qu'elles méritent. Un juge a déjà dit : [TRADUCTION] « Souvent, la forte impression que les faits sont clairs, selon la preuve, s'estompe lorsque vient le temps d'exprimer cette impression sur papier » (*United States c. Forness*, 125 F.2d 928 (2d Cir. 1942), p. 942). Enfin, les motifs constituent un outil essentiel d'élaboration uniforme du droit en ce qu'ils guident les tribunaux dans leurs décisions futures conformément à la règle du *stare decisis*. D'où l'observation suivante formulée dans H. Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2e éd. 1885) : [TRADUCTION] « Les parties au litige et la collectivité en général ont droit à un énoncé public des motifs du jugement — lequel est essentiel à l'établissement de règles fixes

rule of law and support the legitimacy of the judicial system.

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

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

B. *The Test for Sufficient Reasons*

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

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

intelligibles et au développement du droit en tant que science » (p. 147-148). De toutes ces façons, les motifs constituent une manifestation concrète de la primauté du droit et renforcent la légitimité du processus judiciaire.

[13] Les fonctions essentielles des motifs — révéler aux parties les raisons de la déclaration de culpabilité, rendre compte devant le public et fournir matière à examen en appel — ont été soulignées dans *Sheppard*. Cet arrêt a, par ailleurs, reconnu la nécessité de tenir compte des délais et du volume des affaires à traiter dans les cours criminelles de première instance et affirmé que les motifs devront être plus ou moins détaillés selon les circonstances et la mesure dans laquelle le dossier est complet.

[14] Bref, le droit a progressé au point qu'il est maintenant possible d'affirmer sans l'ombre d'un doute que le juge qui préside un procès criminel, où l'innocence de l'accusé est en jeu, a l'obligation de motiver sa décision. La question qui demeure irrésolue est plus difficile à trancher : Que doit-on entendre, dans le contexte d'une affaire donnée, par des motifs *suffisants*?

B. *L'appréciation du caractère suffisant des motifs*

[15] Dans *Sheppard*, et dans des arrêts subséquents, notre Cour a préconisé une approche fonctionnelle et contextuelle pour l'appréciation du caractère suffisant des motifs en matière criminelle. Les motifs doivent être suffisants pour remplir leurs fonctions qui consistent à expliquer pourquoi l'accusé a été déclaré coupable ou acquitté, rendre compte devant le public et permettre un examen efficace en appel.

[16] Par conséquent, lorsqu'un tribunal d'appel examine les motifs pour déterminer s'ils sont suffisants, il doit les considérer globalement, dans le contexte de la preuve présentée, des arguments invoqués et du procès, en tenant compte des buts ou des fonctions de l'expression des motifs (voir *Sheppard*, par. 46 et 50; *R. c. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), p. 524).

[17] These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" — the verdict — and the "why" — the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

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

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

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

> Where a case turns on the application of well-settled legal principles to facts as found after a consideration

[17] Ces buts seront atteints si les motifs, considérés dans leur contexte, indiquent pourquoi le juge a rendu sa décision. Il ne s'agit pas d'indiquer *comment* le juge est parvenu à sa conclusion, ou d'une invitation à « suivre son raisonnement », mais plutôt de révéler *pourquoi* il a rendu cette décision. La Cour d'appel de l'Ontario a prononcé l'arrêt *Morrissey* avant que notre Cour confirme l'obligation de fournir des motifs dans *Sheppard*. L'arrêt *Morrissey* décrit toutefois bien l'objet des motifs du juge de première instance. Le juge Doherty affirme, à la p. 525 : [TRADUCTION] « En motivant sa décision, le juge de première instance essaie de faire comprendre aux parties le résultat et le pourquoi de sa décision » (je souligne). L'essentiel est d'établir un lien logique entre le « résultat » — le verdict — et le « pourquoi » — le fondement du verdict. Il doit être possible de discerner les raisons qui fondent la décision du juge, dans le contexte de la preuve présentée, des observations des avocats et du déroulement du procès.

[18] Le juge peut expliquer le « pourquoi » de sa décision et son lien logique avec son « résultat » sans nécessairement énoncer chacune des constatations ou conclusions qui l'ont amené au verdict. Pour reprendre les propos tenus par le juge Doherty à la p. 525 de l'arrêt *Morrissey* :

> [TRADUCTION] Les motifs d'un juge de première instance ne sauraient être considérés ni analysés comme s'il s'agissait d'instructions au jury. Les instructions au jury indiquent à des non-juristes le chemin à suivre pour parvenir à un verdict. Les motifs d'un jugement sont exprimés une fois le juge de première instance parvenu à la fin de ce cheminement et expliquent pourquoi il est arrivé à telle ou telle conclusion. Ils ne sont pas censés et ne doivent pas être interprétés comme l'énonciation de chacune des étapes du processus que le juge a suivi pour parvenir à un verdict. [Je souligne.]

[19] Le juge n'est pas tenu d'expliquer des points bien établis, non controversés ou compris et acceptés par les parties. Cela vaut à la fois pour les règles de droit et pour les éléments de preuve. En ce qui a trait au droit, le juge Doherty a ajouté ce qui suit, dans *Morrissey*, p. 524 :

> [TRADUCTION] Lorsque l'issue d'une affaire tient à l'application de principes de droit bien établis aux faits

of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those principles.

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

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

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

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

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

constatés après l'examen d'éléments de preuve contradictoires, le juge du procès n'est pas obligé d'exposer ces principes de droit pour démontrer aux parties, et encore moins au tribunal d'appel, qu'il les connaissait et qu'il les a appliqués.

[20] De même, le juge de première instance n'est pas tenu de traiter de la preuve non contestée, ni d'expliquer en détail sa conclusion sur chaque élément de preuve ou fait controversé, dans la mesure où il est possible de discerner logiquement les conclusions qui relient la preuve au verdict.

[21] C'est ce à quoi renvoie l'arrêt *Sheppard*, lorsqu'il y est question du « raisonnement qu'a suivi le juge du procès pour démêler des éléments de preuve embrouillés ou litigieux » (par. 46). Dans *Sheppard*, il était impossible de déterminer quels faits le juge de première instance avait jugés avérés. Il était donc impossible de savoir *pourquoi* le juge était arrivé au *résultat* obtenu — c'est-à-dire au verdict.

[22] Dans *Sheppard*, l'accusé était inculpé du vol de deux fenêtres. La seule preuve reliant l'accusé aux fenêtres émanait d'une ex-petite amie qui avait juré [TRADUCTION] « d'avoir sa peau ». Le juge du procès avait employé une formule toute faite pour le déclarer coupable :

> [TRADUCTION] Après avoir examiné l'ensemble des témoignages en l'espèce et me rappelant le fardeau qui incombe au ministère public et la crédibilité des témoins, et la façon dont le tout doit être apprécié, je conclus que le défendeur est coupable des actes reprochés.

[23] Les motifs ne parlaient pas des faits. Ils ne disaient rien au sujet de la crédibilité des témoins. Ni au sujet du droit applicable à l'infraction. Ils répétaient des phrases stéréotypées sur ce que le juge du procès est censé faire, mais n'indiquaient pas qu'il l'avait fait. Rien dans les motifs ne disait à l'accusé pourquoi le juge du procès le déclarait coupable. Rien ne révélait au public pourquoi la déclaration de culpabilité avait été prononcée. Et rien ne permettait à la Cour d'appel de savoir si les conclusions et le raisonnement du juge du procès étaient valables. Les motifs étaient clairement insuffisants d'un point de vue fonctionnel.

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

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

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

[26] *Braich* was decided together with *Sheppard*. Unlike in *Sheppard*, the factual record was detailed. Binnie J., writing for the Court, adopted a flexible approach that took into account the fact that

[24] En l'espèce, la Cour d'appel a interprété les mots le « raisonnement qu'a suivi le juge du procès pour démêler des éléments de preuve embrouillés ou litigieux » comme signifiant que le juge du procès devait décrire en détail le raisonnement précis qui l'avait mené, à partir d'éléments de preuve disparates, à ses conclusions sur la crédibilité et la culpabilité. En d'autres termes, elle a insisté précisément sur [TRADUCTION] « l'énonciation de chacune des étapes du processus que le juge a suivi pour parvenir à un verdict » rejetée dans *Morrissey* (p. 525). L'arrêt *Sheppard* n'exige pas cela du juge. Certes, le « raisonnement » suivi par le juge doit ressortir clairement des motifs, considérés dans le contexte du procès. Mais il n'est pas nécessaire que le juge décrive chacune des étapes de son raisonnement.

[25] L'approche fonctionnelle préconisée dans *Sheppard* indique que les motifs doivent être suffisants pour remplir leurs fonctions — informer les parties du fondement du verdict, rendre compte devant le public et permettre un véritable examen en appel. L'approche fonctionnelle n'exige rien de plus que ce qui permet d'accomplir ces objectifs. En fait, les motifs ne seront insuffisants que s'ils n'atteignent pas leurs objectifs; dans le cas contraire, l'insuffisance des motifs ne pourra justifier un appel. Ce principe tiré de *Sheppard* a été réitéré dans *R. c. Braich*, [2002] 1 R.C.S. 903, 2002 CSC 27, par. 31 :

> Le principe général confirmé dans *Sheppard* est le suivant : « il faut repousser toute tentative de faire de l'absence de motifs ou de leur insuffisance un moyen d'appel distinct. Une approche plus contextuelle s'impose. L'appelante doit établir non seulement que les motifs comportent des lacunes, mais également que ces lacunes lui ont causé un préjudice dans l'exercice du droit d'appel que lui confère la loi en matière criminelle » (par. 33). En d'autres termes, le critère applicable consiste à savoir si les motifs jouent bien *le rôle* qui constitue leur raison d'être, soit permettre à la cour d'appel d'apprécier la justesse de la décision de première instance. [En italique dans l'original.]

[26] L'arrêt *Braich* a été prononcé en même temps que l'arrêt *Sheppard*. Contrairement à l'affaire *Sheppard*, il s'agissait d'un cas où le dossier factuel était détaillé. S'exprimant au nom de la Cour,

inferences could be drawn from that record, and found the reasons to be sufficient.

[27] The appellate court had found the trial judge's reasons inadequate because they failed to weigh evidentiary frailties properly in assessing identification evidence. In overturning this ruling, Binnie J. adopted a functional approach. He found that the accused was able to articulate informed disagreement with the trial judge and to formulate an arguable ground of appeal on the facts of the case (paras. 21 and 24). Warning against a formalistic approach, he stated, "[t]he insistence on a 'demonstration' of a competent weighing of the frailties elevates the alleged insufficiency of reasons to a stand-alone ground of appeal divorced from the functional test, a broad proposition rejected in *Sheppard*" (para. 38). He concluded that the trial judge met the functional test for sufficiency of reasons.

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

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

le juge Binnie a adopté une approche souple, qui tenait compte du fait que des inférences pouvaient être tirées de ce dossier, et il a jugé que les motifs étaient suffisants.

[27] La cour d'appel avait conclu que les motifs du juge du procès étaient insuffisants parce qu'ils n'analysaient pas convenablement les faiblesses de la preuve d'identification. En infirmant cette décision, le juge Binnie a adopté une approche fonctionnelle. Il a conclu que l'accusé était en mesure d'exprimer un désaccord éclairé avec le juge de première instance et de formuler un moyen d'appel défendable à partir des faits de l'espèce (par. 21 et 24). Mettant en garde contre une approche formaliste, il a affirmé : « L'importance accordée à la "démonstration" d'une appréciation compétente des faiblesses élève l'insuffisance alléguée des motifs au rang de moyen d'appel distinct indépendant du critère fonctionnel. Or, cette proposition de portée étendue a été rejetée dans *Sheppard* » (par. 38). Il a conclu que les motifs du juge du procès répondaient au critère fonctionnel quant à savoir s'ils étaient suffisants.

[28] Dans *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17, notre Cour a accueilli un pourvoi du ministère public contre une décision en appel qui concluait à une erreur de droit pour cause d'insuffisance des motifs. Sous la plume des juges Bastarache et Abella, la majorité a conclu que la cour d'appel avait fait fi de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins. Elle avait plutôt choisi de substituer sa propre appréciation de la crédibilité à celle de la juge du procès et d'écarter ses motifs parce que la juge n'avait pas expliqué en quoi la preuve ne soulevait pas un doute raisonnable. Les juges Bastarache et Abella ont fait observer ceci au par. 20 :

> Apprécier la crédibilité ne relève pas de la science exacte. Il est très difficile pour le juge de première instance de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits. C'est pourquoi notre Cour a statué — la dernière fois dans l'arrêt *H.L.* — qu'il fallait respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante.

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

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

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

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

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

[29] Dans l'arrêt *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, [2007] 3 R.C.S. 129, 2007 CSC 41, l'appelant a soutenu que les motifs du juge du procès étaient insuffisants. Ce moyen d'appel a été écarté. M'exprimant au nom de la majorité, j'ai statué ceci, au par. 101 :

> Pour statuer sur leur caractère suffisant, il faut considérer les motifs à la lumière du dossier présenté à la cour. Lorsque le dossier renferme tous les éléments nécessaires à la révision en appel, les motifs peuvent être brefs. Des motifs succincts peuvent donc être justifiés lorsque la preuve versée au dossier est abondante, comme en l'espèce. Par contre, les motifs revêtent une importance particulière lorsque « le juge doit se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments de preuve embrouillés et contradictoires sur une question clé », comme c'était le cas en première instance : *Sheppard*, par. 55. Pour juger du caractère suffisant des motifs, il faut se rappeler que « [l]a cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » : *Sheppard*, par. 26.

[30] Considérés dans le contexte de l'ensemble du dossier, les motifs du juge du procès étaient suffisants pour permettre à l'appelant de savoir pourquoi une décision défavorable avait été rendue contre lui, et pour permettre un véritable examen en appel : *Hill*, par. 103.

[31] Plus récemment, dans l'arrêt *R. c. Dinardo*, [2008] 1 R.C.S. 788, 2008 CSC 24, rédigé par la juge Charron, la Cour a écarté une approche formaliste. L'issue de la cause reposait sur la crédibilité. Les motifs du juge du procès ne précisaient pas toutes les possibilités à envisager avant de tirer une conclusion sur l'existence d'un doute raisonnable comme l'exige l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742. Après avoir affirmé que seule la substance, et non la forme, de l'arrêt *W. (D.)* doit être respectée par le juge du procès, la juge Charron a ajouté ceci :

> Dans une cause dont l'issue repose sur la crédibilité, comme en l'espèce, le juge du procès doit répondre à la question déterminante de savoir si la preuve offerte par l'accusé, appréciée au regard de l'ensemble de la preuve, soulève un doute raisonnable quant à sa culpabilité. [par. 23]

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

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

[34] In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, the issue was whether the trial judge's reasons had adequately detailed the path to the verdict. Binnie J., writing for the Court, held that while the reasons "fell well short of the ideal", they were not so impaired that the Crown's right of appeal was impaired (para. 27). He stated: "Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue" (para. 20).

[35] In summary, the cases confirm:

(1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of

[32] La juge Charron a ensuite affirmé que, lorsque la question de la crédibilité est déterminante, la déférence est de mise et une intervention rarement justifiée (par. 26). S'il est vrai que les motifs doivent expliquer pourquoi la preuve ne soulevait pas un doute raisonnable, « aucune règle générale n'exige que les motifs soient suffisamment détaillés pour permettre à la juridiction d'appel d'instruire toute l'affaire à nouveau. Il n'est pas nécessaire d'établir que le juge du procès avait conscience et a tenu compte de tous les éléments de preuve, ou encore qu'il a répondu à chaque argument soulevé par les avocats » (par. 30).

[33] La Cour a conclu que les motifs du juge du procès ne respectaient même pas cette norme souple. La preuve indiquait que la plaignante était atteinte d'une déficience intellectuelle, qu'elle avait déjà inventé des histoires pour attirer l'attention et qu'elle s'était contredite dans ses réponses sur la principale question en litige, soit celle de savoir si l'accusé avait commis l'agression. L'omission du juge du procès de mentionner ces éléments cruciaux a laissé un doute dans l'esprit de la Cour quant à savoir s'il s'était arrêté à la question fondamentale de la crédibilité.

[34] Dans l'arrêt *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34, la question était de savoir si les motifs du juge du procès décrivaient de façon suffisamment détaillée le raisonnement qui l'avait mené au verdict. S'exprimant au nom de la Cour, le juge Binnie a statué que, bien que les motifs « soient loin de la perfection », ils n'étaient pas insuffisants au point de porter atteinte au droit d'appel du ministère public (par. 27). Il a affirmé : « Les motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige » (par. 20).

[35] En résumé, ces arrêts confirment ceci :

(1) Pour déterminer si des motifs sont suffisants, les cours d'appel doivent adopter une approche fonctionnelle, substantielle et considérer les motifs globalement, dans le contexte de la preuve

the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).

(2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

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

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

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

1. Reasons in Context

[37] As we have seen, the cases confirm that a trial judge's reasons should not be viewed on a stand-alone, self-contained basis. The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated *in the context of the record, the issues and the submissions of counsel at trial*. The question is whether, viewing the reasons in their entire context, the foundations for the trial judge's conclusions — the "why" for the verdict — are discernable. If so, the functions of reasons for judgment are met. The

présentée, des arguments invoqués et du déroulement du procès, en tenant compte des buts et des fonctions de l'expression des motifs (voir *Sheppard*, par. 46 et 50; *Morrissey*, p. 524).

(2) Le fondement du verdict du juge du procès doit être « intelligible », ou pouvoir être discerné. En d'autres termes, il doit être possible de relier logiquement le verdict à son fondement. Il n'est pas nécessaire de décrire en détail le processus suivi par le juge pour arriver au verdict.

(3) Lorsqu'il s'agit de déterminer si le lien logique entre le verdict et son fondement est établi, il faut examiner la preuve, les observations des avocats et le déroulement du procès pour identifier les questions « en litige » telles qu'elles sont ressorties au procès.

Ce résumé n'est pas exhaustif et les tribunaux d'appel voudront peut-être se reporter au par. 55 de *Sheppard* pour une liste plus complète des grands principes.

[36] Sur cette toile de fond, j'examinerai maintenant de façon plus approfondie quatre points sur lesquels les thèses de la défense et de la poursuite diffèrent en l'espèce : (1) le rôle du contexte dans l'évaluation du caractère suffisant des motifs; (2) l'obligation d'expliquer en détail les propositions juridiques ou le lien entre des éléments de preuve précis et le verdict; (3) l'ampleur de l'obligation de traiter des conclusions sur la crédibilité; (4) le rôle des tribunaux d'appel.

1. Les motifs considérés dans leur contexte

[37] Comme nous l'avons vu, la jurisprudence confirme que les motifs du juge du procès ne doivent pas être considérés isolément, comme formant un tout autonome. Le caractère suffisant des motifs ne dépend pas seulement de ce que le juge du procès a dit, mais de ce qu'il a dit *dans le contexte du dossier, des questions en litige et des observations des avocats au procès*. Il s'agit de savoir si, en lisant les motifs dans leur contexte global, il est possible de discerner le fondement des conclusions du juge du procès — le « pourquoi » du verdict. Si

parties know the basis for the decision. The public knows what has been decided and why. And the appellate court can judge whether the trial judge took a wrong turn and erred. The authorities are constant on this point.

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

[39] In *Sheppard*, Binnie J. affirmed the need to look at the record: "Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene" (para. 46). In point 2 of his summary (at para. 55), he stated: "Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record." Similarly, with respect to the need for lawyers to know the basis of the judgment for appellate purposes, he stated at point 3, after saying that they may require reasons: "On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record." Throughout the reasons in *Sheppard*, Binnie J. emphasizes the functional and relative nature of the question of whether a trial judge's reasons for judgment are adequate.

[40] *Hill*, citing *Sheppard*, confirms that "the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate

oui, les motifs du jugement remplissent bien leurs fonctions. Les parties connaissent le fondement de la décision. Le public sait ce qui a été décidé et pourquoi. Et la cour d'appel peut déterminer si le juge du procès a suivi la mauvaise voie et commis une erreur. La jurisprudence et les auteurs s'entendent sur ce point.

[38] Ce rôle important du dossier a été reconnu dans *Macdonald*. La majorité de la Cour a expliqué, à la p. 673, sous la plume du juge en chef Laskin, qu'une question de droit n'est soulevée que si le dossier indique qu'« on peut logiquement conclure que le juge s'est trompé dans l'appréciation d'une question pertinente ou d'un élément de preuve de nature à influer sur la justesse de son verdict »; la simple omission de donner des motifs, sans plus, ne soulève pas une question de droit.

[39] Dans *Sheppard*, le juge Binnie a confirmé la nécessité d'examiner le dossier : « Lorsque la raison pour laquelle un accusé a été déclaré coupable ou acquitté ressort clairement du dossier, et que l'absence de motifs ou leur insuffisance ne constitue pas un obstacle important à l'exercice du droit d'appel, le tribunal d'appel n'interviendra pas » (par. 46). Au point 2 de son résumé (par. 55), il a affirmé : « Il peut être important d'exprimer les motifs du jugement pour clarifier le fondement de la déclaration de culpabilité, mais il se peut que ce fondement ressorte clairement du dossier. » De même, en ce qui concerne la nécessité que les avocats connaissent le fondement du jugement pour évaluer l'opportunité d'un appel, il a reconnu que les motifs peuvent s'avérer essentiels, puis il a ajouté au point 3 : « Par contre, il est possible que les autres éléments du dossier leur apprennent tout ce qu'ils doivent savoir à cette fin. » Tout au long de sa décision dans *Sheppard*, le juge Binnie met l'accent sur le caractère fonctionnel et relatif de la question de savoir si le juge du procès a suffisamment motivé sa décision.

[40] L'arrêt *Hill*, qui cite *Sheppard*, confirme qu'« il faut considérer les motifs à la lumière du dossier présenté à la cour. Lorsque le dossier renferme tous les éléments nécessaires à la

review, less detailed reasons may be acceptable" (para. 101).

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

2. The Degree of Detail Required

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

[43] The answer is provided in *Dinardo* and *Walker* — what is required is that the reasons, read in the context of the record and the submissions on the live issues in the case, show that the judge has seized the substance of the matter. Provided this is done, detailed recitations of evidence or the law are not required.

[44] The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the

révision en appel, les motifs peuvent être brefs » (par. 101).

[41] L'approche contextuelle de la question de savoir si les motifs sont suffisants reconnaît que le processus judiciaire en première instance — y compris les motifs du juge du procès — est un processus dynamique dans lequel la preuve, les avocats et le juge jouent des rôles différents, mais étroitement reliés. La question de savoir si le juge du procès a suffisamment motivé sa décision doit être tranchée au regard du contexte global du déroulement du procès. Il faut se demander si les motifs, à la lumière du dossier et des observations des avocats sur les questions en litige, expliquent pourquoi le juge a rendu cette décision, en faisant ressortir un lien logique entre, d'une part, la preuve et le droit et, d'autre part, le verdict.

2. Le niveau de détails requis

[42] En l'espèce, la Cour d'appel a principalement reproché au juge du procès de ne pas avoir expliqué de façon suffisamment précise pourquoi il avait retenu le témoignage de la plaignante et écarté celui de l'accusé, et de ne pas avoir indiqué précisément quelle preuve il avait retenue ou écartée relativement à chacune des infractions dont l'accusé avait été déclaré coupable. De même, dans *Dinardo*, le juge du procès a été critiqué pour ne pas avoir exposé en détail le processus d'appréciation du doute raisonnable conformément à l'approche recommandée dans *W. (D.)*. Dans les deux cas, la question était de savoir combien de détails le juge du procès devait fournir — en l'espèce, sur les faits, dans *Dinardo*, sur le droit.

[43] On trouve la réponse dans les arrêts *Dinardo* et *Walker* — ce qui compte, c'est qu'il ressorte des motifs, considérés dans le contexte du dossier et des observations sur les questions en litige, que le juge a compris l'essentiel de l'affaire. Si c'est le cas, une description détaillée des éléments de preuve ou du droit n'est pas nécessaire.

[44] Le niveau de détails requis peut varier selon les circonstances. Des motifs moins détaillés peuvent être suffisants lorsque le fondement de la

trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue": *Sheppard*, at para. 55, point 6.

[45] Just as it is reasonable to infer that the trial judge seized the import of the evidence, it is generally reasonable to infer that the trial judge understands the basic principles of criminal law at issue in the trial. Indeed, for this reason it has repeatedly been held that "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not required to recite pages of "boilerplate" or review well-settled authorities in detail, and failure to do so is not an error of law. As Binnie J. pointed out in *Sheppard*, at para. 55, point 7:

> Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

[46] Similarly, in *Dinardo*, the Court, *per* Charron J., held that the trial judge was not required to recite the rule set out in *W. (D.)*, provided the reasons demonstrated he had seized the substance of the critical issue of a reasonable doubt in the context of a credibility assessment.

[47] This said, the presumption that trial judges are presumed to know the law with which they work on a day-in day-out basis does not negate the need for reasons to show that the law is correctly applied in the particular case (*Sheppard*, at para. 55, point 9), nor the need for reasons to deal

décision du juge ressort du dossier, même sans être exprimé. Des motifs plus détaillés peuvent être nécessaires lorsque le juge du procès est appelé à « se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments de preuve embrouillés et contradictoires sur une question clé » : *Sheppard*, par. 55, point 6.

[45] Tout comme il est raisonnable d'inférer que le juge du procès a saisi l'importance de la preuve, il est généralement raisonnable d'inférer qu'il comprend les principes fondamentaux du droit criminel en cause dans le procès. C'est d'ailleurs pour cette raison qu'on a statué à plusieurs reprises que « [l]es juges du procès sont censés connaître le droit qu'ils appliquent tous les jours » : *R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, où la Cour a refusé l'idée d'imposer au juge du procès l'obligation positive de démontrer qu'il a apprécié chaque aspect de la preuve pertinente. Le juge du procès n'est pas tenu de réciter des pages de « formule standard » ni de revoir en détail la jurisprudence et la doctrine bien établies, et l'omission de le faire ne constitue pas une erreur de droit. Comme le juge Binnie l'a souligné dans *Sheppard*, par. 55, point 7 :

> Il faut tenir compte des délais et du volume des affaires à traiter dans les cours criminelles. Le juge du procès n'est pas tenu à une quelconque norme abstraite de perfection. On ne s'attend pas et il n'est pas nécessaire que les motifs du juge du procès soient aussi précis que les directives adressées à un jury.

[46] De même, dans *Dinardo*, la Cour a statué, sous la plume de la juge Charron, que le juge du procès n'était pas tenu de réciter la règle énoncée dans l'arrêt *W. (D.)* s'il ressortait des motifs qu'il avait saisi l'essentiel de la question fondamentale du doute raisonnable dans le contexte de l'appréciation de la crédibilité.

[47] Cela dit, la présomption selon laquelle les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours n'écarte pas la nécessité qu'il ressorte des motifs que le droit a été appliqué correctement dans l'affaire en particulier (*Sheppard*, par. 55, point 9), ni que les motifs traitent des « principes

with "troublesome principles of unsettled law" (*Sheppard*, at para. 55, point 6).

3. Findings on Credibility

[48] The sufficiency of reasons on findings of credibility — the issue in this case — merits specific comment. The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.

[49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo*

de droit qui posent problème et ne sont pas encore bien établis » (*Sheppard*, par. 55, point 6).

3. Les conclusions relatives à la crédibilité

[48] Le caractère suffisant des motifs concernant les conclusions sur la crédibilité — la question en litige en l'espèce — mérite des précisions. Dans l'arrêt *Gagnon*, la Cour s'est attaquée à cette question et a annulé la décision d'un tribunal d'appel portant que les motifs du juge du procès sur la crédibilité étaient déficients. Les juges Bastarache et Abella ont fait observer, au par. 20 : « Apprécier la crédibilité ne relève pas de la science exacte. » Ils ont ajouté qu'il peut être difficile pour le juge du procès « de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits », et ils ont mis les tribunaux d'appel en garde contre la tentation de faire fi de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins et de substituer leur propre appréciation de la crédibilité à celle du juge du procès.

[49] Bien qu'il soit utile que le juge tente d'exposer clairement les motifs qui l'ont amené à croire un témoin plutôt qu'un autre, en général ou sur un point en particulier, il demeure que cet exercice n'est pas nécessairement purement intellectuel et peut impliquer des facteurs difficiles à énoncer. De plus, pour expliquer en détail pourquoi un témoignage a été écarté, il se peut que le juge doive tenir des propos peu flatteurs sur le témoin. Or, le juge voudra peut-être épargner à l'accusé, qui a témoigné pour nier le crime, la honte de subir des commentaires négatifs sur son comportement, en plus de celle de voir son témoignage écarté et d'être déclaré coupable. Bref, l'appréciation de la crédibilité est un exercice difficile et délicat qui ne se prête pas toujours à une énonciation complète et précise.

[50] Ce qu'on entend par des motifs suffisants concernant la crédibilité peut se déduire de l'arrêt *Dinardo*, dans lequel la juge Charron a statué que les conclusions sur la crédibilité doivent être tirées au regard des autres éléments de preuve (par. 23). Il faut peut-être pour cela que la preuve

makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility . . . the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

[51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

4. The Role of Appellate Courts in Assessing the Sufficiency of Reasons

[52] In *Sheppard*, the Court, *per* Binnie J. enunciated this "simple underlying rule": "[I]f, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law [under s. 686 of the *Criminal Code*] has been committed" (para. 28).

[53] However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

contradictoire soit à tout le moins mentionnée. Cependant, comme l'arrêt *Dinardo* le dit clairement, ce qui compte, c'est qu'il ressorte des motifs que le juge a saisi l'essentiel de la question en litige. « Dans une cause dont l'issue repose sur la crédibilité, [. . .] le juge du procès doit répondre à la question déterminante de savoir si la preuve offerte par l'accusé, appréciée au regard de l'ensemble de la preuve, soulève un doute raisonnable quant à sa culpabilité » (par. 23). La juge Charron a ensuite écarté la proposition voulant que le juge du procès doive s'engager dans un compte rendu détaillé des éléments de preuve contradictoires : *Dinardo*, par. 30.

[51] Comme nous l'avons vu plus haut, le niveau de détails requis pour expliquer les conclusions relatives à la crédibilité peut aussi varier selon la preuve versée au dossier et la dynamique du procès. Il se peut que les facteurs en faveur ou en défaveur de la crédibilité ressortent clairement du dossier. En pareil cas, les motifs du juge du procès ne peuvent être jugés déficients simplement parce qu'il ne les a pas énumérés.

4. Le rôle des cours d'appel dans l'appréciation de la suffisance des motifs

[52] Dans *Sheppard*, le juge Binnie a énoncé, au nom de la Cour, la « règle fondamentale » suivante : « [L]orsque la cour d'appel estime que les lacunes des motifs font obstacle à un examen valable en appel de la justesse de la décision, une erreur de droit a été commise [au sens de l'art. 686 du *Code criminel*] » (par. 28).

[53] Cependant, la Cour y a également affirmé ceci : « La cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » (par. 26). Comme l'indique clairement la Cour, les motifs ne justifieront une intervention en appel que s'ils ne remplissent pas leurs fonctions. Il faut plus précisément que les motifs, considérés dans le contexte de la preuve versée au dossier et des questions en litige sur lesquelles était axé le procès, ne révèlent pas de fondement intelligible qui sous-tende le verdict et permette un véritable examen en appel.

[54] An appellate court reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's perceptions of the facts. As decided in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, and stated in *Gagnon* (at para. 20), "in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected". It is true that deficient reasons may cloak a palpable and overriding error, requiring appellate intervention. But the appellate court's point of departure should be a deferential stance based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law.

[55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

[56] If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute

[54] La cour d'appel doit entreprendre l'examen du caractère suffisant des motifs avec déférence envers les perceptions de fait du juge du procès. Comme la Cour l'a décidé dans *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, et affirmé dans *Gagnon* (par. 20), « il [faut] respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante ». Il est vrai que des motifs déficients peuvent dissimuler une erreur manifeste et dominante nécessitant une intervention, mais la cour d'appel doit adopter dès le départ une attitude empreinte de retenue en accord avec le postulat voulant que le juge du procès soit le mieux placé pour trancher les questions de fait et censé connaître les principes fondamentaux du droit.

[55] La cour d'appel doit se demander, en faisant preuve de retenue, si les motifs considérés avec la preuve versée au dossier, les observations des avocats et les questions en litige au procès font ressortir le fondement du verdict. Elle doit examiner les motifs dans leur contexte global. Elle doit déterminer si, de ce point de vue, le juge du procès semble avoir saisi l'essentiel des questions fondamentales en litige au procès. Si les éléments de preuve sont embrouillés ou contradictoires, la cour d'appel doit se demander si le juge du procès a manifestement relevé et résolu les contradictions. En présence d'une question de droit épineuse ou de droit nouveau, elle doit se demander si le juge du procès a relevé et résolu cette question.

[56] Si les réponses à ces questions sont affirmatives, les motifs ne sont pas déficients, malgré l'absence de détails et malgré le fait qu'ils soient loin d'être parfaits. On ne doit pas conclure que le juge du procès a commis une erreur de droit parce qu'il a omis de décrire chaque facteur qui l'a mené à une conclusion sur la crédibilité, ou à la conclusion de culpabilité ou d'innocence. On ne doit pas non plus conclure à l'erreur de droit parce que le juge du procès a omis de concilier chacune des faiblesses de la preuve ou de faire allusion à chaque principe de droit applicable. Nul n'est besoin d'énoncer les inférences raisonnables. Si, par exemple, dans une cause dont l'issue repose sur la crédibilité, le juge du procès explique avoir écarté la preuve offerte

an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. . . . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

[57] Appellate courts must ask themselves the critical question set out in *Sheppard*: Do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

5. Application of the Principles to This Case

[58] This was a case that turned on credibility. The complainant testified to 11 incidents of sexual assault by the accused, over a period of years when she was a child, between the ages of 9 and 17. The

par l'accusé, mais ne précise pas qu'il a un doute raisonnable, il ne s'agit pas d'une erreur de droit. En pareil cas, la déclaration de culpabilité permet en soi d'inférer que la preuve de l'accusé ne soulevait pas un doute raisonnable. Enfin, les cours d'appel doivent se garder de simplement passer le dossier en revue et substituer leur propre analyse de la preuve à celle du juge du procès parce que les motifs ne correspondent pas à l'idée qu'ils se font de motifs parfaits. Comme l'a établi l'arrêt *Harper c. La Reine*, [1982] 1 R.C.S. 2, p. 14, « [u]n tribunal d'appel n'a ni le devoir ni le droit d'apprécier à nouveau les preuves produites au procès afin de décider de la culpabilité ou de l'innocence. [. . .] S'il se dégage du dossier, ainsi que des motifs de jugement, qu'il y a eu omission d'apprécier des éléments de preuve pertinents et, plus particulièrement, qu'on a fait entièrement abstraction de ces éléments, le tribunal chargé de révision doit alors intervenir. »

[57] Les cours d'appel doivent se poser la question cruciale formulée dans l'arrêt *Sheppard* : les motifs du juge du procès, considérés dans le contexte de la preuve versée au dossier, des questions en litige telles qu'elles sont ressorties au procès et des observations des avocats, privent-ils l'appelant du droit à un véritable examen en appel? Pour procéder à un véritable examen en appel, la cour doit pouvoir discerner le fondement de la déclaration de culpabilité. Les conclusions essentielles sur la crédibilité doivent avoir été tirées, et les questions de droit fondamentales doivent avoir été résolues. Si la cour d'appel arrive à la conclusion que, compte tenu de l'ensemble du dossier, le juge du procès n'a pas tranché sur le fond les questions essentielles en litige (comme ce fut le cas dans *Sheppard* et *Dinardo*), elle peut alors, mais seulement alors, conclure que la déficience des motifs constitue une erreur de droit.

5. Application des principes à la présente affaire

[58] Il s'agissait d'une cause dont l'issue reposait sur la crédibilité. La plaignante a témoigné relativement à 11 incidents, répartis sur de nombreuses années de son enfance, où l'accusé l'aurait agressée

accused testified. He admitted to having sexual intercourse with the complainant, but claimed that the relationship only became sexual after she was 15 and that the intercourse was consensual.

[59] The trial judge found the complainant to be a credible witness and accepted most of her evidence, while rejecting some portions that had been contradicted by other evidence. He discussed the reasons for these conclusions in some detail, noting that the complainant was a child at the time of most of the incidents, and that they had occurred a long time before. Some errors in her evidence were understandable, he concluded.

[60] The trial judge largely disbelieved the accused's evidence, although he found that on some points, it was not challenged. Again he gave reasons, although less extensive than he had in the case of the complainant's evidence.

[61] In summary, the reasons for judgment show that on most points, the trial judge accepted the evidence of the complainant and rejected that of the accused. This said, there were aspects of the complainant's evidence that he did not accept and aspects of the accused's evidence that he accepted. In the end, the trial judge convicted the accused of three offences: (1) having intercourse with a minor; (2) indecent assault; and (3) having illicit intercourse with his stepdaughter. He acquitted the accused on the count of gross indecency.

[62] The Court of Appeal found the trial judge's reasons to be deficient on the following grounds:

(1) The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led;

(2) The trial judge failed to mention some of the accused's evidence;

sexuellement alors qu'elle avait entre 9 et 17 ans. L'accusé a témoigné. Il a reconnu avoir eu des rapports sexuels avec la plaignante, mais il a soutenu qu'elle avait 15 ans lorsque leur relation a pris une tournure sexuelle et qu'il s'agissait de rapports consensuels.

[59] Le juge du procès a estimé que la plaignante était un témoin crédible et il a retenu la plupart de son témoignage, en rejetant néanmoins certaines parties contredites par d'autres éléments de preuve. Il a exposé de façon assez détaillée les motifs de ces conclusions, faisant observer que la plaignante était encore une enfant au moment de la plupart des incidents, survenus longtemps auparavant. Il était compréhensible, a-t-il conclu, que des erreurs se soient glissées dans son témoignage.

[60] Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu que, sur certains points, il n'était pas mis en doute. Encore une fois, il a exprimé des motifs, bien que moins détaillés que ses motifs concernant le témoignage de la plaignante.

[61] En résumé, il ressort des motifs du jugement que, sur la plupart des points, le juge du procès a retenu le témoignage de la plaignante et rejeté celui de l'accusé. Cela dit, il a écarté certains aspects du témoignage de la plaignante et retenu certains aspects du témoignage de l'accusé. Le juge du procès a finalement déclaré l'accusé coupable de trois infractions : (1) rapports sexuels avec une personne mineure; (2) attentat à la pudeur; et (3) rapports sexuels illicites avec sa belle-fille. Il l'a acquitté du chef de grossière indécence.

[62] La Cour d'appel a conclu que les motifs du juge du procès étaient déficients pour les raisons suivantes :

(1) le juge du procès n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions;

(2) le juge du procès n'a pas mentionné une partie de la preuve offerte par l'accusé;

(3) The trial judge failed to make general comments about the accused's evidence;

(4) The trial judge failed to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence;

(5) The trial judge failed to explain why he rejected the accused's plausible denial of the charges.

[63] The trial judge's failure to clearly explain which of the three offences were grounded by which of the incidents must be considered in the context of the record as a whole. The three offences of which the accused was convicted found support in the evidence as to a number of the incidents. This gives rise to a reasonable inference that the trial judge accepted some or all of this evidence and grounded the convictions on that evidence. While reasons drawing a precise link between each count on which the accused was found guilty and the particular evidence that the trial judge accepted in support of that count might have been desirable, this omission did not render the reasons deficient on this record, as discussed more fully below.

[64] Nor did the trial judge's failure to mention some of the accused's evidence render the reasons for judgment deficient. The foregoing discussion of the law establishes that a trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the third objection, that the trial judge failed to make general comments about the accused's evidence. As helpful as it might be in a given case, a trial judge is not required to summarize specific findings on credibility by issuing a general statement as to "overall" credibility. It is enough that the trial judge has demonstrated a recognition, where

(3) le juge du procès n'a pas fait de commentaires généraux sur le témoignage de l'accusé;

(4) le juge du procès n'a pas concilié ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de son témoignage;

(5) le juge du procès n'a pas expliqué pourquoi il a écarté la dénégation plausible des accusations par l'accusé.

[63] L'omission du juge du procès d'indiquer clairement sur quels incidents se fondaient les trois infractions doit être appréciée dans le contexte de l'ensemble du dossier. Les trois infractions dont l'accusé a été déclaré coupable étaient étayées par la preuve relative à plusieurs incidents, d'où l'inférence raisonnable que le juge du procès a retenu cette preuve en totalité ou en partie et s'est appuyé sur elle pour prononcer les déclarations de culpabilité. Bien qu'il eût été souhaitable, que les motifs établissent un lien précis entre chacun des chefs d'accusation dont l'accusé a été déclaré coupable et la preuve que le juge du procès a retenue à l'appui de ce chef, cette omission ne rendait pas les motifs déficients en l'espèce, comme nous le verrons en détail plus loin.

[64] L'omission du juge du procès de mentionner une partie de la preuve offerte par l'accusé ne rendait pas non plus ses motifs de jugement déficients. L'analyse juridique qui précède établit que le juge du procès n'est pas tenu de traiter de tous les éléments de preuve sur un point donné, pourvu qu'il ressorte des motifs qu'il a saisi l'essentiel des questions en litige au procès. Il se dégage clairement des motifs que le juge du procès a examiné soigneusement la preuve de l'accusé, et qu'il l'a d'ailleurs acceptée sur certains points. Dans ces circonstances, l'omission de mentionner certains aspects de cette preuve ne constitue pas une erreur. Il en va de même de la troisième objection, selon laquelle le juge du procès n'a pas fait de commentaires généraux sur la preuve offerte par l'accusé. Aussi utile que cela puisse être dans certains cas, le juge du procès n'a pas à résumer ses conclusions relatives à la crédibilité en faisant une déclaration globale sur

applicable, that the witness's credibility was a live issue.

[65] The trial judge's alleged failure to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence did not render the reasons deficient. As juries are routinely instructed, it is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness. The trial judge explained that the fact that many of the incidents testified to happened many years before and the fact that the complainant was a child at the time might well explain certain inconsistencies. In fact, he did explain why he rejected some of her evidence.

[66] Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

[67] It may have been desirable for the trial judge to explain certain matters more fully. In particular, it would have been preferable to relate the charges on which the accused was found guilty to the evidence of the specific incidents disclosed by the

la crédibilité « en général ». Il suffit qu'il démontre qu'il comprenait, le cas échéant, que la crédibilité du témoin était une question en litige.

[65] L'omission alléguée du juge du procès de concilier ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de celui-ci ne rendait pas ses motifs déficients. Comme on l'explique habituellement aux jurés, le juge des faits peut accepter une partie de la déposition d'un témoin tout en en écartant d'autres parties. Le juge du procès a indiqué que le fait que plusieurs incidents dont la plaignante avait témoigné s'étaient produits de nombreuses années auparavant, quand elle n'était qu'une enfant, pouvait expliquer certaines incohérences. En fait, il a bel et bien indiqué pourquoi il a écarté une partie de son témoignage.

[66] Enfin, l'omission du juge du procès d'expliquer pourquoi il a écarté la dénégation plausible des accusations par l'accusé ne permet pas de conclure à la déficience des motifs. Il ressort clairement des motifs du juge du procès que, de façon générale, lorsque les témoignages de la plaignante et de l'accusé se contredisaient, il a retenu celui de la plaignante. Cela explique pourquoi il a écarté la dénégation de l'accusé. Il a exposé les raisons pour lesquelles il a retenu le témoignage de la plaignante, ayant jugé qu'elle était généralement sincère et [TRADUCTION] « un témoin fort crédible », et il a conclu que son témoignage sur des événements précis n'était [TRADUCTION] « pas sérieusement mis en doute » (par. 68). Il s'ensuit, nécessairement, qu'il a écarté le témoignage de l'accusé lorsqu'il contredisait le témoignage de la plaignante qu'il avait retenu. Aucun autre motif n'était nécessaire pour justifier le rejet du témoignage de l'accusé. Dans ce contexte, les condamnations elles-mêmes permettent d'inférer raisonnablement que l'accusé n'a pas réussi à soulever un doute raisonnable en niant les accusations.

[67] Il eût peut-être été souhaitable que le juge du procès explique davantage certains points. Plus particulièrement, il eût été préférable d'établir un lien précis entre les infractions dont l'accusé a été déclaré coupable et la preuve se rapportant à chacun

evidence. Given the trial judge's mixed findings on credibility, the relationship between the 11 incidents to the convictions may not have been totally clear. However, on the law enunciated above, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this, he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident.

[68] Instead of looking for this basis, the Court of Appeal focussed on omitted details and proceeded from a sceptical perspective. Having concluded that the accused's denial was plausible, it proceeded to examine the case from that perspective, asking whether the reasons disclosed that the trial judge had properly applied the reasonable doubt standard. In doing so, it fell into the trap identified in *Gagnon* of ignoring the trial judge's unique position to see and hear witnesses, and instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised.

III. Conclusion

[69] I would allow the appeal and restore the verdicts of guilty.

Appeal allowed.

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent: J. M. Brian Coleman, Vancouver.

des incidents. Compte tenu des conclusions nuancées sur la crédibilité auxquelles est arrivé le juge du procès, le lien entre les 11 incidents et les déclarations de culpabilité n'était peut-être pas parfaitement clair. Cependant, selon l'état du droit exposé plus tôt, il s'agit de savoir si les motifs, considérés dans le contexte du dossier et des questions en litige au procès, faisaient ou non ressortir entre la preuve et le verdict un lien logique suffisant pour permettre un véritable appel. La principale question en litige au procès était la crédibilité. Il est manifeste que le juge du procès a retenu la totalité ou une partie suffisante du témoignage étoffé de la plaignante concernant les incidents et que ni l'ensemble de la preuve ni le témoignage contradictoire de l'accusé n'ont laissé subsister de doute raisonnable dans son esprit. Il en a conclu que la culpabilité de l'accusé avait été établie hors de tout doute raisonnable. Lorsqu'on considère le dossier globalement, le fondement du verdict est évident.

[68] Plutôt que de s'efforcer de découvrir ce fondement, la Cour d'appel s'est intéressée principalement aux détails omis et a fait preuve de scepticisme. Après avoir conclu que la dénégation de l'accusé était plausible, elle a examiné l'affaire de ce point de vue, se demandant s'il ressortait des motifs que le juge du procès avait appliqué correctement la règle du doute raisonnable. Elle est alors tombée dans le piège décrit dans l'arrêt *Gagnon*, en faisant fi de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins, et elle a substitué sa propre appréciation de la crédibilité à celle du juge du procès en critiquant les motifs du jugement parce qu'ils n'expliquaient pas pourquoi aucun doute raisonnable n'avait été soulevé.

III. Conclusion

[69] Je suis d'avis d'accueillir le pourvoi et de rétablir les verdicts de culpabilité.

Pourvoi accueilli.

Procureur de l'appelante : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intimé : J. M. Brian Coleman, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

9

CITATION: The Town of Richmond Hill v. Haulover Investments Ltd., 2012 ONSC 1111
DIVISIONAL COURT FILE NO.: 533/11
DATE: 20120411

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: THE TOWN OF RICHMOND HILL, Moving Party

AND:

HAULOVER INVESTMENTS LTD. and REGIONAL MUNICIPALITY OF YORK, Respondents

BEFORE: Pepall J.

COUNSEL: *Chris Barnett, Laura K. Bisset*, for the Moving Party

Jeffrey E. Streisfield, for the Respondent Haulover Investments Ltd.

No one Appearing for the Respondent Regional Municipality of York

HEARD AT TORONTO: February 8, 2012

ENDORSEMENT

Relief Requested

[1] The Town of Richmond Hill (the "Town") seeks leave to appeal a decision of the Ontario Municipal Board dated October 28, 2011. The Board approved amendments to the Town's Official Plan and Zoning Bylaw that would permit mixed-use high density development at the south-east corner of Yonge Street and 16th Avenue in Richmond Hill.

[2] The impact of the Board's decision would be that if constructed, both buildings would exceed the 20 storey height and the density limitations contained in a new Official Plan adopted by Town Council but currently under appeal to the Municipal Board. The two proposed buildings would be 28 and 24 storeys high.

Background Facts

[3] Beginning in 2007, the Town had commenced a lengthy study and consultation process with the aim of preparing a new Official Plan that conformed with various planning policy documents issued by the Province. The Respondent Haulover Investments Ltd. ("Haulover") was aware of the Town's direction in this regard. On March 23, 2009, Town Council approved the Official Plan Guiding Principles. On July 13, and October 26, 2009, Town Council endorsed the recommended urban structure for the Town and a Housing and Residential Intensification Study.

[4] In April 2010, Haulover filed applications for a site specific Official Plan amendment and Zoning Bylaw amendments. Before and after the applications were submitted, Haulover met with Town staff to discuss the inconsistency between the proposed development and the Town's vision for the property. No decision was rendered by the Town Council within the time frames specified in the *Planning Act*, R.S.O. 1990, c. P.13. As a result, on October 10, 2010, Haulover appealed its applications.

[5] On May 3, 2010, Town Council endorsed Urban Design Principles and Guidelines for the subject property area and on July 10, 2010, adopted the new Official Plan.

[6] On March 9, 2011 Council accepted staff's recommendation not to support Haulover's applications, in part due to Haulover's failure to have regard to the new Official Plan policies.

[7] In May 2011, Haulover modified its development proposal to incorporate comments from the Town and the Regional Municipality of York and reduced the height of one tower from 30 to 28 storeys. Town Council staff did not take this concept back to Town Council for consideration.

[8] Section 37 of the *Planning Act* authorizes a municipality to permit increases in the height and density of development in return for community benefits. The Town authorized a proposed development by Great Land Development for property adjacent to the property in issue on this motion. In return for certain community benefits, the Town permitted the height of a proposed building to be 24 storeys. The Municipal Board approved the Great Land Development on August 16, 2010.

[9] The Haulover hearing proceeded before the Municipal Board. The Regional Municipality of York and Haulover had reached an agreement as a result of which the former made no objections to Haulover's proposed development at the Board hearing.

Board's Decision

[10] In her reasons of October 28, 2011, Municipal Board Member Sylvia Sutherland identified two key issues to be considered: which Official Plan was applicable and height.

[11] On the first issue, the Board applied the *Clergy* principle. The *Clergy* principle is a presumptive rule that the Board will apply only those planning practices and policies that were in effect at the time the application under consideration was made: *Beechridge Farms Inc. v. Ajax (Town)* [2008] O.J. No.447. The Board determined that the new Official Plan was under appeal and not in force and that the old Official Plan was therefore applicable. The Board recognized that the *Clergy* principle is not strict and that on occasion, it had been set aside. The Board saw no reason to do so in this case however. In addition, the Board did consider the new Official Plan and made a factual finding that the proposed development was consistent with the policy direction of the new Official Plan. The Board also observed that the evidence of Michael Manett of Manett Planning Services Ltd., who had done a conformity analysis of the proposal and who was called as a witness by Haulover, supported this finding.

[12] On the second issue relating to height, relying on both the Town's Intensification Study, which was a supporting document to the Town's new Official Plan and which observed that the highest buildings were to be at the intersection in issue, and the new Official Plan itself, the Board observed that locating the highest building at the corner of Yonge and 16th Avenue was the direction the Town was taking. The Great Land Development related to land south of the intersection. The settlement entered into by Great Land Development and the Town logically supported a taller building at the intersection in issue on Haulover's applications. Furthermore, to measure height in storeys rather than in metres was arbitrary.

[13] The Board accepted Mr. Manett's view that there was no adverse impact and found that the proposed Haulover development was consistent with the Growth Plan for the Greater Golden

Horseshoes [released under the *Places to Grow Act*, 2005, S.O. 2005, c.13] and the Provincial Policy Statement [2005 issued under s. 3 of the *Planning Act*]. The Board considered and accepted the view of M. Behar of M. Behar Planning & Design who was called as a witness by Haulover. His opinion was that many of the details relating to design were most appropriately dealt with at the stage of site plan approval and that the proposed development was in substantial compliance with the principle of good urban design. Lastly, the Board accepted Mr. Manett's evidence that the existing services were suitable for the development.

[14] As a result, the Board allowed Haulover's appeals.

Parties' Submissions

[15] The Town submits that:

(a) the Board erred in law by failing to "have regard to" the decisions of Council with respect to the applications of Haulover and the new Official Plan as required by s. 2.1 of the *Planning Act* and particularly in light of the public dimension of the process undertaken by the Town;

(b) the Board exceeded its jurisdiction by imposing on the Town community benefits the Town did not agree to. This constituted a misapplication of s. 37 of the *Planning Act*;

(c) the Board disposed of the appeal without regard to applicable policy and the circumstances of the case. Had it had such regard, it would have found the policies of the new Official Plan to be applicable;

(d) the Board's decision is inconsistent with its previous decision relating to the Great Land Development, which is located at the same intersection in the Town, wherein the development applications were subject to the exact same policy framework; and

(e) the Board's reasons are inadequate and in violation of the duty of procedural fairness.

[16] Haulover submits that the Board considered the relevant planning policies, the issues and the expert evidence. The fundamental disagreement between the Town and Haulover related to the proposed height of the buildings and urban design considerations both of which are matters that fall within the Board's expertise to determine. Haulover states that the Town has failed to

satisfy the test for leave to appeal to the Divisional Court from a decision of the Municipal Board. It notes that the Region's approval of the development is also part of the package the Board considered.

Discussion

[17] The parties both agree on the applicable test. The proposed appeal must raise a question of law. There must be good reason to doubt the correctness of the decision and the questions raised must be of sufficient importance to merit the attention of a Divisional Court panel.

[18] In my view, the first four issues raised are issues of fact or mixed fact and law. The Board's decision is entitled to deference. The Board was acting within its core area of expertise and was alive to the issues of height and the differing Official Plans. Member Sutherland referred to the six expert witnesses and described why she accepted the evidence of Haulover's experts. In any event, there is no reason to doubt the correctness of the Board's decision.

[19] Dealing firstly with the first and third issues identified by the Town, under section 2.1 of the *Planning Act*, the Board is to have regard to any decision made under the Act by a municipal council and that relates to the same planning matter. Here, the Board did consider the Official Plan and the new Official Plan. It is the case that the Board noted that Haulover's appeals arose as a result of no decision by Town Council within the requisite time frames. There was no decision of Council before it to consider. That said, the Board found that the proposed development was consistent with the Growth Plan for the Greater Golden Horseshoe and the Provincial Policy Statement and the in force Official Plan was not. The Board did consider the planning evidence of the Town Planner, Mr. Robb, which it did not accept. The Board also accepted the settlement between Haulover and the Regional Municipality. The Board exercised its discretion having considered these issues.

[20] On the second issue, a reading of the Board's decision makes it clear that community benefits were not imposed on the Town. Rather, the Board simply observed that Haulover's proposal applications featured somewhat similar benefits to those accepted by the Town with respect to the Great Land Development proposal. It did not determine that as a result, Haulover

should be permitted the height and density requested. At page 7 of the Decision, the Board expressly stated that it does not use precedent as a basis for its decisions.

[21] On the fourth issue, the Board's decision is clearly not inconsistent with its decision relating to the Great Land Development property. The context of the decision was a major development south of the intersection in issue. It was not an error for the Board to consider that development.

[22] Lastly, the fifth issue engages natural justice and therefore attracts a correctness standard: *Clifford v. OMERS*, [2009] ONCA 270.

[23] Obviously, the Board had a legal obligation to give reasons for its decision. The issue to consider is whether the Board complied with that legal obligation. As stated by Goudge J.A. at paragraph 11 in *Clifford*, "…the 'path' taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way."

[24] In my view, there is no question that the Board "grappled with the substance of the matter." The Board identified the issues to be considered, addressed the evidence of the witnesses and made a reasoned decision. The Board did explain why it reached the decision it did. The Reasons also allow for effective judicial review. The Board's decision was a rational one based on the evidence. The Board's reasons are not inadequate nor was there any violation of a duty of procedural fairness.

[25] In conclusion, the test for leave has not been met and the motion is dismissed. If the parties are unable to agree on costs, they are to make brief written submissions.

Pepall J.

Released: April 11, 2012

10

Case Name:

Ravichandran v. Canada (Minister of Citizenship and Immigration)

Between
Karthik Mario Ravichandran, Vinodh Marino Ravichandran, Diviya Mariza Ravichandran, Applicants, and
The Minister of Citizenship and Immigration, Respondent

[2015] F.C.J. No. 677

[2015] A.C.F. no 677

2015 FC 665

Docket: IMM-2110-14

Federal Court
Toronto, Ontario

Tremblay-Lamer J.

Heard: May 13, 2015.
Judgment: May 22, 2015.

(35 paras.)

Immigration law -- Immigrants -- Application for immigrant visa -- Practice and judicial review -- Evidence -- Application by three siblings for judicial review of refusal of permanent residence as members of refugees abroad class and country of asylum class allowed -- Applicants were Tamil citizens of Sri Lanka who fled to India in 2007 due to police raids and threats after incident between father and paramilitary member -- Officer unreasonably found applicants lacked credibility on basis of similarities between accounts -- Officer was obliged to address explanation applicants had recently refreshed memories, and account was based on recounting of events by parents -- Credibility finding focused on peripheral inconsistencies -- Matter remitted for redetermination.

Application by the three Ravichandran siblings for judicial review of a visa officer's decision refusing permanent residence as members of the refugees abroad class and the country of asylum class. The applicants were Tamil citizens of Sri Lanka. They alleged a fear of persecution based on an incident in 2007 in which their father refused to issue a travel ticket to a member of a paramilitary group and was abducted and tortured by police. A family friend secured the father's release through bribery. Police subsequently raided the home and held the mother and children at gunpoint,

demanding to know the father's location. One of the siblings was beaten and jailed when he intervened. The applicants fled to India in the ensuing months and sought permanent residence in Canada in 2014. The officer refused the claim on credibility grounds, as the similar testimony of the applicants suggested it was scripted, and due to inconsistent evidence of their travel history. The applicants sought judicial review.

HELD: Application allowed. It was unreasonable for the officer to find the applicants lacked credibility on the basis of the similarities between their accounts. The officer unreasonably failed to accept the explanation that each applicant re-read their narratives prior to the interview to refresh their memories, and that the incidents described had been recounted to the applicants by their parents. The officer was obliged to address the explanations and instead ignored them. In addition, the officer unreasonably relied on the inconsistencies in the peripheral matter of the applicants' travel history in rejecting their credibility. The alternative finding of a lack of a well-founded fear of persecution failed to address the substance of the applicants' claims. The matter was remitted for redetermination.

Statutes, Regulations and Rules Cited:

Immigration and Refugee Protection Act, SC 2001, c 27, s. 11, s. 72(1), s. 96

Immigration and Refugee Protection Regulations, SOR 2002-227, s. 139(1)(e), s. 144, s. 145

Counsel:

Adrienne Smith, for the Applicants.

Nicole Rahaman, for the Respondent.

JUDGMENT AND REASONS

1 TREMBLAY-LAMER J.:-- This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of a visa officer at the High Commission of Canada in New Delhi, India in which the officer refused the applicants' applications for permanent residence in Canada as members of the Convention refugees abroad class and the country of asylum class pursuant to sections 11 and 96 of the Act and sections 139 and 145-147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

I. Facts

2 The applicants are three siblings who are Sri Lankan citizens of Tamil ethnicity.

3 They allege that their family was targeted for persecution by the Sri Lankan authorities in February 2007 after their father refused to issue a travel ticket to a relative of the leader of the Karuna paramilitary group. As a result, he was abducted by police and tortured. After a family friend secured his release by paying a substantial sum he was warned by friends to get out of the house. He left, taking his younger son with him.

4 A few days later, when the two remaining siblings and their mother were home, the police and Karuna group raided their house, held them at gunpoint, and demanded to know the location of their father. At one point, they started to drag the female applicant into a room, at which time her mother intervened and was shoved. Her older brother then intervened, and was assaulted and taken outside to a police truck, where he was beaten. He was taken to the police station and further beaten. The next day, his mother paid to secure his release, but was instructed that she would need to pay a further sum within one month of his release. The two applicants and their mother went into hiding and then fled to India separately in the following three months.

5 The officer interviewed each of the three applicants individually on March 12, 2014. She found their accounts to be very similar and confronted them with this, to which one of them explained that this was likely due to the fact that they had refreshed their memories with a narrative prior to the interview.

II. The Impugned Decision

6 The officer found that the applicants had failed to provide sufficient evidence of a well-founded fear of persecution should they return to Sri Lanka.

7 Her principal reason for this finding was that she found the applicants' testimony not to be credible. First, the testimony they provided was extremely similar, suggesting that it was scripted. Second, they had provided inconsistent information regarding their travel histories.

8 She found, in the alternative, that even if some of the information provided by the applicants was true, she did not accept that the government was still looking for them due to the refusal of their father, with whom they no longer had contact, to issue a ticket seven years earlier.

III. Issues

A. Are the officer's affidavits admissible?

B. Did the officer err in finding the applicants were not credible?

C. Did the officer err in finding that even if some of the evidence provided by the applicants was credible, they had not established a well-founded fear of persecution?

IV. Standard of Review

9 Whether or not an applicant falls within the Convention refugees abroad class is a question of mixed fact and law and is reviewable on a standard of reasonableness (*Bakhtiari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1229 at para 22).

V. Legislative Scheme

10 The Convention refugees abroad class is governed by sections 144 and 145 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. A foreign national will be a member of this class if he or she has been determined by an officer, outside Canada, to be a Convention refugee as defined by section 96 of the Act.

11 The relevant provisions of the Act and Regulations are included in the Annex to this Judgment and Reasons.

VI. Analysis

A. *Are the officer's affidavits admissible?*

12 The applicants submit that the affidavits sworn by the officer, dated June 24, 2014 and March 27, 2015, should be disregarded by the Court on the basis that they are an attempt to supplement the officer's reasons (*Barboza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1420 at para 26).

13 While the officer's affidavits legitimately speak to her practices with respect to note-taking in interviews and responds to allegations made by the applicants that certain things were said in the interview that were not recorded in her notes, I have compared her affidavits to the reasons provided in the decision letter and Global Case Management

System [GCMS] notes, and am satisfied that her affidavits provide additional reasons to support the decision.

14 As the respondent is not entitled to submit affidavit evidence on judicial review to supplement the reasons in the decision under review, I disregard the supplemental reasons provided in the officer's affidavits.

B. *Did the officer err in finding the applicants not credible?*

15 The applicants argue that the officer erred by basing her negative credibility finding on similarities in their evidence and on inconsistencies between their respective testimonies in respect of where they travelled seventeen (17) years earlier when they were young children. I deal with each of these grounds in turn below.

(1) Credibility finding based on similarity of evidence

16 The applicants submit that it was an error for the officer to find that the evidence they provided at the interview was too similar and therefore not credible, since consistency is the hallmark of credibility, particularly in the refugee law context. They argue that the officer unreasonably failed to accept their explanation that they had re-read their narratives prior to the interview to refresh their memories. She also failed to consider that many of the incidents they described had in fact happened to their father and been recounted to them by their parents, thereby explaining the similarities in the way they talked about them.

17 The respondent, on the other hand, submits that unwarranted similarities in testimony can serve to undermine credibility, and that the officer reasonably found that the applicants' testimony was not credible because all of their testimony appeared to be rehearsed and scripted.

18 I agree with the respondent that unwarranted similarities in testimony may serve to undermine an applicant's credibility. For example, courts have found that it is not unreasonable to draw a negative inference as to credibility from unwarranted similarities between a refugee claimant's narrative and the narratives of other unrelated claimants (*Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 695 at para 39; *Shi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1088 at paras 1, 19). Outside of the immigration context, the Ontario Superior Court of Justice drew a negative inference from the use of the same wording in the affidavits of two defense witnesses (*Simpson v Global Warranty Management Corp*, 2014 ONSC 724 at para 52). In another non-immigration case, *R v BL*, [1998] OJ No 2522, Justice Hill of the Ontario Court of Justice noted at para 107:

> It is generally recognized that some differences or discrepancies in a witness' testimony, in particular when compared to prior statements of that witness out of court, may well be indicative of a truthful witness -- one who has not provided a scripted and rehearsed account, but rather one which suffers only from certain human frailties, for example, the product of a dulled memory, confusion from the stress of being a witness or other cause too insufficient to significantly affect the witness' credibility and reliability.

19 However, while decision-makers may rely on their common sense in drawing negative credibility inferences from unwarranted and striking similarities between the testimony of applicants, it is equally true that they must use their common sense to determine whether, in the circumstances of the case, there is a valid reason for the similarity. If there is, it would not be appropriate to find that the similarity casts doubt on the applicant's credibility (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 550 at paras 25-28, [*Zhang*]).

20 Just as was found by Justice Russell in the circumstances of *Zhang*, I do not believe that in the circumstances of this case common sense dictates that, simply because the three applicants gave strikingly similar evidence, it was more likely than not that their evidence was not true. There was evidence before the officer that the applicants had refreshed their memories of these seven year-old events before the interview using a narrative. It is also significant that many of the events the applicants were recounting did not happen to all of them personally. The younger brother was not present for any of the events in the story, except for seeing the trauma his dad experienced after his detention. In addition to

that, the sister was present only for the raid of their house. In addition to those events, the older brother was only present for his detention. All of the other background and events were told to the applicants by their parents, so very little of their testimony was first-hand information. These circumstances provided a strong explanation as to why the applicants might have used similar wording in telling their stories.

21 While it was open to the officer to disbelieve the applicants' explanations, the explanations they provided appeared reasonable on their face and the officer had an obligation to address them in her reasons and to explain why she did not find them convincing. Instead, she ignored them.

22 Accordingly, I find that it was unreasonable for the officer to find the applicants not credible on the basis of the similarities between their accounts.

(2) Credibility finding based on inconsistencies with respect to travel when young

23 The only inconsistency noted by the officer was with respect to the applicants' travel histories when they were young. While the two brothers did not state that they had visited China, Japan and Thailand as children when asked about their travel histories, the female applicant testified that she had been to these places with her brothers:

> Have you ever been to any other country? Since birth till now? Yes Where? Hong Kong, Japan, Thailand. When did you go to Hong Kong? As a child; don't remember. How long? I was a baby. Japan? 2 or 3 years old. Thailand? Same thing. Small kid. Who all went to Hong Kong, Japan, and Thailand? My mother, two brothers, and I.

24 When her brothers were confronted with this discrepancy, the older brother testified that he had been young at the time and didn't realize that the officer was asking about travels he took when he was young. The younger brother testified that he didn't know where he had been and that they didn't always travel together, which his older brother confirmed. The officer responded that they were not telling the truth because their younger sister had testified to having travelled with both of them to these countries.

25 Despite the applicants' explanations, the officer concluded on the basis of these inconsistencies that the applicants had not all been entirely truthful during the interview. In doing so, she failed to acknowledge that the female applicant was testifying about events that occurred when she was a baby and a toddler, and that the boys were still fairly young children at the time as well. She also failed to recognize that these inconsistencies were on a peripheral and immaterial matter.

26 As such, I conclude that the officer unreasonably relied on the inconsistencies in this peripheral matter to support her finding that the evidence provided by the applicants was not credible.

C. *Did the officer err in finding that even if some of the evidence provided by the applicants had been credible, they had not established a well-founded fear?*

27 The officer made an alternative finding that the applicants' claims would fail even if some of the information they had provided were accepted as true:

> However, even if some of the information is true, I find it hard to believe that after seven years the government is still looking for your mother and the three of you because your father refused to issue a ticket to someone who was related to a Karuna member. As I said, the incident happened seven years ago. An incident of this nature doesn't seem to suggest that the government would be keeping a log with your information. The war in Sri Lanka has ended. You have not provided me any information that would suggest that you would be suspected of having any ties to the LTTE, which is what the government in Sri Lanka would be interested in. Unless there is something else that happened that you have not told me about, I am not satisfied that you have

> provided sufficient evidence for a well-founded fear of persecution should you return to Sri Lanka or why you continue to be personally and seriously affected by conflict or human rights violations. [...] Many Sri Lankan Tamils have been returning to Sri Lanka since the war ended.

28 The applicants contend that the officer provided no basis for her conclusion that the incidents they described do not suggest that the Sri Lankan government would be after them, and that the officer failed to provide reasons with respect to whether they met the eligibility criteria. They argue that she failed to assess whether the incidents they described amounted to persecution based on their connection to their father, and instead assessed only whether they had demonstrated that they would be suspected of having ties with the LTTE.

29 The respondent, on the other hand, submits that the officer clearly assessed and expressed why the applicants did not meet the eligibility criteria, and that the threshold for adequacy of reasons is fairly low in respect of decisions by administrative officers when compared to decisions of an administrative tribunal after an adjudicative hearing (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-11; *Shali v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1108 at para 31).

30 I agree with the respondent that the fundamental question in assessing the adequacy of reasons is whether they show that the tribunal grappled with the substance of the matter (*Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at para 88, [*Ghirmatsion*]) and whether they are sufficiently clear, precise and intelligible to allow an applicant to know why her application failed and to be able to decide whether to apply for judicial review (*Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471 at para 58, [*Ogunfowora*]). However, I do not agree with the respondent that the reasons here met this standard.

31 In my view, the officer's reasons suggest that in reaching her alternative conclusion, she did not grapple with the substance of the applicants' claims.

32 First, she stated that she was assessing whether the applicants would meet the Convention refugee definition if she accepted that "some of the information is true", but did not specify which evidence she accepted as true for the purposes of this hypothetical analysis.

33 Furthermore, she relied on the fact that the applicants did not have ties with their father anymore to support her conclusion that the Sri Lankan authorities would no longer be looking for them, but failed to consider the practical question of whether the Sri Lankan authorities would still perceive or believe that they were still associated with him. The same government officials that would put the family at risk were still in power.

34 In conclusion, the officer's alternative reasons, even when read in the context of the record, were not sufficiently clear, precise and intelligible to allow the applicants to know why their applications would have failed even if their testimony had been accepted, and to show that the officer grappled with the evidence to determine whether they met the Convention refugee definition (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-18; *D'Errico v Canada (Minister of Human Resources and Skills Development)*, 2014 FCA 95 at paras 12-14.

35 For these reasons, this application for judicial review is allowed and this matter is to be remitted to a different officer for re-determination. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is to be remitted to a different officer for re-determination.

2. There is no question for certification.

TREMBLAY-LAMER J.

* * * * *

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

> **11.** (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.
>
> **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
>
> (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Immigration and Refugee Protection Regulations, SOR 2002-227

> **139.** (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that
>
> [...]
>
> (e) the foreign national is a member of one of the classes prescribed by this Division;
>
> **144.** The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.
>
> 145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.
>
> **145.** A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

* * *

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

96. A qualité de réfugié au sens de la Convention -- le réfugié -- la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

139. (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis:

[...]

e) il fait partie d'une catégorie établie dans la présente section;

144. La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

145. Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

145. Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

11

ONTARIO CIVILIAN POLICE COMMISSION

DATE: 2016-02-02

FILE: 2016 ONCPC-02

CASE NAME: SEGUIN AND WALLACE AND TORONTO POLICE SERVICE

IN THE MATTER OF THE *POLICE SERVICES ACT*, R.S.O. 1990, C.P.15, AS AMENDED

BETWEEN:

Eloi-Gourde Bureau
APPELLANT

-and-

Constable Dominic Seguin#8423 and
Constable Alexander Wallace #9300
RESPONDENTS

-and-

Toronto Police Service
RESPONDENT

DECISION

Panel: D. Stephen Jovanovic, Associate Chair

Zahra Dhanani, Member

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3

Appearances:

Soloman Lam, Counsel for the Appellant

Harry G. Black, Q.C., Counsel for the Respondents, Seguin and Wallace

Sharon Wilmot, Counsel for the Respondent, Toronto Police Service

Miriam Saksznajder, Counsel for the Statutory Intervener, The Independent Police Review Director

I. Introduction

1. Eloi-Gourde Bureau (the Appellant or Complainant) has appealed the decision of retired Justice Walter Gonet (the Hearing Officer) dated November 7, 2014, whereby he dismissed charges of misconduct against Constables Dominic Seguin and Alexander Wallace (also referred to as the Respondent Officers). The charges were instituted following a public complaint by the Appellant to the Office of the Independent Police Review Director and were set out in a Notice of Hearing as follows:

> You are alleged to have committed misconduct in that you did without good and sufficient cause, make an unlawful or unnecessary arrest, contrary to section 2(1)(g)(i) of the Schedule Code of Conduct of Ontario Regulation 123/98 and therefore, contrary to section 80(1)(a) of the

> Police Services Act, R.S.O. 1990, as amended
>
> Statement of Particulars
>
> Being a member of the Toronto Police Service attached to Number 51 Division, you were assigned to uniform duties.
>
> On Sunday, June 27, 2010, you were on duty and assigned to the G20 Summit detail.
>
> You assisted in the arrest of E.G.B. for wearing a disguise with the intent to commit a criminal offence without having the requisite grounds to do so.
>
> In doing so, you have committed misconduct in that you did without good and sufficient cause, make an unlawful or unnecessary arrest.

2. The Hearing Officer, as part of the same proceeding, also dismissed a charge of misconduct arising from the same incident against Sergeant Nancy McLean, who was alleged to have "encouraged or incited officers under your command to insult E.G.B. during their interaction with him." No Appeal has been brought from the dismissal of that charge.

II. Decision

3. Pursuant to section 87(8) (c) of the Police Services Act (the Act) the Commission orders a new hearing of the charges against Constables Seguin and Wallace before a new Hearing Officer.

III. Background

4. The Respondent Officers were part of a bicycle team of approximately fifteen police officers, under the command of Sergeant McLean, during the morning of June 27, 2010, the final day of the now infamous G-20 Summit in Toronto. At approximately 10:00 a.m. that morning they arrested the Appellant, his wife Jennifer Vales, and a friend, David Clement, for the offence of wearing a disguise with the intent to commit an indictable offence contrary to the *Criminal Code**.

5. The Hearing Officer's decision referred to the widespread rioting, damage to property, including the burning of police vehicles and injuries to police officers that occurred the previous day, despite the extensive police presence in downtown Toronto. Police intelligence expected similar, if not increased, violence and rioting on that Sunday.

6. It was against this backdrop that the Respondent Officers approached the Appellant and his two companions as they were walking northbound on University Avenue near College Street.

*section 351(2) of the *Criminal Code* provides as follows:

Everyone who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

7. Constable Wallace testified that as he approached the Appellant, he noticed that he was wearing a neon orange coloured bandana covering the lower portion of his face from the nose down. He further testified once he got beside the Appellant:

> It was at that time that I made the decision that I – believed that that one, specific male was committing an offence under the Criminal Code of wearing a disguise with a – with intent to commit a further indictable offence. I immediately got off my bicycle and I approached the male as other officers within my group approached the other two parties.

8. Constable Wallace also testified that in so effecting the arrest, he took into account, in a short span of time, the weather conditions, the lack of any reason for the disguise, the violent events and the damage of the previous day (by people concealing their faces), and the intelligence he received during that morning's briefing.

9. The evidence of Constable Seguin was largely consistent with that of Constable Wallace and with that of the other police officers involved. As he approached the Appellant from behind, he could see him wearing what has been described as an orange bandana-type sleeve, pulled up covering the bottom half of his face, from the bridge of his nose down to his chin, so that only his eyes were visible. Constable Seguin

testified to essentially taking the same factors into account, as did Constable Wallace and he, too, formed the belief that the Appellant was wearing a disguise to conceal his identity and some time that day, would commit a criminal offence, such as mischief. Constable Seguin stated that it was Constable Wallace who placed the Appellant under arrest and denied, as did the other police officers involved, that there was any verbal or physical intimidation of the Appellant or his companions.

10. Sergeant McLean testified that she was in charge of the group of bicycle officers that approached the Appellant and his companions. She too saw the Appellant wearing the orange sleeve from his nose down and observed his arrest. She believed that reasonable grounds existed to arrest the Appellant considering the events of the previous day, the police intelligence briefing that a demonstration was to take place at Queen's Park and that the only purpose of the mask worn by the Appellant could have been to disguise his identity.

11. The Appellant's evidence was that as he and his two companions were walking north on University Avenue, he was wearing part of a sleeve that had been cut from an orange T-shirt around his neck, that it was not covering his face and that he intended to use it if police utilized tear gas as they had the previous day. He testified that various officers pushed him into a wire construction fence, while Sergeant McLean started to swear at him in English and French, called his friends "fucking anarchists" and told him that he should return to Quebec.

12. During his cross-examination, the Appellant was confronted with an article written by a journalist, Patrick Duquette,

which was published in Le Droit, on June 29 and June 30, 2015, a newspaper circulated in Gatineau and Ottawa and online. The article was based on an interview Duquette had with the Appellant and contained statements or quotations from the Appellant that were inconsistent with the evidence which he gave in chief. The Appellant, in cross-examination, denied that he had ever spoken to Duquette and offered no explanation as to why Duquette would have printed quotations from him if they had not, in fact, spoken to one another.

13. The Respondent officers called Duquette as a witness before the Hearing Officer. Duquette testified that his article "Mayor's Son Arrested at G-20 Summit" was, in fact, based on his telephone interview with the Appellant and that the quotations attributable to him were accurate and had been recorded on his computer at the time of their conversation. Duquette testified that the Appellant did not make any reference to a woman Sergeant or any other police officer making any anti-French comments and that if the Appellant had done so, then these comments would have been the lead in his article.

The Issues

14. The Appellant submitted that the broad issues to be decided on this Appeal are:

    i) Did the Hearing Officer fail to consider the totality of the evidence in concluding that there was not clear and convincing evidence of the charge against the Respondents?

    2) Did the Hearing Officer err in giving inadequate reasons for dismissing the charges against the Respondents?

15. The decision to dismiss the charges appears to have been based entirely on the finding that the Appellant was not a credible witness, a finding that the Hearing Officer was entitled to make on the evidence. The reasons of the Hearing Officer make it difficult, if not impossible to determine if he did "consider" the totality of the evidence even though he did recite some of it.

16. However, in our view, this Appeal can be decided based on our finding on the second issue. Before examining the adequacy of the reasons given by the Hearing Officer, it would be useful to refer to some of the well-known authorities on the issue of adequacy of reasons.

17. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [2011] 3 S.C.R. 768, the Supreme Court of Canada wrote of the restraint that must be shown by Appellate Tribunals in reviewing the reasons of administrative tribunals where a party has alleged inadequacy of the reasons. At paragraph 16, the Court wrote the following:

> Reasons may not include all arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion…In other words if the reasons allow the reviewing

> court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of reasonable outcomes, the Dunsmuir criteria are met.

18. The Dunsmuir "criteria" refers to the existence of justification, transparency and intelligibility within the decision-making process that makes a decision reasonable, i.e. whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. The Court in *Newfoundland* accepted "perfection is not the standard" for reasons and that a reviewing court should ask whether "when read in light of the evidence before it and the nature of its statutory tasks, the Tribunal's reasons adequately explain the bases of its decision."

19. The Court also adopted the following statement:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the content of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

20. *In Barrington v. The Institute of Chartered Accountants of Ontario*, 2011 ONCA 409 (CanLII), the Court wrote:

> The reasons for decision in professional discipline cases must address the major points in issue in the case. A failure to deal with material evidence or a failure to provide an adequate explanation for rejecting material evidence precludes effective appellate review: *Gray v. Ontario* (2002), 59 O.R. (3d) 364 (C.A.), at paragraphs 22-24; *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d), (C.A.) at paragraphs 61 and 92.
>
> A tribunal is not required to refer to all the evidence or to answer every submission. In the words of this Court, in *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) (C.A.), leave to appeal refused [2009] S.C.C.A. at No. 416, the [tribunal] was required to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way.

21. Finally, in *Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*(2002), 61 O.R. (3d) 649 (C.A.) the Court dealt with the approach to be taken in dealing with an argument as to inadequacy of reasons as follows:

> [87] Even in the criminal context the inadequacy of reasons has been

> rejected as a freestanding ground of appeal: *R. v. Braich,* 2002 SCC 27, 210 D.L.R. (4th) 635. Instead, the Supreme Court has adopted a functional approach that requires an appellant to show that deficiency in the reasons caused prejudice as to the exercise of the right of appeal. This functional approach is reflected in the administrative context in the Supreme Court's comments in *Baker [v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193] that a statutory body's duty to give a rationale for its reasons, which is based on a duty of fairness, is flexible and variable, and is defined by the context of the particular statute, the decision being rendered, and the rights affected.
>
> [88] For right of review to be meaningful the reviewing body, in this case the Divisional Court, must be able to perform its task.

22. In turning to the Hearing Officer's decision, at pages 3 to 9, he reviewed the evidence of the nine witnesses called, including the parties. At the bottom of the ninth page, he recited the burden of proof as being on the prosecution to prove the allegations of misconduct as against the Respondent Officers, by way of clear and convincing evidence that must be weighty, cogent and reliable. The Hearing Officer wrote that the evidence has to withstand the test of credibility and reliability. He then, in two paragraphs on page 10 of the decision, asked himself "Was the evidence of the complainant and witnesses clear and convincing?"

23. Other than referring to no evidence of physical violence in the photographs that were exhibits before him, the rest of the Hearing Officer's brief analysis dealt solely with the Appellant's denial of his conversation with Duquette. The Hearing Officer then concluded "the denials and contradictions by Bureau of Duquette's evidence and Bureau's insistence that he did not discuss his evidence with anyone taints the complainant's other evidence of the incident. I am left in doubt and find that the prosecution has failed to satisfy its onus of presenting 'clear and convincing' evidence of the guilt of the accused on these charges." The Hearing Officer, as he was entitled to do, rejected the totality of the Appellant's evidence.

24. It appears that the Hearing Officer rejected the totality of that evidence because of the Appellant's denial of his conversation with Duquette. The Hearing Officer, in his analysis, did not comment on the evidence of Vales, the Respondent Officers, nor of the other witnesses in reaching his conclusion to dismiss the charges.

25. At the outset of the hearing of this Appeal, the Appellant's counsel indicated that he was content with a finding that the "sleeve" was, in fact, on the Appellant's face, notwithstanding the Appellant's evidence before the Hearing Officer. However, he submitted that the charges against the Respondent Officers did not turn on his credibility, but rather on the evidence of the Respondent officers. The submission was that the simple wearing of the sleeve be it called a mask or a disguise, was not sufficient to justify the Appellant's arrest.

26. In order to establish misconduct under section 2(1) (g)(i) of the *Code of Conduct,* two criteria must be satisfied by the prosecution. First, that the arrest was unlawful or unnecessary, and second, that it was without good and sufficient cause. The decision of the Hearing Officer contained no analysis of the requisite elements of the charge.

27. Section 495(1) (a) of the *Criminal Code* was the basis for the arrest of the Appellant. It reads as follows:

> 495(1) A Peace Officer may arrest without warrant
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

The Hearing Officer's decision contains no mention, let alone an analysis of this section of the *Code*. There is also no mention or analysis of section 351(2) of the *Code*, the offence for which the Appellant was arrested.

28. An arresting officer must subjectively have reasonable and probable grounds on which to base an arrest. These grounds must also be justifiable from an objective point of view i.e. a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R.V. Storrey*, [1990] 1 S.C.R. 241.

29. There was ample evidence before the Hearing Officer to allow him to conclude that the Appellant was wearing the sleeve on his face. However, he did not make any such finding. Had he done so, he would have been required to then consider if the Respondent Officers had reasonable and probable

grounds, considering all of the circumstances, to make a lawful arrest. His reasons do not display that he engaged in this analysis. In our view, the reasons given by the Hearing Officer were inadequate or insufficient to satisfy the purpose required of reasons. The reasons, in our respectful view, when read in the context of the record, do not show that he "grappled" with the substance of the issues before him.

30. Counsel for the Respondent Officers made the following submissions in his factum on the adequacy of the Hearing Officer's reasons:

> 81. The structure and the content of the reasons are a mirror reflection of the manner in which the issues developed by counsel at the hearing. There is such a thing as judicial economy, relevance and materiality: judges and hearing officers tailor their reasons to issues at the hearing, and need not state the obvious nor repeat the inconsequential.

31. We acknowledge that the Hearing Officer was an experienced, former jurist who had conducted other hearings into similar allegations of misconduct against police officers, arising from the mass arrests of individuals during the G-20 Summit. In at least one other decision, the Hearing Officer dealt with what constituted an unlawful arrest: *Wong and Toronto Police Service*, 2015 ONCPC 15 (CanLII)

32. At first instance, it is tempting to conclude that given his experience, the Hearing Officer did address his mind to the issue of whether the Respondent Officers "did without good and sufficient cause, make an unlawful or unnecessary

arrest." As counsel for the Respondent Officers submitted, the Hearing Officer "need not state the obvious nor repeat the inconsequential."

33. However, in our respectful view, the Appellant had a sufficient interest in the proceedings, (his credibility notwithstanding) having been arrested and detained, then released without charges to entitle him to adequate reasons to explain the dismissal of the charges, reasons that could allow for meaningful appellate review.

34. The Appellant's counsel submitted that the appropriate Order would be for us to "revoke" the acquittal, substitute findings of guilt, and then consider further submissions on penalty. Counsel for the Responding Officers submitted that if we were to accept that the Hearing Officer's decision could not stand, the only acceptable disposition would be to order a new Hearing. Counsel for the Independent Police Review Director took no position with respect to the Orders requested nor did counsel for the Toronto Police Service.

35. In our view, it would not be appropriate to make findings of guilt in this matter without having had the benefit of hearing the evidence of the witnesses. While the *Act* does allow the Commission to substitute its decision for that of the Hearing Officer, this power should be used sparingly when asked to turn an acquittal into a conviction.

IV. Disposition

36. Pursuant to section 87(8) (c) of the *Act* the Commission orders a new hearing of the charges against Constables Seguin and Wallace before a new Hearing Officer.

37. We note, however, the time and resources that have already been devoted to this matter, arising from events, which occurred more than five years ago. A new hearing would likely not even commence until more than six years after the G-20 Summit. While our decision is to refer the matter back for a new hearing, the ultimate decision whether to proceed will be up to the prosecution, which retains discretion, after considering the best utilization of its resources and most importantly whether there is any reasonable prospect of obtaining convictions given what transpired at the original hearing.

DATED AT TORONTO THIS 2nd DAY OF FEBRUARY, 2016

D. Stephen Jovanovic
Associate Chair

Zahra Dhanani
Member

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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Dichmont v. Newfoundland and Labrador (Government Services and Lands)*, 2015 NLTD(G) 14
Date: February 9, 2015
Docket: 201201G5863

BETWEEN:

DESIREE A. DICHMONT

APPLICANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF GOVERNMENT SERVICES AND LANDS

FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION

SECOND RESPONDENT

Before: Justice Alphonsus E. Faour

Place of Hearing: St. John's, Newfoundland and Labrador

Date(s) of Hearing: September 20, 2013

Summary:

The Applicant sought judicial review of a decision of the Human Rights Commission to dismiss her complaint of religious discrimination arising from the government's refusal to permit her to continue as a marriage commissioner because same sex marriages were contrary to her religious beliefs. The Commission declined to refer the complaint to a board of inquiry saying there was insufficient evidence. The Commission and the government submitted that the decision was reasonable and within the scope of authority granted by the legislation.

Held:

The Commission's failure to provide reasons, and its denial of an opportunity to have the question of religious discrimination, and the reasonableness of accommodation options considered by a board of inquiry, meant that its decision was unreasonable. Its decision was set aside and the Commission ordered to refer the matter to a board of inquiry.

Appearances:

Philip Fourie ; Derek Nowak; Deina Warren	Appearing on behalf of the Applicant
David G. Rodgers	Appearing on behalf of the First Respondent
Carey S. Majid	Appearing on behalf of the Second Respondent

Authorities Cited:

CASES CONSIDERED: Pottle v. Canada (Attorney General), [2004] N.J. No. 470; **Tilly v. Law Society of Newfoundland and Labrador**, 2010 NLTD(G) 187; **Coady v. Newfoundland & Labrador (Human Rights Commission)**, 2010 NLTD 21; **Dunsmuir v. New Brunswick**, 2008 SCC 9; **Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)**, 2012 SCC 10; **French v. Nova Scotia (Human Rights Commission)**, 2012 NSSC 395; **Keith v. Canada (Correctional Service)**,

2012 FCA 117; **Burke v. Newfoundland and Labrador Assn. of Public and Private Employees**, 2010 NLCA 12; **Francis v. CHC Composites Inc.**, 2006 NLTD 5; **Hutchinson v. Canada (Minister of Environment)**, 2003 FCA 133; **Jazairi v. Ontario (Human Rights Commission)** (1997), 99 O.A.C. 184, 1997 CarswellOnt 813; **Grant v. St. John's (City) Regional Health and Community Services Board**, 2003 NLCA 22; **Cooper v. Canada (Canadian Human Rights Commission)**, [1996] 3 S.C.R. 854, 1996 CarswellNat 1693; **Spurrell v. Newfoundland (Human Rights Commission)**, 2003 NLSCTD 28; **Baker v. Canada (Minister of Citizenship & Immigration)**, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124 (S.C.C.); **Stevens v. Newfoundland (Human Rights Commission)**, 2005 NLTD 153; **Hiscock v. Newfoundland & Labrador (Human Rights Commission)**, 2006 NLTD 172; **Hallingham v. Newfoundland (Workers' Compensation Commission)** (1997), 158 Nfld. & P.E.I.R. 21, 1997 CarswellNfld 234 (C.A.); **Kerr v. Bell Canada**, 2007 FC 1230; **Nichols v. Saskatchewan** (2006), CHRR 06-887; **Bjerland v. Saskatchewan** (2006), CHRR 06-888; **Goertzen v. Saskatchewan** (2006), CHRR 06-889; **Nichols v. M.J.**, 2009 SKQB 299; **Saskatchewan (Marriage Act, Marriage Commissioners) (Re)**, 2011 SKCA 3; **Doré v. Barreau du Québec**, 2012 SCC 12; **Taylor-Baptise v. Ontario Public Service Employees Union**, 2013 HRTO 180

STATUTES CONSIDERED: *Solemnization of Marriage Act*, R.S.N.L. 1990, c. S-19; *Human Rights Code*, R.S.N.L. 1990 c. H-14; *Human Rights Act, 2010*, S.N.L. 2010 c. H-13.1

REASONS FOR JUDGMENT

FAOUR, J.:

INTRODUCTION

[1] Desiree Dichmont, (the "Applicant"), for reasons of her religious convictions, resigned as a marriage commissioner when the government insisted that same sex marriages must be performed.

[2] She applied to the Human Rights Commission with a complaint of religious discrimination. That application was dismissed by the Commission without being referred to an adjudication panel for a full hearing. She seeks judicial review of that decision.

RELEVANT FACTS (CHRONOLOGY)

[3] Ms. Dichmont was appointed as a marriage commissioner pursuant to the *Solemnization of Marriage Act*, R.S.N.L. 1990, c. S-19, on December 9, 1997. She says she was content to serve in that capacity and took much enjoyment from presiding over marriages. That situation changed when this Court issued a declaration concerning the definition of marriage on December 21, 2004. In the case of **Pottle v. Canada (Attorney General)**, [2004] N.J. No. 470, (Reasons for Oral decision on December 21, 2004, issued February 9, 2005) the Court declared, at paragraph 22 (QL):

> The common law definition of marriage for civil purposes in the province of Newfoundland and Labrador is declared to be the voluntarily union for life of two persons to the exclusion of all others; and that civil marriage between two persons of the same sex who otherwise meet the substantive and procedural requirements of the law of Canada governing capacity to marry and whose applications otherwise meet the requirements of the *Solemnization of Marriage Act* R.S.N.L. 1990, c. S-19, as amended, is lawful and valid in Newfoundland and Labrador.

[4] Consequent on the making of the order, only two days later, on December 23, 2004, the Government of the Province sent a letter to all marriage commissioners. Receipt of this letter was taken by Ms. Dichmont to be an ultimatum with which she was unable to live. The letter said, in part:

> We are aware that some service providers may decide not to provide services to same sex couples. However, we must ensure equality in services under the law. If, after due consideration, you feel that you are unable to provide services to same sex couples, please indicate your decision to us by providing us with your resignation. If it is necessary for you to resign, we wish to express our sincere gratitude for the services you have provided in the past. If you have questions, or if you choose to resign, please advise us by telephone or fax. Your resignation will become effective January 31, 2005.

[5] On January 14, 2005, Ms. Dichmont submitted her letter of resignation.

[6] She subsequently applied to the Human Rights Commission with a complaint of religious discrimination. This complaint was made pursuant to the provisions of the *Human Rights Code,* R.S.N.L. 1990 c. H-14. That legislation was repealed and a new act enacted under the *Human Rights Act, 2010*, S.N.L. 2010 c. H-13.1.

[7] Following a number of delays, extending over several years, which were occasioned because both parties consented to waiting until similar issues were decided in other provinces, the complaint was placed before the Commission. An investigation was completed, and considered voluminous material submitted by Ms. Dichmont and the government. When the Commission considered the complaint, after reviewing the investigation report, it issued a decision in the form of a letter to counsel for Ms. Dichmont. It read in part, as follows:

> Re: Desiree A. Dichmont v. Her Majesty the Queen in Right Of Newfoundland and Labrador as Represented by the Minister of Government Services and Lands
> Our File No. LR-2618
>
> The above noted file was presented to Commissioners at a meeting held in St. John's on September 27, 2012 and was dismissed. The Commission, after reviewing materials filed by your client and the Respondent(s) and the Report prepared by the Commission staff, has determined that there is insufficient evidence to proceed to a Board of Inquiry.

[8] The remainder of the letter provides notice of a right to appeal pursuant to Section 33 of the *Act*.

[9] The Commission had before it voluminous material filed by the Complainant and the Crown. At its essence, the arguments concerned whether the Complainant's rights under the freedom of religion provisions in the *Act* were infringed when she was obliged to resign following a demand that she indicate her willingness to perform marriages between same-sex couples in her role as a duly

appointed marriage commissioner. There was also the question of the employer's (Crown's) duty to accommodate her religious beliefs.

[10] She now asks this court to review and quash that decision. The grounds argued by the Complainant, including the formal grounds set out in the Originating Application:

1. It failed to decide the case in accordance with s. 32(a), (b), or (c) of the *Act*;

2. It failed to provide reasons, giving no mechanism to determine whether it considered the appropriate principles;

3. It failed to apply *Charter* protections and freedoms to the Applicant;

4. It misapplied the low threshold test flowing from the Act for a *prima facie* case of discrimination;

5. Its decision-making ability was impaired due to an inadequate investigation, giving rise to a decision which failed the test of "reasonableness"

[11] The complaint was filed while the 1990 *Code* was in effect. As noted, this *Act* was repealed and replaced by the *Human Rights Act, 2010*, the legislation in effect when the matter was heard. However, the question of which act applied was not argued, and appeared not to be a significant issue, as both parties based their arguments on the current legislation. I will accept that the 2010 Act applies, but where necessary I will take notice of any differences in the *Code* in force at the time the complaint was lodged.

[12] After consideration of the arguments of both sides, I find that there are essentially six matters in issue.

1) The Standard of Review - This is not really in dispute, although each side would apply it differently;

2) The Investigation - The Appellant argues that it was incomplete and inadequate to ground the decision of the Commission;

3) Reasons - Whether a simple statement that there was "insufficient evidence" was sufficient.

4) Reasonableness of Dismissal - Whether the decision to dismiss was reasonable on an objective standard:

   a) Did the complaint engage issues of religious freedom? Was a *prima facie* case made out?

   b) Was there a *prima facie* duty to accommodate that ought to have been considered?

5) The *Charter of Rights and Freedoms* - Was the Commission obligated to address the *Charter*?

6) Remedy - Assuming the Applicant prevails on one of these issues, then what is the appropriate remedy.

Before examining these issues, it is useful to look at the legislative framework.

LEGISLATIVE FRAMEWORK

[13] The *Human Rights Act, 2010* is a complete code for dealing with issues of discrimination. It replaces the *Human Rights Code*, R.S.N.L. 1990, c. H-14, which was in force when the complaint was lodged. That act, in section 9, prohibited discrimination against a person by an employer on the basis of:

> (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, marital status, physical disability or mental disability . . .

[14] The current *Act* contains similar prohibition, although it is worded differently. Section 9(1) reads:

> **9**. (1) For the purpose of this Act, the prohibited grounds of discrimination are race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, marital status, family status, source of income and political opinion.

[15] Then section 14 prohibits discrimination on one of the prohibited grounds in employment. It reads:

> **14.** (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person.

[16] Section 3 provides that the *Act* applies to the Crown.

[17] When a complaint is made, the *Act* provides a structure within which such allegations may be assessed, resolved or adjudicated. Section 26 provides that the Executive Director of the Commission shall assist the parties in an attempt to settle or resolve the complaint.

[18] Where it has not been possible to achieve a settlement, section 27 calls for an investigation of the complaint, and to that end, the Commission has certain powers under sections 28 and 29 to enter premises, or seek a warrant to search from a provincial court judge.

[19] Following an investigation a three stage process follows.

[20] Section 32 permits the Executive Director to dismiss a complaint that is outside the jurisdiction of the Commission, is frivolous or made in bad faith, or where its substance has been dealt with in another proceeding. If the Executive Director so dismisses, subsection 32(2) requires reasons be given.

[21] Section 34 provides for consideration of the complaint by the Commission itself. This is the "screening" stage, which role is given the Commission in respect of any complaint. It has the power to dismiss the complaint, or refer it to a board of inquiry for adjudication.

[22] Part V of the *Act*, section 35 and following, govern the powers and procedures before a board of inquiry.

[23] This matter appears to have been decided under section 34, as the Commission dismissed the complaint without reference to a board of inquiry. The Appellant has applied for judicial review. The *Act* provides for judicial review from a dismissal of a complaint, without specifying whether from the Executive Director or the Commission. Section 33 provides:

> **33.** Where a complaint or part of a complaint is dismissed, a party to the complaint may, within 30 days after service of the written notice of the dismissal, apply for judicial review of the dismissal by filing an application with the Trial Division and serving it on all the parties to the complaint and the executive director.

[24] The powers of the court are not defined. In the former *Human Rights Code*, section 21(4) provided very specific authority for review of such a decision, and a direction respecting a remedy. It read:

> (4) Where the commission declines to refer a complaint to a board of inquiry, the complainant may apply to the Trial Division for an order that the commission refer the complaint to a board of inquiry.

[25] The current legislation provides no such direction. In **Tilly v. Law Society of Newfoundland and Labrador**, 2010 NLTD(G) 187, I considered the powers of the court where the legislation governing the screening stage for a discipline process for lawyers provided for an appeal without giving any further direction. In the **Tilley** case I decided there were several options – at paragraph 26:

> **[26]** Since the *Law Society Act, 1999* does not restrict the powers of this Court on an appeal, I take it I have three options: I may dismiss the appeal; I may allow the appeal and grant the relief requested, that is, to order that the matter be referred to the Discipline Committee for a hearing; or I may remit it to the Committee for further consideration.

[26] The Applicant has argued that I should consider a fourth option, that I should determine the merits of the complaint. This is in the context of its argument that there was a *Charter* breach in this case, and I should take a broad interpretation of my powers under section 24. I will deal with that issue later.

[27] The Commission argued that the court's options under the current legislation were narrower than in the previous *Code*. It cited **Coady v. Newfoundland & Labrador (Human Rights Commission)**, 2010 NLTD 21, and argued that in his decision, Justice Orsborn took the view that that old provision was an appeal, and therefore gave the court a broader discretion than the current legislation, which merely provides for judicial review. I believe this draws a conclusion which is not warranted by the decision. The comments of the court in **Coady** support the view that the current legislation, in specifying the availability of judicial review, provides greater latitude to the court to apply the **Dunsmuir** principles than existed in the previous *Code*. At paragraph 35, the court discussed the powers of the court under the previous legislation:

> **35** The jurisdiction bestowed on the court by subsec. 21(4) is not one of review or appeal. The 'standard of review in the face of a privative clause' analysis does not arise. There is no reference to an appeal, on specific grounds or otherwise. The jurisdiction is an original jurisdiction to simply respond to an application and determine whether or not an inquiry should be ordered.
>
> **36** The fact that reasons are not required suggests that judicial review is not contemplated. Clearly, in the absence of reasons, it is difficult to carry out a

> judicial review in the sense of assessing the decision for unreasonable omissions, whether crucial evidence has been overlooked or not considered, or whether the Commission has followed some impermissible chain of reasoning.
>
> **37** In my view, with respect, and in the absence of appellate authority on the point, subsec. 21(4) of the Code requires the court to take a second look at the material before the Commission and, in so doing, to perform its own screening analysis to determine if an inquiry is warranted. The statute thus requires the court to make its own non-deferential assessment of the material considered by the Commission, but with the additional fact that the Commission has already determined that an inquiry is not warranted. Taking this fact into consideration does not equate to judicial deference to the decision of the Commission; rather, it simply acknowledges the obvious - that, as contemplated by the Code, the court is only asked to consider the matter after the specialized tribunal has ruled out an inquiry. I would add that, in performing a screening function to determine whether an inquiry is "warranted", it is not inappropriate in my view to take into account proportionality - the nature and frequency of the conduct alleged in the complaint, the likely time and expense involved in establishing and holding a board of inquiry, and the potential for meaningful relief.
>
> [Emphasis added]

[28] The decision in **Coady** contemplates a role for this court which is not defined by the principles applicable to judicial review. As a consequence, under the old legislation, the court's powers were limited to, essentially, a reconsideration of the decision of the Commission. Where judicial review is specifically permitted in the current Act, then it is possible to examine the decision from the perspective of its internal rationality and whether a standard of "reasonableness" may apply. In addition, both parties in this case have accepted that the normal rules of judicial review apply. As a consequence, in my view, at least the three options noted in the **Tilley** case are available.

[29] That summarizes the structure of the Act relevant to this complaint. The next question is to which standard, on judicial review, the Commission is to be held.

STANDARD OF REVIEW

[30] As I indicated, there was no real disagreement on the applicable standard. Both sides agree that the standard of "reasonableness" applies to a decision of the Commission at the screening stage. This analysis arises in the case of **Dunsmuir v. New Brunswick**, 2008 SCC 9, where the Supreme Court of Canada outlined a framework for analysis of the applicable standard of review. In that case, the court discussed the factors which would bear on the level of deference applicable to decisions of administrative tribunals. A requirement for a "correctness" standard gives rise to the lowest level of deference, while a "reasonableness" standard attracts a higher level of deference to the decision of the tribunal. Both sides agree that a "reasonableness" standard applies, so at this point I will not discuss this aspect further.

[31] In **Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)**, 2012 SCC 10, the court dealt with the level of scrutiny required in a decision to dismiss a complaint at the screening level. At paragraph 17, Justice Cromwell noted the applicable standard in a case where the decision appealed was not to dismiss the complaint, but to send it to a board of inquiry:

> **17** … My view is that the Commission's decision was not a determination of its jurisdiction but rather a discretionary decision that an inquiry was warranted in all of the circumstances. That discretionary decision should be reviewed for reasonableness. … Further, the reasonableness standard of review, applied in the context of proposed judicial intervention at this preliminary stage of the Commission's work, may be expressed as follows: is there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted? …

[32] Justice Cromwell emphasized that a high degree of deference ought to be accorded an administrative tribunal in such a decision. He said, at paragraph 45:

> **45** In my view, the reviewing court should ask whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry. This formulation seems to me to bring

> together the two aspects of the jurisprudence to ensure that both the decision and the process are treated with appropriate judicial deference.

[33] In **Halifax**, the Supreme Court was dealing with a decision to refer a complaint to a board of inquiry. The issue that arises in this case is whether a decision to dismiss attracts the same level of deference as a decision to refer. The Commission, as respondent in this case, cited **French v. Nova Scotia (Human Rights Commission)**, 2012 NSSC 395, and submitted that the same level of deference is required to dismiss as to refer. But consider the comments of Justice Mainville in **Keith v. Canada (Correctional Service)**, 2012 FCA 117, where the Canadian Human Rights Commission declined to refer the complaint to a board of inquiry:

> **44** It is well settled that a decision of the Commission to refer a complaint to the Tribunal is subject to judicial review on a reasonableness standard …
>
> **45** In this case, we are not reviewing a decision to refer a complaint to the Tribunal. Rather, the Commission's decision was to dismiss the complaint. In my view, where the Commission dismisses a complaint under paragraph 43(3)(b) of the Act, a more probing review should be carried out.
>
> **46** Cromwell J. was careful to point out that the conclusion reached in *Halifax* only extends to cases where the complaint is referred for further inquiry. In such cases, any interested party may raise any arguments and submit any appropriate evidence at the second stage of the process; consequently, no final determination of the complaint is reached by referring it to further inquiry. As noted at paragraph 15 of *Halifax*, "[a]ll the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits" (see also paras. 23 and 50 of Halifax). In the case of a dismissal under paragraph 44(3)(b) of the Act, however, any further investigation or inquiry into the complaint by the Commission or the Tribunal is precluded.
>
> **47** The decision of the Commission to dismiss a complaint under paragraph 44(3)(b) of the Act is a final decision made at an early stage, but in such case — contrary to a decision refusing to deal with a complaint under section 41 — the decision is made with the benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes it colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(b) decision in the process contemplated by the

> Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.
>
> **48** In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(b) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.
>
> [Emphasis Added]

[34] In **Keith**, the court was dealing with *inter alia*, a complaint to the Canadian Human Rights Commission that the Corrections Service of Canada had discriminated by not recognizing the credentials of a foreign applicant for a professional position as equivalent to the Canadian requirements. The comments by the Federal Court of Appeal are quite relevant to the case at bar, since they both involve a dismissal of a complaint at the screening stage. In effect, a dismissal at the screening stage is a final decision on the merits because no further consideration is possible. Justice Mainville in **Keith** quite explicitly held a screening decision to a higher standard than a decision to refer, as the Supreme Court did in **Halifax**. It is appropriate to review the decision to dismiss at the screening stage in that light.

[35] In this jurisdiction, the Court of Appeal has commented on the duty of any tribunal when presented with an issue. In **Burke v. Newfoundland and Labrador Assn. of Public and Private Employees**, 2010 NLCA 12, the court was dealing with a decision in a labour relations context. While the tribunal in that case was not performing a "screening" function, as in the case before me, the comments on the circumstances which would ground a finding of reasonableness in the **Dunsmuir** analysis are helpful. At paragraph 67 the court said:

> **67** A decision that is unresponsive to the case presented cannot be said to meet the standard of "justification, transparency and intelligibility" within the *Dunsmuir* test of reasonableness. The essential submissions made should not be ignored. If they are regarded by the tribunal as frivolous or irrelevant to the issues in dispute, the tribunal should say so. If they are not, but rather, are simply unpersuasive, the tribunal should be expected to give at least a rational reason for

> why they are not persuasive. Such a requirement is inherent in the *Dunsmuir* focus on "the process of articulating reasons" to see if the result is supported by a chain of reasoning that is reasonable.

[36] The discussion in **Keith**, and the outline of the requirements for the reasonableness standard articulated in **Burke**, point strongly to the view that there is an additional onus on a tribunal when dismissing a complaint where no hearing on the merits had been held, and that the provision of reasons is an important part of the analysis. In performing such an analysis it should be shown that the tribunal's decision was responsive to the case presented. The fact that a dismissal at this stage is, in reality, a final decision without a hearing on the merits, warrants a greater level of care in order to satisfy the reasonableness standard on judicial review.

THE INVESTIGATION

[37] Following the delay in proceeding with the complaint, to which both sides consented, the Commission directed that its staff conduct an investigation as authorized by the legislation. The investigator invited submissions from both the complainant and the Crown. At its essence, the arguments concerned whether the Complainant's rights under the freedom of religion provisions in the *Act* were infringed when she was obliged to resign following a demand that she indicate her willingness to perform marriages between same-sex couples in her role as a duly appointed marriage commissioner. There was also the question of the employer's (Crown's) duty to accommodate her religious beliefs.

[38] The Commission had before it a submission by the Complainant, a Response to the Submission of the Complainant submitted by counsel for Her Majesty the Queen in Right of Newfoundland and Labrador. Subsequently, the Complainant submitted a response to the Crown's submission, and there was a supplementary response of the Crown to the Complainant's response. Finally there was a supplementary response of the Complainant to the Crown's supplementary response. In all, the Complainant made three submissions and the Crown two, which formed the basis for the investigation performed by Brianna Hookey, Investigating officer for the Commission.

[39] The investigating officer gathered the submissions of both sides, and provided a summary of the arguments of each. Counsel for the Complainant submitted that the investigator merely submitted a summary of the positions of each side, but did no assessment of the arguments made, nor was there an examination of the ways in which the interests of the Applicant could have been balanced with the public policy interest of providing equally accessible services to the public.

[40] The Commission took the position that the investigation was thorough in assembling the positions of both sides in a neutral fashion, and reviewing the law, in particular the recent comparable decisions in Saskatchewan. It did not, however, provide any analysis, or require the Crown to explore the accommodation options.

[41] I have reviewed the investigation file. It is a thorough presentation of the arguments of both parties, and presents them in a neutral manner. I do not believe the investigation was inadequate. The Commission was presented with sufficient information from the Investigating Officer to have determined whether a *prima facie* case was made out, and to have performed its adjudicating function in determining whether this matter proceeded to a board of inquiry.

[42] I should point out that the submissions of the Complainant that the investigation was inadequate stem from the fact that it did not make a recommendation to reject the complaint. It could not have done so, since that was not the role of the investigator. Its role was to present to the decision making body, the Commission, sufficient information about the positions of both sides that it, the Commission, could decide the matter. If there is any deficiency, it is not with the investigation. However, the Complainant, having received nothing by way of reasons from the Commission, would naturally assume that the Commission was guided by the reasoning of the Investigating Officer. Of course, that was not the role of the investigation.

[43] In my view, the Investigating Officer quite competently summarized the positions of both sides for the Commission. I do not accept the position of the Complainant that the investigation was incomplete or inadequate.

PROVISION OF REASONS

[44] Fundamental to any decision of an administrative tribunal, or, for that matter, any court, is the provision of reasons. The decision of the Commission was communicated to the Complainant by a letter without a rationale for the decision. It simply echoed the words in section 34(1)(a) by saying ". . . there is insufficient evidence to proceed to a Board of Inquiry," notwithstanding the significant submissions made by both sides.

[45] The *Act* provides two mechanisms for the initial screening stage of processing a complaint. Under section 32, the Executive Director has the authority to dismiss a complaint in specified circumstances. There is no authority provided in this section to refer a complaint to a Board of Inquiry. When the Executive Director acts under this section, reasons must be provided to the parties when the decision is communicated.

[46] The second mechanism arises under section 34. The Commission is provided the authority to refer a complaint to a Board of Inquiry. The conditions are outlined in the negative. The matter may be referred if: first, it has not been dismissed under section 32 and the Commission believes there is sufficient evidence to proceed; second, if the parties have been unable to settle the matter; and third, if no deferral is warranted.

[47] In this case there was no action by the Executive Director under s. 32, so it was left to the Commission to determine whether the complaint should proceed to a full hearing. The Commission determined there was insufficient evidence to refer to a board of inquiry. Section 34 does not contain a requirement for reasons. Should a reviewing court require reasons in these circumstances?

[48] The Applicant has argued that a decision to dismiss carries with it a requirement for reasons because there is a final determination being made about the merits of the complaint. While the decision of the Commission at the screening stage has been characterized as "administrative" and not judicial, the Supreme Court has commented that when a decision is made to refer to a full hearing, it is not adjudicating on the merits. In **Halifax**, the court said at paragraph 24:

> **24** … While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure …

[49] That case arose on an appeal against a decision to send the complaint to a full hearing. The Applicant in this case points out that the decision of the Commission to decline to send the matter to a board of inquiry represents a final determination of the issues, without providing any reasons for its assessment of the competing views. It is argued that there are issues before it which were left unanswered. It points out that the scope of an employer's duty to accommodate is one question not addressed and says that the failure of reasons does not permit an analysis on judicial review as required by **Dunsmuir**. Justice Orsborn specifically noted this in the **Coady** decision when he said, at paragraph 36:

> **36** … Clearly, in the absence of reasons, it is difficult to carry out a judicial review in the sense of assessing the decision for unreasonable omissions, whether crucial evidence has been overlooked or not considered, or whether the Commission has followed some impermissible chain of reasoning.

[50] The Applicant further argues that in this case there is nothing to indicate that the Commission followed a chain of analysis. The investigation presented two very different positions, but without analysis and without making recommendations. In the absence of reasons, there is nothing in the record to indicate how the Commission reached its conclusion. The *Act* contemplates judicial review in section 33, but if reasons are not provided, it makes the right to seek review an illusory one.

[51] Even in the absence of a requirement for reasons to permit judicial review, the dismissal of a complaint may raise the need for a higher standard. The

discussion above arising from the **Keith** case in the Federal Court of Appeal, and the **Burke** case in our Court of Appeal is relevant. Those cases seem to support the applicability of a higher standard imposed on tribunals such as the Commission when refusing to refer a complaint, since it is, in that instance, making a final determination on the question. The presence of a higher standard would suggest that at least minimal reasons are required to demonstrate the Commission's responsiveness to the complaint.

[52] Supporting its decision, the Commission cites **Francis v. CHC Composites Inc.**, 2006 NLTD 5, where Dymond J. assessed the appropriate standard of review for the Commission in similar circumstances. He said, at paragraph 21:

> **21** … The commission has the right to accept or reject a particular set of facts as being sufficient to forward a complaint on to a Board of Inquiry. There has to be an assessment of the facts as presented.

[53] Justice Dymond went on to describe the role the staff of the Commission play in making recommendations for consideration, at paragraph 22:

> **22** … At the Commission stage, prior to a referral to a Board of Inquiry, the expertise of staff is relied on by the Commission as it reviews any recommendations put to it by a staff member. …

[54] The **Francis** case concerned a complaint of racial and/or gender discrimination in levels of pay by a private employer. In declining to refer the complaint to a board of inquiry, the Commission's decision was communicated in terms similar to those used in the present case. However, in **Francis**, the Commission went on to say, noted in Justice Dymond's decision at paragraph 34:

> **34** … Our Code prohibits unequal pay for similar work.
>
> You and the males noted in the Report and correspondence from you appear to have different job classifications. Those different job classifications tend to undermine the argument that you and the subject males do similar work.

[55] The Commission dismissed the complaint, and the court in **Francis** said it was justified. I agree with this assessment of the role of the commission as a "screening" body. But I note, in that case, the Commission, in dismissing the complaint, provided rationale which was related to the complaint itself. It demonstrated responsiveness to the complaint. In addition, Dymond J. noted (above) that "there has to be an assessment of the facts …" The decision of the Commission in **Francis** is in marked contrast with the present decision in respect of the reasons provided.

[56] In **Hutchinson v. Canada (Minister of Environment)**, 2003 FCA 133, the Federal Court of Appeal cited with approval a passage from the trial division. That passage required a high level of deference by the court "… unless there be a breach of the principles of natural justice or other procedural unfairness …" The provision of reasons is one of the indicators of the presence of natural justice or procedural fairness.

[57] In **Jazairi v. Ontario (Human Rights Commission)** (1997), 99 O.A.C. 184, 1997 CarswellOnt 813, Justice Corbett says at paragraph 29, *et.seq*:

> **29** … It is the proper role of the Commission to "screen" cases in such fashion. The Commission must make its decision regarding the appointment of a Board of Inquiry on the basis of the investigator's report, the submissions of the parties, and a consideration of the appropriateness of such a step. In so doing, the Commission must conduct some analysis of the evidence.

[58] **Jazairi** is additional authority for demonstrating the requirement for some analysis of the evidence. The Court of Appeal in this Province took much the same approach in **Grant v. St. John's (City) Regional Health and Community Services Board**, 2003 NLCA 22. In that case the allegation was discrimination on the basis of mental disability in the context of employment. Following an investigation, the Commission declined to refer to a board of inquiry. However, it gave extensive reasons for its decision, and those reasons engaged the issues in play in the complaint. The Court upheld the decision of the Commission.

[59] In **Grant** the Court of Appeal referred to the decision of the Supreme Court of Canada in **Cooper v. Canada (Canadian Human Rights Commission)**, [1996] 3 S.C.R. 854, 1996 CarswellNat 1693, which noted that the Canadian Human Rights Commission was not a judicial body, but a screening body, akin to a judge at a preliminary inquiry. At paragraph 19 of **Grant**, the Court of Appeal quoted from the decision of Justice La Forest in **Cooper**:

> The Commission is not an adjudicative body; that is the role of a tribunal [board of inquiry] appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. …
>
> [Emphasis Added]

[60] The comparison with a preliminary inquiry is apt. In the context of a criminal charge, a judge must perform the screening role in a reasonable fashion. There must be a consideration of the case presented by the Crown. It cannot summarily dismiss evidence that, *prima facie*, demonstrates the Crown's case, without some rationale.

[61] In this case, by summarily dismissing the complaint without providing reasons, the Commission effectively foreclosed any consideration of the duties of the employer to accommodate, and the balancing that must take place when there is a clash of rights**.**

[62] The discussion in **Cooper** was under the federal legislation governing the Canadian Human Rights Commission. The related legislative scheme was generally similar to the legislation in this Province which was under consideration in **Grant**. As I have noted, the *Act* was amended in 2010, but the screening role of the Commission has remained the same.

[63] In **Grant**, Justice Welsh commented that where, in an employment context, the investigation made it clear that the employer had a valid defence to the complaint, it would be open to the Commission to decline to refer it to a board of inquiry. In that case, however, the facts were quite obvious. Nothing had been presented which would raise the question of discrimination on the basis of disability, and therefore the employer's action was, *prima facie,* non-discriminatory. More importantly, in considering the requirement for reasons, the Commission gave a rationale for its decision.

[64] In its submission the Commission argued further against the requirement for reasons by citing three authorities in this jurisdiction. Justice Adams upheld the decision of the Commission to decline to refer in **Spurrell v. Newfoundland (Human Rights Commission)**, 2003 NLSCTD 28. That case involved a complaint based on sexual harassment in the workplace. The employer had already done a thorough investigation. The commission provided a decision which contained no reasons, with wording very similar to the present case. In **Spurrell,** the issue was simply whether there was evidence of sexual harassment. The investigation uncovered no evidence to support the allegation. While the reasons were minimal, it is important that each case be viewed in context, and it was clear from the decision, when read with the investigation, the basis for the decision. In my view, I do not think it is helpful to the Commission in this case.

[65] Justice Adams, in finding that the Commission acted within its authority, also reviewed **Baker v. Canada (Minister of Citizenship & Immigration)**, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124 (S.C.C.), where Justice L'Hereux-Dubé provided a list of factors which might be considered. He listed them at paragraph 21 of **Spurrell**:

> **21** In *Baker*, in deciding that reasons ought to have been given, at paras. 23-27, L'Heureux-Dubé referred to a non-exhaustive list of factors to be considered:
>
> > (1) the nature of the decision being made and the process followed in making it,
> >
> > (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates,
> >
> > (3) the importance of the decision to the individual or individuals affected,

> (4) the legitimate expectations of the person challenging the decision, and
>
> (5) the choices of procedure made by the agency itself, particularly when the statute leaves the decision maker the ability to choose its own procedures or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[66] Several of these factors are those to be considered when undertaking a **Dunsmuir** analysis of the decision of a tribunal. However, in the context of the duty to provide reasons, I would view the third and fourth factors noted in the **Baker** case to be relevant in this case. In engaging the complainant's religious beliefs, the complaint affected important rights. Given the nature of this complaint, a reasonable expectation would be careful consideration of the issues that were raised.

[67] In **Stevens v. Newfoundland (Human Rights Commission)**, 2005 NLTD 153, Justice Adams upheld the decision of the Commission where it declined to refer on the basis that the complaint was out of time. The reasons provided, while minimal, were responsive to that issue.

[68] Justice Barry also upheld the Commission's decision to decline to refer in **Hiscock v. Newfoundland & Labrador (Human Rights Commission)** 2006 NLTD 172. He found that the lack of a specific direction in the statute to provide reasons gave the Commission the ability to perform the screening role in a summary fashion, and followed the approach of Justice Adams in **Spurrell**. However, at paragraph 19, he also cited Chief Justice Gushue in **Hallingham v. Newfoundland (Workers' Compensation Commission)** (1997), 158 Nfld. & P.E.I.R. 21, 1997 CarswellNfld 234 (C.A.):

> **19** … Even if the Tribunal were not statutorily required to give reasons, its failure to demonstrate that it considered all relevant factors in arriving at its decision could lead to an inference that it did not consider them …

[69] A review of these authorities indicates to me that while there is no specific requirement to provide reasons in the statute, the Commission's process must be intelligible, at least to the complainant, if not to a reviewing court. The statute specifically provides for judicial review of a decision to dismiss, in section 33, and it follows that there must be sufficient rationale in its decision to permit adequate review.

[70] The court has jurisdiction in a judicial review whether or not the statute provides for it. But where it is specifically provided, a reviewing court must have sufficient reasons either from the decision or the record generally to carry out its function. This was emphasized in the **Burke** case where the Court of Appeal said that reasons must do more than merely state conclusions. Reasons must be related to the submissions, as it said at paragraph 70:

> … if reasons must show that the tribunal grappled with the substance of the matter, it must follow that, for the purpose of a Dunsmuir analysis, the tribunal's reasoning process must also actually grapple with the substance of the matter. Where it appears, from an analysis of the reasons given in the context of the record and submissions made, that it did not address the essential submissions, it cannot be said that the decision meets the *Dunsmuir* standard of "justification, transparency and intelligibility".
>
> [Emphasis in original]

[71] In this case, the decision of the tribunal gave no rationale for dismissing the complaint. The investigation, while thoroughly done, provided no conclusions nor did it make any recommendations. There is nothing on the record which provides a rationale for the decision to dismiss, in particular, where this complaint involved not actions of, for example dismissal in an employment context, but religious belief. Where the complaint involves a particular action, it may be evident on the face of the record whether the complaint has merit. However, where conflicting values, involving rights of belief and non-discriminatory public services, are involved, something more is required.

[72] As an aside, I found it interesting that much of the brief and argument of the Commission, after dealing with the Standard of Review, was focused on providing

reasons for the merits of the decision. It is not appropriate to argue the merits of the complaint from the perspective of defending the Commission's decision at a judicial review. These reasons should have been evident from the record and the decision, read together. If there is room to argue the merits before a reviewing court, then there are probably grounds to send the matter to a full hearing.

[73] It is clear that the Commission is authorized to dismiss a complaint without providing extensive reasons. It is also evident that the record, together with the decision, should provide sufficient rationale to permit a reviewing court to assess the rationale, and hence the reasonableness, of the decision. However, the foregoing discussion leads me to only one conclusion, that is, in this case, the reasons provided were inadequate and unresponsive to the issues raised. The lack of reasons in the decision could not be saved by the results of the investigation, as it drew no conclusions and made no recommendations. It merely repeated and summarized the positions of the parties. It did not provide a qualitative analysis of the government's assertion that no accommodation was possible. In that circumstance, the Commission was obligated to provide at least minimal reasons, at least equivalent to the reasons provided in the **Francis** and the **Stevens** cases, but more importantly, to show responsiveness to the submissions of the parties.

[74] This conclusion, by itself, is sufficient to quash the decision and consider the appropriate remedy. However, several other issues were raised, including whether, given all the circumstances, the decision was reasonable. I will deal with them before considering remedies.

REASONABLENESS OF THE DECISION TO DISMISS

[75] The decision of the Commission, on review, is required to conform to the reasonableness standard as elaborated by the Supreme Court of Canada in **Dunsmuir.** At paragraph 47 it said:

> **47** … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is

> concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

[76] The Supreme Court adapted the principles in the **Dunsmuir** decision to the screening role of tribunals involved in a two stage process such as the Respondent in this case. In the **Halifax** case, Justice Cromwell for the court, in the passages cited earlier, focused on the screening role of the Nova Scotia Human Rights Commission. The Commission in that case, in pursuance of its screening role, decided that the matter ought to be referred to a board of inquiry. In light of the later comments of Justice Mainville in the **Keith** decision, it is arguable that a higher standard is expected of the Commission when it dismisses a complaint, because a dismissal is, in effect, a final decision, without an opportunity for a full hearing on the merits.

[77] Under this standard, it is not for the Court to substitute its decision for that of the panel unless it is determined to be deficient in its rationale and justification, and, in the words of Justice Mainville in **Keith** at paragraph 48, ". . . taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry . . . ." It is for me, then, to first, determine whether the Commission has followed a rational decision-making process, and second, whether it is reasonable to deny any opportunity for determination on the merits at a hearing.

Rational Decision-Making Process

[78] The Commission argues that it followed a process authorized by its legislation. It says it was entitled, following the thorough investigation done by its staff, to make a determination with no further analysis.

[79] The Federal Court recognized there is a test for the screening threshold in human rights cases. In **Kerr v. Bell Canada**, 2007 FC 1230, Justice Dawson concluded that a *prima facie* case of discrimination was sufficient to engage the

adjudication process, and at paragraph 10 cited earlier decisions of the Supreme Court of Canada:

> **10** As a matter of law, once a complainant establishes a prima facie case of discrimination under the Act, she ought to be entitled to relief in the absence of justification by the employer. See: *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.) at page 202. In *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) at page 558, the test for establishing a prima facie case of discrimination was described by the Court as follows:
>
> > The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.
>
> [Emphasis in the Kerr decision]

[80] I accept that once the Applicant established a *prima facie* case of discrimination, the Commission was obligated to assess any response of the employer to determine if it provided a complete answer, and if not, then refer the matter on to a board of inquiry. Whether there was a *prima facie* case can be found in the Commission's submission to the court. At paragraph 54 of its brief, the Commission clearly acknowledged that the impact on the Applicant was due to her religious beliefs:

> **54** The investigation found no evidence that Dichmont was discriminated against because of her religious beliefs. Rather, she was asked to resign her appointment if she could not marry same sex couples due to her religious beliefs because to allow her that option would have discriminated against same-sex couples accessing a public service.

[81] Even in its brief, the Commission's reasoning is defective. While it concluded there was no evidence of religious discrimination, it also acknowledged that her resignation was because of the incompatibility of the requirements of the employer with her religious beliefs. What it doesn't provide in its brief, and certainly did not in the investigation or its decision, is an assessment of whether the

deprivation of her employment was due to discrimination on the basis of religious belief, and if so, whether the government's response on accommodation responded fully to her complaint. It is an open question whether there was a way to accommodate her beliefs while respecting the rights of same-sex couples to access a public service.

[82] An examination of the initial complaint of the Applicant, and the subsequent investigation, indicates facts which, if believed, would constitute a *prima facie* case of discrimination on the basis of religious belief. She says in her complaint to the Commission filed on June 1st, 2005:

> I have been a Marriage Commissioner for the Province of Newfoundland and Labrador since December 1997. Recently the courts sanctioned same-sex marriages and I am opposed to performing them … my personal religious convictions forced me to resign.
>
> …
>
> I truly felt that … I was being penalized because of my religious observance.

[83] In her complaint she referred to the letter sent to all Marriage Commissioners on December 23, 2004, quoted above. She also asked that, in order to ensure the rights of same-sex couples were not infringed, that mechanisms be considered, as proposed in other jurisdictions, which would have the effect of accommodating her beliefs and still providing service to all citizens, whatever their sexual orientation.

[84] The Commission submitted, at paragraph 41 of its brief, that its ability to dismiss a complaint was somehow unfettered. It argued:

> **41** To not allow the Commission the power to dismiss a complaint would leave some complaints in a sort of legal limbo – not dismissed by the Executive Director under section 32 yet not referred by the Commission under section 34. This result is illogical and is contrary to the legislative intent of the government.

[85] I found this argument unpersuasive, since the Commission always has an option. It can refer the matter to a board of inquiry, or it can dismiss. There is no basis for the suggestion that by requiring a rational decision-making process the Commission does not thereby have the power to dismiss. If it chooses to dismiss, the record must indicate some structured and rational analysis. Otherwise, it is directed by the legislation to refer the matter to the next step.

[86] A significant part of the Commission's argument before this court centred on four decisions out of Saskatchewan which it said provided rationale for dismissing the complaint. I agree that in each of the cases, involving marriage commissioners who for religious reasons were not able to continue in that role, the facts raise issues similar to the case before the court. However, merely referring to decisions in another jurisdiction without applying the reasoning to the facts in this case does not constitute rational analysis.

[87] The three decisions of the Saskatchewan Human Rights Tribunal and a decision of the Saskatchewan of Appeal contain significant differences which must be considered before dismissing this complaint. In **Nichols v. Saskatchewan** (2006), CHRR 06-887; **Bjerland v. Saskatchewan** (2006), CHRR 06-888; and **Goertzen v. Saskatchewan** (2006), CHRR 06-889, the complaints to the Saskatchewan Human Rights Tribunal were from former marriage commissioners who had felt compelled to resign their positions for the same reasons as the Applicant in this case. The decisions arose from full hearings before the same tribunal, and were issued by the tribunal at the same time. The reasons in all three, except for the minor variations in the facts, are identical. The tribunal upheld the decisions to dismiss the complaints by the former marriage commissioners. I note, however, that it appears in each case, the decision to dismiss was made after a full hearing, and was accompanied by extensive reasons.

[88] One of the cases, **Nichols**, was the subject of a complaint by a same sex couple. The basis of the complaint was a refusal by Nichols to perform a marriage ceremony because he objected to same sex marriage for religious reasons. The tribunal which heard the complaint under Saskatchewan's *Human Rights Code*, S.S. 19790, c. S-24.1, upheld the complaint of discrimination and ordered that compensation be paid. Nichols appealed to the Saskatchewan Court of Queen's Bench and the case was reported as **Nichols v. M.J.**, 2009 SKQB 299.

[89] In **Nichols**, the court upheld the tribunal decision on the basis of two principles: first that there should not be discrimination in the provision of a government service in respect of citizens seeking service; and second, that it was not the duty of citizens to accommodate the religious beliefs of public officials.

[90] These cases were cited, presumably, to underscore the reasonableness of the decision of the Commission in this case, although, as noted above, they were not cited as part of the reason for dismissing the complaint. I was asked to consider that if the decisions from Saskatchewan reached a similar conclusion, then a decision to dismiss must be reasonable.

[91] However, there are some critical differences, which a thorough and rational analysis could have considered. First, while the three decisions of the Human Rights Tribunal noted above bear very closely on the decision before me, they are not binding on this court.

[92] Second, there was no discussion in any of the three of the duty to accommodate, particularly on the part of the government which administers the regime. Each of the cases turned solely on the question of whether discrimination in respect of sexual orientation was present by permitting marriage commissioners to refuse to perform marriages for same-sex couples. There was no consideration of alternate administrative mechanisms wherein marriage commissioners could be assigned cases by a central authority, thereby accommodating their beliefs, without discrimination towards those seeking service.

[93] Third, in the **Nichols** case in the Saskatchewan Court of Queen's Bench, there had been, admitted by the marriage commissioner Nichols, a denial of service based on sexual orientation. This is quite different from the instant case, where there has been no denial of service, and the Applicant clearly agrees that same-sex couples have the right to receive service on a non-discriminatory basis.

[94] The Commission was required to follow a rational decision-making process. Since it did not provide reasons, it is impossible to determine what process it

followed. On an examination of the issues before it, a rational process would have included an examination of whether a *prima facie* case of discrimination was made out, and if so, whether the response of the Second Respondent, the government, was adequate. It was not a reasonable response to dismiss a complaint without the opportunity to address these facts. The reference to the cases in Saskatchewan may have provided an argument, but only in the presence of a rational analysis of the complaint, and a substantial balancing of the competing rights involved.

Denial of opportunity for hearing on the merits

[95] As noted in the **Keith** case, there is a higher threshold required where a screening tribunal dismisses a complaint, because it is essentially a final decision on the merits. Should there have been an opportunity for a hearing on the substance of the Applicant's complaint?

[96] For at least two reasons, I find there should have been such an opportunity. First, as discussed above, the complaint made out a *prima facie* case of discrimination on the basis of religious belief. That case requires full consideration of its merits. Secondly, when a complaint of religious discrimination is made out, there is a balancing required between the competing rights. In this case, there is the obligation on the government to provide non-discriminatory services to citizens which must be balanced with the religious rights of citizens, like the Applicant, who provide the services. That requires an examination of the various mechanisms for accommodating religious beliefs in that context.

[97] On the issue of accommodation, the Saskatchewan Court of Appeal in **Saskatchewan (Marriage Act, Marriage Commissioners) (Re)**, 2011 SKCA 3, considered two proposals by the government for accommodating the religious beliefs of marriage commissioners. Two models were considered – the "grandfathering option", applicable only to those commissioners who were in place at the date of the legislation, permitted those who wished to file a written notice to take advantage of an exemption; and the "comprehensive option", which applied to all commissioners, without the filing of a written notice. The court rejected both options, but not before discussing the "minimal impairment" test arising from

Charter analysis. During the hearing, the court opined whether, for example, a "single-entry point" system could accomplish the goal of non-discrimination in the provision of services, and at the same time accommodate the religious beliefs of marriage commissioners. This would involve requiring all requests for the services of a marriage commissioner to be directed to a central office before any assignment to a particular individual. At paragraph 86-87 the court described the arrangements that might result:

> **86** In this sort of arrangement, the Director's office could reply to a request for marriage services by privately taking into account the religious beliefs of commissioners and then providing, to the couple planning to marry, a list of commissioners in the relevant geographical area who would be available on the planned date of the wedding and who would be prepared to officiate. The accommodation of commissioners who did not want to be involved in a same-sex ceremony would not be apparent to the couple proposing to wed and there would be no risk of the couple approaching a commissioner and being refused services because of their sexual orientation.
>
> **87** Mr. Megaw conceded and accepted that this sort of system did in fact represent a less restrictive means of achieving the objectives of the Grandfathering Option and the Comprehensive Option. None of the other participants in the hearing suggested otherwise or expressed concern that such an approach would be impractical, overly costly, or administratively unworkable. Further, we were advised by counsel for Egale that in Ontario, or in Toronto at least, a system along these lines is presently in place and operating.

[98] This comment was made in the context of determining whether there were less intrusive options than those presented by the government. While its comments on this issue were *obiter*, the Saskatchewan Court of Appeal mused whether the "single entry" option might be a mechanism which could accommodate and balance the rights of all parties. The court found that the options presented by the government were not acceptable, in that they did not achieve the proper balance. The result is that, at least from the perspective of the Saskatchewan Court of Appeal, there has not been thorough consideration in that province of the merits of systems that could accommodate both the concerns of same-sex couples, and of marriage commissioners who hold contrary religious beliefs.

[99] The Applicant takes issue with the assertion of the First Respondent, the government, and the Second Respondent, the Commission, that no reasonable

accommodation is possible. It points out that the only submission on this point was presented by the First Respondent. While the First Respondent might make submissions on its efforts at accommodation, the legislation gives the Commission the role to assess whether those efforts are reasonable. Moreover, says the applicant, there was nothing presented which demonstrated any efforts at accommodation, or any evidence that accommodation would inflict hardship on the employer.

[100] In my view, the question of accommodation of the religious beliefs of marriage commissioners has not yet been resolved in this jurisdiction, nor, it appears, in at least some other provinces, including Saskatchewan. And while this discussion cannot resolve the issue, it does indicate that it is reasonable to consider that further deliberation might be necessary before dismissing a complaint. In dismissing the complaint, the Commission precluded an opportunity for a board of inquiry to consider the question of discrimination and any accommodation options the government might propose.

[101] The Commission failed to provide reasons. More importantly, it had before it a *prima facie* allegation of religious discrimination which, if left unanswered made it unreasonable to dismiss the complaint rather than to refer to a hearing. Moreover, when presented with an assertion of the employer's obligation to accommodate those beliefs, it was unreasonable to dismiss the complaint without permitting a thorough hearing dealing with the reasonableness of possible methods of accommodation.

[102] In my view, the decision to dismiss, given the complaint and the submissions before it, was unreasonable, and should be quashed.

The Argument under the *Charter*

[103] The Applicant has argued that the decision of the Commission violated her rights under the *Canadian Charter of Rights and Freedoms*. She cites **Doré v. Barreau du Québec**, 2012 SCC 12, for the proposition that the decision itself was

contrary to the *Charter*. She argues that this case is authority that administrative decision-makers must exercise their statutory discretion in accordance with *Charter* protections. Justice Abella, speaking for the court, said at paragraph 35:

> … administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and ... cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).
>
> [Emphasis in Original]

[104] The Applicant has proposed that it was a breach of the *Charter* for the Commission to fail to consider the issue of accommodation, and to order a tribunal. As such, it seeks a remedy pursuant to the section 24 of the *Charter*.

[105] In making this argument, the Applicant says that the Commission's failure to acknowledge the infringement on her religious beliefs violated her constitutionally protected freedoms.

[106] The Commission responds to this argument by saying that the *Charter* is inapplicable in this situation. It cites **Taylor-Baptise v. Ontario Public Service Employees Union**, 2013 HRTO 180. This was a case where the female complainant was the subject of sexist comments from subordinates in the workplace on a web-based blog. Her application to the Human Rights Tribunal was dismissed. On further application for a reconsideration of her complaint, she argued that the Human Rights Tribunal was obligated to follow *Charter* jurisprudence in respect of sections 2(b) [freedom of expression], 2(d) [freedom of association], 7 [security of the person], and 15 [equality] in assessing whether the impugned comments violated her human rights.

[107] Adjudicator David Wright dismissed these arguments, saying at paragraph 46:

> **46** This is another way of stating her disagreement with the Decision. It is not a violation of the *Charter to* interpret the *Code* in a manner with which the applicant disagrees, or even in a manner that is wrong.

[108] In that case, consideration of *Charter* principles was done in the context of a full hearing with evidence. While I agree that administrative tribunals must operate within the *Charter* framework, in this case there has been no consideration of the various issues that are required to be balanced, because there has been no hearing. In my view, this is not an appropriate case to apply *Charter* principles or remedies. But when one applies the values which underlie the *Charter* to this case, the failure to acknowledge them speaks quite strongly to the unreasonableness of the decision to refuse to refer to a board of inquiry.

[109] Even in **Doré** the court recognized that any consideration of the *Charter* in a review of a decision of an administrative tribunal does not displace the normal analysis mandated by the court in **Dunsmuir**. Justice Abella raised the question at paragraph 45:

> **45** It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

[110] She went on to confirm that the reasonableness standard is still to be applied, even when *Charter* rights are being considered. A proper balancing of the protections afforded individuals in the *Charter* will provide a basis for determining the reasonableness of a decision on judicial review. She said, at paragraphs 57 and 58:

> **57** On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the

> statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. . . .
>
> **58** If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[111] Based on my analysis above, I have already found that from two perspectives the decision to dismiss the complaint was unreasonable: no reasons were provided, and a *prima facie* case of religious discrimination was raised leading to the reasonable conclusion that the matter ought to have been referred to an adjudication panel. The application of the *Charter* principles at play does not necessitate a separate analysis. But consideration of the *Charter* could have resulted in an analysis which would go to the reasonableness of the decision, and might have given some direction as to the approach the Commission ought to have taken.

[112] One further aspect of the protections afforded by the *Charter* is important in assessing the reasonableness of the Commission's decision. It would have been open to the Applicant to use these principles in a hearing before an adjudication panel. It was unreasonable for the Commission to deny her that opportunity by dismissing the complaint in a summary fashion.

[113] Having considered the analysis in **Doré**, I am unable to consider the application of the *Charter* to the decision of the Commission. It is impossible to impute discrimination to the Commission when, on the record, there has been no consideration by it of the merits of the complaint. While there was an investigation, nothing in the record indicates the kind of balancing of competing interests which would normally ground a decision of a panel. This court can only respond to the evidence and issues before it. In my view, my only option is to examine the issue on administrative law principles, and leave the consideration of *Charter* protections to another day perhaps at a hearing on the merits. The fact that the complaint could have engaged *Charter* principles is a further element which points to unreasonableness of the decision to dismiss.

[114] The Applicant, in making this argument, seeks a remedy under section 24, the remedial provision of the *Charter*. In my view, it cannot be applied in this case because there has not been a hearing on the merits, and hence there is nothing on the record which indicates a breach of the *Charter*.

REMEDY

[115] As for a remedy, the *Human Rights Act, 2010* provides for judicial review of a decision to dismiss a complaint in section 33, noted above. While the powers of this Court are not specified, it is clear that in any judicial review, all of the remedial powers of the court are engaged. I also note that the former legislation, the *Human Rights Code* contained a specific direction to this court in section 21(4):

> Where the commission declines to refer a complaint to a board of inquiry, the complainant may apply to the Trial Division for an order that the commission refer the complaint to a board of inquiry.

[116] In addition, there appears to be a presumption that the court has the authority to refer the complaint to a board of inquiry by reference to section 35 of the current *Act*, which reads as follows:

> **35** Where the commission refers a matter to a board of inquiry under subsection 34 (1) or where a judge of the Trial Division orders the commission to refer a matter to a board of inquiry on an appeal under section 33 , the commission shall refer the matter to the chief adjudicator of the panel appointed under section 36 who shall hear the matter or refer it to another panel member.

[117] This provision clearly contemplates that the court may refer the matter on an appeal under section 33. While section 33 refers to judicial review, rather than an appeal, the wording of section 35 by implication provides direction that the court has at least the power to refer to a board of inquiry.

[118] The Applicant submitted that I consider another option – that rather than refer the matter to an adjudication panel, I rule on the question of discrimination and whether there was reasonable accommodation possible. It argued on two grounds that this was possible. First, that remedial powers of the court on judicial review would permit it. Second, that her arguments concerning the *Charter* necessarily engaged the remedial provisions in section 24.

[119] The difficulty with this proposal is that there has not been a hearing where both sides aired these issues. While I might be able to rule on the question of whether discrimination on the basis of religious belief had been made out, as noted above, the threshold at this stage is only that a *prima facie* case had been established. There has been no real argument on the point, nor evidence presented, which would permit a final determination of this point.

[120] Even if I were to find that discrimination on the basis of religious belief had been established, there has been insufficient discussion of the accommodation options, and whether, in a practical sense, they could balance the rights of providers of the service with the rights of those seeking the services of marriage commissioners. The real difficulty is that, notwithstanding the *obiter* comments of the Saskatchewan Court of Appeal in the **Marriage Act Reference,** there has not been consideration of the challenges, if any, posed by accommodating her religious beliefs and whether such accommodation would pose a real hardship in implementation and in its effect on those citizens in the Province seeking these services.

[121] While it is not relevant to my consideration of the matter, I note that the government's web site lists over 170 individuals authorized as marriage commissioners. This includes those appointed by the Minister, and those who are *ex officio* as Provincial Court Judges and Mayors. In the larger towns and cities there are numerous individuals available as marriage commissioners, and, at first glance, accommodation should not be a problem. There are many communities, however, in which only one person is available. Does this present a problem in respect of reasonable accommodation? This is clearly an issue that needs to be addressed in a hearing which has the opportunity to hear evidence on the point, and make a determination which assesses the level of hardship this would impose, if any, on the government in ensuring equal treatment of citizens seeking services.

[122] Arguably, in an application for judicial review the court has broad powers to effect a remedy. Since there are no specific directions, I take it the powers of the court are not restricted by the legislation. In that light, it is reasonable that I have three options: I may dismiss the application; I may allow the application and remit it to the Commission for reconsideration; or I may order that the matter be referred to a board of inquiry for a hearing on the merits. If I accept the submission of the Applicant, I also have a fourth option, that of deciding the matter, and imposing a requirement that her religious beliefs be accommodated.

[123] While I had before me the full submissions of the Applicant and the Government, I have not had the benefit of the balancing of interests which must take place on consideration of a complaint. A board of inquiry appointed under the *Human Rights Act, 2010* has been delegated that authority by the legislature, and I do not see the basis on which I could usurp that legislative direction. I have determined that the Commission acted unreasonably in failing to refer the complaint for a hearing. I cannot make the assumption that an adjudicative panel would not act reasonably in considering the complaint. Therefore it is not appropriate for me to make a decision that an adjudicative panel would be empowered to make.

[124] Accordingly, in my view, the appropriate disposition is to order that the matter proceed to a board of inquiry under s. 35 of the *Human Rights Act, 2010*.

CONCLUSION

[125] The decision of the Commission to dismiss the complaint was unreasonable from at least three perspectives:

[126] First, it gave no reasons, and as such provided no basis on which it could be determined that an appropriate balancing analysis was undertaken;

[127] Second, its failure to refer for a hearing by an adjudication panel was unreasonable when it was clear that a *prima facie* case of religious discrimination had been made out, and the obligation of the employer, the government, to accommodate those beliefs, when balanced against the rights of citizens to receive equal treatment from public officers, had not been appropriately considered;

[128] Third, while a separate remedy under the *Charter* was not appropriate, the application of those principles was an additional element in emphasizing the unreasonableness of the decision.

COSTS

[129] The Applicant engaged three counsel for the purposes of this Application. The issues were not so complex to justify an order for costs in respect of all her counsel. However, given the genesis of this issue in the Province of Saskatchewan, and the jurisprudence out of that jurisdiction, and its relevance to this hearing, I am satisfied that it was reasonable there be counsel from that Province, in addition to local counsel. Accordingly, the Applicant shall have her costs on the basis of two counsel.

DISPOSITION

[130] The Application is granted. The decision of the Commission to dismiss the complaint of Mrs. Dichmont is set aside. Pursuant to section 35 of the *Human Rights Act, 2010* the Commission is directed to refer this matter to a board of inquiry.

[131] The Applicant shall have her costs on the basis of two counsel in accordance with Column 3 of the Scale of Costs in the Appendix to Rule 55 of the Rules of the Supreme Court.

_____

ALPHONSUS E. FAOUR
Justice

13

Case Name:

Cesaroni Holdings Ltd. v. Markham (Town)

IN THE MATTER OF subsection 17(24) of the Planning Act, R.S.O. 1990, c. P.13, as amended
Appellant: Cesaroni Holdings Limited
Appellant: Massimo Saragosa
Appellant: Gel-Don Investments Inc.
Appellant: Clarence & Mary Vallee and others
Subject: Proposed Official Plan Amendment No. 182
Municipality: Town of Markham
IN THE MATTER OF section 43 of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28, as amended
Request by: Gel-Don Investments Inc., P & F Meat Products Ltd., 589236 Ontario Ltd., Nella Galluci and Anastasia Cavelli
Request for: a review of the Board's Decision and Order issued on November 19, 2010

[2011] O.M.B.D. No. 629

OMB Case No. PL091117, OMB File No. PL091117

Ontario Municipal Board

Panel: Susan B. Campbell, Vice-Chair

Decision: August 19, 2011.

(36 paras.)

Appearances:

Gel-Don Investments Inc., P & F Meat Products Ltd., 589236 Ontario Ltd., Nella Gallucci and Anastasia Cavelli: M. Melling, counsel, M. Maslow (student-at-law).

Town of Markham: B. Ketcheson, counsel.

DECISION DELIVERED BY SUSAN B. CAMPBELL
AND ORDER OF THE BOARD

The Motion:

1 Gel-Don Investments Inc., et al (the "Applicants") bring a Motion pursuant to section 43 of the *Ontario Municipal Board Act* (the "OMB Act") for a rehearing of certain appeals with respect to the issue of the maximum permitted height of structures in Official Plan Amendment No. 182 ("OPA 182") of the Town of Markham (the "Town"). The Motion arises from a Decision/Order of the Board issued November 19, 2010 (the "Decision"). The Decision was in respect of appeals concerning OPA 182, which guide land use and urban design for properties and structures located within the Hamlet of Victoria Square (the "Hamlet") located in the Town.

2 In Exhibit # 1, the Motion Record of the Applicants, the basis for the Motion is summarized as follows:

> Contrary to law and the rules of natural justice and procedural fairness, the Decision is utterly inadequate to fulfill its central purpose: conveying the Board's reasons for its decision. Put another way, the Decision fails to identify the 'path' taken by the Board to reach its determination of the Height Issue.

3 The background to this Motion and the Applicants' position is set out in their Motion materials. A number of parties appealed OPA 182. Eventually these parties, including the Applicants agreed upon a final form of OPA 182, subject to a resolution by the Board of the Height Issue.

4 A three day hearing was held with one day dedicated exclusively to the Height Issue. This issue was the only issue contest by the Town and the Applicants. At the hearing the Town's and the Applicants' planners testified with respect to their differing opinions on the Height Issue.

5 It is the position of the Applicants that the nine page decision which was issued following the hearing addressed the Height Issue in a mere five sentences with no mention or analysis of the competing opinions and submissions on the Height Issue. The Applicants cited five sentences from the Decision:

> There is also a strong planning rationale to consider the Heritage characteristics since the Provincial Policy Statement now recognizes the value of properties listed for Heritage value as significant built heritage resources. There are a significant number of buildings listed for heritage in this Hamlet -- that is twenty five. Roofing can be a significant consideration of the appearance of a new structure and whether it fits within the area. Within the 3 corners there are 3 listed heritage buildings on 2 of the areas and there are 3 more nearby. This is a good reason to support the cautious approach adopted by the Town.

6 Counsel for the Applicants, supported by the Affidavit evidence of their planner, Maria Gatzios, maintains that the Decision, in its entirety, including the above noted five sentences, failed to mention or analyze the evidence put to the Board on the Height Issue.

7 In her Affidavit, found in Exhibit # 1, Tab 2, Ms Gatzios sets out the Height Issue which was before the Board. The Applicants preferred certain language with respect to building height in the Hamlet, while the Town preferred other language. Basically, the Applicants prefer language envisioning a height of up to three storeys within a building which has "a heritage architectural style, including a pitched roof and other compatible elements". The Town preferred language limiting the three storey height to a building with a pitched roof "... subject to demonstrating a heritage

architectural style which is compatible with adjacent lands".

8 Ms Gatzios said that her evidence on the Height Issue lasted for approximately three hours with a half an hour of cross-examination. In her Affidavit she sets out at paragraphs 22 through 42 the evidence that she gave at the hearing. This panel of the Board finds that the evidence was lengthy and detailed. It included an analysis of the difference between the Applicants' and the Town's version of the Height Policy; a review of architectural elements which would be permitted by the two versions; an analysis of impact; a review of the built-form context of the Hamlet; a review of the existing and planned context of the Hamlet; a review and analysis of the Hamlet, Town and Regional planning policies; a review and analysis of the Zoning By-law; and a review of staff reports. Ms Gatzios, in paragraph 42 of her Affidavit sets out her conclusions and the opinion which she provided to the Board. Again, they are numerous and detailed.

9 In paragraph 43 of her Affidavit Ms Gatzios says "the testimony of the Town's planning consultant, Mr. Butler, directly conflicted with, and contradicted my testimony on the Height Issue, particularly on a crucial point such as compatibility of three storey buildings with other structures within Victoria Square".

10 Ms Gatzios, in paragraph 45 of her Affidavit, says she has reviewed the Board's decision and it does not refer to a number of areas of either her evidence nor that of the Town's planner. She says in paragraphs 47 and 48 "after reviewing the Decision, I do not know and could not explain to my clients how the Board reached its conclusion in favour of the Town...I am unable to understand or explain to my clients why the Board found that two structures of the same height are fundamentally different because they contain a different number of storeys".

The Law, Applicants' Position:

11 Counsel for the Applicants submits, and this panel of the Board finds, that "higher Courts have issued key decisions providing a methodology for assessing the adequacy of our administrative tribunals' reasons for decision".

12 In *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) 210 the Ontario Court of Appeal reviewed the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817. The Court of Appeal said "in Baker, where the Supreme Court of Canada first explained that in certain circumstances the duty of procedural fairness requires reasons to be given, it also cautioned that, although it has the final say, the reviewing court must use flexibility in determining what constitutes reasons sufficient to meet this obligation".

13 The Court of Appeal noted that in *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, the Supreme Court of Canada said that the sufficiency of reasons must be assessed "functionally". The Court of Appeal said, in following that decision, that "in the context of administrative law, reasons must be sufficient to fulfill the purpose required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review". The Court went on to say "the 'path' taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way ... the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter".

14 In *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 the Supreme Court of Canada said "the question is whether the reasons are sufficient to allow meaningful appellate review and whether the parties' 'functional need to know' why the trial judge's decision has been made has been met". The Court went on to say "... reasons are particularly important 'when a trial judge is called upon to address troublesome principles of unsettled law or to resolve confused and contradictory evidence on a key issue'" (emphasis added).

15 Counsel for the Applicants submits that the evidence of the planner for the Applicants and that of the planner for the Town was focussed on a single issue and "was almost entirely contradictory". He maintains that the Decision neither addresses and assesses contradictory evidence, nor provides the parties with "the path" taken to reach the Decision. He submits that the Decision does not in any way demonstrate how the Board "grappled with the substance of the Height

Issue and the wealth of evidence tendered about it". There is no explanation of how the Board assessed the heritage evidence.

16 Secondly, Counsel submits that the Decision does not allow for effective judicial review in the manner set out by the Ontario Court of Appeal in *Law Society of Upper Canada v. Neinstein*, [2010] O.N.C.A. 193. The Court in that case said "where there is a right of appeal from (the) decision, reasons must provide a sufficient window into the decision to allow meaningful appellate review to the extent contemplated by the permitted scope of the appeal. Reasons for a decision that describe both what is decided and why that decision was made are susceptible to effective appellate review".

17 Counsel for the Applicants submits that "the Decision completely fails to discuss, never mind explain, the resolution of the contradictory evidence on the Height Issue". In fact the Decision is so bare that an appellate body would know nothing about what oral evidence was called on the Height Issue". Counsel therefore maintains that "the Decision is wholly inadequate to permit effective judicial review".

Town's Response; the Law:

18 The Town agrees that the only outstanding issue between the Applicants and the Town at the hearing was the Height Issue. It was the position of the Town, through the evidence of its planner, David Butler, that OPA 182 should be modified to allow non-residential buildings within the defined Hamlet area to have additional height up to a maximum of three storeys but only with the third storey being within a pitched roof and subject to compatibility to the heritage architectural style of the adjacent lands (Exhibit # 4, Factum of the Town).

19 The Town agrees that Mr. Butler and Ms Gatzios over a day and a half provided expert land use planning evidence to the Board on the Height Issue.

20 In paragraph 25 of its Factum, the Town says "the reasons for the Decision of the height issue are found on page 7" and quotes from the Decision. In paragraph 26 of the Factum the Town says that "these reasons appear to accept the evidence of Mr. Butler, which limits the consideration of the architectural features of the surroundings of a proposed three-storey building to within the Hamlet itself...it appears that the Board preferred the approach of assessing the appropriateness of the three-storey building to the existing development within the limits of Victoria Square".

21 The Town submits that the fact that the Board "preferred" the wording of the policy proposed by the Town means that the Board considered both the position of that of the Applicant and that of the Town.

22 Counsel for the Town reviewed the jurisprudence on the adequacy of reasons provided by a judge or a tribunal. It submits that the purpose of a decision and reasons is "satisfied if the reasons ... are able to demonstrate why the decision-maker made the decision, rather than how the decision-maker arrived at that conclusion. A logical connection between the decision and why it was reached should be shown".

23 Therefore, Counsel for the Town submits that even in cases in which the Board does not address expert evidence presented at the hearing in the decision, that does not necessarily justify a rehearing. He cites a decision of the Divisional Court, *Oro (Township) v. BAFMA Inc.*, 1995 CarswellOnt 164. The Court said "the fact that the Board chose not to follow all the expert evidence does not in itself justify the court interfering with the decision when it had other persons who were appearing in opposition thereto. The Board was establishing policy".

24 The Town therefore submits that there is no reason for a rehearing on the Height Issue. It is the position of the Town that "the Decision properly and carefully sets out evidence and findings that the Board relied on in support of the conclusions reached". Counsel submits that section 43 should not be used to allow a party to reargue its case; some measure of finality to a case is vital.

Board's Findings:

25 The Board finds that section 43 should not facilitate a reargument by a party of its case in the absence of the type of error set out in Rule 115.01 of the Board's Rules of Practice and Procedure. That Rule provides that a decision may be reviewed only if the Board on the review motion is "satisfied that the request for review raises a convincing and compelling case that the Board:

(a) acted outside its jurisdiction;

(b) violated the rules of natural justice and procedural fairness, including those against bias;

(c) made an error of law or fact such that the Board would likely have reached a different decision;

(d) heard false or misleading evidence ...; or

(e) should consider evidence which was not available at the time of the hearing, but that is credible and could affect the result."

26 Counsel for the Applicants relies on Rule 115.01(b), maintaining that contrary to the rules of natural justice, the Decision does not convey the Board's reasons for the Decision.

27 In considering the jurisprudence and Counsel's arguments, the Board must first comment on the relevance of *Oro (Township) v. BAFMA Inc.*, cited by Counsel for the Town. The Board finds the case to be irrelevant to the case at hand for two reasons. First, no one on this motion suggested that the Height Issue should be reheard because the Board "chose not to follow all the expert evidence". Rather Counsel for the Applicants submitted that the Decision does not disclose how the Board considered and weighed the conflicting opinion evidence of two expert land use planners.

28 The Board also finds that Oro, decided in 1995, is irrelevant to one's consideration of the adequacy of a decision and reasons in 2011. The Supreme Court of Canada and the Ontario Court of Appeal in decisions made in 1999, 2007 and 2009 have spoken to what constitutes adequate reasons from a trial judge or administrative tribunal and the Board must follow those decisions.

29 The Board finds the following words of the Ontario Court of Appeal in *Clifford*, decided in 2009, particularly relevant to the case at hand: "it is surely desirable that public decision makers empowered by law to make decisions affecting the rights, privileges or interests of individuals should, so far as possible, explain their decisions". The Board has such a legal obligation.

30 The Court of Appeal in *Clifford* followed the decision of the Supreme Court of Canada in *R. v. M. (R. E.)*, decided in 2008. A decision must let "the individual whose rights, privileges or interests are affected know why the decision was made and permit effective judicial review". A decision must show that the "tribunal grappled with the substance of the matter" and "the 'path' taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding".

31 In the case at hand the Board must therefore ask whether the Applicants, as parties whose rights, privileges and interest are affected can determine why the Decision on the Height Issue was made. Can they determine the "path taken by the tribunal to reach its decision"? Did the Board demonstrate that it "grappled" with the substance of the matter?

32 Having reviewed the Decision in its entirety, and not only the five sentences cited by Counsel for the Applicants, the Board finds that the reasons for the Board's Decision on the Height Issue are adequate. The Board apparently had

before it considerable conflicting opinion evidence which it did not review in detail, however the Decision discloses that the Board "grappled" with the substance of the Issue. It considered evidence with respect to the nature of the Hamlet and its heritage characteristics. It considered why two or three storeys in the Hamlet are appropriate and how those storeys should be accommodated from a design perspective. This panel of the Board acknowledges, in keeping with the decision of the Supreme Court of Canada in *R. v. M. (R. E.)*, that a tribunal need not "describe every landmark along the way" to its decision. Rather, it must make the "path" to the decision clear. This panel of the Board finds that the "path" is clear and although the Applicant may have hoped to find more "landmarks", the lack of such "landmarks" is not fatal to the decision.

33 This panel of the Board finds that the Board discharged its responsibility as set out by the Supreme Court of Canada and the Ontario Court of Appeal: the Board explained to the parties concerned, that is, the parties whose rights, privileges or interests are affected, why it made its decision. The Board had regard to evidence on the heritage nature of the Hamlet and the manner in which height in new buildings in the Hamlet should be accommodated. It decided that the wording of the policy as suggested by the Town was appropriate in the circumstances. There is nothing lacking in the Decision that would cause this panel of the Board to order a rehearing of the Height Issue and in effect allow the Applicants to reargue their case. The Board did not violate the rules of natural justice.

34 The Board does not accept the evidence of Ms Gatzios that she was unable to explain to her clients the Decision of the Board on the Height Issue. The reasons for the Decision on the Height Issue are discernable from a reading of the entire Decision.

35 The Motion is denied.

36 This is the Order of the Board.

SUSAN B. CAMPBELL
VICE-CHAIR