EB-2017-0335

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Hydro One Networks Inc. for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018;

AND IN THE MATTER OF the Decision of the Ontario Energy Board on the Application dated September 28, 2017;

AND IN THE MATTER OF Rules 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

Book of Authorities of Ontario Energy Board Staff

January 22, 2018

Tab	Document
1	*Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670
2	*Lake v. Canada (Minister of Justice)*, 2008 SCC 23
3	*N.L.N.U. v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
4	*R. v. Dinardo*, 2008 SCC 24

Tab 1

CanLII

Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670 (CanLII)

Date: 2009-09-23
Docket: C49624
Other citations: 98 OR (3d) 210; 312 DLR (4th) 70; 93 Admin LR (4th) 131; [2009] OJ No 3900 (QL); 188 LAC (4th) 97; 256 OAC 354
Citation: Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670 (CanLII), <http://canlii.ca/t/25qjr>, retrieved on 2018-01-18

Clifford v. The Attorney General of Ontario et al.
[Indexed as: Clifford v. Ontario (Attorney General)]

98 O.R. (3d) 210

Court of Appeal for Ontario,
Goudge, Sharpe and R.P. Armstrong JJ.A.
September 23, 2009

Administrative law -- Duty to act fairly -- Sufficiency of reasons -- Appeal Sub-committee of Ontario Municipal Employees Retirement System noting that it had to decide whether respondent and deceased were in common-law relationship for at least three years prior to deceased's death and whether that relationship was still in place at time of his death -- Tribunal reviewing evidence and answering both questions in affirmative -- Tribunal having duty to give reasons -- Standard of review of duty to give reasons being correctness -- Functional assessment of sufficiency of reasons required -- Tribunal's reasons adequate as they explained why it answered questions as it did and they allowed for effective judicial review.

Administrative law -- Judicial review -- Standard of review -- Standard of review of tribunal's obligation to give reasons being correctness.

The deceased's ex-wife S was his named beneficiary under his OMERS pension plan. B asserted that she was the deceased's common-law partner at the time of his death. The President of OMERS concluded that B, and not S, was entitled to the surviving spousal benefit under the OMERS plan. S appealed to the Appeal Sub-committee of OMERS (the "Tribunal"). The Tribunal noted that it had to decide two questions: whether B and the deceased were in a common-law relationship for at least three years before his death; and whether that relationship was still in place at the time of his death. The Tribunal reviewed the evidence and answered both questions in the affirmative. S applied for judicial review

of that decision. The Divisional Court found that the Tribunal was required to give reasons and that it failed to do so adequately. B and OMERS appealed.

Held, the appeal should be allowed.

Procedural fairness imposed a legal obligation on the Tribunal to give reasons for its decision. The standard of review of the obligation to give reasons is correctness. The sufficiency of reasons 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. That is accomplished if the reasons, read in context, show why the tribunal acted as it did. The basis of the decision must be explained and that explanation must be logically linked to the decision made. The tribunal is not required to refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. In this case, the reasons were sufficient to meet the Tribunal's legal obligation. They demonstrated that the Tribunal grappled with the two live issues before it. From a funct ional perspective, they explained why the Tribunal gave the answers it did to those questions. They allowed for effective judicial review of the decision itself. As for the decision itself, it was reasonable. There was clearly ample evidence to support the Tribunal's answers to the questions before it. [page211]

APPEAL from the judgment of the Divisional Court (Molloy, J.C. Murray JJ.; Pitt J. dissenting) (2008), 2008 CanLII 26256 (ON SCDC), 90 O.R. (3d) 742, [2008] O.J. No. 2136 (Div. Ct.) allowing the application for judicial review of a decision of the Appeal Sub-committee of the Ontario Municipal Employees Retirement System.

Cases referred to Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, REJB 1999-13279, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9 (CanLII), 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC Â220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65; R. v. R.E.M., [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51 (CanLII), 235 C.C.C. (3d) 290, 83 B.C.L.R. (4th) 44, EYB 2008-148153, J.E. 2008-1861, [2008] 11 W.W.R. 383, 260 B.C.A.C. 40, 60 C.R. (6th) 1, 380 N.R. 47, 79 W.C.B. (2d) 321, 297 D.L.R. (4th) 577
Statutes referred to Ontario Municipal Employees Retirement System Act, 2006, S.O. 2006, c. 2 Pension Benefits Act, R.S.O. 1990, c. P.8

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

Sheila Holmes, for appellant Bernadette Campbell.

John Legge, for respondent Sylvia Clifford.

The judgment of the court was delivered by

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 [page212] 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 [page213] 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 [page214] 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 SCC 9 (CanLII), [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9. 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 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 established that in certain circumstances the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision. [page215]

[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:
[page216]

> [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 SCC 51 (CanLII), [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, particularly paras. 15 to 35. [page217] 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 [page218] 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 give 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 [page219] 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 non-lawyers. 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 [page220] 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.

Appeal allowed.

Tab 2

CanLII

Lake v. Canada (Minister of Justice), [2008] 1 SCR 761, 2008 SCC 23 (CanLII)

Date: 2008-05-08
Docket: 31631
Other citations: 292 DLR (4th) 193; 230 CCC (3d) 449; 56 CR (6th) 336; 373 NR 339; 72 Admin LR (4th) 30; EYB 2008-132986; JE 2008-970; [2008] SCJ No 23 (QL); 171 CRR (2d) 280; [2008] ACS no 23; 236 OAC 371
Citation: Lake v. Canada (Minister of Justice), [2008] 1 SCR 761, 2008 SCC 23 (CanLII), <http://canlii.ca/t/1wtj4>, retrieved on 2018-01-19

SUPREME COURT OF CANADA

CITATION: Lake *v.* Canada (Minister of Justice), [2008] 1 S.C.R. 761, 2008 SCC 23

DATE: 20080508
DOCKET: 31631

BETWEEN:

Talib Steven Lake
Appellant
and
Canada (Minister of Justice)
Respondent

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

REASONS FOR JUDGMENT: (paras. 1 to 49) LeBel J. (McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella, Charron and Rothstein J J. concurring)

Lake *v.* Canada (Minister of Justice), [2008] 1 S.C.R. 761, 2008 SCC 23

Talib Steven Lake
Appellant

v.

Canada (Minister of Justice)
Respondent

Indexed as: Lake *v.* Canada (Minister of Justice)

Neutral citation: 2008 SCC 23.

File No.: 31631.

2007: December 6; 2008: May 8.

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

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Mobility rights — Right to remain in Canada — Extradition — Whether Minister of Justice's decision to surrender fugitive to U.S. breached his mobility rights — Canadian Charter of Rights and Freedoms, s. 6(1).

Extradition — Surrender — Minister of Justice surrendering fugitive to U.S. — Whether extradition unjustifiably infringed fugitive's mobility rights — Whether Minister erred in his assessment of Cotroni factors — Whether Minister failed to provide adequate reasons for surrender — Canadian Charter of Rights and Freedoms, s. 6(1).

Extradition — Judicial review of Minister's order — Standard of review — Minister of Justice surrendering fugitive to U.S. — Whether reasonableness standard applies to Minister's decision to order surrender of fugitive when fugitive's rights under Canadian Charter of Rights and Freedoms engaged — If so, whether Minister's decision was reasonable — Extradition Act, S.C. 1999, c. 18, s. 57.

In 1997, the appellant committed a number of offences in Canada related to trafficking crack cocaine and also sold crack cocaine to an undercover Ontario Provincial Police officer in Detroit, Michigan. The appellant was charged in Canada with six offences, including conspiracy to traffic in crack cocaine, but he was not charged with trafficking cocaine in relation to the Detroit transaction. The appellant pled guilty to the charges against him. At the sentencing hearing, Crown counsel

indicated that he agreed with the joint recommendation for a sentence at the low end of the range with respect to these types of offences because the appellant faced a strong likelihood of additional conviction and sentencing in the U.S. The appellant had received concurrent sentences of one to three years of imprisonment. After the appellant served his Canadian jail sentences, the U.S. requested his extradition to stand trial in that country in relation to the Detroit transaction. The appellant was committed for extradition and, in 2005, the Minister of Justice ordered his surrender. The Court of Appeal dismissed an application for judicial review of the Minister's decision.

Held: The appeal should be dismissed.

The Minister's reasons for his decision to surrender the appellant were sufficient to allow the appellant to understand the basis for the decision and the reviewing court to assess the validity of the decision. The Minister is required to give the appellant reasons for his decision and to respond to any submissions made by the appellant; however, the Minister is not required to provide a detailed analysis for every *Cotroni* factor. The *Cotroni* factors do not have to be given equal weight and nothing precludes a conclusion that a single factor is determinative in a particular case. Although the *locus delicti* of the foreign offence is not always determinative, there was nothing unreasonable about the Minister's conclusion in this case that no other *Cotroni* factor outweighs the fact that the appellant's conduct occurred in the U.S. [25] [30] [46] [48]

Section 6(1) of the *Canadian Charter of Rights and Freedoms* is *prima facie* infringed by a decision to surrender a Canadian citizen, but the infringement can generally be justified under s. 1 of the *Charter*. Judicial assessment by a court of appeal of the Minister's decision to surrender a fugitive is a form of administrative law review under s. 57 of the *Extradition Act* and the applicable administrative law standard is reasonableness. The Minister's superior expertise in relation to Canada's international obligations and foreign affairs is relevant to the review of his assessment of whether an extradition is justified. The legal threshold for finding that a surrender violates s. 6(1) of the *Charter* is evidence of improper or arbitrary motives for the decision not to prosecute the fugitive in Canada. This leaves room for considerable deference to the Minister. The fact that the Minister is not empowered to grant constitutional remedies does not determine the applicable standard. The assessment of whether a surrender violates s. 7 of the *Charter* similarly involves balancing factors for and against extradition to determine whether extradition would shock the conscience. The Minister must balance the individual's circumstances and the consequences of extradition against such factors as the seriousness of the offence for which extradition is sought, the importance of meeting Canada's international obligations, and the need to ensure that Canada is not used as a safe haven from justice. The Minister's decision is largely a political decision and falls at the extreme legislative end of the continuum of administrative decision making. Interference with a Minister's decision should be limited to exceptional cases of real substance. [22] [26] [34] [36-39]

> According deference to the Minister's assessment of the constitutional validity of his decision to surrender a fugitive does not unacceptably attenuate judicial review. The reviewing court's role is to determine whether the Minister's decision falls within a range of reasonable outcomes. This requires examining whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. The Minister's conclusion should be upheld by a reviewing court unless it is unreasonable. This approach reflects the fact that the Minister's assessments under ss. 6(1) and 7 of the *Charter* involve fact-based balancing tests. The Minister is in the best position to weigh the relevant factors. [40-41]

The Minister's conclusion that the appellant was not prosecuted and sentenced in Canada for the Detroit transaction was not unreasonable. The appellant was not charged with the substantive offence of trafficking in relation to the transaction and the charge of conspiracy to traffic did not subsume the substantive offence of trafficking. The sentencing judge made no reference to the charge in the U.S. at the sentencing hearing. Crown counsel sought a reduced sentence for the convictions in Canada in light of the likelihood that the appellant would be convicted and punished in the U.S. for the Detroit transaction. The Minister's deference to the U.S. owing to the fact that the Detroit transaction occurred within its territory provides a sufficient basis for concluding that the decision to surrender the appellant, including the decision that the extradition would not violate s. 6(1) of the *Charter*, was reasonable. [44-45] [48]

Cases Cited

Explained: *United States of America v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 (CanLII); **not followed:** *Stewart v. Canada (Minister of Justice)* (1998), 1998 CanLII 6226 (BC CA), 131 C.C.C. (3d) 423; *United States of America v. Gillingham* (2004), 2004 BCCA 226 (CanLII), 184 C.C.C. (3d) 97; *United States of America v. Maydak* (2004), 2004 BCCA 478 (CanLII), 190 C.C.C. (3d) 71; *United States of America v. Kunze* (2005), 2005 BCCA 87 (CanLII), 194 C.C.C. (3d) 422; *Hanson v. Canada (Minister of Justice)* (2005), 2005 BCCA 77 (CanLII), 195 C.C.C. (3d) 46; *United States of America v. Fordham* (2005), 2005 BCCA 197 (CanLII), 196 C.C.C. (3d) 39; *Ganis v. Canada (Minister of Justice)* (2006), 2006 BCCA 543 (CanLII), 216 C.C.C. (3d) 337; **referred to:** *United States of America v. Cotroni*, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469; *Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500; *United States v. Allard*, 1987 CanLII 50 (SCC), [1987] 1 S.C.R. 564; *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631; *Bonamie, Re* (2001), 2001 ABCA 267 (CanLII), 293 A.R. 201; *United States of Mexico v. Hurley* (1997), 1997 CanLII 3355 (ON CA), 35 O.R. (3d) 481; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *United States of America v. Taylor* (2003), 2003 BCCA 250 (CanLII), 175 C.C.C. (3d) 185; *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387; *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (CanLII); *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 (CanLII); *Suresh v. Canada (Minister of Citizenship*

and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1 (CanLII); *Sheppe v. The Queen*, 1980 CanLII 190 (SCC), [1980] 2 S.C.R. 22; *United States of America v. Jamieson*, 1996 CanLII 224 (SCC), [1996] 1 S.C.R. 465; *United States of America v. Whitley* (1994), 1994 CanLII 498 (ON CA), 94 C.C.C. (3d) 99, aff'd 1996 CanLII 225 (SCC), [1996] 1 S.C.R. 467; *Ross v. United States of America* (1994), 1994 CanLII 1749 (BC CA), 93 C.C.C. (3d) 500, aff'd 1996 CanLII 226 (SCC), [1996] 1 S.C.R. 469.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 6(1), 7.

Extradition Act, R.S.C. 1985, c. E-23, s. 9(3).

Extradition Act, S.C. 1999, c. 18, ss. 25, 43(1), 44(1), 47(*a*), 49, 57(2), 57(7).

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(4).

Treaties and Other International Instruments

Treaty on Extradition Between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 4.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Armstrong and MacFarland JJ.A.) (2006), 2006 CanLII 29924 (ON CA), 212 C.C.C. (3d) 51, 145 C.R.R. (2d) 156, [2006] O.J. No. 3485 (QL) (*sub nom. United States of America v. Lake*), dismissing an application for judicial review from a surrender order made by the Minister of Justice. Appeal dismissed.

John Norris, for the appellant.

Robert J. Frater and *Jeffrey G. Johnston*, for the respondent.

The judgment of the Court was delivered by

LEBEL J. —

I. Introduction

[1] The appellant Talib Steven Lake, a dual American and Canadian citizen, faces extradition to the United States of America to stand trial on a charge of unlawfully distributing nearly 100 grams of crack cocaine in the city of Detroit, Michigan. He was committed for surrender after an extradition hearing, and the Minister of Justice ordered his surrender. Mr. Lake appeals to this Court from the Ontario Court of Appeal's decision dismissing an application for judicial review of the Minister's surrender order. He contends that extradition would unjustifiably infringe his rights under s. 6(1) of the *Canadian Charter of Rights and Freedoms*. He argues that the Minister erred in his assessment of the factors set out by this Court in *United*

States of America v. Cotroni, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469, and in his conclusion that extradition was preferable to prosecution in Canada. He adds that the Minister failed to provide adequate reasons as to why extradition was preferred.

[2] This appeal raises two central issues. First, what is the appropriate standard to be applied by courts in reviewing a decision by the Minister to order surrender? Second, in light of that standard, should the Minister's decision be set aside in this case? In connection with these issues, the appellant also contends that the Minister did not provide adequate reasons for ordering his surrender. He argues that while deference is generally owed to a decision by the Minister to order surrender, where an individual's *Charter* rights are engaged, the appropriate standard of review is correctness. The respondent submits that, according to the jurisprudence of this Court, the Minister's assessment of a fugitive's *Charter* rights is also entitled to deference. The nature of the Minister's decision requires him, even when considering a fugitive's *Charter* rights, to weigh competing factors, many of which include foreign policy considerations in which the Minister has superior expertise. Heightened scrutiny and interference by the judiciary has the potential to seriously disrupt the extradition regime, which engages Canada's international obligations and serves as an important tool in the suppression of crime.

[3] In my view, the Minister provided sufficient reasons for his decision to order the appellant's surrender. That decision was reviewable on a standard of reasonableness, and it was reasonable. I would therefore dismiss the appeal.

II. Background

[4] In 1997 the appellant was charged in Windsor, Ontario with a series of offences related to cocaine trafficking. The Crown alleged that at the time, he was a U.S. citizen residing in Detroit. The charges were laid as a result of an undercover operation of the Windsor unit of the O.P.P. Drug Enforcement Branch. Mr. Lake became known to one of the investigators, Constable Ralph Faiella, as a result of a meeting between Constable Faiella and the appellant's cousin, Aaron Walls, in Windsor. In August 1997, Mr. Walls, a lifetime resident of Windsor, offered to sell Constable Faiella crack cocaine, which he said Mr. Lake would bring from Detroit. The officer agreed and a meeting was arranged. At the meeting, Constable Faiella was introduced to Mr. Lake and paid him C$1,700 in exchange for 25 grams of crack cocaine.

[5] Subsequently, as a result of earlier meetings, Constable Faiella accepted an invitation to play golf with Mr. Walls and Mr. Lake. He exchanged

telephone numbers with Mr. Lake, who indicated that he would be happy to sell him several ounces of cocaine for $1,625 per ounce. They agreed to contact each other at a later date.

[6] On September 18, 1997, Mr. Lake and Constable Faiella made arrangements over the phone for a four-ounce transaction. Mr. Lake instructed the officer to meet him in front of Kinko's Restaurant in Detroit the following Monday, September 22, 1997, at 11:00 a.m. The Federal Bureau of Investigation was informed, and it agreed to provide and monitor a body pack device and to provide additional surveillance. The transaction was intercepted and recorded by the F.B.I. The total weight of the cocaine purchased by Constable Faiella was later determined to be approximately 99.2 grams.

[7] Constable Faiella participated in another transaction with Mr. Walls and Mr. Lake involving the sale of 96.5 grams of crack cocaine at Mr. Walls' Windsor residence in October 1997. On December 8, 1997, he telephoned Mr. Lake and set up a transaction for another four ounces of cocaine the following day. He met Mr. Walls and another man at a Windsor convenience store, where both men were immediately arrested. A search warrant was then executed at the Walls residence, and when the police arrived, Mr. Lake was in the backyard with another man and was seen to be placing something at the base of a fence. Mr. Lake was arrested, and the item seized next to the fence was found to be a plastic bag containing 65 grams of crack cocaine.

[8] The appellant was charged with six offences in relation to the above transactions. One of the charges was that he had conspired with Aaron Walls to traffic in a controlled substance between September 11 and September 22, 1997. The appellant was not, however, charged with the substantive offence of trafficking in relation to the Detroit transaction. He pled guilty on all charges.

A. *Sentencing Hearing*

[9] At the sentencing hearing before Ouellette J. of the Ontario Court (General Division), counsel made a joint submission consisting of an agreed statement of facts and a recommendation that Mr. Lake be sentenced to a total of three years in prison. Crown counsel indicated that the motivating factor in his agreeing to a three-year sentence, which he acknowledged to be "on the low end of the range with respect to these types of offences", was that he had recently received a copy of an indictment against the appellant issued in the United States District Court, Eastern District of Michigan, for the offence of trafficking in cocaine allegedly committed on September 22, 1997. Given the compelling evidence against the appellant, Crown counsel was of

the view that Mr. Lake faced a strong likelihood of conviction in the United States on this charge and would therefore likely serve time there in addition to his sentence on the Canadian charges. At the time, although the appellant claimed to be a Canadian citizen by virtue of the fact that his mother had been born in Canada, he could not offer any proof of his Canadian citizenship and it was expected that deportation proceedings would take place upon conclusion of his sentence.

[10] The appellant was sentenced to a total of three years' imprisonment, in addition to the eight months he had spent in pre-trial custody. At some point, he was able to establish his Canadian citizenship, and he settled in Windsor upon his release.

B. *Extradition Request and Minister's Reasons for Surrender*

[11] On May 5, 2003, after Mr. Lake had served his Canadian jail sentence, the United States requested that he be extradited to stand trial on the trafficking offence. On June 30, 2003, the Minister issued an authority to proceed. On May 31, 2004, Mr. Lake was committed for extradition. His counsel made submissions to the Minister, arguing against surrender on several grounds. However, the Minister ordered Mr. Lake's surrender on February 28, 2005.

[12] In his reasons, the Minister stated that the competent prosecutorial authority had, after considering the documentary evidence provided by the American authorities as well as the factors set out by this Court in *Cotroni*, decided that prosecution of Mr. Lake in Canada was not warranted. Although the Minister indicated that he would not interfere with this exercise of prosecutorial discretion, he nevertheless went on to consider whether the decision to prefer extradition over prosecution in Canada was consistent with Mr. Lake's rights under s. 6(1) of the *Charter*. Given that the transfer of cocaine was alleged to have taken place in Detroit, the Minister concluded that Canada did not have jurisdiction to prosecute the offence. Even if some form of prosecution in Canada were possible for this offence, he would have yielded to the superior interest of the United States in protecting its own public and maintaining public confidence in its laws and criminal justice system through prosecution. In the Minister's opinion, surrender would not unjustifiably infringe Mr. Lake's rights under s. 6(1) of the *Charter*.

[13] The Minister also considered whether he should deny surrender on the basis that Mr. Lake had already been convicted and sentenced for the conduct, and the offence, for which he was sought in the United States. He decided that although the Canadian and American charges arose from the same investigation and involved overlapping conduct, they were separate and distinct and concerned two different

wrongs. Ordering Mr. Lake's surrender therefore would not violate Art. 4 of the *Treaty on Extradition Between Canada and the United States of America*, Can. T.S. 1976 No. 3, or s. 47(*a*) of the *Extradition Act*, S.C. 1999, c. 18. The Minister added that Crown counsel had taken the American indictment into account in agreeing to a reduced sentence and that Ouellette J. had accepted that Mr. Lake would likely face further prosecution. He concluded that Mr. Lake had not already been sentenced for the conduct underlying the American charge.

[14] The Minister decided that, despite the delay between the U.S. indictment and the formal request for Mr. Lake's extradition, this case did not amount to one of the "clearest of cases" that would justify ignoring Canada's obligations under the Treaty. He noted that the delay between the end of Mr. Lake's Canadian sentence and the request was only two years, and that Mr. Lake was aware of the indictment at the time of his Canadian sentencing hearing and could have turned himself in at any time in order to deal with the charge expeditiously. There was no suggestion that the delay had affected the possibility that Mr. Lake would receive a fair trial in the United States or his ability to make full answer and defence. The Minister also observed that the mandatory 10-year minimum sentence Mr. Lake would face if convicted in the United States would not "shock the conscience" of Canadians, nor would it be unjust or oppressive in light of the seriousness of the allegations against him. Nor would Mr. Lake's personal circumstances justify refusing surrender. According to the Minister, while it was commendable that Mr. Lake was supporting his common law spouse and their children in Windsor, this fact did not amount to a compelling or overriding circumstance that outweighed the importance of ensuring that Canada was not used as a safe haven by fugitives from justice.

C. *Judicial History — Ontario Court of Appeal* (2006), 2006 CanLII 29924 (ON CA), 212 C.C.C. (3d) 51

[15] On a judicial review application to the Court of Appeal, the appellant argued that the Minister had erred in concluding that surrender would not infringe his s. 6(1) mobility rights, and that the Minister's reasons for so concluding were inadequate. The appellant added that the minimum sentence he would face upon conviction in the United States was arbitrary and disproportionate and that his surrender therefore violated his rights under both s. 7 of the *Charter* and s. 44(1)(*a*) of the *Extradition Act*. On September 1, 2006, the Court of Appeal dismissed the appellant's application for judicial review.

[16] Laskin J.A., for a unanimous court, agreed that the Minister had a duty to give adequate reasons for his surrender order. Such reasons should explain why the surrender order was made and should be sufficient to permit the reviewing court to determine whether the Minister applied the proper principles and fairly

considered any submissions against surrender. In this case, although the Minister's reasons were brief, Laskin J.A. concluded that they were adequate.

[17] Further, Laskin J.A. found no reason to interfere with the Minister's conclusion that the appellant's rights under s. 6(1) would not be unjustifiably infringed by a decision to order his surrender. In making this assessment, the Minister was required to apply the correct legal test, but his weighing of the factors relevant to that test was entitled to deference. Though the Minister had erred in concluding that Canada had no jurisdiction to prosecute Mr. Lake for the substantive offence of trafficking, this error was unimportant given that he had gone on to conclude that even if some form of prosecution in Canada was in fact possible, the United States had a greater interest in prosecuting Mr. Lake. Contrary to the appellant's submission, the Minister is not required to refer expressly to all the *Cotroni* factors. Citing this Court's decision in *United States of America v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 (CanLII), Laskin J.A. concluded that the Minister's decision would be upheld if it was "clearly reasonable". In deferring to the greater interest of the United States in prosecuting Mr. Lake, the Minister's decision met this threshold requirement.

[18] Regarding the mandatory minimum sentence, Laskin J.A. noted that the test under s. 7 of the *Charter* is not whether the sentence is arbitrary; arbitrariness may be a valid consideration but it is not, on its own, determinative. Rather, to infringe s. 7, the foreign sentence must "shock the conscience" (*Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, at p. 522) or be "simply unacceptable" (*United States v. Allard*, 1987 CanLII 50 (SCC), [1987] 1 S.C.R. 564, at p. 572). Under s. 44(1)(*a*) of the *Extradition Act*, the sentence must be "unjust" or "oppressive". A mandatory 10-year minimum sentence for distributing nearly 100 grams of a lethal drug is not so shocking or unjust as to warrant judicial intervention. The appellant had also argued that the sentence would be disproportionate given that courts generally impose concurrent sentences for a conviction on a substantive offence and a conviction on conspiracy to commit that offence. He submitted that he would effectively be serving consecutive sentences for the offences in the instant case. In Laskin J.A.'s view, however, proportionality is relevant only if the sentence is so extreme that it offends what is fair and just. He considered the sentence faced by the appellant to fall far short of that standard, particularly given that the U.S. indictment had been taken into account at Mr. Lake's sentencing hearing in Canada.

III. Analysis

[19] In his appeal to this Court, the appellant argues that the Minister's decision should be set aside solely on the basis that extradition would unjustifiably infringe his rights under s. 6(1) of the *Charter*. He submits that none of the important objectives of extradition would be advanced by a decision to order his surrender. In

particular, he argues that the Minister erred in concluding that Canada did not have jurisdiction to prosecute the offence and that he has in fact already been prosecuted and sentenced in Canada for the very conduct underlying the U.S. indictment. The appellant adds that the Minister failed to consider the factors weighing against surrender and that the Minister's reasons were therefore insufficient. He contends that the Minister's decision should be reviewed on a correctness standard and that, in light of these alleged errors, the Minister's decision was incorrect and must be set aside.

A. *Issues*

[20] The issues to be resolved in this appeal are (1) the appropriate standard of review for the Minister's decision when a fugitive's *Charter* rights are engaged and (2) whether, in light of that standard, the Minister's decision should be upheld or set aside. As mentioned above, a related issue is whether the Minister provided sufficient reasons for his decision. Before we consider the standard, it will be necessary to review the nature of the extradition process and its status under the *Charter*.

B. *Process of Extradition From Canada*

[21] The process of extradition from Canada has two stages: a judicial one and an executive one. The first stage consists of a committal hearing at which a committal judge assesses the evidence and determines (1) whether it discloses a *prima facie* case that the alleged conduct constitutes a crime both in the requesting state and in Canada and that the crime is the type of crime contemplated in the bilateral treaty; and (2) whether it establishes on a balance of probabilities that the person before the court is in fact the person whose extradition is sought. In addition, s. 25 of the *Extradition Act*, S.C. 1999, c. 18 (formerly s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23), empowers the committal judge to grant a remedy for any infringement of the fugitive's *Charter* rights that may occur at the committal stage: *Kwok*, at para. 57.

[22] After an individual has been committed for extradition, the Minister reviews the case to determine whether the individual should be surrendered to the requesting state. This stage of the process has been characterized as falling "at the extreme legislative end of the *continuum* of administrative decision-making" and is viewed as being largely political in nature: *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631, at p. 659. Nevertheless, the Minister's discretion is not absolute. It must be exercised in accordance with the restrictions set out in the *Extradition Act*, as well as with the *Charter*.

[23] Section 44(1) of the *Extradition Act* compels the Minister to refuse surrender when he is satisfied that

> **44.** (1) . . .
>
> (*a*) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or
>
> (*b*) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

[24] Although a detailed discussion on the nature of the relationship between s. 44(1) of the *Extradition Act* and s. 7 of the *Charter* will not be necessary for the purposes of this appeal, it is evident that similar considerations may often apply to both these provisions and that the protections they afford overlap somewhat. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive: *Bonamie, Re* (2001), 2001 ABCA 267 (CanLII), 293 A.R. 201 (C.A.). Where extradition is sought for the purpose of persecuting an individual on the basis of a prohibited ground, ordering surrender would be contrary to the principles of fundamental justice: *United States of Mexico v. Hurley* (1997), 1997 CanLII 3355 (ON CA), 35 O.R. (3d) 481 (C.A.), at pp. 496-97.

[25] Section 43(1) of the *Extradition Act* provides that an individual who has been committed for extradition may make submissions against surrender to the Minister and the Minister must consider them before making his decision. If the Minister decides to order surrender, he is required to give the individual reasons for his decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817. In particular, the Minister must respond to any submissions against surrender made by the individual and explain why he disagrees: *United States of America v. Taylor* (2003), 2003 BCCA 250 (CanLII), 175 C.C.C. (3d) 185 (B.C.C.A.).

[26] The individual is entitled to appeal against the order of committal and to apply for judicial review of the Minister's decision to order surrender. The grounds for appealing the committal order are set out in s. 49 of the *Extradition Act*: an appeal may be filed in a provincial court of appeal on a ground involving a question of law or may be filed, with leave, on a ground involving a question of fact or mixed law and fact, or on any other ground of appeal. Section 57(7) provides that the grounds for judicial review of the Minister's decision to order surrender are those on which the

Federal Court may grant relief under s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Thus, under s. 57(2), judicial assessment of the Minister's decision by the court of appeal is a form of administrative law review and must be conducted in accordance with the applicable administrative law standard. As I will explain below, it is my view that the applicable standard is reasonableness.

C. *Extradition and the Charter*

[27] In determining whether surrender is consistent with the *Charter*, the Minister must consider many factors, including Canada's international obligations and its relationships with foreign governments. The need to fulfil Canada's obligations in relation to extradition is always a crucial factor precisely because of the important objectives of the extradition regime. La Forest J. elaborated on these objectives, and on the importance of international co-operation in achieving them, in *Cotroni*, at p. 1485:

> The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made McLuhan's global village a reality. The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression. Extradition is an important and well-established tool for effecting this cooperation.

[28] In *Cotroni*, this Court held that while extradition constitutes a *prima facie* infringement of a Canadian citizen's mobility rights under s. 6(1) of the *Charter*, that infringement can be justified under s. 1. After canvassing the important objectives of extradition, La Forest J., for the majority, rejected the argument that extraditing a Canadian citizen to face charges on which he can be prosecuted in Canada is irrational. It may be easier to prosecute a Canadian citizen in a foreign jurisdiction owing to the availability of witnesses or evidence. In addition, the foreign jurisdiction may have a greater interest in prosecuting the offence. In concluding that the right was minimally impaired by the extradition process, he noted that "extradition practices have been tailored as much as possible for the protection of the liberty of the individual" (p. 1490).

[29] On the issue of where a fugitive should be prosecuted, La Forest J. stated that "to require judicial examination of each individual case to see which could more effectively and fairly be tried in one country or the other would pose an impossible task and seriously interfere with the workings of the system" (p. 1494). Citing this Court's decisions in *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, and *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, he noted that prosecutorial discretion is consistent with the *Charter* and will not be interfered with absent evidence of improper or arbitrary motives. La Forest J. went on to list the considerations, now known as the "*Cotroni* factors", that will generally be considered in determining whether to prosecute in this country or to allow authorities in a foreign jurisdiction to seek extradition. These factors include:

- where was the impact of the offence felt or likely to be felt,
- which jurisdiction has the greater interest in prosecuting the offence,
- which police force played the major role in the development of the case,
- which jurisdiction has laid charges,
- which jurisdiction is ready to proceed to trial,
- where is the evidence located,
- whether the evidence is mobile,
- the number of accused involved and whether they can be gathered together in one place for trial,
- in what jurisdiction were most of the acts in furtherance of the crime committed,
- the nationality and residence of the accused,
- the severity of the sentence the accused is likely to receive in each jurisdiction.

[30] How relevant each of these factors is to the determination of the appropriate jurisdiction for prosecution may vary from case to case. Nothing in *Cotroni* suggests that these factors should be given equal weight or precludes a conclusion that a single factor is determinative in a particular case. The list merely identifies some of the factors that will tend to favour either extradition or prosecution in Canada. To instruct prosecutorial authorities on how to decide whether to prosecute would deprive the concept of prosecutorial discretion of all meaning. The

responsibility for deciding which factors are determinative lies with the authorities themselves; the list serves simply to highlight the relevant factors. The exercise of prosecutorial discretion will be interfered with in only the clearest of cases, such as where there is evidence of bad faith or improper motives. Absent such evidence, the infringement of an individual's s. 6(1) mobility rights upon surrender will not be unjustified merely because the Minister has decided, rather than prosecuting the individual in Canada, to defer to the foreign authorities seeking extradition.

[31] The Minister is also often asked to consider whether surrender would violate an individual's rights under s. 7 of the *Charter*. The test that has been applied is whether ordering extradition would "shock the conscience" (*Schmidt*, at p. 522), or whether the fugitive faces "a situation that is simply unacceptable" (*Allard*, at p. 572). In *Schmidt*, La Forest J. emphasized that deference is owed to the Minister's assessment:

> The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance. [p. 523]

[32] In *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779, the majority of this Court explained that the proper approach is to balance the factors for and against extradition in the circumstances in order to determine whether extradition would tend to "shock the conscience". In *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (CanLII), the Court reaffirmed the *Kindler* approach but added that the words "shock the conscience" should not "be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice" (para. 68). In making this assessment, the relevant factors may be specific to the fugitive, such as age or mental condition, or general, such as considerations associated with a particular form of punishment.

[33] In *Burns*, the issue was whether s. 7 requires that the Minister, before ordering surrender, seek assurances that the death penalty will not be imposed where the fugitive faces the possibility of being sentenced to death upon conviction in the requesting state. In concluding that such assurances are required in all but the most exceptional cases, the Court emphasized the serious philosophical and practical concerns regarding capital punishment that had been expressed by Canada and by the international community, noting in particular the fact that the death penalty is final and irreversible. In addition, the Minister was unable to "poin[t] to any public purpose

that would be served by extradition *without* assurances that is not substantially served by extradition *with* assurances" (para. 125 (emphasis in original)). *Burns* thus serves as an example of the kind of critical circumstances in which a reviewing court will interfere with the Minister's decision.

D. *Standard of Review*

[34] This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt*) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 (CanLII)).

[35] The appellant argues that where the decision to order surrender engages an individual's *Charter* rights, the appropriate standard of review is correctness. According to the appellant, though reviewing courts generally owe, and generally show, great deference to the Minister's decision, the Minister's assessment of the fugitive's *Charter* rights is entitled to no such deference. Although the appellant concedes that the Minister has superior expertise in relation to Canada's treaty obligations and international interests, he does not consider the Minister to have superior expertise where the constitutionality of his own decision is concerned. He adds that the reviewing court is the first point of access to *Charter* relief at the surrender stage, noting the following statement of Arbour J. in *Kwok*, at para. 80:

> The Minister is required to respect a fugitive's constitutional rights in deciding whether to exercise his or her discretion to surrender the fugitive to the Requesting State. But the Minister cannot decide whether a *Charter* breach has occurred and, if so, grant the fugitive an appropriate remedy. That function is judicial, not ministerial. (See also para. 94.)

Finally, the appellant submits that although the Minister's assessment of a fugitive's *Charter* rights involves many factual considerations, it is fundamentally a legal matter. In my view, the appellant's arguments are flawed for the following reasons.

[36] First, it should be noted that in *Kwok*, Arbour J. was responding to an argument by the appellant in that case that s. 6(1) of the *Charter* is relevant at the committal stage. In support of this argument, Mr. Kwok had stated that the Minister is not a "'court of competent jurisdiction', empowered by the *Charter* to grant constitutional remedies": para. 80. Although she acknowledged that the Minister cannot grant remedies for a *Charter* breach, Arbour J. pointed out that the Minister's decision is subject to judicial review by the provincial court of appeal. If a *Charter* breach occurs, the appellate court is empowered to grant an appropriate remedy. However, this line of reasoning sheds no light on the standard the appellate court should apply in reviewing the Minister's decision in order to determine whether such a breach has occurred. It merely refutes the argument that any infringement of s. 6(1) rights must be assessed at the committal hearing.

[37] Second, the Minister's superior expertise in relation to Canada's international obligations and foreign affairs remains relevant to the review of his assessment of a fugitive's claim that extradition would violate his or her rights under the *Charter*. Whereas the Minister's discretion must be exercised in accordance with the *Charter*, his assessment of any *Charter* infringement that could result from ordering an individual's surrender is closely intertwined with his responsibility to ensure that Canada fulfills its international obligations. The right of a Canadian citizen under s. 6(1) to remain in Canada is *prima facie* infringed by a decision to order that citizen's surrender for extradition, but the infringement can generally be justified under s. 1, as this Court held in *Cotroni*. In determining whether the infringement is justified, the Minister is required to consider not only "the possibility of prosecution in Canada, but also the interest of the foreign State in prosecuting the fugitive on its own territory": *Kwok*, at para. 93. Accordingly, the Minister's assessment of whether the infringement of s. 6(1) is justified rests largely on his decision whether Canada should defer to the interests of the requesting state. This is largely a political decision, not a legal one. The legal threshold for finding it unacceptable is evidence that the decision not to prosecute in Canada was made for improper or arbitrary motives. This leaves room for considerable deference to the Minister's conclusion that the infringement of s. 6(1) is justified.

[38] Similarly, the Minister's assessment of whether extradition accords with the fugitive's s. 7 rights involves a balancing test. As I mentioned above, the Minister must weigh the factors for and against extradition to determine whether the circumstances are such that extradition would "shock the conscience". In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (CanLII), this Court considered the appropriate standard of review for the Minister's decision whether a refugee faces a substantial risk of torture upon deportation. In its view, the Minister's decision in that context requires a fact-driven inquiry involving the weighing of various factors and possessing a "negligible legal dimension" (para. 39). Accordingly, the Court concluded that the Minister's decision would be entitled to deference upon judicial review.

[39] Whether extradition would "shock the conscience" involves a similar type of inquiry. The Minister must balance the individual's circumstances and the consequences of extradition against such factors as the seriousness of the offence for which extradition is sought and the importance of meeting Canada's international obligations and generally ensuring that Canada is not used as a safe haven by fugitives from justice. This inquiry will also often involve consideration of the protections that would be available to the fugitive and the conditions he or she would face in the requesting state. To say, as does the appellant in the instant case, that the decision whether surrender would unjustifiably infringe a fugitive's *Charter* rights remains fundamentally a legal matter is to disregard the reality that *all* executive and administrative decisions involving one's rights are in essence "legal matters". Yet not all such decisions are subject to judicial review on a correctness standard. The decision in issue in *Suresh* was clearly a legal matter. The Court concluded that deference was owed to the Minister's decision because it was based primarily on the Minister's assessment of the facts; there was generally no need for the court to re-weigh the facts. The same is true in the extradition context.

[40] The appellant also pointed to several decisions of the British Columbia Court of Appeal in which the Minister's assessment of a fugitive's *Charter* rights and of whether extradition would be unjust or oppressive within the meaning of s. 44(1)(*a*) of the *Extradition Act* was reviewed on a correctness standard: *Stewart v. Canada (Minister of Justice)* (1998), 1998 CanLII 6226 (BC CA), 131 C.C.C. (3d) 423; *United States of America v. Gillingham* (2004), 2004 BCCA 226 (CanLII), 184 C.C.C. (3d) 97; *United States of America v. Maydak* (2004), 2004 BCCA 478 (CanLII), 190 C.C.C. (3d) 71; *United States of America v. Kunze* (2005), 2005 BCCA 87 (CanLII), 194 C.C.C. (3d) 422; *Hanson v. Canada (Minister of Justice)* (2005), 2005 BCCA 77 (CanLII), 195 C.C.C. (3d) 46; *United States of America v. Fordham* (2005), 2005 BCCA 197 (CanLII), 196 C.C.C. (3d) 39; *Ganis v. Canada (Minister of Justice)* (2006), 2006 BCCA 543 (CanLII), 216 C.C.C. (3d) 337. In *Stewart*, the first case in which a court held that the appropriate standard was correctness, Donald J.A. expressed the concern that "[i]f deference were accorded [the Minister's] assessment of the constitutional validity of [his] own act then I believe that judicial review would be unacceptably attenuated" (para. 18). With respect, this concern is misplaced. It rests on an incorrect understanding of the Minister's role in assessing the interests at stake in the extradition context. It is also inconsistent with this Court's jurisprudence on the judicial review of extradition decisions.

[41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a

court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

E. *Application to the Facts of This Case*

[42] The appellant asks that the Minister's decision be set aside on the basis that extradition would constitute an unjustified infringement of his rights under s. 6(1) of the *Charter*. As I explained above, s. 6(1) requires the Minister to consider the possibility of prosecution in Canada. The Minister concluded that Canada did not have jurisdiction to prosecute the appellant for the substantive offence of trafficking that was based on the conduct that occurred in Detroit on September 22, 1997. However, he went on to say that regardless of whether or not Canada had jurisdiction to prosecute the appellant for that conduct, he would defer to the greater interest of the United States. Assuming, for the sake of argument, that Canada does have jurisdiction to prosecute the appellant, the issue is whether it was reasonable for the Minister to conclude that his extradition to the United States constitutes a justifiable infringement of his s. 6(1) rights.

[43] The appellant did not press the argument before this Court that he would be entitled to plead *autrefois convict* if he were actually to be charged in Canada with the substantive offence of trafficking in relation to the transaction of September 22, 1997. Nor did he argue that the Minister's decision conflicted with Art. 4 of the Treaty, which prohibits extradition if the fugitive has already been convicted of or discharged for the alleged offence. Rather, the appellant focusses on the allegation that it would be unfair to extradite him on the trafficking charge, because he has already been prosecuted and sentenced in Canada. This, he argues, is a relevant factor to be considered in determining whether the infringement of his s. 6(1) rights can be justified under s. 1.

[44] In my view, the Minister's conclusion was not unreasonable. The appellant was not charged with the substantive offence of trafficking in relation to the transaction of September 22, 1997. Although it is true that he was charged with conspiracy to traffic in narcotics on dates that included September 22, 1997, a charge

of conspiracy does not subsume the substantive offence. An individual may be convicted both of conspiracy and of the substantive offence that was the object of that conspiracy: *Sheppe v. The Queen*, 1980 CanLII 190 (SCC), [1980] 2 S.C.R. 22. If an accused is convicted on both charges, the usual order is that the sentences be served concurrently. However, even if an accused is charged only with conspiracy, evidence that he or she actually committed the substantive offence will generally lead to a harsher sentence than if the accused had conspired to commit it but had not actually done so.

[45] The Minister was of the view that the Canadian sentence did not reflect the fact that the appellant had committed the substantive offence. After reviewing the transcript of the sentencing hearing and the agreed statement of facts, the Minister noted that the sentencing judge had made no reference to the U.S. indictment and that Crown counsel had advised the court that he was seeking a *reduced* sentence in light of that indictment. Although the agreed statement of facts does make reference to the transaction of September 22, 1997, the clear implication of Crown counsel's words at the sentencing hearing was that he was not seeking to punish the appellant for the Detroit transaction precisely because he expected the appellant to be punished for that offence in the United States. The relevant part of the transcript reads as follows:

> What Mr. Lake faces is prosecution with respect to this charge in the United States, in which the evidence is compelling. And the likelihood of him being convicted in the United States as a result of the events of September 22, 1997, are high. The crown has taken that into account with respect to looking at the entire situation. And that was a motivating factor as far as the crown was concerned with respect to this sentence which I acknowledge is on the low end of the range with respect to these types of offences. [A.R., at p. 85]

In my view, it was reasonable for the Minister to conclude, relying upon the transcript of the sentencing hearing, that the appellant had not already been punished for the conduct underlying the U.S. indictment.

[46] As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's *Cotroni* analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

[47] In the case at bar, the Minister stated that he had considered the *Cotroni* factors, and in reaching his conclusion he emphasized that the alleged conduct had occurred in the United States:

> . . . I would yield to the superior interest of the United States of America in prosecuting this matter. The evidence alleges that Mr. Lake trafficked cocaine within the boundaries of the United States of America. The United States of America is entitled to seek to protect its own public and maintain public confidence in its laws and criminal justice system through prosecution. [A.R., at p. 17]

[48] Although the *locus delicti* may not always be determinative, in this case, there is nothing unreasonable about the Minister's conclusion. There is no other factor that would clearly outweigh the fact that the alleged conduct occurred in the United States. The appellant points to the severity of the punishment he will face upon conviction in the United States. However, this Court has upheld other decisions by the Minister to extradite individuals who face long prison sentences for drug offences: *United States of America v. Jamieson*, 1996 CanLII 224 (SCC), [1996] 1 S.C.R. 465; *United States of America v. Whitley* (1994), 1994 CanLII 498 (ON CA), 94 C.C.C. (3d) 99 (Ont. C.A.), aff'd by and reasons adopted at 1996 CanLII 225 (SCC), [1996] 1 S.C.R. 467; *Ross v. United States of America* (1994), 1994 CanLII 1749 (BC CA), 93 C.C.C. (3d) 500 (B.C.C.A.), aff'd by and reasons adopted at 1996 CanLII 226 (SCC), [1996] 1 S.C.R. 469. The sentence does not on its own provide a sufficient basis for interfering with a decision by the Minister to surrender a fugitive for extradition. The Minister's deference to the United States owing to the fact that the alleged conduct occurred within its territory provides a sufficient basis for concluding that his decision was reasonable.

IV. Conclusion

[49] In light of this Court's jurisprudence, it is clear that a reviewing court owes deference to a decision by the Minister to order surrender, including the Minister's assessment of the individual's *Charter* rights. Although the Minister must apply the proper legal principles, his decision should be upheld unless it is unreasonable. In the case at bar, the Minister identified the proper test and provided reasons that were sufficient to indicate the basis for his decision to order the appellant's surrender. In my view, his decision to extradite the appellant rather than pursue prosecution in Canada is not unreasonable. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors for the appellant: Ruby & Edwardh, Toronto.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Tab 3

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62 (CanLII)

Date: 2011-12-15
Docket: 33659
Other citations: [2011] 3 FCR 708; 317 Nfld & PEIR 340; 340 DLR (4th) 17; [2012] EXP 65; 424 NR 220; [2012] EXPT 54; DTE 2012T-7; AZ-50813300; EYB 2011-199662; JE 2012-46; [2011] FCJ No 62 (QL); [2011] SCJ No 62 (QL); [2011] ACS no 62; 208 ACWS (3d) 435; 213 LAC (4th) 95
Citation: Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62 (CanLII), <http://canlii.ca/t/fpbh9>, retrieved on 2018-01-18

SUPREME COURT OF CANADA

CITATION: Newfoundland and Labrador Nurses' Union *v.* Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708

DATE: 20111215
DOCKET: 33659

BETWEEN:

Newfoundland and Labrador Nurses' Union
Appellant
and
Her Majesty The Queen in Right of Newfoundland and Labrador, represented by
Treasury Board and Newfoundland and Labrador Health Boards Association, on behalf of Labrador-Grenfell Regional Health Authority
Respondents

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

REASONS FOR JUDGMENT: (paras. 1 to 26)	Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein and Cromwell JJ. concurring)

Newfoundland and Labrador Nurses' Union *v.* Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708

Newfoundland and Labrador Nurses' Union
Appellant

v.

Her Majesty The Queen in Right of Newfoundland and Labrador, represented by Treasury Board, and Newfoundland and Labrador Health Boards Association, on behalf of Labrador-Grenfell Regional Health Authority
Respondents

Indexed as: Newfoundland and Labrador Nurses' Union *v.* Newfoundland and Labrador (Treasury Board)

2011 SCC 62

File No.: 33659.

2011: October 14; 2011: December 15.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Administrative law — Role and adequacy of reasons — Procedural fairness — Whether reasons satisfy Dunsmuir requirements for "justification, transparency and intelligibility".

The union disputed an arbitrator's award which involved the calculation of vacation benefits. The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In his decision, the arbitrator concluded that it was not to be included in calculating the length of vacation entitlements. On judicial review, the arbitrator's reasons were found to be insufficient and therefore unreasonable and the decision was set aside. The majority of the Court of Appeal agreed with the arbitrator.

Held: The appeal should be dismissed.

Dunsmuir confirmed that in determining whether a decision is reasonable, the inquiry for a reviewing court is about "justification, transparency and intelligibility". This represents a respectful appreciation that a wide range of specialized decision-makers render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decision that are often counter-intuitive to a generalist. *Dunsmuir* does not stand for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result. It is a more organic exercise — the reasons must be read together with the outcome, and serve the purpose of showing whether the result falls within a range of possible outcomes. Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. 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 acceptable outcomes, the *Dunsmuir* criteria are met. It is an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness. Any challenge to the reasoning/result of the decision should be made within the reasonableness analysis. Here, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes.

Cases Cited

Referred to: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12

(CanLII), [2009] 1 S.C.R. 339; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, rev'd in part 2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Cameron, Welsh and Mercer JJ.A.), 2010 NLCA 13 (CanLII), 294 Nfld. & P.E.I.R. 161, 908 A.P.R. 161, 190 L.A.C. (4th) 385, 2010 CLLC ¶220-017, [2010] N.J. No. 63 (QL), 2010 CarswellNfld 49, reversing a decision of Orsborn J., 2008 NLTD 200 (CanLII), 283 Nfld. & P.E.I.R. 170, 873 A.P.R. 170, [2008] N.J. No. 364 (QL), 2008 CarswellNfld 332. Appeal dismissed.

David G. Conway and *Tracey L. Trahey*, for the appellant.

Stephen F. Penney and *Jeffrey Beedell*, for the respondents.

The judgment of the Court was delivered by

[1] ABELLA J. — The transformative decision of this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, explained that the purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility" (para. 47). The issues in this appeal are whether the arbitrator's reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.

[2] The dispute underlying the arbitrator's award involved the calculation of vacation benefits. The arbitrator concluded that under the collective agreement, the grievors' time as casual employees was not to be included in calculating the length of their vacation entitlement when they became permanent employees.

[3] The definition of "Employee" in the collective agreement includes all paid employees, including casual employees. Casual employees are defined in Article 2.01(b) as employees who work on an "occasional or intermittent basis". They are under "no obligation . . . to come [to work] when they are called" and the Employer, in turn, has "no obligation" to call them.

[4] Notably, that definitional provision states that while casual employees are generally entitled to the benefits of the collective agreement, they are *expressly excluded* from a number of benefits, including the vacation entitlement calculations applicable to permanent employees under Article 17. Instead, they receive 20 percent of their basic salary in lieu.

[5] The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In the 12-page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles, and ultimately agreed with the Employer that the time an employee spent as a casual could not be used in calculating that employee's length of service towards vacation entitlement when he or she became a permanent, temporary or part-time employee.

[6] The arbitrator reasoned that casual employees, defined in Article 2.01(b), work on an occasional, intermittent basis, and are not required to come to work even when called. Article 2.01(b) also sets out a list of benefits to which casual employees are *not* entitled. In lieu of those benefits, casual employees receive the benefit of 20 percent of their basic salary. One of the benefits from which they are expressly excluded and for which they receive the additional 20 percent is Article 17, which determines the length of vacation time to which an employee is entitled.

[7] These points, it seems to me, provided a reasonable basis for the arbitrator's conclusion, based on a plain reading of the agreement itself.

[8] On judicial review, the parties acknowledged that the standard of review was reasonableness. The chambers judge was of the view that such a review is based not only on whether the outcome falls within the range of possible outcomes, in accordance with *Dunsmuir*, but also requires that the reasons set out a line of analysis that reasonably supports the conclusion reached. The chambers judge concluded that the arbitrator's reasons required "more cogency" and that his conclusion was "unsupported by any chain of reasoning that could be considered reasonable". They were, in short, insufficient. As a result, the chambers judge found the result to be unreasonable and set it aside.

[9] The majority in the Court of Appeal overturned the decision of the chambers judge, concluding that while "a more comprehensive explanation" would have been preferable, the reasons were "sufficient to satisfy the *Dunsmuir* criteria" of "justification, transparency and intelligibility". In their words:

> . . . reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.

[10] The dissenting judge agreed with the chambers judge. In her view, the arbitrator's reasons disclosed no line of reasoning which could lead to his conclusion. As a result, there were "no reasons" to review.

Analysis

[11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" . . . . [Emphasis added; citations omitted; paras. 47-48.]

[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 63.

[13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the 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 (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). 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 acceptable outcomes, the *Dunsmuir* criteria are met.

[17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the

decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> 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 context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[19] The Union acknowledged that an arbitrator's interpretation of a collective agreement is subject to reasonableness. As I understand it, however, its argument before us was that since the arbitrator's reasons amounted to "no reasons", and since the duty to provide reasons is, according to *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, a question of procedural fairness, a correctness standard applies.

[20] Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).

[21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

[22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[23] The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.

[24] As George W. Adams noted:

> The hallmarks of grievance arbitration are speed, economy and informality. Speedy dispute resolution is important to the maintenance of industrial peace and the ongoing economic needs of an enterprise. Adjudication that is too expensive contributes to industrial unrest by preventing the pursuit of meritorious grievances that individually involve small monetary values but collectively constitute a weathervane of employee satisfaction with the rules negotiated. The relative informality of grievance arbitration is facilitated by much less stringent procedural and evidentiary rules than those applicable to court proceedings. Informality permits direct participation by laymen, enhances the parties' understanding of the system and minimizes potential points of contention permitting everyone to focus on the merits of a dispute and any underlying problem. . . .
>
> . . . appeal to a higher authority by way of judicial review may be needed to correct egregious errors, to prevent undue extension of arbitral power and to integrate the narrow expertise of arbitrators into the general values of the legal system. The very existence of judicial review can be a healthy check on the improper exercise of arbitral responsibility and discretion. [Emphasis added.]
>
> (*Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at §§4.1100 to 4.1110)

[25] Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. This process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis.

[26] In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: David G. Conway, St. John's.

Solicitors for the respondents: Stewart McKelvey, St. John's.

Tab 4

R. v. Dinardo, [2008] 1 SCR 788, 2008 SCC 24 (CanLII)

Date: 2008-05-09
Docket: 31918
Other citations: 293 DLR (4th) 375; 231 CCC (3d) 177; 57 CR (6th) 48; 374 NR 198; AZ-50490788; [2008] CarswellQue 3451; EYB 2008-133045; JE 2008-1022; [2008] SCJ No 24 (QL); [2008] ACS no 24; 77 WCB (2d) 514
Citation: R. v. Dinardo, [2008] 1 SCR 788, 2008 SCC 24 (CanLII), <http://canlii.ca/t/1wtt2>, retrieved on 2018-01-18

SUPREME COURT OF CANADA

CITATION: R. *v.* Dinardo, [2008] 1 S.C.R. 788, 2008 SCC 24

DATE: 20080509
DOCKET: 31918

BETWEEN:

Jean Dinardo
Appellant
and
Her Majesty The Queen
Respondent

CORAM: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 41)

Charron J. (Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring)

Jean Dinardo
Appellant

v.

Her Majesty The Queen
Respondent

Indexed as: R. *v.* Dinardo

Neutral citation: 2008 SCC 24.

File No.: 31918.

2008: January 25; 2008: May 9.

Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Criminal law — Trial — Judgments — Duty of trial judge to give reasons — Credibility of complainant — Accused convicted of sexual assault and sexual exploitation of a person with a disability — Complainant's testimony containing inconsistencies — Whether trial judge's reasons sufficient for meaningful appellate review on question of credibility — Whether trial judge sufficiently explained why he rejected accused's denial of guilt and how he resolved significant issues of credibility concerning complainant's testimony.

Criminal law — Evidence — Prior consistent statements — Credibility of complainant — Accused convicted of sexual assault and sexual exploitation of a person with a disability — Complainant's testimony containing inconsistencies — Trial judge considering contents of complainant's prior consistent statements to corroborate her testimony — Whether trial judge's improper use of statements caused prejudice to accused.

The accused was convicted of sexual assault and sexual exploitation of a person with a disability after the complainant alleged that she was assaulted by the accused while she was a passenger in his taxi. At the commencement of the trial, a *voir dire* was held to determine whether the complainant, who is mildly mentally challenged, was competent to testify. The trial judge concluded that although the complainant's deficiency was apparent, it did not mean that she could not testify and that it would be up to him to determine her credibility. At trial, the complainant provided essentially consistent answers on the central parts of her allegations. However, on many points, the complainant gave contradictory answers, much as she had done during the course of her *voir dire* testimony. She also gave conflicting testimony about inventing the allegations. The accused testified and denied the allegations against him.

In his reasons for judgment, the trial judge noted that the accused testified well. However, he rejected the accused's argument that the configuration of his car would have made it impossible for him to touch the complainant without leaning over. In assessing the complainant's credibility, the trial judge emphasized that the complainant did not contradict herself on the important aspects of her allegations. Moreover, her evidence at trial was corroborated by her out-of-court statements made shortly after the alleged incident. The accused was convicted of both offences. A majority of the Court of Appeal upheld the convictions on the basis that the trial judge's reasons, although succinct, made it clear why the trial judge disbelieved the accused. Although the inconsistencies in the complainant's testimony were not specifically addressed by the trial judge, they related primarily to peripheral matters and the evidence allowed for appellate review of the correctness of the decision. While the trial judge erred in using the complainant's prior consistent statements to corroborate her evidence, the majority concluded that the improper use of the statements did not justify a new trial because the accused suffered no prejudice. The dissenting judge would have allowed the appeal and ordered a new trial. He held that the trial judge did not sufficiently explain why he rejected the accused's denial of guilt or how he resolved the significant difficulties in the complainant's testimony to reach a verdict beyond a reasonable doubt.

Held: The appeal should be allowed and a new trial ordered.

The inquiry into the sufficiency of the trial judge's reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue. The trial judge erred by failing to explain how he reconciled the inconsistencies in the complainant's testimony, particularly on the issue of whether she invented the allegations. The defence rested on the overall lack of credibility and reliability of the complainant's testimony, as well as on the accused's testimony denying her allegations. In this context, it was incumbent upon the trial judge to explain, even in succinct terms, how he resolved these difficulties to reach a verdict beyond a reasonable doubt. His failure to do so deprived the accused of his right to a meaningful appeal. Where the trial judge's reasoning is not apparent from the reasons or the record, the reviewing court should not substitute its own analysis of the evidence for that of the trial judge, as the majority of the Court of Appeal did here. [27] [29] [31-32]

The Court of Appeal correctly concluded that the trial judge erred by using the complainant's prior consistent statements to corroborate her testimony at trial. However, the Court of Appeal was incorrect in holding that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative value of the complainant's prior consistent statements in convicting the accused. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. [40]

Cases Cited

Applied: *R. v. G.C.*, [2006] O.J. No. 2245 (QL); **referred to:** *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (CanLII); *R. v. D. (J.J.R.)* (2006), 2006 CanLII 40088 (ON CA), 215 C.C.C. (3d) 252; *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27 (CanLII); *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (CanLII); *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122; *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10 (CanLII); *R. v. F. (J.E.)* (1993), 1993 CanLII 3384 (ON CA), 85 C.C.C. (3d) 457.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 153.1(1), 271(1)(*a*).

Authors Cited

Hill, S. Casey, David M. Tanovich and Louis P. Strezos, eds. *McWilliams' Canadian Criminal Evidence*, vol. 1, 4th ed. Aurora, Ont.: Canada Law Book, 2003 (loose-leaf updated Ma rch 2008, release 10).

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Rochon and Côté JJ.A.), J.E. 2007-551, SOQUIJ AZ-50418375, [2007] Q.J. No. 1320 (QL), 2007 CarswellQue 1206, 2007 QCCA 287 (CanLII), upholding the convictions entered by Rancourt J.C.Q. Appeal allowed.

Marco Labrie and *Catherine Sheitoyan*, for the appellant.

Henri-Pierre La Brie and *Magalie Cimon*, for the respondent.

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

[1] Mr. Dinardo was convicted of sexual assault and sexual exploitation of a person with a disability. He appealed his conviction on the grounds that the trial judge misdirected himself on the issue of credibility and failed to provide sufficient reasons to allow for meaningful appellate review. The majority of the Court of Appeal dismissed Mr. Dinardo's appeal. Chamberland J.A., in dissent, would have allowed the appeal and ordered a new trial based on two errors of law. First, the trial judge did not sufficiently explain why he rejected Mr. Dinardo's denial of guilt. Second, he failed to explain how he resolved some significant difficulties in the complainant's testimony to reach a verdict beyond a reasonable doubt. Mr. Dinardo appeals to this Court as of right on these two grounds.

[2] I agree with Chamberland J.A. that the trial judge erred in law by failing to explain how he resolved the significant issues of credibility concerning the complainant's testimony, particularly in light of Mr. Dinardo's evidence at trial. While a trial judge is presumed to know the law, I conclude that in the context of the evidence and the issues in this case, the trial judge's reasons are insufficient to allow for meaningful appellate review on the question of credibility. Accordingly, I would allow the appeal and order a new trial.

2. The Facts and Proceedings Below

[3] In September 2004, Mr. Dinardo, a cab driver, picked up the complainant at a home for mentally challenged persons in Longueuil called the "Auberge" and drove her to the "Maison des jeunes" in Boucherville. During the 15-minute drive to the Maison des jeunes, the accused allegedly touched the complainant's breasts, put his finger inside her vagina and said [TRANSLATION] "That smells good" (A.R., at p. 137). The complainant further alleged that Mr. Dinardo invited her to touch his penis, which she refused.

[4] The complainant, who was 22 years old at the time of trial, is mildly mentally challenged and suffers from Tourette syndrome. When the alleged incident occurred, she was residing at the Auberge during the week. It was common for residents of the home to visit the Maison des jeunes for activities during the day. As a general rule, residents were transported back and forth in taxis.

[5] When the complainant arrived at the Maison des jeunes, she spontaneously recounted the alleged events to a teacher. When she returned to the Auberge that afternoon, she made a similar statement to an employee of the home. The taxi driver who dropped off the complainant witnessed this statement. Later that day, the complainant told the same story to a second employee of the home.

[6] Mr. Dinardo was charged with sexual assault and sexual exploitation of a person with a disability contrary to ss. 271(1)(*a*) and 153.1(1) of the ***Criminal Code***, R.S.C. 1985, c. C-46. At the commencement of the trial, the court held a *voir dire* to determine whether the complainant was competent to testify. During the course of her testimony on the *voir dire*, the complainant contradicted herself on the question of whether she knew what it meant to tell the truth. She first stated that she did not understand the importance of telling the truth. She subsequently testified that she knew what it meant to lie and that lying was wrong. She stated that if she did not remember the answer to a question, she would simply say [TRANSLATION] "I don't remember" (A.R., at pp. 110-11).

[7] When the complainant was asked on cross-examination whether she ever invented stories, she stated that she sometimes invented stories [TRANSLATION] "[to] be funny" (A.R., at p. 112). An example of the [TRANSLATION] "silly things" she sometimes said was that a friend "kicked me in the ass . . . in the behind, but it's not true" (A.R., at p. 112). The complainant provided inconsistent answers on the frequency with which she told these types of stories, but said that her foster family reprimanded her when she did so.

[8] In response to defence counsel's argument that it was apparent that [TRANSLATION] "she can be made to say almost anything" (A.R., at p. 123), the trial judge held that while the complainant's deficiency was apparent, it did not mean that she could not testify and it would be up to him to determine her credibility. He therefore ruled that the complainant was competent to testify on a promise to tell the truth. No issue is raised with respect to this ruling; however, the obvious difficulties demonstrated during the course of the complainant's *voir dire* testimony and the trial judge's acknowledgement that any issue of credibility would have to be ultimately resolved by him at trial provide relevant context for assessing the sufficiency of the trial judge's reasons on appellate review.

[9] The complainant testified at trial and provided essentially consistent answers on the central parts of her allegations. She also identified the accused by his first name (Jean) and by a tattoo on his right arm. However, on many points, the complainant gave contradictory answers, much as she had done in the course of her *voir dire* testimony. She also gave this troubling evidence on cross-examination (A.R., at pp. 174-75):

[TRANSLATION]

Q This story you told Ms. Thériault on arriving at the Maison des Jeunes, is it possible that it, that the story was made up?

A Yes.
Q Why did you make the story up?

A Well, I made it up to say he touched me.
Q You made it up to say he touched you?
A Yes.
Q Why? You didn't like him?
A No, I didn't like him.
Q Why?
A I was afraid of him.
Q You were afraid of him. Because he had tattoos?

A Yes.

[10] In re-examination, the complainant testified as follows (A.R., at pp. 181-82):

[TRANSLATION]

Q . . . listen to me carefully. He said: "Is it possible that you made up the story you told Nicole Thériault?"
A Oh, I didn't make it up.
Q Okay. But you said yes. Do you know . . . what do you mean by that? What is . . . explain that, about that.

A I didn't make it up.
Q Okay. Your sentence, it was: "I made it up – after what he said to you – to say he touched me".

A Yes.
Q What do you mean by that?
A He touched me.
Q Okay. But when you told her that, told Nicole Thériault that, was it made up? Had you made it up?

A No.

[11] At the end of the complainant's testimony, the trial judge asked the following questions (A.R., at p. 182):

[TRANSLATION]

BY THE COURT

I have one, X. Can you tell me what it means to "make something up"?

A I don't know.

Q You don't know, eh? So when you answered earlier that, that you made it up, you don't know what that means?

A No.

[12] Four witnesses gave evidence at trial regarding the complainant's account of the allegations. Ms. Thériault, a teacher at the Maison des jeunes, testified that the complainant stated immediately upon her arrival that [TRANSLATION] "[t]

he taxi driver touched me" (A.R., at p. 210). The taxi driver who brought the complainant back to the Auberge at the end of the day stated that during the trip, the complainant told him that [TRANSLATION] "[t]his morning, the driver who brought me here, he touched my breast" (A.R., at p. 246). When they arrived at the Auberge, the driver witnessed the complainant recount the alleged events to Ms. Lussier, the assistant director of the home. Ms. Duquette, the complainant's [TRANSLATION] "attendant" at the Auberge, stated that the complainant confided to her that same day that she had been "assaulted" by the taxi driver (A.R., at p. 284). Ms. Duquette discussed the allegations with the assistant director of the home, and according to Ms. Duquette, [TRANSLATION] "the story was the same for both of us" (A.R., at p. 285).

[13] Two of the witnesses also testified that the complainant had a history of lying. Ms. Thériault stated that she did not initially believe the complainant [TRANSLATION] "because she is manipulative" (A.R., at p. 214). She also stated that the complainant lied from time to time when she was looking for attention. When she lied, however, [TRANSLATION] "she admitted it. She knew the difference" (A.R., at p. 229). This led Ms. Thériault to believe that there was some truth to the allegations. Ms. Duquette also testified that the complainant had a history of lying. When she was being untruthful, she would blush or confuse what she was saying. On this occasion, however, the complainant had repeated the same story several times to different people. For this reason, Ms. Duquette believed that the complainant was being truthful. Both witnesses also testified that the complainant's behaviour on the date of the alleged offence was out of character.

[14] Mr. Dinardo testified and denied the allegations against him. He stated that when he arrived at the Auberge, the complainant was brought out to the taxi and an employee of the home fastened her seatbelt. The employee placed the complainant's hands between her legs to prevent her from hitting herself or the cab driver because of her condition. He testified that her hands remained between her legs for the duration of the trip.

[15] Mr. Dinardo also testified that the configuration of the car was such that it would have been impossible for him to touch the complainant without leaning over. Mr. Dinardo testified that he had no prior convictions of this nature, and had never had any complaints as a taxi driver.

[16] In his reasons for judgment, the trial judge summarized the evidence of the witnesses for the Crown and the defence: C.Q. Longueuil, No. 505-01-053038-044, March 30, 2006. After recalling the test in *R. v. W. (D.)*, **1991 CanLII 93 (SCC)**, [1991] 1 S.C.R. 742, and the Crown's burden of proof beyond a reasonable doubt, the

trial judge made his findings on credibility. He stated that while the accused had [TRANSLATION] "testified well" (para. 46), he did not believe the accused's "argument" that [TRANSLATION] "it was impossible for him to touch the passenger because of the console, the coffee cup and his note book" (para. 54). He rejected this argument on the basis of the photographs produced by Mr. Dinardo and the fact that the complainant had been able to see the tattoo on his right forearm.

[17] The trial judge then considered the complainant's credibility. He did not refer to the evidence that the complainant, by her own admission, had a tendency to lie. Rather, he observed only that [TRANSLATION] "[w]hen cross-examined by counsel for the accused, she never contradicted herself on important facts, only on certain details that the Court does not consider important enough for the contradictions to affect her credibility" (para. 70). He placed significant emphasis on the fact that the complainant's version of the events was consistent, noting that [TRANSLATION] "in this case, there is a form of corroboration in the facts and statements of the victim, who never contradicted herself" (para. 68). He also noted that the complainant's statement was made spontaneously upon her arrival at the Maison des jeunes. The accused was convicted of both offences.

[18] A majority of the Court of Appeal dismissed the appeal: [2007] Q.J. No. 1320 (QL), **2007 QCCA 287 (CanLII)**. Rochon J.A., Côté J.A. concurring, held that although the trial judge's reasons were succinct, they made it clear why the trial judge disbelieved Mr. Dinardo. While the trial judge did not explicitly direct himself on the second step of *W. (D.)*, the test is not a [TRANSLATION] "sacrosanct formula" (para. 29). It was implicit in the trial judge's rejection of the accused's evidence that his evidence did not raise a reasonable doubt. While it may have been preferable to state this explicitly, his failure to do so was not an error of law.

[19] The majority then observed that the complainant's testimony should be evaluated having regard to her mental disability. Rochon J.A. reviewed ten inconsistencies in the complainant's evidence identified by Mr. Dinardo, including the complainant's testimony about inventing stories. None of these inconsistencies were specifically addressed by the trial judge. Rochon J.A. concluded that the inconsistencies related primarily to peripheral aspects of the case. With respect to the complainant's testimony about telling stories, the majority stated that [TRANSLATION] "[e]ven if I were to conclude that this last piece of evidence required an explanation by the judge, a review of the evidence on these questions would enable a court of appeal to review the soundness of the decision" (para. 73).

[20] The majority also held that the trial judge erred in using the complainant's prior consistent statements to corroborate her evidence that a crime had

been committed. The majority concluded, however, that the improper use of the statements did not justify ordering a new trial because the accused suffered no prejudice.

[21] Chamberland J.A., in dissent, noted that despite stating twice that the accused had [TRANSLATION] "testified well", the trial judge found Mr. Dinardo guilty without explaining why he rejected Mr. Dinardo's denial of guilt. Although he explained why he disbelieved Mr. Dinardo's evidence that he could not have touched the complainant because of the configuration of his car, the trial judge did not discuss the most important aspect of Mr. Dinardo's testimony — that is, his denial of the allegations.

[22] Chamberland J.A. also concluded that the trial judge erred in failing to explicitly consider the second step of the *W. (D.)* test — even if he did not believe the "argument" of the accused, he failed to consider whether he was left in reasonable doubt by the accused's testimony. There was no corroborating evidence in the case and the complainant's testimony was problematic. Chamberland J.A. was particularly concerned about the exchange at the end of the complainant's cross-examination in which she stated that she invented the allegations [TRANSLATION] "to say he touched me" (para. 116). Chamberland J.A. noted that more than one witness testified that the complainant had a history of lying. In the circumstances, it was incumbent upon the trial judge to explicitly address the accused's denial of the allegations. Chamberland J.A. would have ordered a new trial.

3. Analysis

[23] The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. 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. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

3.1 *Sufficiency of Reasons*

[24] In *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (CanLII), this Court confirmed that courts have a duty to give reasons. Reasons serve many purposes; in particular, they explain the court's disposition of the case and facilitate appellate review of findings made at trial. The content of the duty will, of course, depend upon the exigencies of the case. As this Court has noted, "the requirement of reasons is tied to their purpose and the purpose varies with the context" (*Sheppard*, at para. 24).

[25] *Sheppard* instructs appeal courts to adopt a functional approach to reviewing the sufficiency of reasons (para. 55). The inquiry should not be conducted in the abstract, but should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel (*R. v. D. (J.J.R.)* (2006), 2006 CanLII 40088 (ON CA), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32). An appeal based on insufficient reasons will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review: *Sheppard*, at para. 25.

[26] At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27 (CanLII), at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (CanLII), the accused is entitled to know "why the trial judge is left with no reasonable doubt":

> 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.
>
> This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt. [paras. 20-21]

[27] Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (*Sheppard*, at para. 55). Here, the complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal.

[28] It is evident from a review of the record that the complainant's testimony concerned the trial judge. After she was cross-examined on whether she knew what it meant to "make up" a story, Rancourt J.C.Q. asked several follow-up questions of his own (A.R., at pp. 182-83). In his reasons for judgment, however, he did not explain why the complainant's conflicting testimony did not cause him to doubt her credibility. Instead, he concluded as follows:

> [TRANSLATION] When cross-examined by counsel for the accused, she never contradicted herself on important facts, only on certain details that the Court does not consider important enough for the contradictions to affect her credibility. [para. 70]

[29] It cannot be said that the complainant's testimony wavered only on the trivial details of the allegations. Her testimony wavered on *the* central issue at trial: that is, whether Mr. Dinardo committed the acts for which he was charged, or whether the story was invented. I disagree with the majority of the Court of Appeal that [TRANSLATION] "the defence evidence related to peripheral aspects of the case" (para. 32). The defence rested on the overall lack of credibility and reliability of the complainant's testimony and, of course, on Mr. Dinardo's own testimony denying her allegations. In this context, it was incumbent upon the trial judge to explain, even in succinct terms, how he resolved these difficulties to reach a verdict beyond a reasonable doubt.

[30] I would like to emphasize that although the trial judge's reasons fell short of the standard required to allow for meaningful appellate review in this case, 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 (*Braich*, at para. 38). As Binnie J. stated in *Sheppard*:

> [I]n the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it. [para. 60]

[31] As I explained at the outset of the analysis, the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue — the trial judge recognized it as so during the *voir dire* to determine whether the complainant was competent to testify. At trial, two of the witnesses testified that the complainant could be untruthful and manipulative. While it was open to the trial judge to conclude that he was convinced beyond a reasonable doubt of the guilt of the accused, it was not open to him to do so without explaining how he reconciled the complainant's inconsistent testimony, particularly in light of the accused's own evidence denying her allegations.

[32] This Court emphasized in *Sheppard* that no error will be found where the basis for the trial judge's conclusion is "apparent from the record, even without being articulated" (para. 55). If the trial judge's reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record. This exercise is not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge. Where the trial judge's reasoning is not apparent from the reasons or the record, as in the instant case, the appeal court ought not to substitute its own analysis for that of the trial judge (*Sheppard*, at paras. 52 and 55).

[33] In my view, the majority's reassessment of the complainant's credibility went beyond the approach advocated in *Sheppard* and is inconsistent with the standard of review of credibility findings (*R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at p. 131). Rather than asking whether the reasons for conviction were obvious from a review of the record, the majority satisfied itself that the trial judge did not fall into error by engaging in its own analysis of the evidence, including the complainant's evidence about inventing stories. The majority examined the troubling testimony, which Rochon J.A. referred to as [TRANSLATION] "surprising comments" (para. 70), as well as the trial judge's follow-up questions to the complainant at the end of her testimony. The majority held that the trial judge's questions [TRANSLATION] "helped clarify some of the victim's answers that might at first glance seem troubling" (para. 73), and concluded that meaningful appellate review was possible on the record.

[34] With respect, I find it difficult to understand how a review of the trial judge's questions to the complainant could have clarified her conflicting testimony. On the contrary, the questions expose the very real obstacle to appellate review posed by the trial judge's failure to state explicitly why he accepted the complainant's evidence despite its difficulties. The complainant provided inconsistent testimony throughout the proceedings on the issue of whether she knew what it meant to invent a story; the complainant's answers to the trial judge's questions provide little clarification in this regard. Without some explanation in his reasons for judgment, there is simply no way to know how the trial judge satisfied himself that the complainant was a credible witness.

[35] The majority also stated that [TRANSLATION] "[t]he judge's comments about the victim's testimony must be considered in light of the fact that the victim has a mild intellectual disability" (para. 48). While I agree that the complainant's testimony must be assessed in the light of her mental disability, this does not lower the standard of proof or absolve the trial judge of his responsibility to explain how he reconciled the complainant's difficult testimony. I do not mean to suggest that a more detailed credibility analysis is required in the case of witnesses with mental disabilities; as with any witness whose evidence presents serious difficulties, however, some explanation is required if the evidence is to form the basis for convicting the accused. The words of this Court bear repeating:

> [The] accused is entitled to know why the trial judge is left with no reasonable doubt.
>
> (*Gagnon*, at para. 21)

The only indication of the trial judge's reasoning process is his reliance on the corroborative value of the complainant's prior consistent statements. This, as the majority of the Court of Appeal correctly found, constituted an error of law. As I will now explain, having regard to the reasons as a whole and the context of the trial, I cannot agree with the majority's conclusion that no harm was occasioned by the use of these statements.

3.2 *Prior Consistent Statements*

[36] As a general rule, prior consistent statements are inadmissible (*R. v. Stirling*, [2008] 1 S.C.R 272, 2008 SCC 10 (CanLII)). There are two primary justifications for the exclusion of such statements: first, they lack probative value (*Stirling*, at para. 5), and second, they constitute hearsay when adduced for the truth of their contents.

[37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), **1993 CanLII 3384 (ON CA)**, 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

[38] In *R. v. G.C.*, [2006] O.J. No. 2245 (QL), the Ontario Court of Appeal noted that the prior consistent statements of a complainant may assist the court in assessing the complainant's likely truthfulness, particularly in cases involving allegations of sexual assault against children. As Rouleau J.A. explained, for a unanimous court:

> Although properly admitted at trial, the evidence of prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents. However, the evidence can "be supportive of the central allegation in the sense of creating a logical framework for its presentation", as set out above, and can be used in assessing the truthfulness of the complainant. As set out in *R. v. F. (J.E.)* at p. 476:
>
> > The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.
>
> The trial judge understood the limited use that could be made of this evidence as appears from his reasons:
>
> > [I]t certainly struck me while the fact that you go and tell somebody that you were molested doesn't confirm the fact that you were molested. I'm struck by the manner or the way it came out, tends to confirm [the complainant's] story — how they were reading this book, and how the thing came up about child sexual abuse.
>
> In cases involving sexual assault on young children, the courts recognize the difficulty in the victim providing a full account of events. In appropriate cases, the way the complaint comes forth can, by adding or detracting from the

> logical cogency of the child's evidence, be a useful tool in assisting the trial judge in the assessment of the child's truthfulness. This was such a case. [Emphasis added; paras. 20-22.]

[39] The Ontario Court of Appeal's reasoning in *G.C.* applies equally to the facts of this case. The complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony. However, in light of the evidence that the complainant had difficulty situating events in time, was easily confused, and lied on occasion, the spontaneous nature of the initial complaint and the complainant's repetition of the essential elements of the allegations provide important context for assessing her credibility.

[40] The Court of Appeal correctly concluded that the trial judge erred when he considered the contents of the complainant's prior consistent statements to corroborate her testimony at trial, noting in his judgment that [TRANSLATION] "there is a form of corroboration in the facts and statements of the victim, who never contradicted herself" (para. 68). I am unable to agree with the majority, however, that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative value of the complainant's prior statements in convicting Mr. Dinardo. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. Accordingly, I would also allow the appeal on this basis.

4. Disposition

[41] I would allow the appeal and order a new trial.

Appeal allowed.

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